NATIONAL MARINE SANCTUARIES MANAGERS'

LEGAL HANDBOOK

QH91.75.U55N38

NATIONAL MARINE SANCTUARIES MANAGERS LEGAL HANDBOOK

TABLE OF CONTENTS

1. Part 921, National Estuarine Reserve Research System (NERRS)

2. Part 921, National Estuarine Research Reserve System Program Regulations (Proposed Rules dated July 17, 1992)

3. Part 922, National Marine Sanctuary Program

4. Part 924, Monitor Marine Sanctuary Regulations

6. Part 929, Key Largo National Marine Sanctuary Final Regulations

7. Part 930, Federal Consistency with Approved Coastal Zone Management Programs

8. Part 933, Coastal Zone Management Research and Technical Assistance

9. Part 935, Channel Island National Marine Sanctuary Regulations

10. Part 936, Point Reyes/Farallones Islands National Marine Sanctuaries Regulations

11. Part 937, Looe Key National Marine Sanctuary Regulations

12. Part 938, Gray's Reef National Marine Sanctuary Regulations

13. Part 941,Fagatele Bay National Marine Sanctuary Regulations

14. Part 942, Cordell Bank National Marine Sanctuary Regulations

15. Part 943, Flower Garden Banks National Marine Sanctuary Regulations

16. Part 944, Monterey Bay National Marine Sanctuary Regulations (final rule dated September 18, 1992)

17. Coastal Zone Management Act of 1972 as amended.

18. 1990 Amendments to the Coastal Zone Management Act, a summary by the Coastal Zone Information Center

19. Marine Protection, Research, and Sanctuaries Act PRS of 1972, as amended (without 1992 amendments)

20. National Marine Sanctuaries: Challenge and Opportunity--A report to the National Oceanic and Atmospheric Administration (THE POTTER REPORT)

5. Parts 928 and 932 Implementing the CZMA Reauthorization Amendments of 1990, phase I (dated July 14, 1992)

21. National Marine Sanctuaries Program, Title III, 1992 Amendments

22. Magnuson Fishing Conservation and Management Act

23. Endangered Species Act

24. Marine Mammal Protection Act

25. Memorandum prepared by GCOS summarizing the 1992 amendments to MPRSA Title III

26. Summary of relevant Federal authorities (from appendix C of Monterey Bay NMS FEIS/MP)

27. CEQ NEPA regulations, 40 C.F.R. Parts 1500 - 1508

28. Environmental Review Procedures NOAA, Administrative Order 216-6

29. Forty Most Asked Questions Concerning CEQ's NEPA Procedures, 46 F.R. 48026

30. Federal Court Cases Involving NMS Regulations:

    1. Gentile v. NOAA, et al.

    2. Deaton, et al., v. U.S. DOC

    3. Craft, et al., v. NPS, et al.

31. Selected GCOS Legal Opinions/Memoranda

    1. Sale/Disposal of Historic Sanctuary Resources and the Federal Archaeological Program

    2. Acceptance of Donations for National Marine Sanctuaries

    3. Inward Extent of Jurisdiction under Title III of Marine Protection, Research, and Sanctuaries Act

    4. Regulation of Fishing in National Marine Sanctuaries

32. Selected Legal Opinion re: NERRS

    1. Eligibility of the Heritage Task Force for the Hudson River Valley, Inc. to Receive NERR Financial Assistance

1.
Part 921
National Estuarine Reserve Research System (NERRS)

PART 921—NATIONAL ESTUARINE RESERVE RESEARCH SYSTEM REGULATIONS

Sec.

Subpart A—General

921.1 Mission, goals and general provisions.
921.2 Definitions.
921.3 National Estuarine Reserve Research System biogeographic classification scheme and estuarine typologies.
921.4 Relationship to other provisions of the Coastal Zone Management Act.

Subpart B—Site Selection, Post Site Selection and Management Plan Development

921.10 General.
921.11 Site selection.
921.12 Post site selection.
921.13 Management plan and environmental impact statement development.

Subpart C—Acquisition, Development, and Preparation of the Final Management Plan

921.20 General.
921.21 Initial acquisition and development awards.

Subpart D—Reserve Designation and Subsequent Operation

921.30 Designation of National Estuarine Research Reserves.
921.31 Supplemental acquisition and development awards.
921.32 Operation and management: Implementation of the management plan.
921.33 Boundary changes, amendments to the management plan, and addition of multiple-site components.

Subpart E—Performance Evaluation and Withdrawal of Designation

921.40 Evaluation of system performance.
921.41 Suspension of eligibility for financial assistance.
921.42 Withdrawal of designation.

Subpart F—Research

921.50 General.
921.51 Estuarine research guidelines.
921.52 Promotion and coordination of estuarine research.

Subpart G—Monitoring

921.60 General.

Subpart H—Interpretation and Education

921.70 General.
921.71 Categories of potential interpretive and educational projects; evaluation criteria.

Subpart I—General Financial Assistance Provisions

921.80 Application information.
921.81 Allowable costs.
921.82 Amendments to financial assistance awards.

APPENDIX I TO PART 921—BIOGEOGRAPHIC CLASSIFICATION SCHEME

APPENDIX II TO PART 921—TYPOLOGY OF NATIONAL ESTUARINE RESEARCH RESERVES

AUTHORITY: Sec. 315, Public Law 92-583, as amended; 86 Stat. 1280 (16 U.S.C. 1461).

SOURCE: 55 FR 29949, July 23, 1990, unless otherwise noted.

Subpart A—General

§ 921.1 Mission, goals and general provisions.

(a) The mission of the National Estuarine Reserve Research System is the establishment and management,

through Federal-State cooperation, of a national system of estuarine research reserves representative of the various regions and estuarine types in the United States. Estuarine research reserves are established to provide opportunities for long-term research, education, and interpretation.

(b) The goals of the program for carrying out this mission are to:

(1) Ensure a stable environment for research through long-term protection of estuarine reserve resources;

(2) Address coastal management issues identified as significant through coordinated estuarine research within the System;

(3) Enhance public awareness and understanding of the estuarine environment and provide suitable opportunities for public education and interpretation;

(4) Promote Federal, state, public and private use of one or more reserves within the System when such entities conduct estuarine research; and

(5) Conduct and coordinate estuarine research within the System, gathering and making available information necessary for improved understanding and management of estuarine areas.

(c) National estuarine research reserves shall be open to the public to the extent permitted under State and Federal law. Multiple uses are allowed to the degree compatible with the research reserve's overall purpose as provided in the management plan (see § 921.13) and consistent with paragraphs (a) and (b) of this section. Use levels are set by the individual state and analyzed in the management plan. The research reserve management plan shall describe the uses and establish priorities among these uses. The plan shall identify uses requiring a state permit, as well as areas where uses are encouraged or prohibited. Consistent with resource protection and research objectives, public access may be restricted to certain areas within a research reserve.

(d) Habitat manipulation for research purposes is allowed consistent with the following limitations. Manipulative research activities must be specified in the management plan, be consistent with the mission and goals of the program (see paragraphs (a) and (b) of this section) and the goals and objectives of the affected research reserve, and be limited in nature and extent to the minimum manipulative activity necessary to accomplish the stated research objective. Manipulative research activities with a significant or long-term impact on reserve resources require the prior approval of the state and the National Oceanic and Atmospheric Administration (NOAA). Manipulative research activities which can reasonably be expected to have a significant adverse impact on the estuarine resources and habitat of a reserve, such that the activities themselves or their resulting short- and long-term consequences compromise the representative character and integrity of a reserve, are not allowed. Habitat manipulation for resource management purposes is not permitted within national estuarine research reserves, except as allowed for restoration activities consistent with paragraph (e) of this section. NOAA may allow an exception to this prohibition if manipulative activity is necessary for the protection of public health or the preservation of other sensitive resources which have been listed or are eligible for protection under relevant Federal or state authority (*e.g.*, threatened/endangered species or significant historical or cultural resources). If habitat manipulation is determined to be necessary for the protection of public health or the preservation of sensitive resources, then these activities shall be specified in the Reserve Management Plan and limited to the reasonable alternative which has the least adverse and shortest term impact on the representative and ecological integrity of the reserve.

(e) Under the Act an area may be designated as an estuarine reserve only if the area is a representative estuarine ecosystem that is suitable for long-term research. Many estuarine areas have undergone some ecological change as a result of human activities (*e.g.*, hydrological changes, intentional/unintentional species composition changes—introduced and exotic species). In those areas proposed or designated as national estuarine research

reserves, such changes may have diminished the representative character and integrity of the site. Although restoration of degraded areas is not a primary purpose of the System, such activities may be permitted to improve the representative character and integrity of a reserve. Restoration activities must be carefully planned and approved by NOAA through the Reserve Management Plan. Historical research may be necessary to determine the "natural" representative state of an estuarine area (*i.e.*, an estuarine ecosystem minimally affected by human activity or influence). Frequently, restoration of a degraded estuarine area will provide an excellent opportunity for management oriented research.

(f) NOAA may provide financial assistance to coastal states, not to exceed 50 percent of all actual costs or $4 million whichever amount is less, to assist in the acquisition of land and waters, or interests therein. NOAA may provide financial assistance to coastal states not to exceed 50 percent of all actual costs for the management and operation of, and the conduct of educational or interpretive activities concerning, national estuarine research reserves (see subpart I of this part). NOAA may provide financial assistance to any coastal state or public or private person, not to exceed 50 percent of all actual costs, to support research and monitoring within a national estuarine research reserve. Five types of awards are available under the National Estuarine Reserve Research System Program. The predesignation awards are for site selection, draft management plan preparation and conduct of basic characterization studies. Acquisition and development awards are intended primarily for acquisition of interests in land and construction. The operation and management award provides funds to assist in implementing the research, educational, and administrative programs detailed in the research reserve management plan and is reflective of the joint State-Federal partnership in the preservation and protection of estuarine resources. The research and monitoring awards provide funds to conduct estuarine research and monitoring within the System. The educational and interpretive award provides funds to conduct estuarine educational and interpretive activities within the System.

(g) Lands already in protected status managed by other Federal agencies, state or local governments, or private organizations can be included within national estuarine research reserves only if the managing entity commits to long-term non-manipulative management consistent with paragraphs (d) and (e) of this section in the reserve management plan. Federal lands already in protected status cannot comprise the key land and water areas of a research reserve (see § 921.11(c)(3)).

(h) To assist the states in carrying out the Program's goals in an effective manner, the National Oceanic and Atmospheric Administration (NOAA) will coordinate a research and education information exchange throughout the national estuarine research reserve system. As part of this role, NOAA will ensure that information and ideas from one reserve are made available to others in the system. The network will enable reserves to exchange information and research data with each other, with universities engaged in estuarine research, and with Federal and state agencies. NOAA's objective is a system-wide program of research and monitoring capable of addressing the management issues that affect long-term productivity of our Nation's estuaries.

§ 921.2 Definitions.

(a) *Act* means the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.* Section 315 of the Act, 16 U.S.C. 1461, establishes the National Estuarine Reserve Research System.

(b) *Under Secretary* means the Under Secretary for Oceans and Atmosphere, U.S. Department of Commerce, or designee.

(c) *Coastal state* means a state of the United States, in or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of these regulations the term also includes Puerto Rico, the

Virgin Islands, Guam, the Commonwealth of the Northern Marianas Islands, the Trust Territories of the Pacific Islands, and American Samoa (see 16 U.S.C. 1453(4)).

(d) *Estuary* means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term also includes estuary-type areas with measurable freshwater influence and having unimpaired connections with the open sea, and estuary-type areas of the Great Lakes and their connecting waters. See 16 U.S.C. 1453(7)).

(e) *National Estuarine Research Reserve* means an area that is a representative estuarine ecosystem suitable for long-term research, which may include all or the key land and water portion of an estuary, and adjacent transitional areas and uplands constituting to the extent feasible a natural unit, and which is set aside as a natural field laboratory to provide long-term opportunities for research, education, and interpretation on the ecological relationships within the area (see 16 U.S.C. 1453(8)) and meets the requirements of 16 U.S.C. 1461(b). This includes those areas designated as national estuarine sanctuaries under section 315 of the Act prior to the date of the enactment of the Coastal Zone Management Reauthorization Act of 1985 and each area subsequently designated as a national estuarine research reserve.

§ 921.3 National Estuarine Reserve Research System biogeographic classification scheme and estuarine typologies.

(a) National estuarine research reserves are chosen to reflect regional differences and to include a variety of ecosystem types. A biogeographic classification scheme based on regional variations in the nation's coastal zone has been developed. The biogeographic classification scheme is used to ensure that the National Estuarine Reserve Research System includes at least one site from each region. The estuarine typology system is utilized to ensure that sites in the System reflect the wide range of estuarine types within the United States.

(b) The biogeographic classification scheme, presented in Appendix I to this part, contains 27 regions. Figure 2 graphically depicts the biogeographic regions of the United States.

(c) The typology system is presented in Appendix II to this part.

§ 921.4 Relationship to other provisions of the Coastal Zone Management Act.

(a) The National Estuarine Reserve Research System is intended to provide information to state agencies and other entities involved in addressing coastal management issues. Any coastal state, including those that do not have approved coastal zone management programs under section 306 of the Act, is eligible for an award under the National Estuarine Reserve Research System (see § 921.2(c)).

(b) For purposes of consistency review by states with a federally approved coastal zone management program, the designation of a national estuarine research reserve is deemed to be a Federal activity, which, if directly affecting the state's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved state coastal zone program as provided by section 1456(c)(1) of the Act, and implementing regulations at 15 CFR part 930, subpart C. In accordance with section 1456(c)(1) of the Act and the applicable regulations NOAA will be responsible for certifying that designation of the reserve is consistent with the State approved coastal zone management program. The State must concur with or object to the certification. It is recommended that the lead State agency for reserve designation consult at the earliest practicable time, with the appropriate State officials concerning the consistency of the proposed national estuarine research reserve.

(c) The National Estuarine Research Reserve Program will be administered in close coordination with the National Marine Sanctuary Program (Title III of the Marine Protection Research and Sanctuaries Act, as amended, 16 U.S.C. 1431-1445), also administered by NOAA. Title III authorizes the Secretary of Commerce to designate dis-

crete areas of the marine environment as marine sanctuaries to protect or restore such areas for their conservation, recreational, ecological, historical, research, educational or esthetic values. National marine sanctuaries and estuarine research reserves may not overlap, though they may be adjacent.

Subpart B—Site Selection, Post Site Selection and Management Plan Development

§ 921.10 General.

(a) A state may apply for Federal financial assistance for the purpose of site selection, preparation of documents specified in § 921.13 (draft management plan and environmental impact statement (EIS)) and the conduct of research necessary to complete basic characterization studies. The total Federal share of this group of predesignation awards may not exceed $100,000, of which up to $25,000 may be used for site selection as described in § 921.11. Federal financial assistance for preacquisition activities under § 921.11 and § 921.12 is subject to the total $4 million for which each reserve is eligible for land acquisition. In the case of a biogeographic region (see Appendix I to this part) shared by two or more states, each state is eligible for Federal financial assistance to establish a national estuarine research reserve within their respective portion of the shared biogeographic region. Financial assistance application procedures are specified in subpart I of this part.

(b) In developing a research reserve program, a state may choose to develop a multiple-site research reserve reflecting a diversity of habitats in a single biogeographic region. A multiple-site research reserve also allows the state to develop complementary research and educational programs within the individual components of its multi-site research reserve. Multiple-site research reserves are treated as one reserve in terms of financial assistance and development of an overall management framework and plan. Each individual site of a proposed multiple-site research reserve shall be evaluated both separately under § 921.11(c) and collectively as part of the site selection process. A state may propose to establish a multiple-site research reserve at the time of the initial site selection, or at any point in the development or operation of the estuarine research reserve, even after Federal funding for the single site research reserve has expired. If the state decides to develop a multiple-site national estuarine research reserve after the initial acquisition and development award is made for a single site, the proposal is subject to the requirements set forth in § 921.33(b). However, a state may not propose to add one or more sites to an already designated research reserve if the operation and management of such research reserve has been found deficient and uncorrected or the research conducted is not consistent with the Estuarine Research Guidelines in accordance with the provisions of subparts E and F of this part. In addition, Federal funds acquisition of a multiple-site research reserve remains limited to $4,000,000 (see § 921.20). The funding for operation of a multiple-site research reserve is limited to $70,000 per year (see § 921.32(c)) and preacquisition funds are limited to $100,000 per reserve.

§ 921.11 Site selection.

(a) A state may use up to $25,000 in Federal funds to establish and implement a site selection process which is approved by NOAA.

(b) In addition to the requirements set forth in subpart I of this part, a request for Federal funds for site selection must contain the following programmatic information:

(1) A description of the proposed site selection process and how it will be implemented in conformance with the biogeographic classification scheme and typology (§ 921.3);

(2) An identification of the site selection agency and the potential management agency; and

(3) A description of how public participation will be incorporated into the process (see § 921.11(d)).

(c) As part of the site selection process, the state and NOAA shall evaluate and select the final site(s). NOAA has final authority in approving such sites.

Site selection shall be guided by the following principles:

(1) The site's contribution to the biogeographical and typological balance of the National Estuarine Reserve Research System. NOAA will give priority consideration to proposals to establish reserves in biogeographic regions or subregions that are not represented in the system (see the biogeographic classification scheme and typology set forth in § 921.3 and appendices I and II to this part);

(2) The site's ecological characteristics, including its biological productivity, diversity of flora and fauna, and capacity to attract a broad range of research and educational interests. The proposed site must be a representative estuarine ecosystem and should, to the maximum extent possible, be an estuarine ecosystem minimally affected by human activity or influence (see § 921.1(e));

(3) Assurance that the site's boundaries encompass an adequate portion of the key land and water areas of the natural system to approximate an ecological unit and to ensure effective conservation. Boundary size will vary greatly depending on the nature of the ecosystem. Research reserve boundaries must encompass the area within which adequate control has or will be established by the managing entity over human activities occurring within the reserve. Generally, reserve boundaries will encompass two areas: key land and water areas (or "core area") and a buffer zone. Key land and water areas and a buffer zone will likely require significantly different levels of control (see § 921.13(a)(7)). The term "key land and water areas" refers to that core area within the reserve that is so vital to the functioning of the estuarine ecosystem that it must be under a level of control sufficient to ensure the long-term viability of the reserve for research on natural processes. Key land and water areas, which comprise the core area, are those ecological units of a natural estuarine system which preserve, for research purposes, a full range of significant physical, chemical and biological factors contributing to the diversity of fauna, flora and natural processes occurring within the estuary. The determination of which land and water areas are "key" to a particular reserve must be based on specific scientific knowledge of the area. A basic principle to follow when deciding upon key land and water areas is that they should encompass resources representative of the total ecosystem, and which if compromised could endanger the research objectives of the reserve. The term "buffer zone" refers to an area adjacent to or surrounding key land and water areas and essential to their integrity. Buffer zones protect the core area and provide additional protection for estuarine-dependent species, including those that are rare or endangered. When determined appropriate by the state and approved by NOAA, the buffer zone may also include an area necessary for facilities required for research and interpretation. Additionally, buffer zones should be established sufficient to accommodate a shift of the core area as a result of biological, ecological or geomorphological change which reasonably could be expected to occur. National estuarine research reserves may include existing Federal or state lands already in a protected status where mutual benefit can be enhanced. However, NOAA will not approve a site for potential national estuarine research reserve status that is dependent primarily upon the inclusion of currently protected Federal lands in order to meet the requirements for research reserve status (such as key land and water areas). Such lands generally will be included within a research reserve to serve as a buffer or for other ancillary purposes;

(4) The site's suitability for long-term estuarine research, including ecological factors and proximity to existing research facilities and educational institutions;

(5) The site's compatibility with existing and potential land and water uses in contiguous areas as well as approved coastal and estuarine management plans; and

(6) The site's importance to education and interpretive efforts, consistent with the need for continued protection of the natural system.

(d) Early in the site selection process the state must seek the views of af-

fected landowners, local governments, other state and Federal agencies and other parties who are interested in the area(s) being considered for selection as a potential national estuarine research reserve. After the local government(s) and affected landowner(s) have been contacted, at least one public meeting shall be held in the area of the proposed site. Notice of such a meeting, including the time, place, and relevant subject matter, shall be announced by the state through the area's principal news media at least 15 days prior to the date of the meeting and by NOAA in the FEDERAL REGISTER.

(e) A state request for NOAA approval of a proposed site (or sites in the case of a multi-site reserve) must contain a description of the proposed site in relationship to each of the site selection principles (§ 921.11(c)) and the following information:

(1) An analysis of the proposed site based on the biogeographical scheme/typology discussed in § 921.3 and set forth in appendices I and II to this part;

(2) A description of the proposed site and its major resources, including location, proposed boundaries, and adjacent land uses. Maps, including aerial photographs, are required;

(3) A description of the public participation process used by the state to solicit the views of interested parties, a summary of comments, and, if interstate issues are involved, documentation that the Governor(s) of the other affected state(s) has been contacted. Copies of all correspondence, including contact letters to all affected landowners must be appended;

(4) A list of all sites considered and a brief statement of the basis for not selecting the non-preferred sites; and

(5) A nomination of the proposed site(s) for designation as a National Estuarine Research Reserve by the Governor of the coastal state in which the area is located.

§ 921.12 Post site selection.

(a) At the time of the state's request for NOAA approval of a proposed site, the state may submit a request for up to $40,000 of the total $100,000 allowed for predesignation funds to develop the draft management plan and for the collection of the information necessary for preparation of the environmental impact statement. At this time, the state may also submit a request for the remainder of the predesignation funds for research necessary to complete a basic characterization of the physical, chemical and biological characteristics of the site approved by NOAA. The state's request for these post site selection funds must be accompanied by the information specified in subpart I of this part and, for draft management plan development and environmental impact statement information collection, the following programmatic information:

(1) A draft management plan outline (see § 921.13(a) below); and

(2) An outline of a draft memorandum of understanding (MOU) between the state and NOAA detailing the Federal-state role in research reserve management during the initial period of Federal funding and expressing the state's long-term commitment to operate and manage the national estuarine research reserve.

(b) The state is eligible to use the funds referenced in § 921.12(a) after the proposed site is approved by NOAA under the terms of § 921.11.

§ 921.13 Management plan and environmental impact statement development.

(a) After NOAA approves the state's proposed site, the state may request to use additional predesignation funds for draft management plan development and the collection of information necessary for the preparation by NOAA of the environmental impact statement. The state shall develop a draft management plan, including an MOU. The plan will set out in detail:

(1) Research reserve goals and objectives, management issues, and strategies or actions for meeting the goals and objectives;

(2) An administrative section including staff roles in administration, research, education/interpretation, and surveillance and enforcement;

(3) A research plan, including a monitoring design;

(4) An education/interpretive plan;

(5) A plan for public access to the research reserve;

(6) A construction plan, including a proposed construction schedule, general descriptions of proposed developments and preliminary drawings, if appropriate. Information should be provided for proposed minor construction projects in sufficient detail to allow these projects to begin in the initial phase of acquisition and development. If a visitor center, research center or any other facilities are proposed for construction or renovation at the site, or restorative activities which require significant construction are planned, a detailed construction plan including preliminary cost estimates and architectural drawings must be prepared as a part of the final management plan; and

(7) An acquisition plan identifying the ecologically key land and water areas of the research reserve, ranking these areas according to their relative importance, and including a strategy for establishing adequate long-term state control over these areas sufficient to provide protection for reserve resources to ensure a stable environment for research. This plan must include an identification of ownership within the proposed research reserve boundaries, including land already in the public domain; the method(s) of acquisition which the state proposes to use—acquisition (including less-than-fee simple options) to establish adequate long-term state control; an estimate of the fair market value of any property interest—which is proposed for acquisition; a schedule estimating the time required to complete the process of establishing adequate state control of the proposed research reserve; and a discussion of any anticipated problems. In selecting a preferred method(s) for establishing adequate state control over areas within the proposed boundaries of the reserve, the state shall perform the following steps for each parcel determined to be part of the key land and water areas (control over which is necessary to protect the integrity of the reserve for research purposes), and for those parcels required for research and interpretive support facilities or buffer purposes:

(i) Determine, with appropriate justification, the minimum level of control(s) required (*e.g.*, management agreement, regulation, less-than-fee simple property interest (*e.g.*, conservation easement), fee simple property acquisition, or a combination of these approaches;

(ii) Identify the level of existing state control(s);

(iii) Identify the level of additional state control(s), if any, necessary to meet the minimum requirements identified in (a)(7)(i); of this section;

(iv) Examine all reasonable alternatives for attaining the level of control identified in (a)(7)(iii) of this section, and perform a cost analysis of each; and

(v) Rank, in order of cost, the methods (including acquisition) identified in paragraph (a)(7)(iv) of this section.

An assessment of the relative cost-effectiveness of control alternatives shall include a reasonable estimate of both short-term costs (*e.g.*, acquisition of property interests, regulatory program development including associated enforcement costs, negotiation, adjudication, etc.) and long-term costs (*e.g.*, monitoring, enforcement, adjudication, management and coordination). In selecting a preferred method(s) for establishing adequate state control over each parcel examined under the process described above, the state shall give priority consideration to the least costly method(s) of attaining the minimum level of long-term control required. Generally, with the possible exception of buffer areas required for support facilities, the level of control(s) required for buffer areas will be considerably less than that required for key land and water areas. This acquisition plan, after receiving the approval of NOAA, shall serve as a guide for negotiations with landowners. A final boundary for the reserve shall be delineated as a part of the final management plan;

(8) A resource protection plan detailing applicable authorities, including allowable uses, uses requiring a permit and permit requirements, any restrictions on use of the research reserve, and a strategy for research reserve

surveillance and enforcement of such use restrictions, including appropriate government enforcement agencies;

(9) If applicable, a restoration plan describing those portions of the site that may require habitat modification to restore natural conditions;

(10) A proposed memorandum of understanding (MOU) between the state and NOAA regarding the Federal-state relationship during the establishment and development of the national estuarine research reserve, and expressing a long-term commitment by the state to maintain and manage the research reserve in accordance with section 315 of the Act 16 U.S.C. 1461, and applicable regulations. In conjunction with the MOU and where possible under state law, the state will consider taking appropriate administrative or legislative action to ensure the long-term protection and operation of the national estuarine research reserve. The MOU shall be signed prior to research reserve designation. If other MOUs are necessary (such as with a Federal agency or another state agency), drafts of such MOUs also must be included in the plan; and

(11) If the state has a federally approved coastal zone management program, documentation that the proposed national estuarine research reserve is consistent to the maximum extent practicable with that program. See § 921.4(b) and § 921.30(b).

(b) Regarding the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act on a national estuarine research reserve proposal, the state shall provide all necessary information to NOAA concerning the socioeconomic and environmental impacts associated with implementing the draft management plan and feasible alternatives to the plan. Based on this information, NOAA will prepare the draft EIS.

(c) Early in the development of the draft management plan and the draft EIS, the state shall hold a meeting in the area or areas most affected to solicit public and government comments on the significant issues related to the proposed action. NOAA will publish a notice of the meeting in the FEDERAL REGISTER 15 days prior to the meeting. The state shall be responsible for publishing a similar notice in the local media.

(d) NOAA will publish a FEDERAL REGISTER notice of intent to prepare a draft EIS. After the draft EIS is prepared and filed with the Environmental Protection Agency (EPA), a Notice of Availability of the DEIS will appear in the FEDERAL REGISTER. Not less than 30 days after publication of the notice, NOAA will hold at least one public hearing in the area or areas most affected by the proposed national estuarine research reserve. The hearing will be held no sooner than 15 days after appropriate notice of the meeting has been given in the principal news media and in the FEDERAL REGISTER by NOAA and the state, respectively. After a 45-day comment period, a final EIS will be prepared by NOAA.

Subpart C—Acquisition, Development, and Preparation of the Final Management Plan

§ 921.20 General.

The acquisition and development period is separated into two major phases. After NOAA approval of the site, draft management plan and draft MOU, and completion of the final EIS, a state is eligible for an initial acquisition and development award(s). In this initial phase, the state should work to meet the criteria required for formal research reserve designation; *e.g.*, establishing adequate state control over the key land and water areas as specified in the draft management plan and preparing the final management plan. These requirements are specified in § 921.30. Minor construction in accordance with the draft management plan may also be conducted during this initial phase. The initial acquisition and development phase is expected to last no longer than three years. If necessary, a longer time period may be negotiated between the state and NOAA. After research reserve designation, a state is eligible for a supplemental acquisition and development award(s) in accordance with § 921.31. In this post-designation acquisition and development phase, funds may be used in accordance with the final management plan to construct research and educa-

tional facilities, complete any remaining land acquisition, and for restorative activities identified in the final management plan. In any case, the amount of Federal financial assistance provided to a coastal state with respect to the acquisition of lands and waters, or interests therein, for any one national estuarine research reserve may not exceed an amount equal to 50 percent of the costs of the lands, waters, and interests therein or $4,000,000, whichever amount is less. The amount of Federal assistance for development and construction activities is $1,500,000.

§ 921.21 Initial acquisition and development awards.

(a) Assistance is provided to aid the recipient in:

(1) Acquiring a fee simple or less-than-fee simple real property interest in land and water areas to be included in the research reserve boundaries (see § 921.13(a)(7); § 921.30(d));

(2) Minor construction, as provided in paragraphs (b) and (c) of this section;

(3) Preparing the final management plan; and

(4) Up to the point of research reserve designation, initial management costs, *e.g.*, for implementing the NOAA approved draft management plan, preparing the final management plan, hiring a reserve manager and other staff as necessary and for other management-related activities. Application procedures are specified in subpart I of this part.

(b) The expenditure of Federal and state funds on major construction activities is not allowed during the initial acquisition and development phase. The preparation of architectural and engineering plans, including specifications, for any proposed construction, or for proposed restorative activities, is permitted. In addition, minor construction activities, consistent with paragraph (c) of this section also are allowed. The NOAA-approved draft management plan must, however, include a construction plan and a public access plan before any award funds can be spent on construction activities.

(c) Only minor construction activities that aid in implementing portions of the management plan (such as boat ramps and nature trails) are permitted during the initial acquisition and development phase. No more than five (5) percent of the initial acquisition and development award may be expended on such facilities. NOAA must make a specific determination, based on the final EIS, that the construction activity will not be detrimental to the environment.

(d) Except as specifically provided in paragraphs (a) through (c) of this section, construction projects, to be funded in whole or in part under an acquisition and development award(s), may not be initiated until the research reserve receives formal designation (see § 921.30). This requirement has been adopted to ensure that substantial progress in establishing adequate state control over key land and waters areas has been made and that a final management plan is completed before major sums are spent on construction. Once substantial progress in establishing adequate state control/acquisition has been made, as defined by the state in the management plan, other activities guided by the final management plan may begin with NOAA's approval.

(e) For any real property acquired in whole or part with Federal funds for the research reserve the state shall execute suitable title documents to include substantially the following provisions, or otherwise append the following provisions in a manner acceptable under applicable state law to the official land record(s):

(1) Title to the property conveyed by this deed shall vest in the [recipient of the award granted pursuant to section 315 of the Act, 16 U.S.C. 1461 or other NOAA approved state agency] subject to the condition that the designation of the [name of National Estuarine Reserve] is not withdrawn and the property remains part of the federally designated [name of National Estuarine Research Reserve].

(2) In the event that the property is no longer included as part of the research reserve, or if the designation of the research reserve of which it is part is withdrawn, then NOAA or its successor agency, after full and reasonable consultation with the State, may

exercise the following rights regarding the disposition of the property:

(i) The recipient may retain title after paying the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the current fair market value of the property;

(ii) If the recipient does not elect to retain title, the Federal Government may either direct the recipient to sell the property and pay the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the proceeds from the sale (after deducting actual and reasonable selling and repair or renovation expenses, if any, from the sale proceeds), or direct the recipient to transfer title to the Federal Government. If directed to transfer title to the Federal Government, the recipient shall be entitled to compensation computed by applying the recipient's percentage of participation in the cost of the original project to the current fair market value of the property;

(iii) Fair market value of the property must be determined by an independent appraiser and certified by a responsible official of the state, as provided by Department of Commerce Regulations in 15 CFR part 24, and Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally assisted programs in 15 CFR part 11.

(f) Upon instruction by NOAA, provisions analogous to those of § 921.21(e) shall be included in the documentation underlying less-than-fee-simple interests acquired in whole or part with Federal funds.

(g) Federal funds or non-Federal matching share funds shall not be spent to acquire a real property interest in which the State will own the land concurrently with another entity unless the property interest has been identified as a part of an acquisition strategy pursuant to § 921.13(7) which has been approved by NOAA prior to the effective date of these regulations.

(h) Prior to submitting the final management plan to NOAA for review and approval, the state shall hold a public meeting to receive comment on the plan in the area affected by the estuarine research reserve. NOAA will publish a notice of the meeting in the FEDERAL REGISTER. The state shall be responsible for having a similar notice published in the local media.

Subpart D—Reserve Designation and Subsequent Operation

§ 921.30 Designation of National Estuarine Research Reserves.

(a) The Under Secretary may designate an area as a national estuarine research reserve pursuant to section 315 of the Act, if based on written findings the state has met the following requirements:

(1) The Governor of the coastal state in which the area is located has nominated the area for designation as a national estuarine research reserve;

(2) The area is a representative estuarine ecosystem that is suitable for long-term research and contributes to the biogeographical and typological balance of the System;

(3) Key land and water areas of the proposed research reserve, as identified in the management plan, are under adequate state control sufficient to provide long-term protection for reserve resources and to ensure a stable environment for research;

(4) Designation of the area as a reserve will serve to enhance public awareness and understanding of estuarine areas, and provide suitable opportunities for public education and interpretation;

(5) A final management plan has been approved by NOAA and contains the signed copy of the designation findings;

(6) An MOU has been signed between the state and NOAA ensuring a long-term commitment by the state to the effective operation and implementation of the national estuarine research reserve; and

(7) The coastal state in which the area is located has complied with the requirements of these regulations.

(b) NOAA will determine whether the designation of a national estuarine research reserve in a state with a federally approved coastal zone management program directly affects the

coastal zone. If the designation is found to directly affect the coastal zone, NOAA will make a consistency determination pursuant to section 307(c)(1) of the Act, 16 U.S.C. 1456, and 15 CFR part 930, subpart C. See § 921.4(b). The results of this consistency determination will be published in the FEDERAL REGISTER when a notice of designation is published. See § 921.30(c).

(c) NOAA will cause a notice of designation of a national estuarine research reserve to be placed in the FEDERAL REGISTER. The state shall be responsible for having a similar notice published in the local media.

(d) The term "state control" in § 921.30(a)(3) does not necessarily require that key land and water areas be owned by the state in fee simple. Acquisition of less-than-fee-simple interests (*e.g.*, conservation easements) and utilization of existing State regulatory measures are encouraged where the state can demonstrate that these interests and measures assure adequate long-term State control consistent with the purposes of the research reserve (see also § 921.13(a)(7); § 921.21(g)). Should the state later elect to purchase an interest in such lands using NOAA funds, adequate justification as to the need for such acquisition must be provided to NOAA.

§ 921.31 Supplemental acquisition and development awards.

After national estuarine research reserve designation, and as specified in the approved management plan, the state may request a supplemental acquisition and/or development award(s) for acquiring additional property interests identified in the management plan as necessary to enhance long-term protection of the area for research and education, for facility construction, for restorative activities identified in the approved management plan, and for administrative purposes. The amount of Federal financial assistance provided for supplemental development costs directly associated with facility construction other than land acquisition (*i.e.*, major construction activities) for any one national estuarine research reserve may not exceed $1,500,000 and must be matched by the state on a 50/50 basis. Supplemental acquisition awards for the acquisition of lands or waters, or interests therein, for any one National Estuarine Reserve may not exceed an amount equal to 50 per centum of the cost of the lands, waters, and interests therein or $4,000,000 whichever amount is less. In the case of a biogeographic region (see Appendix I to this part) shared by two or more states, each state is eligible for Federal financial assistance to establish a national estuarine research reserve within their respective portion of the shared biogeographic region. Application procedures are specified in subpart I of this part. Land acquisition must follow the procedures specified in § 921.13(a)(7), § 921.21 (e) and (f) and § 921.81.

§ 921.32 Operation and management: Implementation of the management plan.

(a) After the national estuarine research reserve is formally designated, the state is eligible to receive Federal funds to assist the state in the operation and management of the research reserve. The purpose of this Federally funded operation and management phase is to implement the approved final management plan and to take the necessary steps to ensure the continued effective operation of the research reserve.

(b) State operation and management of national estuarine research reserves shall be consistent with the mission, and shall further the goals, of the National Estuarine Research Reserve System (see § 921.1).

(c) Federal funds of up to $70,000 per year, to be matched by the state on a 50/50 basis, are available for the operation and management of the national estuarine research reserve, including the establishment and operation of a basic environmental monitoring program. In the case of a biogeographic region (see appendix I to this part) shared by two or more states, each state is eligible for Federal financial assistance to establish a national estuarine research reserve within their respective portion of the shared biogeographic region (see § 921.10).

(d) Operation and management funds are subject to the following limitations:

(1) No more than $70,000 in Federal funds may be expended in a twelve month award period (*i.e.*, Federal funds for operation and management may not be expended at a rate greater than $70,000 per year);

(2) No more than ten percent of the total amount (state and Federal shares) of each operation and management award may be used for construction-type activities (*i.e.*, $14,000 maximum per year).

§ 921.33 Boundary changes, amendments to the management plan, and addition of multiple-site components.

(a) Changes in research reserve boundaries and major changes to the final management plan, including state laws or regulations promulgated specifically for the research reserve, may be made only after written approval by NOAA. If determined to be necessary, NOAA may require public notice, including notice in the FEDERAL REGISTER and an opportunity for public comment. Changes in the boundaries of the research reserve involving the acquisition of properties not listed in the management plan or final EIS require public notice and the opportunity for comment; in certain cases, an environmental assessment and possibly, an environmental impact statement, may be required. Where public notice is required, NOAA will place a notice in the FEDERAL REGISTER of any proposed changes in research reserve boundaries or proposed major changes to the final management plan. The state shall be responsible for publishing an equivalent notice in the local media. See also requirements of § 921.4(b) and § 921.13(a)(11).

(b) As discussed in § 921.10(b), a state may choose to develop a multiple-site national estuarine research reserve after the initial acquisition and development award for a single site has been made. Public notice of the proposed addition will be placed by NOAA in the FEDERAL REGISTER. The state shall be responsible for publishing an equivalent notice in the local media. An opportunity for comment, in addition to the preparation of either an environmental assessment or environmental impact statement on the proposal, will also be required. An environmental impact statement, if required, shall be prepared in accordance with section § 921.13 and shall include an administrative framework for the multiple-site research reserve and a description of the complementary research and educational programs within the research reserve. If NOAA determines, based on the scope of the project and the issues associated with the additional site, that an environmental assessment is sufficient to establish a multiple-site research reserve, then the state shall develop a revised management plan which, concerning the additional component, incorporates each of the elements described in § 921.13(a). The revised management plan shall address goals and objectives for all components of the multi-site research reserve and the additional component's relationship to the original site(s).

Subpart E—Performance Evaluation and Withdrawal of Designation

§ 921.40 Evaluation of system performance.

(a) Following designation of a national estuarine research reserve pursuant to § 921.30, periodic performance evaluations shall be conducted concerning the operation and management of each national estuarine research reserve, including the research and monitoring being conducted within the reserve and education and interpretive activities. Evaluations may assess performance in all aspects of research reserve operation and management or may be limited in scope, focusing on selected issues of importance. Performance evaluations in assessing research reserve operation and management may also examine whether a research reserve is in compliance with the requirements of these regulations, particularly whether:

(1) The operation and management of the research reserve is consistent with and furthers the mission and goals of the National Estuarine Reserve Research System (see § 921.1); and

(2) A basis continues to exist to support any one or more of the findings made under § 921.30(a).

(b) Generally, performance will be evaluated at least every three years. More frequent evaluations may be scheduled as determined to be necessary by NOAA.

(c) Performance evaluations will be conducted by Federal officials. When determined to be necessary, Federal and non-Federal experts in natural resource management, estuarine research, interpretation or other aspects of national estuarine research reserve operation and management may be requested by NOAA to participate in performance evaluations. If other experts are to be included in the evaluation, NOAA will first ask the state to recommend appropriate individuals to serve in that capacity.

(d) Performance evaluations will be conducted in accordance with the procedural and public participation provisions of the CZMA regulations on review of performance at 15 CFR part 928 (*i.e.*, § 928.3(b) and § 928.4).

(e) To ensure effective Federal oversight of each research reserve within the National Estuarine Reserve Research System the state is required to submit an annual report on operation and management of the research reserve during the immediately preceding state fiscal year. This annual report must be submitted within a ninety day period following the end of the state fiscal year. The report shall detail program successes and accomplishments, referencing the research reserve management plan and, as appropriate, the work plan for the previous year. A work plan, detailing the projects and activities to be undertaken over the coming year to meet the goals and objectives of the research reserve as described in the management plan and the state's role in ongoing research reserve programs, shall also be included.

§ 921.41 Suspension of eligibility for financial assistance.

(a) If a performance evaluation under § 921.40 reveals that the operation and management of the research reserve is deficient, or that the research being conducted within the reserve is not consistent with the Estuarine Research Guidelines referenced in subpart F of this part, the eligibility of the research reserve for Federal financial assistance as described in these regulations may be suspended until the deficiency or inconsistency is remedied.

(b) NOAA will provide the state with a written notice of the deficiency or inconsistency. This notice will explain the finding, assess the Federal role in contributing to the problem, propose a solution or solutions, provide a schedule by which the state should remedy the deficiency or inconsistency, and state whether the state's eligibility for Federal financial assistance has been suspended in whole or part. In this notice the state shall also be advised that it may comment on this finding and meet with NOAA officials to discuss the results of the performance evaluation and seek to remedy the deficiency or inconsistency.

(c) Eligibility of a research reserve for financial assistance under these regulations shall be restored upon written notice by NOAA to the state that the deficiency or inconsistency has been remedied.

(d) If, after a reasonable time, a state does not remedy a deficiency in the operation and management of a national estuarine research reserve which has been identified pursuant to a performance evaluation under § 921.40(a), such outstanding deficiency shall be considered a basis for withdrawal of designation (see § 921.42).

§ 921.42 Withdrawal of designation.

(a) Designation of an estuarine area as a national estuarine research reserve may be withdrawn if a performance evaluation conducted pursuant to § 921.40 reveals that:

(1) The basis for any one or more of the findings made under § 921.30(a) in designating the research reserve no longer exists;

(2) A substantial portion of the research conducted within the research reserve, over a period of years, has not been consistent with the Estuarine Research Guidelines referenced in subpart F of this part; or

(3) A state, after a reasonable time, has not remedied a deficiency in the operation and management of a research reserve identified pursuant to an earlier performance evaluation conducted under § 921.40.

(b) If a basis is found under § 921.42(a) for withdrawal of designation, NOAA will provide the state with a written notice of this finding. This notice will explain the basis for the finding, propose a solution or solutions and provide a schedule by which the state should correct the deficiency. In this notice, the state shall also be advised that it may comment on the finding and meet with NOAA officials to discuss the finding and seek to correct the deficiency.

(c) If, within a reasonable period of time, the deficiency is not corrected in a manner acceptable to NOAA, a notice of intent to withdraw designation, with an opportunity for comment, will be placed in the FEDERAL REGISTER.

(d) The state shall be provided the opportunity for an informal hearing before the Under Secretary to consider NOAA's finding of deficiency and intent to withdraw designation, as well as the state's comments on and response to NOAA's written notice pursuant to § 921.42(b) and FEDERAL REGISTER notice pursuant to § 921.42(c).

(e) Within 30 days after the informal hearing, the Under Secretary shall issue a written decision regarding the designation status of the national estuarine research reserve. If a decision is made to withdraw research reserve designation, the procedures specified in § 921.21(e) regarding the disposition of real property acquired in whole or part with Federal funds shall be followed.

(f) NOAA may not withdraw designation of a national estuarine research reserve if the performance evaluation reveals that the deficiencies in management of the site are a result of inadequate Federal financial support.

Subpart F—Research

§ 921.50 General.

(a) To stimulate high quality research within designated national estuarine research reserves, NOAA may provide financial support for research which is consistent with the Estuarine Research Guidelines referenced in § 921.51. Research awards may be awarded under this subpart to only those designated research reserves with approved final management plans with the following exception: NOAA may award research awards under this subpart to reserves without final management plans that have been designated prior to the effective date of these regulations; in the absence of an approved final management plan, however these reserves will be eligible for research awards during only the first two years after the effective date of these regulations. Although this research may be conducted within the immediate watershed of the research reserve, the majority of research activities of any single research project funded under this subpart must be conducted within reserve boundaries. Research funds are primarily used to support management-related research that will enhance scientific understanding of the research reserve ecosystem, provide information needed by reserve managers and coastal management decision-makers, and improve public awareness and understanding of estuarine ecosystems and estuarine management issues. Research projects may be oriented to specific research reserves; however, research projects that would benefit more than one research reserve in the National Estuarine Reserve Research System are encouraged.

(b) Federal research funds under this subpart are not intended as a source of continuous funding for a particular project over time. Research funds may be used to support start-up costs for long-term projects if an applicant can identify an alternative source of long-term research support.

(c) Research funds are available on a competitive basis to any coastal state or qualified public or private person. A notice of available funds will be published in the FEDERAL REGISTER. Research funds are provided in addition to any other funds available to a coastal state under the Act. Federal research funds provided under this subpart must be matched equally by the

recipient, consistent with § 921.81(e)(4) ("allowable costs").

§ 921.51 Estuarine research guidelines.

(a) Research within the National Estuarine Reserve Research System shall be conducted in a manner consistent with Estuarine Research Guidelines developed by NOAA.

(b) A summary of the Estuarine Research Guidelines is published in the FEDERAL REGISTER as a part of the notice of available funds discussed in § 921.50(c).

(c) The Estuarine Research Guidelines are reviewed annually by NOAA. This review will include an opportunity for comment by the estuarine research community.

§ 921.52 Promotion and coordination of estuarine research.

(a) NOAA will promote and coordinate the use of the National Estuarine Reserve Research System for research purposes.

(b) NOAA will, in conducting or supporting estuarine research other than that authorized under section 315 of the Act, give priority consideration to research that uses the National Estuarine Reserve Research System.

(c) NOAA will consult with other Federal and state agencies to promote use of one or more research reserves within the National Estuarine Reserve Research System when such agencies conduct estuarine research.

Subpart G—Monitoring

§ 921.60 General.

(a) To provide a systematic basis for developing a high quality estuarine resource and ecosystem information base for national estuarine research reserves and, as a result, for the System, NOAA may provide financial support for monitoring programs. Monitoring funds are used to support three major phases of a monitoring program; studies necessary for comprehensive site description/characterization, development of a site profile, and implementation of a monitoring program.

(b) Monitoring funds are available on a competitive basis to the state agency responsible for reserve management or qualified public or private person or entity designated by the Reserve. However, if the applicant is other than the managing entity of a reserve research (coastal state), that applicant must submit as a part of the application a letter from the reserve manager indicating formal support of the application by the managing entity of the reserve. Monitoring awards will be made on the basis of a five-year performance period; and with initial funding for a twelve (12) month period; and with annual supplemental funding contingent on performance and appropriations under the Act. Monitoring funds are provided in addition to any other funds available to a coastal state under the Act. Federal monitoring funds must be matched equally by the recipient, consistent with § 921.81(e)(4) ("allowable costs").

(c) Monitoring projects funded under this Subpart must focus on the resources within the boundaries of the research reserve and must be consistent with the applicable sections of the Estuarine Research Guidelines referenced in § 921.51. Portions of the project may occur within the immediate watershed of the Reserve beyond the site boundaries. However, the monitoring proposal must demonstrate why this is necessary for the success of the project.

Subpart H—Interpretation and Education

§ 921.70 General.

(a) To stimulate the development of innovative or creative interpretive and educational projects and materials to enhance public awareness and understanding of estuarine areas, NOAA may fund interpretive and educational activities. Interpretive and educational awards may be awarded under this subpart to only those designated research reserves with approved final management plans with the following exception: NOAA may award research awards under this subpart to reserves without final management plans that have been designated prior to the effective date of these regulations; in the absence of an approved final man-

agement plan, however these reserves will be eligible for research awards during only the first two years after the effective date of these regulations.

(b) Educational and interpretive funds are available on a competitive basis to any coastal state entity. However, if the applicant is other than the managing entity of a research reserve, that applicant must submit as a part of the application a letter from the reserve manager indicating formal support of the application by the managing entity of the reserve. These funds are provided in addition to any other funds available to a coastal state under the Act. Federal interpretation and educational funds must be matched equally by the recipient, consistent with § 921.81(e)(4) ("allowable costs").

§ 921.71 Categories of potential interpretive and educational projects; evaluation criteria.

(a) Proposals for interpretive or educational projects will be considered under the following categories:

(1) Design, development and distribution/placement of interpretive or educational media (*i.e.*, the development of tangible items, such as exhibits/displays, publications, posters, signs, audio/visuals, computer software and maps which have an educational or interpretive purpose; and techniques for making available or locating information concerning research reserve resources, activities, or issues);

(2) Development and presentation of curricula, workshops, lectures, seminars, and other structured programs or presentations for facility or field use;

(3) Extension/outreach programs; or

(4) Creative and innovative methods and technologies for implementing interpretive or educational projects.

(b) Interpretive and educational projects may be oriented to one or more research reserves or to the entire system. Those projects which would directly benefit more than one research reserve, and, if practicable, the entire National Estuarine Reserve Research System, shall receive priority consideration for funding.

(c) Proposals for interpretive and educational projects in national estuarine research reserves will be evaluated in accordance with criteria listed below:

(1) Educational or interpretive merits;

(2) Relevance or importance to reserve management or coastal decision-making;

(3) Educational quality (*e.g.*, soundness of approach, experience related to methodologies);

(4) Importance to the National Estuarine Reserve Research System;

(5) Budget and Institutional Capabilities (*e.g.*, reasonableness of budget, sufficiency of logistical support); and

(6) In addition, in the case of long-term projects, the ability of the state or the grant recipient to support the project beyond this initial funding.

Subpart I—General Financial Assistance Provisions

§ 921.80 Application information.

(a) Only a coastal state may apply for Federal financial assistance awards for preacquisition, acquisition and development, operation and management, and education and interpretation. Any coastal state or public or private person may apply for Federal financial assistance awards for estuarine research or monitoring. The announcement of opportunities to conduct research in the reserve system appears on an annual basis in the FEDERAL REGISTER. If a state is participating in the national Coastal Zone Management Program, the applicant for an award under section 315 of the Act shall notify the state coastal management agency regarding the application.

(b) An original and two copies of the formal application must be submitted at least 120 working days prior to the proposed beginning of the project to the following address: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, Universal Building South, 1825 Connecticut Avenue, NW., Suite 714, Washington, DC 20235. The Application for Federal Assistance Standard

Form 424 (Non-construction Program) constitutes the formal application for site selection, post-site selection, operation and management, research, and education and interpretive awards. The Application for Federal Financial Assistance Standard Form 424 (Construction Program) constitutes the formal application for land acquisition and development awards. The application must be accompanied by the information required in subpart B (predesignation) of this part, subpart C of this part and § 921.31 (acquisition and development), and § 921.32 (operation and management) as applicable. Applications for development awards for construction projects, or restorative activities involving construction, must include a preliminary engineering report. All applications must contain back up data for budget estimates (Federal and non-Federal shares), and evidence that the application complies with the Executive Order 12372, "Intergovernmental Review of Federal Programs." In addition, applications for acquisition and development awards must contain:

(1) State Historic Preservation Office comments;

(2) Written approval from NOAA of the draft management plan for initial acquisition and development award(s); and

(3) A preliminary engineering report for construction projects, or restorative activities involving construction.

§ 921.81 Allowable costs.

(a) Allowable costs will be determined in accordance with applicable OMB Circulars and guidance for Federal financial assistance, the financial assistance agreement, these regulations, and other Department of Commerce and NOAA directives. The term "costs" applies to both the Federal and non-Federal shares.

(b) Costs claimed as charges to the award must be reasonable, beneficial and necessary for the proper and efficient administration of the financial assistance award and must be incurred during the award period.

(c) Costs must not be allocable to or included as a cost of any other Federally-financed program in either the current or a prior award period.

(d) General guidelines for the non-Federal share are contained in Department of Commerce Regulations at 15 CFR part 24 and OMB Circular A-110. Copies of Circular A-110 can be obtained from the Marine and Estuarine Management Division; 1825 Connecticut Avenue, NW., Suite 714; Washington, DC 20235. The following may be used in satisfying the matching requirement:

(1) Site Selection and Post Site Selection Awards. Cash and in-kind contributions (value of goods and services directly benefiting and specifically identifiable to this part of the project) are allowable. Land may not be used as match.

(2) Acquisition and Development Awards. Cash and in-kind contributions are allowable. In general, the fair market value of lands to be included within the research reserve boundaries and acquired pursuant to the Act, with other than Federal funds, may be used as match. However, the fair market value of real property allowable as match is limited to the fair market value of a real property interest equivalent to, or required to attain, the level of control over such land(s) identified by the state and approved by the Federal Government as that necessary for the protection and management of the national estuarine research reserve. Appraisals must be performed according to Federal appraisal standards as detailed in Department of Commerce regulations at 15 CFR part 24 and the Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs in 15 CFR part 11. The fair market value of privately donated land, at the time of donation, as established by an independent appraiser and certified by a responsible official of the state (pursuant to 15 CFR part 24), may also be used as match. Land, including submerged lands already in the state's possession, may be used as match to establish a national estuarine research reserve. The value of match for these state lands will be calculated by determining the value of the benefits foregone by the state, in the use of the land, as a result of new restrictions that may be imposed by Reserve designation. The appraisal of

the benefits foregone must be made by an independent appraiser in accordance with Federal appraisal standards pursuant to 15 CFR part 24 and 15 CFR part 11. A state may initially use as match land valued at greater than the Federal share of the acquisition and development award. The value in excess of the amount required as match for the initial award may be used to match subsequent supplemental acquisition and development awards for the national estuarine research reserve (see also § 921.20). Costs related to land acquisition, such as appraisals, legal fees and surveys, may also be used as match.

(3) Operation and Management Awards. Generally, cash and in-kind contributions (directly benefiting and specifically identifiable to operations and management), except land, are allowable.

(4) Research, Monitoring, Education and Interpretive Awards. Cash and in-kind contributions (directly benefiting and specifically identifiable to the scope of work), except land, are allowable.

§ 921.82 Amendments to financial assistance awards.

Actions requiring an amendment to the financial assistance award, such as a request for additional Federal funds, revisions of the approved project budget or original scope of work, or extension of the performance period must be submitted to NOAA on Standard Form 424 and approved in writing.

Appendix I to Part 921—Biogeographic Classification Scheme

Acadian

1. Northern Gulf of Maine (Eastport to the Sheepscot River).
2. Southern Gulf of Maine (Sheepscot River to Cape Cod).

Virginian

3. Southern New England (Cape Cod to Sandy Hook).
4. Middle Atlantic (Sandy Hook to Cape Hatteras).
5. Chesapeake Bay.

Carolinian

6. Northern Carolinas (Cape Hatteras to Santee River).
7. South Atlantic (Santee River to St. John's River).
8. East Florida (St. John's River to Cape Canaveral).

West Indian

9. Caribbean (Cape Canaveral to Ft. Jefferson and south).
10. West Florida (Ft. Jefferson to Cedar Key).

Louisianian

11. Panhandle Coast (Cedar Key to Mobile Bay).
12. Mississippi Delta (Mobile Bay to Galveston).
13. Western Gulf (Galveston to Mexican border).

Californian

14. Southern California (Mexican Border to Point Concepcion).
15. Central California (Point Concepcion to Cape Mendocino).
16. San Francisco Bay.

Columbian

17. Middle Pacific (Cape Mendocino to the Columbia River).
18. Washington Coast (Columbia River to Vancouver Island).
19. Puget Sound.

Great Lakes

20. Western Lakes (Superior, Michigan, Huron).
21. Eastern Lakes (Ontario, Erie).

Fjord

22. Southern Alaska (Prince of Wales Island to Cook Inlet).
23. Aleutian Islands (Cook Inlet to Bristol Bay).

Sub-Arctic

24. Northern Alaska (Bristol Bay to Demarcation Point).

Insular

25. Hawaiian Islands.
26. Western Pacific Island.
27. Eastern Pacific Island.

Appendix II to Part 921—Typology of National Estuarine Research Reserves

This typology system reflects significant differences in estuarine characteristics that are not necessarily related to regional location. The purpose of this type of classification is to maximize ecosystem variety in the selection of national estuarine research reserves. Priority will be given to important

ecosystem types as yet unrepresented in the reserve system. It should be noted that any one site may represent several ecosystem types or physical characteristics.

Class I—Ecosystem Types

Group I—Shorelands

A. *Maritime Forest-Woodland:* This type of ecosystem consists of single-stemmed species that have developed under the influence of salt spray. It can be found on coastal uplands or recent features, such as barrier islands and beaches, and may be divided into the following biomes:

1. *Northern Coniferous Forest Biome:* This is an area of predominantly evergreens such as the sitka spruce (Picea), grand fir (Abies), and white cedar (Thuja), with poor development of the shrub and herb layers, but high annual productivity and pronounced seasonal periodicity.

2. *Moist Temperate (Mesothermal) Coniferous Forest Biome:* Found along the west coast of North America from California to Alaska, this area is dominated by conifers, has a relatively small seasonal range, high humidity with rainfall ranging from 30 to 150 inches, and a well-developed understory of vegetation with an abundance of mosses and other moisture-tolerant plants.

3. *Temperate Deciduous Forest Biome:* This biome is characterized by abundant, evenly distributed rainfall, moderate temperatures which exhibit a distinct seasonal pattern, well-developed soil biota and herb and shrub layers, and numerous plants which produce pulpy fruits and nuts. A distant subdivision of this biome is the pine edaphic forest of the southeastern coastal plain, in which only a small portion of the area is occupied by climax vegetation, although it has large areas covered by edaphic climax pines.

4. *Broad-leaved Evergreen Subtropical Forest Biomes:* The main characteristic of this biome is high moisture with less pronounced differences between winter and summer. Examples are the hammocks of Florida and the live oak forests of the Gulf and South Atlantic coasts. Floral dominants include pines, magnolias, bays, hollies, wild tamarind, strangler fig, gumbo limbo, and palms.

B. *Coast Shrublands:* This is a transitional area between the coastal grasslands and woodlands and is characterized by woody species with multiple stems a few centimeters to several meters above the ground developing under the influence of salt spray and occasional sand burial. This includes thickets, scrub, scrub savanna, heathlands, and coastal chaparral. There is a great variety of shrubland vegetation exhibiting regional specificity:

1. *Northern Areas:* Characterized by Hudsonia, various erinaceous species, and thickets of Myrica, Prunus, and Rosa.
2. *Southeast Areas:* Floral dominanis include Myrica, Baccharis, and Ilex.
3. *Western Areas:* Adenostoma, Arcotyphylos, and Eucalyptus are the dominant floral species.

C. *Coastal Grasslands:* This area, which possesses sand dunes and coastal flats, has low rainfall (10 to 30 inches per year) and large amounts of humus in the soil. Ecological succession is slow, resulting in the presence of a number of serial stages of community development. Dominant vegetation includes mid-grasses (2 to 4 feet tall), such as Ammophila, Agropyron, and Calamovilfa, tall grasses (5 to 8 feet tall), such as Spartina, and trees such as the willow (Salix sp.), cherry (Prunus sp.), and cottonwood (Populus deltoides). This area is divided into four regions with the following typical strand vegetation:

1. Arctic/Boreal: Elymus;
2. Northeast/West: Ammophila;
3. Southeast/Gulf: Uniola; and
4. Mid-Atlantic/Gulf: Spartina patens.

D. *Coastal Tundra:* This ecosystem, which is found along the Arctic and Boreal coasts of North America, is characterized by low temperatures, a short growing season, and some permafrost, producing a low, treeless mat community made up of mosses, lichens, heath, shrubs, grasses, sedges, rushes, and herbaceous and dwarf woody plants. Common species include arctic/alpine plants such as Empetrum nigrum and Betula nana, the lichens Cetraria and Cladonia, and herbaceous plants such as Potentilla tridentata and Rubus chamaemorus. Common species on the coastal beach ridges of the high arctic desert include Dryas intergrifolia and Saxifrage oppositifolia. This area can be divided into two main subdivisions:

1. *Low Tundra:* characterized by a thick, spongy mat of living and undecayed vegetation, often with water and dotted with ponds when not frozen; and

2. *High Tundra:* a bare area except for a scanty growth of lichens and grasses, with underlying ice wedges forming raised polygonal areas.

E. *Coastal Cliffs:* This ecosystem is an important nesting site for many sea and shore birds. It consists of communities of herbaceous, graminoid, or low woody plants (shrubs, heath, etc.) on the top or along rocky faces exposed to salt spray. There is a diversity of plant species including mosses, lichens, liverworts, and "higher" plant representatives.

Group II—Transition Areas

A. *Coastal Marshes:* These are wetland areas dominated by grasses Poacea), sedges (Cyperaceae), rushes (Juncaceae), cattails (Typhaceae), and other graminoid species and is subject to periodic flooding by either salt or freshwater. This ecosystem may be subdivided into: (a) Tidal, which is periodically flooded by either salt or brackish water; (b) non-tidal (freshwater); or (c) tidal freshwater. These are essential habitats for many important estuarine species of fish and invertebrates as well as shorebirds and waterfowl and serves important roles in shore stabilization, flood control, water purification, and nutrient transport and storage.

B. *Coastal Swamps:* These are wet lowland areas that support mosses and shrubs together with large trees such as cypress or gum.

C. *Coastal Mangroves:* This ecosystem experiences regular flooding on either a daily, monthly, or seasonal basis, has low wave action, and is dominated by a variety of salt-tolerant trees, such as the red mangrove (Rhizophora mangle), black mangrove (Avicennia nitida), and the white mangrove (Laguncularia racemosa). It is also an important habitat for large populations of fish, invertebrates, and birds. This type of ecosystem can be found from central Florida to extreme south Texas to the islands of the Western Pacific.

D. *Intertidal Beaches:* This ecosystem has a distinct biota of microscopic animals, bacteria, and unicellular algae along with microscopic crustaceans, mollusks, and worms with a detritus-based nutrient cycle. This area also includes the driftline communities found at high tide levels on the beach. The dominant organisms in this ecosystem include crustaceans such as the mole crab (Emerita), amphipods (Gammaridae), ghost crabs (Ocypode), and bivalve molluscs such as the coquina (Donax) and surf clams (Spisula and Mactra).

E. *Intertidal Mud and Sand Flats:* These areas are composed of unconsolidated, high organic content sediments that function as a short-term storage area for nutrients and organic carbons. Macrophytes are nearly absent in this ecosystem, although it may be heavily colonized by benthic diatoms, dinoflagellates, filamentous blue-green and green algae, and chemosynthetic purple sulfur bacteria. This system may support a considerable population of gastropods, bivalves, and polychaetes, and may serve as a feeding area for a variety of fish and wading birds. In sand, the dominant fauna include the wedge shell Donax, the scallop Pecten, tellin shells Tellina, the heart urchin Echinocardium, the lug worm Arenicola, sand dollar Dendraster, and the sea pansy Renilla. In mud, faunal dominants adapted to low oxygen levels include the terebellid Amphitrite, the boring clam Playdon, the deep sea scallop Placopecten, the quahog Mercenaria, the echiurid worm Urechis, the mud snail Nassarius, and the sea cucumber Thyone.

F. *Intertidal Algal Beds:* These are hard substrates along the marine edge that are dominated by macroscopic algae, usually thalloid, but also filamentous or unicellular in growth form. This also includes the rocky coast tidepools that fall within the intertidal zone. Dominant fauna of these areas are barnacles, mussels, periwinkles, anemones, and chitons. Three regions are apparent:

1. *Northern Latitude Rocky Shores:* It is in this region that the community structure is best developed. The dominant algal species include Chondrus at the low tide level, Fucus and Ascophyllum at the mid-tidal level, and Laminaria and other kelplike algae just beyond the intertidal, although they can be exposed at extremely low tides or found in very deep tidepools.

2. *Southern Latitudes:* The communities in this region are reduced in comparison to those of the northern latitudes and possesses algae consisting mostly of single-celled or filamentous green, blue-green, and red algae, and small thalloid brown algae.

3. *Tropical and Subtropical Latitudes:* The intertidal in this region is very reduced and contains numerous calcareous algae such as Porolithon and Lithothamnion, as well as green algae with calcareous particles such as Halimeda, and numerous other green, red, and brown algae.

Group III—Submerged Bottoms

A. *Subtidal Hardbottoms:* This system is characterized by a consolidated layer of solid rock or large pieces of rock (neither of biotic origin) and is found in association with geomorphological features such as submarine canyons and fjords and is usually covered with assemblages of sponges, sea fans, bivalves, hard corals, tunicates, and other attached organisms. A significant feature of estuaries in many parts of the world is the oyster reef, a type of subtidal hardbottom. Composed of assemblages of organisms (usually bivalves), it is usually found near an estuary's mouth in a zone of moderate wave action, salt content, and turbidity. If light levels are sufficient, a covering of microscopic and attached macroscopic algae, such as kelp, may also be found.

B. *Subtidal Softbottoms:* Major characteristics of this ecosystem are an unconsolidated layer of fine particles of silt, sand, clay, and gravel, high hydrogen sulfide levels, and anaerobic conditions often existing below the surface. Macrophytes are either sparse or absent, although a layer of benthic microalgae may be present if light levels are sufficient. The faunal community

is dominated by a diverse population of deposit feeders including polychaetes, bivalves, and burrowing crustaceans.

C. *Subtidal Plants:* This system is found in relatively shallow water (less than 8 to 10 meters) below mean low tide. It is an area of extremely high primary production that provides food and refuge for a diversity of faunal groups, especially juvenile and adult fish, and in some regions, manatees and sea turtles. Along the North Atlantic and Pacific coasts, the seagrass Zostera marina predominates. In the South Atlantic and Gulf coast areas, Thalassia and Diplanthera predominate. The grasses in both areas support a number of epiphytic organisms.

Class II—Physical Characteristics

Group I—Geologic

A. *Basin Type:* Coastal water basins occur in a variety of shapes, sizes, depths, and appearances. The eight basic types discussed below will cover most of the cases:

1. *Exposed Coast:* Solid rock formations or heavy sand deposits characterize exposed ocean shore fronts, which are subject to the full force of ocean storms. The sand beaches are very resilient, although the dunes lying just behind the beaches are fragile and easily damaged. The dunes serve as a sand storage area, making them chief stabilizers of the ocean shorefront.

2. *Sheltered Coast:* Sand or coral barriers, built up by natural forces, provide sheltered areas inside a bar or reef where the ecosystem takes on many characteristics of confined waters—abundant marine grasses, shellfish, and juvenile fish. Water movement is reduced, with the consequent effects of pollution being more severe in this area than in exposed coastal areas.

3. *Bay:* Bays are larger confined bodies of water that are open to the sea and receive strong tidal flow. When stratification is pronounced, the flushing action is augmented by river discharge. Bays vary in size and in type of shorefront.

4. *Embayment:* A confined coastal water body with narrow, restricted inlets and with a significant freshwater inflow can be classified as an embayment. These areas have more restricted inlets than bays, are usually smaller and shallower, have low tidal action, and are subject to sedimentation.

5. *Tidal River:* The lower reach of a coastal river is referred to as a tidal river. The coastal water segment extends from the sea or estuary into which the river discharges to a point as far upstream as there is significant salt content in the water, forming a salt front. A combination of tidal action and freshwater outflow makes tidal rivers well-flushed. The tidal river basin may be a simple channel or a complex of tributaries, small associated embayments marshfronts, tidal flats, and a variety of others.

6. *Lagoon:* Lagoons are confined coastal bodies of water with restricted inlets to the sea and without significant freshwater inflow. Water circulation is limited, resulting in a poorly flushed, relatively stagnant body of water. Sedimentation is rapid with a great potential for basin shoaling. Shores are often gently sloping and marshy.

7. *Perched Coastal Wetlands:* Unique to Pacific islands, this wetland type, found above sea level in volcanic crater remnants, forms as a result of poor drainage characteristics of the crater rather than from sedimentation. Floral assemblages exhibit distinct zonation while the faunal constituents may include freshwater, brackish, and/or marine species. Example: Aunu'u Island, American Samoa.

8. *Anchialine Systems:* These small coastal exposures of brackish water form in lava depressions or elevated fossil reefs, have only a subsurface connection to the ocean, but show tidal fluctuations. Differing from true estuaries in having no surface continuity with streams or ocean, this system is characterized by a distinct biotic community dominated by benthic algae such as Rhizoclonium, the mineral encrusting Schizothrix, and the vascular plant Ruppia maritima. Characteristic fauna, which exhibit a high degree of endemicity, include the mollusks Theodoxus neglectus and T. cariosus, the small red shrimp Metabetaeus lohena and Halocaridina rubra, and the fish Eleotris sandwicensis and Kuhlia sandvicensus. Although found throughout the world, the high islands of the Pacific are the only areas within the U.S. where this system can be found.

B. *Basin Structure:* Estuary Basins may result from the drowning of a river valley (coastal plains estuary), The drowning of a glacial valley (fjord), the occurrence of an offshore barrier (bar-bounded estuary), some tectonic process (tectonic estuary), or volcanic activity (volcanic estuary).

1. *Coastal plains estuary:* Where a drowned valley consists mainly of a single channel, the form of the basin is fairly regular, forming a simple coastal plains estuary. When a channel is flooded with numerous tributaries, an irregular estuary results. Many estuaries of the eastern United States are of this type.

2. *Fjord:* Estuaries that form in elongated, steep headlands that alternate with deep U-shaped valleys resulting from glacial scouring are called fjords. They generally possess rocky floors or very thin veneers of sediment, with deposition generally being restricted to the head where the main river enters. Compared to total fjord volume, river discharge is small. But many fjords have restricted tidal ranges at their mouths, due to sills, or upreaching sections of the bottom which limit free movement of water,

often making river flow large with respect to the tidal prism. The deepest portions are in the upstream reaches, where maximum depths can range from 800 m to 1200 m, while sill depths usually range from 40 m to 150 m.

3. *Bar-bounded Estuary:* These result from the development of an offshore barrier, such as a beach strand, a line of barrier islands, reef formations, a line of moraine debris, or the subsiding remnants of a deltaic lobe. The basin is often partially exposed at low tide and is enclosed by a chain of offshore bars or barrier islands, broken at intervals by inlets. These bars may be either deposited offshore or may be coastal dunes that have become isolated by recent sea level rises.

4. *Tectonic Estuary:* These are coastal indentures that have formed through tectonic processes such as slippage along a fault line (San Francisco Bay), folding, or movement of the earth's bedrock, often with a large inflow of freshwater.

5. *Volcanic Estuary:* These coastal bodies of open water, a result of volcanic processes, are depressions or craters that have direct and/or subsurface connections with the ocean and may or may not have surface continuity with streams. These formations are unique to island areas of volcanic origin.

C. *Inlet Type:* Inlets in various forms are an integral part of the estuarine environment, as they regulate, to a certain extent, the velocity and magnitude of tidal exchange, the degree of mixing, and volume of discharge to the sea. There are four major types of inlets:

1. *Unrestricted:* An estuary with a wide unrestricted inlet typically has slow currents, no significant turbulence, and receive the full effect of ocean waves and local disturbances which serve to modify the shoreline. These estuaries are partially mixed, as the open mouth permits the incursion of marine waters to considerable distances upstream, depending on the tidal amplitude and stream gradient.

2. *Restricted:* Restrictions of estuaries can exist in many forms: bars, barrier islands, spits, sills, and more. Restricted inlets result in decreased circulation, more pronounced longitudinal and vertical salinity gradients, and more rapid sedimentation. However, if the estuary mouth is restricted by depositional features or land closures, the incoming tide may be held back until it suddenly breaks forth into the basin as a tidal wave, or bore. Such currents exert profound effects on the nature of the substrate, turbidity, and biota of the estuary.

3. *Permanent:* Permanent inlets are usually opposite the mouths of major rivers and permit river water to flow into the sea. Sedimentation and deposition are minimal.

4. *Temporary (Intermittent):* Temporary inlets are formed by storms and frequently shift position, depending on tidal flow, the depth of the sea and sound waters, the frequency of storms, and the amount of littoral transport.

D. *Bottom Composition:* The bottom composition of estuaries attests to the vigorous, rapid, and complex sedimentation processes characteristic of most coastal regions with low relief. Sediments are derived through the hydrologic processes of erosion, transport, and deposition carried on by the sea and the stream.

1. *Sand:* Near estuary mouths, where the predominating forces of the sea build spits or other depositional features, the shores and substrates of the estuary are sandy. The bottom sediments in this area are usually coarse, with a graduation toward finer particles in the head of the estuary. In the head region and other zones of reduced flow, fine silty sands are deposited. Sand deposition occurs only in wider or deeper regions where velocity is reduced.

2. *Mud:* At the base level of a stream near its mouth, the bottom is typically composed of loose muds, silt, and organic detritus as a result of erosion and transport from the upper stream reaches and organic decomposition. Just inside the estuary entrance, the bottom contains considerable quantities of sand and mud, which support a rich fauna. Mud flats, commonly built up in estuarine basins, are composed of loose, coarse, and fine mud and sand, often dividing the original channel.

3. *Rock:* Rocks usually occur in areas where the stream runs rapidly over a steep gradient with its coarse materials being derived from the higher elevations where the stream slope is greater. The larger fragments are usually found in shallow areas near the stream mouth.

4. *Oyster shell:* Throughout a major portion of the world, the oyster reef is one of the most significant features of estuaries usually being found near the mouth of the estuary in a zone of moderate wave action salt content, and turbidity. It is often a major factor in modifying estuarine current systems and sedimentation, and may occur as an elongated island or peninsula oriented across the main current, or may develop parallel to the direction of the current.

Group II—Hydrographic

A. *Circulation:* Circulation patterns are the result of the combined influences of freshwater flow, tidal action, wind and oceanic forces, and serve many functions: nutrient transport, plankton dispersal, ecosystem flushing, salinity control, water mixing, and more.

1. *Stratified:* This is typical of estuaries with a strong freshwater influx and is commonly found in bays formed from "drowned" river valleys, fjords, and other

deep basins. There is a net movement of freshwater outward at the top layer and saltwater at the bottom layer, resulting in a net outward transport of surface organisms and net inward transport of bottom organisms.

2. *Non-stratified:* Estuaries of this type are found where water movement is sluggish and flushing rate is low, although there may be sufficient circulation to provide the basis for a high carrying capacity. This is common to shallow embayments and bays lacking a good supply of freshwater from land drainage.

3. *Lagoonal:* An estuary of this type is characterized by low rates of water movement resulting from a lack of significant freshwater influx and a lack of strong tidal exchange because of the typically narrow inlet connecting the lagoon to the sea. Circulation, whose major driving force is wind, is the major limiting factor in biological productivity within lagoons.

B. *Tides:* This is the most important ecological factor in an estuary, as it affects water exchange and its vertical range determines the extent of tidal flats which may be exposed and submerged with each tidal cycle. Tidal action against the volume of river water discharged into an estuary results in a complex system whose properties vary according to estuary structure as well as the magnitude of river flow and tidal range. Tides are usually described in terms of their cycle and their relative heights. In the United States, tide height is reckoned on the basis of average low tide, which is referred to as datum. The tides, although complex, falls into three main categories:

1. *Diurnal:* This refers to a daily change in water level that can be observed along the shoreline. There is one high tide and one low tide per day.

2. *Semidiurnal:* This refers to a twice daily rise and fall in water that can be observed along the shoreline.

3. *Wind/Storm Tides:* This refers to fluctuations in water elevation to wind and storm events, where influence of lunar tides is less.

C. *Freshwater:* According to nearly all the definitions advanced, it is inherent that all estuaries need freshwater, which is drained from the land and measurably dilutes seawater to create a brackish condition. Freshwater enters an estuary as runoff from the land either from a surface and/or subsurface source.

1. *Surface water:* This is water flowing over the ground in the form of streams. Local variation in runoff is dependent upon the nature of the soil (porosity and solubility), degree of surface slope, vegetational type and development, local climatic conditions, and volume and intensity of precipitation.

2. *Subsurface water:* This refers to the precipitation that has been absorbed by the soil and stored below the surface. The distribution of subsurface water depends on local climate, topography, and the porosity and permeability of the underlying soils and rocks. There are two main subtypes of surface water:

a. *Vadose water:* This is water in the soil above the water table. Its volume with respect to the soil, is subject to considerable fluctuation.

b. *Groundwater:* This is water contained in the rocks below the water table, is usually of more uniform volume than vadose water, and generally follows the topographic relief of the land, being high below hills and sloping into valleys.

Group III—Chemical

A. *Salinity:* This reflects a complex mixture of salts, the most abundant being sodium chloride, and is a very critical factor in the distribution and maintenance of many estuarine organisms. Based on salinity, there are two basic estuarine types and eight different salinity zones (expressed in parts per thousand—ppt).

1. *Positive estuary:* This is an estuary in which the freshwater influx is sufficient to maintain mixing, resulting in a pattern of increasing salinity toward the estuary mouth. It is characterized by low oxygen concentration in the deeper waters and considerable organic content in bottom sediments.

2. *Negative estuary:* This is found in particularly arid regions, where estuary evaporation may exceed freshwater inflow, resulting in increased salinity in the upper part of the basin, especially if the estuary mouth is restricted so that tidal flow is inhibited. These are typically very salty (hyperhaline), moderately oxygenated at depth, and possess bottom sediments that are poor in organic content.

3. *Salinity zones (expressed in ppt):*

a. Hyperhaline—greater than 40 ppt.

b. Euhaline—40 ppt to 30 ppt.

c. Mixohaline: 30 ppt to 0.5 ppt.

(1) Mixoeuhaline—greater than 30 ppt but less than the adjacent euhaline sea.

(2) Polyhaline—30 ppt to 18 ppt.

(3) Mesohaline—18 ppt to 5 ppt.

(4) Oligohaline—5 ppt to 0.5 ppt.

d. Limnetic: Less than 0.5 ppt.

B. pH Regime: This is indicative of the mineral richness of estuarine waters and fall into three main categories:

1. Acid: Waters with a pH of less than 5.5.

2. Circumneutral: A condition where the pH ranges from 5.5 to 7.4.

3. Alkaline: Waters with a pH greater than 7.4.

2.
Part 921
National Estuarine Research Reserve System Program Regulations
(Proposed Rules dated July 17, 1992)

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 921

[Docket No. 910927-1227]

National Estuarine Research Reserve System Program Regulations

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Proposed rule.

SUMMARY: The proposed rule would revise the existing interim-final rules for selecting, designating, operating, and funding national estuarine research reserves to bring them into accord with requirements of the Coastal Zone Act Reauthorization Amendments of 1990 (title VI, subtitle C, Pub. L. 101-508) and to adopt some of the revisions suggested by comments received on the interim-final rule. Comments are invited.

DATES: Comments will be considered if submitted on or before August 31, 1992.

ADDRESSES: Send comments to: Mr. William J. Harrigan, Acting Chief; Sanctuaries and Reserves Division; Office of Ocean and Coastal Resource Management, NOS/NOAA; 1825 Connecticut Avenue NW.; suite 714; Washington, DC 20235, (202) 606-4122.

FOR FURTHER INFORMATION CONTACT: June Cradick at (202) 606-4016.

SUPPLEMENTARY INFORMATION:

I. Authority

This notice of proposed rulemaking is issued under the authority of section 315(a) of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1461 (the Act). The National Estuarine Reserve Research System has been operating under interim-final regulations published July 23, 1990 (55 FR 29940).

II. Background

On July 23, 1990 (55 FR 29940) NOAA published interim final regulations for continued implementation of the National Estuarine Reserve Research System Program pursuant to section 315 of the Act, 16 U.S.C. 1461. Written comments were accepted until September 21, 1990. On November 5, 1990 Public Law 101-508 was passed reauthorizing the Program. Several changes to the regulations were required as a result of the 1990 reauthorization. In addition, for the reasons stated below, some of the revisions suggested in the comments received on the interim final rules are here proposed. A summary of the significant proposed changes to the interim-final regulations is presented below.

When implemented, these regulations will establish the Program's mission and goals and revise procedures for selecting, designating and operating national estuarine research reserves.

III. Changing the Name of the Program

The name of the Program was changed from the National Estuarine Reserve Research System to the National Estuarine Research Reserve System by section 6214 of Public Law 101-508. The proposed revisions to the regulations would revise the Program name accordingly when it appears in the regulations.

IV. Revision of the Procedures for Selecting, Designating, and Operating National Estuarine Research Reserves

(A) Revision of Match Requirements

The Coastal Zone Act Reauthorization Amendments of 1990 (Amendments) effectively reduced from 50% to 30% state, and, where applicable, private party match requirements for the following financial assistance award types: operations, research, monitoring, facility construction and education/interpretation. The Amendments also provide for 100 percent Federal support for educational-interpretive activities that benefit the entire System. Match requirements for site selection and land acquisition remain at 50%. The proposed revisions would make the regulations conform.

(B) Definitions

The proposed revisions would add a definition for the term "state agency".

(C) Increase in Acquisition Support

The Amendments increase the maximum amount of Federal financial assistance that can be awarded for the acquisition of land and waters, or interests therein, for any one National Estuarine Research Reserve from $4,000,000 to $5,000,000.

(D) Change in Development Support

The proposed regulations would revise the regulations to allow costs associated with the development of research, monitoring and education programs to be included as supplemental development costs and to eliminate the ceiling of $1,500,000 on financial assistance which can be provided for development assistance directly associated with facility construction.

(E) Simplification of Operational Support

The proposed regulations would reduce state and Federal paperwork burdens by combining support for routine monitoring and education activities with the annual non-competitive operations and management award. Competitive awards for special monitoring, research and education projects would continue as a separate activity.

(F) Clarification of Site Selection

The proposed regulations would clarify the process to be followed by a coastal state which proposes to reactivate an inactive site previously approved by NOAA for development as an estuarine sanctuary or research reserve.

(G) Resource Manipulation

The regulations recognize the possibility that in reserve buffer areas long-term uses may have existed (*e.g.* hunting and fishing) prior to designation which should be allowed to continue.

(H) Performance Evaluation

The Amendments emphasize the importance of public participation in the performance evaluation process. They also establish interim sanctions, including partial or full withdrawal of financial assistance, and establish a process for instituting such sanctions. The proposed revisions would make the regulations conform.

V. Other Actions Associated With the Rulemaking

[A] Classification Under Executive Order 12291. NOAA has concluded that these regulations are not major because they will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers; individual industries; Federal, state, or local government agencies; or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets.

These rules amend existing procedures for identifying, designating, and managing national estuarine research reserves in accordance with the Coastal Zone Act Reauthorization Amendments of 1990. They will not result in any direct economic or environmental effects nor will they lead to any major indirect economic or environmental impacts.

[B] Regulatory Flexibility Act Analysis. A Regulatory Flexibility Analysis is not required for this rulemaking. The regulations set forth procedures for identifying and designating national estuarine research reserves, and managing sites once designated. These rules do not directly affect "small government jurisdictions" as defined by Public Law 96-354, the Regulatory Flexibility Act, and the rules will have no effect on small businesses. Accordingly, the General Counsel of the Department of Commerce has certified to the Chief Counsel of the Small Business Administration that these revisions, if adopted as proposed, will not have a significant economic impact on a substantial number of small entities.

[C] Paperwork Reduction Act of 1980. This rule contains collection of information requirements subject to Public Law 96-511, the Paperwork Reduction Act (PRA), which have already been approved by the Office of Management and Budget (approval number 0648-0121). Public reporting burden for the collections of information contained in this rule is estimated to average 2.012 hours per response for management plans and related documentation, 1.25 hours for performance reports, and 15 hours for annual reports and work plans. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of these collections of information, including suggestions for reducing this burden, to Richard Roberts, room 724, Department of Commerce, 6010 Executive Blvd., Rockville, Maryland 20852, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. ATTN: Desk Officer for NOAA.

[D] Executive Order 12612. These proposed rules do not contain policies which have sufficient Federalism implications to warrant preparation of a Federalism Assessment pursuant to Executive Order 12612. However, the provisions of the rules setting forth what a state must do or agree to do in order to qualify for the various types of Federal financial assistance available under the rules have been reviewed to ensure that the rules grant the states the maximum administrative discretion possible in the administration of the National Estuarine Research Reserve System policies embodied in the qualification requirements. In formulating those policies, the NOAA worked with affected states to develop their own policies with respect to the use of National Estuarine Research Reserves. To the maximum extent possible consistent with the NOAA's responsibility to ensure that the objectives of the National Estuarine Research Reserve System provisions of the Coastal Zone Management Act are achieved, the rules refrain from establishing uniform national standards. Extensive consultations with state officials and organizations have been held regarding the financial assistance qualifications imposed. Details regarding awards of financial assistance have been discussed above under the heading "Revision of the Procedures for Selecting, Designating and Operating National Estuarine Research Reserves" and are not repeated here.

[E] National Environmental Policy Act. NOAA has concluded that publication of these interim-final rules does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, an environmental impact statement is not required.

List of Subjects in 15 CFR Part 921

Administrative practice and procedure, Coastal zone, Environmental impact statements, Grants programs—Natural resources, Reporting and recordkeeping requirements, Research.

(Federal Domestic Assistance Catalog Number 11.420, National Estuarine Research Reserve Research System; Federal Domestic Assistance Catalog Number 11.420 Coastal Zone Management Estuarine Sanctuaries)

Dated: July 2, 1992.

W. Stanley Wilson,

Assistant Administrator for Ocean Services and Coastal Zone Management.

For the reasons set forth in the preamble, it is proposed that 15 CFR part 921 be revised as follows:

PART 921—NATIONAL ESTUARINE RESEARCH RESERVE SYSTEM REGULATIONS

Subpart A—General

Sec.

921.1 Mission, goals and general provisions.
921.2 Definitions.
921.3 National Estuarine Research Reserve System biogeographic classification scheme and estuarine typologies.
921.4 Relationship to other provisions of the Coastal Zone Management Act and the Marine Protection, Research and Sanctuaries Act.

Subpart B—Site Selection, Post Site Selection and Management Plan Development

921.10 General.
921.11 Site selection and feasibility.
921.12 Post site selection.
921.13 Management plan and environmental impact statement development.

Subpart C—Acquisition, Development, and Preparation of the Final Management Plan

921.20 General.
921.21 Initial acquisition and development awards.

Subpart D—Reserve Designation and Subsequent Operation

921.30 Designation of National Estuarine Research Reserves.
921.31 Supplemental acquisition and development awards.
921.32 Operation and management: Implementation of the management plan.
921.33 Boundary changes, amendments to the management plan, and addition of multiple-site components.

Subpart E—Ongoing Oversight, Performance Evaluation and Withdrawal of Designation

921.40 Ongoing oversight and evaluations of designated National Estuarine Research Reserves.
921.41 Withdrawal of designation.

Subpart F—Special Research Projects

921.50 General.
921.51 Estuarine research guidelines.
921.52 Promotion and coordination of estuarine research.

Subpart G—Special Monitoring Projects

921.60 General.

Subpart H—Special Interpretation and Education Projects

921.70 General.

Subpart I—General Financial Assistance Provisions

921.80 Application information.
921.81 Allowable costs.
921.82 Amendments to financial assistance awards.

Appendix I to Part 921—Biogeographic Classification Scheme

Appendix II to Part 921—Typology of National Estuarine Research Reserves

Authority: Section 315, Public Law 92-583, as amended; 86 Stat. 1280 (16 U.S.C. 1461).

Subpart A—General

§ 921.1 Mission, goals and general provisions.

(a) The mission of the National Estuarine Research Reserve Program is the establishment and management, through Federal-state cooperation, of a national system (National Estuarine Research Reserve System or System) of estuarine research reserves (National Estuarine Research Reserves or Reserves) representative of the various regions and estuarine types in the United States. Estuarine research reserves are established to provide opportunities for long-term research, education, and interpretation.

(b) The goals of the Program are to:

(1) Ensure a stable environment for research through long-term protection of National Estuarine Research Reserve resources;

(2) Address coastal management issues identified as significant through coordinated estuarine research within the System;

(3) Enhance public awareness and understanding of estuarine areas and provide suitable opportunities for public education and interpretation;

(4) Promote Federal, state, public and private use of one or more reserves within the System when such entities conduct estuarine research; and

(5) Conduct and coordinate estuarine research within the System, gathering and making available information necessary for improved understanding and management of estuarine areas.

(c) National Estuarine Research Reserves shall be open to the public to the extent permitted under state and Federal law. Multiple uses are allowed to the degree compatible with each reserve's overall purpose as provided in the management plan (see § 921.13) and consistent with paragraphs (a) and (b), of this section. Use levels are set by the state where the reserve is located and analyzed in the management plan. The research reserve management plan shall describe the uses and establish priorities among these uses. The plan shall identify uses requiring a state permit, as well as areas where uses are encouraged or prohibited. Consistent with resource protection and research objectives, public access and use may be restricted to certain areas or components within a research reserve.

(d) Habitat manipulation for research purposes is allowed consistent with the following limitations. Manipulative research activities must be specified in the management plan, be consistent with the mission and goals of the program (see paragraphs (a) and (b) of this section) and the goals and objectives set forth in the reserve's management plan, and be limited in nature and extent to the minimum manipulative activity necessary to accomplish the stated research objective. Manipulative research activities with a significant or long-term impact on reserve resources require the prior approval of the state and the National Oceanic and Atmospheric Administration (NOAA). Manipulative research activities which can reasonably be expected to have a significant adverse impact on the estuarine resources and habitat of a reserve, such that the activities themselves or their resulting short and long-term consequences compromise the representative character and integrity of a reserve, are prohibited. Habitat manipulation for resource management purposes is prohibited except as specifically approved by NOAA as:

(1) A restoration activity consistent with paragraph (e) of this section; or

(2) as an activity necessary for the protection of public health or the preservation of other sensitive resources which have been listed or are eligible for protection under relevant Federal or state authority (*e.g.*, threatened/endangered species or significant historical or cultural resources) or if the manipulative activity is a long-term (*i.e.*, has occurred prior to designation) pre-existing use (*e.g.*, use of a buffer area for hunting and/or fishing club activities).

If habitat manipulation is determined to be necessary for the protection of public health, the preservation of sensitive resources, or if the manipulation is a long-term preexisting use in a buffer area, then these activities shall be specified in the Reserve Management Plan in accordance with § 921.13(a)(10) and shall be limited to the reasonable alternative which has the least adverse and shortest term impact on the representative and ecological integrity of the reserve.

(e) Under the Act an area may be designated as an estuarine reserve only if the area is a representative estuarine ecosystem that is suitable for long-term research. Many estuarine areas have undergone some ecological change as a result of human activities (*e.g.*, hydrological changes, intentional/unintentional species composition changes—introduced and exotic species). In those areas proposed or designated as national estuarine research reserves, such changes may have diminished the representative character and integrity of the site. Although restoration of degraded areas is not a primary purpose of the System, such activities may be permitted to improve the representative character and integrity of a reserve. Restoration activities must be carefully planned and approved by NOAA through the Reserve Management Plan. Historical research may be necessary to determine the "natural" representative state of an estuarine area (*i.e.*, an estuarine ecosystem minimally affected by human activity or influence). Frequently, restoration of a degraded estuarine area will provide an excellent opportunity for management oriented research.

(f) NOAA may provide financial assistance to coastal states, not to exceed, per Reserve, 50 percent of all actual costs or $5 million whichever amount is less, to assist in the acquisition of land and waters, or interests therein. NOAA may provide financial assistance to coastal states not to exceed 70 percent of all actual costs for the management and operation of, the development and construction of facilities, and the conduct of educational or interpretive activities concerning reserves (see Subpart I). NOAA may provide financial assistance to any coastal state or public or private person, not to exceed 70 percent of all actual costs, to support research and monitoring within a reserve. Predesignation, acquisition and development, operation and management, special research and monitoring, and special education and interpretation awards are available under the National Estuarine Research Reserve Program. Predesignation awards are for site selection/feasibility, draft management plan preparation and conduct of basic characterization studies. Acquisition and development awards are intended primarily for acquisition of interests in land, facility construction and to develop and/or upgrade research, monitoring and education programs. Operation and management awards provide funds to assist in implementing, operating and managing the administrative, and basic research, monitoring and education programs, outlined in the research reserve management plan. Special research and monitoring awards provide funds to conduct estuarine research and monitoring projects within the System. Special educational and interpretive awards provide funds to conduct estuarine educational and interpretive projects within the System.

(g) Lands already in protected status managed by other Federal agencies, state or local governments, or private organizations may be included within National Estuarine Research Reserves only if the managing entity commits to long-term management consistent with paragraphs (d) and (e) of this section in the reserve management plan. Federal lands already in protected status may not comprise the key land and water areas of a research reserve (see § 921.11(c)(3)).

(h) To assist the states in carrying out the Program's goals in an effective manner, NOAA will coordinate a research and education information exchange throughout the National Estuarine Research Reserve System. As part of this role, NOAA will ensure that information and ideas from one reserve are made available to others in the system. The network will enable reserves to exchange information and research data with each other, with

universities engaged in estuarine research, and with Federal, state, and local agencies. NOAA's objective is a system-wide program of research and monitoring capable of addressing the management issues that affect long-term productivity of our Nation's estuaries.

§ 921.2 Definitions.

(a) *Act* means the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*

(b) *Under Secretary* means the Under Secretary of Commerce for Oceans and Atmosphere, or designee.

(c) *Coastal state* means a state of the United States, in or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of these regulations the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Marianas Islands, the Trust Territories of the Pacific Islands, and American Samoa (see 16 U.S.C. 1453(4)).

(d) *State agency* means an instrumentality of a coastal state to whom the coastal state has delegated the authority and responsibility for the creation and/or management/operation of a national estuarine research reserve. Factors indicative of this authority may include the power to receive and expend funds on behalf of the reserve, acquire and sell or convey real and personal property interests, adopt rules for the protection of the reserve, enforce rules applicable to the reserve, or develop and implement research and education programs for the reserve. For the purposes of these regulations, the terms "coastal state" and "State agency" shall be synonymous.

(e) *Estuary* means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term also includes estuary-type areas with measurable freshwater influence and having unimpaired connections with the open sea, and estuary-type areas of the Great Lakes and their connecting waters. (See 16 U.S.C. 1453(7)).

(f) *National Estuarine Research Reserve* means an area that is a representative estuarine ecosystem suitable for long-term research, which may include all of the key land and water portion of an estuary, and adjacent transitional areas and uplands constituting to the extent feasible a natural unit, and which is set aside as a natural field laboratory to provide long-term opportunities for research, education, and interpretation on the ecological relationships within the area (see 16 U.S.C. 1453(8)) and meets the requirements of 16 U.S.C. 1461(b). This includes those areas designated as national estuarine sanctuaries or reserves under section 315 of the Act prior to enactment of the Coastal Zone Act Reauthorization Amendments of 1990 and each area subsequently designated as a national estuarine research reserve.

§ 921.3 National Estuarine Research Reserve System Biogeographic Classification Scheme and Estuarine Typologies.

(a) National Estuarine Research Reserves are chosen to reflect regional differences and to include a variety of ecosystem types. A biogeographic classification scheme based on regional variations in the nation's coastal zone has been developed. The biogeographic classification scheme is used to ensure that the National Estuarine Research Reserve System includes at least one site from each region. The estuarine typology system is utilized to ensure that sites in the System reflect the wide range of estuarine types within the United States.

(b) The biogeographic classification scheme, presented in Appendix I of this part, contains 29 regions. Figure 1 graphically depicts the biogeographic regions of the United States.

(c) The typology system is presented in appendix II of this part.

§ 921.4 Relationship to other provisions of the Coastal Zone Management Act, and to the Marine Protection, Research and Sanctuaries Act.

(a) The National Estuarine Research Reserve System is intended to provide information to state agencies and other entities involved in addressing coastal management issues. Any coastal state, including those that do not have approved coastal management programs under section 306 of the Act, is eligible for an award under the National Estuarine Research Reserve Program (see § 921.2(c)).

(b) For purposes of consistency review by states with a federally approved coastal management program, the designation of a national estuarine research reserve is deemed to be a Federal activity, which, if directly affecting the state's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved state coastal management program as provided by section 1456(c)(1) of the Act, and implementing regulations at 15 CFR part 930, subpart C. In accordance with section 1456(c)(1) of the Act and the applicable regulations NOAA will be responsible for certifying that designation of the reserve is consistent with the state's approved coastal management program. The state must concur with, or object to, the certification. It is recommended that the lead state agency for reserve designation consult, at the earliest practicable time, with the appropriate state officials concerning the consistency of a proposed national estuarine research reserve.

(c) The National Estuarine Research Reserve Program will be administered in close coordination with the National Marine Sanctuary Program (Title III of the Marine Protection, Research and Sanctuaries Act, as amended, 16 U.S.C. 1431–1445), also administered by NOAA. Title III authorizes the Secretary of Commerce to designate discrete areas of the marine environment as National Marine Sanctuaries to protect or restore such areas for their conservation, recreational, ecological, historical, research, educational or esthetic values. National marine sanctuaries and estuarine research reserves may not overlap, but may be adjacent.

Subpart B—Site Selection, Post Site Selection and Management Plan Development

§ 921.10 General.

(a) A coastal state may apply for Federal financial assistance for the purpose of site selection, preparation of documents specified in § 921.13 (draft management plan (DMP) and environmental impact statement (EIS)), and the conduct of limited basic characterization studies. The total Federal share of this assistance may not exceed $100,000. Federal financial assistance for preacquisition activities under §§ 921.11 and 921.12 is subject to the total $5 million for which each reserve is eligible for land acquisition. In the case of a biogeographic region (see appendix I of this part) shared by two or more coastal states, each state is eligible for Federal financial assistance to establish a separate national estuarine research reserve within their respective portion of the shared biogeographic region. Financial assistance application procedures are specified in Subpart I.

(b) In developing a research reserve program, a state may choose to develop a multiple-site research reserve reflecting a diversity of habitats in a single biogeographic region. A multiple-site research reserve allows the state to develop complementary research and educational programs within the individual components of its multi-site research reserve. Multiple-site research

reserves are treated as one reserve in terms of financial assistance and development of an overall management framework and plan. Each individual site of a proposed multiple-site research reserve shall be evaluated both separately under § 921.11(c) and collectively as part of the site selection process. A coastal state may propose to establish a multiple-site research reserve at the time of the initial site selection, or at any point in the development or operation of the estuarine research reserve. If the state decides to develop a multiple-site national estuarine research reserve after the initial acquisition and development award is made for a single site, the proposal is subject to the requirements set forth in § 921.33(b). However, a state may not propose to add one or more sites to an already designated research reserve if the operation and management of such research reserve has been found deficient and uncorrected or the research conducted is not consistent with the Estuarine Research Guidelines referenced in § 921.51. In addition, Federal funds for the acquisition of a multiple-site research reserve remain limited to $5,000,000 (see § 921.20). The funding for operation of a multiple-site research reserve is limited to the maximum allowed for any one reserve per year (see § 921.32(c)) and preacquisition funds are limited to $100,000 per reserve.

§ 921.11 Site selection and feasibility.

(a) A coastal state may use Federal funds to establish and implement a site selection process which is approved by NOAA.

(b) In addition to the requirements set forth in Subpart I of this part, a request for Federal funds for site selection must contain the following programmatic information:

(1) A description of the proposed site selection process and how it will be implemented in conformance with the biogeographic classification scheme and typology (§ 921.3);

(2) An identification of the site selection agency and the potential management agency; and

(3) A description of how public participation will be incorporated into the process (see § 921.11(d)).

(c) As part of the site selection process, the state and NOAA shall evaluate and select the final site(s). NOAA has final authority in approving such sites. Site selection shall be guided by the following principles:

(1) The site's contribution to the biogeographical and typological balance of the National Estuarine Research Reserve System. NOAA will give priority consideration to proposals to establish reserves in biogeographic regions or subregions or incorporating types that are not represented in the system. (See the biogeographic classification scheme and typology set forth in § 921.3 and appendices I and II of this part);

(2) The site's ecological characteristics, including its biological productivity, diversity of flora and fauna, and capacity to attract a broad range of research and educational interests. The proposed site must be a representative estuarine ecosystem and should, to the maximum extent possible, be an estuarine ecosystem minimally affected by human activity or influence (see § 921.1(e)).

(3) Assurance that the site's boundaries encompass an adequate portion of the key land and water areas of the natural system to approximate an ecological unit and to ensure effective conservation. Boundary size will vary greatly depending on the nature of the ecosystem. Research reserve boundaries must encompass the area within which adequate control has or will be established by the managing entity over human activities occurring within the reserve. Generally, reserve boundaries will encompass two areas: Key land and water areas (or "core area") and a buffer zone. Key land and water areas and a buffer zone will likely require significantly different levels of control (see § 921.13(a)(7)). The term "key land and water areas" refers to that core area within the reserve that is so vital to the functioning of the estuarine ecosystem that it must be under a level of control sufficient to ensure the long-term viability of the reserve for research on natural processes. Key land and water areas, which comprise the core area, are those ecological units of a natural estuarine system which preserve, for research purposes, a full range of significant physical, chemical and biological factors contributing to the diversity of fauna, flora and natural processes occurring within the estuary. The determination of which land and water areas are "key" to a particular reserve must be based on specific scientific knowledge of the area. A basic principle to follow when deciding upon key land and water areas is that they should encompass resources representative of the total ecosystem, and which if compromised could endanger the research objectives of the reserve. The term "buffer zone" refers to an area adjacent to or surrounding key land and water areas and essential to their integrity. Buffer zones protect the core area and provide additional protection for estuarine-dependent species, including those that are rare or endangered. When determined appropriate by the state and approved by NOAA, the buffer zone may also include an area necessary for facilities required for research and interpretation. Additionally, buffer zones should be established sufficient to accommodate a shift of the core area as a result of biological, ecological or geomorphological change which reasonably could be expected to occur. National Estuarine Research Reserves may include existing Federal or state lands already in a protected status where mutual benefit can be enhanced. However, NOAA will not approve a site for potential national estuarine research reserve status that is dependent primarily upon the inclusion of currently protected Federal lands in order to meet the requirements for research reserve status (such as key land and water areas). Such lands generally will be included within a research reserve to serve as a buffer or for other ancillary purposes; and may be included, subject to NOAA approval, as a limited portion of the core area;

(4) The site's suitability for long-term estuarine research, including ecological factors and proximity to existing research facilities and educational institutions;

(5) The site's compatibility with existing and potential land and water uses in contiguous areas as well as approved coastal and estuarine management plans; and

(6) The site's importance to education and interpretive efforts, consistent with the need for continued protection of the natural system.

(d) Early in the site selection process the state must seek the views of affected landowners, local governments, other state and Federal agencies and other parties who are interested in the area(s) being considered for selection as a potential national estuarine research reserve. After the local government(s) and affected landowner(s) have been contacted, at least one public meeting shall be held in the vicinity of the proposed site. Notice of such a meeting, including the time, place, and relevant subject matter, shall be announced by the state through the area's principal newspaper at least 15 days prior to the date of the meeting and by NOAA in the Federal Register.

(e) A state request for NOAA approval of a proposed site (or sites in the case of a multi-site reserve) must contain a description of the proposed site(s) in relationship to each of the site selection principles (§ 921.11(c)) and the following information:

(1) An analysis of the proposed site(s) based on the biogeographical scheme/typology discussed in § 921.3 and set forth in appendices I and II of this part;

(2) A description of the proposed site(s) and its (their) major resources, including location, proposed boundaries, and adjacent land uses. Maps, including aerial photographs, are required;

(3) A description of the public participation process used by the state to solicit the views of interested parties, a summary of comments, and, if interstate issues are involved, documentation that the Governor(s) of the other affected state(s) has been contacted. Copies of all correspondence, including contact letters to all affected landowners must be appended;

(4) A list of all sites considered and a brief statement of the reasons why a site was not preferred; and

(5) A nomination of the proposed site(s) for designation as a National Estuarine Research Reserve by the Governor of the coastal state in which the site is located.

(f) A state proposing to reactivate an inactive site, previously approved by NOAA for development as an estuarine sanctuary or reserve, may apply for those funds remaining, if any, provided for site selection and feasibility (§ 921.11(a)) to determine the feasibility of reactivation. This feasibility study must comply with the requirements set forth in § 921.11(c)–(e).

§ 921.12 Post site selection.

(a) At the time of the coastal state's request for NOAA approval of a proposed site, the state may submit a request for funds to develop the draft management plan and for preparation of the EIS. At this time, the state may also submit a request for the remainder of the predesignation funds to perform a limited basic characterization of the physical, chemical and biological characteristics of the site approved by NOAA necessary for providing EIS information to NOAA. The state's request for these post site selection funds must be accompanied by the information specified in subpart I and, for draft management plan development and EIS information collection, the following programmatic information:

(1) A draft management plan outline (see § 921.13(a) below); and

(2) An outline of a draft memorandum of understanding (MOU) between the state and NOAA detailing the Federal-state role in research reserve management during the initial period of Federal funding and expressing the state's long-term commitment to operate and manage the reserve.

(b) The state is eligible to use the funds referenced in § 921.12(a) after the proposed site is approved by NOAA under the terms of § 921.11.

§ 921.13 Management plan and environmental impact statement development.

(a) After NOAA approves the state's proposed site and application for funds submitted pursuant to § 921.12, the state may begin draft management plan development and the collection of information necessary for the preparation by NOAA of an EIS. The state shall develop a draft management plan, including an MOU. The plan shall set out in detail:

(1) Research reserve goals and objectives, management issues, and strategies or actions for meeting the goals and objectives;

(2) An administrative plan including staff roles in administration, research, education/interpretation, and surveillance and enforcement;

(3) A research plan, including a monitoring design;

(4) An education/interpretive plan;

(5) A plan for public access to the research reserve;

(6) A construction plan, including a proposed construction schedule, general descriptions of proposed developments and general cost estimates. Information should be provided for proposed minor construction projects in sufficient detail to allow these projects to begin in the initial phase of acquisition and development. A categorical exclusion, environmental assessment, or EIS may be required prior to construction;

(7) An acquisition plan identifying the ecologically key land and water areas of the research reserve, ranking these areas according to their relative importance, and including a strategy for establishing adequate long-term state control over these areas sufficient to provide protection for reserve resources to ensure a stable environment for research. This plan must include an identification of ownership within the proposed research reserve boundaries, including land already in the public domain; the method(s) of acquisition which the state proposes to use—acquisition (including less-than-fee simple options) to establish adequate long-term state control; an estimate of the fair market value of any property interest—which is proposed for acquisition; a schedule estimating the time required to complete the process of establishing adequate state control of the proposed research reserve; and a discussion of any anticipated problems. In selecting a preferred method(s) for establishing adequate state control over areas within the proposed boundaries of the reserve, the state shall perform the following steps for each parcel determined to be part of the key land and water areas (control over which is necessary to protect the integrity of the reserve for research purposes), and for those parcels required for research and interpretive support facilities or buffer purposes:

(i) Determine, with appropriate justification, the minimum level of control(s) required [e.g., management agreement, regulation, less-than-fee simple property interest (e.g., conservation easement), fee simple property acquisition, or a combination of these approaches] This does not preclude the future necessity of increasing the level of state control;

(ii) Identify the level of existing state control(s);

(iii) Identify the level of additional state control(s), if any, necessary to meet the minimum requirements identified in paragraph (a)(7)(i) of this section;

(iv) Examine all reasonable alternatives for attaining the level of control identified in paragraph (a)(7)(iii) of this section, and perform a cost analysis of each; and

(v) Rank, in order of cost, the methods (including acquisition) identified in paragraph (a)(7)(iv) of this section.

An assessment of the relative cost-effectiveness of control alternatives shall include a reasonable estimate of both short-term costs (*e.g.*, acquisition of property interests, regulatory program development including associated enforcement costs, negotiation, adjudication, etc.) and long-term costs (*e.g.*, monitoring, enforcement, adjudication, management and coordination). In selecting a preferred method(s) for establishing adequate state control over each parcel examined under the process described above, the state shall give priority consideration to the least costly method(s) of attaining the minimum level of long-term control required. Generally, with the possible exception of buffer areas required for support facilities, the level of control(s) required for buffer areas will be considerably less than that required for key land and water areas. This acquisition plan, after receiving the approval of NOAA, shall serve as a guide for negotiations with landowners. A final boundary for the reserve shall be delineated as a part of the final management plan;

(8) A resource protection plan detailing applicable authorities, including allowable uses, uses requiring a permit and permit requirements, any

restrictions on use of the research reserve, and a strategy for research reserve surveillance and enforcement of such use restrictions, including appropriate government enforcement agencies;

(9) If applicable, a restoration plan describing those portions of the site that may require habitat modification to restore natural conditions;

(10) If applicable, a resource manipulation plan, describing those portions of the reserve buffer in which long-term preexisting (prior to designation) manipulation (*e.g.*, use of a buffer area for hunting and/or fishing club activities), for reasons not related to research or restoration is occurring. The plan shall explain in detail the nature of such activities, shall justify why such manipulation should be permitted to continue within the reserve buffer; and shall describe possible effects of this manipulation on key land and water areas and their resources;

(11) A proposed memorandum of understanding (MOU) between the state and NOAA regarding the Federal-state relationship during the establishment and development of the national estuarine research reserve, and expressing a long-term commitment by the state to maintain and manage the research reserve in accordance with section 315 of the Act, 16 U.S.C. 1461, and applicable regulations. In conjunction with the MOU, and where possible under state law, the state will consider taking appropriate administrative or legislative action to ensure the long-term protection and operation of the national estuarine research reserve. If other MOUs are necessary (such as with a Federal agency, another state agency or private organization), drafts of such MOUs must be included in the plan. All necessary MOU's shall be signed prior to research reserve designation; and

(12) If the state has a federally approved coastal management program, a certification that the national estuarine research reserve is consistent to the maximum extent practicable with that program. See §§ 921.4(b) and 921.30(b).

(b) Regarding the preparation of an EIS under the National Environmental Policy Act on a national estuarine research reserve proposal, the state and NOAA shall collect all necessary information concerning the socioeconomic and environmental impacts associated with implementing the draft management plan and feasible alternatives to the plan. Based on this information, the state will draft and provide NOAA with a preliminary EIS.

(c) Early in the development of the draft management plan and the draft EIS, the state and NOAA shall hold a scoping meeting (pursuant to NEPA) in the area or areas most affected to solicit public and government comments on the significant issues related to the proposed action. NOAA will publish a notice of the meeting in the **Federal Register** at least 15 days prior to the meeting. The state shall be responsible for publishing a similar notice in the local media.

(d) NOAA will publish a **Federal Register** notice of intent to prepare a draft EIS. After the draft EIS is prepared and filed with the Environmental Protection Agency (EPA), a Notice of Availability of the draft EIS will appear in the **Federal Register**. Not less than 30 days after publication of the notice, NOAA will hold at least one public hearing in the area or areas most affected by the proposed national estuarine research reserve. The hearing will be held no sooner than 15 days after appropriate notice of the meeting has been given in the principal news media by the state and in the **Federal Register** by NOAA. After a 45-day comment period, a final EIS will be prepared by the state and NOAA.

Subpart C—Acquisition, Development and Preparation of the Final Management Plan

§ 921.20 General.

The acquisition and development period is separated into two major phases. After NOAA approval of the site, draft management plan and draft MOU, and completion of the final EIS, a coastal state is eligible for an initial acquisition and development award(s). In this initial phase, the state should work to meet the criteria required for formal research reserve designation; *e.g.*, establishing adequate state control over the key land and water areas as specified in the draft management plan and preparing the final management plan. These requirements are specified in § 921.30. Minor construction in accordance with the draft management plan may also be conducted during this initial phase. The initial acquisition and development phase is expected to last no longer than three years. If necessary, a longer time period may be negotiated between the state and NOAA. After research reserve designation, a state is eligible for a supplemental acquisition and development award(s) in accordance with § 921.31. In this post-designation acquisition and development phase, funds may be used in accordance with the final management plan to construct research and educational facilities, complete any remaining land acquisition, for program development, and for restorative activities identified in the final management plan. In any case, the amount of Federal financial assistance provided to a coastal state with respect to the acquisition of lands and waters, or interests therein, for any one national estuarine research reserve may not exceed an amount equal to 50 percent of the costs of the lands, waters, and interests therein or $5,000,000, whichever amount is less.

§ 921.21 Initial acquisition and development awards.

(a) Assistance is provided to aid the recipient prior to designation in:

(1) Acquiring a fee simple or less-than-fee simple real property interest in land and water areas to be included in the research reserve boundaries (see § 921.13(a)(7); § 921.30(d));

(2) Minor construction, as provided in paragraphs (b) and (c) of this section;

(3) Preparing the final management plan; and

(4) Up to the point of research reserve designation, initial management costs, *e.g.*, for implementing the NOAA approved draft management plan, preparing the final management plan, hiring a reserve manager and other staff as necessary and for other management-related activities. Application procedures are specified in subpart I of this part.

(b) The expenditure of Federal and state funds on major construction activities is not allowed during the initial acquisition and development phase. The preparation of architectural and engineering plans, including specifications, for any proposed construction, or for proposed restorative activities, is permitted. In addition, minor construction activities, consistent with paragraph (c) of this section also are allowed. The NOAA-approved draft management plan must, however, include a construction plan and a public access plan before any award funds can be spent on construction activities.

(c) Only minor construction activities that aid in implementing portions of the management plan (such as boat ramps and nature trails) are permitted during the initial acquisition and development phase. No more than five (5) percent of the initial acquisition and development award may be expended on such activities. NOAA must make a specific determination, based on the final EIS, that the construction activity will not be detrimental to the environment.

(d) Except as specifically provided in paragraphs (a)–(c) of this section,

construction projects, to be funded in whole or in part under an acquisition and development award(s), may not be initiated until the research reserve receives formal designation (see § 921.30). This requirement has been adopted to ensure that substantial progress in establishing adequate state control over key land and water areas has been made and that a final management plan is completed before major sums are spent on construction. Once substantial progress in establishing adequate state control/acquisition has been made, as defined by the state in the management plan, other activities guided by the final management plan may begin with NOAA's approval.

(e) For any real property acquired in whole or part with Federal funds for the research reserve, the state shall execute suitable title documents to include substantially the following provisions, or otherwise append the following provisions in a manner acceptable under applicable state law to the official land record(s):

(1) Title to the property conveyed by this deed shall vest in the [recipient of the award granted pursuant to Section 315 of the Act, 16 U.S.C. 1461 or other NOAA approved state agency] subject to the condition that the designation of the [name of National Estuarine Reserve] is not withdrawn and the property remains part of the federally designated [name of National Estuarine Research Reserve]; and

(2) In the event that the property is no longer included as part of the research reserve, or if the designation of the research reserve of which it is part is withdrawn, then NOAA or its successor agency, after full and reasonable consultation with the State, may exercise the following rights regarding the disposition of the property:

(i) The recipient may retain title after paying the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the current fair market value of the property;

(ii) If the recipient does not elect to retain title, the Federal Government may either direct the recipient to sell the property and pay the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the proceeds from the sale (after deducting actual and reasonable selling and repair or renovation expenses, if any, from the sale proceeds), or direct the recipient to transfer title to the Federal Government. If directed to transfer title to the Federal Government, the recipient shall be entitled to compensation computed by applying the recipient's percentage of participation in the cost of the original project to the current fair market value of the property; and

(iii) Fair market value of the property must be determined by an independent appraiser and certified by a responsible official of the state, as provided by Department of Commerce Regulations at 15 CFR part 24, and Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally assisted programs at 15 CFR part 11.

(f) Upon instruction by NOAA, provisions analogous to those of § 921.21(e) shall be included in the documentation underlying less-than-fee-simple interests acquired in whole or part with Federal funds.

(g) Federal funds or non-Federal matching share funds shall not be spent to acquire a real property interest in which the state will own the land concurrently with another entity unless the property interest has been identified as a part of an acquisition strategy pursuant to § 921.13(7) which has been approved by NOAA prior to the effective date of these regulations.

(h) Prior to submitting the final management plan to NOAA for review and approval, the state shall hold a public meeting to receive comment on the plan in the area affected by the estuarine research reserve. NOAA will publish a notice of the meeting in the Federal Register. The state shall be responsible for having a similar notice published in the local newspaper(s).

Subpart D—Reserve Designation and Subsequent Operation

§ 921.30 Designation of National Estuarine Research Reserves.

(a) The Under Secretary may designate an area proposed for designation by the Governor of the state in which it is located, as a National Estuarine Research Reserve if the Under Secretary finds:

(1) The area is a representative estuarine ecosystem that is suitable for long-term research and contributes to the biogeographical and typological balance of the System;

(2) Key land and water areas of the proposed research reserve, as identified in the management plan, are under adequate state control sufficient to provide long-term protection for reserve resources to ensure a stable environment for research;

(3) Designation of the area as a reserve will serve to enhance public awareness and understanding of estuarine areas, and provide suitable opportunities for public education and interpretation;

(4) A final management plan has been approved by NOAA;

(5) An MOU has been signed between the state and NOAA ensuring a long-term commitment by the state to the effective operation and implementation of the area as a National Estuarine Research Reserve;

(6) All MOU's necessary for reserve management (i.e., with relevant Federal, state, and local agencies and/or private organizations) have been signed; and

(7) The coastal state in which the area is located has complied with the requirements of subpart B of this part.

(b) NOAA will determine whether the designation of a national estuarine research reserve in a state with a federally approved coastal zone management program directly affects the coastal zone. If the designation is found to directly affect the coastal zone, NOAA will make a consistency determination pursuant to section 307(c)(1) of the Act, 16 U.S.C. 1456, and 15 CFR part 930, subpart C. See § 921.4(b). The results of this consistency determination will be published in the Federal Register when the notice of designation is published. See § 921.30(c).

(c) NOAA will publish the notice of designation of a National Estuarine Research Reserve in the Federal Register. The state shall be responsible for having a similar notice published in the local media.

(d) The term "state control" in § 921.30(a)(3) does not necessarily require that key land and water areas be owned by the state in fee simple. Acquisition of less-than-fee simple interests (*e.g.*, conservation easements) and utilization of existing state regulatory measures are encouraged where the state can demonstrate that these interests and measures assure adequate long-term state control consistent with the purposes of the research reserve (see also § 921.13(a)(7); § 921.21(g)). Should the state later elect to purchase an interest in such lands using NOAA funds, adequate justification as to the need for such acquisition must be provided to NOAA.

§ 921.31 Supplemental acquisition and development awards.

After national estuarine research reserve designation, and as specified in the approved management plan, a coastal state may request a supplemental acquisition and/or development award(s) for acquiring additional property interests identified in the management plan as necessary to

strengthen protection of key land and water areas and to enhance long-term protection of the area for research and education, for facility and exhibit construction, for restorative activities identified in the approved management plan, for administrative purposes related to acquisition and/or facility construction and to develop and/or upgrade research, monitoring and education/interpretive programs. Federal financial assistance provided to a national estuarine research reserve for supplemental development costs directly associated with facility construction (*i.e.*, major construction activities) may not exceed 70 percent of the total project cost. NOAA must make a specific determination that the construction activity will not be detrimental to the environment. Supplemental acquisition awards for the acquisition of lands or waters, or interests therein, for any one reserve may not exceed an amount equal to 50 per centum of the cost of the lands, waters, and interests therein or $5,000,000, whichever amount is less. In the case of a biogeographic region (see appendix I of this part) shared by two or more states, each state is eligible independently for Federal financial assistance to establish a separate national estuarine research reserve within their respective portion of the shared biogeographic region. Application procedures are specified in subpart I of this part. Land acquisition must follow the procedures specified in § 921.13(a)(7), § 921.21 (e) and (f) and § 921.81.

§ 921.32 Operation and Management: Implementation of the Management Plan.

(a) After the reserve is formally designated, a coastal state is eligible to receive Federal funds to assist the state in the operation and management of the reserve including the management of research, monitoring, education, and interpretive programs. The purpose of this Federally funded operation and management phase is to implement the approved final management plan and to take the necessary steps to ensure the continued effective operation of the reserve.

(b) State operation and management of the reserves shall be consistent with the mission, and shall further the goals of the National Estuarine Research Reserve Program (see § 921.1).

(c) Federal funds are available for the operation and management of the reserve. Federal funds provided pursuant to this section may not exceed 70% of the total cost of operating and managing the reserve for any one year. In the case of a biogeographic region (see appendix I of this part) shared by two or more states, each state is eligible for Federal financial assistance to establish a separate reserve within their respective portion of the shared biogeographic region (see § 921.10).

(d) Operation and management funds are subject to the following limitations:

(1) Eligible coastal state agencies may apply for up to the maximum share available per reserve for that fiscal year. Share amounts will be announced annually by letter from the Sanctuary and Reserves Division to all participating states. This letter will be provided as soon as practicable following approval of the Federal budget for that fiscal year.

(2) No more than ten percent of the total amount (state and Federal shares) of each operation and management award may be used for construction-type activities.

§ 921.33 Boundary changes, amendments to the management plan, and addition of multiple-site components.

(a) Changes in the boundary of reserve and major changes to the final management plan, including state laws or regulations promulgated specifically for the reserve, may be made only after written approval by NOAA. NOAA may require public notice, including notice in the Federal Register and an opportunity for public comment before approving a boundary or management plan change. Changes in the boundary of a reserve involving the acquisition of properties not listed in the management plan or final EIS require public notice and the opportunity for comment; in certain cases, a categorical exclusion, an environmental assessment and possibly an environmental impact statement may be required. NOAA will place a notice in the Federal Register of any proposed changes in research reserve boundaries or proposed major changes to the final management plan. The state shall be responsible for publishing an equivalent notice in the local media. See also requirements of § 921.4(b) and § 921.13(a)(11).

(b) As discussed in § 921.10(b), a state may choose to develop a multiple-site national estuarine research reserve after the initial acquisition and development award for a single site has been made. NOAA will publish notice of the proposed new site including an invitation for comments from the public in the Federal Register. The state shall be responsible for publishing an equivalent notice in the local newspaper(s). An EIS, if required, shall be prepared in accordance with section § 921.13 and shall include an administrative framework for the multiple-site research reserve and a description of the complementary research and educational programs within the research reserve. If NOAA determines, based on the scope of the project and the issues associated with the additional site(s), that an environmental assessment is sufficient to establish a multiple-site research reserve, then the state shall develop a revised management plan which, concerning the additional component, incorporates each of the elements described in § 921.13(a). The revised management plan shall address goals and objectives for all components of the multi-site research reserve and the additional component's relationship to the original site(s).

(c) The state shall revise the management plan for a reserve at least every five years, or more often if necessary. Management plan revisions are subject to paragraph (a) of this section.

(d) NOAA will approve boundary changes, amendments to management plans, or the addition of multiple-site components, by notice in the Federal Register. If necessary NOAA will revise the designation document (findings) for the site.

Subpart E—Ongoing Oversight, Performance Evaluation and Withdrawal of Designation

§ 921.40 Ongoing oversight and evaluations of designated National Estuarine Research Reserves.

(a) The Assistant Administrator shall conduct, in accordance with sections 312 and 315 of the Act and procedures set forth in 15 CFR part 928, ongoing oversight and evaluations of reserves. Interim sanctions may be imposed in accordance with regulations promulgated under 15 CFR part 928.

(b) The Assistant Administrator may consider the following indicators of non-adherence in determining whether to invoke interim sanctions:

(1) Inadequate implementation of required staff roles in administration, research, education/interpretation, and surveillance and enforcement. Indicators of inadequate implementation could include: No reserve Manager, or no staff or insufficient staff to carry out the required functions.

(2) Inadequate implementation of the required research plan, including the monitoring design. Indicators of inadequate implementation could include: Not carrying out research or monitoring that is required by the plan, or carrying out research or monitoring that is inconsistent with the plan.

(3) Inadequate implementation of the required education/interpretation plan. Indicators of inadequate implementation could include: Not carrying out education or interpretation that is required by the plan, or carrying out education/interpretation that is inconsistent with the plan.

(4) Inadequate implementation of public access to the reserve. Indicators of inadequate implementation of public access could include: Not providing necessary access, giving full consideration to the need to keep some areas off limits to the public in order to protect fragile resources.

(5) Inadequate implementation of facility development plan. Indicators of inadequate implementation could include: Not taking action to propose and budget for necessary facilities, or not undertaking necessary construction in a timely manner when funds are available.

(6) Inadequate implementation of acquisition plan. Indicators of inadequate implementation could include: Not pursuing an aggressive acquisition program with all available funds for that purpose, not requesting promptly additional funds when necessary, and evidence that adequate long-term state control has not been established over some core or buffer areas, thus jeopardizing the ability to protect the reserve site and resources from offsite impacts.

(7) Inadequate implementation of reserve protection plan. Indicators of inadequate implementation could include: Evidence of non-compliance with reserve restrictions, insufficient surveillance and enforcement to assure that restrictions on use of the reserve are adhered to, or evidence that reserve resources are being damaged or destroyed as a result of the above.

(8) Failure to carry out the terms of the signed Memorandum of Understanding (MOU) between the state and NOAA, which establishes a long-term state commitment to maintain and manage the reserve in accordance with section 315 of the Act. Indicators of failure could include: State action to allow incompatible uses of state-controlled lands or waters in the reserve, failure of the state to bear its fair share of costs associated with long-term operation and management of the reserve, or failure to initiate timely updates of the MOU when necessary.

§ 921.41 Withdrawal of designation.

The Assistant Administrator may withdraw designation of an estuarine area as a National Estuarine Research Reserve pursuant to and in accordance with the procedures of section 312 and 315 of the Act and regulations promulgated thereunder.

Subpart F—Special Research Projects

§ 921.50 General.

(a) To stimulate high quality research within designated national estuarine research reserves, NOAA may provide financial support for research projects which are consistent with the Estuarine Research Guidelines referenced in § 921.51. Research awards may be awarded under this subpart to only those designated research reserves with approved final management plans. Although research may be conducted within the immediate watershed of the research reserve, the majority of research activities of any single research project funded under this subpart must be conducted within reserve boundaries. Funds provided under this subpart are primarily used to support management-related research projects that will enhance scientific understanding of the research reserve ecosystem, provide information needed by reserve managers and coastal management decision-makers, and improve public awareness and understanding of estuarine ecosystems and estuarine management issues. Special research projects may be oriented to specific research reserves; however, research projects that would benefit more than one research reserve in the National Estuarine Reserve Research System are encouraged.

(b) Funds provided under this subpart are available on a competitive basis to any coastal state or qualified public or private person. A notice of available funds will be published in the Federal Register. Special research project funds are provided in addition to any other funds available to a coastal state under the Act. Federal funds provided under this subpart may not exceed 70% of the total cost of the project, consistent with § 921.81(e)(4) ("allowable costs").

§ 921.51 Estuarine research guidelines.

(a) Research within the National Estuarine Research Reserve System shall be conducted in a manner consistent with Estuarine Research Guidelines developed by NOAA.

(b) A summary of the Estuarine Research Guidelines is published in the Federal Register as a part of the notice of available funds discussed in § 921.50(c).

(c) The Estuarine Research Guidelines are reviewed annually by NOAA. This review will include an opportunity for comment by the estuarine research community.

§ 921.52 Promotion and coordination of estuarine research.

(a) NOAA will promote and coordinate the use of the National Estuarine Research Reserve System for research purposes.

(b) NOAA will, in conducting or supporting estuarine research other than that authorized under section 315 of the Act, give priority consideration to research that make use of the National Estuarine Research Reserve System.

(c) NOAA will consult with other Federal and state agencies to promote use of one or more research reserves within the National Estuarine Research Reserve System when such agencies conduct estuarine research.

Subpart G—Special Monitoring Projects

§ 921.60 General.

(a) To provide a systematic basis for developing a high quality estuarine resource and ecosystem information base for National Estuarine Research Reserves and, as a result, for the System, NOAA may provide financial support for basic monitoring programs as part of operations and management under § 921.32. Monitoring funds are used to support three major phases of a monitoring program: studies necessary for comprehensive site description/characterization, development of a site profile, and implementation of a monitoring program.

(b) Additional monitoring funds may be available on a competitive basis to the state agency responsible for reserve management or a qualified public or private person or entity designated by the reserve for special monitoring projects. However, if the applicant is other than the managing entity of a research reserve (coastal state), that applicant must submit as a part of the application a letter from the reserve manager indicating formal support of the application by the managing entity of the reserve. Funds provided under this subpart for special monitoring projects are provided in addition to any other funds available to a coastal state under the Act. Federal funds provided under this subpart may not exceed 70% of the total cost of the project, consistent with § 921.81(e)(4) ("allowable costs").

(c) Monitoring projects funded under this subpart must focus on the resources within the boundaries of the research reserve and must be consistent with the applicable sections of the Estuarine Research Guidelines referenced in § 921.51. Portions of the project may occur within the immediate watershed of the reserve beyond the site

boundaries. However, the monitoring proposal must demonstrate why this is necessary for the success of the project.

Subpart H—Special Interpretation and Education Projects

§ 921.70 General.

(a) To stimulate the development of innovative or creative interpretive and educational projects and materials to enhance public awareness and understanding of estuarine areas, NOAA may fund special interpretive and educational projects in addition to those activities provided for in operations and management under § 921.32. Special interpretive and educational awards may be awarded under this subpart to only those designated research reserves with approved final management plans.

(b) Funds provided under this subpart may be available on a competitive basis to any state agency. However, if the applicant is other than the managing entity of a research reserve, that applicant must submit as a part of the application a letter from the reserve manager indicating formal support of the application by the managing entity of the reserve. These funds are provided in addition to any other funds available to a coastal state under the Act. Federal funds provided under this subpart may not exceed 70% of the total cost of the project, consistent with § 921.81(e)(4) ("allowable costs").

(c) Applicants for education/interpretive projects that NOAA determines benefit the entire national estuarine research reserve system may receive Federal assistance of up to 100% of project costs.

Subpart I—General Financial Assistance Provisions

§ 921.80 Application information.

(a) Only a coastal state may apply for Federal financial assistance awards for preacquisition, acquisition and development, operation and management, and special education and interpretation projects under subpart H. Any coastal state or public or private person may apply for Federal financial assistance awards for special estuarine research or monitoring projects under subpart G. The announcement of opportunities to conduct research in the reserve system appears on an annual basis in the Federal Register. If a state is participating in the national Coastal Zone Management Program, the applicant for an award under section 315 of the Act shall notify the state coastal management agency regarding the application

(b) An original and two copies of the formal application must be submitted at least 120 working days prior to the proposed beginning of the project to the following address: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, Universal Building South, 1825 Connecticut Avenue, NW., suite 714, Washington, DC 20235. The Application for Federal Assistance Standard Form 424 (Non-construction Program) constitutes the formal application for site selection, post-site selection, operation and management, research, and education and interpretive awards. The Application for Federal Financial Assistance Standard Form 424 (Construction Program) constitutes the formal application for land acquisition and development awards. The application must be accompanied by the information required in subpart B of this part (predesignation), subpart C of this part, and § 921.31 (acquisition and development), and § 921.32 (operation and management) as applicable. Applications for development awards for construction projects, or restorative activities involving construction, must include a preliminary engineering report, a detailed construction plan, a site plan, a budget and categorical exclusion check list or environmental assessment. All applications must contain back up data for budget estimates (Federal and non-Federal shares), and evidence that the application complies with the Executive Order 12372, "Intergovernmental Review of Federal Programs." In addition, applications for acquisition and development awards must contain:

(1) State Historic Preservation Office comments;

(2) Written approval from NOAA of the draft management plan for initial acquisition and development award(s); and

§ 921.81 Allowable costs.

(a) Allowable costs will be determined in accordance with applicable OMB Circulars and guidance for Federal financial assistance, the financial assistance agreement, these regulations, and other Department of Commerce and NOAA directives. The term "costs" applies to both the Federal and non-Federal shares.

(b) Costs claimed as charges to the award must be reasonable, beneficial and necessary for the proper and efficient administration of the financial assistance award and must be incurred during the award period.

(c) Costs must not be allocable to or included as a cost of any other Federally-financed program in either the current or a prior award period.

(d) General guidelines for the non-Federal share are contained in Department of Commerce Regulations at 15 CFR part 24 and OMB Circular A-110. Copies of Circular A-110 can be obtained from the Sanctuaries and Reserves Division; 1825 Connecticut Avenue, NW., suite 714; Washington, DC 20235. The following may be used in satisfying the matching requirement:

(1) Site Selection and Post Site Selection Awards. Cash and in-kind contributions (value of goods and services directly benefiting and specifically identifiable to this part of the project) are allowable. Land may not be used as match.

(2) Acquisition and Development Awards. Cash and in-kind contributions are allowable. In general, the fair market value of lands to be included within the research reserve boundaries and acquired pursuant to the Act, with other than Federal funds, may be used as match. However, the fair market value of real property allowable as match is limited to the fair market value of a real property interest equivalent to, or required to attain, the level of control over such land(s) identified by the state and approved by the Federal Government as that necessary for the protection and management of the national estuarine research reserve. Appraisals must be performed according to Federal appraisal standards as detailed in Department of Commerce regulations at 15 CFR part 24 and the Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally assisted programs in 15 CFR part 11. The fair market value of privately donated land, at the time of donation, as established by an independent appraiser and certified by a responsible official of the state, pursuant to 15 CFR part 11, may also be used as match. Land, including submerged lands already in the state's possession, may be used as match to establish a national estuarine research reserve. The value of match for these state lands will be calculated by determining the value of the benefits forgone by the state, in the use of the land, as a result of new restrictions that may be imposed by reserve designation. The appraisal of the benefits forgone must be made by an independent appraiser in accordance with Federal appraisal standards pursuant to 15 CFR part 24 and 15 CFR part 11. A state may initially use as match land valued at greater than the Federal share of the acquisition and development award. The value in excess of the amount

required as match for the initial award may be used to match subsequent supplemental acquisition and development awards for the national estuarine research reserve (see also § 921.20). Costs related to land acquisition, such as appraisals, legal fees and surveys, may also be used as match.

(3) Operation and Management Awards. Generally, cash and in-kind contributions (directly benefiting and specifically identifiable to operations and management), except land, are allowable.

(4) Research, Monitoring, Education and Interpretive Awards. Cash and in-kind contributions (directly benefiting and specifically identifiable to the scope of work), except land, are allowable.

§ 921.82 Amendments to financial assistance awards.

Actions requiring an amendment to the financial assistance award, such as a request for additional Federal funds, revisions of the approved project budget or original scope of work, or extension of the performance period must be submitted to NOAA on Standard Form 424 and approved in writing.

Appendix I to Part 921—Biogeographic Classification Scheme

Acadian

1. Northern Gulf of Maine (Eastport to the Sheepscot River).
2. Southern Gulf of Maine (Sheepscot River to Cape Cod).

Virginian

3. Southern New England (Cape Cod to Sandy Hook).
4. Middle Atlantic (Sandy Hook to Cape Hatteras).
5. Chesapeake Bay.

Carolinian

6. North Carolinas (Cape Hatteras to Santee River).
7. South Atlantic (Santee River to St. John's River).
8. East Florida (St. John's River to Cape Canaveral).

West Indian

9. Caribbean (Cape Canaveral to Ft. Jefferson and south).
10. West Florida (Ft. Jefferson to Cedar Key).

Louisianian

11. Panhandle Coast (Cedar Key to Mobile Bay).
12. Mississippi Delta (Mobile Bay to Galveston).
13. Western Gulf (Galveston to Mexican border).

Californian

14. Southern California (Mexican border to Point Conception).
15. Central California (Point Conception to Cape Mendocino).
16. San Francisco Bay.

Columbian

17. Middle Pacific (Cape Mendocino to the Columbia River).
18. Washington Coast (Columbia River to Vancouver Island).
19. Puget Sound.

Great Lakes

20. Lake Superior (including St. Mary's River).
21. Lakes Michigan and Huron (including Straits of Mackinac, St. Clair River, and Lake St. Clair).
22. Lake Erie (including Detroit River and Niagara Falls).
23. Lake Ontario (including St. Lawrence River).

Fjord

24. Southern Alaska (Prince of Wales Island to Cook Inlet).
25. Aleutian Islands (Cook Inlet to Bristol Bay).

Sub-Arctic

26. Northern Alaska (Bristol Bay to Damarcation Point).

Insular

27 Hawaiian Islands.
28. Western Pacific Island.
29. Eastern Pacific Island.

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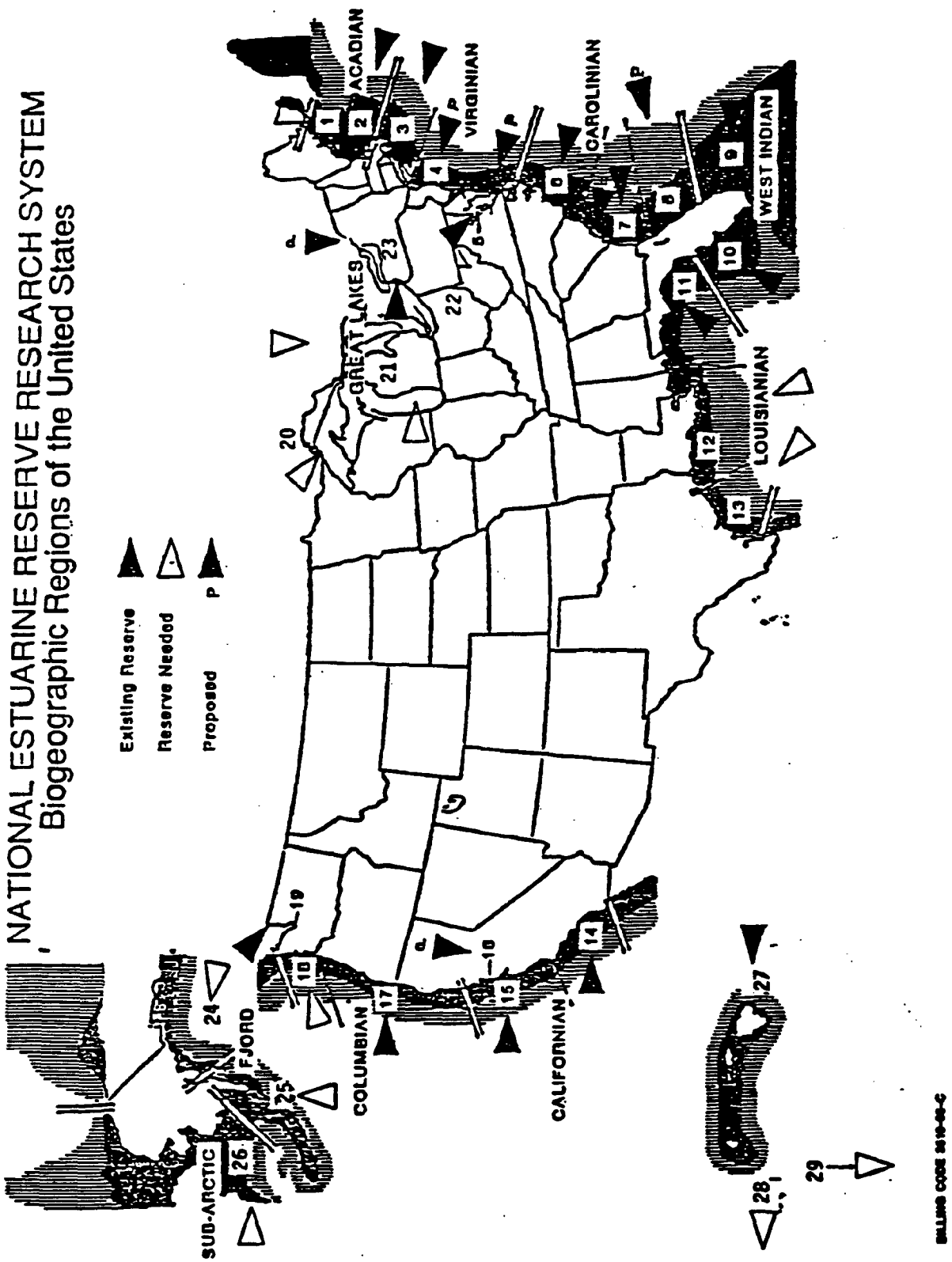
NATIONAL ESTUARINE RESERVE RESEARCH SYSTEM
Biogeographic Regions of the United States
Existing Reserve
Reserve Needed
Proposed
P
ACADIAN
VIRGINIAN
CAROLINIAN
WEST INDIAN
GREAT LAKES
LOUISIANIAN
COLUMBIAN
CALIFORNIAN
SUB-ARCTIC
FJORD

Appendix II to Part 921—Typology of National Estuarine Research Reserves

This typology system reflects significant differences in estuarine characteristics that are not necessarily related to regional location. The purpose of this type of classification is to maximize ecosystem variety in the selection of national estuarine reserves. Priority will be given to important ecosystem types as yet unrepresented in the reserve system. It should be noted that any one site may represent several ecosystem types or physical characteristics.

Class I—Ecosystem Types

Group I—Shorelands

A. Maritime Forest-Woodland

This type of ecosystem consists of single-stemmed species that have developed under the influence of salt spray. It can be found on coastal uplands or recent features such as barrier islands and beaches, and may be divided into the following biomes:

1. Northern Coniferous Forest Biome: This is an area of predominantly evergreens such as the sitka spruce (*Picea*), grand fir (*Abies*), and white cedar (*Thuja*), with poor development of the shrub and herb leyers, but high annual productivity and pronounced seasonal periodicity.

2. Moist Temperate (Mesothermal) Coniferous Forest Biome: Found along the west coast of North America from California to Alaska, this area is dominated by conifers, has relatively small seasonal range, high humidity with rainfall ranging from 30 to 150 inches, and a well-developed understory of vegetation with an abundance of mosses and other moisture-tolerant plants.

3. Temperate Deciduous Forest Biome: This biome is characterized by abundant, evenly distributed rainfall, moderate temperatures which exhibit a distinct seasonal pattern, well-developed soil biota and herb and shrub layers, and numerous plants which produce pulpy fruits and nuts. A distinct subdivision of this biome is the pine edible forest of the southeastern coastal plain, in which only a small portion of the area is occupied by climax vegetation, although it has large areas covered by edaphic climax pines.

4. Broad-leaved Evergreen Subtropical Forest Biome: The main characteristic of this biome is high moisture with less pronounced differences between winter and summer. Examples are the hammocks of Florida and the live oak forests of the Gulf and South Atlantic coasts. Floral dominants include pines, magnolias, bays, hollies, wild tamarind, strangler fig, gumbo limbo, and palms.

B. Coast Shrublands

This is a transitional area between the coastal grasslands and woodlands and is characterized by woody species with multiple stems a few centimeters to several meters above the ground developing under the influence of salt spray and occasional sand burial. This includes thickets, scrub, scrub savanna, heathlands, and coastal chaparral. There is a great variety of shrubland vegetation exhibiting regional specificity:

1. Northern Areas: Characterized by *Hudsonia*, various erinaceous species, and thickets of *Myrica*, *Prunus*, and *Rosa*.

2. Southeast Areas: Floral dominants include *Myrica*, *Baccharis*, and *Ilex*.

3. Western Areas: *Adenostoma*, *Arcotyphylos*, and *Eucalyptus* are the dominant floral species.

C. Coastal Grasslands

This area, which possesses sand dunes and coastal flats, has low rainfall (10 to 30 inches per year) and large amounts of humus in the soil. Ecological succession is slow, resulting in the presence of a number of seral stages of community development. Dominant vegetation includes mid-grasses (2 to 4 feet tall), such as *Ammophila*, *Agropyron*, and *Calamovilfa*, tall grasses (5 to 8 feet tall), such as *Spartina*, and trees such as willow (*Salix* sp.), cherry (*Prunus* sp.), and cottonwood (*Pupulus deltoides*). This area is divided into four regions with the following typical strand vegetation:

1. Arctic/Boreal: *Elymus:*
2. Northeast/West: *Ammophila:*
3. Southeast/Gulf: *Uniola:* and
4. Mid-Atlantic/Gulf: *Spartina patens.*

D. Coastal Tundra

This ecosystem, which is found along the Arctic and Boreal coasts of North America, is characterized by low temperatures, a short growing season, and some permafrost, producing a low, treeless mat community made up of mosses, lichens, heath, shrubs, grasses, sedges, rushes, and herbaceous and dwarf woody plants. Common species include arctic/alpine plants such as *Empetrum nigrum* and *Betula nana*, the lichens *Cetraria* and *Cladonia*, and herbaceous plants such as *Potentilla tridentata* and *Rubus chamaemorus*. Common species on the coastal beach ridges of the high arctic desert include *Dryas intergrifolia* and *Saxifrage oppositifolia*.

This area can be divided into two main subdivisions:

1. Low Tundra: Characterized by a thick, spongy mat of living and undecayed vegetation, often with water and dotted with ponds when not frozen; and

2. High Tundra: A bare area except for a scanty growth of lichens and grasses, with underlaying ice wedges forming raised polygonal areas.

E. Coastal Cliffs

This ecosystem is an important nesting site for many sea and shore birds. It consists of communities of herbaceous, graminoid, or low woody plants (shrubs, heath, etc.) on the top or along rocky faces exposed to salt spray. There is a diversity of plant species including mosses, lichens, liverworts, and "higher" plant representatives.

Group II—Transition Areas

A. Coastal Marshes

These are wetland areas dominated by grasses (Poacea), sedges (Cyperaceae), rushes (Juncaceae), cattails (Typhaceae), and other graminoid species and is subject to periodic flooding by either salt or freshwater. This ecosystem may be subdivided into: (a) Tidal, which is periodically flooded by either salt or brackish water; (b) nontidal (freshwater); or (c) tidal freshwater. These are essential habitats for many important estuarine species of fish and invertebrates as well as shorebirds and waterfowl and serves important roles in shore stabilization, flood control, water purification, and nutrient transport and storage.

B. Coastal Swamps

These are wet lowland areas that support mosses and shrubs together with large trees such as cypress or gum.

C. Coastal Mangroves

This ecosystem experiences regular flooding on either a daily, monthly, or seasonal basis, has low wave action, and is dominated by variety of salt-tolerant trees, such as the red mangrove (*Rhizophora mangle*), black mangrove (*Avicennia nitida*), and the white mangrove (*Loguncularia racemosa*). It is also an important habitat for large populations of fish, invertebrates, and birds. This type of ecosystem can be found from central Florida to extreme south Texas to the islands of the Western Pacific.

D. Intertidal Beaches

This ecosystem has a distinct biota of microscopic animals, bacteria, and unicellular algae along with macroscopic crustaceans, mollusks, and worms with a detritus-based nutrient cycle. This area also includes the driftline communities found at high tide levels on the beach. The dominant organisms in this ecosystem include crustaceans such as the mole crab (*Emerita*), amphipods (*Gammeridae*), ghost crabs (*Ocypode*), and bivalve mollusks such as the coquina (*Donax*) and surf clams (*Spisula and Mactra*).

E. Intertidal Mud and Sand Flats

These areas are composed of unconsolidated, high organic content sediments that function as a short-term storage area for nutrients and organic carbons. Macrophytes are nearly absent in this ecosystem, although it may be heavily colonized by benthic diatoms, dinoflaggellates, filamentous blue-green and green algae, and chaemosynthetic purple sulfur bacteria. This system may support a considerable population of gastropods, bivalves, and polychaetes, and may serve as a feeding area for a variety of fish and wading birds. In sand, the dominant fauna include the wedge shell *Donax*, the scallop *Pecten*, tellin shells *Tellina*, the heart urchin *Echinocardium*, the lug worm *Arenicola*, sand dollar *Dendraster*, and the sea pansy *Renilla*. In mud, faunal dominants adapted to low oxygen levels include the terebellid *Amphitrite*, the boring clam *Playdon*, the deep sea scallop *Placopecten*, the quahog *Mercenaria*, the echiurid worm *Urechis*, the mud snail *Nassarius*, and the sea cucumber *Thyone*.

F. Intertidal Algal Beds

These are hard substrates along the marine edge that are dominated by macroscopic algae, usually thalloid, but also filamentous or unicellular in growth form. This also includes the rocky coast tidepools that fall within the intertidal zone. Dominant fauna of these areas are barnacles, mussels, periwinkles, anemones, and chitons. Three regions are apparent:

1. Northern Latitude Rocky Shores: It is in this region that the community structure is best developed. The dominant algal species include *Chondrus* at the low tide level, *Fucus* and *Ascophyllum* at the mid-tidal level, and *Laminaria* and other kelplike algae just beyond the intertidal, although they can be exposed at extremely low tides or found in very deep tidepools.

2. Southern Latitudes: The communities in this region are reduced in comparison to those of the northern latitudes and possesses algae consisting mostly of single-celled or filamentour green, blue-green, and red algae, and small thalloid brown algae.

3. Tropical and Subtropical Latitudes: The intertidal in this region is very reduced and contains numerous clacareous algae such as *Porolithon* and *Lithothamnion*, as well and green algae with calcareous particles such as *Halimeda*, and numerous other green, red, and brown algae.

Group III—Submerged Bottoms

A. Subtidal Hardbottoms

This system is characterized by a consolidated layer of solid rock or large pieces of rock (neither of biotic origin) and is found in association with geomorphological features such as submarine canyons and fjords and is usually covered with assemblages of sponges, sea fans, bivalves, hard corals, tunicates, and other attached organisms. A significant feature of estuaries in many parts of the world is the oyster reef, a type of subtidal hardbottom. Composed of assemblages of organisms (usually bivalves), it is usually found near an estuary's mouth in a zone of moderate wave action, salt content, and turbidity. If light levels are sufficient, a covering of microscopic and attached macroscopic algae, such as kelp, may also be found.

B. Subtidal Softbottoms

Major characteristics of this ecosystem are an unconsolidated layer of fine particles of silt, sand, clay, and gravel, high hydrogen sulfide levels, and anaerobic conditions often existing below the surface. Macrophytes are either sparse or absent, although a layer of benthic microalgae may be present if light levels are sufficient. The faunal community is dominated by a divers population of deposit feeders including polychaetes, bivalves, and burrowing crustaceans.

C. Subtidal Plants

This system is found in relatively shallow water (less than 8 to 10 meters) below mean low tide. It is an area of extremely high primary production that provides food and refuge for a diversity of faunal groups, especially juvenile and adult fish, and in some regions, manatees and sea turtles. Along the North Atlantic and Pacific coasts, the seagrass *Zostera marina* predominates. In the South Atlantic and Gulf coast areas, *Thalassia* and *Diplanthera* predominate. The grasses in both areas support a number of epiphytic organisms.

CLASS II—Physical Characteristics

Group I—Geologic

A. Basin Type

Coastal water basins occur in a variety of shapes, sizes, depths, and appearances. The eight basic types discussed below will cover most of the cases:

1. Exposed Coast: Solid rock formations or heavy sand deposits characterize exposed ocean shore fronts, which are subject to the full force of ocean storms. The sand beaches are very resilient, although the dunes lying just behind the beaches are fragile and easily damaged. The dunes serve as a sand storage area, making them chief stabilizers of the ocean shorefront.

2. Sheltered Coast: Sand or coral barriers, built up by natural forces, provide sheltered areas inside a bar or reef where the ecosystem takes on many characteristics of confined waters—abundant marine grasses, shellfish, and juvenile fish. Water movement is reduced, with the consequent effects of pollution being more severe in this area than in exposed coastal areas.

3. Bay: Bays are larger confined bodies of water that are open to the sea and receive strong tidal flow. When stratification is pronounced, the flushing action is augmented by river discharge. Bays vary in size and in type of shorefront.

4. Embayment: A confined coastal water body with narrow, restricted inlets and with a significant freshwater inflow can be classified as an embayment. These areas have more restricted inlets than bays, are usually smaller and shallower, have low tidal action, and are subject to sedimentation.

5. Tidal River: The lower reach of a coastal river is referred to as a tidal river. The coastal water segment extends from the sea or estuary into which the river discharges to a point as far upstream as there is significant salt content in the water, forming a salt front. A combination of tidal action and freshwater outflow makes tidal rivers well-flushed. The tidal river basin may be a simple channel or a complex of tributaries, small associated embayments, marshfronts, tidal flats, and a variety of others.

6. Lagoon: Lagoons are confined coastal bodies of water with restricted inlets to the sea and without significant freshwater inflow. Water circulation is limited, resulting in a poorly flushed, relatively stagnant body of water. Sedimentation is rapid with a great potential for basin shoaling. Shores are often gently sloping and marshy.

7. Perched Coastal Wetlands: Unique to Pacific islands, this wetland type, found above sea level in volcanic crater remnants, forms as a result of poor drainage characteristics of the crater rather than from sedimentation. Floral assemblages exhibit distinct zonation while the faunal constituents may include freshwater, brackish, and/or marine species. Example: Aunu'u Island, American Samoa.

8. Anchialine Systems: These small coastal exposures of brackish water form in lava depressions or elevated fossil reefs, have only a subsurface connection to the ocean, but show tidal fluctuations. Differing from true estuaries in having no surface continuity with streams or ocean, this system is characterized by a distinct biotic community dominated by benthic algae such as Rhizoclonium, the mineral encrusting Schizothrix, and the vascular plant Ruppia maritima. Characteristic fauna, which exhibit a high degree of endemicity, include the mollusks Theodoxus neglectus and T. cariosus. Although found throughout the world, the high islands of the Pacific are the only areas within the U.S. where this system can be found.

B. Basin Structure

Estuary basins may result from the drowning of a river valley (coastal plains estuary), the drowning of a glacial valley (fjord), the occurrence of an offshore barrier (bar-bounded estuary), some tectonic process (tectonic estuary), or volcanic activity (volcanic estuary).

1. Coastal plains estuary: Where a drowned valley consists mainly of a single channel, the form of the basin is fairly regular, forming a simple coastal plains estuary. When a channel is flooded with numerous tributaries, an irregular estuary results. Many estuaries of the eastern United States are of this type.

2. Fjord: Estuaries that form in elongated, steep headlands that alternate with deep U-shaped valleys resulting from glacial scouring are called fjords. They generally possess rocky floors or very thin veneers of sediment, with deposition generally being restricted to the head where the main river enters. Compared to total fjord volume, river discharge is small. But many fjords have restricted tidal ranges at their mouths, due to sills, or upreaching sections of the bottom which limit free movement of water, often making river flow large with respect to the tidal prism. The deepest portions are in the upstream reaches, where maximum depths can range from 800 m to 1200 m, while sill depths usually range from 40 m to 150 m.

3. Bar-bounded Estuary: These result from the development of an offshore barrier, such as a beach strand, a line of barrier islands, reef formations, a line of moraine debris, or the subsiding remnants of a deltaic lobe. The basin is often partially exposed at low tide and is enclosed by a chain of offshore bars or barrier islands, broken at intervals by inlets. These bars may be either deposited offshore or may be coastal dunes that have become isolated by recent sea level rises.

4. Tectonic Estuary: These are coastal indentures that have formed through tectonic processes such as slippage along a fault line (San Francisco Bay), folding or movement of the earth's bedrock, often with a large inflow of freshwater.

5. Volcanic Estuary: These coastal bodies of open water, a result of volcanic processes, are depressions or craters that have direct and/or subsurface connections with the ocean and may or may not have surface continuity with streams. These formations are unique to island areas of volcanic origin.

C. Inlet Type

Inlets in various forms are an integral part of the estuarine environment, as they regulate, to a certain extent, the velocity and magnitude of tidal exchange, the degree of mixing, and volume of discharge to the sea. There are four major types of inlets:

1. Unrestricted: An estuary with a wide, unrestricted inlet typically has slow currents, no significant turbulence, and receives the full effect of ocean waves and local disturbances which serve to modify the

shoreline. These estuaries are partially mixed, as the open mouth permits the incursion of marine waters to considerable distances upstream, depending on the tidal amplitude and stream gradient.

2. Restricted: Restrictions of estuaries can exist in many forms: Bars, barrier islands, spits, sills, and more. Restricted inlets result in decreased circulation, more pronounced longitudinal and vertical salinity gradients, and more rapid sedimentation. However, if the estuary mouth is restricted by depositional features or land closures, the incoming tide may be held back until it suddenly breaks forth into the basin as a tidal wave, or bore. Such currents exert profound effects on the nature of the substrate, turbidity, and biota of the estuary.

3. Permanent: Permanent inlets are usually opposite the mouths of major rivers and permit river water to flow into the sea.

4. Temporary (Intermittent): Temporary inlets are formed by storms and frequently shift position, depending on tidal flow, the depth of the sea, and sound waters, the frequency of storms, and the amount of littoral transport.

D. Bottom Composition

The bottom composition of estuaries attests to the vigorous, rapid, and complex sedimentation processes characteristic of most coastal regions with low relief. Sediments are derived through the hydrologic processes of erosion, transport, and deposition carried on by the sea and the stream.

1. Sand: Near estuary mouths, where the predominating forces of the sea build spits or other depositional features, the shore and substrates of the estuary are sandy. The bottom sediments in this area are usually coarse, with a graduation toward finer particles in the head of the estuary. In the head region and other zones of reduced flow, fine silty sands are deposited. Sand deposition occurs only in wider or deeper regions where velocity is reduced.

2. Mud: At the base level of a stream near its mouth, the bottom is typically composed of loose muds, silts, and organic detritus as a result of erosion and transport from the upper stream reaches and organic decomposition. Just inside the estuary entrance, the bottom contains considerable quantities of sand and mud, which support a rich fauna. Mud flats, commonly built up in estuarine basins, are composed of loose, coarse, and fine mud and sand, often dividing the original channel.

3. Rock: Rocks usually occur in areas where the stream runs rapidly over a steep gradient with its coarse materials being derived from the higher elevations where the stream slope is greater. The larger fragments are usually found in shallow areas near the stream mouth.

4. Oyster shell: Throughout a major portion of the world, the oyster reef is one of the most significant features of estuaries, usually being found near the mouth of the estuary in a zone of moderate wave action, salt content, and turbidity. It is often a major factor in modifying estuarine current systems and sedimentation, and may occur as an elongated island or peninsula oriented across the main current, or may develop parallel to the direction of the current.

Group II—Hydrographic

A. Circulation

Circulation patterns are the result of combined influences of freshwater inflow, tidal action, wind and oceanic forces, and serve many functions: nutrient transport, plankton dispersal, ecosystem flushing, salinity control, water mixing, and more.

1. Stratified: This is typical of estuaries with a strong freshwater influx and is commonly found in bays formed from "drowned" river valleys, fjords, and other deep basins. There is a net movement of freshwater outward at the top layer and saltwater at the bottom layer, resulting in a net outward transport of surface organisms and net inward transport of bottom organisms.

2. Non-stratified: Estuaries of this type are found where water movement is sluggish and flushing rate is low, although there may be sufficient circulation to provide the basis for a high carrying capacity. This is common to shallow embayments and bays lacking a good supply of freshwater from land drainage.

3. Lagoonal: An estuary of this type is characterized by low rates of water movement resulting from a lack of significant freshwater influx and a lack of strong tidal exchange because of the typically narrow inlet connecting the lagoon to the sea. Circulation, whose major driving force is wind, is the major limiting factor in biological productivity within lagoons.

B. Tides

This is the most important ecological factor in an estuary, as it affects water exchange and its vertical range determines the extent of tidal flats which may be exposed and submerged with each tidal cycle. Tidal action against the volume of river water discharged into an estuary results in a complex system whose properties vary according to estuary structure as well as the magnitude of river flow and tidal range. Tides are usually described in terms of their cycle and their relative heights. In the United States, tide height is reckoned on the basis of average low tide, which is referred to as datum. The tides, although complex, fall into three main categories:

1. Diurnal: This refers to a daily change in water level that can be observed along the shoreline. There is one high tide and one low tide per day.

2. Semidiurnal: This refers to a twice daily rise and fall in water that can be observed along the shoreline.

3. Wind/Storm Tides: This refers to fluctuations in water elevation to wind and storm events, where influence of lunar tides is less.

C. Freshwater

According to nearly all the definitions advanced, it is inherent that all estuaries need freshwater, which is drained from the land and measurably dilutes seawater to create a brackish condition. Freshwater enters an estuary as runoff from the land either from a surface and/or subsurface source.

1. Surface water: This is water flowing over the ground in the form of streams. Local variation in runoff is dependent upon the nature of the soil (porosity and solubility), degree of surface slope, vegetational type and development, local climatic conditions, and volume and intensity of precipitation.

2. Subsurface water: This refers to the precipitation that has been absorbed by the soil and stored below the surface. The distribution of subsurface water depends on local climate, topography, and the porosity and permeability of the underlying soils and rocks. There are two main subtypes of surface water:

a. Vadose water: This is water in the soil above the water table. Its volume with respect to the soil is subject to considerable fluctuation.

b. Groundwater: This is water contained in the rocks below the water table, is usually of more uniform volume than vadose water, and generally follows the topographic relief of the land, being high below hills and sloping into valleys.

Group III—Chemical

A. Salinity

This reflects a complex mixture of salts, the most abundant being sodium chloride, and is a very critical factor in the distribution and maintenance of many estuarine organisms. Based on salinity, there are two basic estuarine types and eight different salinity zones (expressed in parts per thousand—ppt).

1. Positive estuary: This is an estuary in which the freshwater influx is sufficient to maintain mixing, resulting in a pattern of increasing salinity toward the estuary mouth. It is characterized by low oxygen concentration in the deeper waters and considerable organic content in bottom sediments.

2. Negative estuary: This is found in particularly arid regions, where estuary evaporation may exceed freshwater inflow, resulting in increased salinity in the upper part of the basin, especially if the estuary mouth is restricted so that tidal flow is inhibited. These are typically very salty (hyperhaline), moderately oxygenated at depth, and possess bottom sediments that are poor in organic content.

3. Salinity zones (expressed in ppt):

a. Hyperhaline—greater than 40 ppt.

b. Euhaline—40 ppt to 30 ppt.

c. Mixhaline—30 ppt to 0.5 ppt.

(1) Mixoeuhaline—greater than 30 ppt but less than the adjacent euhaline sea.

(2) Polyhaline—30 ppt to 18 ppt.

(3) Mesohaline—18 ppt to 5 ppt.

(4) Oligohaline—5 ppt to 0.5 ppt.

d. Limnetic: Less than 0.5 ppt.

B. pH Regime:

This is indicative of the mineral richness of estuarine waters and falls into three main categories:

1. Acid: Waters with a pH of less than 5.5.

2. Circumneutral: A condition where the pH ranges from 5.5 to 7.4.

3. Alkaline: Waters with a pH greater than 7.4.

[FR Doc. 92-16168 Filed 7-16-92; 8:45 am]
BILLING CODE 3510-08-M

federal register

Friday
July 17, 1992

Part VI

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 921

National Estuarine Research Reserve System Program Regulations; Proposed Rule

3.
Part 922
National Marine Sanctuary Program

PART 922—NATIONAL MARINE SANCTUARY PROGRAM

Subpart A—General

Sec.
922.1 Mission, goals, and special policies.
922.2 Definitions.
922.10 Effect of national marine sanctuary designation.
922.11 Access and valid rights.

Subpart B—Site Evaluation List (SEL)

922.20 General.
922.21 Periodic reevaluation, delegations, and additions.
922.22 Addition of sites with historical qualities of special national significance.

Subpart C—Designation of National Marine Sanctuaries

922.30 Selection of active candidates.
922.31 Development of designation materials.
922.32 Congressional prospectus.
922.33 Designation determination and findings.
922.34 Designation.
922.35 Coordination with states.

Subpart D—Implementation After Designation

922.40 General.
922.41 Enforcement procedures.

APPENDIX 1 TO PART 922—NATIONAL MARINE SANCTUARY PROGRAM SITE IDENTIFICATION AND SELECTION CRITERIA FOR MARINE AREAS WITH QUALITIES OF SPECIAL NATIONAL SIGNIFICANCE

AUTHORITY: Pub. L. 98-498 (16 U.S.C. 1431-1439).

SOURCE: 53 FR 43806, Oct. 28, 1988, unless otherwise noted.

Subpart A—General

§ 922.1 Mission, goals, and special policies.

(a) In accordance with the standards set forth in Title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (Act), the mission of the National Marine Sanctuary Program (Program) is to identify, designate and manage areas of the marine environment of special national significance due to their conservation, recreational, ecological, historical, research, educational, or esthetic qualities.

(b) The goals of the Program are to carry out the mission to:

(1) Provide enhanced resource protection through comprehensive and coordinated conservation and management of National Marine Sanctuaries that complements existing regulatory authorities;

(2) Support, promote, and coordinate scientific research on, and monitoring of, the site-specific marine resources of the National Marine Sanctuaries;

(3) Enhance public awareness, understanding, appreciation and wise use of the marine environment; and

(4) Facilitate, to the extent compatible with the primary objective of resource protection, multiple uses of the National Marine Sanctuaries;

(c) To the extent consistent with the policies set forth in Title III of the Act, in carrying out the Program's mission and goals:

(1) Particular attention will be given to the establishment and management of marine areas as National Marine Sanctuaries for the protection of the area's natural resource and ecosystem values; particularly for ecologically or economically important or threatened species or species assemblages, and for offshore areas where there are no existing special area protection mechanisms;

(2) The size of National Marine Sanctuaries, while highly dependent on the nature of the sites' resources, will be no longer than necessary to ensure effective management;

(3) Management efforts will be coordinated to the extent practicable with other countries managing protected marine areas;

(4) Program regulations, policies, standards, guidelines, and procedures under the Act concerning the identification, evaluation, registration, and treatment of historical resources shall be consistent, to the extent practicable, with the declared national policy for the protection and preservation of these resources as stated in the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.*, the Archeological and Historical Preservation Act of 1974, 16 U.S.C. 469 *et seq.*, and the Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. 470aa *et seq.* The same degree of regulatory protection and preservation

planning policy extended to historical resources on land shall be extended, to the extent practicable, to historical resources in the marine environment within the boundaries of designated National Marine Sanctuaries. The management of historical resources under the authority of the Act shall be consistent, to the extent practicable, with the Federal archeological program by consulting the Uniform Regulations, ARPA (43 CFR Part 7), the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716, Sept. 29, 1983) and other relevant Federal regulations.

§ 922.2 Definitions.

(a) "Act" means Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*

(b) "Active Candidate" means a site selected by the Secretary from the Site Evaluation List for further consideration for possible designation as a National Marine Sanctuary.

(c) "Historical" means possessing historical, cultural, archeological, or paleontological significance, including sites, structures, districts, and objects significantly associated with or representative of earlier people, cultures, and human activities and events.

(d) "Marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, consistent with international law.

(e) "National historic landmark" means a district, site, building, structure or object designated by the Secretary of the Interior under the National Historic Landmarks (NHL) Program (36 CFR Part 65).

(f) "National Marine Sanctuary" means an area of the marine environment, as defined above in subsection (d), of special national significance due to its resource or human-use values, which is designated to ensure its conservation and management.

(g) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, agency, department, or instrumentality of the Federal government, of any state or local unit of government, or of any foreign government.

(h) "Regional Fishery Management Council" means any fishery council established under section 302 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

(i) "Secretary" means the Secretary of the United States Department of Commerce or his or her designee.

(j) "Site Evaluation List" (SEL) means a list of selected natural and historical resource sites selected by the Secretary as qualifying for further evaluation for possible designation as National Marine Sanctuaries.

(k) "State" means each of the several states, the District of Columbia, the Commonweath of Puerto Rico, the Commonweath of the Northern Mariana Islands, American Samoa, the United States Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States.

(l) "Subsistence use" means the customary and traditional use by rural residents of areas near or in the marine environment for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles; and for barter, if for food or nonedible items other than money, if the exchange is of a limited and noncommercial nature.

§ 922.10 Effect of national marine sanctuary designation.

The designation of a National Marine Sanctuary, and the regulations implementing it, are binding on any person subject to the jurisdiction of the United States. Designation does not constitute any claim to territorial jurisdiction on the part of the United States for designated sites beyond the U.S. territorial sea, and the regulations implementing the designation shall be applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party. No regulation shall apply to a person who is not a citizen,

national, or resident alien of the United States, unless in accordance with—

(a) Generally recognized principles of international law;

(b) An agreement between the United States and the foreign state of which the person is a citizen; or

(c) An agreement between the United States and the flag state of the foreign vessel, if the person is a crewmember of the vessel.

§ 922.11 Access and valid rights.

Leases, permits, licenses, or rights of subsistence use or access either in existence on October 19, 1984 (the date of enactment of the Marine Sanctuaries Amendments of 1984 (Pub. L. No. 98-498)), with respect to any National Marine Sanctuary designated before that date, or in existence on the date of designation of any National Marine Sanctuary designated after October 19, 1984, shall not be terminated by the Secretary. The Secretary, may, however, regulate such leases, permits, licenses, or rights consistent with the purposes for which the Sanctuary was designated.

Subpart B—Site Evaluation List (SEL)

§ 922.20 General.

(a) The Site Evaluation List (SEL) was established in 1983 as a comprehensive list of marine sites with high natural resource values that are highly qualified for further evaluation for possible designation as National Marine Sanctuaries. Appendix 1 describes that list, how it was established and its purposes. In addition, Subpart F of Appendix 1 has been revised to establish identification and selection criteria for revising the list to include marine sites with historical qualities of special national significance.

(b) Only sites on the SEL may be considered for subsequent review as active candidates for designation.

(c) Placement of a site on the SEL, or selection of a site from the SEL as an active candidate for designation as provided for in § 922.30, shall not subject the site to any regulatory control under the Marine Protection, Research and Sanctuaries Act. Such controls may only be imposed after designation, as provided for in § 922.34.

§ 922.21 Periodic reevaluation, deletions, and additions.

(a) The Secretary shall reevaluate any site remaining on the SEL for five years (December 31, 1988, for the original sites on the SEL and a separate five-year review period, beginning with the date of their addition, for any sites added to the SEL).

(b) If, after a five-year reevaluation, the Secretary determines that a marine site on the SEL is no longer highly qualified in accordance with the Program's mission and goals and the site identification and selection criteria, the Secretary shall publish a notice in the FEDERAL REGISTER of an intent to delete the site from the SEL and provide a 45-day period for public comment.

(c) As sites are designated as National Marine Sanctuaries, or rejected from further consideration, they will be removed from the SEL. Rejected sites will not be replaced on the SEL.

(d) If, after a five-year reevaluation, the Secretary determines that the new sites should be considered for addition to the SEL, the Secretary shall publish a notice in the FEDERAL REGISTER at least 12 months prior to initiating a new site identification process. After a 90-day period is provided for public comment on the Secretary's determination, the Secretary shall reevaluate the prior SEL development process and publish a notice in the FEDERAL REGISTER requesting public comment on that process and any proposed modifications, if necessary.

(e) Except as provided in § 922.21(d) and § 922.22, the Secretary will consider recommendations of potential additional sites to the SEL only if such sites are important new discoveries or if substantial new information previously unavailable establishes the national significance of a known site. The Secretary may determine, after an opportunity for public review and comment, whether such sites meet the selection criteria and are highly qualified in accordance with the Program's mission and goals. Qualified sites will be added to the SEL for further eval-

uation as National Marine Sanctuaries, consistent with the procedures set forth in these regulations.

§ 922.22 Addition of sites with historical qualities of special national significance.

(a) The identification and selection criteria set forth in Appendix 1 shall be used to identify areas of the marine environment possessing historical qualities of special national significance. The Secretary shall establish a group of experts to be called the Marine Historical Resource Evaluation Team to recommend a list of marine sites with historical values of special national significance for inclusion in the SEL. The Marine and Estuarine Management Division of the National Oceanic and Atmospheric Administration shall direct and coordinate the activities of the Team.

(b) After analysis of the historical sites recommended by the Marine Historical Resource Evaluation Team, the Secretary shall publich a notice in the FEDERAL REGISTER of the historical sites proposed for placement on the SEL and shall afford the public at least 90 days in which to comment. On the basis of the identification and selection criteria in Appendix 1, and after full consideration of public comment, the Secretary shall select those sites which are qualified for placement on the SEL because of their historical qualities of special national significance, and shall publish a notice in the FEDERAL REGISTER of the selected sites. Written documentation shall be prepared describing the values qualifying each site for placement on the SEL.

Subpart C—Designation of National Marine Sanctuaries

§ 922.30 Selection of active candidates.

(a) The Secretary shall, from time to time, select a limited number of sites from the SEL for Active Candidate consideration based on a preliminary assessment of the designation standards set forth in § 922.33.

(b) Selection of a site as an Active Candidate shall begin the formal sanctuary designation-evaluation process. A notice of intent to prepare a draft environmental impact statement shall be published in the FEDERAL REGISTER and in newspapers in the area(s) of local concern. A brief written analysis describing the site shall be provided. The Secretary, at any time, may drop a site from consideration if the Secretary determines that the site does not meet the designated standards and criteria set forth in the Act.

§ 922.31 Development of designation materials.

(a) After selecting a site as an Active Candidate, the Secretary shall prepare a draft designation document, including terms of the proposed designation, a draft management plan to implement the proposed designation and any proposed regulations needed to implement the terms of the proposed designation. The draft designation document shall be prepared in consultation with the House Merchant Marine and Fisheries Committee and the Senate Commerce, Science, and Transportation Committee; the Secretaries of State, Defense, Transportation, and the Interior, the Administrator of the Environmental Protection Agency, and the heads of other interested Federal agencies; the responsible officials or relevant agency heads of the appropriate state or local government entities, including coastal zone management agencies, that will or are likely to be affected by the establishment of the area as a National Marine Sanctuary; the appropriate officials of any Regional Fishery Management Council established by section 302 of the Magnuson Act which may be affected by the proposed designation; and other interested persons.

(b) The terms of the proposed designation shall include the geographic area to be included within the sanctuary; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic values; and the types of activities that would be subject to regulation in order to protect those characteristics. Following designation, the terms of designation may be modified only by the same procedures through which the original designation was made. If proposed regulations are needed to implement the

311-049 O—92——5

terms of the proposed designation, they shall be consistent with the terms of designation. Following designation, all amendments to these regulations shall be consistent with the terms of designation.

(c) The draft management plan generally shall include sections on: goals and objectives; management responsibilities; resource studies and research; enforcement, including surveillance activities; interpretive and educational programs; and proposed regulations (where applicable). Proposed regulations relating to activities under the jurisdiction of one or more other Federal agencies shall be developed in consultation with those agencies.

(d) A draft environmental impact statement (DEIS) shall be prepared on the designation document/management plan, including any proposed regulations. The DEIS shall also include the resource assessment report, discussed in paragraph (h) of this section; maps depicting the boundaries of the proposed area, and the existing and potential uses and resources of the area.

(e) The draft management plan and the DEIS shall be prepared as quickly as possible to allow for maximum public input. The time period between Active Candidate selection and proposing to designate the area as a National Marine Sanctuary normally will not exceed three (3) years unless the Secretary determines that additional time is needed for public input.

(f) The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare and recommend for consideration by the Secretary draft regulations for fishing within the proposed sanctuary if the proposed sanctuary includes waters within the U.S. Exclusive Economic Zone.

(1) The Council shall have one hundred and twenty (120) days from the date of the Secretary's request to prepare draft fishery regulations and submit them to the Secretary. In preparing these recommendations, the Council shall use as guidance the national standards of section 301(a) of the Magnuson Act (16 U.S.C. 1851) to the extent that they are consistent and compatible with the goals and objectives of the proposed sanctuary designation.

(2) Draft regulations recommended by the Council, or its determination that regulations are not necessary, may be accepted by the Secretary. When making a determination whether to accept the Council's recommendation, the Secretary shall consider whether the Council's action fulfills the purposes and policies of the Marine Protection, Research, and Sanctuaries Act and the goals and objectives of the proposed designation;

(3) The Secretary shall prepare proposed fishery regulations necessary to implement the proposed sanctuary designation if the Council:

(i) Declines to make a determination with respect to the need for regulations,

(ii) Makes a determination which is rejected by the Secretary, or

(iii) Fails to recommend draft proposed regulations within the period specified in paragraph (f)(1) of the section.

(4) All amendments to fishery regulations shall be drafted, approved, and issued in the same manner as the original regulations.

(g) Fishery activities not proposed for regulation under paragraph (f) of this section may be listed in the draft sanctuary designation document as potentially subject to regulation, without following the procedures specified in paragraph (f) of this section. If the Secretary subsequently determines that regulation of any such fishery activity is necessary, then the procedures specified in paragraph (f) shall be followed.

(h) As part of the DEIS, the Secretary shall develop a resource assessment report documenting present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial or recreational uses. In consultation with the Secretary of the Interior, the Secretary shall draft a resource assessment section for the report concerning any commercial or recreational resource uses in the area that are subject to the primary jurisdiction of the Department of the Interior.

(i) After the DEIS is prepared, the Secretary shall publish a notice of proposed designation in the FEDERAL REGISTER. That notice shall include the text of the draft designation document, any proposed regulations determined necessary to implement the proposed designation, and a summary of the management plan. The FEDERAL REGISTER notice shall be published concurrently with the Environmental Protection Agency (EPA) Notice of Availability of the DEIS.

(1) Notice of the proposed designation shall be published in newspapers of general circulation or communicated to electronic media in the communities that may be affected by the proposal.

(2) No sooner than thirty (30) days after publication of the notice of proposed designation in the FEDERAL REGISTER, the Secretary shall hold at least one public hearing in the coastal area or areas most affected by the proposed designation for the purpose of receiving the views of any interested parties.

§ 922.32 Congressional prospectus.

(a) As required by section 304(a)(1)(C) of the Act, on the same day that the FEDERAL REGISTER notice in § 922.31(i) is issued, the Secretary shall submit to the House Committee on Merchant Marine and Fisheries and the Senate Commerce, Science, and Transportation Committee a prospectus containing:

(1) The terms of the proposed designation;

(2) The basis of the designation findings made under section 303(a) of the Act with respect to the area;

(3) An assessment of the factors required to be considered by section 303(b)(1) of the Act;

(4) Proposed mechanisms to coordinate existing regulatory and management authorities within the area;

(5) The DEIS and the draft management plan, including the proposed regulations, detailing the proposed goals and objectives, management responsibilities, resource studies, interpretive and educational programs, and enforcement, including surveillance activities for the area;

(6) An estimate of the annual cost of the proposed designation, including costs of personnel, equipment and facilities, enforcement, research, and public education;

(7) An evaluation of the advantages of cooperative state and Federal management if all or part of a proposed marine sanctuary is within the territorial limits of any state or is superjacent to the subsoil and seabed within the seaward boundary of a state, as that boundary is established under the Submerged Lands Act (43 U.S.C .301 *et seq.*); and

(8) Any proposed regulations that may be necessary and reasonable to implement the proposed designation.

(b) In accordance with the provisions of section 304 of the Act, the Secretary shall not publish a notice to designate an area proposed as a National Marine Sanctuary until after forty-five (45) days of a continuous session of Congress starting with the day the prospectus required by paragraph (a) of this section is submitted to Congress. If either the Committee on Merchant Marine and Fisheries of the House of Representatives or the Committee on Commerce, Science and Transportation of the Senate, within the forty-five day period, issue a report concerning the prospectus, this report shall be considered by the Secretary before publishing a notice to designate a national marine sanctuary.

§ 922.33 Designation determination and findings.

(a) In addition to preparation of the final environmental impact statement (FEIS), final regulations, and final management plan, the Secretary shall prepare a written Designation Determination and Findings to include:

(1) A determination that the designation will fulfill the purposes and policies of the Act; and

(2) Finding that:

(i) The area is of special national significance due to its resource or human-use values;

(ii) Existing state and Federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;

(iii) Designation of the area as a national marine sanctuary will ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education; and

(iv) The area is of a size and nature that will permit comprehensive and coordinated conservation and management.

(b) In preparing the Designation Determination and Findings the Secretary must consider:

(1) The area's natural resource and ecological qualities, including its contribution to biological productivitiy, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, and the biogeographic representation of the site;

(2) The area's historical, cultural, archeological, or paleontological significance;

(3) The present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

(4) The present and potential activities that may adversely affect the factors identified in paragraph (b) considerations (1), (2) and (3) of this section;

(5) The existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of the Act;

(6) The manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

(7) The public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

(8) The negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development;

(9) The socioeconomic effects of sanctuary designation; and

(10) The fiscal capability to manage the area as a National Marine Sanctuary.

(c) In preparing the Designation Determination and Findings, the Secretary shall consider the views of interested persons, heads of interested Federal agencies, responsible officials of appropriate state and local government entities, and appropriate officials of any Regional Fishery Management Council(s) that may be affected by the designation submitted in response to the notice proposing the designation or submitted as part of a public hearing on the proposal; and any reports submitted by the House Committee on Merchant Marine and Fisheries or the Senate Committee on Commerce, Science, and Transportation in response to the sanctuary proposal prospectus.

§ 922.34 Designation.

(a) In designating an area as a National Marine Sanctuary, the Secretary shall publish a notice of the designation in the FEDERAL REGISTER; this notice shall include the text of the final implementing regulations and shall also advise the public of the availability of the final management plan and the final EIS.

(b) The designation and regulations shall become final and take effect after the close of a review period of forty-five (45) days of continuous session of Congress, computed in accordance with section 304(b)(4) of the Act, beginning on the date of publication of the Federal Register notice in paragraph (a) of this section unless:

(1) The designation or any of its terms is disapproved by enactment of a joint resolution of disapproval consistent with section 304(b)(3) of the Act; or

(2) In the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any state, the Governor(s) of the affected state(s) certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area

of the sanctuary lying within the seaward boundary of the state(s).

(c) If the Secretary determines that the actions in paragraph (b) of this section affect the sanctuary designation in a manner that sanctuary goals and objectives cannot be fulfilled, the Secretary may withdraw the entire designation. If the Secretary does not withdraw the designation, only those terms of the designation not disapproved under paragraph (b)(1) of this section or not certified under paragraph (b)(2) of this section shall take effect.

§ 922.35 Coordination with states.

(a) The Secretary shall consult and cooperate with affected states throughout the national marine sanctuary designation process. In particular the Secretary shall:

(1) Consult with the relevant state officials prior to selecting any site on the SEL as an Active Candidate pursuant to § 922.30, especially concerning the relationship of any site to state waters and the consistency of the proposed designation with a federally approved state coastal zone management program. For the purposes of a consistency review by states with a federally approved coastal zone management programs, designation of a national marine sanctuary is deemed to be a Federal activity, which, if directly affecting the state's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved state coastal zone program as provided by section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended, and implementing regulations at 15 CFR Part 930, Subpart C.

(2) Ensure that relevant state agencies are consulted prior to holding any public hearings pursuant to § 922.31(i)(2).

(3) Provide the Governor an opportunity to certify the designation or any of its terms as unacceptable as specified in § 922.34(b)(2).

Subpart D—Implementation After Designation

§ 922.40 General.

(a) The Secretary shall implement the management plan, and applicable regulations, including carrying out surveillance and enforcement activities, and conducting such research and education as are necessary and reasonable to carry out the purposes and policies of the Act.

(b) Consistent with the sanctuary management plan, the Secretary shall develop and implement a site-specific contingency and emergency-response plan designed to protect the sanctuary resources. The plan shall contain alert procedures and actions to be taken in the event of an emergency such as a shipwreck or an oil spill.

(c) Where essential to prevent immediate, serious and irreversible damage to sanctuary resources, activities including those not listed in the designation may be regulated within the limits of the Act on an emergency basis for an interim period not to exceed one hundred and twenty (120) days, during which time an appropriate amendment of the terms of the designation shall be sought by the Secretary.

(d) Every five years, or sooner, the Secretary shall evaluate the substantive progress toward implementing the management plan and the goals of a designated sanctuary, especially the effectiveness of site-specific management techniques.

§ 922.41 Enforcement procedures.

The consolidated civil procedure regulations, set forth at 15 CFR Part 904, shall apply to all enforcement matters under the Act.

Appendix 1 to Part 922—National Marine Sanctuary Program Site Identification and Selection Criteria for Marine Areas with Qualities of Special National Significance

Background

The Site Evaluation List (SEL) was established in 1983 (48 FR 35568, August 4, 1983). Only sites on the SEL may be considered by

the Secretary for subsequent review as "Active Candidates" for designation.

The original SEL was based on the then existing Marine Research, Protection, and Sanctuaries Act, which provided that national marine sanctuaries could be designated for their conservation, recreational, ecological, or esthetic values. It consisted of twenty-nine (29) marine sites with high natural resource values, identified and recommended for inclusion on the SEL by regional resource evaluation teams in accordance with the National Marine Sanctuary Program's mission and goals and then existent site identification and selection criteria (48 FR 24296, May 31, 1983). The Marine Sanctuaries Amendments of 1984 (Pub. L. No. 98-498) amended the Act to add additional qualities—historical, research, or education—which must also be considered when selecting sanctuary sites.

Areas of nationally significant research and educational qualities were considered in establishing the original SEL. These qualities are inherent in sites possessing significant conservation, recreational, ecological, or esthetic value. Therefore, additional areas of significant research and educational values will not be reconsidered at this time, except as provided in § 922.21 of the regulations.

Sites possessing nationally significant historical resources were not specifically considered when establishing the original SEL. There are no historical sites on the SEL. The existing SEL now needs to be amended to add areas of the marine environment possessing historical qualities of special national significance. Thus, the existing site identification and selection criteria have been amended to incorporate more specific criteria to identify and select areas of the marine environment possessing historical qualities of special national significance.

SITE IDENTIFICATION AND SELECTION CRITERIA

The following criteria are grouped into four categories: (1) Natural resource values; (2) human use/historical resource values; (3) potential activity impacts; and (4) management concerns. The criteria under each category reflect concerns significant to the National Marine Sanctuary Program and are designed to ensure that sites recommended to NOAA for SEL consideration have high natural resource and human resource values.

In selecting sites for the SEL, NOAA also considers the extent information on the site is available, existing and potential activity impacts and management concerns (as presented in sections III and IV, below). NOAA's selection of sites for the SEL is only the first of several determinations before sanctuary designation or subsequent rejection of the site as not qualified for sanctuary status.

At the SEL stage, NOAA's prime focus is on the site's natural resource and human use/historical resource values. The presence of such high values is a requisite or "minimum" requirement for NOAA's further consideration since the Marine Protection, Research, and Sanctuaries Act emphasizes the protection and management of marine areas which are of special national significance based on the site's conservation, recreational, ecological, historical, research, educational or esthetic qualities. Other, more specific issues are factored into NOAA's decision whether to select a site as an Active Candidate (see Subpart C of the regulations).

To determine if an area possesses historical values of special national significance and otherwise meets the Sanctuary designation standards specified in Section 303 of the Act, certain definitions and criteria are included in this appendix (see II.F) for use in evaluating these potential sites for listing on the SEL in accordance with § 922.22 of the regulations.

I. Natural Resource Values

A. Subregional Representation

The area under consideration is representative of the biogeographic subregion in which it is located.

Examples: This criterion would apply to an area containing species assemblages which are especially characteristic of the Oregonian subregion of the British Columbian region. Another example would be an area containing species assemblages which are especially characteristic of the Floridian or American Atlantic Antillean subregion of the West Indian region.

B. Community Representation

The area under consideration is significant in relation to the ecological communities which are found within the specified habitat type or within the biogeographic region or subregion (i.e., on a macroscale, communities as assemblages of species populations within a prescribed area or habitat).

Examples: (1) The wide spectrum of marine habitats in the Channel Islands National Marine Sanctuary in California created by accentuated bottom relief, varied bottom substrates, and graduation in water depth from island shorelines to deep coastal basins support a variety of ecological communities.

(2) Coral reef, grass bed, soft bottom, and open-bay habitat areas in the Key Largo National Marine Sanctuary support a variety of ecological communities associated with the east Florida reef tract.

C. Biological Productivity

The area under consideration is significant in relation to its level of primary and/or secondary production.

Examples: (1) East Breaks at the edge of the continental shelf off Corpus Christi, Texas, is characterized by intense local upwelling, high primary productivity, and exceptional fish production.

(2) In the Gray's Reef National Marine Sanctuary, much production may be imported; outcroppings of limestone rocks may serve to entrap, conserve, and circulate detritus and plankton which provides energy sources for reef invertebrates, which in turn support marine fisheries and sea turtles.

(3) In the Channel Islands National Marine Sanctuary, the cold waters of the California current flowing south meet the warm waters of the California Counter Current flowing north to create upwellings of cold nutrient-rich waters that enhance the biological productivity of the area.

NOTE: This example also meets Criterion I.F.

(4) In many cases, coral reefs are not only energetically self-sustaining (*i.e.*, they produce locally enough food to support the community), but they are also specifically organized to entrap, hoard, and recycle materials received from the surrounding waters (*i.e.*, products that are imported and conserved).

D. Biotic Character/Species Representation

The area under consideration is of special interest because it supports:

(1) Ecologically limited species;

(2) Ecologically important species; or

(3) Unique species associations or biological assemblages.

Examples: (1) This criterion would apply to marine habitat areas upon which ecologically limited species (*e.g.*, threatened, endangered, rare, depleted, endemic, or peripheral species) are dependent during all or part of their lives.

(2) This criterion would apply to marine areas containing species which contribute in a significant way to the maintenance of a specified ecosystem found in the region or subregion, such as the Channel Islands Marine Sanctuary, which supports one of the most varied assemblages of marine mammals and seabirds in the world.

(3) The waters of Point Lobos, California, support a unique assemblage of kelp, sea urchin abalone, and sea otters.

(4) Submarine canyons support unusual biological communities of soft corals, crustaceans, and fish, and are known as "pueblo villages."

(5) This criterion would also apply to wide sandy bottom areas which are characterized by low productivity, but unique species composition, such as certain areas off central Texas.

E. Species Maintenance

The area under consideration is important to life history activities, including special feeding, courtship, breeding, birthing/nursery, resting/wintering, and migration areas.

Examples: (1) The waters off Point Reyes and the Farallon Islands provide deep and shallow water feeding areas for a wide variety of marine organisms, including seabirds, marine mammals, and marine fisheries. The Farallon Islands support the largest seabird rookeries in the contiguous United States and are used, along with the mainland, by California sea lions, harbor seals, and elephant seals for hauling out and pupping purposes. Whales, including several endangered species, and porpoise pass through the sanctuary on annual migrations.

(2) The waters around certain Hawaiian Islands are important wintering, birthing/nursery, and perhaps courtship/breeding areas for endangered whales.

(3) Spiny lobster migration routes off Florida are important for the "off shelf" movement of this species.

(4) The mouth of the Mississippi River is an important brown shrimp over-wintering ground.

F. Ecosystem Structure/Habitat Features

The area under consideration is characterized by special chemical, physical, and/or geological habitat features.

Examples: (1) The Florida Middle Grounds on the Gulf of Mexico continental shelf represent an unusual geological formation—a drowned Pleistocene reef—which supports rich and diverse reef communities.

(2) Transition zones occur where two different marine systems converge—such as at coastal/marine system interfaces, shelf/slope interfaces, soft bottom/hard bottom ecotones, or cold water/warm water current convergence zone. These areas of mixing often have unique physical and ecological characteristics, high production, and species diversity/population densities which are often greater than in areas flanking them. For example, a transition zone is formed near Cape Hatteras where cold northern waters of the Labrador Current mix with warm water eddies of the Gulf Stream/Florida Current and as a result, northern and southern species mix and co-exist with species endemic to the area.

NOTE: This example also meets Criterion I.C.

(3) Easternmost coastal areas of Maine—with unique bay-heads and rocky coasts, varied substrates derived from glacial materials, extensive sub-fjord character, and numerous offshore islands—are matched by

few areas in the world in habitat types and species diversity.

II. Human Use/Historical Resource Values

A. Fishery Resources of Recreational Importance

The area under consideration contains fish and shellfish species, species groups (*e.g.*, snapper-grouper complex), or fishery habitats which are important to the recreational fishing industry/community and for which conservation and management are in the public interest.

B. Fishery Resources of Commercial Importance

The area under consideration contains fish and shellfish species, species groups (e.g., snapper-grouper complex), or fishery habitats which are important to the commercial fishing industry and for which conservation and management are in the public interest.

C. Ecological/Esthetic Resources of Importance for Recreational Activities Other Than Fishing

The area under consideration contains exceptional natural resources and features which, because of their importance to nature watching and other nonconsumptive recreational activities, enhance human appreciation, understanding, and enjoyment of nature.

Examples: (1) Rocky shorelines, shallow nearshore waters, and intertidal pools in the Channel Islands and Gulf of the Farallones National Marine Sanctuaries have rich and varied plant and animal life which attract many persons interested in photography and nature study.

(2) The prominent topography around the Channel Islands and Gulf of the Farallones National Marine Sanctuaries provides outstanding ocean vistas.

(3) The spectacular spur-and-groove coral reef formation in the Looe Key National Marine Sanctuary attracts SCUBA and snorkeling enthusiasts from all over the world.

(4) The waters off Maui, Hawaii, are popular for humpback whale watching.

D. Research Opportunity

The area under consideration provides exceptional opportunities for research in marine science and resource management.

Examples: (1) The Gray's Reef National Marine Sanctuary serves as a natural laboratory or control area for research in live bottom ecology.

(2) The Key Largo National Marine Sanctuary is amenable to onsite research activities for many reasons, including the diversity of resources available, the past history of scientific research and education in the area, the compatibility with similar research efforts in adjacent John Pennekamp State Park and Biscayne National Park, and the proximity of the site to user groups. In addition, the Carysfort Reef Lighthouse provides a unique research base from which to launch studies concerning the sanctuary environment.

(3) The Channel Islands National Marine Sanctuary offers a special opportunity to coordinate research with the Channel Islands National Park. Such coordination will contribute to a better scientific understanding of the marine environment and to more effective management by answering questions such as those related to development and use of marine resources.

E. Interpretive Opportunity

The area under consideration provides an excellent opportunity to interpret the meanings and relationships of special marine resources in order to enhance general understanding, appreciation, and wise use of the marine environment.

Examples: (1) Through a variety of interpretive media, including aquaria displays, narrated slide shows and glassbottom boat tours, a visitor to the Key Largo National Marine Sanctuary is exposed to a variety of marine and coastal ecosystems, including open ocean, fringing coral reefs, patch reefs, mangroves, open bay, and barrier islands.

(2) The Channel Islands National Marine Sanctuary provides an exceptional opportunity to interpret marine and insular ecosystem features through the use of various interpretive "hands on" techniques that go beyond traditional educational tools such as brochures and pamphlets.

F. Historical, Cultural, Archeological or Paleontological Significance

The area under consideration contains (or is likely to contain) historical resources of special national significance.

DEFINITIONS

The term "historical" as defined in § 922.2(c) means possessing historical, cultural, archeological or paleontological significance, including sites, structures, districts and objects significantly associated with or representative of earlier people, cultures, and human activities and events. The term is used in the broad sense to refer to both pre-historic and historic periods, to the anthropological concept of culture, and to the processes, events, places, and objects related to the human past. The phrase "special national significance" in the context of historical areas denotes those areas with historical values of unique national signifi-

cance and which are illustrative of the nation's maritime heritage.

CRITERIA FOR IDENTIFICATION AND SELECTION

The site identification criteria to be used by the Marine Historical Resource Evaluation Team to make its recommendation to the Secretary and the criteria to be used by the Secretary for selection of recommended sites for inclusion on the SEL are the same.

To qualify for recommendation to the Secretary and for selection for listing on the SEL because of a site's historical values, a site must have special national significance within the meaning set forth below in paragraphs (1) and (2) and meet the programmatic requirements set forth in paragraph (3). In determining whether a site has special national significance, the site's contribution to the historical resources already represented in the National Marine Sanctuary Program, if any, shall also be considered.

(1) *Determination of Significance*—The National Historic Landmark (NHL) Program (36 CFR Part 65), administered by the Department of the Interior, focuses attention on properties of exceptional value to the nation as a whole. It is the Federal means of weighing the national significance of historical resources. Properties designated as NHLs that are not already listed on the National Register of Historic Places are automatically listed there. In addition to adding historical units to the National Park System, NHL designation is a prerequisite for determining the eligibility of historical resources for nomination to the World Heritage List.

Consistent with the Marine Research, Protection, and Sanctuaries Act directive that the management of special marine areas complement existing regulatory authorities to the extent practicable, the criteria for nomination as a NHL shall be used as the first step in evaluating the historical, cultural, archeological or paleontological significance of a marine resource (See Table 1). Sites of national significance demonstrated by their designation as NHLs, or considered in consultation with the Department of the Interior and other appropriate authorities as meeting the NHL criteria, shall be further evaluated for recommendation for selection and evaluation for addition on the SEL, in accordance with paragraphs (2) and (3), below. Sites within the jurisdiction of the United States which have international significance as determined by the criteria for nomination to the World Heritage List shall also be evaluated (See Table 2).

(2) *Determination of Representative Distribution*—In addition to having national significance, a site, in order to be recommended or selected, must complement or contribute to the desired range of historical resources of the National Marine Sanctuary Program. Consistent with the Program's mission and goals set forth in § 922.1 of the regulations, sites recommended or selected for historical qualities must be illustrative of the nation's maritime heritage and representative of the nation's most significant historical marine resources.

(3) *Additional Programmatic Requirements*—In addition to having special national significance to qualify for recommendation and selection for addition to the SEL, coordinated and comprehensive conservation and management of the site including: (a) resource protection; (b) scientific reseach and monitoring; and (c) public education must be necessary in order to derive maximum present and future public benefit from the site's resources. Designation of a site as a National Marine Sanctuary must also complement existing regulatory authorities and improve the protection and preservation of the site's resources.

ADDITIONAL FACTORS IN SITE IDENTIFICATION AND SELECTION

III. Potential Activity Impacts

Many marine areas are subject to human use, some of which bring adverse pressures to bear on the natural resources. Where applicable, initial identification of potential marine sanctuary areas includes a summary of existing and potential human activities in these areas as well as a preliminary assessment of environmental impacts. To the extent such information is available, NOAA's selection of sites for the SEL will consider impacts of human activities on the area's natural resource and human use values, as well as the impacts of site selection on human activities already taking place within the site.

IV. Management Concerns

A. Relationship to Other Programs

While some sanctuaries may be designed to protect resources not currently managed by other existing programs (*e.g.*, the *U.S.S. MONITOR* on the continental shelf off North Carolina), most recommendations involved cooperation with some other Federal, State, local agency or organization. The ability of existing regulatory mechanisms to protect the values of the area and the contribution of the National Marine Sanctuary Program to that existing management effort may be an important factor in selecting sanctuary candidates. Depending on the location, the resource, and the existing system, national marine sanctuary designation could either complement the status quo by filling specific gaps or form a management umbrella over a fragmented system to help coordinate and strengthen diverse, but

related efforts. At different sites, NOAA may work to complement other programs' efforts such as national estuarine research reserves, national parks, wildlife refuges, or state preserves, among others. There may be instances where NOAA's primary contribution to protection of special marine areas will be in the form of enhanced public awareness through interpretive and research programs.

B. Management of a Conservation Unit

Optimum size of a marine sanctuary is an issue to be considered in potential sanctuary sites. The size or extent of a marine sanctuary should be a cohesive conservation unit amenable to effective management given fiscal and staff constraints of the managing entities.

C. Accessibility

Since national marine sanctuaries are to be readily available for public use, when use is compatible with the sanctuary's goals and objectives, consideration should be given to factors which limit or enhance public access to a particular site.

D. Surveillance and Enforcement

Another issue to be considered when evaluating a potential sanctuary site is the degree to which the area lends itself to adequate enforcement and surveillance and the capabilities of responsible agents (*e.g.*, U.S. Coast Guard, state law enforcement divisions, or the like). This depends on the location, its size, and the types of resources involved. Consideration is also given to: (1) Degree of surveillance/enforcement presence needed in the area—light, medium, or heavy; (2) schedule—routine, prescribed, or case-by-case basis; and (3) logistics—vessels, aircraft, personnel, equipment, and budgetary requirements.

E. Economic Considerations

The designation of a national marine sanctuary may have economic effects at both local and national levels. Prior to the development of a management plan for a particular site which describes the uses and activities which may take place within a sanctuary, it is difficult to calculate fully the economic impact of sanctuary designation. It is also difficult to determine, at the SEL stage, the economic benefits of the sanctuary to society as a whole based on such considerations as public use, and research and interpretive values which will also be fully described in a management plan. Sanctuary designation may, in some cases, enhance economic value by ensuring long-term protection for commercially significant resources, such as commercial or recreational fish stocks, vital habitats, and resources which generate tourism. Conversely, a designated marine sanctuary may have negative economic impacts if management regulations unduly restrict commercial activities.

To the extent feasible, a decision to include a proposed site on the SEL will take into consideration the economic effects of sanctuary designation. As consideration of a particular site progresses through the designation process, more information will be developed and analyzed concerning the economic effects of sancturay designation.

TABLE 1: NATIONAL HISTORIC LANDMARKS PROGRAM SELECTION CRITERIA (36 CFR 65.4)

Specific Criteria of National Significance: The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association, and:

(1) That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or

(2) That are associated importantly with the lives of persons nationally significant in the history of the United States; or

(3) That represent some great idea or ideal of the American people; or

(4) That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or

(5) That are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or

(6) That have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

Ordinarily, cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved

from their original locations, reconstructed historic buildings and properties that have achieved significance within the past 50 years are not eligible for designation. Such properties, however, will qualify if they fall within the following categories:

(1) A religious property deriving its primary national significance from architectural or artistic distinction or historical importance; or

(2) A building or structure removed from its original location but which is nationally significant primarily for its architectural merit, or for association with persons or events of transcendent importance in the nation's history and the association consequential; or

(3) A site of a building or structure no longer standing but the person or even associated with it is of transcendent importance in the nation's history and the association consequential; or

(4) A birthplace, grave or burial if it is of a historical figure of transcendent national significance and no other appropriate site, building or structure directly associated with the productive life of that person exists; or

(5) A cemetery that derives its primary national significance from graves if persons of transcendent importance, or from an exceptionally distinctive design or from an exceptionally significant event; or

(6) A reconstructed building or ensemble of buildings of extraordinary national significance when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other buildings or structures with the same association have survived; or

(7) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own national historical significance; or

(8) A property achieving national significance within the past 50 years if it is of extraordinary national importance.

TABLE 2: CRITERIA FOR INCLUSION OF CULTURAL PROPERTIES ON THE WORLD HERITAGE LIST

(1) A monument, group of buildings or site which have been nominated for inclusion on the World Heritage List will be considered to be of outstanding universal value for the purposes of the World Heritage Convention when the World Heritage Committee finds that it meets one or more of the following criteria and the test of authenticity. Each property nominated should therefore:

(i) Represent a unique artistic achievement, a masterpiece of the creative genius; or

(ii) Have exerted great influence, over a span of time or within a cultural area of the world, on developments in architecture, monumental arts or townplanning and landscaping; or

(iii) Bear a unique or at least exceptional testimony to a civilization which has disappeared; or

(iv) Be an outstanding example of a type of structure which illustrates a significant stage in history; or

(v) Be an outstanding example of a traditional human settlement which is representative of a culture and which has become vulnerable under the impact of irreversible change; or

(vi) Be directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance. (The Committee considered that this criterion should justify inclusion in the List only in exceptional circumstances or in conjunction with other criteria); and

In addition, the property must meet the test of authenticity in design, materials, workmanship, or setting.

(2) The following additional factors will be kept in mind by the Committee in deciding on the eligibility of a cultural property for inclusion on the List:

(i) The state of preservation of the property should be evaluated relatively, that is, it should be compared with that of other property of the same type dating from the same period, both inside and outside the country's borders; and

(ii) Nominations of immovable property which is likely to become movable will not be considered.

PART 923—COASTAL ZONE MANAGEMENT PROGRAM DEVELOPMENT AND APPROVAL REGULATIONS

Subpart A—General

Sec.
923.1 Purpose.
923.2 Definitions.
923.3 General requirements.

Subpart B—Uses Subject to Management

923.10 General.
923.11 Uses of subject to management.
923.12 Uses of regional benefit.
923.13 Energy facility planning process.

Subpart C—Special Management Areas

923.20 General.
923.21 Areas of particular concern.
923.22 Areas for preservation or restoration.
923.23 Other areas of particular concern.

4.
Part 924
Monitor Marine Sanctuary Regulations

result in significant improvement in achieving the coastal management objectives of section 303(2)(A) through (I).

(c) The States and the Assistant Administrator will negotiate an agreement at the beginning of each financial assistance award period establishing: (1) The specific significant improvement objectives to be achieved during the financial assistance award period, (2) the Federal funds to be devoted to each task, and (3) the basis for assessing the State's progress in accomplishing each significant improvement task. The agreement will be included as part of the financial assistance award. There is no requirement that the State address each of the nine significant improvement objectives within an individual financial assistance award period.

(d) If unforeseen circumstances arise that affect the accomplishment of any significant improvement task, the State must provide the Assistant Administrator with prompt notice and negotiate with the Assistant Administrator any necessary changes to the schedule and products before the scheduled completion dates. The Assistant Administrator shall provide the State agency with a schedule for negotiation and a time certain when a decision will be available to the State agency. Any such changes will be made part of the agreement included in the financial assistance award.

(e) Significant improvements need not be achieved within the period of one financial assistance award if there is specific reason to identity a longer period.

§ 923.104 Establishing the "increasing proportion".

(a) During the first year a State is required to make significant improvements (its second 306 award), it must agree to expend 20 percent of the Federal share of its upcoming section 306 financial assistance award on activities designed to lead to significant improvements. Thereafter, the State must agree to constant incremental increases of at least one percent in each succeeding year. The amount to be spent on significant improvements will be determined by multiplying the applicable percentage by the amount of Federal funds actually received.

(b) In no case may a State be required to expend more on significant improvement activities than the incremental increases established by this section. However, States may voluntarily exceed the minimum requirement on significant improvement expenditures established by this section. The failure to make significant improvements as a result of those expenditures in excess of the minimum requirement will not result in any reduction in financial assistance under the provisions of § 928.5(a), unless such failure results in an unjustified deviation under § 928.5(b).

§ 923.105 Failure to agree to pursue significant improvements.

(a) If a State chooses not to pursue significant improvements in accordance with this subpart, the Secretary must withhold all financial assistance under section 306. However, a decision not to award section 306 funds does not necessarily require withdrawal of program approval. A State may continue to implement and enforce its approved program with State funds. Under these circumstances, a State will still be able to exercise its Federal consistency review rights under section 307 and will remain eligible for CEIP funds if it meets all other eligibility requirements.

(b) A discussion of the procedures by which the Assistant Administrator will evaluate whether a State has failed to make significant improvements is contained in 15 CFR Part 928, Review of Performance of State Coastal Management and Coastal Energy Impact Programs.

PART 924—MONITOR MARINE SANCTUARY

Sec.

924.1 Authority.
924.2 Description of the Sanctuary.
924.3 Activities prohibited within the Sanctuary.
924.4 Penalties for commission of prohibited acts.
924.5 Permitted activities.
924.6 Permit procedures and criteria.

Sec.
924.7 Certification procedures.
924.8 Appeals of administrative action.

AUTHORITY: Secs. 302 and 303, Pub. L. 92-532, as amended; 86 Stat. 1061 (16 U.S.C. 1432 and 1433).

SOURCE: 40 FR 21706, May 19, 1975, unless otherwise noted.

§ 924.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of the Act. The following regulations are issued pursuant to the authorities of sections 302(f), 302(g) and 303 of the Act.

§ 924.2 Description of the Sanctuary.

The Sanctuary consists of a vertical water column in the Atlantic Ocean one mile in diameter extending from the surface to the seabed, the center of which is at 35°00'23" north latitude and 75°24'32" west longitude.

§ 924.3 Activities prohibited within the Sanctuary.

Except as may be permitted by the Administrator, no person subject to the jurisdiction of the United States shall conduct, nor cause to be conducted, any of the following activities in the Sanctuary:

(a) Anchoring in any manner, stopping, remaining, or drifting without power at any time;

(b) Any type of subsurface salvage or recovery operation;

(c) Any type of diving, whether by an individual or by a submersible;

(d) Lowering below the surface of the water any grappling, suction, conveyor, dredging or wrecking device;

(e) Detonation below the surface of the water of any explosive or explosive mechanism;

(f) Seabed drilling or coring;

(g) Lowering, laying, positioning or raising any type of seabed cable or cable-laying device;

(h) Trawling; or

(i) Discharging waste material into the water in violation of any Federal statute or regulation.

§ 924.4 Penalties for commission of prohibited acts.

Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 for each violation of any regulation issued pursuant to Title III of the Act, and further authorizes a proceeding *in rem* against any vessel used in violation of any such regulation. Details are set out in Subpart D of Part 922 of this chapter (39 FR 23254, 23257, June 27, 1974). Subpart D is applicable to any instance of a violation of these regulations.

§ 924.5 Permitted activities.

Any person or entity may conduct in the Sanctuary any activity listed in § 924.3 of this part if:

(a) Such activity is either: (1) For the purpose of research related to the MONITOR, or (2) pertains to salvage or recovery operations in connection with an air or marine casualty; and

(b) Such person or entity is in possession of a valid permit issued by the Administrator authorizing the conduct of such activity; except that, no permit is required for the conduct of any activity immediately and urgently necessary for the protection of life, property or the environment.

§ 924.6 Permit procedures and criteria.

(a) Any person or entity who wishes to conduct in the Sanctuary an activity for which a permit is authorized by § 924.5 (hereafter a permitted activity) may apply in writing to the Administrator for a permit to conduct such activity citing this section as the basis for the application. Such application should be made to the Administrator, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, DC 20230. Upon receipt of such application, the Administrator shall request, and such person or entity shall supply to the Administrator, such information and in such form as the Administrator may require to enable him to act upon the application.

(b) In considering whether to grant a permit for the conduct of a permitted activity for the purpose of research related to the MONITOR, the

Secretary shall evaluate such matters as: (1) The general professional and financial responsibility of the applicant; (2) the appropriateness of the research method(s) envisioned to the purpose(s) of the research; (3) the extent to which the conduct of any permitted activity may diminish the value of the MONITOR as a source of historic, cultural, aesthetic and/or maritime information; (4) the end value of the research envisioned; and (5) such other matters as the Administrator deems appropriate.

(c) In considering whether to grant a permit for the conduct of a permitted activity in the Sanctuary in relation to an air or marine casualty, the Administrator shall consider such matters as: (1) The fitness of the applicant to do the work envisioned; (2) the necessity of conducting such activity; (3) the appropriateness of any activity envisioned to the purpose of the entry into the Sanctuary; (4) the extent to which the conduct of any such activity may diminish the value of the MONITOR as a source of historic, cultural, aesthetic and/or maritime information; and (5) such other matters as the Administrator deems appropriate.

(d) In considering any application submitted pursuant to this Section, the Administrator may seek and consider the views of any person or entity, within or outside of the Federal Government, as he deems appropriate; except that, he shall seek and consider the views of the Advisory Council on Historic Preservation.

(e) The Administrator may, in his discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as he deems appropriate, except that the Administrator shall attach to any permit granted for research related to the MONITOR the condition that any information and/or artifact(s) obtained in the research shall be made available to the public. The Administrator may observe any activity permitted by this section; and/or may require the submission of one or more reports of the status or progress of such activity.

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

(g) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (a) have been approved by the Office of Management and Budget under control number 0648-0141)

[40 FR 21706, May 19, 1975, as amended at 49 FR 1040, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 924.7 Certification procedures.

Any Federal agency which, as of the effective date of these regulations, already has permitted, licensed or otherwise authorized any prohibited activity in the Sanctuary shall notify the Administrator of this fact in writing. The writing shall include a reasonably detailed description of such activity, the person(s) involved, the beginning and ending dates of such permission, the reason(s) and purpose(s) for same, and a description of the total area affected. The Administrator shall then decide whether the continuation of the permitted activity, in whole or in part, or subject to such condition(s) as he may deem appropriate, is consistent with the purposes of Title III of the Act and can be carried out within these regulations. He shall inform the Federal agency of his decision in these regards, and the reason(s) therefore, in writing. The decision of the Secretary made pursuant to this section shall be final action for the purpose of the Administrative Procedure Act.

§ 924.8 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 924.6 to

the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Secretary may request, and if he does, the Appellant shall provide, such additional information and in such form as the Secretary may request in order to enable him to act upon the appeal. If the Appellant has not requested a hearing, the Secretary shall decide the appeal upon: (1) The basis of the criteria set out in § 924.6(b) or (c) of this part, as appropriate, (2) information relative to the application on file in NOAA, (3) information provided by the Appellant, and (4) such other considerations as he deems appropriate. He shall notify the Appellant of his decision, and the reason(s) therefore, in writing within 30 days of the date of his receipt of the appeal.

(c) If the Appellant has requested a hearing, the Secretary shall grant an informal hearing before a Hearing Officer designated for that purpose by the Secretary after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall be held no later than 30 days following the Secretary's receipt of the appeal. The Appellant and any interested person may appear personally or by counsel at the hearing, present evidence, cross-examine witnesses, offer argument and file a brief. Within 30 days of the last day of the hearing, the Hearing Officer shall recommend in writing a decision to the Secretary based upon the considerations outlined in paragraph (b) of this section and based upon the record made at the hearing.

(d) The Secretary may adopt the Hearing Officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Secretary shall notify the Appellant of his decision, and the reason(s) therefore, in writing within 15 days of his receipt of the recommended decision of the Hearing Officer. The Secretary's action, whether without or after a hearing, as the case may be, shall constitute final action for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this Section may be extended by the Secretary for good cause, either upon the Secretary's own motion and upon written notification to an Appellant stating the reason(s) therefore, or upon the written request of an Appellant to the Secretary stating the reason(s) therefore, except that no time limit may be extended more than 30 days.

[40 FR 21706, May 19, 1975, as amended at 49 FR 1040, Jan. 6, 1984]

PART 926—COASTAL ZONE MANAGEMENT PROGRAM DEVELOPMENT GRANTS, ALLOCATION OF FUNDS TO STATES

Sec.
926.1 Purpose of rules and regulations.
926.2 Definitions.
926.3 Basis of allocation.
926.4 Allocation of non-distributed funds.
926.5 State allocation computation examples.
926.6 State allocations.
926.7 Duration of allocation.

AUTHORITY: Sec. 305(e), Pub. L. 92-583, as amended; 86 Stat. 1280 (16 U.S.C. 1454).

SOURCE: 40 FR 11863, Mar. 14, 1975, unless otherwise noted.

§ 926.1 Purpose of rules and regulations.

Twelve million dollars has been appropriated by the Congress for Fiscal Year 1975 to implement the Coastal Zone Management Act of 1972 (Pub. L. 92-583) as amended. Of this amount $9 million has been made available for coastal zone management program development grants-in-aid to the 34 coastal States and territories under section 305 of that Act. It is the purpose of this part to establish the rules and regulations for allocation of grant-in-aid funds under section 305 of the Coastal Zone Management Act of 1972, as amended (Pub. L. 92-583; 86 Stat. 1280; and Pub. L. 93-612; 88 Stat. 1974) pursuant to the requirements of section 305(e) which states:

Grants under this section shall be allocated to the States based on rules and regula-

5.
Parts 928 and 932 Implementing the CZMA Reauthorization Amendments of 1990, phase I (dated July 14, 1992)

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Parts 928 and 932

[Docket No. 910815-2061]

Implementing the Coastal Zone Act Reauthorization Amendments of 1990; Phase One

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule implements sections 6210 and 6212 of Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990. These sections amended the Coastal Zone Management Act of 1972 (CZMA) to authorize the making of coastal zone enhancement grants to the states, to revise the procedures applicable to review by the Secretary of Commerce, under section 312 of the CZMA, of a state's performance with respect to coastal management, and to authorize the Secretary to impose interim sanctions against a state. The regulations issued today set forth the criteria and procedures for applying for and awarding coastal zone enhancement grants, revise the procedures applicable to review by the Secretary of a state's performance with respect to coastal management, and set forth procedures for invoking and lifting interim sanctions.

EFFECTIVE DATE: August 13, 1992.

FOR FURTHER INFORMATION CONTACT: Vickie Allin, Policy Coordination Division (202/606-4100).

SUPPLEMENTARY INFORMATION:

I. Authority

This final rule is issued pursuant to the authority of the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451-1464).

II. Availability of Comments

All comments received in response to the notice of proposed rulemaking for this rule (56 FR 52220, Oct. 19, 1991) are available for inspection at the Office of Ocean and Coastal Resource Management during normal business hours (8 a.m.-4:30 p.m.) in suite 701, Universal South Building, 1825 Connecticut Avenue, NW., Washington DC 20235.

III. Regulatory Issues

A. General Background

The CZMA was enacted to encourage and assist coastal states and territories (states) in developing and implementing management programs to preserve, protect, develop and, where possible, restore or enhance the resources of our Nation's coast. On November 5, 1990, the President signed Public Law 101-508, the Omnibus Budget Reconciliation Act of 1990. Subtitle C, known as the Coastal Zone Act Reauthorization Amendments of 1990 (1990 Reauthorization), of title VI of that Act, reauthorized and comprehensively amended the CZMA. The amendments include:

- A new Coastal Nonpoint Pollution Control Program, which requires each coastal state with a federally approved coastal zone management (CZM) program to develop a program, to be implemented through section 306 of the CZMA and section 319 of the Clean Water Act, to protect coastal waters from nonpoint source pollution. Program approval and oversight are shared between NOAA and the Environmental Protection Agency (EPA);
- A new enhancement grants program which encourages each coastal state to improve its CZM program in one or more of eight identified national priority areas: coastal wetlands management and protection, natural hazards management (including potential sea and Great Lakes level rise), public access improvements, reduction of

marine debris, assessment of cumulative and secondary impacts of coastal development, special area management planning, ocean resource planning, and siting of coastal energy and government facilities;

• A new "Coastal Zone Management Fund" (CZM Fund) consisting of Coastal Energy Impact Program loan repayments from which the Secretary of Commerce is directed to pay (subject to amounts provided in appropriation Acts) for the Federal administrative costs of the program and to fund special projects, emergency state assistance, and other discretionary CZM activities;

• New requirements for expanded public participation opportunities in the program evaluation process and expedited production of final evaluation findings, and new authority to impose interim sanctions involving suspension of financial assistance for 6 to 36 months if a state or national estuarine research reserve (reserve) designated under section 315 of the CZMA is failing to adhere to its federally-approved program or management plan or the terms of financial assistance awards;

• A new requirement for the Secretary to provide technical assistance and management-oriented research to support development and implementation of state CZM programs;

• Authorization for NOAA to make annual achievement awards to individuals and local governments for outstanding accomplishments in the field of coastal zone management;

• Clarification of the scope of the CZMA's Federal consistency provisions, which state that Federal actions in or affecting the coastal zone must be consistent with federally-approved state coastal management programs, and overturning the Supreme Court's 1984 decision in *Secretary of the Interior* v. *California*, in which the Court held that OCS oil and gas lease sales were not subject to Federal consistency;

• Modifications to the National Estuarine Research Reserve System under section 315 of the CZMA, including increasing the maximum amount of Federal financial assistance for land or water acquisition at an individual reserve from $4 to $5 million, and increasing the maximum Federal share of costs for managing reserves and supporting educational activities from 50 to 70 percent;

• Reorganization and consolidation of CZM program approval requirements and other technical changes, including new statements of findings and purpose, new and revised policies and objectives, and new and revised statutory definitions; and

• Three new program approval requirements regarding public participation in permitting processes, consistency determinations and other similar decisions, providing a mechanism to ensure that all state agencies will adhere to the program, and requiring enforceable policies and mechanisms to implement the applicable requirements of the new Coastal Nonpoint Pollution Control Programs, respectively.

B. Approach to Rulemaking

Because of the substantial scope of the amendments and the statutory requirement to promulgate regulations for the Coastal Zone Enhancement Grants Program by November 5, 1991, NOAA decided to undertake a phased rulemaking. The final rule issued today is the first phase. It implements sections 6210 and 6212 of the Omnibus Budget Reconciliation Act of 1990. These Sections amended the CZMA to authorize the making of coastal zone enhancement grants to the states, to revise the procedures applicable to review by the Secretary of Commerce, under section 312 of the CZMA, of a state's performance with respect to coastal management, and to authorize the Secretary to impose interim sanctions against a state.

NOAA believes it is premature to undertake rulemaking on most of the other amendments at this time. For example, NOAA needs more information before proceeding to rulemaking on program approvability requirements for the new nonpoint pollution control programs. This is because EPA must issue guidance on management measures for sources of nonpoint pollution on the basis of which States are to develop their programs. EPA has 18 months in which to develop this guidance. In addition, NOAA and EPA have joint approval authority for these programs. NOAA's regulations need to reflect agreement between NOAA and EPA on who will have authority to approve which parts of the program. Thus, rulemaking to implement the Coastal Nonpoint Pollution Control Program will be a later phase of the rulemaking process.

Similarly, NOAA will not proceed with rulemaking at this time to implement the new program approval requirements of section 306(d) (14), (15) and (16). This is because no state is required to meet these requirements until, at the earliest, 3 years from the date of enactment (or November 1993), and because the requirements of sections 306(d) (14) and (15) have been partially met already by existing state programs. NOAA will incorporate the requirements of sections 306(d) (14) and (15) into its program approval regulations and issue guidance to the States on meeting these requirements. The new requirement of section 306(d)(16) that state CZM programs contain enforceable policies to implement the new Coastal Nonpoint Pollution Control Programs will be incorporated into program approval regulations for these programs, when those regulations are developed.

NOAA will not issue regulations on the CZM Fund, the technical assistance program, or the CZM achievement awards at this time. Also, NOAA does not intend to revise its Federal consistency rules at this time. The changes to the Federal consistency provisions, except for overturning the Supreme Court's decision on outer continental shelf (OCS) oil and gas lease sales, merely codify NOAA's existing regulations. NOAA wishes to gain more experience with the new provisions, the issues likely to arise in their implementation, and the public and interagency concerns, before deciding how to address rulemaking on this subject.

The changes to the National Estuarine Research Reserve System (section 315 of the CZMA) are non-controversial conforming changes which will be included as a part of a separate rulemaking that will make other necessary clarifying changes to NOAA's existing section 315 regulations.

C. Final Rule

1. Coastal Zone Enhancement Grants Program

The 1990 Reauthorization amended section 309 of the CZMA to authorize a new Coastal Zone Enhancement Grants Program to encourage each coastal state to improve its CZM program in one or more of eight identified areas. Beginning in FY 1991, the Secretary is authorized to make grants (not less than 10 percent and not more than 20 percent of the amounts appropriated under sections 306 and 306A of the CZMA, up to a maximum of $10 million annually) to coastal states to provide funding for development and submission for Federal approval of program changes that support attainment of one or more coastal zone enhancement objectives. As part of this effort, the Secretary is required to evaluate and rank state proposals for funding, and make funding awards based on those proposals. The Secretary has the authority to suspend a state's eligibility for enhancement grant funding for at least one year, if the Secretary finds that the state is not

undertaking the actions committed to under the terms of the enhancement grant.

Section 309(d) requires NOAA to issue regulations relating to the new enhancement grants program that establish:

(1) Specific and detailed criteria that must be addressed by a coastal state (including the State's priority needs for improvement as identified by the Secretary after careful consultation with the State) as part of the State's development and implementation of coastal zone enhancement objectives;

(2) Administrative or procedural rules or requirements as necessary to facilitate the development and implementation of such objectives by coastal states; and

(3) Other funding award criteria as are necessary or appropriate to ensure that evaluations of proposals, and decisions to award funding, under this section are based on objective standards applied fairly and equitably to those proposals.

Since the statute required NOAA to implement the new enhancement grants program immediately, NOAA adopted an interim approach for FY 1991. This allowed time for development of the statutorily-mandated regulations and identification of each state's priority needs for improvement with regard to the coastal zone enhancement objectives. In FY 1991, NOAA set aside 10 percent of the funds allocated under section 318(a)(2) for section 309 purposes. These funds were allocated to states based on the formula and weighting factors at 15 CFR 927.1(c).

The process developed by NOAA for determining a state's priority needs has been set forth in NOAA guidance on "Section 309 Assessments and Strategies," issued on May 10, 1991. NOAA guidance is available from the Office of Ocean and Coastal Resource Management, Coastal Programs Division, Universal South Building, room 724, 1825 Connecticut Avenue, NW., Washington, DC 20235.

The process for determining a state's priority needs has two stages. First, each state develops a public assessment document ("Assessment") that reviews each enhancement objective as it applies to the state and identifies the relative importance of each objective. Based on the Assessment, NOAA, after careful consultation with the state, identifies the priority needs for improvement in the state.

Once NOAA has identified the priority needs, the second stage is development of a multi-year strategy ("Strategy"). The state, in consultation with NOAA, proposes, to NOAA for approval, a Strategy that identifies specific program changes that the state will seek to achieve in the identified priority areas. The Strategy guides the development of the state's FY 1992 and subsequent year section 309 grant proposals.

The final regulations implementing the new Coastal Zone Enhancement Grants Program under section 309 of the CZMA, as amended, assume that a state has completed an Assessment and Strategy in accordance with NOAA guidance. The final regulations are set forth at 15 CFR part 932, replacing the regulations currently at 15 CFR part 932.

The regulations at 15 CFR 932.1 set forth the basic eligibility requirements for receiving financial assistance under section 309. The objectives of assistance under section 309 (b), (c) and (d) are provided at 15 CFR 932.2.

Section 309(b) authorizes the Secretary to make grants to coastal States to provide funding for development and submission for Federal approval of program changes that support attainment of one or more coastal zone enhancement objectives. The term "program change" is defined at 15 CFR 932.3 to include state actions that change current management programs, such as the development of new or revised enforceable policies, authorities and state coastal land acquisition and management programs. NOAA believes the definition is generally flexible enough to fund many types of activities that will ultimately lead to a program change. However, NOAA will provide additional guidance to the states on eligible activities. Other key terms, such as "project of special merit," "fiscal needs" and "technical needs," are also defined at 15 CFR 932.3.

The regulations for allocating funds under section 309 are set forth at 15 CFR 932.4. NOAA will annually determine the amount of funds to be devoted to section 309, taking into account the amount appropriated under section 318(a)(2) of the CZMA, as amended. NOAA recognizes the need to maintain core funding for state coastal zone management programs and has modified its guidance accordingly.

NOAA will award section 309 funds by: (1) Weighted formula and (2) individual review of projects of special merit. Projects proposed for funding under both categories are not state entitlements and, therefore, would be required to meet the identified criteria discussed below. NOAA will annually determine the proportion of available funds to be awarded to all eligible coastal states by weighted formula and the proportion to be awarded to eligible coastal states based on NOAA's review of individual project proposals of special merit.

In response to comments received on the proposed regulations, NOAA will set a base allocation for section 306 and weighted formula funding. If funding allocations for sections 306 and 309 in any year are reduced, the reduction would first be taken from project of special merit funding, secondly from weighted formula funding and lastly from section 306 funding. This funding allocation scheme will be a part of the guidance document for the enhancement grant process.

Under the weighted formula approach, NOAA will establish state weighted formula funding targets. The weighted formula funding targets will be the state base allocation determined by operation of the formula at existing 15 CFR 927.1(c), multiplied by a weighting factor derived from NOAA's evaluation and ranking of the quality of the state's Strategy, as supported by the state's Assessment. The application of the weighting factor could result in a weighted formula funding target that is higher or lower than the state's base allocation.

Section 309 requires that the Secretary "evaluate and rank State proposals for funding." NOAA interprets the word "rank" to mean that a state's Strategy or project would be assigned a position or rank, relative to other state submissions, according to its satisfaction of the applicable criteria. NOAA anticipates that the ranking under the weighted formula approach could result in several ranking categories (so that some states would be assigned the same rank.)

NOAA will award the remaining section 309 funds, which are not awarded by the weighted formula approach, based on an annual review of projects of special merit. NOAA will limit the funding of projects of special merit to the highest ranked proposals based on criteria set forth at proposed 15 CFR 932.5(b). Competitive funding for projects of special merit is a new concept in distributing coastal zone management funding. However, NOAA believes that this is the CZMA's intent and will yield better projects.

The allocation process will allow each coastal state that has a NOAA approved Assessment and Strategy to pursue an enhancements program, while at the same time provide incentive for states to develop and submit more aggressive proposals which commit to making the greatest improvements toward the coastal zone enhancement objectives.

The regulations set forth the criteria for section 309 project selection at 15 CFR 932.5. States will be required to meet minimum criteria for projects that will be funded by weighted formula. For projects of special merit, states will be required to meet both minimum criteria

and additional criteria that include the merit of the project. NOAA will evaluate and rank projects of special merit using a point system. Following the first year of funding under this part, NOAA will consider a state's past performance in assessing the merit of the state's individual project proposals.

The regulations also set forth pre-application procedures for financial assistance under section 309 at 15 CFR 932.6. As suggested in many of the comments received on the proposed regulations, the procedures have been simplified. States are encouraged but not required to annually consult with the Assistant Administrator or his/her designee. Further, only one submission prior to the final application is required. This "draft proposal" would include all of the information necessary to make grants for the section 309 projects the state proposes for funding during the next fiscal year and would be submitted on a schedule set by the Assistant Administrator.

The procedures for submission of formal applications and for reviewing and approving projects under section 309 are set forth at 15 CFR 932.7. Applications for financial assistance under section 309 will be included with applications for financial assistance under subpart J of existing 15 CFR part 923. States will be notified of their section 309 awards at the same time that they are notified of their section 306/306A awards.

The regulations set forth the procedures for revising a state's Assessment and Strategy at 15 CFR 932.8. States will be required to submit proposed revisions to the Assistant Administrator prior to the initiation of the contemplated change. Based on the extent to which the proposed revision(s) change the original scope of the state's Strategy, the Assistant Administrator may require the State to provide public review and comment on the proposed revision(s) in accordance with NOAA guidance.

2. Review of Performance (Program Evaluation)

Section 312 of the CZMA requires a continuing review of the performance of coastal states with respect to coastal management, and detailed written findings on the extent to which the state has implemented and enforced the program approved by the Secretary, addressed the coastal management needs identified in section 303(2)(A)–(K) of the CZMA, and adhered to the terms of any grant or cooperative agreement. Section 312 further requires that a public meeting be conducted as part of each evaluation and that opportunity be provided for oral and written comment by the public. Evaluation reports must be issued following each review of state performance.

The 1990 Reauthorization mandated changes to the procedures for carrying out evaluations of state coastal management programs and national estuarine research reserves. (Any changes to procedures for evaluation of estuarine reserves will be included as a part of a separate rulemaking to revise NOAA's section 315 regulations.) These changes require: A 45-day notice for public meetings, written response to all written comments on the evaluation, and completion of the final evaluation report within 120 days of the last public meeting held in the state. The 1990 Reauthorization amended section 312 of the CZMA to authorize new interim sanctions which provide for suspension and redirection of any portion of financial assistance awards to state coastal management programs or estuarine reserves if the state is failing to adhere to its approved program or reserve management plan, or a portion of the program or plan. Final sanction provisions at section 312(d) require the Secretary to withdraw program approval and financial assistance if the state refuses to take corrective actions specified under section 312(c)(2).

The basic requirements for review of performance are set forth at existing 15 CFR part 928. They define key terms, such as "continuing review," and provide that evaluations will be conducted in the course of continuing reviews and that written findings will be prepared.

Specifically, these final regulations revise existing 15 CFR 928.4(b)(2) to require that notice of public meeting(s) be provided at least 45 days in advance. They revise existing 15 CFR 928.3(b)(7) to require that final findings be completed within 120 days of the last public meeting in the state. The regulation specifies that copies of the final findings document will be sent to all persons and organizations who participate in the evaluation. Persons who attend a public meeting or are interviewed during an evaluation may be asked to complete a card or sign-in sheet containing their name and address and indicating a desire to receive the final findings. A new regulation has been added at existing 15 CFR 928.3(b)(6) requiring that all final findings documents contain a section which specifically identifies, summarizes and responds to the written comments received during the evaluation process.

In addition, NOAA has determined that two of the statutory changes to section 312(b)—namely, the requirement to respond in writing to all written comments received and the requirement to complete the evaluation within 120 days of the last public meeting—will increase the workload associated with the evaluation process. To deal with this increased workload, the final regulations revise the definition of "continuing review" at existing 15 CFR 928.2(a) to state that evaluations of State coastal management programs will be conducted and written findings prepared at least once every three years, rather than at least once every two years as previously provided. (NOAA's estuarine reserve regulations at existing 15 CFR 922.40(b) already provide for evaluation of estuarine reserves at least once every three years.) The phrase "but not more than once every year" has been deleted, so as not to restrict unnecessarily NOAA's flexibility to conduct issue or problem specific evaluations, as described below.

In addition, because NOAA recognizes that significant changes can occur in three years, the final regulations at existing 15 CFR 928.3(b)(9) provide for issue or problem specific evaluations to be conducted between regularly scheduled evaluations. In response to public comment, the regulation has been revised to clarify the conditions under which an issue or problem specific evaluation will be held: (1) To follow-up on potentially serious problems or issues identified in the most recent scheduled evaluation, or (2) to evaluate evidence of potentially serious problems or issues that may arise during the day-to-day monitoring of state performance of grant tasks and other program implementation activities in the interim between scheduled evaluations. These issue or problem specific evaluations will still be subject to the public participation and other minimum requirements of section 312. States will be notified of an issue or problem specific evaluation in the same manner as they are notified of a regularly schedule evaluation.

The regulations set forth the process for invoking interim sanctions at existing 15 CFR 928.5(a). They replace the old regulations on reduction of financial assistance for failure to make significant improvements, which were deleted because the significant improvement provisions were deleted in the 1990 Reauthorization. The process for invoking interim sanctions includes notice to the state and opportunity to comment on and rebut the finding of non-adherence on which the sanctions are based before any action is taken. Indicators of non-adherence are

provided to inform states of what NOAA expects and on what basis interim sanctions might be invoked.

To implement the changes to section 312(d) of the CZMA made by the 1990 Reauthorization, existing 15 CFR 928.5(b) entitled "Withdrawal of Program Approval and Financial Assistance" replaces the references to "unjustifiable deviation" with the requirement that the Assistant Administrator withdraw program approval and financial assistance if he/she finds that a state has failed to take the actions required under the interim sanction provisions of section 312(c).

D. Summary of Public Comments and Responses

On February 22, 1991, OCRM distributed issue papers on the rulemaking for the Coastal Zone Enhancement Grants Program and Review of Performance to approximately 225 interested parties on a mailing list established for this rulemaking and maintained by OCRM. Thirty-eight comments were received. After considering these comments, NOAA published a Notice of Proposed Rulemaking (56 FR 52220, Oct. 19, 1991) which invited public comments for 45 days, ending December 2, 1991. A public meeting was held on November 20, 1991. Comments were received from 41 sources, including 1 Federal agency, 3 NOAA offices, 20 coastal states and territories (30 letters), 3 interest groups, 1 business, 2 members of the Coastal Ocean Policy Roundtable, and 1 Congressional committee. The majority of commenters submitted comments on the regulations proposed to govern the Coastal Zone Enhancement Grant Program. A summary of the significant comments received together with NOAA's response organized by applicable subheading appear below.

A. Part 928—Review of Performance

Section 928.3 Procedures for Continuing Review of Approved State Coastal Zone Management Programs

Comment: Three comments expressed concern with the proposed revisions to § 928.3(b)(7).

(a) One comment objected to the deletion of the phrase "state comments" which the commenter felt may indicate unwillingness on the part of the Assistant Administrator to respond to a state's position or reasoning.

Response: No such intention should be read into this revision. Subsection 928.3(b)(7) established the timeframe for completing final evaluation findings. Previously, that timeframe was measured from the date of receipt of state comments on the draft findings. The 1990 Amendments instituted a new requirement to complete the final findings within 120 days, measured from the date of the last public meeting in the state. The revisions simply implement the new requirement. They do not change the state's right to comment on the draft findings or NOAA's obligation to consider the state's comments.

(b) Another comment asked why the final evaluation findings should only be sent to those completing a card or sign-in sheet when the amendments call for the final findings to be sent to all participants in the evaluation.

Response: NOAA intends to send final findings to all who participate in evaluations. The purpose of the card or sign-in sheet is to verify the addresses and affiliations of persons who speak or are interviewed during the evaluation and to offer multiple individuals from the same organization the option of receiving individual copies or a single copy for the organization, as they wish. NOAA has modified the language of this regulation slightly to clarify its intent.

(c) One comment recommended that NOAA send a notice announcing the availability of the draft evaluation findings to all participants in the evaluation at the time the draft findings are sent to the state for review.

Response: NOAA disagrees. The draft findings contain preliminary conclusions and tentative recommendations and include material subject to revision. They are made available for review and comment to the organization responsible for the matters addressed.

Comment: One comment concerned proposed § 928.3(b)(8). That comment recommended that NOAA summarize and respond to oral comments made at the public meetings and attach the full text of the written comments it summarizes and responds to as an appendix to the final findings.

Response: NOAA disagrees. The statute requires NOAA to respond only to written comments, recognizing the difficulty of summarizing and responding to the vast amount of oral comment on evaluations. Even restricting a summary to oral comments at public meetings would require turning those informal meetings into formal hearings with written transcripts. This would add greatly to the cost and workload of evaluation without a corresponding benefit. Oral comments are considered in developing the findings and recommendations and are cited as appropriate in the findings document.

Comment: One comment sought criteria and a mechanism for notifying states of issue or problem-specific evaluations under the proposed revisions to § 928.3(b)(9).

Response: NOAA agrees and has revised the regulation to indicate when it would consider undertaking an issue or problem-specific evaluation. NOAA does not believe any change is needed regarding notification mechanism since the regulation states that the procedure of §§ 928.3 and 928.4 will be followed. This includes the notification procedure at § 928.3(b)(3).

Section 928.5 Enforcement

Comment: Several comments concerned the procedures for imposing interim sanctions.

(a) One comment stated that the enforcement section was onerous and dealt only with mandatory recommendations.

Response: The comment appears to confuse the regulations implementing the interim sanctions provisions with changes made by NOAA to the format of its evaluation findings. Recently, in conjunction with notifying states of its FY 1992 evaluation schedule, NOAA/OCRM informed them that it was making two changes to the format of the evaluation findings. One of these changes is to distinguish between suggested or necessary actions. Since the format of evaluations is not specified in regulation, the regulations are not affected by this change. The regulations at § 928.5 specify the procedures for invoking interim sanctions. These procedures will be invoked only if a state is found to be not adhering to all or a portion of its approved management program.

(b) One comment expressed concern that suspension and redirection of funds already allocated by the lead state agency through signed contracts could cause undue hardship.

Response: NOAA's procedures for invoking interim sanctions call for the state to develop a proposed workplan which may propose alternative actions and/or an alternative schedule to correct a non-adherence problem. NOAA expects that its consultations with the state on this workplan would serve to identify and provide a means to avoid the undue hardship identified by the commenter.

(c) One comment recommended that the state be required to provide for public review and comment on the workplan it submits pursuant to § 928.5(a)(vi).

Response: NOAA believes that public review and comment is inappropriate. Of course a state is free to solicit comments regarding its proposed workplan.

(d) One commenter recommended that the "schedule of actions that should be undertaken by the State" in § 928.5(a)(1)(ii)(A) be one that is developed with due regard for the state's administrative ability to satisfy it.

Response: NOAA's procedures at § 928.5(a)(2)(vi) provide for the state to suggest an alternative schedule.

Comment: Several comments concerned the indicators of non-adherence that NOAA may consider in deciding whether to invoke interim sanctions.

(a) One comment called for the development of national standards for judging the performance of state coastal zone management programs.

Response: Given the statutory flexibility given to states in designing the content and organization of their programs, NOAA has concluded that national standards applicable to all programs are infeasible at this time. NOAA has included several indicators on non-adherence which encompass the various approvable organizational structures of approved programs and which provide guidance to the states on what NOAA expects and on what basis NOAA would consider imposing interim sanctions.

(b) One comment cautioned NOAA not to rely on the new requirements of Sections 306(d) (14), (15), and (16) in assessing state performance until guidance has been issued to the states and they have had a reasonable opportunity to comply.

Response: NOAA agrees and has revised its indicators at § 928.5(a)(3)(i) (B) and (E) accordingly.

(c) One commenter stated that the regulatory requirements at § 923.40 (as referenced in § 928.5(a)(3)(i)(B)) did not become legally binding until April 1, 1978, and therefore should not be applied to state programs approved before that date.

Response: Although not applied retroactively, states whose programs were approved prior to April 1, 1978, were given a reasonable time to bring their programs into conformance with the new requirements. At this time, all approved programs have been found to comply with § 923.40.

(d) One commenter requested that the statutory and regulatory basis for requiring notice that a management program decision would conflict with a local zoning ordinance be set forth in § 928.5(a)(3)(i)(E).

Response: NOAA has done so.

(e) One comment expressed concern that the review standard of "non-compliance of local coastal programs with the approved state program [including] local permitting or zoning decisions that are inconsistent with state standards or criteria * * *" may be outside a state coastal zone management program's control.

Response: This indicator refers only to state coastal programs that have chosen the local coastal program form of organization. All of these programs must be found to have a legally enforceable mechanism to assure local coastal programs they approve will adhere to state standards or criteria. Therefore, if this indicator were truly outside the state coastal management program's control, that program would no longer be approvable.

(f) One comment requested NOAA define what it meant by "in a timely fashion" at § 928.5(a)(3)(i)(G).

Response: NOAA has modified this indicator to clarify that program changes must be submitted within the timeframes specified at §§ 923.81 and 923.84.

(g) One commenter recommended adding to the indicator at § 928.5(a)(3)(ii) consideration of the magnitude of the injury or threat to coastal resources caused by the non-adherence.

Response: NOAA's indicators encompass both procedural and substantive aspects of program performance. Although NOAA does not believe it is appropriate to modify the section indicated, NOAA does agree that its consideration of the substantive aspects of program performance should consider the on-the-ground impacts of a possible non-adherence issue.

Therefore, NOAA has modified § 928.5(a)(3)(i)(A) to encompass such consideration.

Comment: One comment concerned the proposed revisions to the regulations on withdrawal of program approval and financial assistance. That comment recommended NOAA increase the period for states to respond to a proposed notice of withdrawal from a maximum of 60 days to a maximum of 90 days, in light of NOAA's proposal to increase the period between regularly scheduled evaluations from 2 to 3 years.

Response: There is no relationship between the period of time between regularly scheduled evaluations and the period of time allowed for state response to a notice of withdrawal of program approval. NOAA believes 60 days for state response to the proposed withdrawal notice is sufficient.

B. Part 932—Coastal Zone Enhancement Grants

NOAA received many comments that were critical of its proposed regulations. However, NOAA believes the basic structure of its regulations is sound. NOAA believes the allocation of some funds by weighted formula and some by individual project evaluation and ranking provides a reasonable accommodation to state needs for longer-term predictable funding while assuring that the funds will go to the best projects. Therefore, although some changes have been made to address specific suggestions and to simplify the requirements where possible, the basic provisions contained in the proposed regulations remain unchanged.

Section 932.1 General

Comment: Seven comments expressed opinions about the general nature of the regulations.

(a) Several comments supported the enhancement grants program. One of them stated, however, that a state should not be punished if it did not participate in the program.

Response: The enhancement grants program under § 309 is a voluntary program. Failure to participate will in no way affect funding of base programs under § 306.

(b) One comment expressed concerns about the use of a weighted formula for any portion of the grants. The comment stated that the proposed weighting formula was too cumbersome, unnecessarily complex, and not in the spirit of the original CZMA.

Response: NOAA believes that a weighted formula is an appropriate method of carrying out CZMA's intent for NOAA to "rank and evaluate" proposals.

(c) Several comments stated major concerns about the competitive nature of grant awards.

Response: NOAA believes that Congress intended that section 309 grants be awarded through a competitive process.

(d) One comment recommended that an alternative process for allocating funds under section 309 be instituted for FY 92, and that the majority of the money be distributed using the same formula as for section 306 funding. Another commented that the rules should be adopted as "interim final" and finalized after experience is gained.

Response: NOAA believes that proceeding with the adoption of these regulations will not interfere with the fair and timely issuance of grants under these regulations for FY 92. NOAA does not believe that the intent of the CZMA is for NOAA to distribute these funds through the use of the section 306 formula. NOAA believes that the issue of potential amendments to the regulations is premature and that the

majority of issues can be addressed in periodic guidance documents.

Section 932.2 Objectives

Comment: Three comments concerned the objectives.

(a) Two comments stated that the regulations too narrowly defined the objectives in regards to demonstrable improvements in the way resources are managed. They cited section 309(a) and (d) to show that other methods of management may be warranted under the enhancement grant program.

Response: NOAA disagrees. The overriding factor in determining both the objectives and the definition of "program change" at § 932.3(a) is the use of the phrase "may make grants to coastal states to provide funding for development and submission for Federal approval of program changes." Therefore, no changes have been made to this section.

(b) One comment sought the addition of two objectives.

Response: The objectives in this section reflect the objectives in section 309(a) of the CZMA. NOAA does not believe that additional objectives can be added unless the CZMA is further amended.

Section 932.3 Definitions

Comment: Twenty-five respondents commented on the definition of "Program change". One comment stated that the definition should be tied directly to accomplishments such as routine program implementation (RPI) or program amendments and should not be used simply to implement existing programs. Twenty-three respondents (all coastal states and territories) felt the definition was much too narrow. The most frequent clarification was that the definition should include limited implementation of program improvements developed under section 309. Another frequently recommended expansion of the definition was to allow program improvements that were somehow under the threshold of RPI.

Response: NOAA believes that the objective of the enhancement grant program is "program changes", primarily enforceable policies. Historically, states have tended not to submit routine changes due to the amount of processing necessary to initiate these changes. NOAA will consider revising its guidance for routine program changes (called routine program implementation or RPI) to effectively reduce the amount of paperwork required of the states so that this enhancement grant program can run efficiently.

Comment: Two respondents offered comments on the definition of "Assessment".

(a) One commenter stated that the guidance for preparing an assessment should have to be submitted to public review just as the state must have public review as an integral part of the assessment process.

Response: NOAA routinely circulates draft guidance to the states and other interested parties for comment prior to initiating its use. The guidance is not of such a nature that it requires comment through a formal public notice process.

(b) One commenter stated that the proposed definition was too negative in that it only mentioned "problems" related to the enhancement objectives.

Response: NOAA agrees and has used the phrase "problems and opportunities" in the final regulations.

Comment: Two respondents offered comments on the definition of "Strategy". They felt that the strategy document was being too narrowly defined and that it should focus on a wider variety of issues and not necessarily identify all implementation methods that may be used. They pointed out that a part of the strategy may be to identify the tools.

Response: NOAA does not intend to exclude meaningful visionary elements from the strategy process, but must insist that the documents submitted have defined goals and objectives with paths and benchmarks to determine if the objectives are being met. While some "solutions" may not be evident at the beginning of the process, NOAA would like a clear, focused description of the process to be used to develop the enforceable policies required of the enhancement grant program.

Comment: Two respondents commented on the definition of "Fiscal needs". They stated that the definition combined with the requirements at § 932.6(b)(5)(i) are far greater than are required to adequately show fiscal need.

Response: NOAA is required to show that the Federal funds are needed by the state prior to making grant awards. The requirements at § 932.6(b) may seem extensive, yet are not meant to require lengthy analysis. Therefore, the language has been retained in the final regulations.

Comment: One respondent commented that the definition of "Assistant Administrator" needed to specifically define who would be the "designee".

Response: Delegation of Authority within NOAA will follow normal defined NOAA procedures. Accordingly, no change is needed to this definition.

Section 932.4 Allocation of Section 309 Funds

Comment: Twenty-one respondents commented that the base level of funding under section 306 should be maintained.

Response: NOAA agrees that a base dollar level of funding (based on FY 91 funding) should be maintained and will modify its guidance document accordingly. The guidance document is also being amended to reflect a three tier approach to funding: Base section 306 funding, a base weighted formula funding, and project of special merit (PSM) funding available annually on a competitive basis. Each of the three levels would be set annually after appropriation levels have been enacted. If less funds are appropriated than the previous year, the PSM funding would be reduced. If additional cuts are needed, weighted formula funding would be reduced, followed, as a last resort, by reductions in base section 306 funding.

Comment: Sixteen respondents commented on (b) the allocation of funds between sections 306 and 309. One party commented that the regulations should reflect Congressional intent by providing that the full 20 percent of CZM funding go to section 309 unless, due to lower than anticipated appropriations, base state programs would be impaired. Fifteen respondents recommended that the Assistant Administrator set the allocation to section 309 at the minimum (10 percent) level unless the base section 306 funding increased.

Response: NOAA believes that the funding levels should be set annually as a part of the guidance document after appropriation levels have been set by Congress. The rule merely repeats the language of section 309, and no change has been made.

Comment: Twenty-two respondents commented on (c) the allocation of funds between weighted formula and projects of special merit. Of these, one commenter recommended that at least 90 percent be allocated to weighted formula; four commented that at least 80 percent go to weighted formula; two stated 75 percent to weighted formula; one recommended at least 60 percent to weighted formula. The remainder stated that "as much as possible go to weighted formula" or "the allocation of funds be made as predictable as possible."

Response: NOAA is establishing, as a matter of policy, as previously stated in the response to comments on section 932.4(1) above, a base weighted formula

dollar amount rather than a ratio between weighted formula and projects of special merit. This will give the states more predictability in funding multi-year strategies and projects. This funding criterion will also appear in the guidance document.

Comment: Several respondents commented on section (d) weighted formula funding.

(a) Several commented on the range of weights as applied in the guidance.

Response: Section 932.4(d)(4) merely states that the Assistant Administrator may set a range of weights. NOAA believes that the actual range of weights should be set forth in the guidance document, as opposed to the regulations, so that it can be readily amended to reflect changes in funding levels and experience with managing the program.

(b) Several commented that the weighted formula process was much too complicated and subjective.

Response: NOAA has revised this section to clarify the actual process to be followed in the review of weighted formula projects which will make it less complex. In regard to the subjectivity comment, NOAA believes that the detailed process outlined in these regulations and the guidance document will ensure the objective application of the standards.

Comment: Eighteen respondents commented on (e) funding for projects of special merit. Of these, seventeen expressed their concern about interstate competition, and one expressed support for the process and recommended that there not be any caps placed on the amount that any one state should be able to receive.

Response: NOAA continues to believe that the projects of special merit are a vital part of the enhancement grants program. We are refining the FY 92 guidance document to address the issue of caps on individual state grants under this program. We believe that increasing the amount of funds available under weighted formula funding has made the projects of special merit (with lower funding levels) even more competitive and thus caps for individual states may not seem appropriate at this time. The guidance document is the appropriate place for discussion of these caps.

Section 932.5 Criteria for Section 309 Project Selection

Comment: Twenty respondents commented on the general project selection criteria.

(a) Nineteen of these respondents commented that the procedures outlined in the proposed regulations were much too complex and cumbersome.

Response: In an effort to make the application procedures less complicated, in addition to the changes made at § 932.5, other changes have been made. In § 932.6, pre-submission consultation is made optional. The regulations also clarify that the initial or draft proposal is in the same format and will contain the same information as the final application at § 932.7.

(b) One commented that NOAA should avoid the urge to "over-quantify" the process.

Response: NOAA believes that the process outlined in § 932.5 is an objective and fair process without unnecessary reliance on quantification.

Comment: Several parties commented on (b) the criteria for projects of special merit.

(a) One commenter stated that interstate projects should be given higher priority.

Response: The former section 309 of the CZMA dealing with interstate grants was repealed as a part of the 1990 Reauthorization. Therefore, projects of this type are ineligible for funding under the new section 309; however, they are eligible for funding under the new section 306, the Coastal Zone Management Fund.

(b) One respondent commented that the terms "overall benefit of the project to the public" and "transferability" should either not be used or should be defined prior to their use as evaluation criteria. Another respondent commented that "technical needs" should not be used an evaluation criteria.

Response: NOAA believes that all three of these criteria are appropriate and necessary evaluation measures.

Section 932.6 Pre-application Procedures

Comment: As stated at § 932.5, many commenters stated their opinion that the evaluation and application processes were too complex.

Response: NOAA has simplified the process in the final regulations. The "pre-submission consultation" has been made an optional process due to the high level of consultation that will be required during the assessment and strategy preparation. Further, the "pre-proposal" process has been clarified by renaming it the "draft proposal" to indicate that no additional information is required for the final application.

Comment: Two respondents commented that travel should be an eligible expense under the enhancement grants.

Response: NOAA agrees and has revised § 932.6(b) to include travel as an allowable expense.

Comment: One commenter suggested that a public review step be added to both the pre-proposal process and the strategy revision process.

Response: Public participation in the strategy amendment process may be required by the Assistant Administrator at § 932.8 if the changes significantly revise the scope of the approved strategy. Public participation at the draft proposal stage is not necessary due to the direct linkages to the assessment and strategy development processes.

Comment: One respondent recommended amending § 932.6(b)(3) to allow expenses for capital projects.

Response: NOAA disagrees. Congressional intent clearly indicates that enhancements be developed for coastal zone management programs.

Comment: One respondent commented that § 932.6(b)(8) be amended to allow states to submit proposals for more money than the weighted formula funding target, so as to put a state at an advantage to use funds not used by other states.

Response: NOAA has clarified its regulations accordingly. However, NOAA retains the right to choose which projects are funded with weighted formula or project of special merit funds if additional funds are available.

Comment: One respondent recommended that an additional requirement be added to § 932.6(c)(2) to ensure that technical advisors have a knowledge of the specific geographic area upon which they are commenting.

Response: NOAA agrees as a matter of policy to ensure regional representation of any external reviewers.

Section 932.7 Formal Application for Financial Assistance and Application Review and Approval Procedures

Comment: Eight respondents commented that interim regulations should be followed for FY 92 funding, as the time periods outlined in the guidance cannot be met.

Response: These comments generally refer to issues considered in the FY 92 guidance document. NOAA believes that proceeding with adoption of these regulations will not interfere with the fair and timely issuance of section 309 grants for FY 92.

IV. Other Actions Associated With the Notice of Proposed Rulemaking

A. Executive Order 12291: Regulatory Impact Analysis

Executive Order 12291 requires each Federal agency to determine if a regulation is a "major" rule as defined

by the Order and, "to the extent permitted by law," to prepare and consider a Regulatory Impact Analysis (RIA) in connection with every major rule. NOAA has concluded that this is not a "major" regulatory action, as defined by the Executive Order, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

These rules will provide for enhancement of State CZM programs in eight national objective areas and will improve the evaluation of their performance. The rules only serve to strengthen the framework for making rational coastal management decisions and will not result in any major direct or indirect economic or environmental impacts. Therefore, preparation of an RIA is not required.

B. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) requires Federal agencies to consider explicitly the effect of regulations on "small entities." A Regulatory Flexibility Analysis was not prepared for this regulatory action. This rule sets forth procedures for the Coastal Zone Enhancement Grants Program and review of performance. The rule affects only State governments, which are not "small government entities," as defined by the RFA. Since the rule will not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis, as defined under the Regulatory Flexibility Act of 1980 is not required.

C. Paperwork Reduction Act

The Paperwork Reduction Act is intended to minimize the reporting burden on the regulated community as well as minimize the cost of Federal information collection and dissemination. Information requirements of section 312—Review of Performance—embody existing procedures and do not constitute any increase in reporting on the part of any affected party.

The rule to implement section 309—Coastal Zone Enhancement Grants—contains a collection of information requirement subject to the Paperwork Reduction Act. This collection of information requirement is a one-time requirement for Assessments of State priority needs for improvement in the eight national priority areas and Strategies for making those improvements and is necessary to implement section 309(d) of the CZMA, as amended, which requires the Secretary of Commerce to identify each State's priority needs for improvement, after careful consultation with the States. These Assessments and Strategies will replace an existing reporting requirement (part C of the annual performance report) for FY 1991. Therefore, the paperwork burden has been minimized.

In addition, all States will be required to provide pre-proposals containing their proposed enhancement grant projects annually at the same time, in order that NOAA may carry out the individual evaluation and ranking of proposals required by statute and provide States with timely information on approved projects to include in their joint section 306/306A/309 financial assistance award applications. This procedure for pre-proposals will replace a similar procedure for interstate grants, authorization for which was repealed by the 1990 Reauthorization.

The request to collect this information has been approved by the Office of Management and Budget under section 3504(h) of that Act (OMB Control No. 0648-0119). Public reporting burden for this collection is estimated to average 480 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, completing and reviewing the collection of information, and developing the Assessments and Strategies. Comments on this estimate may be sent to:

The Office of Ocean and Coastal Resource Management, Policy Coordination Division, 1825 Connecticut Avenue, NW., Washington, DC 20235, Attention: Vickie A. Allin.

or

Office of Management and Budget, Paperwork Reduction Project (0648-0119), Washington, DC 20530.

D. National Environmental Policy Act (NEPA)

NOAA has determined that this regulatory action will not significantly affect the quality of the human environment. Therefore, an environmental assessment or environmental impact statement will not be prepared.

E. Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

List of Subjects

15 CFR Part 928

Administrative practice and procedure, Coastal zone, Grant programs—natural resources, and Natural resources.

15 CFR Part 932

Coastal zone, Grant programs—natural resources, Natural resources, and Reporting and recordkeeping requirements.

Dated: July 2, 1992.

W. Stanley Wilson,

Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, NOAA amends 15 CFR chapter IX as set forth below.

PART 928—REVIEW OF PERFORMANCE

1. The authority citation for part 928 is revised to read as follows:

Authority: Section 312 of the Coastal Zone Management Act, as amended (16 U.S.C. 1458).

2. Section 928.1 is revised to read as follows:

§ 928.1 General.

This part sets forth the requirements for review of approved State coastal zone management (CZM) programs pursuant to section 312 of the Act (16 U.S.C. 1458). This part defines "continuing review" and other important terms, and sets forth the procedures for:

(a) Conducting continuing reviews of approved State CZM programs;

(b) Providing for public participation;

(c) Invoking interim sanctions for non-adherence to an approved coastal zone management program or a portion of such program; and

(d) Withdrawing program approval and financial assistance.

3. Section 928.2 is amended by revising paragraphs (a), (c), (d), and (g) to read as follows:

§ 928.2 Definitions.

(a) *Continuing review* means monitoring State performance on an ongoing basis. As part of the continuing review, evaluations of approved CZM programs will be conducted and written findings will be produced at least once every three years.

* * * * *

(c) *Interim sanction* means suspension and redirection of any portion of financial assistance extended to any coastal State under this title, if the Secretary determines that the coastal State is failing to adhere to the management program or a State plan developed to manage a national estuarine reserve, or a portion of the program or plan approved by the Secretary, or the terms of any grant or cooperative agreement funded under this title.

(d) *Approved CZM program* means those elements of the program approved by the Secretary, under 15 CFR part 923 (Development and Approval Provisions), including any changes to those elements made by approved amendments and routine program implementation.

* * * * *

(g) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, or the NOAA Official responsible for directing the Federal Coastal Zone Management Program.

4. Section 928.3 is amended by revising the section heading, paragraphs (a), (b)(7), (c)(1)(ii), (c)(3) introductory text, and (c)(3)(iii); and by adding paragraphs (b) (8) and (9) to read as follows:

§ 928.3 Procedure for conducting continuing reviews of approved State CZM programs.

(a) As required by section 312(a), the Secretary shall conduct a continuing review of the performance of coastal States with respect to coastal management. Each review shall include a written evaluation with an assessment and detailed findings concerning the extent to which the State has implemented and enforced the program approved by the Secretary, addressed the coastal management needs identified in section 303(2)(A) through (K), and adhered to the terms of any grant, loan, or cooperative agreement funded under this title (16 U.S.C. 1451–1464).

(b) * * *

(7) The Assistant Administrator will issue final findings to the State CZM program manager and the head of the State CZM agency within 120 days of the last public meeting in the State. Copies of the final findings will be sent to all persons and organizations who participated in the evaluation. Participants may be asked to complete a card or sign-in sheet provided by the evaluation team indicating that they wish to receive the final findings. Notice of the availability of the final findings will also be published in the Federal Register.

(8) The final findings will contain a section entitled "Response to Written Comments." This section will include a summary of all written comments received during the evaluation and NOAA's response to the comments. If appropriate, NOAA's response will indicate whether NOAA agrees or disagrees with the comment and how the comment has been addressed in the final findings.

(9) The Assistant Administrator may conduct issue or problem-specific evaluations between scheduled evaluations of approved State CZM programs. Such issue or problem-specific evaluations will be conducted to follow-up on potentially serious problems or issues identified in the most recent scheduled evaluation or to evaluate evidence of potentially serious problems or issues that may arise during day-to-day monitoring of State performance of grants tasks or other program implementation activities in the interim between scheduled evaluations. If the Assistant Administrator conducts an issue or problem specific evaluation, he/she will comply with the procedures and public participation requirements of 15 CFR 928.3 and 928.4.

(c) * * *

(1) * * *

(ii) Addressed the coastal management needs identified in section 303(2) (A)–(K) (16 U.S.C. 1452); and

* * * * *

(3) Procedure for assessing how the State has addressed the coastal management needs identified in section 303(2) (A)–(K). The assessment of the extent to which the State has addressed the coastal management needs identified in section 303(2) (A)–(K) will occur as follows:

* * * * *

(iii) The findings concerning how the State has addressed the coastal management needs of section 303 will be used by the Assistant Administrator in negotiating the next financial assistance award.

* * * * *

5. Section 928.4 is amended by revising paragraphs (a), (b)(2), and (b)(3) to read as follows:

§ 928.4 Public participation.

(a) As required by section 312(b) of the Act, in evaluating a coastal State's performance, the Secretary shall conduct the evaluation in an open and public manner, and provide full opportunity for public participation, including holding public meetings in the State being evaluated and providing opportunities for the submission of written and oral comments by the public. The Secretary shall provide the public with at least 45 days notice of such public meetings by placing a notice in the Federal Register, by publication of timely notices in newspapers of general circulation within the State being evaluated, and by communications with persons and organizations known to be interested in the evaluation. Each evaluation shall be prepared in report form and shall include written responses to the written comments received during the evaluation process.

(b) *Requirements.* (1) * * *

(2) Each State will issue a notice of the public meeting(s) in its evaluation by placing a notice in the newspaper(s) of largest circulation in the coastal area where the meeting(s) is being held and by taking other reasonable action to communicate with persons and organizations known to be interested in the evaluation, such as sending a notice of the meeting(s) to persons on its mailing list and publishing a notice in its newsletter, at least 45 days before the date of the public meeting(s). The State will provide a copy of such notice to the Assistant Administrator. States are encouraged to republish the newspaper notice at least 15 days before the date of the public meeting(s). The State will inform the public that oral or written comments will be accepted and that attendance at the public meeting(s) is not necessary for submission of written comments.

(3) Notice of the availability of final findings will be published in the Federal Register. The notice will state that copies of the final findings will be available to the public upon written request. Copies of the final findings will be sent to persons and organizations who participated in the evaluation, in accordance with 15 CFR 928.3(b)(7).

6. Section 928.5 is amended by revising paragraphs (a), (b)(1), and (b)(2) (i) and (iii) to read as follows:

§ 928.5 Enforcement.

(a) *Procedures and criteria for invoking and lifting interim sanctions.* (1) As required by section 312(c) of the Act:

(i) The Secretary may suspend payment of any portion of financial assistance extended to any coastal State, and may withdraw any unexpended portion of such assistance, if the Secretary determines that the coastal State is failing to adhere to—

(A) The management program or a State plan developed to manage a national estuarine reserve established under section 315 of the Act (16 U.S.C. 1461), or a portion of the program or plan approved by the Secretary; or

(B) The terms of any grant or cooperative agreement funded under this title (16 U.S.C. 1451–1464).

(ii) Financial assistance may not be suspended under paragraph (a)(1)(i) of this section unless the Secretary provides the Governor of the coastal State with—

(A) Written specifications and a schedule for the actions that should be taken by the State in order that such suspension of financial assistance may be withdrawn; and

(B) Written specifications stating how those funds from the suspended financial assistance shall be expended by the coastal State to take the actions referred to in paragraph (a)(1)(ii)(A) of this section.

(iii) The suspension of financial assistance may not last for less than 6 months or more than 36 months after the date of suspension.

(2) *Requirements.* (i) The Assistant Administrator will identify the need for interim sanctions through the continuing review process. The Assistant Administrator will use the criteria at 15 CFR 928.5(a)(3) in determining when to invoke interim sanctions.

(ii) The Assistant Administrator will issue the State a preliminary finding of non-adherence with the approved CZM program, or a portion thereof, and/or with a term or terms of a grant or cooperative agreement. This preliminary finding of non-adherence may be contained in the draft evaluation findings, or in a preliminary notification letter to the State CZM program manager. If the preliminary finding is contained in a preliminary notification letter, the Assistant Administrator will comply with the applicable public participation requirements of section 312(b) and NOAA's regulations at 15 CFR 928.4. The draft evaluation findings or preliminary notification letter containing a preliminary finding of non-adherence will explain that if the finding of non-adherence is issued, the State is subject to suspension of financial assistance and, if the State fails to take the actions specified pursuant to section 312(c) and this part, to withdrawal of program approval and financial assistance.

(iii) The State will be given 30 days from receipt of the draft evaluation findings or preliminary notification letter to comment on and rebut the preliminary finding of non-adherence. During this 30-day period, the State may request up to 15 additional days to respond, for a maximum of 45 days from receipt of the draft evaluation findings or preliminary notification letter.

(iv) After considering the State's comments, the Assistant Administrator will decide whether or not to issue a final finding of non-adherence. If the Assistant Administrator decides to issue a final finding of non-adherence, he/she will do so in the final evaluation findings issued pursuant to section 312(b) or in a final notification letter as provided by paragraph (a)(2)(ii) of this section. The Assistant Administrator may invoke interim sanctions provided by section 312(c) immediately or at any time after issuing the final evaluation findings or final notification letter containing the finding of non-adherence, but not later than the next regularly scheduled evaluation.

(v) If the Assistant Administrator decides to invoke interim sanctions, he/she will do so by sending the final evaluation findings or final notification letter to the Governor of the State and the State CZM program manager. The final evaluation findings or final notification letter will contain the information required in section 312(c)(2)(A) and (B). This information will include the amount of financial assistance to be suspended and redirected, the actions the State should take in order to have the suspension withdrawn, how the suspended funds shall be expended to take the required actions, and a schedule for taking the required actions. The final evaluation findings or final notification letter will also contain the length of the suspension, which may not last for less than 6 months or more than 36 months. The Assistant Administrator will establish the length of the suspension based on the amount of time that is reasonably necessary for the State to take the required actions. If the State can take the required actions faster than expected, the suspension can be withdrawn early (but not in less than six months).

(vi) The State must respond to the final evaluation findings or final notification letter by developing a proposed work program to accomplish the required actions on the schedule set forth in the final evaluation findings or final notification letter. The State may propose an alternative approach to accomplishing the required actions and/or an alternative schedule. The Assistant Administrator's approval of the State's work program will signify his/her agreement with the approach and schedule for accomplishing the actions necessary to withdraw the suspension.

(vii) The Assistant Administrator will monitor State performance under the work program. This may involve additional direction to the State through the grant administration process and/or a visit to the State by appropriate NOAA program staff, evaluation staff and/or other experts to work with the State on a specific problem or issue. The Assistant Administrator will consider proposals to revise the work program on a case-by-case basis, providing that the State will still be able to accomplish the necessary actions within a maximum of 36 months.

(viii) The State must document that it has taken the required actions on the schedule established under this section. The State must provide its documentation in writing to the Assistant Administrator. The Assistant Administrator may conduct a follow-up evaluation or otherwise revisit the State at his/her discretion.

(ix) If the Assistant Administrator determines that the required actions have been taken, the Assistant Administrator will promptly notify the Governor and the State program manager, in writing, that NOAA has withdrawn the suspension of financial assistance. If, however, the State does not take the required actions, then the Assistant Administrator will invoke the final sanction provisions of section 312(d) on program termination and withdrawal of all financial assistance.

(3) *Criteria for invoking interim sanctions.* (i) The Assistant Administrator may consider the following indicators of non-adherence to an approved State CZM program in determining whether to invoke interim sanctions.

(A) Ineffective or inconsistent implementation of legally enforceable policies included in the CZM program. Indicators of ineffective or inconsistent implementation could include: evidence of non-compliance with core authorities by the regulated community; insufficient monitoring and inspecting of coastal development to ensure that it conforms to program requirements and applicable conditions; or inadequate enforcement action when development is found not to be in compliance with the program or permit under which it is authorized or is found to be an unpermitted activity. In applying this indicator, NOAA will consider any available evidence of the impacts of ineffective or inconsistent implementation on coastal resources.

(B) Inadequate monitoring of the actions of State and local agencies for compliance with the program. Indicators of inadequate monitoring of these agencies could include: evidence of non-compliance of networked agencies with the CZM program, unresolved conflicts between agencies regarding what constitutes compliance with the program, or lack of a mechanism to ensure that all State agencies will

adhere to the program or to approved local coastal programs pursuant to NOAA's regulations at 15 CFR 923.40 (and pursuant to new section 306(d)(15), after November 5, 1993 and after states have been given reasonable opportunity to comply with NOAA's implementing guidance).

(C) Non-compliance of local coastal programs with the approved State program. Indicators of non-compliance could include: Local permitting or zoning decisions that are inconsistent with State standards or criteria, widespread granting of variances such as to render a zoning program ineffective in meeting State standards or criteria, changes to local comprehensive plans or zoning maps that are inconsistent with State standards or criteria, or inadequate monitoring and enforcement, as described in paragraph (a)(3)(i)(A) of this section.

(D) Ineffective implementation of Federal consistency authority. Indicators of ineffective implementation could include: Not reviewing Federal activities, Federal licenses and permits, including offshore oil and gas exploration and development, and Federal financial assistance to State and local governments for consistency with the approved CZM program or employing review procedures that are not in accordance with State and NOAA regulations.

(E) Inadequate opportunity for intergovernmental cooperation and public participation in management program implementation. Indicators of inadequate opportunity could include: not carrying out procedures necessary to insure adequate consideration of the national interest in facilities which are necessary to meet requirements which are other than local in nature, not implementing effectively mechanisms for continuing consultation and coordination, not providing required notice that a management program decision would conflict with a local zoning ordinance, decision or other action pursuant to section 306(d)(3)(B)(i) and 15 CFR 923.57, or not providing opportunities for public participation in permitting processes, consistency determinations and other similar decisions pursuant to new section 306(d)(14) after November 5, 1993 and after states have been given reasonable opportunity to comply with NOAA's implementing guidance.

(F) Non-adherence to the terms of a grant or cooperative agreement, including the schedule for funded activities. The Assistant Administrator will also consider the extent to which priorities for expenditure of Federal funds reflect an appropriate priority for activities necessary to implement and enforce core program authorities effectively

(G) Not submitting changes to the approved program for Federal approval on a schedule developed pursuant to 15 CFR 923.81(c) and 923.84(b)(1)(i) or developing and implementing changes to the approved program without Federal approval which are inconsistent with the Act or the approved program or which result in a reduced level of protection of coastal resources.

(ii) The Assistant Administrator may consider whether an indication of non-adherence is of recent origin (in which case the State may be given a reasonable opportunity to correct it) or has been repeatedly brought to the State's attention without corrective action in determining whether to invoke interim sanctions.

(b) *Withdrawal of program approval and financial assistance.* (1) As required by sections 312(d) and 312(e) of the Act:

(i) The Secretary shall withdraw approval of the management program of any coastal State and shall withdraw financial assistance available to that State under this title as well as any unexpended portion of such assistance, if the Secretary determines that the coastal State has failed to take the actions referred to in paragraph (a)(1)(ii)(A) of this section.

(ii) Management program approval and financial assistance may not be withdrawn under paragraph (b)(1)(i) of this section, unless the Secretary gives the coastal State notice of the proposed withdrawal and an opportunity for a public hearing on the proposed action. Upon the withdrawal of management program approval under paragraph (b)(1)(i) of this section, the Secretary shall provide the coastal State with written specifications of the actions that should be taken, or not engaged in, by the State in order that such withdrawal may be canceled by the Secretary.

(2) *Requirements.* (i) If the Assistant Administrator determines that the State has not taken the actions required in 15 CFR 928.5(a)(2), the Assistant Administrator will provide the Governor and the State CZM program manager with written notice of this finding and NOAA's obligation to withdraw program approval and financial assistance under this title. The State will be given 30 days from receipt of this notice to respond with evidence that it has taken the actions specified pursuant to 15 CFR 928.5(a)(2). During this 30-day period, the State may request up to 30 additional days to respond, for a maximum of 60 days from receipt of notice.

(ii) * * *

(iii) If the State does not request a public hearing or submit satisfactory evidence that it has taken the actions specified pursuant to 15 CFR 928.5(a)(2) within 30 days of publication of this notice, and the Assistant Administrator determines that the State has failed to take the actions specified pursuant to 15 CFR 928.5(a)(2), the Assistant Administrator will withdraw program approval and financial assistance and will notify the State in writing of the decision and the reasons for it. The notification will set forth actions that must be taken by the State which would cause the Assistant Administrator to cancel the withdrawal.

* * * * *

7. Part 932 is revised to read as follows:

PART 932—COASTAL ZONE ENHANCEMENT GRANTS PROGRAM

Sec.

932.1 General.
932.2 Objectives.
932.3 Definitions.
932.4 Allocation of section 309 funds.
932.5 Criteria for section 309 project selection.
932.6 Pre-application procedures.
932.7 Formal application for financial assistance and application review and approval procedures.
932.8 Revisions to assessments and strategies.

Authority: Section 309 of the Coastal Zone Management Act, as amended (16 U.S.C. 1456).

§ 932.1 General.

(a) The purpose of this part is to set forth the criteria and procedures for awarding coastal zone enhancement grants under section 309 of the Coastal Zone Management Act, as amended (16 U.S.C. 1456). This part describes the criteria States must address in developing and implementing coastal zone enhancement objectives, the procedures for allocating section 309 funds between weighted formula and individual review of proposals of special merit, how the amount of section 309 weighted formula grants will be determined, the criteria NOAA will use to evaluate and rank individual proposals of special merit, and the procedures for applying for financial assistance under section 309.

(b) A coastal State with an approved program under section 306 of the Coastal Zone Management Act (CZMA), as amended (16 U.S.C. 1455), is eligible for grants under this part if the State meets the following requirements:

(1) The State must have a NOAA approved Assessment and Strategy,

submitted in accordance with NOAA guidance and 15 CFR 932.8;

(2) The State must be found to be adhering to its approved program and must be making satisfactory progress in performing grant tasks under section 306, as indicated by not being under interim or final sanctions; and

(3) The State must be making satisfactory progress in carrying out its previous year's award under section 309.

(c) If the Assistant Administrator finds that a State is not undertaking the actions committed to under the terms of a section 309 grant, the Assistant Administrator shall suspend the State's eligibility for future funding under this section for at least one year.

(d) A State's eligibility for future funding under this section will be restored after the State demonstrates, to the satisfaction of the Assistant Administrator, that it will conform with the requirements under this part.

(e) Funds awarded to States under section 309 are for the enhancement of existing coastal zone management programs. A State which reduces overall State financial support for its CZM program as a result of having been awarded section 309 funding may lose eligibility for funding under section 309 in subsequent years.

(f) All applications for funding under section 309 of the CZMA, as amended, including proposed work programs, funding priorities and funding awards, are subject to the administrative discretion of the Assistant Administrator and any additional NOAA guidance.

(g) Grants awarded under section 309 may be used to support up to 100 percent of the allowable costs of approved projects under section 309 of the CZMA, as amended.

(h) All application forms are to be requested from and submitted to: National Oceanic and Atmospheric Administration, Office of Ocean and Coastal Resource Management, Coastal Programs Division, 1825 Connecticut Avenue, NW., suite 724, Washington, DC 20235.

§ 932.2 Objectives.

(a) The objective of assistance provided under this part is to encourage each State with a federally-approved coastal management program to continually improve its program in specified areas of national importance. The Secretary is authorized to make grants to a coastal State for the development and submission for Federal approval of program changes that support attainment of one or more coastal zone enhancement objectives.

(b) As required by section 309(a) of the Act, for purposes of this part, the term "coastal zone enhancement objective" means any of the following objectives:

(1) Protection, restoration, or enhancement of the existing coastal wetlands base, or creation of new coastal wetlands.

(2) Preventing or significantly reducing threats to life and destruction of property by eliminating development and redevelopment in high-hazard areas, managing development in other hazard areas, and anticipating and managing the effects of potential sea level rise and Great Lakes level rise.

(3) Attaining increased opportunities for public access, taking into account current and future public access needs, to coastal areas of recreational, historical, aesthetic, ecological, or cultural value.

(4) Reducing marine debris entering the Nation's coastal and ocean environment by managing uses and activities that contribute to the entry of such debris.

(5) Development and adoption of procedures to assess, consider, and control cumulative and secondary impacts of coastal growth and development, including the collective effect on various individual uses or activities on coastal resources, such as coastal wetlands and fishery resources.

(6) Preparing and implementing special area management plans for important coastal areas.

(7) Planning for the use of ocean resources.

(8) Adoption of procedures and enforceable policies to help facilitate the siting of energy facilities and Government facilities and energy-related activities and Government activities which may be of greater than local significance.

§ 932.3 Definitions.

(a) *Program change* means "routine program implementation" as defined in 15 CFR 923.84 and "amendment" as defined in 15 CFR 923.80, and includes the following:

(1) A change to coastal zone boundaries that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(2) New or revised authorities, including statutes, regulations, enforceable policies, administrative decisions, executive orders, and memoranda of agreement/understanding, that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(3) New or revised local coastal programs and implementing ordinances that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(4) New or revised coastal land acquisition, management and restoration programs that improve a State's ability to attain one or more of the coastal zone enhancement objectives.

(5) New or revised Special Area Management Plans or plans for Areas of Particular Concern (APC), including enforceable policies and other necessary implementing mechanisms or criteria and procedures for designating and managing APCs that will improve a State's ability to achieve one or more of the coastal zone enhancement objectives.

(6) New or revised guidelines, procedures and policy documents which are formally adopted by a State and provide specific interpretations of enforceable CZM policies to applicants, local governments and other agencies that will result in meaningful improvements in coastal resource management and that will improve a State's ability to attain one or more of the coastal zone enhancement objectives.

(b) *Assessment* means a public document, prepared by a State and approved by NOAA in accordance with guidance on Assessments and Strategies issued by NOAA (hereafter referred to as the guidance [1]), that identifies the State's priority needs for improvement with regard to the coastal zone enhancement objectives. The Assessment determines the extent to which problems and opportunities exist with regard to each of the coastal zone enhancement objectives and the effectiveness of efforts to address those problems. The Assessment includes the factual basis for NOAA and the States to determine the priority needs for improvement of management programs in accordance with this Part.

(c) *Strategy* means a comprehensive, multi-year statement of goals and the methods for their attainment, prepared by a State in accordance with NOAA guidance and these regulations and approved by NOAA, that sets forth the specific program changes the State will seek to achieve in one or more of the coastal zone enhancement objectives. The Strategy will address only the

[1] NOAA guidance is available from the Office of Ocean and Coastal Resource Management, Coastal Programs Division, Universal South Building, room 724, 1825 Connecticut Avenue, NW., Washington, DC 20235.

priority needs for improvement identified by the Assistant Administrator, after careful consultation with the State. The strategy will include specific task descriptions, cost estimates and milestones, as appropriate.

(d) *Weighted Formula Project* means a project or task for which NOAA awards funding based on the criteria at 15 CFR 932.5(a). Such tasks are essential to meeting the milestones and objectives of each state's strategy. As funding for weighted formula tasks is more predictable than for projects of special merit, basic functions necessary to achieve the objectives of the strategy, such as hiring of full time staff should be included in weighted formula tasks.

(e) *Projects of Special Merit (PSM)* means a project or task that NOAA will rank and evaluate based on criteria at 15 CFR 932.5(b). As PSM funds will be awarded competitively on an annual basis, these projects should further the objectives of the strategy but may not be essential to meeting specific benchmarks in the strategy. PSM projects should not be dependent on long term levels of funding to succeed.

(f) *Fiscal needs* means the extent to which a State must rely solely on Federal funds to complete a project under section 309 because State funds are not otherwise available.

(g) *Technical needs* means the extent to which a State lacks trained personnel or equipment or access to trained personnel or equipment to complete a project under section 309.

(h) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, or the NOAA Official responsible for directing the Federal Coastal Zone Management Program.

§ 932.4 Allocation of section 309 funds.

(a)(1) As required by section 309(e) of the Act, a State will not be required to contribute any portion of the cost of any proposal for which funding is awarded under this section.

(2) As required by section 309(f) of the Act, beginning in fiscal year 1991, not less than 10 percent and not more than 20 percent of the amounts appropriated to implement sections 306 and 306A of the Act shall be retained by the Secretary for use in implementing this section, up to a maximum of $10,000,000 annually.

(b) The Assistant Administrator will annually determine the amount of funds to be devoted to section 309, which shall be not less than 10 percent nor more than 20 percent of the total amount appropriated under section 318(a)(2) of the Coastal Zone Management Act, as amended (16 U.S.C. 1464), taking into account the total amount appropriated under section 318(a)(2). The total amount of funds to be devoted to section 309 shall not exceed $10,000,000 annually.

(c) Of the total amount determined in paragraph (b) of this section, the Assistant Administrator will annually determine the proportion to be awarded to eligible coastal States by weighted formula and the proportion to be awarded to eligible coastal States for projects of special merit. This determination will take into account the total amount appropriated under section 318(a)(2) of the CZMA, as amended.

(d) *Weighted formula funding.* (1)(i) A weighted formula funding target will be determined for each State that meets the eligibility requirements at 15 CFR 932.1(b). The weighted formula funding target will be the State base allocation determined by the application of the formula at 15 CFR 927.1(c), multiplied by a weighting factor derived from the Assistant Administrator's evaluation and ranking of the quality of the State's Strategy (as described in (d)(1) of this section), as supported by the State's Assessment.

(ii) The application of the weighting factor may result in a weighted formula funding target that is higher or lower than the State's base allocation. Each State's weighted formula funding target will be adjusted to reflect the funds available.

(iii) The Assistant Administrator may establish minimum and maximum weighted formula funding targets under 15 CFR 932.4(d).

(2) The Assistant Administrator will determine each State's weighting factor based on an evaluation and ranking of the State's Strategy that takes into consideration the following:

(i) The scope and value of the proposed program change(s) contained in the Strategy in terms of improved coastal resource management;

(ii) The technical merits of the Strategy in terms of project design and cost effectiveness;

(iii) The likelihood of success that the State will have in attaining the proposed program change(s), including an evaluation of the State's past performance and support for the Strategy; and,

(iv) The fiscal and technical needs of the State.

(3) Each State will be notified individually of its weighting factor, the reasons for assigning this weighting factor, and any changes thereto. In consultation with the Assistant Administrator, a State may choose to make substantive changes to its approved Assessment and Strategy to improve its weighting factor, in accordance with the procedures at 15 CFR 932.8.

(e) *Funding for projects of special merit.* The Assistant Administrator will award the remaining section 309 funds, which are not awarded under 15 CFR 932.4(d), to States based on an annual evaluation and ranking of projects of special merit, as defined in 15 CFR 932.3(d). Funding of projects of special merit will be limited to the highest ranked projects based on the criteria at 15 CFR 932.5(b).

(f) The Assistant Administrator will notify each State annually of the total amount of funds to be devoted to section 309 pursuant to 15 CFR 932.4(b), the proportion to be awarded by weighted formula pursuant to 15 CFR 932.4(c), the State's weighted formula funding target pursuant to 15 CFR 932.4(d), and the total amount of funds available for funding for projects of special merit pursuant to 15 CFR 932.4(e).

§ 932.5 Criteria for section 309 project selection.

(a) *Section 309 criteria for weighted formula funding.*

(1) For those projects that will be funded by weighted formula, the Assistant Administrator will determine that:

(i) The project is consistent with the State's approved Assessment and Strategy and advances the attainment of the objectives of the Strategy;

(ii) Costs are reasonable and necessary to achieve the objectives of both the project and the Strategy. Allowability of costs will be determined in accordance with the provisions of OMB Circular A-87: Cost Principles for State and Local Governments [2];

(iii) The project is technically sound;

(iv) The State has an effective plan to ensure proper and efficient administration of the project; and

(v) The State has submitted the required project information as specified in 15 CFR 932.6(b)(1).

(2) In reviewing projects that will be considered under the weighted formula, the Assistant Administrator will take into consideration the fiscal and technical needs of proposing States and the overall merit of each proposal in terms of benefits to the public.

(b) *Section 309 criteria for evaluation and ranking of projects of special merit.* (1) After determining those projects that

[2] OMB Circular A-87: Cost Principles for State and Local Governments is available from the Office of Ocean and Coastal Resource Management, Policy Coordination Division, Universal South Building, room 701, 1825 Connecticut Avenue, NW., Washington, DC 20235.

will be funded under weighted formula funding, the Assistant Administrator will evaluate and rank State funding proposals of special merit which may be funded under 15 CFR 932.4(e).

(2) In addition to meeting the criteria in paragraph (a)(1) of this section, proposals will be evaluated and ranked under this subsection using the following criteria:

(i) *Merit.* (90 points) The Assistant Administrator will review each application to determine the following:

(A) Degree to which the project significantly advances the program improvements and leads to a program change identified in the State's Strategy. In making this determination, the Assistant Administrator shall consider the weighting factor derived from the evaluation of the quality of the State's Strategy, as supported by the State's Assessment, relative to the weighting factors assigned to other eligible States;

(B) Overall benefit of the project to the public relative to the project's cost;

(C) Innovativeness of the proposal;

(D) Transferability of the results to problems in other coastal States; and

(E) The State's past performance under section 309.

(ii) *Fiscal needs.* (5 points) The Assistant Administrator will review each application to determine the "fiscal needs" of a State as defined in 15 CFR 932.3(e).

(iii) *Technical needs.* (5 points) The Assistant Administrator will review each application to determine the "technical needs" of a State as defined in 15 CFR 932.3(f).

(c) Section 309 funds not awarded to States under § 932.5(a) will be awarded to States under 15 CFR 932.5(b).

§ 932.6 Pre-application procedures.

(a) *Pre-submission consultation.* Each State is strongly encouraged to consult with the Assistant Administrator prior to the submission of its draft proposal (see 15 CFR 932.6(b)) and formal application for section 309 funding. The purpose of the consultation will be to determine whether the proposed projects are consistent with the purposes and objectives of section 309 and with the State's approved Strategy, to resolve any questions concerning eligibility for funding under section 309 (see 15 CFR 932.1(b)), and to discuss preliminarily the State's recommendations regarding which projects should be funded by weighted formula and which projects should be individually evaluated and ranked as projects of special merit.

(b) *Draft proposals.* States shall submit draft proposals for section 309 funding annually on a schedule to be determined by the Assistant Administrator. These draft proposals shall contain all of the information needed for final application, including the following:

(1) A clear and concise description of the projects that the State proposes to be funded under section 309. This description shall explain the relationship of each proposed project to the State's approved Assessment and Strategy and how each proposed project will accomplish all or part of a program change that the State has identified in its Strategy. In addition, each project description shall include:

(i) A specific timetable for completion of each project;

(ii) A description of the activities that will be undertaken to complete each project and by whom;

(iii) The identification of any subawardees, pursuant to 15 CFR 923.95(d)(3)(ii); and

(iv) The estimated total cost for each project.

(2) Section 309 funds may be used for any of the following allowable uses which support the attainment of a program change:

(i) Personnel costs;

(ii) Supplies and overhead;

(iii) Travel;

(iv) Equipment (pursuant to 15 CFR part 24);

(v) Projects, studies and reports; and

(vi) Contractual costs including subcontracts, subawards, personal service contracts with individuals, memoranda of agreement/understanding, and other forms of passthrough funding for the purpose of carrying out the provisions of section 309.

(3) Funds may not be used for land acquisition or low cost construction projects.

(4) The State may recommend which projects should be funded by weighted formula under 15 CFR 932.5(a) and which projects should be funded as projects of special merit under 15 CFR 932.5(b).

(5) The draft proposal shall contain documentation of fiscal needs and technical needs, if any. This documentation shall include:

(i) For fiscal needs, information on the current State budget (surplus or deficit), the budget of the applying agency (increase or decrease over previous fiscal year), future budget projections, and what efforts have been made by the applying agency, if any, to secure additional State funds from the Legislature and/or from off-budget sources such as user fees; and

(ii) For technical needs, identification of the technical knowledge, skills and equipment that are needed to carry out proposed projects and that are not available to the applying agency, and what efforts the applying agency has made, if any, to obtain the trained personnel and equipment it needs (for example, through agreements with other State agencies).

(6) The Assistant Administrator may request additional documentation of fiscal and technical needs.

(7) Following the first year of funding under section 309, the draft proposal shall describe how the past year's work contributed to the attainment of a program change as defined in 15 CFR 932.3(a) in one or more of the coastal zone enhancement objectives.

(8) If the sum of estimated project costs for projects the State recommends be funded under 15 CFR 932.5(a) exceeds the State's weighted formula funding target pursuant to 15 CFR 932.4(d), NOAA shall determine, in consultation with the State, which projects are appropriate for funding with weighted formula funds.

(c) *Review of draft proposals.* (1) The Assistant Administrator will make the final determination of which projects should be funded by weighted formula and which projects should be funded as projects of special merit, taking into account the State's recommendations.

(2) The Assistant Administrator may seek advice from technical experts in the fields of the coastal zone enhancement objectives as to the technical soundness and overall merit of section 309 project proposals.

(3) The Assistant Administrator will make the final determinations on project selection using the criteria at 15 CFR 932.5(a) and evaluate and rank projects of special merit based on the criteria at 15 CFR 932.5(b).

(4) If the Assistant Administrator determines that a State's project proposal(s) for weighted formula funding fails to meet the criteria at 15 CFR 932.5(a), the Assistant Administrator may either reduce or deny the amount available to the State under 15 CFR 932.4(d).

(5) Each state will be notified of the results of the review of draft proposals, as described in paragraphs (c) (3) and (4) of this section, in time to include approved section 309 projects in their applications for financial assistance pursuant to subpart J of 15 CFR part 923.

§ 932.7 Formal application for financial assistance and application review and approval procedures.

(a) Applications for financial assistance under this part must be developed and submitted on the same

schedule as applications for financial assistance under subpart J of 15 CFR part 923.

(b) Applications for financial assistance under this part must be in a separate section of the application and must contain the information specified at 15 CFR 932.6(b)(1) for each approved section 309 project.

(c) Applications will be reviewed for conformance with the regulations at subpart J of 15 CFR part 923.

(d) States will be notified of their section 309 awards at the time they are notified of their section 306/306A awards.

(e) If the Assistant Administrator seeks technical advice pursuant to 15 CFR 932.6(c)(2), anonymous copies of the project reviews provided to the Assistant Administrator on projects proposed by a State will be made available to the State upon request after October 1 of each year.

§ 932.8 Revisions to assessments and strategies.

(a) A State, in consultation with the Assistant Administrator, may propose to revise its approved Strategy. Revision(s) to an approved Strategy must be submitted to and approved by the Assistant Administrator prior to the initiation of the contemplated change.

(b) The Assistant Administrator will review such proposed revision(s) and determine if public review and comment is required. This determination will be based on the extent to which the proposed revision(s) changes the original scope of the State's Strategy.

(c) If the Assistant Administrator determines that public review and comment is necessary, he/she will notify the State of his/her determination. The State will be required to provide public review and comment in accordance with NOAA guidance.

(d) A State that wants to revise substantively the program changes identified in its approved Strategy or to address new enhancement objectives not identified as a priority in the original Assessment, also must revise the Assessment through a public process as described in NOAA's guidance.

(e) The Assistant Administrator, in consultation with the State, may reduce a state's weighting factor assigned to its Strategy as a result of failure to meet the milestones in its Strategy.

(f) The Assistant Administrator will notify the State of his/her decision to approve or deny the proposed revision(s) to the Strategy, and any change in the weighting factor assigned to its Strategy.

[FR Doc. 92-16107 Filed 7-13-92; 8:45 am]
BILLING CODE 3510-08-M

6.
Part 929
Key Largo
National Marine Sanctuary
Final Regulations

period, the State may request up to 30 additional days to respond, for a maximum of 60 days from receipt of notice.

(ii) If the State does not respond satisfactorily within the time allowed, the agency will notify the State of intent to take the proposed action. This notice will be published in the FEDERAL REGISTER and will inform the State of its right to a public hearing.

(iii) If the State does not request a public hearing or submit satisfactory evidence of adherence or justification within 30 days of publication of this notice, the agency will decide whether to withdraw program approval and financial assistance and the agency will notify the State in writing of the decision and the reasons for it. The notification will set forth actions by the State which would cause the Secretary to cancel the withdrawal.

(iv) If the State requests a public hearing within 30 days of publication of the notice of intent to withdraw program approval and financial assistance, the Assistant Administrator will publish 30 days advance notice of the hearing in the FEDERAL REGISTER and the newspaper(s) of largest circulation in the State's coastal zone. The hearing will be held in a location convenient to the citizens of the State's coastal zone and a record of the hearing will be maintained. Within 30 days of the completion of the hearing, the agency will make the determination as set forth in paragraph (b)(2)(iii) of this section.

(3) If program approval and financial assistance are withdrawn pursuant to this section, a notice will be placed in the FEDERAL REGISTER and Federal consistency under section 307 of the Act will cease to apply to the State's CZM program.

PART 929—KEY LARGO NATIONAL MARINE SANCTUARY FINAL REGULATIONS

Sec.

929.1 Authority.
929.2 Purpose.
929.3 Boundaries.
929.4 Definitions.
929.5 Management and enforcement.
929.6 Allowed activities.
929.7 Activities prohibited or controlled.
929.8 Other authorities.
929.9 Penalties for commission of prohibited acts.
929.10 Permit procedures and criteria.
929.11 Appeals of administrative action.

AUTHORITY: Title III of Pub. L. 92-532, 86 Stat. 1061, 1062 (16 U.S.C. 1431-1434).

SOURCE: 48 FR 55118, Dec. 9, 1983, unless otherwise noted.

§ 929.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of the Marine Protection, Research and Sanctuaries Act of 1972 as amended (the Act). The following regulations are issued pursuant to Title III of the Act.

§ 929.2 Purpose.

The purpose of designating the Key Largo National Marine Sanctuary is to protect and preserve the coral reef ecosystem in its natural state and to regulate uses within the Sanctuary to ensure the health and well-being of the coral and associated flora and fauna.

§ 929.3 Boundaries.

The Sanctuary consists of a portion of the Atlantic Ocean beginning at approximately three miles east of Key Largo, Florida, adjacent to the John Pennekamp Coral Reef State Park. The coordinates for the Sanctuary are: The point of beginning (POB) is at geographic coordinates 25° (degrees), 19.45′ (minutes) north latitude, 80°, 12.0′ west longitude, said point being the northeast boundary corner of John Pennekamp Coral Reef State Park. From said POB run thence southeasterly to geographic coordinates 25°, 16.2′ north latitude 80°, 8.7′ west longitude, said point also being on the 300 foot isobath, thence in a southwesterly direction to geographic coordinates 25°, 07.5′ north latitude, 80°, 12.5′ west longitude, thence again run in a southwesterly direction to geographic coordinates 24°, 58.3′ north latitude, 80°, 19.8′ west longitude, thence leaving said 300 foot isobath run northwesterly to geographic coordinates 25°, 2.2′ north latitude, 80°,

25.25' west longitude, said point being the southeast boundary corner of John Pennekamp Coral Reef State Park, thence in a northeasterly direction along said easterly boundary of said State Park to the POB.

§ 929.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration (NOAA).

(b) "Assistant Administrator" means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration, or his/her successor, or designee.

(c) "Persons" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, or any State or local unit of the government.

(d) "The Sanctuary" means the Key Largo National Marine Sanctuary.

(e) "Tropical fish" means fish and invertebrates of minimal sport and food value, usually brightly colored, often used for aquaria purposes and which live in a close interrelationship with corals and coral reef substrates.

§ 929.5 Management and enforcement.

The National Oceanic and Atmospheric Administration (NOAA) has primary responsibility for the management of the Sanctuary pursuant to the Act. NOAA's responsibilities under the Act require that the Sanctuary Programs Division review, consider, and approve any activities that take place in the Sanctuary in accordance with these rules and regulations. The U.S. Coast Guard and the Florida Department of Natural Resources, Division of Recreation and Parks (FDNR) shall conduct surveillance and enforcement of these regulations pursuant to 14 U.S.C. 89, 16 U.S.C. 1432 (f)(4), 16 U.S.C. 7421 (b), 16 U.S.C. 3375 (a), or other appropriate legal authority.

§ 929.6 Allowed activities.

All activities except those specifically prohibited by § 929.7 or other applicable authority may be undertaken within the Sanctuary subject to the restrictions and conditions imposed by other authorities.

§ 929.7 Activities prohibited or controlled.

(a) Unless permitted by the Assistant Administrator in accordance with § 929.10, or as may be necessary for the national defense, or to respond to an emergency threatening life, property or the environment, the following activities are prohibited or controlled within the Sanctuary. All prohibitions and controls must be applied consistently with international law. Refer to § 929.9 for penalties for commission of prohibited acts.

(1) *Removal or damage of natural features, marine life and archaeological and historical resources.* (i) No person shall destroy, injure, harmfully disturb, break, cut or similarly damage or remove any coral or other marine invertebrate, or any plant, soil, rock, or other material, except that commercial taking of spiny lobster and stone crab by trap and recreational taking of spiny lobster by hand which is consistent with both the applicable regulations under the appropriate Fishery Management Plan and these regulations is allowed. Divers are prohibited from handling coral formations, standing on coral formations, or otherwise disturbing the corals.

(ii) No person shall catch or collect any tropical fish.

(iii) No person shall remove, deface, damage, or tamper with archaeological or historical resources or the cargo of any submerged wrecks or other historircal resources within the boundaries of the Sanctuary.

(iv) There shall be a rebuttable presumption that any items listed in these paragraphs found in the possession of a person within the Sanctuary have been collected or removed from within the Sanctuary.

(2) *Dredging, filling, excavating and building activities.* No person shall dredge, excavate, fill or otherwise alter the seabed in any way nor construct any structure of any kind, whether permanent or temporary, with the exception of navigation aids.

(3) *Discharges.* No person shall deposit or discharge any materials or substance of any kind into the waters

of the Sanctuary. The only exceptions are:

(i) Fish or fish parts and chumming materials;

(ii) Cooling waters from vessels; and

(iii) Effluent from marine sanitation devices approved by the United States Coast Guard.

(4) *Tampering with markers.* No person shall mark, deface or damage in any way whatsoever, or displace, remove or tamper with any signs, notices or placards, whether temporary of permanent, or with any navigational aids, monuments, stakes, posts, mooring buoys, scientific equipment or other boundary markers installed by the Sanctuary Manager, or trap floats placed for the purpose of lobster fishing.

(5) *Use of harmful fishing methods.* No person shall use within the Sanctuary, or shall carry or possess, except while passing without interruption through the Sanctuary or for law enforcement purposes, the following firearms or weapons: Pole spears, air rifles, bows and arrows, slings, Hawaiian slings, rubber powered arbaletes, pneumatic and spring loaded guns, explosive powered guns or similar devices known as spearguns. No person shall use within the Sanctuary:

(i) Wire fish traps;

(ii) Bottom trawls, dredges, fish sleds, or similar vessel-towed or anchored bottom fishing gear or net; or

(iii) Poisons, electric charges, explosives or similar devices.

(6) *Operation of watercraft and anchoring.* All watercraft shall be operated in accordance with applicable Federal rules and regulations. The following additional regulations apply within the boundaries of the Sanctuary.

(i) Watercraft shall be operated to avoid striking or otherwise causing damage to the natural features of the Sanctuary.

(ii) Watercraft must use mooring buoys, stations or anchoring arms when such facilities have been provided.

(iii) No anchor shall be cast or dragged in such a way as to damage any coral reef formations. Anchors shall be dropped only on sand flats off the reefs and be placed to avoid dragging into the coral formations.

(iv) Within 100 yards of divers, sightseeing boats or fishermen, no watercraft shall be operated at a speed greater than 4 knots or in any manner to create a wake, except by law enforcement officials while in the performance of their official duties.

(v) All watercraft from which diving operations are being conducted shall fly in a conspicuous manner the red and white "divers down" flag. Divers shall stay within 100 yards of their diving flag.

(7) *Use of dangerous weapons.* Except for law enforcement purposes, no person shall use or discharge explosives or weapons of any description within the Sanctuary boundaries. Distress signaling devices, necessary and proper for safe vessel operation, and knives generally used by fishermen and swimmers are not considered weapons for purposes of this subsection.

(b) The Sanctuary may be closed to public use in the event of emergency conditions endangering life or property. The Assistant Administrator or his/her designee may also close certain areas in order to permit recovery of the living resources from overuse, or provide for scientific research relating to protection and management. However, the total closed area shall not exceed a size necessary to accomplish these purposes. Public notice of closures will be provided through the local news media and posting of placards at the John Pennekamp Coral Reef State Park, if deemed necessary.

(c) The regulation of activities within the Sanctuary shall not prohibit any activity conducted by the Department of Defense that is essential for national defense or because of emergency. Such activities shall be conducted consistently with all regulations to the maximum extent possible.

(d) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is signatory.

§ 929.8 Other authorities.

No license, permit or other authorization issued pursuant to any other authority may validly authorize any activity prohibited by § 929.7 unless such activity meets the criteria stated in § 929.10 (a), (c) and (d), and is specifically authorized by the Assistant Administrator.

§ 929.9 Penalties for commission of prohibited acts.

Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding *in rem* against any vessel used in violation of any such regulation. NOAA will apply the consolidated civil procedure regulations set forth at 46 FR 61643 (1981) (to be codified at 15 CFR 904.100 through 904.243), and the seizure, forfeiture, and disposal procedure regulations set forth at 46 FR 31648 (1981) (to be codified at 50 CFR Part 219) to all enforcement matters under the Act.

§ 929.10 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct in the Sanctuary activities specified in the permit including any activity specifically prohibited under § 929.7, if such activity is: (1) Research related to the resources of the Sanctuary; (2) to further the educational value of the Sanctuary; or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to the Assistant Administrator, Attn: Sanctuary Programs Division, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, DC 20235. An application shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit, the Assistant Administrator shall evaluate such matters as: (1) The general professional and financial responsibility of the applicant; (2) the appropriateness of the methods being proposed to the purpose(s) of the activity; (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, education, or scientific information; and (4) the end value of the activity.

(d) In addition to meeting the criteria in § 929.10 (a) and (c), the applicant must also satisfactorily demonstrate to the Assistant Administrator:

(1) That adequate safeguards shall be provided to protect the environment; and (2) that the environment shall be returned to the condition which existed before the activity occurred.

Permits shall be appropriately conditioned, and monitored by NOAA to ensure compliance.

(e) In considering an application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of Regional Fishery Management Councils and any other person or entity, within or outside of the Federal government, and may hold a public hearing, as he/she deems appropriate.

(f) The Assistant Administrator may grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed necessary, and may attach to any permit granted for research related to the Sanctuary stipulations requiring that: (1) The Assistant Administrator or a designated representative may observe and monitor any activity permitted by this section; (2) any information obtained in the research site shall be made available to the public; (3) periodic reports of the status of progress of such activity be submitted; and (4) the permittee shall fly the Sanctuary research flag while working in the Sanctuary.

(g) A permit granted pursuant to this section is nontransferrable.

(h) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or Permittee has acted in violation of the terms of

the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or Permittee, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141 for use through October 31, 1986)

[48 FR 55118, Dec. 9, 1983, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 929.11 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, the applicant for a permit or the Permittee, or any other interested person (hereafter Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 929.10 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator may request the appellant, and the permit applicant or permittee if other than the appellant, to submit such additional information and in such form as will allow action upon the appeal. The Administrator shall decide the appeal using the criteria set out in § 929.10 (a), (c) and (d) and any information relative to the aplication on file, any information provided by the appellant, and such other consideration as is deemed appropriate. The Administrator shall notify the appellant of the final decision and the reason(s) therefor, in writing, normally within 30 days of the date of the receipt of adequate information required to make the decision.

(c) If a hearing is requested or, if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose, after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant or permittee if different, and, other interested persons may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the interested persons of his/her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's decision shall constitute final action for the Agency for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his/her own motion or upon written request from the appellant, permit applicant or permittee, stating the reason(s) therefor.

[48 FR 55118, Dec. 9, 1983, as amended at 49 FR 1041, Jan. 6, 1984]

PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

Subpart A—Objectives

Sec.

930.1 Overall objectives.

Subpart B—General Definitions

930.10 Index to definitions.
930.11 Act.
930.12 Section.
930.13 Secretary.

7.
Part 930
Federal Consistency with Approved Coastal Zone Management Programs

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(b) Upon receipt of an appeal authorized by this section, the Administrator may request the appellant, and the permit applicant or permittee if other than the appellant, to submit such additional information and in such form as will allow action upon the appeal. The Administrator shall decide the appeal using the criteria set out in § 929.10 (a), (c) and (d) and any information relative to the aplication on file, any information provided by the appellant, and such other consideration as is deemed appropriate. The Administrator shall notify the appellant of the final decision and the reason(s) therefor, in writing, normally within 30 days of the date of the receipt of adequate information required to make the decision.

(c) If a hearing is requested or, if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose, after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant or permittee if different, and, other interested persons may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the interested persons of his/her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's decision shall constitute final action for the Agency for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his/her own motion or upon written request from the appellant, permit applicant or permittee, stating the reason(s) therefor.

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PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

Subpart A—Objectives

Sec.

930.1 Overall objectives.

Subpart B—General Definitions

930.10 Index to definitions.
930.11 Act.
930.12 Section.
930.13 Secretary.

Sec.
930.14 Executive Office of the President.
930.15 OCZM.
930.16 Assistant Administrator.
930.17 Federal agency.
930.18 State agency.
930.19 Management program.
930.20 Coastal zone.
930.21 Associated facilities.

Subpart C—Consistency for Federal Activities

930.30 Objectives.
930.31 Federal activity.
930.32 Consistent to the maximum extent practicable.
930.33 Identifying Federal activities directly affecting the coastal zone.
930.34 Federal agency consistency determinations.
930.35 Federal and State agency coordination.
930.36 Availability of mediation for negative determination disputes.
930.37 Consistency determinations for proposed activities.
930.38 Consistency determinations for activities initiated prior to management program approval.
930.39 Content of a consistency determination.
930.40 Multiple Federal agency participation.
930.41 State agency response.
930.42 State agency disagreement.
930.43 Availability of mediation for disputes concerning proposed activities.
930.44 Availability of mediation for previously reviewed activities.

Subpart D—Consistency for Activities Requiring a Federal License or Permit

930.50 Objectives.
930.51 Federal license or permit.
930.52 Applicant.
930.53 Management program license and permit listing.
930.54 Unlisted Federal license and permit activities.
930.55 Availability of mediation for license or permit disputes.
930.56 State agency guidance and assistance to applicants; information requirements.
930.57 Consistency certifications.
930.58 Necessary data and information.
930.59 Multiple permit review.
930.60 Commencement of State agency review.
930.61 Public notice.
930.62 Public hearings.
930.63 State agency concurrence with a consistency certification.
930.64 State agency objection to a consistency certification.
930.65 Federal permitting agency responsibility.
930.66 Availability of mediation for previously reviewed activities.

Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities

930.70 Objectives.
930.71 Federal license or permit activity described in detail.
930.72 Person.
930.73 OCS plan.
930.74 OCS activities subject to State agency review.
930.75 State agency assistance to persons; information requirements.
930.76 Submission of an OCS plan and consistency certification.
930.77 Necessary data and information.
930.78 Commencement of State agency review; public notice.
930.79 State agency concurrence or objection.
930.80 Effect of State agency concurrence.
930.81 Federal permitting agency responsibility.
930.82 Multiple permit review.
930.83 Amended or new OCS plans.
930.84 Review of amended or new OCS plans; public notice.
930.85 Continuing State agency objections.
930.86 Failure to comply substantially with an approved OCS plan.

Subpart F—Consistency for Federal Assistance to State and Local Governments

930.90 Objectives.
930.91 Federal assistance.
930.92 Applicant agency.
930.93 Intergovernmental review process.
930.94 State intergovernmental review process for consistency.
930.95 Guidance provided by the State agency.
930.96 Consistency review.
930.97 Federal assisting agency responsibility.
930.98 Federally assisted activities outside of the coastal zone or the described geographic area.
930.99 Availability of mediation for Federal assistance disputes.
930.100 Availability of mediation for previously reviewed activities.

Subpart G—Secretarial Mediation

930.110 Objectives.
930.111 Informal negotiations.
930.112 Request for mediation.
930.113 Public hearings.
930.114 Secretarial mediation efforts.

Sec.
930.115 Termination of mediation.
930.116 Judicial review.

Subpart H—Secretarial Review Related to the Objectives or Purposes of the Act and National Security Interests

930.120 Objectives.
930.121 Consistent with the objectives or purposes of the Act.
930.122 Necessary in the interest of national security.
930.123 Appellant.
930.124 Informal discussions.
930.125 Appeals to the Secretary.
930.126 Federal and State agency responses to appeals.
930.127 Public notice; receipt of comments.
930.128 Dismissal of appeals.
930.129 Public hearings.
930.130 Secretarial review.
930.131 Federal agency responsibility.
930.132 Review initiated by the Secretary.
930.133 Public notice; receipt of comments; public hearings.
930.134 Secretarial review; Federal agency responsibility.

Subpart I—Assistant Administrator Reporting and Continuing Review of Federal Actions Subject to the Federal Consistency Requirements

930.140 Objectives.
930.141 Notification of Federal actions believed to be inconsistent with approved management programs.
930.142 Notification of Federal actions believed to have been incorrectly determined to be inconsistent with an approved management program.
930.143 Assistant Administrator reporting.
930.144 Assistant Administrator advisory statements.
930.145 Review of the implementation of the Federal consistency provisions.

AUTHORITY: Secs. 307, 316 and 317, Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280 (16 U.S.C. 1451 et seq.), as amended by Pub. L. 94-370, 90 Stat. 1013.

SOURCE: 44 FR 37143, June 25, 1979, unless otherwise noted.

Subpart A—Objectives

§ 930.1 Overall objectives.

The objectives of these regulations are: (a) To describe the obligations of all agencies, individuals and other parties who are required to comply with the Federal consistency provisions of the Coastal Zone Management Act;

(b) To implement the Federal consistency provisions in a manner which strikes a balance between the need to ensure consistency for Federal actions affecting the coastal zone with approved coastal management and the need to promote Federal programs;

(c) To provide flexible procedures which foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay, while making certain that the objectives of the Federal consistency provisions of the Act are satisfied;

(d) To interpret significant terms in the Federal consistency provisions so that they can be uniformly understood and adhered to by all agencies, individuals and other affected parties;

(e) To provide procedures to make certain that all Federal agency and State agency consistency decisions are directly related to the objectives, policies, standards and other criteria set forth in, or referenced as part of, approved coastal management programs;

(f) To provide procedures which the Secretary, in cooperation with the Executive Office of the President, may use to mediate serious disagreements which arise between Federal and State agencies during the administration of approved coastal management programs;

(g) To provide procedures which permit the Secretary to review Federal license or permit activities, or Federal assistance activities, to determine whether they are consistent with the objectives or purposes of the Act, or are necessary in the interest of national security;

(h) To provide procedures which permit interested parties to notify the Assistant Administrator for Coastal Zone Management of Federal actions believed to be inconsistent with approved coastal management programs, or believed to have been incorrectly determined to be inconsistent with an approved management program; and

(i) To provide procedures for the reporting of any Federal actions found by the Assistant Administrator for Coastal Zone Management to be inconsistent with an approved coastal zone management program, and for the performance review of State im-

plementation of the Federal consistency provisions.

Subpart B—General Definitions

§ 930.10 Index to definitions.

The following list includes all terms defined in Part 930 of this title keyed to the section or paragraph in which they are defined.

Term	Section
Act	930.11
Appellant	930.123
Applicant	930.52
Applicant agency	930.92
Assistant Administrator	930.16
Associated facilities	930.21
Coastal Zone	930.29
Consistent to the maximum extent practicable	930.32
Consistent with the objectives or purposes of the Act	930.121
Development project	930.31(b)
Executive Office of the President	930.14
Failure substantially to comply with an OCS plan	930.66(d)
Federal activity	930.31
Federal agency	930.17
Federal assistance	930.91
Federal license or permit	930.51
Federal license or permit activity described in detail	930.71
Management program	930.19
Necessary in the interest of national security	930.122
OCS plan	930.73
OCZM	930.15
OMB A-95 process	930.93
Person	930.72
Secretary	930.13
Section	930.12
State agency	930.18

§ 930.11 Act.

The term "Act" means the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.).

§ 930.12 Section.

The term "Section" means a section of the Coastal Zone Management Act of 1972, as amended.

§ 930.13 Secretary.

The term "Secretary" means the Secretary of the U.S. Department of Commerce.

§ 930.14 Executive Office of the President.

The term "Executive Office of the President" means the office, council, board, or other entity within the Executive Office of the President which shall participate with the Secretary in seeking to mediate serious disagreements which may arise between a Federal agency and a coastal State.

§ 930.15 OCZM.

The term "OCZM" means the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 930.16 Assistant Administrator.

The term "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 930.17 Federal agency.

The term "Federal agency" means any department, agency, board, commission, council, independent office or similar entity within the executive branch of the Federal government, or any wholly owned Federal government corporation.

§ 930.18 State agency.

(a) The term "State agency" means the agency of the State government designated pursuant to section 306(c)(5) of the Act to receive and administer grants for an approved coastal management program, or a single designee State agency appointed by the 306(c)(5) State agency. Any appointment by the 306(c)(5) State agency of a designee agency must be described in the State's management program. In the absence of such description, all consistency determinations, consistency certifications and Federal assistance proposals shall be sent to and reviewed by the 306(c)(5) State agency.

(b) The State agency is responsible for commenting on Federal agency consistency determinations (see Subpart C of this part), concurring with or objecting to consistency certifications for Federal licenses, permits, and Outer Continental Shelf plans (see Subparts D and E of this part), and reviewing the consistency of Federal assistance activities proposed by State or local government agencies (see Subpart F of this part). The State agency

shall be responsible for securing necessary review and comment from other State, regional, or local government agencies. Thereafter, only the State agency is authorized to comment officially on a Federal consistency determination, concur with or object to a consistency certification, or determine the consistency of a proposed Federal assistance activity.

§ 930.19 Management program.

The term "management program" has the same definition as provided in section 304(11) of the Act, except that for the purposes of this part the term is limited to those management programs adopted by a coastal State in accordance with the provisions of section 306 of the Act, and approved by the Assistant Administrator.

§ 930.20 Coastal zone.

The term "coastal zone" has the same definition as provided in section 304(1) of the Act.

§ 930.21 Associated facilities.

The term "associated facilities" describes all proposed facilities:

(a) Which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a Federal action (e.g., activity, development project, license, permit, or assistance), and

(b) Without which the Federal action, as proposed, could not be conducted.

All further requirements in this part related to the review of and consistency for Federal activities including development projects (see Subpart C of this part), Federal license and permit activities (see Subparts D and E of this part) and Federal assistance activities (see Subpart F of this part) also apply to associated facilities related to those Federal actions. Therefore, the proponent of a Federal action must consider whether the Federal action and its associated facilities affect the coastal zone and, if so, whether these interrelated activities satisfy the relevant consistency requirement of the Act.

Subpart C—Consistency for Federal Activities

§ 930.30 Objectives.

The provisions of this subpart are provided to assure that all federally conducted or supported activities including development projects directly affecting the coastal zone are undertaken in a manner consistent to the maximum extent practicable with approved State coastal management programs.

§ 930.31 Federal activity.

(a) The term "Federal activity" means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities.

(b) A Federal development project is a Federal activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization, or disposal of land or water resources.

(c) The term "Federal activity" does not include the issuance of a Federal license or permit to an applicant or person (see Subparts D and E of this part) or the granting of Federal assistance to an applicant agency (see Subpart F of this part).

§ 930.32 Consistent to the maximum extent practicable.

(a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program.

The duty the Act imposes upon Federal agencies is not set aside by virtue of

section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c) (1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program.

§ 930.33 Identifying Federal activities directly affecting the coastal zone.

(a) Federal agencies shall determine which of their activities directly affect the coastal zone of States with approved management programs.

(b) Federal agencies shall consider all development projects within the coastal zone to be activities directly affecting the coastal zone. All other types of activities within the coastal zone are subject to Federal agency review to determine whether they directly affect the coastal zone.

(c)(1) Federal activities outside of the coastal zone, as defined in Section 304(1) of the Act, are subject to Federal agency review to determine whether they directly affect the coastal zone.

(2) OCS oil and gas lease sale activities conducted pursuant to the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*) are not Federal activities which directly affect the coastal zone within the meaning of Section 307(c)(1) of the Act, and, therefore, are not subject to review under this Subpart.

[44 FR 37143, June 25, 1979, as amended at 50 FR 35213, Aug. 30, 1985]

§ 930.34 Federal agency consistency determinations.

(a) Federal agencies shall provide State agencies with consistency determinations for all Federal activities directly affecting the coastal zone. The Federal agency may provide the State agency with this information in any manner it chooses so long as the requirements of this subpart are satisfied.

(b) Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of sufficient information to determine reasonably the consistency of the activity with the State's management program, but before the Federal agency reaches a significant point of decisionmaking in its review process. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to an alternative notification schedule.

§ 930.35 Federal and State agency coordination.

(a) State agencies should list in their management programs Federal activities which, in the opinion of the State agency, are likely to directly affect the coastal zone and require a Federal agency consistency determination. Listed Federal activities must be described in terms of the specific type of activity involved (e.g., Federal reclamation projects). In the event the State agency chooses to describe Federal activities outside of the coastal zone but likely to directly affect the coastal zone, it must also describe the geographic location of such activities (e.g., reclamation projects in coastal floodplains).

(b) State agencies should monitor unlisted Federal activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review, review of National Environmental Policy Act (NEPA) environmental impact statements, etc.) and should notify Federal agencies of unlisted Federal activities which Federal agencies have not subjected to a consistency review but which, in the opinion of the State agency, directly affect the coastal zone and require a Federal

agency consistency determination. State agencies must notify Federal agencies within 45 days from receipt of notice of the unlisted Federal activity, otherwise the State agency waives its right to request a consistency determination. The waiver does not apply in cases where the State agency does not receive notice of the Federal activity (e.g., for those Federal activities which are not processed through Intergovernmental Review Process established pursuant to E.O. 12372, NEPA review or a similar procedure which permits State agency monitoring).

(c) The recommended listing and monitoring procedures described in paragraphs (a) and (b) of this section are neither a substitute for nor eliminate Federal agency responsibility under §§ 930.33(b) and 930.34 to provide State agencies with consistency determinations for all development projects in the coastal zone and for all other Federal activities which the Federal agency finds directly affect the coastal zone.

(d) If a Federal agency decides that a consistency determination is not required for a Federal activity (1) identified by a State agency on its list or through case-by-case monitoring, (2) which is the same as or similar to activities for which consistency determinations have been prepared in the past, or (3) for which the Federal agency undertook a thorough consistency assessment and developed initial findings on the effects of the activity on the coastal zone, the Federal agency shall provide the State agency with a notification, at the earliest practicable time in the planning of the activity, briefly setting forth the reasons for its negative determination. A negative determination shall be provided to the State agency at least 90 days before final approval of the activity, unless both the Federal agency and the State agency agree to an alternative notification schedule.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 930.36 Availability of mediation for negative determination disputes.

In the event of a serious disagreement between a Federal agency and a State agency regarding a determination related to whether a proposed activity directly affects the coastal zone, either party may seek the Secretarial mediation services provided for in Subpart G.

§ 930.37 Consistency determinations for proposed activities.

(a) Federal agencies shall review their proposed Federal activities which directly affect the coastal zone in order to develop consistency determinations which indicate whether such activities will be undertaken in a manner consistent to the maximum extent practicable with approved State management programs. Federal agencies are encouraged to consult with State agencies during their efforts to assess whether such activities will be consistent to the maximum extent practicable with such programs.

(b) In cases where Federal agencies will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal, etc.) which cumulatively has a direct effect upon the coastal zone, the agency may develop a general consistency determination thereby avoiding the necessity of issuing separate consistency determinations for each incremental action controlled by the major activity. A general consistency determination may only be used in situations where the incremental actions are repetitive or periodic, substantially similar in nature, and do not directly affect the coastal zone when performed separately. If a Federal agency issues a general consistency determination, it must thereafter periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken.

(c) In cases where the Federal agency has sufficient information to determine the consistency of a proposed development project from planning to completion, only one consist-

ency determination will be required. However, in cases where major Federal decisions related to a proposed development project will be made in phases based upon developing information, with each subsequent phase subject to Federal agency discretion to implement alternative decisions based upon such information (e.g., planning, siting, and design decisions), a consistency determination will be required for each major decision. In cases of phased decisionmaking, Federal agencies shall ensure that the development project continues to be consistent to the maximum extent practicable with the State's management program.

§ 930.38 Consistency determinations for activities initiated prior to management program approval.

(a) A consistency determination will be required for ongoing Federal activities other than development projects (e.g., waste disposal practices) initiated prior to management program approval, which are governed by statutory authority under which the Federal agency retains discretion to reassess and modify the activity. In these cases the consistency determination must be made by the Federal agency at the earliest practicable time following management program approval, and the State agency must be provided with a consistency determination no later than 120 days after management program approval for ongoing activities which the State agency lists or identifies through monitoring as subject to consistency with the management program.

(b) A consistency determination shall be required for major, phased Federal development project decisions described in § 930.37(c) which are made following management program approval and are related to development projects initiated prior to program approval. In making these new decisions, Federal agencies shall consider coastal zone effects not fully evaluated at the outset of the project. This provision shall not apply to phased Federal decisions which were specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement issued pursuant to the National Environmental Policy Act).

§ 930.39 Content of a consistency determination.

(a) The consistency determination shall include a brief statement indicating whether or not the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the management program. The statement must be based upon an evaluation of the relevant provisions of the management program. The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the statement evaluation, activity description and supporting information shall be commensurate with the expected effects of the activity on the coastal zone.

(b) Federal agencies shall be guided by the following in making their consistency determinations. The activity (e.g., project siting and constuction), its direct effects (e.g., air, water, waste discharges, etc.), and associated facilities (e.g., proposed siting and construction of access road, connecting pipeline, support buildings, etc.) and the direct effects of the associated facilities (e.g., erosion, wetlands, beach access impacts, etc.) must all be consistent to the maximum extent practicable with the management program. Although nonassociated facilities (e.g., recreational housing which is induced by but not necessarily related to a Federal harbor dredging project—see § 930.21) must be included within the consistency determination's description of the direct effects of the activity, Federal agencies are not responsible for evaluating the consistency of such facilities.

(c) In making their consistency determinations, Federal agencies shall give appropriate weight to the various types of provisions within the management program. Federal agencies must ensure that their activities are consistent to the maximum extent practicable with the enforceable, mandatory

policies of the management program. However, Federal agencies need only give adequate consideration to management program provisions which are in the nature of recommendations. Finally, Federal agencies do not have to evaluate coastal zone effects for which the management program does not contain mandatory or recommended policies because, in the absence of such provisions, there is no basis for making a consistency determination with respect to such effects.

(d) When Federal agency standards are more restrictive than standards or requirements contained in the State's management program, the Federal agency may continue to apply its stricter standards (e.g., restrict project development or design alternatives notwithstanding permissive management program policies). In such cases the Federal agency should inform the State agency in the consistency determination of the statutory, regulatory or other basis for the application of the stricter standards.

§ 930.40 Multiple Federal agency participation.

Whenever more than one Federal agency is involved in conducting or supporting a Federal activity or its associated facilities directly affecting the coastal zone, or is involved in a group of Federal activities related to each other because of their geographic proximity, consideration should be given to the preparation of one consistency determination for all the Federal activities involved. In such cases, Federal agencies should consider joint preparation or lead agency development of the consistency determination. In either case, the consistency determination (a) must be transmitted to the State agency at least 90 days before final decisions are taken by any of the participating agencies, (b) must indicate whether or not each of the proposed activities is consistent to the maximum extent practicable with the management program, and (c) must include information on each proposed activity sufficient to support the consistency determination.

§ 930.41 State agency response.

(a) A State agency shall inform the Federal agency of its agreement or disagreement with the Federal agency's consistency determination at the earliest practicable time. If a final response has not been developed and issued within 45 days from receipt of the Federal agency notification, the State agency should at that time inform the Federal agency of the status of the matter and the basis for further delay. The Federal agency may presume State agency agreement if the State agency fails to provide a response within 45 days from receipt of the Federal agency notification.

(b) State agency agreement shall not be presumed in cases where the State agency, with the 45 day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the consistency determination.

(c) Final Federal agency action may not be taken sooner than 90 days from the issuance of the consistency determination to the State agency unless both the Federal agency and the State agency agree to an alternative period (see § 930.34(b)).

§ 930.42 State agency disagreement.

(a) In the event the State agency disagrees with the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the disagreement and supporting information. The State agency response must describe (1) how the proposed activity will be inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the management program.

(b) If the State agency's disagreement is based upon a finding that the Federal agency has failed to supply

sufficient information (see § 930.39(a)), the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal activity with the management program.

(c) State agencies shall send to the Assistant Administrator a copy of responses which describe disagreements with Federal agency consistency determinations.

§ 930.43 Availability of mediation for disputes concerning proposed activities.

(a) In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed Federal activity directly affecting the coastal zone, either party may request the Secretarial mediation services provided for in Subpart G.

§ 930.44 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally approved activities in order to make certain that such activities continue to be undertaken in a manner consistent, to the maximum extent practicable, with the State's management program.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency's objection to a Federal activity which was: (1) Previously determined to be consistent to the maximum extent practicable with the State's management program, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, is no longer consistent to the maximum extent practicable with the State's management program, or (2) previously determined not to be a Federal activity directly affecting the coastal zone, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, the activity directly affects the coastal zone and is not consistent to the maximum extent practicable with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists, either party may request the Secretarial mediation services provided for in Subpart G.

Subpart D—Consistency for Activities Requiring a Federal License or Permit

§ 930.50 Objectives.

The provisions of this subpart are provided to assure that Federally licensed or permitted activities affecting the coastal zone are conducted in a manner consistent with approved management programs.

§ 930.51 Federal license or permit.

(a) The term "Federal license or permit" means any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant.

(b) The term also includes the following types of renewals and major amendments which affect the coastal zone:

(1) Renewals and major amendments of Federal license and permit activities not previously reviewed by the State agency;

(2) Renewals and major amendments of Federal license and permit activities previously reviewed by the State agency which are filed after and are subject to management program amendments not in existence at the time of original State agency review; and

(3) Renewals and major amendments of Federal license and permit activities previously reviewed by the State agency which will cause coastal zone effects substantially different than those originally reviewed by the State agency.

§ 930.52 Applicant.

The term "applicant" means any individual, public or private corporation,

partnership, association, or other entity organized or existing under the laws of any State, or any State, regional, or local government, who, following management program approval, files an application for a Federal license or permit to conduct an activity affecting the coastal zone. The term "applicant" does not include Federal agencies applying for Federal licenses or permits. Federal agency "activities" requiring Federal licenses or permits are subject to the consistency requirements of Subpart C of this part.

§ 930.53 Management program license and permit listing.

(a) During management program development, Federal agencies should assist State agencies in identifying Federal license and permit activities which reasonably can be expected to affect the coastal zone.

(b) State agencies shall develop a list of Federal license and permit activities which are likely to affect the coastal zone and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the Federal license and permit activities shall be described in terms of the specific licenses or permits involved (e.g., Corps of Engineers 404 permits, Coast Guard bridge permits, etc.). In the event the State agency chooses to review Federal licenses and permits for activities outside of the coastal zone but likely to affect the coastal zone, it must generally describe the geographic location of such activities.

(c) If a State agency wishes to avoid repeated review of minor Federally permitted activities which, while individually inconsequential, cumulatively cause effects on the coastal zone, the State agency, after developing conditions allowing concurrence for such activities, may issue a general public notice (see § 930.61) and general concurrence allowing similar minor work in the same geographic area to proceed without prior State agency review. In such cases, the State agency must set forth in the management program license and permit list the minor Federal license and permit activities and the relevent conditions which are covered by the general concurrence. Minor Federal license or permit activities which satisfy the conditions of the general concurrence are not subject to the consistency certification requirement of this subpart. Except in cases where the State agency indicates otherwise, copies of Federal license or permit applications for activities subject to a general concurrence must be sent by the applicant to the State agency to allow the State agency to monitor adherence to the conditions required by such concurrence. Confidential and proprietary material within such applications may be deleted.

(d) The license and permit list may be amended by the State agency following consultation with the affected Federal agency and approval of additions or deletions by the Assistant Administrator. The State agency shall provide copies of the list and any amendments to Federal agencies and shall make the information available to the public.

(e) No Federal license or permit described on an approved list shall be issued by a Federal agency until the requirements of this subpart have been satisfied. Federal agencies shall inform applicants for listed licenses and permits of the requirements of this subpart.

§ 930.54 Unlisted Federal license and permit activities.

(a) With the assistance of Federal agencies, State agencies should monitor unlisted Federal license and permit activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA environmental impact statements, etc.) and shall immediately notify Federal agencies and applicants of unlisted activities affecting the coastal zone which require State agency review. State agencies must inform the Federal agency and applicant within 30 days from notice of the license or permit application, otherwise the State agency waives its right to review the unlisted activity. The waiver does not apply in cases where the State agency does not receive notice of the Federal license or permit activity.

(b) The State agency must also notify the Assistant Administrator of unlisted Federal license or permit activities which the State agency believes should be subject to State agency review. Following State agency notification to the Federal agency, applicant and the Assistant Administrator, the Federal agency may not issue the license or permit until the requirements of this subpart have been satisfied, unless the Assistant Administrator disapproves the State agency decision to review the activity.

(c) The Federal agency and the applicant have 15 days from receipt of the State agency notice to provide comments to the Assistant Administrator regarding the State agency's decision to review the activity. The sole basis for the Assistant Administrator's approval or disapproval of the State agency's decision will relate to whether the proposed activity can be reasonably expected to affect the coastal zone of the State. The Assistant Administrator shall issue a decision, with supporting comments, to the State agency, Federal agency and applicant within 30 days from receipt of the State agency notice.

(d) In the event of disapproval by the Assistant Administrator, the Federal agency may approve the license or permit application and the applicant need not comply with the requirements of this subpart. If the Assistant Administrator approves the State agency's decision, the Federal agency and applicant must comply with the consistency certification procedures of this subpart.

(e) Following an approval by the Assistant Administrator, the applicant shall amend the Federal application by including a consistency certification and shall provide the State agency with a copy of the certification along with necessary supporting data and information (see §§ 930.63 and 930.64). For the purposes of this section, concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months from the original Federal agency notice to the State agency (see paragraph (a) of this section) or within three months from receipt of the applicant's consistency certification and accompanying information, whichever period terminates last.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 930.55 Availability of mediation for license or permit disputes.

In the event of a serious disagreement between a Federal and State agency regarding whether a listed or unlisted Federal license or permit activity is subject to consistency review, either party may request the Secretarial mediation services provided for in Subpart G; notice shall be provided to the applicant. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding approval of a license or permit application for an activity on an approved management program list (see § 930.53) or individually approved by the Assistant Administrator (see § 930.54) pending satisfaction of the requirements of this subpart. Similarly, the existence of a serious disagreement will not prevent the Federal agency from approving a license or permit activity which has not received Assistant Administrator approval.

§ 930.56 State agency guidance and assistance to applicants; information requirements.

(a) As a preliminary matter, any applicant for a Federal license or permit selected for review by a State agency should obtain the views and assistance of that agency regarding the means for ensuring that the proposed activity will be conducted in a manner consistent with the State's management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document.

(b) The management program as originally approved or amended may describe requirements regarding the data and information necessary to

assess the consistency of Federal license and permit activities. Required data and information may not include confidential and proprietary material. In the case of approved amendments, State agencies shall send copies to relevant Federal agencies who shall, in turn, provide the information requirements to applicants. If a State does not choose to develop or amend its management program to include information requirements, the applicant must, at a minimum, supply the State agency with the information required by § 930.58.

§ 930.57 Consistency certifications.

(a) When satisfied that the proposed activity meets the Federal Consistency requirements of this subpart, all applicants for Federal licenses or permits subject to State agency review shall provide in the application to the Federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the State's approved management program. At the same time, the applicant shall furnish to the State agency a copy of the certification.

(b) The applicant's consistency certification shall be in the following form: "The proposed activity complies with (name of State) approved coastal management program and will be conducted in a manner consistent with such program."

§ 930.58 Necessary data and information.

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

(1) A detailed description of the proposed activity and its associated facilities which is adequate to permit an assessment of their probable coastal zone effects. Maps, diagrams, technical data and other relevant material must be submitted when a written description alone will not adequately describe the proposal (a copy of the Federal application and all supporting material provided to the Federal agency should also be submitted to the State agency).

(2) Information required by the State agency pursuant to § 930.56(b).

(3) A brief assessment relating the probable coastal zone effects of the proposal and its associated facilities to the relevant elements of the management program.

(4) A brief set of findings, derived from the assessment, indicating that the proposed activity (e.g., project siting and construction), its associated facilities (e.g., access road, support buildings), and their effects (e.g., air, water, waste discharges, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the applicant shall give appropriate weight to the various types of provisions within the management program. While applicants must be consistent with the enforceable, mandatory policies of the management program, they need only demonstrate adequate consideration of policies which are in the nature of recommendations. Applicants need not make findings with respect to coastal zone effects for which the management program does not contain mandatory or recommended policies.

(b) At the request of the applicant, interested parties who have access to information and data required by subparagraphs (a) (1) and (2) of this section may provide the State agency with all or part of the material required. Furthermore, upon request by the applicant, the State agency shall provide assistance for developing the assessment and findings required by paragraphs (a) (3) and (4) of this section.

(c) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposal.

§ 930.59 Multiple permit review.

(a) Applicants shall, to the extent practicable, consolidate related Federal license and permit activities affect-

ing the coastal zone for State agency review. State agencies shall, to the extent practicable, provide applicants with a "one-stop" multiple permit review for consolidated permits to minimize duplication of effort and to avoid unnecessary delays.

(b) A State agency objection to one or more of the license or permit activities submitted for consolidated review shall not prevent the applicant from receiving Federal agency approval for those license and permit activities found to be consistent with the management program.

§ 930.60 Commencement of State agency review.

(a) Except as provided in § 930.54(e), State agency review of an applicant's consistency certification begins at the time the State agency receives a copy of the consistency certification, and the information and data required pursuant to § 930.58.

(b) A State agency request for information or data in addition to that required by § 930.58 shall not extend the date of commencement of State agency review.

§ 930.61 Public notice.

(a) Following receipt of the material described in § 930.60 the State agency shall ensure timely public notice of the proposed activity. At a minimum the provision of public notice must be in accordance with State law. In addition, public notice must be provided in the immediate area of the coastal zone which is likely to be affected by the proposed activity. Public notice shall be expanded in proportion to the degree of likely public interest resulting from the unique geographic area involved, the substantial commitment of or impact on coastal resources, the complexity or controversy of the proposal, or for other good cause.

(b) Public notice shall facilitate public comment by providing a summary of the proposed activity, by announcing the availability for inspection of the consistency certification and accompanying public information and data, and by requesting that comments be submitted to the State agency.

(c) A number of procedural options, if permitted by State law, are available to State agencies to satisfy the public notice requirements of this subpart. They include, but are not limited to:

(1) The State agency providing the public notice;

(2) The State agency requiring the applicant to provide the public notice; or

(3) The State agency relying upon the public notice provided by the Federal agency reviewing the application for the Federal license or permit (e.g., notice of availability of NEPA environmental impact statements) if such notice satisfies the minimum requirements set forth in paragraphs (a) and (b) of this section.

(d) Federal and State agencies are encouraged to issue joint public notices whenever possible to minimize duplication of effort and to avoid unnecessary delays.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 930.62 Public hearings.

(a) At the discretion of the State agency, public notice may include the announcement of one or more public hearings. Public hearings shall be scheduled with a view towards (1) allowing access to the consistency certification and accompanying public information within a reasonable time prior to the hearing, (2) facilitating broad public attendance and participation at the hearing, and (3) affording the applicant expeditious consideration of the proposed activity.

(b) Federal and State agencies are encouraged to hold joint public hearings in the event both agencies determine that a hearing on the action is necessary.

§ 930.63 State agency concurrence with a consistency certification.

(a) At the earliest practicable time, the State agency shall notify the Federal agency and the applicant whether

the State agency concurs with or objects to a consistency certification. Concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months following commencement of State agency review.

(b) State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to inform the public, obtain sufficient comment, and develop a reasonable decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the applicant and the Federal agency of the status of the matter and the basis for further delay.

(c) If the State agency issues a concurrence or is conclusively presumed to concur with the applicant's consistency certification, the Federal agency may approve the Federal license or permit application. Notwithstanding State agency concurrence with a consistency certification, the Federal permitting agency may deny approval of the Federal license or permit application. Federal agencies should not delay processing applications pending receipt of a State agency's concurrence. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant and the State agency.

§ 930.64 State agency objection to a consistency certification.

(a) If the State agency objects to the applicant's consistency certification within six months following commencement of review, it shall notify the applicant, Federal agency and Assistant Administrator of the objection.

(b) State agency objections must describe (1) how the proposed activity is inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program.

(c) During the period when the State agency is reviewing the consistency certification, the applicant and the State agency should attempt to agree upon conditions, which, if met by the applicant, would permit State agency concurrence. The parties shall also consult with the Federal agency responsible for approving the Federal license or permit to ensure that proposed conditions satisfy Federal as well as State management program requirements.

(d) A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to § 903.58. If the State agency objects on the grounds of insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

(e) A State agency objection shall include a statement informing the applicant of a right of appeal to the Secretary on the grounds described in Subpart H.

§ 930.65 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification, the Federal agency shall not issue the Federal license or permit except as provided in Subpart H of this part.

§ 930.66 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally licensed and permitted activities in order to make certain that such activities continue to conform to both Federal and State requirements.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency objection to a Federally licensed or permitted activity which was: (1) Previously determined to be consistent with the State's management program, but which the State agency later maintains is being conducted or is having coastal zone effects substantially different than

originally proposed and, as a result, is no longer consistent with the State's management program; or (2) previously determined not to be an activity affecting the coastal zone, but which the State agency later maintains is being conducted or is having coastal effects substantially different than originally proposed and, as a result, the activity affects the coastal zone in a manner inconsistent with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action; a copy of the request must be sent to the applicant.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists with the Federal agency, either party may seek the Secretarial mediation services provided for in Subpart G of this part.

Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities

§ 930.70 Objectives.

The provisions of this subpart are provided to assure that all Federal license and permit activities described in detail in OCS plans and which affect the coastal zone are conducted in a manner consistent with approved coastal zone management programs.

§ 930.71 Federal license or permit activity described in detail.

The term "Federal license or permit activity described in detail" means any activity requiring a Federal license or permit, as defined in § 930.51, which the Secretary of the Interior determines must be described in detail within an OCS plan.

§ 930.72 Person.

The term "person" means any individual, corporation, partnership, association, or other entity organized or existing under the laws of any State, the Federal government, any State, regional, or local government, or any entity of such Federal, State, regional or local government, who submits to the Secretary of the Interior, or designee following management program approval, an OCS plan which describes in detail Federal license or permit activities.

§ 930.73 OCS plan.

(a) The term "OCS plan" means any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.), and the regulations under that Act, which is submitted to the Secretary of the Interior or designee following management program approval and which describes in detail Federal license or permit activities.

(b) The requirements of this subpart do not apply to Federal license and permit applications filed after management program approval for activities described in detail in OCS plans approved by the Secretary of the Interior or designee prior to management program approval.

§ 930.74 OCS activities subject to State agency review.

Except for States which do not anticipate coastal zone effects resulting from OCS activities, management program lists required pursuant to § 930.53 shall include a reference to OCS plans which describe in detail Federal license and permit activities affecting the coastal zone.

§ 930.75 State agency assistance to persons; information requirements.

(a) As a preliminary matter, any person intending to submit to the Secretary of the Interior and OCS plan which describes in detail Federal license or permit activities affecting the coastal zone should obtain the views and assistance of the State agency regarding the means for ensuring that such activities will be conducted in a manner consistent with the State's management program. As part of its assistance efforts, the State agency shall make available for inspection copies of the management program document.

(b) In accordance with the provisions in § 930.56(b), the management program as originally approved or

amended may describe requirements regarding data and information which will be necessary for the State agency to assess the consistency of the Federal license and permit activities described in detail in OCS plans.

§ 930.76 Submission of an OCS plan and consistency certification.

Any person submitting to the Secretary of the Interior or designee any OCS plan shall:

(a) Identify all activities described in detail in the plan which are subject to State agency review;

(b) When satisfied that the proposed activities meet the Federal consistency requirements of this subpart, provide the Secretary of the Interior or designee with a consistency certification, attached to the OCS plan, and the Secretary of the Interior or designee shall furnish the State agency a copy of the OCS plan (excluding proprietary information) and consistency certification.

(c) The person's consistency certification shall be in the following form:

> The proposed activities described in detail in this plan comply with (name of State(s)) approved coastal management program(s) and will be conducted in a manner consistent with such program(s).

§ 930.77 Necessary data and information.

(a) The State agency shall use the information received pursuant to the Department of the Interior's operating regulations governing exploration, development and production operations on the OCS (see 30 CFR 250.34) and regulations pertaining to the OCS information program (see 30 CFR Part 252) to determine the consistency of proposed Federal license and permit activities described in detail in OCS plans.

(b) The person shall supplement the information provided by paragraph (a) of this section by supplying the State agency with:

(1) Information required by the State agency pursuant to § 930.75(b).

(2) A brief assessment relating the probable coastal zone effects of the activities and their associated facilities to the relevant elements of the management program, and

(3) A brief set of findings, derived from the assessment, indicating that each of the proposed activities (e.g., drilling, platform placement) and their associated facilities (e.g., onshore support structures, offshore pipelines), and their effects (e.g., air, water, waste discharge, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the person shall give appropriate weight to the various provisions within the management program in accordance with the guidance provided in § 930.58(a)(4).

(c) At the request of the person, interested parties who have access to information required by paragraphs (a) and (b)(1) of this section may provide the State agency with all or part of the material required. Furthermore, upon request by the person, the State agency shall provide assistance for developing the assessment and findings required by paragraphs (b) (2) and (3) of this section.

(d) When satisfied that adequate protection against public disclosure exists, persons should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposed activities. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposed activities.

§ 930.78 Commencement of State agency review; public notice.

(a) State agency review of the person's consistency certification begins at the time the State agency receives a copy of the OCS plan, consistency certification, and required necessary data and information. A State agency request for information and data in addition to that required by § 930.77 shall not extend the date of commencement of State agency review.

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed

activities in accordance with the directives within §§ 930.61 through 930.62.

§ 930.79 State agency concurrence or objection.

(a) At the earliest practicable time, the State agency shall notify the person, the Secretary of the Interior or designee and the Assistant Administrator of its concurrence with or objection to the consistency certification. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to inform the public, obtain sufficient comment, and develop a reasonable decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the person, the Secretary of the Interior or designee and the Assistant Administrator of the status of review and the basis for further delay in issuing a final decision. Notice shall be in written form and postmarked no later than three months following the State agency's receipt of the certification and supporting information. Concurrence by the State agency shall be conclusively presumed if the notification required by this subparagraph is not provided.

(b) Concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection to the consistency certification within six months following commencement of State agency review.

(c) If the State agency objects to one or more of the Federal license or permit activities described in detail in the OCS plan, it must provide a separate discussion for each objection in accordance with the directives within § 930.64 (b) and (d). The objection shall also include a statement informing the person of a right of appeal to the Secretary on the grounds described in Subpart H.

§ 930.80 Effect of State agency concurrence.

(a) If the State agency issues a concurrence or is conclusively presumed to concur with the person's consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time Federal applications are actually filed for the Federal licenses and permits to which such concurrence applies.

(b) Unless the State agency indicates otherwise, copies of Federal license and permit applications for activities described in detail in an OCS plan which has received State agency concurrence shall be sent by the person to the State agency to allow the State agency to monitor the activities. Confidential and proprietary material within such applications may be deleted.

§ 930.81 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification related to Federal license or permit activities described in detail in an OCS plan, the Federal agency shall not issue any of such licenses or permits except as provided in Subpart H of this part.

§ 930.82 Multiple permit review.

(a) A person submitting a consistency certification for Federal license or permit activities described in detail in an OCS plan is strongly encouraged to work with other Federal agencies in an effort to include, for consolidated State agency review, consistency certifications and supporting data and information applicable to OCS-related Federal license and permit activities affecting the coastal zone which are not required to be described in detail in OCS plans but which are subjected to State agency consistency review (e.g., Corps of Engineer permits for the placement of structures on the OCS and for dredging and the transportation of dredged material, Environmental Protection Agency air and water quality permits for offshore operations and onshore support and processing facilities, etc.). In the event the person does not consolidate such OCS-related permit activities with the State agency's review of the OCS plan, such activities will remain subject to individual State agency review under

the requirements of Subpart D of this part.

(b) A State agency objection to one or more of the OCS-related Federal license or permit activities submitted for consolidated review shall not prevent the person from receiving Federal agency approval (1) for those OCS-related license or permit activities found by the State agency to be consistent with the management program, and (2) for the license and permit activities described in detail in the OCS plan provided the State agency concurs with the consistency certification for such plan. Similarly, a State agency objection to the consistency certification for an OCS plan shall not prevent the person from receiving Federal agency approval for those OCS-related license or permit activities determined by the State agency to be consistent with the management program.

§ 930.83 Amended or new OCS plans.

If the State agency objects to the person's OCS plan consistency certification, and if, pursuant to Subpart H, the Secretary does not determine that each of the objected to Federal license or permit activities described in detail in such plan is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the person shall submit an amended or new plan to the Secretary of the Interior or designee and to the State agency along with a consistency certification and data and information necessary to support the new consistency determination. The data and information shall specifically describe modifications made to the original OCS plan, and the manner in which such modifications will ensure that all of the proposed Federal license or permit activities described in detail in the amended or new plan will be conducted in a manner consistent with the State's management program.

§ 930.84 Review of amended or new OCS plans; public notice.

(a) After receipt of a copy of the amended or new OCS plan, consistency certification, and accompanying data and information, State agency review shall begin.

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed activities in accordance with the directives within §§ 930.61 through 930.62.

(c) The State agency shall concur with or object to the person's consistency certification in accordance with the directives within § 930.79, except that the applicable time period for purposes of concurrence by conclusive presumption shall be three months instead of six months.

(d) If the State agency issues a concurrence or is conclusively presumed to concur with the person's new consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time Federal applications are actually filed for the Federal licenses and permits to which such concurrence applies.

(e) Unless the State agency indicates otherwise, copies of Federal license and permit applications for activities described in detail in an amended or new OCS plan which has received State agency concurrence shall be sent by the person to the State agency to allow the State agency to monitor the activities. Confidential and proprietary material within such applications may be deleted.

§ 930.85 Continuing State agency objections.

If the State agency objects to the consistency certification for an amended or new OCS plan, the prohibition in § 930.81 against Federal agency approval of licenses or permits for activities described in detail in such a plan applies, further Secretarial review pursuant to Subpart H may take place, and the development of an additional amended or new OCS plan and consistency certification may be required pursuant to §§ 930.83 through 930.84.

§ 930.86 Failure to comply substantially with an approved OCS plan.

(a) The Department of the Interior and State agencies shall cooperate in their efforts to monitor Federally licensed and permitted activities de-

scribed in detail OCS plans to make certain that such activities continue to conform to both Federal and State requirements.

(b) If a State agency claims that a person is failing substantially to comply with an approved OCS plan subject to the requirements of this Subpart, and such failure allegedly involves the conduct of activities affecting the coastal zone in a manner that is not consistent with the approved management program, the State agency shall transmit its claim to the U.S. Geological Survey supervisor for the area involved. Such claim shall include: (1) A description of the specific activity involved and the alleged lack of compliance with the OCS plan, and (2) a request for appropriate remedial action. A copy of the claim shall be sent to the person and the Assistant Administrator.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that the person is failing to comply substantially with the OCS plan, the governor or section 306(c)(5) State agency (see § 930.18) may file a written objection with the Secretary. If the Secretary finds that the person is failing to comply substantially with the OCS plan, the person shall submit an amended or new OCS plan along with a consistency certification and supporting information to the Secretary of the Interior or designee and to the State agency. Following such a finding by the Secretary, the person shall comply with the originally approved OCS plan, or with interim orders issued jointly by the Secretary and the U.S. Geological Survey, pending approval of the amended or new OCS plan. The directives within §§ 930.83 through 930.85 shall apply to further State agency review of the consistency certification for the amended or new plan.

(d) A person shall be found to have failed substantially to comply with an approved OCS plan if the State agency claims and the Secretary finds that one or more of the activities described in detail in the OCS plan which affects the coastal zone are being conducted or are having a coastal zone effect substantially different than originally described by the person in the plan or accompanying information and, as a result, the activities are no longer being conducted in a manner consistent with the State's management program. The Secretary may make a finding that a person has failed substantially to comply with an approved OCS plan only after providing a reasonable opportunity for the person and the Secretary of the Interior to review the State agency's objection and to submit comments for the Secretary's consideration.

Subpart F—Consistency for Federal Assistance to State and Local Governments

§ 930.90 Objectives.

The provisions of this subpart are provided to assure that Federal assistance to State and local governments for activities affecting the coastal zone is granted only when such activities are consistent with approved coastal zone managements programs.

§ 930.91 Federal assistance.

The term "Federal assistance" means assistance provided under a Federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid.

§ 930.92 Applicant agency.

The term "applicant agency" means any unit of State or local government, or any related public entity such as a special purpose district, which, following management program approval, submits an application for Federal assistance.

§ 930.93 Intergovernmental review process.

The term "intergovernmental review process" describes the procedures established by states pursuant to E.O. 12372, "Intergovernmental Review of Federal Programs," and implementing regulations of the review of Federal financial assistance to states and local governments.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[48 FR 29136, June 24, 1983]

§ 930.94 State intergovernmental review process for consistency.

The process by which states with approved coastal management programs may review applications from state agencies and local governments for Federal assistance should be developed by each state in accordance with Executive Order 12372 and implementing regulations. In accordance with the Executive Order and regulations, states may use this process to review such applications for consistency with their approved coastal management programs.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[48 FR 29137, June 24, 1983]

§ 930.95 Guidance provided by the State agency.

(a) State agencies should include within the management program a listing of specific types of Federal assistance programs subject to a consistency review. Such a listing, and any amendments, will require prior 306(c)(5) state agency (see § 930.18) consultation with affected Federal agencies and approval by the Assistant Administrator.

(b) In the event the State agency chooses to review applications for Federal assistance activities outside of the coastal zone but likely to affect the coastal zone, the State agency must develop a Federal assistance provision within the management program generally describing the geographic area (e.g. coastal floodplains) within which Federal assistance activities will be subject to review. This provision, and any refinements, will require prior 306(c)(5) State agency consultation with affected Federal agencies and approval by the Assistant Administrator.

(c) The State agency shall provide copies of any Federal assistance list or geographic provision, and any refinements, to Federal agencies, units of State or local government empowered to undertake Federally assisted activities within the coastal zone or described geographic area.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979. Redesignated and amended at 48 FR 29136, June 24, 1983]

§ 930.96 Consistency review.

(a) If pursuant to the intergovernmental review process, the State agency does not object to the proposed activity, the Federal agency may grant the Federal assistance to the applicant agency. Notwithstanding State agency consistency approval for the proposed project, the Federal agency may deny assistance to the applicant agency. Federal agencies should not delay processing applications pending receipt of a State agency approval or objection. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant agency and the State agency.

(b) If pursuant to the intergovernmental review process, the State agency objects to the proposed project, the state agency shall notify the applicant agency, Federal agency and the Assistant Administrator of the objection.

(c) State agency objections must describe: (1) How the proposed project is inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the applicant agency, would permit the proposed project to be conducted in a manner consistent with the management program.

(d) A State agency objection may be based upon a determination that the applicant agency has failed, following a written State agency request, to supply necessary information. If the State agency objects on the grounds of

insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

(e) State agency objections shall include a statement informing the applicant agency of a right of appeal to the Secretary on the grounds described in Subpart H of this part.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29137, June 24, 1983]

§ 930.97 Federal assisting agency responsibility.

Following receipt of a State agency objection, the Federal agency shall not approve assistance for the activity except as provided in Subpart H of this part.

§ 930.98 Federally assisted activities outside of the coastal zone or the described geographic area.

(a) State agencies should monitor proposed Federal assistance activities outside of the coastal zone or the described geographic area (e.g., by use of the intergovernmental review process, review of NEPA environmental impact statements, etc.) and shall immediately notify applicant agencies, Federal agencies, and any other agency or office which may be identified by the state in its intergovernmental review process pursuant to E.O. 12372 of proposed activities which can reasonably be expected to affect the coastal zone and which the State agency is reviewing for consistency with the management program. Notification shall also be sent by the State agency to the Assistant Administrator. State agencies must inform the parties of objections within the time period permitted under the intergovernmental review process, otherwise the State agency waives its right to object to the proposed activity.

(b) If within the permitted time period the State agency notifies the Federal agency of its objection to a proposed Federally assisted activity, the Federal agency shall not provide assistance to the applicant agency except as provided in Subpart H, unless the Assistant Administrator disapproves the State agency's decision to review the activity. The Assistant Administrator shall be guided by the provisions in § 930.54 (c) and (d).

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29137, June 24, 1983]

§ 930.99 Availability of mediation for Federal assistance disputes.

In the event of a serious disagreement between a Federal and State agency regarding whether a Federal assistance activity is subject to consistency review, either party may request the Secretarial mediation services provided for in Subpart G of this part. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding Federal assistance for the activity pending satisfaction of the requirements of this subpart, except in cases where the Assistant Administrator has disapproved a State agency decision to review an activity.

§ 930.100 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally assisted activities in order to make certain that such activities continue to conform to both Federal and State requirements.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency objection to a Federally assisted activity which was: (1) Previously determined to be consistent with the State's management program, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a

result, is no longer consistent with the State management program, or (2) previously determined not to be a project affecting the coastal zone, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result the project affects the coastal zone in a manner inconsistent with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action; a copy of the request must be sent to the applicant agency.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists with the Federal agency, either party may seek the Secretarial mediation services provided for in Subpart G of this part.

Subpart G—Secretarial Mediation

§ 930.110 Objectives.

The purpose of this subpart is to describe mediation procedures which Federal and State agencies may use to attempt to resolve serious disagreements which arise during the administration of approved management programs.

§ 930.111 Informal negotiations.

The availability of mediation does not preclude use by the parties of alternative means for resolving their disagreement. In the event a serious disagreement arises, the parties are strongly encouraged to make every effort to resolve the disagreement informally. OCZM shall be available to assist the parties in these efforts.

§ 930.112 Request for mediation.

(a) The Secretary or other head of a Federal agency, or the Governor or the section 306(c)(5) State agency (see § 930.18), may notify the Secretary in writing of the existence of a serious disagreement, and may request that the Secretary seek to mediate the serious disagreement. A copy of the written request must be sent to the agency with which the requesting agency disagrees, and to the Assistant Administrator.

(b) Within 15 days following receipt of a request for mediation the disagreeing agency shall transmit a written response to the Secretary, and to the agency requesting mediation, indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, it must indicate the basis for its refusal in its response. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to persuade the disagreeing agency to reconsider its decision and enter into mediation efforts. If the disagreeing agencies do not all agree to participate, the Secretary will cease efforts to provide mediation assistance.

§ 930.113 Public hearings.

(a) If the parties agree to the mediation process, the Secretary shall appoint a hearing officer who shall schedule a hearing in the local area concerned. The hearing officer shall give the parties at least 30 days notice of the time and place set for the hearing and shall provide timely public notice of the hearing.

(b) At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to public data and information related to the serious disagreement.

(c) Hearings shall be informal and shall be conducted by the hearing officer with the objective of securing in a timely fashion information related to the disagreement. The Federal and State agencies, as well as other interested parties, may offer information at the hearing subject to the hearing officer's supervision as to the extent and manner of presentation. Unduly repetitious oral presentation may be excluded at the discretion of the hearing officer; in the event of such exclusion the party may provide the hearing officer with a written submission of the proposed oral presentation. Hearings will be recorded and the hearing officer shall provide transcripts and copies of written information offered at the hearing to the Federal and State agency parties. The public may inspect and copy the transcripts and written

information provided to these agencies.

§ 930.114 Secretarial mediation efforts.

(a) Following the close of the hearing, the hearing officer shall transmit the hearing record to the Secretary. Upon receipt of the hearing record, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, the disagreeing Federal and State agencies, and any other interested parties whose participation is deemed necessary by the Secretary. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference.

(b) Secretarial mediation efforts shall last only so long as the Federal and State agencies agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

§ 930.115 Termination of mediation.

Mediation shall terminate (a) at any time the Federal and State agencies agree to a resolution of the serious disagreement, (b) if one of the agencies withdraws from mediation, (c) in the event the agencies fail to reach a resolution of the serious disagreement within 15 days following Secretarial conference efforts, and the agencies do not agree to extend mediation beyond that period, or (d) for other good cause.

§ 930.116 Judicial review.

The availability of the mediation services provided in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart.

Subpart H—Secretarial Review Related to the Objectives or Purposes of the Act and National Security Interests

§ 930.120 Objectives.

The provisions of this subpart provide procedures by which the Secretary may find that a Federal license or permit activity, including those described in detail in an OCS plan, or a Federal assistance activity, which is inconsistent with a management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.

§ 930.121 Consistent with the objectives or purposes of the Act.

The term "consistent with the objectives or purposes of the Act" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because it satisfies the following four requirements:

(a) The activity furthers one or more of the competing national objectives or purposes contained in section 302 or 303 of the Act,

(b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest,

(c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and

(d) There is no reasonable alternative available (e.g., location design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

§ 930.122 Necessary in the interest of national security.

The term "necessary in the interest of national security" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's

management program, is found by the Secretary to be permissible because a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed. Secretarial review of national security issues shall be aided by information submitted by the Department of Defense or other interested Federal agencies. The views of such agencies, while not binding, shall be given considerable weight by the Secretary. The Secretary will seek information to determine whether the objected-to activity directly supports national defense or other essential national security objectives.

§ 930.123 Appellant.

The term "appellant" refers to an applicant, person or applicant agency submitting an appeal to the Secretary pursuant to the provisions of this subpart.

§ 930.124 Informal discussions.

In the event the State agency informs the applicant, person or applicant agency that it intends to object to the proposed activity, the parties should consult informally to attempt to resolve the matter in a manner which avoids the necessity of appealing the issue to the Secretary. OCZM shall be available to assist the parties in these discussions.

§ 930.125 Appeals to the Secretary.

(a) An appellant may file a notice of appeal with the Secretary with 30 days of the appellant's receipt of a State agency objection. The notice of appeal shall be accompanied by a statement in support of the appellant's position, along with supporting data and information. The appellant shall send a copy of the notice of appeal and accompanying documents to the Federal and State agencies involved.

(b) No extension of time will be permitted for the filing of a notice of appeal.

(c) The Secretary may approve a reasonable request for an extension of time to submit supporting information so long as the request is filed with the Secretary within the 30-day period. Normally, the Secretary shall limit an extension period to 15 days.

§ 930.126 Federal and State agency responses to appeals.

(a) Upon receipt of the notice of appeal and supporting information, the Federal and State agencies shall have 30 days to submit detailed comments to the Secretary. Copies of such comments shall be sent to the appellant and other agency within the same time period.

(b) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.127 Public notice; receipt of comments.

(a) The Secretary shall provide timely public notice of the appeal within 15 days of receipt of the notice. At a minimum, public notice shall be provided in the immediate area of the coastal zone which is likely to be affected by the proposed activity. At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to copies of the appellant's notice of appeal and accompanying public information, and to the public information in the agencies' detailed comments.

(b) Interested persons may submit comments to the Secretary within 30 days from the date of public notice, with copies provided to the appellant and to the Federal and State agencies within the same time period.

(c) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.128 Dismissal of appeals.

The Secretary may dismiss an appeal for good cause. Good cause shall include, but is not limited to:

(a) Failure of the appellant to submit a notice of appeal within the required 30-day period.

(b) Failure of the appellant to submit the supporting information within the required period or approved extension period;

(c) Secretarial receipt of a detailed comment from the Federal agency stating that the agency has disapproved the Federal license, permit or assistance application;

311-049 O—92——8

(d) Failure of the appellant to base the appeal on grounds that the proposed activity either (1) is consistent with the objectives or purposes of the Act or (2) is necessary in the interest of national security.

§ 930.129 Public hearings.

The Secretary may order a hearing independently or in reponse to a request. If a hearing is ordered by the Secretary it shall be guided by the procedures described within § 930.113.

§ 930.130 Secretarial review.

(a) In reviewing an appeal, the Secretary shall find that a proposed Federal license or permit activity, or a Federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, when the information submitted supports this conclusion.

(b) The Secretary shall make all reasonable efforts to complete consideration of an appeal within 90 days from the date of public notice.

(c) Following consideration of the appeal, the Secretary shall issue a decision in writing to the appellant and to the Federal and State agencies indicating whether the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security; the decision shall include the basis for such finding. The Secretary shall provide public notice of the decision.

(d) The decision of the Secretary shall constitute final agency action for the purposes of the Administrative Procedure Act.

§ 930.131 Federal agency responsibility.

(a) If the Secretary finds that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the Federal agency may approve the activity.

(b) If the Secretary does not make either of these findings, the Federal agency shall not approve the activity.

§ 930.132 Review initiated by the Secretary.

(a) The Secretary may choose to consider whether a Federal license or permit activity, or a Federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. Secretarial review may be initiated either before of after the completion of State agency review. The Secretary's decision to review the activity may result from an independent concern regarding the activity or a request from interested parties. If the Secretary decides to initiate review, notification shall be sent to the applicant, person or applicant agency, and to the Federal and State agencies. The notice shall include a statement describing the reasons for the review and shall contain a request for submission of detailed comments to be submitted within 30 days from receipt of the notification. Copies of comments shall be exchanged among the parties.

(b) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.133 Public notice; receipt of comments; public hearings.

(a) Upon receipt of detailed comments from the parties, the Secretary shall provide public notice and request public comments in accordance with the provisions in § 930.127.

(b) The Secretary may order a hearing in accordance with the provisions in § 930.129.

§ 930.134 Secretarial review; Federal agency responsibility.

(a) Secretarial review shall be undertaken in accordance with the provisions in § 930.130.

(b) Federal agencies are responsible for adhering to the provisions in § 930.131 when deciding to approve or deny an application for an activity objected to by a State agency and independently reviewed by the Secretary.

Subpart I—Assistant Administrator Reporting and Continuing Review of Federal Actions Subject to the Federal Consistency Requirements

§ 930.140 Objectives.

The provisions of this subpart provide procedures to permit interested

parties to notify the Assistant Administrator of Federal actions (a) believed to be inconsistent with an approved management program but which are not so found by the Federal or State reviewing agency, and (b) believed to have been incorrectly determined to be inconsistent with an approved management program. This subpart also provides for the reporting of any Federal actions found by the Assistant Administrator to be inconsistent with an approved management program and for the performance review of State implementation of the Federal consistency provisions of this part.

§ 930.141 Notification of Federal actions believed to be inconsistent with approved management programs.

(a) Interested parties are invited to submit to the Assistant Administrator detailed comments related to the alleged inconsistency of Federal activities including development projects, Federal license or permit activities, including those described in detail in OCS plans, and Federal assistance activities which are subject to the requirements of this part, and which have not been found by a Federal agency or State agency to be inconsistent with an approved management program. Copies of such comments should be sent to relevant Federal and State agencies, and to the applicant, person or applicant agency as appropriate.

(b) Comments need not conform to any particular form, but should be specific, substantive and factual, and must describe how the Federal action is or would be inconsistent with an approved management program.

(c) Commentators are encouraged to recommend modifications or alternatives to the existing or proposed action which would enable it to be consistent with the management program.

(d) The Assistant Administrator shall assure that public information within such comments is made available for public inspection.

§ 930.142 Notification of Federal actions believed to have been incorrectly determined to be inconsistent with an approved management program.

(a) Interested parties are invited to submit to the Assistant Administrator detailed comments related to Federal license and permit activities, including those described in detail in OCS plans, and Federal assistance activities which are believed to have been incorrectly determined by a State agency to be inconsistent with an approved management program. Copies of such comments should be sent to the relevant Federal and State agencies, and to the applicant, person, or applicant agency as appropriate.

(b) Comments need not conform to any particular form, but should be specific, substantive, and factual, and must clearly describe the basis for the belief that the State agency has incorrectly objected to the Federal action on the grounds of its inconsistency with the management program.

(c) The Assistant Administrator shall assure that public information within such comments is made available for public inspection.

§ 930.143 Assistant Administrator reporting.

After considering the views of interested parties, the relevant Federal agency, State agency, and the applicant, person, or applicant agency, as appropriate, the Assistant Administrator shall determine whether the Federal action will be included in the annual report listing of inconsistent Federal actions.

§ 930.144 Assistant Administrator advisory statements.

Upon request, the Assistant Administrator may issue as advisory statement prior to the issuance of the annual report indicating whether a Federal action will be listed within the annual report as being inconsistent with an approved management program.

§ 930.145 Review of the implementation of Federal consistency provisions.

As part of the responsibility to conduct a continuing review of approved

management programs, the Assistant Administrator shall review the performance of each State's implementation of the Federal consistency provisions in this part. The Assistant Administrator shall use information received pursuant to this subpart to evaluate instances where a State agency is believed to have either failed to object to inconsistent Federal actions, or improperly objected to consistent Federal actions. This evaluation shall be incorporated within the Assistant Administrator's general efforts to ascertain instances where a State has not adhered to its approved management program and such lack of adherence is not justified.

PART 931—COASTAL ENERGY IMPACT PROGRAM

Subpart A—General

Sec.

931.1 Coastal Energy Impact Program—general description.
931.2 Objectives of the CEIP.

Subpart B—General Definitions

931.9 Index to definitions.
931.10 Act.
931.11 Coastal zone.
931.12 Fund.
931.13 Coastal energy activity.
931.14 Significantly affected.
931.15 New or expanded coastal energy activity.
931.16 Outer Continental Shelf.
931.17 Outer Continental Shelf energy activity.
931.18 Energy facility.
931.19 New or expanded energy facility.
931.20 Unit of general purpose local government.
931.21 Unit of local government.
931.22 NOAA and OCZM.
931.23 Assistant Administrator.
931.24 NEPA and EIS.

Subpart C—Basic Eligibility

931.25 Eligible coastal State.
931.26 Satisfactory progress.
931.27 Eligibility determination.

Subpart D—Coastal Energy Impact Grants

931.30 General.
931.31 Objectives.
931.32 Definitions.
931.33 Eligibility for financial assistance under this subpart.
931.34 Allowable uses.
931.35 Section 308(c) allotment.
931.36 Application for financial assistance.
931.37 Limitations on expenditures.

Subpart E—Financing Public Facilities and Public Services

931.40 General.
931.41 Objectives.
931.42 Definitions.
931.43 Eligibility.
931.44 Allowable uses.
931.45 Credit assistance inventory.
931.46 Allotment formula.
931.47 Allotment of credit assistance.
931.48 Recall and reversion of allotted credit assistance.
931.49 Application for recalled or reverted credit assistance.
931.50 Application for financial assistance to provide public facilities and services.
931.51 Special requirements for section 308(d)(1) loans.
931.52 Special requirements for section 308(d)(2) Federal guarantees.

Subpart F—Repayment Assistance

931.60 General.
931.61 Objectives.
931.62 Definitions.
931.63 Purposes.
931.64 Sources of repayment assistance.
931.65 General eligibility.
931.66 Reports.
931.67 Review for repayment assistance.
931.68 Award of repayment assistance.
931.69 Appeal procedure.

Subpart G—Grants for Unavoidable Losses of Valuable Coastal Environmental and Recreational Resources

931.70 General.
931.71 Objectives.
931.72 Definitions.
931.73 Eligibility.
931.74 Allowable uses.
931.75 Allotment of section 308(d)(4) environmental and recreational grants.
931.76 Reversion of allotted funds.
931.77 Application for environmental and recreational grants.
931.78 Limitations.

Subpart H—Lateral Seaward Boundaries

931.80 General.
931.81 Establishment of delimitation lines when agreements exist between States.

8.
Part 933
Coastal Zone Management
Research and Technical Assistance

§ 932.44 Amendments.

Amendments to an approved application must be submitted to and approved by the Associate Administrator prior to initiation of the contemplated change. Requests for substantial changes should be discussed with the Associate Administrator well in advance. While all amendments must be approved in writing by the NOAA Grants Officer, approval may be presumed for minor amendments if the grantee has not been notified of objections within 30 working days of date of postmark of the request.

PART 933—COASTAL ZONE MANAGEMENT RESEARCH AND TECHNICAL ASSISTANCE

Subpart A—General

Sec.
933.1 Basic purposes.
933.2 Definitions.

Subpart B—National Research and Technical Assistance Program

933.10 General.
933.11 Eligible entities and arrangements.
933.12 Use of funds.

Subpart C—Operation of National Research and Technical Assistance Program

933.20 Priorities and annual spending plans.
933.21 Funding arrangements.

Subpart D—State Grants for Research and Technical Assistance

933.30 General.
933.31 Eligible entities.
933.32 Use of funds.
933.33 Funding priorities.

Subpart E—Application for State Research and Technical Assistance Grants

933.40 General.
933.41 Applicant responsibility.
933.42 Application procedure.
933.43 Approval of applications.
933.44 Amendments.
933.45 Copies of products.

AUTHORITY: Sec. 310, Coastal Zone Management Act of 1972 (Pub. L. 92-583, 86 Stat. 1280, as amended by Pub. L. 94-370, 90 Stat. 1013).

SOURCE: 42 FR 38738, July 29, 1977, unless otherwise noted.

Subpart A—General

§ 933.1 Basic purposes.

(a) This section sets forth the basic purposes for which the national research and technical assistance program, pursuant to subsection 310(a) of the Act, will be operated, and for which State research and technical assistance grants, pursuant to subsection 310(b) of the Act, will be awarded. The basic intent of both subsections is to fund research, study, and training which supports the development and administration of State coastal zone management programs. However, there is a significance difference in focus between the two subsections in that State grants pursuant to subsection 310(b) will be awarded to State coastal zone development or management agencies for the purpose of meeting State-specific research, study and training needs, while the national program pursuant to subsection 310(a) will work with a variety of entities and will endeavor to address needs which are regional or national in scope.

(b) *Comment.* Statutory citation, subsection 310(a):

> The Secretary may conduct a program of research, study, and training to support the developent and implementation of management programs. * * * The Secretary may enter into contracts or other arrangements with any qualified person for the purposes of carrying out this subsection.

(c) *Comment.* Statutory citation, subsection 310(b):

> The Secretary may make grants to coastal states to assist such states in carrying out research, studies, and training required with respect to coastal zone management.

§ 933.2 Definitions.

(a) The term "Act" means the Coastal Zone Management Act or 1972, as amended.

(b) The term "Secretary" means the Secretary of Commerce or his/her designee. Delegations of authority from the Secretary to the Administrator, National Oceanic and Atmospheric Administration (NOAA), have been duly executed by Amendment 5 of De-

partment of Commerce Organization Order 25-5A, dated October 13, 1976, and from the Administrator to the Associate Administrator for Coastal Zone Management, by NOAA Circular 76-82, effective October 13, 1976.

(c) The term "Associate Administrator" means the Associate Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(d) The term "person" is as defined in subsection 304(13) of the Act and means "any individual; any corporation, partnership, association, or other entity organized or existing under the laws or any state, regional, or local government; or any entity of any such Federal, State, regional, or local government."

Subpart B—National Research and Technical Assistance Program

§ 933.10 General.

(a) The national research and technical assistance program established pursuant to subsection 310(a) of the Act is a program utilizing contracts and other arrangements to support regional and national research, study, and training activities which assist State efforts to develop and/or administer coastal zone management programs.

(1) This program will be conducted so as to complement and support work being done by States using grants under section 305 or 306 of the Act.

(2) Research, study and training efforts will be expected to address the needs of a group of States, a region, or the entire nation or the national coastal zone management program.

(b) The national research and technical assistance program is differentiated from the interstate grant program, pursuant to section 309 of the Act, by the former's emphasis on technical research, study and training. The interstate program, by contract, focuses upon regional cooperation and coordination with particular attention directed toward the development of compatible coastal zone policies.

§ 933.11 Eligible entities and arrangements.

(a) The Associate Administrator will enter into contracts or make other arrangements with any qualified person for the performance of work pursuant to subsection 310(a) of the Act.

(1) For purposes of this subsection, the term "other arrangements" includes both cost-reimbursable and non-reimbursable arrangements with other Federal agencies. Such arrangements shall include the use of the provisions of the Intergovernmental Personnel Act of 1970 (Pub. L. 91-648; Pub. L. 93-638) both for purposes of training and for providing technical assistance. Other arrangements may also include grants to State agencies or other units of government, or to educational or non-profit institutions.

(b) *Comment.* Statutory citation, subsection 310(a):

> Each department, agency, and instrumentality of the executive branch of the Federal Government may assist the Secretary, on a reimbursable basis or otherwise in carrying out the purposes of this section, including, but not limited to, the furnishing of information to the extent permitted by law, the transfer of personnel with their consent and without prejudice to their position and rating, and the performance of any research, study, and training which does not interfere with the performance of the primary duties of such department, agency or instrumentality.

§ 933.12 Use of funds.

(a) Research and studies under subsection 310(a) shall include studies, pilot or demonstration projects, or other analyses complementing or enhancing development and/or administration of State coastal management programs, but with broader application than research and studies funded pursuant to subsection 310(b). The term "broader application" is intended to imply both a broader geographic coverage and a broader range of problems.

(1) Research and studies funded under subsection 310(a) can be expected to:

(i) Supplement and enhance work geared toward management program development and administration;

(ii) Aid in the resolution of coastal zone management issues;

(iii) Have application to a group of States, a region, or the entire nation;

(iv) Assist in resolving issues related to the administration of the national coastal zone management program; and

(v) Where appropriate, be transferable or usable beyond the study area.

(2) In contrast to State grants pursuant to subsection 310(b), these efforts will not necessarily focus on technical and site-specific studies.

(b) Training under subsection 310(a) shall include study, course-work, or other educational activities geared toward developing and/or improving the capabilities of individuals working in or preparing to work in the field of coastal zone management. Such training need not be limited solely to the short-term, professional skill development anticipated in subsection 310(b).

(1) Training activities funded under subsection 310(a) can be expected to:

(i) Improve the capabilities of personnel currently involved in coastal zone management work,

(ii) Provide for the development of additional trained coastal zone management personnel,

(iii) Contribute to improved understanding of the field of coastal zone management, or

(iv) Meet the needs of, or be transferable to, a group of States, a region, or the entire nation.

(2) Training may include, but need not be limited to, the following:

(i) Internships or other training programs designed to provide actual experience working in the field of coastal zone management;

(ii) Course or curriculum development and testing at the high school, college, and graduate school levels;

(iii) Testing of new approaches to education and training in coastal zone management; and

(iv) Exploration of the relationship of coastal zone management to other related fields.

Subpart C—Operation of National Research and Technical Assistance Program

§ 933.20 Priorities and annual spending plans.

(a) Periodically, the Associate Administrator will develop a priorities plan for the national research and technical assistance program.

(1) This plan will indicate those coastal zone management issues, subjects, and areas which the Associate Administrator believes should be the subject of research, study, and training over a specific period of time (usually three to five years). Relative priorities will be assigned to major subject areas contained in the plan.

(2) In order to be responsive to State, regional, and national coastal zone management issues and needs, and to avoid duplication of research being conducted by others, the priorities plan will be circulated for comment in draft form to coastal States, other Federal agencies and other interested parties engaged in related research and/or training.

(3) After considering these comments, the Associate Administrator will finalize the priorities plan and make it generally available.

(4) The priorities plan will be revised periodically by the Associate Administrator and updated as deemed appropriate, following circulation of such changes for review and comment.

(b) *Comment.* Statutory citation, subsection 310(c)(1):

> The Secretary shall provide for the coordination of research, studies, and training activities under this section with any other such activities that are conducted by, or subject to the authority of, the Secretary.

(c) Based upon the priorities plan, the Associate Administrator will develop an annual spending plan for subsection 310(a) which will indicate planned research and technical assistance activities for that fiscal year in more detail. Where possible, the spending plan will also indicate the means by which the Associate Administrator intends to accomplish such studies (i.e., by request for proposals, transfer of funds to other Federal agencies,

grants, etc.) and the timing of such actions.

(1) A summary of the spending plan and the updated priorities plan will be made available to all interested parties upon request.

§ 933.21 Funding arrangements.

(a) To accomplish the national research and technical assistance program, the Associate Administrator may utilize any appropriate procedures which may include:

(1) Competitive procurement,

(2) Sole source procurement,

(3) Grants to State agencies or other units of government, or to educational or non-profit institutions,

(4) Cooperative agreements,

(5) Cost-reimbursement of other Federal agencies, and

(6) Personnel transfers on a reimbursable or non-reimbursable basis.

(b) Because of the variety of funding arrangements available to the Associate Administrator pursuant to subsection 310(a), the specific application procedures will vary depending on the nature of appropriate arrangements, and will be in accordance with prescribed procedures applicable to the Federal government or pursuant to Department of Commerce or NOAA administrative procedures.

Subpart D—State Grants for Research and Technical Assistance

§ 933.30 General.

(a) The State research and technical assistance program, pursuant to subsection 310(b) of the Act, is a program of grants to States to support research, study and training activities which improve State capability to develop and/or administer coastal zone management programs.

(1) Research, study and training grant applications should develop from needs identified or problems experienced during program development and/or administration.

(2) Applications should be justified in terms of the usefulness of the anticipated results to basic program efforts.

(b) Because of the highly applied nature of research conducted pursuant to subsection 310(b) of the Act, it may be difficult to judge whether an activity is most appropriately funded pursuant to subsection 310(b) or pursuant to sections 305 and 306 of the Act.

(1) Generally speaking, those activities which are essential to meeting the criteria for program approval or which are integral to operating an approved program should be funded pursuant to sections 305 and 306 of the Act.

(2) Those activities which enhance or improve a State's ability to meet the criteria for approval or to operate an approved program should be funded pursuant to subsection 310(b).

(3) It is anticipated that research and studies funded pursuant to section 310(b) will be more technical in nature or more geographically specific than those activities typically funded pursuant to sections 305 and 306 of the Act.

§ 933.31 Eligible entities.

To be eligible for grants pursuant to subsection 310(b), a State must either be making adequate progress toward the development of a coastal zone management program pursuant to section 305 of the Act or be operating an approved management program pursuant to section 306 of the Act.

§ 933.32 Use of funds.

(a) For purposes of subsection 310(b), research and studies shall include studies, pilot or demonstration projects, or other analyses of short term duration which can be expected to show results within one year's time. Such research or studies shall be derived from State coastal zone management program development and/or administration needs and shall utilize existing materials to the extent possible.

(1) Such research and studies will tend to focus more on technical and site-specific issues rather than on institutional and managerial issues.

(2) Research and studies related to the coastal energy impact program, established pursuant to section 308 of the Act, may be funded pursuant to subsection 310(b) of the Act if such research and studies are clearly related to a State's ongoing management program efforts and if such research and studies are not otherwise fundable

pursuant to sections 308, 305 or 306 of the Act.

(3) Research and studies related to or conducted within an estuarine sanctuary established pursuant to section 315(1) of the Act may be funded under subsection 310(b) if such research and studies can be shown to be related to program administration, and otherwise meet the criteria set forth in these regulations.

(b) For purposes of subsection 310(b), training shall refer to the education or other development of such personnel as may be needed to efficiently and effectively develop and/or administer State coastal zone management programs or to administer coastal energy impact funds.

(1) In general, such training should be of short term duration and should be directed toward the development of specific job-related skills.

(2) Such training may be for, but not limited to, the following types of expertise at both the State and local levels: permit reviewers and inspectors, law enforcement officers, natural resource managers, economists, fiscal officers, attorneys, planners, and persons with specialized training in the natural sciences.

(c) Grants issued pursuant to subsection 310(b) of the Act may not be used for the following purposes:

(1) Basic and/or long term research or education efforts;

(2) State management program administration activities;

(3) Construction;

(4) Land acquisition; or

(5) Permanent equipment acquisitions, unless such acquisitions can also be used for program development and/or administration purposes.

§ 933.33 Funding priorities.

(a) The Associate Administrator will not establish priorities between nor allocate funds specifically to research and study activities on the one hand or training activities on the other.

(b) Highest funding priority will be given to those research, study and/or training activities which directly support program development and/or administration.

(c) Lower funding priority will be given to the following:

(1) Activities which have a continuing funding dimension and a long time frame for completion; and

(2) Institutional and/or management studies more appropriately funded pursuant to sections 305 and 306 of the Act.

Subpart E—Application for State Research and Technical Assistance Grants

§ 933.40 General.

(a) The purpose of this section is to define the procedures by which grantees apply for and administer grants under the Act and to provide guidelines regarding the content of applications for State research and technical assistance grants pursuant to subsection 310(b) of the Act. These procedures shall be use and interpreted in conjunction with the Grants management Manual for Grants under the Coastal Zone Management Act, hereinafter referred to as the "Manual." The Manual incorporates a wide range of Federal requirements, including those established by the Office of Management and Budget, the General Services Administration, the Department of the Treasury, the General Accounting Office, and the Department of Commerce.

(b) Applications for grants under subsection 310(b) of the Act will be accepted by the Associate Administrator at any time during the fiscal year provided that they contain the information required pursuant to § 933.42.

(c) States are encouraged to submit applications for grants under subsection 310(b) at the same time that they submit applications for grants under section 305 or 306 in order to enable the Associate Administrator to review more comprehensively State management program efforts and to expedite processing at both the State and Federal levels.

(d) States may submit more than one subsection 310(b) application per year if research or technical assistance needs arise that were not anticipated at the time of first application for subsection 310(b) funds.

(e) An application need not contain both research and training elements.

(f) Grants shall not exceed eighty percent of the total cost of the proposed research and/or training. Federal funds received from other sources cannot be used to match subsection 310(b) grants. Match provided by the applicant may consist of cash or in-kind services as provided in the Manual.

(g) Costs claimed as charges to the grant project must be beneficial and necessary to the objectives of the grant project. As used herein the terms "costs" and "grant project" pertain to both the Federal grant and the matching share. The allowability of costs will be determined in accordance with the provisions of FMC 74-4: Cost Principles Applicable to Grants and Contracts with State and Local Governments.

(h) Grants shall be made for a maximum of one year's duration.

§ 933.41 Applicant responsibility.

(a) The application shall designate the entity to receive and administer grants pursuant to subsection 310(b). The applicant for such grants must be that entity designated by the Governor pursuant to 15 CFR 920.52 where a State is developing a coastal management program or that entity designated by the Governor pursuant to section 306(c)(5) of the Act where a coastal State is administering an approved management program. This entity may, in turn, pass through funds to, or subcontract with, other entities.

(b) The grantee will be administratively and fiscally responsible for all aspects of the grant, including any subcontracts made by the grantee.

§ 933.42 Application procedure.

(a) All applications are subject to the provisions of E.O. 12372.

(b) The Form SF-424, Application for Federal Assistance (Non-Construction Programs), constitutes the formal application and must be submitted sixty days prior to the desired grant beginning date. The application must be accompanied by evidence of compliance with requirement of E.O. 12372, including the resolution of any problems raised about the proposed project. The Associate Administrator will not accept applications that are substantially deficient in adherence to E.O. 12372 requirements.

(c) In Part IV, Program Narrative, of the Form SF—424, the applicant shall respond to the following requirements:

(1) A description of the work program to be undertaken during the grant period. This work program shall include:

(i) A precise description of each major research or study task to be undertaken, including an explanation of the need for this task, how it will be accomplished, what existing material it builds on, what results are expected, and how these results will be used in the management program.

(ii) A precise description of each major training task to be undertaken, including an explanation of the need for this training, how it will be accomplished, what existing efforts it builds on, who will benefit from it, and how these benefits will relate to the management program.

(iii) For each task, identify any "Other Entities," as defined in the "Manual," that will be allocated responsibility for carrying out all or portions of the task, and indicate the estimated cost of any subcontract for each allocation. Identify, if any, that portion of the task that will be carried out under contract with consultants and indicate the estimated cost of such contract(s). Where all or part of the work is to be subcontracted, the extent and nature of grantee supervision should be indicated.

(iv) For each task indicate the estimated total cost. Also indicate the estimated total months of effort, if any, allocated to the task from the applicant's staff.

(2) The sum of all tasks in paragraph (c)(1) of this section should equal the total estimated grant project cost.

(3) Using two categories, Professional and Clerical, indicate the total number of personnel in each category on the applicant's staff that will be assigned to the grant project. Also indicate the number assigned full-time and the number assigned less than full-time in the two categories. Additionally, indicate the number of new positions created in the two categories

as a result of the grant project. Indicate total personnel costs.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[42 FR 38738, July 29, 1977, as amended at 48 FR 29137, June 24, 1983]

§ 933.43 Approval of applications.

(a) An application for a state research, study and/or training grant which complies with the policies and requirements of the Act and the guidance contained in this subpart shall be approved by the Associate Administrator, assuming available funding.

(b) Should an application be found deficient, the Associate Administrator will notify the applicant in writing as to the manner in which the application fails to conform to the requirements of the Act or this subpart. Conferences may be held on these matters. Corrections to the application will provide the basis for resubmittal of the application for further consideration and review.

(c) The Associate Administrator may, upon finding extenuating circumstances relating to an application for State research, study and/or training grant, waive appropriate administrative requirements contained herein.

§ 933.44 Amendments.

(a) Amendments to an approved application must be submitted to the Associate Administrator prior to initiation of the contemplated change. Requests for substantial changes should be discussed with the Associate Administrator well in advance. While all amendments must be approved in writing by the NOAA Grants Officer, approval may be presumed for minor amendments if the grantee has not been notified of objections within thirty (30) working days of the date of postmark of the request.

§ 933.45 Copies of products.

(a) In order to insure the ability of the Associate Administrator to make the results of research conducted pursuant to this subsection available to any interested person, grantees shall supply the Associate Administrator with five (5) copies of any products, reports, studies, etc. financed in whole or in part by subsection 310(b) monies. Such products shall be received by the Associate Administrator no later than three months after the expiration date of the grant.

(b) *Comment.* Statutory citation, subsection 310(c)(2):

The Secretary shall make the results of research conducted pursuant to this section available to any interested person.

(1) At least one of the copies received by the Associate Administrator shall be transmitted to the National Technical Information Service for purposes of assuring general availability to interested parties.

PART 935—THE CHANNEL ISLANDS NATIONAL MARINE SANCTUARY REGULATIONS

Sec.

935.1 Authority.
935.2 Purpose.
935.3 Boundaries.
935.4 Definitions.
935.5 Allowed activities.
935.6 Hydrocarbon operations.
935.7 Prohibited activities.
935.8 Penalties for commission of prohibited acts.
935.9 Permit procedures and criteria.
935.10 Certification of other permits.
935.11 Appeals of administrative action.

APPENDIX 1A—CHANNEL ISLANDS NATIONAL MARINE SANCTUARY

AUTHORITY: 16 U.S.C. 1431-1434.

SOURCE: 45 FR 65203, Oct. 2, 1980, unless otherwise noted.

§ 935.1 Authority.

The Sanctuary has been designated pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g) and 303 of the Act.

9.
Part 935
Channel Island
National Marine Sanctuary
Regulations

as a result of the grant project. Indicate total personnel costs.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

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(b) *Comment.* Statutory citation, subsection 310(c)(2):

The Secretary shall make the results of research conducted pursuant to this section available to any interested person.

(1) At least one of the copies received by the Associate Administrator shall be transmitted to the National Technical Information Service for purposes of assuring general availability to interested parties.

PART 935—THE CHANNEL ISLANDS NATIONAL MARINE SANCTUARY REGULATIONS

Sec.

935.1 Authority.
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935.3 Boundaries.
935.4 Definitions.
935.5 Allowed activities.
935.6 Hydrocarbon operations.
935.7 Prohibited activities.
935.8 Penalties for commission of prohibited acts.
935.9 Permit procedures and criteria.
935.10 Certification of other permits.
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§ 935.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the extraordinary ecosystem including marine birds and mammals and other natural resources of the waters surrounding the northern Channel Islands and Santa Barbara Island and ensure the continued availability of the area as a research and recreational resource. This area supports a particularly rich and diverse marine biota, partially because it is located in a transition zone between northern and southern waters and partially because it is one of very few areas off the Southern California coast that has been relatively unaltered by human use.

§ 935.3 Boundaries.

The Sanctuary consists of an area of the waters off the coast of California of approximately 1252.5 square nautical miles adjacent to the following islands and offshore rocks: San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock extending seaward to a distance of 6 nautical miles (nm). The coordinates are shown in Appendix 1A.

§ 935.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(c) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, or any state or local unit of government.

(d) "Islands" means San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock.

(e) "Vessel" means watercraft of any description capable of being used as a means of transportation on the waters of the Sanctuary.

§ 935.5 Allowed activities.

All activities except those specifically prohibited by §§ 935.6 and 935.7 may be carried on in the Sanctuary subject to all prohibitions, restrictions and conditions imposed by any other authority. Recreational use of the area is encouraged.

§ 935.6 Hydrocarbon operations.

(a) Hydrocarbon exploration, development and production pursuant to any lease executed prior to the effective date of these regulations and the laying of any pipeline is allowed subject to paragraph (b) of this section and to all prohibitions, restrictions and conditions imposed by applicable regulations, permits, licenses or other authorizations and consistency reviews including those issued by the Department of the Interior, the Coast Guard, the Corps of Engineers, the Environmental Protection Agency and under the California Coastal Management Program and its implementing regulations.

(b) No person may engage in any hydrocarbon operation unless the following oil spill contingency equipment is available at the site of such operation:

(1) 1500 feet of open ocean containment boom and a boat capable of deploying the boom;

(2) One oil skimming device capable of open ocean use; and

(3) Fifteen bales of oil sorbent material.

(c) Hydrocarbon exploration, development and production activities pursuant to leases executed on or after the effective date of these regulations are prohibited.

§ 935.7 Prohibited activities.

(a) Except as may be necessary for the national defense, in accordance with Article 5, Section 2 of the Designation, or as may be necessary to respond to an emergency threatening life, property, or the environment, the following activities are prohibited within the Sanctuary unless permitted by the Assistant Administrator in accordance with § 935.9. All prohibitions shall be applied consistently with international law.

(1) *Discharge of substances.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts and chumming materials (bait);

(ii) Water (including cooling water) and other biodegradable effluents incidental to vessel use of the sanctuary generated by:

(A) Marine sanitation devices;

(B) Routine vessel maintenance, e.g. deck wash down;

(C) Engine exhaust; or

(D) Meals on board vessels;

(iii) Effluents incidental to hydrocarbon exploration and exploitation activities as allowed by § 935.6.

(2) *Alteration of, or construction on, the seabed.* Except in connection with the laying of any pipeline as allowed by § 935.6, within 2 nautical miles of any Island, no person shall:

(i) Construct any structure other than a navigation aid, or

(ii) Drill through the seabed, or

(iii) Dredge or otherwise alter the seabed in any way, other than

(A) To anchor vessels, or

(B) To bottom trawl from a commercial fishing vessel.

(3) *Commercial vessels operations.* Except to transport persons or supplies to or from an Island, no person shall operate within one nautical mile of an Island any vessel engaged in the trade of carrying cargo, including but not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be construed to limit access for fishing (including kelp harvesting), recreational, or research vessels.

(4) *Disturbing marine mammals and birds.* No person shall disturb seabirds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one nautical mile of any Island except:

(i) For enforcement purposes;

(ii) To engage in keep bed surveys; or

(iii) To transport persons or supplies to or from an Island.

(5) *Removing or damaging historical or cultural resources.* No person shall remove or damage any historical or cultural resource.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impact shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is signatory.

§ 935.8 Penalities for commission of prohibited acts.

(a) Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding in rem against any vessel used in violation of any such regulation. Procedures are set out in Subpart D of Part 922 (15 CFR Part 922) of this chapter. Subpart D is applicable to any instance of a violation of these regulations.

§ 935.9 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct any activity in the Sanctuary prohibited under § 935.7 if such activity is either: (1) Research related to the resouces of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to:

Assistant Administrator for Coastal Zone Management
Attn: Sanctuary Programs Office, Division of Operations and Enforcement
National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, N.W., Washington, DC 20235.

An application shall provide sufficient information to enable the Assistant Administrator to make the determination called for in paragraph (c) of this section and shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit the Assistant Administrator shall evaluate such matters as: (1) The general professional, and financial responsibility of the applicant; (2) the appropriateness of the methods envisioned to the purpose(s) of the activity; (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, or as a source of educational or scientific information; (4) the end value of the activity and (5) such other matters as may be deemed appropriate.

(d) In considering any application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of any person or entity, within or outside of the Federal government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained shall be available to the public.

(f) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[45 FR 65203, Oct. 2, 1980, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 935.10 Certification of other permits.

(a) All permits, licenses and other authorizations issued pursuant to any other authority are hereby certified and shall remain valid if they do not authorize any activity prohibited by § 935.6 or § 935.7. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

§ 935.11 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 935.9 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and will request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria set out in § 935.9(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section, and such other considerations as deemed appropriate. The Administrator will

notifiy all interested persons of the decision, and the reason(s) therefor, in writing, normally within 30 days of the receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and, at the discretion of the hearing officer, other interested persons, may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator will notify interested persons of the decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action shall constitute final action for the agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause, either upon his or her own motion or upon written request from the appellant or applicant stating the reason(s) therefor.

[45 FR 65203, Oct. 2, 1980, as amended at 49 FR 1041, Jan. 6, 1984]

APPENDIX IA—CHANNEL ISLANDS NATIONAL MARINE SANCTUARY

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
Northern Channel Islands Section		
01	33°56'28.959"	119°16'23.800"
02	33°58'03.919"	119°14'56.964"
03	34°01'33.846"	119°14'07.740"
04	34°04'24.203"	119°15'21.308"
05	34°06'06.653"	119°17'27.002"
06	34°06'54.809"	119°19'46.046"
07	34°06'57.988"	119°23'24.905"
08	34°06'51.627"	119°24'04.196"
09	34°07'01.640"	119°25'40.819"
10	34°06'59.904"	119°26'50.959"
11	34°08'02.002"	119°26'47.501"
12	34°08'17.693"	119°29'27.698"
13	34°08'52.234"	119°30'39.562"
14	34°09'16.780"	119°35'22.667"
15	34°09'05.106"	119°36'41.694"
16	34°08'02.782"	119°39'33.421"
17	34°08'46.870"	119°41'48.621"
18	34°09'35.583"	119°45'57.284"
19	34°09'32.627"	119°46'37.335"
20	34°09'33.396"	119°47'32.285"
21	34°09'43.668"	119°48'09.018"
22	34°10'10.616"	119°50'07.659"
23	34°10'21.586"	119°51'05.146"
24	34°10'33.161"	119°53'17.044"
25	34°10'36.545"	119°55'57.373"
26	34°10'21.283"	119°57'26.403"
27	34°08'07.255"	120°01'07.233"
28	34°08'13.144"	120°02'27.930"
29	34°07'47.772"	120°05'05.449"
30	34°07'29.314"	120°06'36.262"
31	34°07'30.691"	120°09'35.238"
32	34°06'36.285"	120°12'39.335"
33	34°06'40.634"	120°13'33.940"
34	34°08'10.759"	120°15'07.017"
35	34°09'12.290"	120°17'07.046"
35A	34°09'50.706"	120°17'31.649"
36	34°10'56.346"	120°18'40.520"
36B	34°11'28.249"	120°19'29.213"
37	34°12'08.078"	120°21'00.835"
37C	34°12'25.468"	120°25'01.261"
38	34°12'18.754"	120°25'39.373"
38D	34°11'33.184"	120°27'33.921"
39	34°12'19.470"	120°30'22.620"
39E	34°12'17.540"	120°32'19.959"
40	34°10'54.592"	120°35'57.887"
40F	34°08'07.491"	120°38'27.883"
41	34°04'53.454"	120°38'18.602"
41G	34°03'30.539"	120°37'39.442"
42	34°01'09.860"	120°35'04.806"
42H	34°00'48.573"	120°34'25.106"
43	33°59'13.122"	120°33'53.385"
44	33°57'01.427"	120°31'54.590"
45	33°55'38.973"	120°27'37.186"
46	33°55'30.037"	120°25'14.587"
47	33°54'50.522"	120°22'29.536"
48	33°55'01.640"	120°19'28.722"
49	33°54'34.409"	120°18'27.344"
50	33°53'23.129"	120°17'39.827"
51	33°50'39.990"	120°15'13.874"
52	33°49'53.280"	120°13'41.904"
53	33°49'03.437"	120°12'06.750"
54	33°48'36.087"	120°11'10.821"
55	33°47'39.280"	120°07'59.707"

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
56	33°47'37.617"	120°06'04.002"
57	33°47'59.351"	120°04'08.370"
58	33°48'38.700"	120°02'33.188"
59	33°48'52.167"	120°01'50.244"
60	33°50'28.486"	119°57'50.820"
61	33°50'55.128"	119°55'19.934"
62	33°52'13.338"	119°52'53.439"
63	33°52'04.900"	119°52'10.719"
64	33°51'39.919"	119°47'21.152"
65	33°51'48.592"	119°46'13.213"
66	33°51'35.796"	119°44'34.589"
67	33°51'44.374"	119°41'12.738"
68	33°52'23.857"	119°39'14.708"
69	33°53'09.365"	119°37'30.784"
70	33°53'12.754"	119°35'35.793"
71	33°53'17.114"	119°34'54.567"
72	33°53'38.865"	119°32'51.578"
73	33°54'02.277"	119°31'06.274"
74	33°54'56.444"	119°28'54.052"
75	33°54'39.349"	119°27'37.512"
76	33°54'15.236"	119°25'23.779"
77	33°54'07.847"	119°24'22.849"
78	33°54'04.662"	119°22'58.006"
79	33°54'14.311"	119°21'44.573"
80	33°54'22.824"	119°21'09.003"
81	33°54'46.904"	119°19'54.677"
82	33°55'05.834"	119°19'16.027"
Santa Barbara Island Section		
83	33°28'56.904"	119°10'04.092"
84	33°26'32.364"	119°10'01.328"
85	33°24'19.904"	119°08'52.236"
86	33°23'26.019"	119°07'54.826"
87	33°22'04.836"	119°05'16.716"
88	33°21'49.387"	119°04'01.551"
89	33°21'44.594"	119°02'49.887"
90	33°21'49.556"	119°01'37.839"
91	33°22'07.538"	118°59'49.357"
92	33°22'27.774"	118°58'51.623"
93	33°22'47.957"	118°58'07.633"
94	33°23'20.805"	118°57'14.375"
95	33°24'18.458"	118°56'08.450"
96	33°26'24.130"	118°54'51.352"
97	33°29'02.820"	118°54'22.276"
98	33°31'27.917"	118°54'50.367"
99	33°32'17.935"	118°55'18.396"
100	33°35'10.090"	118°59'40.091"
101	33°35'24.575"	119°01'22.108"
102	33°35'06.497"	119°03'59.463"
103	33°34'48.322"	119°05'03.374"
104	33°32'37.151"	119°08'37.201"
105	33°30'41.731"	119°09'45.845"

[47 FR 5212, Feb. 4, 1982]

PART 936—THE POINT REYES/FARALLON ISLANDS MARINE SANCTUARY REGULATIONS

Sec.

936.1 Authority.
936.2 Purpose.
936.3 Boundaries.
936.4 Definitions.
936.5 Allowed activities.
936.6 Prohibited activities.
936.7 Penalties for commission of prohibited acts.
936.8 Permit procedures and criteria.
936.9 Certification of other permits.
936.10 Appeals of administrative action.
APPENDIX I—POINT REYES-FARALLON ISLANDS NATIONAL MARINE SANCTUARY

AUTHORITY: Secs. 302(d), (f), (g), and 303 of Title III, Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434. Secs. 302(f), 302(g) and 303, Act.

SOURCE: 46 FR 7939, Jan. 26, 1981, unless otherwise noted.

§ 936.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g), and 303 of the Act.

§ 936.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the extraordinary ecosystem, including marine birds, mammals, and other natural resources, of the waters surrounding the Farallon Islands and Point Reyes, and to ensure the continued availability of the area as a research and recreational resource.

§ 936.3 Boundaries.

The Sanctuary consists of an area of the waters adjacent to the coast of California north and south of the Point Reyes Headlands, between Bodega Head and Rocky Point and the Farallon Islands (including Noonday Rock), and includes approximately 948 square nautical miles (nmi²). The coordinates are listed in Appendix I.

The shoreward boundary follows the mean high tide line and the seaward limit of Point Reyes National Seashore. Between Bodega Head and Point Reyes Headlands, the Sanctuary extends seaward 3 nmi beyond State waters. The Sanctuary also includes the waters within 12 nmi of the Farallon Islands, and between the Islands and the mainland from Point Reyes

10.
Part 936
Point Reyes/Farallones Islands National Marine Sanctuaries Regulations

as a result of the grant project. Indicate total personnel costs.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[42 FR 38738, July 29, 1977, as amended at 48 FR 29137, June 24, 1983]

§ 933.43 Approval of applications.

(a) An application for a state research, study and/or training grant which complies with the policies and requirements of the Act and the guidance contained in this subpart shall be approved by the Associate Administrator, assuming available funding.

(b) Should an application be found deficient, the Associate Administrator will notify the applicant in writing as to the manner in which the application fails to conform to the requirements of the Act or this subpart. Conferences may be held on these matters. Corrections to the application will provide the basis for resubmittal of the application for further consideration and review.

(c) The Associate Administrator may, upon finding extenuating circumstances relating to an application for State research, study and/or training grant, waive appropriate administrative requirements contained herein.

§ 933.44 Amendments.

(a) Amendments to an approved application must be submitted to the Associate Administrator prior to initiation of the contemplated change. Requests for substantial changes should be discussed with the Associate Administrator well in advance. While all amendments must be approved in writing by the NOAA Grants Officer, approval may be presumed for minor amendments if the grantee has not been notified of objections within thirty (30) working days of the date of postmark of the request.

§ 933.45 Copies of products.

(a) In order to insure the ability of the Associate Administrator to make the results of research conducted pursuant to this subsection available to any interested person, grantees shall supply the Associate Administrator with five (5) copies of any products, reports, studies, etc. financed in whole or in part by subsection 310(b) monies. Such products shall be received by the Associate Administrator no later than three months after the expiration date of the grant.

(b) *Comment.* Statutory citation, subsection 310(c)(2):

> The Secretary shall make the results of research conducted pursuant to this section available to any interested person.

(1) At least one of the copies received by the Associate Administrator shall be transmitted to the National Technical Information Service for purposes of assuring general availability to interested parties.

PART 935—THE CHANNEL ISLANDS NATIONAL MARINE SANCTUARY REGULATIONS

Sec.

935.1 Authority.
935.2 Purpose.
935.3 Boundaries.
935.4 Definitions.
935.5 Allowed activities.
935.6 Hydrocarbon operations.
935.7 Prohibited activities.
935.8 Penalties for commission of prohibited acts.
935.9 Permit procedures and criteria.
935.10 Certification of other permits.
935.11 Appeals of administrative action.

APPENDIX 1A—CHANNEL ISLANDS NATIONAL MARINE SANCTUARY

AUTHORITY: 16 U.S.C. 1431-1434.

SOURCE: 45 FR 65203, Oct. 2, 1980, unless otherwise noted.

§ 935.1 Authority.

The Sanctuary has been designated pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g) and 303 of the Act.

§ 935.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the extraordinary ecosystem including marine birds and mammals and other natural resources of the waters surrounding the northern Channel Islands and Santa Barbara Island and ensure the continued availability of the area as a research and recreational resource. This area supports a particularly rich and diverse marine biota, partially because it is located in a transition zone between northern and southern waters and partially because it is one of very few areas off the Southern California coast that has been relatively unaltered by human use.

§ 935.3 Boundaries.

The Sanctuary consists of an area of the waters off the coast of California of approximately 1252.5 square nautical miles adjacent to the following islands and offshore rocks: San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock extending seaward to a distance of 6 nautical miles (nm). The coordinates are shown in Appendix 1A.

§ 935.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(c) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, or any state or local unit of government.

(d) "Islands" means San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock.

(e) "Vessel" means watercraft of any description capable of being used as a means of transportation on the waters of the Sanctuary.

§ 935.5 Allowed activities.

All activities except those specifically prohibited by §§ 935.6 and 935.7 may be carried on in the Sanctuary subject to all prohibitions, restrictions and conditions imposed by any other authority. Recreational use of the area is encouraged.

§ 935.6 Hydrocarbon operations.

(a) Hydrocarbon exploration, development and production pursuant to any lease executed prior to the effective date of these regulations and the laying of any pipeline is allowed subject to paragraph (b) of this section and to all prohibitions, restrictions and conditions imposed by applicable regulations, permits, licenses or other authorizations and consistency reviews including those issued by the Department of the Interior, the Coast Guard, the Corps of Engineers, the Environmental Protection Agency and under the California Coastal Management Program and its implementing regulations.

(b) No person may engage in any hydrocarbon operation unless the following oil spill contingency equipment is available at the site of such operation:

(1) 1500 feet of open ocean containment boom and a boat capable of deploying the boom;

(2) One oil skimming device capable of open ocean use; and

(3) Fifteen bales of oil sorbent material.

(c) Hydrocarbon exploration, development and production activities pursuant to leases executed on or after the effective date of these regulations are prohibited.

§ 935.7 Prohibited activities.

(a) Except as may be necessary for the national defense, in accordance with Article 5, Section 2 of the Designation, or as may be necessary to respond to an emergency threatening life, property, or the environment, the following activities are prohibited within the Sanctuary unless permitted by the Assistant Administrator in accordance with § 935.9. All prohibitions shall be applied consistently with international law.

(1) *Discharge of substances.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts and chumming materials (bait);

(ii) Water (including cooling water) and other biodegradable effluents incidental to vessel use of the sanctuary generated by:

(A) Marine sanitation devices;

(B) Routine vessel maintenance, e.g. deck wash down;

(C) Engine exhaust; or

(D) Meals on board vessels;

(iii) Effluents incidental to hydrocarbon exploration and exploitation activities as allowed by § 935.6.

(2) *Alteration of, or construction on, the seabed.* Except in connection with the laying of any pipeline as allowed by § 935.6, within 2 nautical miles of any Island, no person shall:

(i) Construct any structure other than a navigation aid, or

(ii) Drill through the seabed, or

(iii) Dredge or otherwise alter the seabed in any way, other than

(A) To anchor vessels, or

(B) To bottom trawl from a commercial fishing vessel.

(3) *Commercial vessels operations.* Except to transport persons or supplies to or from an Island, no person shall operate within one nautical mile of an Island any vessel engaged in the trade of carrying cargo, including but not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be construed to limit access for fishing (including kelp harvesting), recreational, or research vessels.

(4) *Disturbing marine mammals and birds.* No person shall disturb seabirds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one nautical mile of any Island except:

(i) For enforcement purposes;

(ii) To engage in keep bed surveys; or

(iii) To transport persons or supplies to or from an Island.

(5) *Removing or damaging historical or cultural resources.* No person shall remove or damage any historical or cultural resource.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impact shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is signatory.

§ 935.8 Penalities for commission of prohibited acts.

(a) Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding in rem against any vessel used in violation of any such regulation. Procedures are set out in Subpart D of Part 922 (15 CFR Part 922) of this chapter. Subpart D is applicable to any instance of a violation of these regulations.

§ 935.9 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct any activity in the Sanctuary prohibited under § 935.7 if such activity is either: (1) Research related to the resouces of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to:

Assistant Administrator for Coastal Zone Management
Attn: Sanctuary Programs Office, Division of Operations and Enforcement
National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, N.W., Washington, DC 20235.

An application shall provide sufficient information to enable the Assistant Administrator to make the determination called for in paragraph (c) of this section and shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit the Assistant Administrator shall evaluate such matters as: (1) The general professional, and financial responsibility of the applicant; (2) the appropriateness of the methods envisioned to the purpose(s) of the activity; (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, or as a source of educational or scientific information; (4) the end value of the activity and (5) such other matters as may be deemed appropriate.

(d) In considering any application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of any person or entity, within or outside of the Federal government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained shall be available to the public.

(f) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[45 FR 65203, Oct. 2, 1980, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 935.10 Certification of other permits.

(a) All permits, licenses and other authorizations issued pursuant to any other authority are hereby certified and shall remain valid if they do not authorize any activity prohibited by § 935.6 or § 935.7. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

§ 935.11 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 935.9 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and will request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria set out in § 935.9(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section, and such other considerations as deemed appropriate. The Administrator will

notify all interested persons of the decision, and the reason(s) therefor, in writing, normally within 30 days of the receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and, at the discretion of the hearing officer, other interested persons, may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator will notify interested persons of the decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action shall constitute final action for the agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause, either upon his or her own motion or upon written request from the appellant or applicant stating the reason(s) therefor.

[45 FR 65203, Oct. 2, 1980, as amended at 49 FR 1041, Jan. 6, 1984]

APPENDIX IA—CHANNEL ISLANDS NATIONAL MARINE SANCTUARY

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
Northern Channel Islands Section		
01	33°56'28.959"	119°16'23.800"
02	33°58'03.919"	119°14'56.964"
03	34°01'33.846"	119°14'07.740"
04	34°04'24.203"	119°15'21.308"
05	34°06'06.653"	119°17'27.002"
06	34°06'54.809"	119°19'46.046"
07	34°06'57.988"	119°23'24.905"
08	34°06'51.627"	119°24'04.198"
09	34°07'01.640"	119°25'40.819"
10	34°06'59.904"	119°26'50.959"
11	34°08'02.002"	119°28'47.501"
12	34°08'17.693"	119°29'27.698"
13	34°08'52.234"	119°30'39.562"
14	34°09'16.780"	119°35'22.667"
15	34°09'05.106"	119°36'41.694"
16	34°08'02.782"	119°39'33.421"
17	34°08'46.870"	119°41'48.621"
18	34°09'35.583"	119°45'57.264"
19	34°09'32.627"	119°46'37.335"
20	34°09'33.396"	119°47'32.285"
21	34°09'43.668"	119°48'09.018"
22	34°10'10.616"	119°50'07.659"
23	34°10'21.586"	119°51'05.146"
24	34°10'33.161"	119°53'17.044"
25	34°10'36.545"	119°55'57.373"
26	34°10'21.283"	119°57'26.403"
27	34°08'07.255"	120°01'07.233"
28	34°08'13.144"	120°02'27.930"
29	34°07'47.772"	120°05'05.449"
30	34°07'29.314"	120°06'36.262"
31	34°07'30.691"	120°09'35.238"
32	34°06'36.285"	120°12'39.335"
33	34°06'40.634"	120°13'33.940"
34	34°06'10.759"	120°15'07.017"
35	34°09'12.290"	120°17'07.046"
35A	34°09'50.706"	120°17'31.649"
36	34°10'56.346"	120°18'40.520"
36B	34°11'28.249"	120°19'29.213"
37	34°12'06.078"	120°21'00.835"
37C	34°12'25.468"	120°25'01.261"
38	34°12'18.754"	120°25'39.373"
38D	34°11'33.184"	120°27'33.921"
39	34°12'19.470"	120°30'22.620"
39E	34°12'17.540"	120°32'19.959"
40	34°10'54.592"	120°35'57.887"
40F	34°06'07.491"	120°38'27.883"
41	34°04'53.454"	120°38'16.602"
41G	34°03'30.539"	120°37'39.442"
42	34°01'09.860"	120°35'04.808"
42H	34°00'48.573"	120°34'25.106"
43	33°59'13.122"	120°33'53.385"
44	33°57'01.427"	120°31'54.590"
45	33°56'36.973"	120°27'37.188"
46	33°55'30.037"	120°25'14.587"
47	33°54'50.522"	120°22'29.536"
48	33°55'01.640"	120°19'26.722"
49	33°54'34.409"	120°18'27.344"
50	33°53'23.129"	120°17'39.927"
51	33°50'39.990"	120°15'13.874"
52	33°49'53.260"	120°13'41.904"
53	33°49'03.437"	120°12'06.750"
54	33°48'36.087"	120°11'10.821"
55	33°47'39.280"	120°07'59.707"

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
56	33°47'37.617"	120°06'04.002"
57	33°47'59.351"	120°04'08.370"
58	33°48'38.700"	120°02'33.188"
59	33°48'52.167"	120°01'50.244"
60	33°50'28.486"	119°57'50.820"
61	33°50'55.128"	119°55'19.934"
62	33°52'13.338"	119°52'53.439"
63	33°52'04.900"	119°52'10.719"
64	33°51'39.919"	119°47'21.152"
65	33°51'48.592"	119°46'13.213"
66	33°51'35.796"	119°44'34.589"
67	33°51'44.374"	119°41'12.738"
68	33°52'23.857"	119°39'14.706"
69	33°53'09.365"	119°37'30.784"
70	33°53'12.754"	119°35'35.793"
71	33°53'17.114"	119°34'54.567"
72	33°53'38.865"	119°32'51.576"
73	33°54'02.277"	119°31'06.274"
74	33°54'56.444"	119°28'54.052"
75	33°54'39.349"	119°27'37.512"
76	33°54'15.236"	119°25'23.779"
77	33°54'07.847"	119°24'22.849"
78	33°54'04.682"	119°22'58.006"
79	33°54'14.311"	119°21'44.573"
80	33°54'22.824"	119°21'09.003"
81	33°54'46.904"	119°19'54.677"
82	33°55'05.834"	119°19'16.027"

Santa Barbara Island Section

83	33°28'56.904"	119°10'04.092"
84	33°26'32.364"	119°10'01.328"
85	33°24'19.904"	119°08'52.236"
86	33°23'26.019"	119°07'54.826"
87	33°22'04.836"	119°05'16.716"
88	33°21'49.387"	119°04'01.551"
89	33°21'44.594"	119°02'49.887"
90	33°21'49.556"	119°01'37.839"
91	33°22'07.536"	118°59'49.357"
92	33°22'27.774"	118°58'51.623"
93	33°22'47.957"	118°58'07.633"
94	33°23'20.805"	118°57'14.375"
95	33°24'18.458"	118°56'08.450"
96	33°26'24.130"	118°54'51.352"
97	33°29'02.820"	118°54'22.276"
98	33°31'27.917"	118°54'50.367"
99	33°32'17.935"	118°55'18.396"
100	33°35'10.090"	118°59'40.091"
101	33°35'24.575"	119°01'22.108"
102	33°35'06.497"	119°03'59.463"
103	33°34'48.322"	119°05'03.374"
104	33°32'37.151"	119°08'37.201"
105	33°30'41.731"	119°09'45.845"

[47 FR 5212, Feb. 4, 1982]

PART 936—THE POINT REYES/FARALLON ISLANDS MARINE SANCTUARY REGULATIONS

Sec.

936.1 Authority.
936.2 Purpose.
936.3 Boundaries.
936.4 Definitions.
936.5 Allowed activities.
936.6 Prohibited activities.
936.7 Penalties for commission of prohibited acts.
936.8 Permit procedures and criteria.
936.9 Certification of other permits.
936.10 Appeals of administrative action.
APPENDIX I—POINT REYES-FARALLON ISLANDS NATIONAL MARINE SANCTUARY

AUTHORITY: Secs. 302(d), (f), (g), and 303 of Title III, Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434. Secs. 302(f), 302(g) and 303, Act.

SOURCE: 46 FR 7939, Jan. 26, 1981, unless otherwise noted.

§ 936.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g), and 303 of the Act.

§ 936.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the extraordinary ecosystem, including marine birds, mammals, and other natural resources, of the waters surrounding the Farallon Islands and Point Reyes, and to ensure the continued availability of the area as a research and recreational resource.

§ 936.3 Boundaries.

The Sanctuary consists of an area of the waters adjacent to the coast of California north and south of the Point Reyes Headlands, between Bodega Head and Rocky Point and the Farallon Islands (including Noonday Rock), and includes approximately 948 square nautical miles (nmi²). The coordinates are listed in Appendix I.

The shoreward boundary follows the mean high tide line and the seaward limit of Point Reyes National Seashore. Between Bodega Head and Point Reyes Headlands, the Sanctuary extends seaward 3 nmi beyond State waters. The Sanctuary also includes the waters within 12 nmi of the Farallon Islands, and between the Islands and the mainland from Point Reyes

11.
Part 937
Looe Key
National Marine Sanctuary
Regulations

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
50	33°47'37.617"	120°06'04.002"
51	33°47'59.351"	120°04'08.370"
58	33°48'38.700"	120°02'33.188"
59	33°48'52.167"	120°01'50.244"
60	33°50'28.486"	119°57'50.820"
61	33°50'55.128"	119°55'19.934"
62	33°52'13.338"	119°52'53.439"
63	33°52'04.900"	119°52'10.719"
64	33°51'39.919"	119°47'21.152"
65	33°51'48.592"	119°46'13.213"
66	33°51'35.796"	119°44'34.589"
67	33°51'44.374"	119°41'12.738"
68	33°52'23.657"	119°39'14.708"
69	33°53'09.365"	119°37'30.784"
70	33°53'12.754"	119°35'35.793"
71	33°53'17.114"	119°34'54.567"
72	33°53'38.865"	119°32'51.578"
73	33°54'02.277"	119°31'06.274"
74	33°54'56.144"	119°28'54.052"
75	33°54'39.319"	119°27'37.512"
76	33°54'15.236"	119°25'23.779"
77	33°54'07.847"	119°24'22.849"
78	33°54'04.682"	119°22'58.006"
79	33°54'14.311"	119°21'44.573"
80	33°54'22.824"	119°21'09.003"
81	33°54'48.904"	119°19'54.677"
82	33°55'05.834"	119°19'16.027"
	Santa Barbara Island Section	
83	33°28'58.904"	119°10'04.092"
84	33°28'32.364"	119°10'01.328"
85	33°24'19.904"	119°08'52.236"
86	33°23'26.019"	119°07'54.826"
87	33°22'04.836"	119°05'16.716"
88	33°21'49.387"	119°04'01.551"
89	33°21'44.594"	119°02'49.887"
90	33°21'49.556"	119°01'37.839"
91	33°22'07.536"	118°59'49.357"
92	33°22'27.774"	118°58'51.623"
93	33°22'47.957"	118°58'07.633"
94	33°23'20.805"	118°57'14.375"
95	33°24'18.458"	118°56'08.450"
96	33°26'24.130"	118°54'51.352"
97	33°29'02.820"	118°54'22.276"
98	33°31'27.917"	118°54'58.367"
99	33°32'17.935"	118°55'16.396"
100	33°35'10.090"	118°59'40.991"
101	33°35'24.575"	119°01'22.196"
102	33°35'06.497"	119°03'59.463"
103	33°34'48.322"	119°05'03.378"
104	33°32'37.151"	119°06'37.201"
105	33°30'41.731"	119°09'45.845"

[47 FR 5212, Feb. 4, 1982]

PART 936—THE POINT REYES/FARALLON ISLANDS MARINE SANCTUARY REGULATIONS

Sec.

936.1 Authority.
936.2 Purpose.
936.3 Boundaries.
936.4 Definitions.
936.5 Allowed activities.
936.6 Prohibited activities.
936.7 Penalties for commission of prohibited acts.
936.8 Permit procedures and criteria.
936.9 Certification of other permits.
936.10 Appeals of administrative action.

APPENDIX I—POINT REYES-FARALLON ISLANDS NATIONAL MARINE SANCTUARY

AUTHORITY: Secs. 302(d), (f), (g), and 303 of Title III, Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434. Secs. 302(f), 302(g) and 303, Act.

SOURCE: 46 FR 7939, Jan. 26, 1981, unless otherwise noted.

§ 936.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g), and 303 of the Act.

§ 936.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the extraordinary ecosystem, including marine birds, mammals, and other natural resources, of the waters surrounding the Farallon Islands and Point Reyes, and to ensure the continued availability of the area as a research and recreational resource.

§ 936.3 Boundaries.

The Sanctuary consists of an area of the waters adjacent to the coast of California north and south of the Point Reyes Headlands, between Bodega Head and Rocky Point and the Farallon Islands (including Noonday Rock), and includes approximately 948 square nautical miles (nmi²). The coordinates are listed in Appendix I.

The shoreward boundary follows the mean high tide line and the seaward limit of Point Reyes National Seashore. Between Bodega Head and Point Reyes Headlands, the Sanctuary extends seaward 3 nmi beyond State waters. The Sanctuary also includes the waters within 12 nmi of the Farallon Islands, and between the Islands and the mainland from Point Reyes

Headlands to Rocky Point. The Sanctuary includes Bodega Bay, but not Bodega Harbor.

§ 936.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Areas of Special Biological Significance" (ASBS) means those areas established by the State of California prior to the designation of the sanctuary except that for purposes of these regulations, the area established around the Farallon Islands shall not be included.

(c) "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(d) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government or any State or local unit of government.

(e) "Vessel" means watercraft of any description capable of being used as a means of transportation on the waters of the Sanctuary.

§ 936.5 Allowed activities.

All activities except those specifically prohibited by § 936.6 may be carried on in the Sanctuary subject to all prohibitions, restrictions, and conditions imposed by any other authority. Recreational use of the area is encouraged.

§ 936.6 Prohibited activities.

(a) Except as may be necessary for national defense, in accordance with Article 5, Section 2 of the Designation, or as may be necessary to respond to an emergency threatening life, property or the environment, the following activities are prohibited within the Sanctuary unless permitted by the Assistant Administrator in accordance with § 936.8 or § 936.9. All prohibitions shall be applied consistently with international law.

(1) *Hydrocarbon operations.* Hydrocarbon exploration, development, and production are prohibited except that pipelines related to operations outside the Sanctuary may be placed at a distance greater than 2 nmi from the Farallon Islands, Bolinas Lagoon, and Areas of Special Biological Significance where certified to have no significant effect on sanctuary resources in accordance with § 936.9.

(2) *Discharge of substances.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts and chumming materials (bait).

(ii) Water (including cooling water) and other biodegradable effluents incidental to vessel use of the sanctuary generated by:

(A) Marine sanitation devices;

(B) Routine vessel maintenance, e.g., deck wash down;

(C) Engine exhaust; or

(D) Meals on board vessels.

(iii) Dredge material disposed of at the interim dumpsite now established approximately 10 nmi south of the southeast Farallon Island and municipal sewage provided such discharges are certified in accordance with § 936.9.

(3) *Alteration of or construction on the seabed.* Except in connection with the laying of pipelines or construction of an outfall if certified in accordance with § 936.9, no person shall:

(i) Construct any structure other than a navigation aid,

(ii) Drill through the seabed, and

(iii) Dredge or otherwise alter the seabed in any way other than by anchoring vessels or botton trawling from a commercial fishing vessel, except for routine maintenance and navigation, ecological maintenance, mariculture, and the construction of docks and piers in Tomales Bay.

(4) *Operations of vessels.* Except to transport persons or supplies to or from islands or mainland areas adjacent to sanctuary waters, within an area extending 2 nautical miles from the Farallon Islands, Bolinas Lagoon, or any Area of Special Biological Significance, no person shall operate any vessel engaged in the trade of carrying cargo, including but not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be

construed to limit access for fishing, recreational or research vessels.

(5) *Disturbing marine mammals and birds.* No person shall disturb seabirds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one nautical mile of the Farallon Islands, Bolinas Lagoon, or any Area of Special Biological Significance except to transport persons or supplies to or from the Islands or for enforcement purposes.

(6) *Removing or damaging historical or cultural resources.* No person shall remove or damage any historical or cultural resource.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions, and other international agreements to which the United States is signatory.

§ 936.7 Penalties for commission of prohibited acts.

(a) Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding in rem against any vessel used in violation of any such regulation. Procedures are outlined in Subpart D of Part 922 (15 CFR Part 922) of this chapter. Subpart D is applicable to any instance of a violation of these regulations.

§ 936.8 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct any activity in the Sanctuary, prohibited under § 936.6, if such an activity is (1) research related to the resources of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to the Assistant Administrator for Coastal Zone Management, Attn: Office of Coastal Zone Management, Sanctuary Programs Office, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, DC 20235. An application shall provide sufficient information to enable the Assistant Administrator to make the determination called for in paragraph (c) of this section and shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit, the Assistant Administrator shall evaluate (1) the general professional and financial responsibility of the applicant, (2) the appropriateness of the methods envisioned to the purpose(s) of the activity, (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary, (4) the end value of the activity, and (5) other matters as deemed appropriate.

(d) In considering any application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of any person or entity, within or outside the Federal government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained will be made available to the public.

(f) The Administrator may suspend, revoke, modify, or deny a permit

granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[46 FR 7939, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 936.9 Certification of other permits.

(a) All permits, licenses, and other authorizations issued pursuant to any other authority are hereby certified and shall remain valid if they do not authorize any activity prohibited by § 936.6. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

(b) A permit, license, or other authorization allowing the discharge of municipal sewage, the laying of any pipeline outside 2 nmi from the Farallon Islands, Bolinas Lagoon and Areas of Special Biological Significance, or the disposal of dredge material at the interim dumpsite now established approximately 10 nmi south of the Southeast Farallon Island prior to the selection of a permanent dumpsite shall be valid if certified by the Assistant Administrator as consistent with the purpose of the Sanctuary and having no significant effect on sanctuary resources. Such certification may impose terms and conditions as deemed appropriate to ensure consistency.

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

(d) Any certification called for in this section shall be presumed unless the Assistant Administrator acts to deny or condition certification within 60 days from the date that the Assistant Administrator receives notice of the proposed permit and the necessary supporting data.

(e) The Assistant Administrator may amend, suspend, or revoke any certification made under this section whenever continued operation would violate any terms or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit and the issuing agency and shall set forth reason(s) for the action taken.

(f) Either the holder or the issuing agency may appeal any action conditioning, denying, amending, suspending, or revoking any certification in accordance with the procedure provided for in § 936.10.

§ 936.10 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 936.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and may request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria defined in § 936.8(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing, and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section and such other considerations as deemed

appropriate. The Administrator will notify all interested persons of the decision, and the reason(s) for the decision, in writing, within 30 days of receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines one is appropriate, the Administrator may grant an informal hearing before a designated hearing officer after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing must normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different), and other interested persons (at the discretion of the hearing officer) may appear personally or by counsel at the hearing, and submit material and present arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify interested persons of the decision, and the reason(s) for the decision, in writing, within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action will constitute final action for the agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause upon written request from the appellant or applicant stating the reason(s) for the extension.

[46 FR 7939, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984]

APPENDIX I—POINT REYES-FARALLON ISLANDS NATIONAL MARINE SANCTUARY

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
1	38°15'50.349"	123°10'48.933"
2	38°12'36.338"	123°07'04.846"
3	38°09'57.033"	123°05'27.435"
4	38°08'26.872"	123°04'52.524"
5	38°07'42.125"	123°05'10.714"
6	38°06'08.017"	123°05'48.920"
7	38°05'26.765"	123°06'09.922"
8	38°04'44.587"	123°06'29.251"
9	38°03'54.439"	123°06'57.591"
10	38°03'07.527"	123°07'37.755"
11	37°59'32.425"	123°08'24.905"
12	37°59'22.344"	123°14'06.127"
13	37°57'31.931"	123°19'19.187"
14	37°54'16.943"	123°23'16.456"
15	37°50'05.522"	123°25'28.791"
16	37°45'33.799"	123°25'32.668"
17	37°41'20.351"	123°23'29.811"
18	37°38'01.053"	123°19'37.445"
19	37°36'04.665"	123°14'30.483"
20	37°35'30.191"	123°13'31.060"
21	37°33'47.197"	123°11'50.904"
22	37°31'12.270"	123°07'39.618"
23	37°30'29.706"	123°05'42.221"
24	37°29'39.287"	123°00'23.711"
25	37°30'34.337"	122°54'18.139"
26	37°31'47.784"	122°51'31.592"
27	37°34'17.533"	122°48'10.415"
28	37°36'58.627"	122°46'05.779"
29	37°39'59.303"	122°44'59.838"
30	37°52'56.355"	122°37'35.195"

[47 FR 5212, Feb. 4, 1982]

PART 937—THE LOOE KEY NATIONAL MARINE SANCTUARY REGULATIONS

Sec.
937.1 Authority.
937.2 Purpose.
937.3 Boundaries.
937.4 Definitions.
937.5 Allowed activities.
937.6 Activities prohibited without a permit.
937.7 Penalties for commission of prohibited acts.
937.8 Permit procedures and criteria.
937.9 Other permits.
937.10 Appeals from administrative action.

AUTHORITY: Secs. 302(f), 302(g), 303, Pub. L. 92-532, 86 Stat. 1061, 1062 (16 U.S.C. 1431-1434).

SOURCE: 46 FR 7949, Jan. 26, 1981, unless otherwise noted.

12.
Part 938
Gray's Reef
National Marine Sanctuary
Regulations

cant, if other than the appellant, and may request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator shall decide the appeal in accordance with the criteria set in § 937.8(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section and such other considerations as deemed appropriate. The Administrator shall notify all interested persons of the decision, and the reason(s) therefor in writing, normally within 30 days of the receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and, at the discretion of the hearing officer, other interested persons, may appear personally or by counsel at the hearing and submit material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify interested persons of the decision, and reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action shall constitute final action for the Agency for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause, either upon his or her own motion or upon written request from the appellant or applicant stating the reason(s) therefor.

[46 FR 7949, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984]

PART 938—THE GRAY'S REEF NATIONAL MARINE SANCTUARY REGULATIONS

Sec.
938.1 Authority.
938.2 Purpose.
938.3 Boundaries.
938.4 Definitions.
938.5 Allowed activities.
938.6 Prohibited activities.
938.7 Penalties for commission of prohibited acts.
938.8 Permit procedures and critieria.
938.9 Certification of other permits.
938.10 Appeals of administrative action.

AUTHORITY: Secs. 302(a), (f), (g) and 303 of Title III, Marine Protection, Research and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431-1434.

SOURCE: 46 FR 7944, Jan. 26, 1981, unless otherwise noted.

§ 938.1 Authority.

The Sanctuary has been designated pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g), and 303 of the Act.

§ 938.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the live bottom ecosystem and other natural resources of the waters of Gray's Reef and to ensure the continued availability of the area as an ecological, research, and recreational resource.

§ 938.3 Boundaries.

The sanctuary consists of 16.68 square nautical miles of high sea waters off the coast of Georgia. The

sanctuary boundary includes all waters within a rectangle starting at coordinate 31° 21′ 45″ N, 80° 55′ 17″ W, commencing to coordinate 31° 25′ 15″ N, 80° 55′ 17″ W, thence to coordinate 31° 25′ 15″ N, 80° 49′ 42″ W, thence to coordinate 31° 21′ 45″ N, 80° 49′ 42″ W, thence back to the point of origin.

§ 938.4 Definitions.

(a) "Administrator" refers to the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Assistant Administrator" refers to the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(c) "Person" is any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government or any State or local unit of government.

§ 938.5 Allowed activities.

All activities except those specifically prohibited by § 938.6 may be carried out within the Sanctuary subject to all prohibitions, restrictions, and conditions imposed by any other authority.

§ 938.6 Prohibited activities.

(a) Except as may be necessary for national defense in accordance with Article 5, Section 2 of the Designation or as may be necessary to respond to an emergency threatening life, property, or the environment, the following activities are prohibited within the Sanctuary unless permitted by the Assistant Administrator in accordance with § 938.8. All prohibitions will be applied consistently with international law.

(1) *Alteration of or construction on the seabed.* No person shall dredge, drill, or otherwise alter the seabed in any way nor construct any structure other than a navigation aid without a permit.

(2) *Discharge of substances.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts, bait, and chumming materials;

(ii) Effluent from marine sanitation devices; and

(iii) Vessel cooling waters.

(3) *Operation of watercraft.* All watercraft shall be operated in accordance with Federal rules and regulations that would apply if there were no Sanctuary.

(4) *Wire trap fishing.* No person shall use, place, or possess wire fish traps within the Sanctuary without a permit.

(5) *Bottom trawling and specimen dredging.* No person shall use a bottom trawl, specimen dredge, or similar vessel-towed bottom sampling device within the Sanctuary without a permit.

(6) *Marine specimen collecting.* (i) No person shall break, cut, or similarly damage, take, or remove any bottom formation, any marine invertebrate, or any marine plant without a permit.

(ii) No person shall take without a permit any tropical fish, which is a fish of minimal sport and food value, usually brightly colored, often used for aquaria purposes, and which lives in a direct relationship with the live bottom community.

(iii) There shall be a rebuttable presumption that any items listed in this paragraph found in the possession of a person within the Sanctuary have been collected or removed from the Sanctuary.

(iv) No person shall use poisons, electric charges, explosives, or similar methods to take any marine animal or plant.

(7) *Removing or damaging historic or cultural resources.* No person shall tamper with, damage, or remove any historic or cultural resources without a permit.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized priniciples of international law, including treaties, conven-

tions, and other international agreements to which the United States is signatory.

§ 938.7 Penalties for commission of prohibited acts.

Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding in rem against any vessel used in violation of any such regulation.

§ 938.8 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct the specific activity in the Sanctuary including any activity specifically prohibited under § 938.6, if such activity is (1) research related to the resources of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to the Assistant Administrator for Coastal Zone Management, Attn: Office of Sanctuary Programs, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, DC 20235. An application shall provide sufficient information to enable the Assistant Administrator to make the determination called for in paragraph (c) of this section and shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit, the Assistant Administrator shall evaluate (1) the general professional and financial responsibility of the applicant, (2) the appropriateness of the methods envisioned to the purpose(s) of the activity, (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary, (4) the end value of the activity, and (5) other matters as deemed appropriate.

(d) In considering any application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of any person or entity, within or outside of the Federal Government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained will be made available to the public.

(f) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[46 FR 7944, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 938.9 Certification of other permits.

(a) All permits, licenses and other authorizations issued pursuant to any other authority are hereby certified and shall remain valid if they do not authorize any activity prohibited by § 938.6. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

(b) The Assistant Administrator may amend, suspend, or revoke the certification made under this section whenever continued operation would violate

any term or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit and the issuing agency and shall set forth reason(s) for the action taken. Either the permit holder or the issuing agency may appeal the action as provided for in § 938.10.

§ 938.10 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 938.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and may request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria defined in § 938.8(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing, the hearing office's recommended decision, if any, as provided in paragraph (c) of this section, and such other considerations as deemed appropriate. The Administrator will notify all interested persons of the decision and the reason(s) for the decision, in writing, within 30 days of receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines one is appropriate, the Administrator may grant an informal hearing before a designated hearing officer after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing must normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and other interested persons (at the discretion of the hearing officer) may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify interested persons of the decision and the reason(s) for the decision, in writing, within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action will constitute final action for the Agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause upon written request from the appellant or applicant stating the reason(s) for the extension.

[46 FR 7944, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984]

PART 941—FAGATELE BAY NATIONAL MARINE SANCTUARY REGULATIONS

Sec.

941.1 Authority.
941.2 Purpose.
941.3 Scope of regulations.
941.4 Boundaries.
941.5 Definitions.
941.6 Management and enforcement.
941.7 Allowed activities.
941.8 Activitives prohibited or controlled.
941.9 Other authorities.
941.10 Penalties for commission of prohibited acts.
941.11 Permit procedures and criteria.
941.12 Appeal of permit action.

AUTHORITY: Title III of Pub. L. 98-498, 16 U.S.C. 1431-1439. (Pub. L. 92-532 as amended by Pub. L. 96-332 and Pub. L. 98-498).

311-049 O—92——10

13.
Part 941
Fagatele Bay
National Marine Sanctuary
Regulations

any term or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit and the issuing agency and shall set forth reason(s) for the action taken. Either the permit holder or the issuing agency may appeal the action as provided for in § 938.10.

§ 938.10 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 938.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and may request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria defined in § 938.8(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing, the hearing office's recommended decision, if any, as provided in paragraph (c) of this section, and such other considerations as deemed appropriate. The Administrator will notify all interested persons of the decision and the reason(s) for the decision, in writing, within 30 days of receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines one is appropriate, the Administrator may grant an informal hearing before a designated hearing officer after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing must normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and other interested persons (at the discretion of the hearing officer) may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify interested persons of the decision and the reason(s) for the decision, in writing, within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action will constitute final action for the Agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause upon written request from the appellant or applicant stating the reason(s) for the extension.

[46 FR 7944, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984]

PART 941—FAGATELE BAY NATIONAL MARINE SANCTUARY REGULATIONS

Sec.

941.1 Authority.
941.2 Purpose.
941.3 Scope of regulations.
941.4 Boundaries.
941.5 Definitions.
941.6 Management and enforcement.
941.7 Allowed activities.
941.8 Activitives prohibited or controlled.
941.9 Other authorities.
941.10 Penalties for commission of prohibited acts.
941.11 Permit procedures and criteria.
941.12 Appeal of permit action.

AUTHORITY: Title III of Pub. L. 98-498, 16 U.S.C. 1431-1439. (Pub. L. 92-532 as amended by Pub. L. 96-332 and Pub. L. 98-498).

311-049 O—92——10

SOURCE: 51 FR 15880, Apr. 29, 1986, unless otherwise noted.

§ 941.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 303(a) of the Marine Protection, Research and Sanctuaries Act of 1972, (the Act), 16 U.S.C. 1433; (Pub. L. 98-498). The following regulations are issued pursuant to Title III of the Act.

§ 941.2 Purpose.

The purpose of designating the Fagatele Bay National Marine Sanctuary is to protect a unique deepwater terrace formation and a coral reef ecosystem representative of the warm water tropical Pacific Islands in its natural state and to regulate uses within the Sanctuary to ensure the health and integrity of the ecosystem and its associated flora and fauna.

§ 941.3 Scope of regulations.

The provisions of this part apply only to the area defined by regulation as the Fagatele Bay National Marine Sanctuary (the Sanctuary). Neither these provisions nor any permit issued under its authority shall be construed to relieve a person from any other requirements imposed by statute or regulation of the Territory of American Samoa or of the United States. In addition, no statute or regulation of the Territory of American Samoa shall be construed to relieve a person from the restrictions, conditions, and requirements contained in this part.

§ 941.4 Boundaries.

The Sanctuary is a 163-acre (.25 sq. mi.) coastal embayment formed by a collapsed volcanic crater on the island of Tutuila, American Samoa. The site is divided into two Subzones, *A* and *B*, and includes Fagatele Bay in its entirety up to mean high high water (MHHW). The seaward boundaries are defined by straight lines between the following points, as approved by the NOAA Charting Services Branch, and the American Samoa Department of Public Works:

Point	Pt. No.	Subzone	Latitude	Longitude
Fagatele Point	1-1	A	14°22'15" S.	170°46'5" W
Matautuloa Benchmark	1-2	A	14°22'18" S.	170°45'35" W
Fagatele Point	2-1	B	14°22'15" S.	170°46'5" W
Steps Point	2-2	B	14°22'44" S.	170°45'27" W

§ 941.5 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration (NOAA).

(b) "Assistant Administrator" menas the Assistant Administrator for Ocean Services and Coastal Zone Management, National Ocean Service, National Oceanic and Atmospheric Administration, or his or her successor, or designee.

(c) "Benthic Community" means the assemblage of organisms, substrate, and structural formations found at or near the bottom that is periodically or permanently covered by water.

(d) "Commercial Fishing" means any activity that results in the sale or trade for intended profit of fish, shellfish, algae, or corals.

(e) "Cultural Resources" means any historical or cultural feature, including archaeological sites, historic structures, shipwrecks, and artifacts.

(f) "Designation" means the action taken by the Secretary of Commerce, to prescribe, through a Designation Document and implementing rules and regulations, the terms for establishing the Sanctuary.

(g) "Director" means Director of the Development Planning Office, Territory of American Samoa or the head of any successor agency.

(h) "The Management Plan" means the document that outlines the day-to-day operations of the Fagatele Bay National Marine Sanctuary and includes but is not limited to provisions for Research, Interpretation, Surveil-

lance and Enforcement, and Administration.

(i) "Permit" means any document issued under Federal or territorial authority, signed by an authorized official, and specifying the permitted actions.

(j) "Permittee" means any person issued a valid permit as defined in paragraph (i) of this section and pursuant to the requirements of these regulations.

(k) "Persons" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal Government, or any State or local unit of government.

(l) "The Sanctuary" means the Fagatele Bay National Marine Sanctuary.

(m) "Sanctuary Manager" means the person hired by NOAA to manage and operate the Sanctuary.

(n) "Secretary" means the Secretary of Commerce, or his or her successor or designee.

§ 941.6 Management and enforcement.

The National Oceanic and Atmospheric Administration (NOAA) has primary responsibility for the management of the Sanctuary pursuant to the Act. The American Samoa Development Planning Office (DPO) will assist NOAA in the administration of the Sanctuary, and act as the lead agency, in conformance with the Designation Document, these regulations, and the terms and provisions of any grant or cooperative agreement. In accordance with § 922.32(b) of the National Marine Sanctuary Program Regulations, 15 CFR Part 922, NOAA may act to deputize enforcement agents of the American Samoa Government (ASG) to enforce these regulations. If NOAA chooses to exercise this provision, a memorandum of understanding shall be executed between NOAA and the ASG or the person(s) or entity authorized to act on their behalf. Prosecution of violations will be carried out by NOAA in accordance with § 941.10 of these regulations.

§ 941.7 Allowed activities.

All activities except those specifically prohibited by § 941.8 may be carried out within the Sanctuary subject to all prohibitions, restrictions, and conditions imposed by other authorities.

§ 941.8 Activities prohibited or controlled.

(a) Unless permitted by the Assistant Administrator in accordance with § 941.11, or as may be necessary for national defense, or to respond to an emergency threatening life, property or the environment, the following activities are prohibited or controlled in *Subzones A* and *B* of the Sanctuary. All prohibitions and controls will be applied consistently with international law. Refer to § 941.10 for penalties for commission of prohibited acts.

(1) *Taking and Damaging Natural Resources.* (i) No person shall gather, take, break, cut, damage, destroy, or possess any invertebrate, coral, bottom formation, or marine plant.

(ii) No person shall take, gather, cut, damage, destroy, or possess any crown-of-thorns starfish (*Acanthaster planci*).

(iii) No person shall possess or use poisons, electrical charges, explosives, or similar environmentally destructive methods.

(iv) No person shall posses or use spearguns, including such devices known as Hawaiian slings, pole spears, arbalettes, pneumatic and spring-loaded spearguns, bows and arrows, bang sticks, or any similar taking device.

(v) No person shall possess or use seines, trammel nets, or any fixed net.

(vi) There shall be a rebuttable presumption that any items listed in these paragraphs found in the possession of a person within the Sanctuary have been used, collected, or removed from within the Sanctuary.

(2) *Operation of Vessels.* (i) No vessel shall approach closer than 200 feet to a vessel displaying a dive flag except at a maximum speed of three knots.

(ii) All vessels from which diving operations are being conducted shall fly in a conspicuous manner the international code flag alpha "A."

(iii) All vessels shall be operated to avoid striking or otherwise causing

damage to the natural features of the Sanctuary.

(3) *Discharges.* No person shall litter, deposit, or discharge any materials or substances of any kind into the waters of the Sanctuary.

(4) *Disturbance of the Benthic Community.* Disturbance of the benthic community by dredging, filling, dynamiting, bottom trawling, or any alteration of the seabed shall be prohibited.

(5) *Removing or Damaging Cultural Resources.* No person shall remove, damage, or tamper with any historical or cultural resource within the boundaries of the Sanctuary.

(6) *Taking of Sea Turtles.* No person shall ensnare, entrap, or fish any sea turtle while it is listed as a threatened or endangered species as defined by the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

(7) *Use of Dangerous Weapons.* Except for law enforcement purposes, no person shall use or discharge explosives or weapons of any description within the Sanctuary boundaries. Distress signaling devices, necessary and proper for safe vessel operation, and knives generally used by fishermen and swimmers are not considered weapons for purposes of this subsection.

(8) *Other Prohibitions.* No person shall mark, deface, or damage in any way, or displace or remove or tamper with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes, posts, or other boundary markers related to the Sanctuary.

(b) In addition to those activities prohibited or controlled in accordance with § 941.8(a), the following activities are prohibited or controlled in *Subzone A:*

(1) *Taking and Damaging Natural Resources.* (i) No person shall possess or use fishing poles, handlines, or trawls.

(ii) Commercial fishing shall be prohibited.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions, and other international agreements to which the United States is signatory.

§ 941.9 Other authorities.

No license, permit or other authorization issued pursuant to any other authority may validly authorize any activity prohibited by § 941.8 unless such activity meets the criteria stated in § 941.11(a), (c) and (d), and is specifically authorized by the Assistant Administrator.

§ 941.10 Penalties for commission of prohibited acts.

Section 307 of the Act, 16 U.S.C. 1437, authorizes the assessment of a civil penalty of not more than $50,000.00 for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding *in rem* against any vessel used in violation of any such regulation. NOAA will apply to all enforcement matters under the Act the consolidated civil procedure regulations set forth at 15 CFR Part 904.

§ 941.11 Permit procedures and criteria.

(a) Under special circumstances an activity otherwise prohibited by § 941.8 of these regulations may be allowed by permit. The activity must be conducted for research or educational purposes designed to enhance understanding of the Sanctuary environment or to improve resource management decisionmaking. The activity must also be judged not to cause long-term or irreparable harm to the resources of the Sanctuary. A permit may be granted by the Assistant Administrator of NOAA in consultation with the Development and Planning Office.

(b) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct the specified activity in the Sanctuary if such activity is:

(1) Related to research involving Sanctuary resources;

(2) To further the educational value of the Sanctuary; or

(3) For salvage or recovery operations.

(c) Permit applications shall be addressed to the Assistant Administrator for Ocean Services and Coastal Zone Management, ATTN: Sanctuary Programs Division, National Ocean Service, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, D.C. 20235. An application shall include a description of all proposed activities, the equipment, methods, and personnel involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(d) In considering whether to grant a permit, the Assistant Administrator shall evaluate such matters as:

(1) The general professional and financial responsibility of the applicant;

(2) The appropriateness of the methods being proposed for the purpose(s) of the activity;

(3) The extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, education, or scientific information; and

(4) The end value of the activity.

(e) In addition to meeting the criteria in § 941.11(a) and (c), the applicant also must demonstrate to the Assistant Administrator that:

(1) The activity shall be conducted with adequate safeguards for the environment; and

(2) The environment shall be returned to, or will regenerate to, the condition which existed before the activity occurred.

(f) In considering an application submitted pursuant to this Section, the Assistant Administrator shall seek and consider the views of the Sanctuary Manager and Director. The Assistant Administrator also may seek and consider the views of any other person or entity, within or outside of the Territorial Government, and may hold a public hearing, as he or she deems appropriate.

(g) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject the permit to such condition(s) as the Assistant Administrator deems necessary. A permit granted for research related to the Sanctuary may include, but is not limited to, the following conditions:

(1) The Assistant Administrator, Director, or their designated representatives may observe any activity permitted by this section;

(2) Any information obtained in the research site shall be made available to the public; and

(3) The submission of one or more reports of the status of such research activity may be required.

(h) A permit granted pursuant to this section is non-transferrable.

(i) The Assistant Administrator may amend, suspend, or revoke a permit granted pursuant to this section, in whole or in part, temporarily or indefinitely if, in his/her view, the permittee has acted in violation of the terms of the permit or regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder and shall set forth the reason(s) for the action taken. The permittee in relation to whom such action has been taken may appeal the action to the Administrator as provided for in § 941.12.

(Information collection requirements for § 941.11 have been approved by the Office of Management and Budget under control number 0648–0141)

§ 941.12 Appeal of permit action.

(a) Except for permit actions which are imposed for enforcement reasons and covered by the procedures at Subpart D of 15 CFR Part 904, an applicant for a permit, the permittee, or any other interested person (hereafter Appellant) may appeal the granting, denial, conditioning or suspension of any permit under § 941.11 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed and the reason(s) therefor, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator may request the Appellant to submit such additional information and in such form as will allow action

upon the appeal. The Administrator shall decide the appeal using the criteria set out in § 941.11 (a), (c) and (d) and any information relative to the application on file, any information provided by the Appellant, and such other consideration as is deemed appropriate. The Administrator shall notify the Appellant of the final decision and the reason(s) therefor in writing, normally within 30 days of the date of the receipt of adequate information required to make the decision.

(c) If a hearing is requested, or if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a Hearing Officer appointed for that purpose. The Appellant and any other interested persons may appear personally or by counsel at the hearing and submit material and present arguments as determined appropriate by the Hearing Officer. Within 30 days of the last day of the hearing, the Hearing Officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the Hearing Officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the interested persons of his or her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the Hearing Officer. The Administrator's decision shall constitute final action by NOAA for purposes of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his or her own motion or upon written request from the Appellant, permit applicant or permittee stating the reason(s) therefor.

PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY

Sec.

942.1 Authority.
942.2 Purpose.
942.3 Boundary.
942.4 Definitions.
942.5 Allowed activities.
942.6 Prohibited activities.
942.7 Penalties.
942.8 Permit applications—procedures and criteria.
942.9 Certification of other authorizations.
942.10 Appeals of administrative action.
APPENDIX I TO PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES.

AUTHORITY: Secs. 303, 304, 305, and 307 of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1433, 1434, 1435, and 1437; section 2 of Pub. L. No. 101-74, 103 Stat. 554; Designation Document for the Cordell Bank National Marine Sanctuary, Article 4, section 1(c).

SOURCE: 54 FR 22423, May 24, 1989, unless otherwise noted.

§ 942.1 Authority.

The Sanctuary has been designated by the designee of the Secretary of Commerce pursuant to the authority of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.* ("Act"). The regulations in this part are issued pursuant to the authority of sections 303, 304, 305, and 307 of the Act.

§ 942.2 Purpose.

The purpose of designating the Sanctuary is to protect and conserve the special, discrete, highly productive marine area of Cordell Bank and its surrounding waters and to ensure the continued availability of the ecological, research, educational, aesthetic, historical and recreational resources therein.

§ 942.3 Boundary.

The Sanctuary consists of an area of marine waters approximately 50 miles west-northwest of San Francisco, California. The Sancturay consists of a 397.05 square nautical mile area extending at 180° from the northernmost boundary of the Point Reyes-Farallon Islands National Marine Sanctuary (PRNMS) to the 1,000 fathom isobath northwest of the Bank, then south along this isobath to the PRNMS boundary and back to the northwest along this boundary to the beginning point. The boundary coordinates are listed in Appendix I following § 942.10.

14.
Part 942
Cordell Bank
National Marine Sanctuary
Regulations

upon the appeal. The Administrator shall decide the appeal using the criteria set out in § 941.11 (a), (c) and (d) and any information relative to the application on file, any information provided by the Appellant, and such other consideration as is deemed appropriate. The Administrator shall notify the Appellant of the final decision and the reason(s) therefor in writing, normally within 30 days of the date of the receipt of adequate information required to make the decision.

(c) If a hearing is requested or if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a Hearing Officer appointed for that purpose. The Appellant and any other interested persons may appear personally or by counsel at the hearing and submit material and present arguments as determined appropriate by the Hearing Officer. Within 30 days of the last day of the hearing, the Hearing Officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the Hearing Officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the interested persons of his or her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the Hearing Officer. The Administrator's decision shall constitute final action by NOAA for purposes of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his or her own motion or upon written request from the Appellant, permit applicant or permittee stating the reason(s) therefor.

PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY

Sec.

942.1 Authority.
942.2 Purpose.
942.3 Boundary.
942.4 Definitions.
942.5 Allowed activities.
942.6 Prohibited activities.
942.7 Penalties.
942.8 Permit applications—procedures and criteria.
942.9 Certification of other authorizations.
942.10 Appeals of administrative action.

APPENDIX I TO PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES.

AUTHORITY: Secs. 303, 304, 305, and 307 of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1433, 1434, 1435, and 1437; section 2 of Pub. L. No. 101-74, 103 Stat. 554; Designation Document for the Cordell Bank National Marine Sanctuary, Article 4, section 1(c).

SOURCE: 54 FR 22423, May 24, 1989, unless otherwise noted.

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§ 942.4 Definitions.

(a) *Act* means Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*

(b) *Administrator* means the Administrator of the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, or designee.

(c) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Ocean Service, NOAA, or designee.

(d) *Injure* means to change adversely, either in the long- or short-term, a chemical or physical quality of, or the viability of, a Sanctuary resource.

(e) *Person* means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, any state or local government, or any foreign government.

(f) *Sanctuary* means the Cordell Bank National Marine Sanctuary.

(g) *Sanctuary resource* means a living or non-living resource of the Sanctuary that contributes to its conservation, recreational, ecological, historical, research, educational, or aesthetic value.

Other terms appearing in these regulations are defined in 15 CFR 922.2.

§ 942.5 Allowed activities.

All activities except those prohibited by § 942.6 may be conducted within the Sanctuary subject to all other prohibitions, restrictions, and conditions imposed by any other authority.

§ 942.6 Prohibited activities.

(a) Except as necessary for national defense, as necessary to respond to an emergency threatening life, property or the environment, or as permitted or certified by the Assistant Administrator in accordance with §§942.8 and 942.9, the following activities are prohibited and thus unlawful for any person to conduct:

(1) *Depositing or discharging materials or substances.* (i) Depositing or discharging, from any location within the boundaries of the Sanctuary, materials or substances of any kind except:

(A) Fish, fish parts and chumming materials (bait) produced and discarded during routine fishing activities conducted in the Sanctuary; and

(B) Water (including cooling water) and other biodegradable effluents incidental to use of a vessel in the Sanctuary and generated by: Marine sanitation devices approved by the United States Coast Guard; routine vessel maintenance, *e.g.*, deck wash down; engine exhaust; or meals on board vessels.

(ii) Depositing or discharging, from any location beyond the boundaries of the Sanctuary, materials or substances of any kind, except for the exclusions listed in paragraph (a)(1)(i) of this section, which enter the Sanctuary and injure a Sanctuary resource.

(2) *Removing, taking, or injuring sanctuary resources.* Removing, taking, or injuring or attempting to remove, take, or injure benthic invertebrates or algae located on Cordell Bank or within the 50 fathom isobath surrounding the Bank. There is a rebuttable presumption that any such resource found in the possession of a person within the Sanctuary was taken or removed by that person. This prohibition does not apply to accidental removal, injury, or takings during normal fishing operations.

(3) *Exploring for, or developing or producing, oil, gas, or minerals.* Exploration for, or development or production of, oil, gas, or minerals in any area of the Sanctuary.

(b) All activities being carried out by the Department of Defense (DOD) within the Sanctuary on the effective date of designation that are necessary for national defense are exempt from the prohibitions contained in these regulations. Additional DOD activities initiated after the effective date of designation that are necessary for national defense will be exempted by the Assistant Administrator after consultation between the Department of Commerce and DOD. DOD activities not necessary for national defense, such as routine exercises and vessel operations, are subject to all prohibitions contained in these regulations.

(c) The prohibitions in this section are applicable to foreign persons and foreign flag vessels only to the extent consistent with generally recognized principles of international law, and in accordance with treaties, conventions, and other international agreements to which the United States is a party.

(d) Where necessary to prevent immediate, serious, and irreversible damage to a Sanctuary resource, any activity may be regulated within the limits of the Act on an emergency basis for no more than 120 days.

[54 FR 22423, May 24, 1989, as amended at 54 FR 52343, Dec. 21, 1989]

§ 942.7 Penalties.

(a) Section 307(c) of the Act authorizes the assessment of a civil penalty of not more than $50,000 for each violation of the Act or any regulation or permit issued pursuant to the Act. Each day of a continuing violation constitutes a separate violation. Section 307(c)(3) further authorizes a proceeding *in rem* against any vessel used in such violation and for which a civil penalty has been assessed.

(b) Regulations setting forth the administrative procedures governing the assessment of civil penalties, enforcement hearings and appeals, permit sanctions and denials for enforcement reasons, and the issuance of written warnings appear at 15 CFR part 904.

§ 942.8 Permit applications—procedures and criteria.

(a) If a person wishes to conduct an activity prohibited under § 942.6, that person must apply for, receive, and have in possession on board any vessel used a valid permit issued pursuant to this part authorizing that person to conduct that activity.

(b) Permit applications shall be addressed to the Assistant Administrator, Ocean Services and Coastal Zone Management; ATTN: Marine and Estuarine Management Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue NW., Washington, DC 20235. An application shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required permits, licenses, approvals, and other authorizations shall be attached.

(c) Upon receipt of a complete application, the Assistant Administrator may seek the views of any person, within or outside the Federal Government, and may hold a public hearing, at his or her discretion.

(d) The Assistant Administrator, at his or her discretion, may issue a permit subject to such terms and conditions as deemed appropriate, to conduct an activity otherwise prohibited by § 942.6, if the Assistant Administrator finds that the activity will further research related to Sanctuary resources; further the educational or historical value of the Sanctuary; further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; or assist in the management of the Sanctuary. In deciding whether to issue a permit, the Assistant Administrator may consider such factors as the professional qualifications and financial ability of the applicant as related to the proposed activity; the appropriateness of the methods and procedures proposed by the applicant for the conduct of the activity; the extent to which the conduct of the activity may diminish or enhance the values for which the Sanctuary was designated; and the end value of the applicant's overall activity.

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

(f) The Assistant Administrator may amend, suspend or revoke a permit issued pursuant to this subsection, in whole or in part, if the Assistant Administrator determines that the permittee has acted in violation of the terms or conditions of the permit or of these regulations or that other good cause exists for amending, suspending or revoking the permit. Any such action shall be communicated in writing to the permittee, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at subpart D of 15 CFR part 904.

§ 942.9 Certification of other authorizations.

(a) All permits, licenses, approvals, and other authorizations issued pursuant to any authority are valid within the Sanctuary subject only to the prohibitions set forth in § 942.6. All applicable regulatory programs remain in effect.

(b) A permit, license, approval, or other authorization allowing the discharge or deposit of materials or substances otherwise prohibited under § 942.6(a)(1), or the removal, taking, or injury of, or attempt to remove, take, or injure benthic invertebrates or algae otherwise prohibited under § 942.6(a)(2) shall be valid if certified by the Assistant Administrator as consistent with the purpose of the Sanctuary and having no significant effect on Sanctuary resources. Such certification may impose terms and conditions as deemed appropriate to ensure consistency.

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

(d) Any certification called for in this section shall be presumed unless the Assistant Administrator acts to deny or condition the certification within 60 days from the date that the Assistant Administrator receives notice of the permit, license, approval, or other authorization, and the supporting data deemed necessary by the Assistant Administrator in order to make a decision on the certification.

(e) The Assistant Administrator may amend, suspend, or revoke any certification made under this section whenever the continued conduct of the activity would violate any terms or conditions of the certification. Any such action shall be communicated in writing to both the holder of the certified permit, license, approval, or other authorization and the issuing agency and shall set forth reason(s) for the action taken.

(f) Either the holder or the issuing agency may appeal any action conditioning, denying, amending, suspending, or revoking any certification in accordance with the procedure provided for in § 942.10.

§ 942.10 Appeals of administrative action.

(a) Except for permit actions taken for enforcement reasons and therefore covered by the procedures at subpart D of 15 CFR part 904, an applicant for a permit, a permittee, or any other interested person (hereinafter appellant) may appeal the grant, denial, conditioning, amendment, suspension, or revocation of any permit under § 942.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed and the reason(s) therefor, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Administrator, in his or her discretion, may hold an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator may request the appellant, the permit applicant or permittee, if other than the appellant, or any person, within or outside the Federal government, to submit such information as the Administrator may deem appropriate in order to decide the appeal. The Administrator shall decide the appeal based on the record before the Assistant Administrator and the record of the appeal. The Administrator shall notify the appellant and other interested persons of the final decision and the reason(s) therefor in writing, normally within 30 days of the date of the receipt of adequate information to make the decision.

(c) If the Administrator determines that an informal hearing should be held, the Administrator may designate an officer before whom the hearing shall be held. Notice of the time, place, and subject matter of the hearing shall be published in the FEDERAL REGISTER. Such hearing shall be held no later than 30 days following publication of the notice in the FEDERAL REGISTER, unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant or permittee and other interested persons may appear personally or by counsel at the hearing and submit

such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the conclusion of the hearing, the hearing officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the appellant and other interested persons of his/her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's decision shall constitute final agency action for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his/her own motion or upon written request from the appellant, permit applicant or permittee, stating the reason(s) therefor.

APPENDIX I TO PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

Point No.	Latitude	Longitude
1	38°15'51.72"	123°10'52.44"
2	38°07'55.88"	123°38'33.53"
3	38°06'45.21"	123°38'00.40"
4	38°04'58.41"	123°37'14.34"
5	38°04'26.22"	123°37'17.83"
6	38°03'42.75"	123°36'55.66"
7	38°03'11.10"	123°36'19.78"
8	38°02'46.12"	123°36'21.96"
9	38°02'02.74"	123°35'58.56"
10	38°01'27.10"	123°35'55.12"
11	38°01'22.26"	123°36'55.13"
12	38°01'11.54"	123°37'26.21"
13	38°00'49.16"	123°37'29.77"
14	37°59'54.49"	123°36'47.90"
15	37°59'12.39"	123°35'59.55"
16	37°58'39.40"	123°35'14.85"
17	37°58'00.57"	123°34'42.93"
18	37°57'18.99"	123°33'43.15"
19	37°56'56.42"	123°32'51.97"
20	37°56'18.90"	123°32'49.24"
21	37°55'22.37"	123°32'36.96"
22	37°54'26.10"	123°32'21.73"
23	37°53'07.46"	123°31'46.81"
24	37°52'34.93"	123°31'18.90"
25	37°51'42.81"	123°31'19.10"
26	37°50'59.58"	123°31'02.96"
27	37°48'49.14"	123°28'44.61"
28	37°49'22.64"	123°29'34.07"
29	37°48'49.14"	123°28'44.61"
30	37°48'36.95"	123°28'08.29"
31	37°48'03.37"	123°28'23.27"
32	37°47'41.54"	123°28'01.97"
33	37°47'01.78"	123°27'16.78"
34	37°46'51.92"	123°26'48.96"
35	37°46'13.20"	123°26'04.79"
36	37°46'00.73"	123°25'36.99"
37	37°50'25.31"	123°25'26.53"
38	37°54'32.28"	123°23'16.49"
39	37°57'45.71"	123°19'17.72"
40	37°59'29.27"	123°14'12.16"
41	37°59'43.71"	123°08'27.55"
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PART 943—FLOWER GARDEN BANKS NATIONAL MARINE SANCTUARY

Sec.
943.1 Purpose.
943.2 Boundaries.
943.3 Definitions.
943.4 Allowed activities.
943.5 Prohibited activities.
943.6 Shunting requirements applicable to hydrocarbon-drilling discharges.
943.7 Emergency regulations.
943.8 Penalties for commission of prohibited activities.
943.9 Response costs and damages.
943.10 National Marine Sanctuary permits—application procedures and issuance criteria.
943.11 Certification of pre-existing leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.
943.12 Notification and review of applications for leases, licenses, permits, approvals, or other authorizations to conduct a prohibited activity.
943.13 Appeals of administrative action.

APPENDIX I TO PART 943—FLOWER GARDEN BANKS NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

APPENDIX II TO PART 943—COORDINATES FOR THE DEPARTMENT OF THE INTERIOR TOPOGRAPHIC LEASE STIPULATIONS FOR OCS LEASE SALE 172

AUTHORITY: Sections 302, 303, 304, 305, 307, and 310 of title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*

SOURCE: 56 FR 63643, Dec. 5, 1991, unless otherwise noted.

EFFECTIVE DATE NOTE: At 56 FR 63643, Dec. 5, 1991, Part 943 was added, effective "either 15 days after publication in the FEDERAL REGISTER or later if the Congress takes certain adjournments".

15.
Part 943
Flower Garden Banks
National Marine Sanctuary
Regulations

such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the conclusion of the hearing, the hearing officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the appellant and other interested persons of his/her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's decision shall constitute final agency action for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his/her own motion or upon written request from the appellant, permit applicant or permittee, stating the reason(s) therefor.

APPENDIX I TO PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

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37	37°45'25.31"	123°31'26.53"
38	37°44'32.28"	123°31'16.49"
39	37°43'45.71"	123°31'17.72"
40	37°43'29.37"	123°31'12.16"
41	37°42'43.71"	123°31'27.55"
42	38°03'10.20"	123°07'44.35"
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PART 943—FLOWER GARDEN BANKS NATIONAL MARINE SANCTUARY

Sec.

943.1 Purpose.
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APPENDIX I TO PART 943—FLOWER GARDEN BANKS NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

APPENDIX II TO PART 943—COORDINATES FOR THE DEPARTMENT OF THE INTERIOR TOPOGRAPHIC LEASE STIPULATIONS FOR OCS LEASE SALE 112

AUTHORITY: Sections 302, 303, 304, 305, 307, and 310 of title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*

SOURCE: 56 FR 63643, Dec. 5, 1991, unless otherwise noted.

EFFECTIVE DATE NOTE: At 56 FR 63643, Dec. 5, 1991, Part 943 was added, effective "either 45 days after publication in the FEDERAL REGISTER or later if the Congress takes certain adjournments".

§ 943.1 Purpose.

The purpose of the regulations in this part is to implement the designation of the Flower Garden Banks National Marine Sanctuary by regulating activities affecting the Sanctuary consistent with the terms of that designation in order to protect and manage the conservation, ecological, recreational, research, educational, historical and esthetic resources and qualities of the area.

§ 943.2 Boundaries.

The Flower Garden Banks National Marine Sanctuary consists of two separate areas of ocean waters over and surrounding the East and West Flower Garden Banks, and the submerged lands thereunder including the Banks, in the northwestern Gulf of Mexico. The area designated at the East Bank is located approximately 120 nautical miles south-southwest of Cameron, Louisiana, and encompasses 19.20 square nautical miles, and the area designated at the West Bank is located approximately 110 nautical miles southeast of Galveston, Texas, and encompasses 22.50 square nautical miles. The two areas encompass a total of 41.70 square nautical miles (143.21 square kilometers). The boundary coordinates for each area are listed in appendix I to this part.

§ 943.3 Definitions.

(a) (1) *Act* means title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*

(2) *Administrator* or *Under Secretary* means the Administrator of the National Oceanic and Atmospheric Administration/Under Secretary of Commerce for Oceans and Atmosphere.

(3) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Ocean Service, National Oceanic and Atmospheric Administration.

(4) *Conventional hook and line gear* means any fishing apparatus operated aboard a vessel and composed of a single line terminated by a combination of sinkers and hooks or lures and spooled upon a reel that may be hand- or electrically operated, hand-held or mounted. This term does not include bottom longlines.

(5) *Director* means the Director of the Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration.

(6) *Effective date of Sanctuary designation* means the date the regulations implementing the designation of the Sanctuary become effective.

(7) *Historical resource* means a resource possessing historical, cultural, archaeological or paleontological significance, including sites, structures, districts, and objects significantly associated with or representative of earlier people, cultures, and human activities and events.

(8) *Injure* means change adversely, either in the long or short term, a chemical, biological or physical attribute of, or the viability of. To "injure" therefore includes, but is not limited to, to cause the loss of and to destroy.

(9) *No-activity zone* means one of the two geographic areas delineated by the Department of the Interior in stipulations for OCS lease sale 112 over and surrounding the East and West Flower Garden Banks as areas in which activities associated with exploration for, development of, or production of hydrocarbons are prohibited. The precise coordinates of these areas are provided in appendix II. These particular coordinates define the geographic scope of the "no-activity zones" for purposes of the regulations in this Part. These coordinates are based on the "¼ ¼ ¼" system formerly used by the Department of the Interior, a method that delineates a specific portion of a block rather than the actual underlying isobath.

(10) *Person* means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, agency, department or instrumentality of the Federal government, of any State or local unit of government, or of any foreign government.

(11) *Sanctuary* means the Flower Garden Banks National Marine Sanctuary.

(12) *Sanctuary quality* means a particular and essential characteristic of

the Sanctuary, including but not limited to water quality and air quality.

(13) *Sanctuary resource* means any living or non-living resource of the Sanctuary that contributes to its conservation, recreational, ecological, historical, research, educational or esthetic value, including, but not limited to, carbonate rock, corals and other bottom formations, coralline algae and other plants, marine invertebrates, brine-seep biota, fish, turtles and marine mammals.

(14) *Shunt* means to discharge expended drilling cuttings and fluids near the ocean seafloor.

(15) *Vessel* means a watercraft of any description capable of being used as a means of transportation in the waters of the Sanctuary.

(b) Other terms appearing in the regulations in this Part are defined at 15 CFR 922.2 and/or in the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1401 *et seq.* and 16 U.S.C. 1431 *et seq.*).

§ 943.4 Allowed activities.

All activities except those prohibited by § 943.5 may be undertaken subject to the requirements of § 943.6, subject to any emergency regulations promulgated pursuant to § 943.7, and subject to all prohibitions, restrictions, and conditions validly imposed by any other Federal authority of competent jurisdiction. If any valid regulation issued by any Federal authority of competent jurisdiction, regardless of when issued, conflicts with a Sanctuary regulation, the regulation deemed by the Director or designee as more protective of Sanctuary resources and qualities shall govern.

§ 943.5 Prohibited activities.

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

(1) Exploring for, developing or producing oil, gas or minerals within a no-activity zone.

(2) Anchoring or otherwise mooring within the Sanctuary a vessel greater than 100 feet (30.48 meters) in registered length.

(3) Anchoring a vessel of less than or equal to 100 feet (30.48 meters) in registered length within an area of the Sanctuary where a mooring buoy is available.

(4) Anchoring a vessel within the Sanctuary using more than fifteen feet (4.57 meters) of chain or wire rope attached to the anchor.

(5) Anchoring a vessel within the Sanctuary using anchor lines (exclusive of the anchor chain or wire rope permitted by paragraph (a)(4) of this section) other than those of a soft fiber or nylon, polypropylene, or similar material.

(6) Discharging or depositing, from within the boundaries of the Sanctuary, any material or other matter except:

(i) Fish, fish parts, chumming materials or bait used in or resulting from fishing with conventional hook and line gear in the Sanctuary;

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

(iii) Water generated by routine vessel operations (*e.g.*, cooling water, deck wash down, and graywater as defined by section 312 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1322) excluding oily wastes from bilge pumping; or

(iv) Engine exhaust.

The prohibitions in this paragraph (a)(6) do not apply to the discharge, in areas of the Sanctuary outside the no-activity zones, of drilling cuttings and drilling fluids necessarily discharged incidental to the exploration for, development of, or production of oil or gas in those areas unless such discharge injures a Sanctuary resource or quality. (See § 943.6 for the shunting requirement applicable to such discharges.)

(7) Discharging or depositing, from beyond the boundaries of the Sanctuary, any material or other matter, except those listed in paragraphs (a)(6)(i) through (iv) of this section, that subsequently enters the Sanctuary and injures a Sanctuary resource or quality.

(8) Drilling into, dredging or otherwise altering the seabed of the Sanctuary (except by anchoring); or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary.

(9) Injuring or removing, or attempting to injure or remove, any coral or other bottom formation, coralline algae or other plant, marine invertebrate, brine-seep biota or carbonate rock within the Sanctuary.

(10) Taking any marine mammal or turtle within the Sanctuary, except as permitted by regulations, as amended, promulgated under the Marine Mammal Protection Act, as amended, 16 U.S.C. 1361 *et seq.*, and the Endangered Species Act, as amended, 16 U.S.C. 1531 *et seq.*

(11) Injuring, catching, harvesting, collecting or feeding, or attempting to injure, catch, harvest, collect or feed, any fish within the Sanctuary by use of bottom longlines, traps, nets, bottom trawls or any other gear, device, equipment or means except by use of conventional hook and line gear.

(12) Possessing within the Sanctuary (regardless of where collected, caught, harvested or removed), except for valid law enforcement purposes, any carbonate rock, coral or other bottom formation, coralline algae or other plant, marine invertebrate, brine-seep biota or fish (except for fish caught by use of conventional hook and line gear).

(13) Possessing or using within the Sanctuary, except possessing while passing without interruption through it or for valid law enforcement purposes, any fishing gear, device, equipment or means except conventional hook and line gear.

(14) Possessing, except for valid law enforcement purposes, or using explosives or releasing electrical charges within the Sanctuary.

(b) The regulations in this part shall be applied to foreign persons and foreign vessels in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other international agreements to which the United States is a party.

(c) The prohibitions in paragraphs (a)(2), (4), (5), (8) and (14) of this section do not apply to necessary activities conducted in areas of the Sanctuary outside the no-activity zones and incidental to exploration for, development of, or production of oil or gas in those areas.

(d) The prohibitions in paragraphs (a)(2) through (14) of this section do not apply to activities necessary to respond to emergencies threatening life, property, or the environment.

(e)(1) The prohibitions in paragraphs (a)(2) through (14) of this section do not apply to activities being carried out by the Department of Defense as of the effective date of Sanctuary designation. Such activities shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualities. The prohibitions in paragraphs (a)(2) through (14) of this section do not apply to any new activities carried out by the Department of Defense that do not have the potential for any significant adverse impacts on Sanctuary resources or qualities. Such activities shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualifies. New activities with the potential for significant adverse impacts on Sanctuary resources or qualities may be exempted from the prohibitions in paragraphs (a)(2) through (14) of this section by the Director or designee after consultation between the Director or designee and the Department of Defense. If it is determined that an activity may be carried out, such activity shall be carried out in a manner that minimizes any adverse impact on Sanctuary resources and qualities.

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

(f) The prohibitions in paragraphs (a)(2) through (14) of this section do not apply to any activity executed in accordance with the scope, purpose, terms, and conditions of a National Marine Sanctuary permit issued pursuant to § 943.10 or a Special Use permit issued pursuant to section 310 of the Act.

(g) The prohibitions in paragraphs (a)(2) through (14) of this section do not apply to any activity authorized by a valid lease, permit, license, approval, or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal authority of competent jurisdiction, or by any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, provided that the holder of such authorization or right complies with § 943.11 and with any terms and conditions on the exercise of such lease, permit, license, approval, other authorization, or right imposed by the Director or designee as a condition of certification as he or she deems necessary to achieve the purposes for which the Sanctuary was designated.

(h) The prohibitions in paragraphs (a)(2) through (14) of this section do not apply to any activity authorized by any lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation, provided that the applicant complies with § 943.12, the Director or designee notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director or designee deems necessary to protect Sanctuary resources and qualities.

(i) Notwithstanding paragraphs (f), (g) and (h) of this section, in no event may the Director or designee issue a National Marine Sanctuary permit under § 943.10 or a Special Use permit under section 310 of the Act authorizing, or otherwise approve, the exploration for, development of, or production of oil, gas or minerals in a no-activity zone, and any leases, licenses, permits, approvals, or other authorizations authorizing the exploration for, development of, or production of oil, gas or minerals in a no-activity zone and issued after the effective date of Sanctuary designation shall be invalid.

§ 943.6 Shunting requirements applicable to hydrocarbon-drilling discharges.

Persons engaged in the exploration for, development of, or production of oil or gas in areas of the Sanctuary outside the no-activity zones must shunt all drilling cuttings and drilling fluids to the seabed through a downpipe that terminates an appropriate distance, but no more than ten meters, from the seabed.

§ 943.7 Emergency regulations.

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

§ 943.8 Penalties for commission of prohibited activities.

(a) Each violation of the Act, any regulation in this part, or any permit issued pursuant thereto, is subject to a civil penalty of not more than $50,000. Each day of a continuing violation constitutes a separate violation.

(b) Regulations setting forth the procedures governing administrative proceedings for assessment of civil penalties, permit sanctions and denials for enforcement reasons, issuance and use of written warnings, and release or forfeiture of seized property appear at 15 CFR part 904.

§ 943.9 Response costs and damages.

Under section 312 of the Act, any person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury, and any vessel used to destroy, cause the loss of, or injure any sanctuary resource is liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury.

§ 943.10 National Marine Sanctuary permits—Application procedures and issuance criteria.

(a) A person may conduct an activity prohibited by § 943.5(a)(2) through (14) if conducted in accordance with the scope, purpose, terms, and conditions of a permit issued under this section.

(b) Applications for such permits should be addressed to the Director of the Office of Ocean and Coastal Resource Management; ATTN: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235. An application must include a detailed description of the proposed activity including a timetable for completion of the activity and the equipment, personnel, and methodology to be employed. The qualifications and experience of all personnel must be set forth in the application. The application must set forth the potential effects of the activity, if any, on Sanctuary resources and qualities. Copies of all other required licenses, permits, approvals, or other authorizations must be attached.

(c) Upon receipt of an application, the Director or designee may request such additional information from the applicant as he or she deems necessary to act on the application and may seek the views of any persons.

(d) The Director or designee, at his or her discretion, may issue a permit, subject to such terms and conditions as he or she deems appropriate, to conduct an activity prohibited by § 943.5(a)(2) through (14), if the Director or designee finds that the activity will: further research related to Sanctuary resources; further the educational, natural or historical resource value of the Sanctuary; further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; or assist in managing the Sanctuary. In deciding whether to issue a permit, the Director or designee shall consider such factors as: The professional qualifications and financial ability of the applicant as related to the proposed activity; the duration of the activity and the duration of its effects; the appropriateness of the methods and procedures proposed by the applicant for the conduct of the activity; the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities; the cumulative effects of the activity; and the end value of the activity. In addition, the Director or designee may consider such other factors as he or she deems appropriate.

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

(f) The Director or designee may amend, suspend, or revoke a permit issued pursuant to this section or deny a permit application pursuant to this section, in whole or in part, if it is determined that the permittee or applicant has acted in violation of the terms or conditions of the permit or of these regulations or for other good cause. Any such action shall be communicated in writing to the permittee or applicant and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are set forth in subpart D of 15 CFR part 904.

(g) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(h) The Director or designee may, *inter alia*, make it a condition of any permit issued that any information obtained under the permit be made available to the public.

(i) The Director or designee may, *inter alia*, make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the statutes, progress, or results of any activity authorized by the permit.

(j) The applicant for or holder of a National Marine Sanctuary permit may appeal the denial, conditioning, amendment, suspension, or revocation of the permit in accordance with the procedures set forth in § 943.13.

§ 943.11 Certification of pre-existing leases, licenses, permits, approvals, other authorizations, or rights to conduct a prohibited activity.

(a) The prohibitions set forth in § 943.5(a)(2) through (14) do not apply to any activity authorized by a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal authority of competent jurisdiction, or by any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, provided that:

(1) The holder of such authorization or right notifies the Director designee, in writing, within 90 days of the effective date of Sanctuary designation, of the existence of such authorization or right and requests certification of such authorization or right;

(2) The holder complies with the other provisions of this § 943.11; and

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

(b) The holder of a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal authority of competent jurisdiction, or of any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, authorizing an activity prohibited by § 943.5(a)(2) through (14) may conduct the activity without being in violation of § 943.5, pending final agency action on his or her certification request, provided the holder is in compliance with this § 943.11.

(c) Any holder of a valid lease, permit, license, approval, or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal authority of competent jurisdiction, or any holder of a valid right of subsistence use or access in existence on the effective date of Sanctuary designation may request the Director or designee to issue a finding as to whether the activity for which the authorization has been issued, or the right given, is prohibited under § 943.5(a)(2) through (14).

(d) Requests for findings or certifications should be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue NW., Washington, DC 20235. A copy of the lease, permit, license, approval or other authorization must accompany the request.

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

(f) The Director or designee may amend any certification made under this section whenever additional information becomes available justifying such an amendment.

(g) The Director or designee shall communicate any decision on a certification request or any action taken with respect to any certification made under this section, in writing, to both the holder of the certified lease, permit, license, approval, other authorization or right, and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

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

(i) The holder may appeal any action conditioning, amending, suspending, or revoking any certification in accordance with the procedures set forth in § 943.13.

(j) Any amendment, renewal or extension not in existence on the effective date of Sanctuary designation of a lease, permit, license, approval, other

authorization or right is subject to the provisions of § 943.12.

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

(a) The prohibitions set forth in § 943.5(a) (2) through (14) do not apply to any activity authorized by any valid lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation by any Federal authority of competent jurisdiction, provided that:

(1) The applicant notifies the Director or designee, in writing, of the application for such authorization (and of any application for an amendment, renewal or extension of such authorization) within fifteen (15) days of the date of application or of the effective date of Sanctuary designation, whichever is later;

(2) The applicant complies with the other provisions of this § 943.12;

(3) The Director or designee notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization (or amendment, renewal or extension); and

(4) The applicant complies with any terms and conditions the Director or designee deems necessary to protect Sanctuary resources and qualities.

(b) Any potential applicant for a lease, permit, license, approval or other authorization from any Federal authority (or for an amendment, renewal or extension of such authorization) may request the Director or designee to issue a finding as to whether the activity for which an application is intended to be made is prohibited by § 943.5(a) (2) through (14).

(c) Notification of findings should be addressed to the Director, Office of Ocean and Coastal Resource Management; ATTN: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue NW., Washington, DC 20235. A copy of the application must accompany the notification.

(d) The Director or designee may request additional information from the applicant as he or she deems necessary to determine whether to object to issuance of such lease, license, permit, approval or other authorization (or to issuance of an amendment, extension or renewal of such authorization), or what terms and conditions are necessary to protect Sanctuary resources and qualities. The information requested must be received by the Director or designee within 45 days of the postmark date of the request. The Director or designee may seek the views of any persons on the application.

(e) The Director or designee shall notify, in writing, the agency to which application has been made of his or her review of the application and possible objection to issuance. After review of the application and information received with respect thereto, the Director or designee shall notify both the agency and applicant, in writing, whether he or she has an objection to issuance and what terms and conditions he or she deems necessary to protect Sanctuary resources and qualities. The Director or designee shall state the reason(s) for any objection or the reason(s) that any terms and conditions are deemed necessary to protect Sanctuary resources and qualities.

(f) The Director or designee may amend the terms and conditions deemed necessary to protect Sanctuary resources and qualities whenever additional information becomes available justifying such an amendment.

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

(h) The applicant may appeal any objection by, or terms or conditions imposed by, the Director or designee to the Assistant Administrator or designee in accordance with the procedures set forth in § 943.13.

§ 943.13 Appeals of administrative action.

(a) Except for permit actions taken for enforcement reasons (see subpart D of 15 CFR part 904 for applicable procedures), an applicant for, or a holder of, a § 943.10 National Marine Sanctuary permit, an applicant for, or a holder of, a section 310 of the Act

Special Use permit, a § 943.11 certification requester, or a § 943.12 applicant (hereinafter appellant) may appeal to the Assistant Administrator or designee:

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

(2) The conditioning, amendment, suspension, or revocation of a certification under § 943.11; or

(3) The objection to issuance or the imposition of terms and conditions under § 943.12.

(b) An appeal under paragraph (a) of this section must be in writing, state the action(s) by the Director or designee appealed and the reason(s) for the appeal, and be received within 30 days of the action(s) by the Director or designee. Appeals should be addressed to the Assistant Administrator, Office of Ocean and Coastal Resource Management, ATTN: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235.

(c) While the appeal is pending, appellants requesting certification pursuant to § 943.11 who are in compliance with such section may continue to conduct their activities without being in violation of the prohibitions in § 943.5(a) (2) through (14). All other appellants may not conduct their activities without being subject to the prohibitions in § 943.5(a) (2) through (14).

(d) The Assistant Administrator or designee may request the appellant to submit such information as the Assistant Administrator or designee deems necessary in order for him or her to decide the appeal. The information requested must be received by the Assistant Administrator or designee within 45 days of the postmark date of the request. The Assistant Administrator may seek the views of any other persons. The Assistant Administrator or designee may hold an informal hearing on the appeal. If the Assistant Administrator or designee determines that an informal hearing should be held, the Assistant Administrator or designee may designate an officer before whom the hearing shall be held. The hearing officer shall give notice in the FEDERAL REGISTER of the time, place, and subject matter of the hearing. The appellant and the Director or designee may appear personally or by counsel at the hearing and submit such material and present such arguments as deemed appropriate by the hearing officer. Within 60 days after the record for the hearing closes, the hearing officer shall recommend a decision in writing to the Assistant Administrator or designee.

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

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

APPENDIX I TO PART 943—FLOWER GARDEN BANKS NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

The boundary coordinates are based on geographic positions of the North American Datum of 1927 (NAD 27).

Point No.	Latitude	Longitude
East Flower Garden Bank		
E-1	27°52'52.13"	93°37'40.52"
E-2	27°53'33.81"	93°36'22.33"
E-3	27°56'13.31"	93°36'39.07"
E-4	27°57'30.14"	93°36'32.26"
E-5	27°58'27.76"	93°37'42.93"
E-6	27°59'00.29"	93°35'29.56"
E-7	27°58'59.23"	93°35'09.91"
E-8	27°56'20.23"	93°34'13.75"

Point No.	Latitude	Longitude
E-9	27°54'03.35"	93°34'18.42"
E-10	27°53'25.95"	93°35'03.79"
E-11	27°52'51.14"	93°36'57.59"
West Flower Garden Bank		
W-1	27°49'09.24"	93°50'43.35"
W-2	27°50'10.23"	93°52'07.96"
W-3	27°51'13.14"	93°52'50.68"
W-4	27°51'31.24"	93°52'49.79"
W-5	27°52'49.55"	93°52'21.89"
W-6	27°54'59.08"	93°49'41.87"
W-7	27°54'57.08"	93°48'38.52"
W-8	27°54'33.46"	93°47'10.36"
W-9	27°54'13.51"	93°46'48.96"
W-10	27°53'37.67"	93°46'50.67"
W-11	27°52'56.44"	93°47'14.10"
W-12	27°50'38.31"	93°47'22.86"
W-13	27°49'11.23"	93°48'42.59"

Appendix II to Part 943—Coordinates for the Department of the Interior Topographic Lease Stipulations for OCS Lease Sale 112

East Flower Garden Bank

Block A-366
SE¼, SW¼;
S½, NE¼, SE¼; SE¼, NW¼, SE¼; S½, SE¼;
Block A-367
W½, NW¼, SW¼; SW¼, W½, SW¼.
Block A-374
W½, NW¼, NW¼; W½, SW¼, NW¼; SE¼, SW¼, NW¼;
SW¼, NE¼, SW¼; W½, SW¼; W½, SE¼, SW¼; SE¼, SE¼, SW¼.
Block A-375
E½;
E½, NW¼, NW¼, SW¼, NW¼, NW¼;
E½, SW¼, NW¼; NW¼, SW¼, NW¼, SW¼;
Block A-388
NE¼;
E½, NW¼; E½, NW¼, NW¼; NE¼, SW¼, NW¼; E½, SW¼; E½, NE¼, SW¼; NW¼, NE¼, SW¼; NE¼, NW¼, SW¼; NE¼, SE¼, SW¼;
NE¼; NE¼, SE¼; W½, NE¼, SE¼; NW¼, SE¼; NW¼, SW¼, SE¼;
Block A-389
NE¼, NW¼; NW¼, NW¼; SW¼, NW¼; NE¼, SE¼, NW¼; W½, SE¼, NW¼;
N½, NW¼, SW¼.

West Flower Garden Bank

Block A-383
E½, SE¼, SE¼; SW½, SE¼, SE¼.
Block A-384
W½, SW¼, NE¼; SE¼, SW¼, NE¼; S½, SE¼, NE¼;
SE¼, NW¼;
E½, SW¼; E½, NW¼, SW¼; SW¼, NW¼, SW¼; SW¼, SW¼;
SE¼
Block A-385
SW¼, SW¼, NW¼;
N¼, SW¼; NW¼, SW¼, SW¼.
Block A-397
W½, W½, NW¼;
W½, NW¼, SW¼; NW¼, SW¼, SW¼.
Block A-398
Entire block
Block A-399
E½;
SE¼, NE¼, NW¼; E½, SE¼, NW¼;
E½, NE¼, SW¼; SW¼, NE¼, SW¼; NE¼, SE¼, SW¼.
Block A-401
NE¼, NE¼; N½, NW¼, NE¼; NE¼, SE¼, NE¼
Block A-Block 134
That portion of the block north of a line connecting points 17 and 18, defined under the universal transverse mercator grid system as follows: Point 17: X=1,378,080.00'; Y=10,096,183.00'; Point 18: X=1,376,079.41'; Y=10,096,183.00';
Block A-135
That portion of the block northwest of a line connecting points 16 and 17, defined under the universal transverse mercator grid system as follows: Point 16: X=1,383,293.84'; Y=10,103,281.93'; Point 17: X=1,378,080.00'; Y=10,096,183.00';

16.
Part 944
Monterey Bay National Marine Sanctuary Regulations
(final rule dated September 18, 1992)

federal register

Friday
September 18, 1992

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Chapter IX, Subchapters A and B and Part 944

Monterey Bay National Marine Sanctuary Regulations; Final Rule

DEPARTMENT OF COMMERCE

15 CFR Chapter IX, Subchapter A and B and Part 944

[Docket No. 900122-2020]

RIN 0648-AC63

Monterey Bay National Marine Sanctuary Regulations

AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; National Marine Sanctuary Designation; final rule; and summary of final management plan.

SUMMARY: The National Oceanic and Atmospheric Administration (NOAA), by the Designation Document contained in this document, and as required by section 205(a)(3) of Public Law 100-627, designates an approximately 4,024 square nautical mile area of coastal and ocean waters, and the submerged lands thereunder, in and surrounding Monterey Bay off the coast of central California as the Monterey Bay National Marine Sanctuary. This document publishes the Designation Document for the Sanctuary and summarizes the final management plan for it. The final management plan details the goals and objectives, management responsibilities, research activities, interpretive and educational programs, and enforcement, including surveillance, activities for the Sanctuary.

Further, NOAA issues final regulations to implement the designation by regulating activities affecting the Sanctuary consistent with the provisions of the Designation Document. The intended effect of these regulations is to protect the conservation, recreational, ecological, historical, research, educational and esthetic resources and qualities of the Monterey Bay National Marine Sanctuary.

EFFECTIVE DATES: Pursuant to section 304(b) of the Marine Protection, Research, and Sanctuaries Act, Congress and the Governor of the State of California have forty-five days of continuous session of Congress beginning on the day on which this document is published to review the designation and regulations before they take effect. After forty-five days, the designation (and any of its terms not disapproved by Congress through enactment of a joint resolution) and regulations automatically become final and take effect. Further, if the Governor of the State of California certifies within the forty-five-day period to the Secretary of Commerce that the designation or any of its terms is unacceptable, the designation or the unacceptable terms cannot take effect in the area of the Sanctuary lying within the seaward boundary of the State. If the Secretary considers that any disapproval will affect the designation in a manner that the goals and objectives of the Sanctuary cannot be fulfilled, the Secretary may withdraw the entire designation. A document announcing the effective date will be published in the **Federal Register**.

ADDRESSES: Copies of the Final Environmental Impact Statement/Management Plan (FEIS/MP) prepared for the designation are available upon request to the Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., suite 714, Washington, DC 20235.

FOR FURTHER INFORMATION CONTACT: Mark Murfay-Brown, 202/606-4126.

SUPPLEMENTARY INFORMATION:

I. Background

Title III of the Marine Protection, Research, and Sanctuaries Act, as amended (the "Act" or "MPRSA"), 16 U.S.C. 1431 *et seq.*, authorizes the Secretary of Commerce to designate discrete areas of the marine environment as national marine sanctuaries if, as required by section 303 of the Act [16 U.S.C. 1433], the Secretary finds, in consultation with Congress, a variety of specified officials, and other interested persons, that the designation will fulfill the purposes and policies of the Act (set forth in section 301(b) [16 U.S.C. 1431(b)]) and:

(1) The area proposed for designation is of special national significance due to its resource or human-use values;

(2) Existing state and Federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research and public education;

(3) Designation of the area as a national marine sanctuary will facilitate the coordinated and comprehensive conservation and management of the area; and

(4) The area is of a size and nature that will permit comprehensive and coordinated conservation and management.

Before the Secretary may designate an area as a national marine sanctuary, section 303 (16 U.S.C. 1433) requires him or her to make the above described findings and section 304 (16 U.S.C. 1434), setting forth the procedures for designation, requires him or her to publish in the **Federal Register** regulations implementing the designation and to advise the public of the availability of the FEIS/MP.

The authority of the Secretary to designate national marine sanctuaries and administer the other provisions of the Act has been delegated to the Under Secretary of Commerce for Oceans and Atmosphere by DOC Organization Order 10-15, section 3.01(z), January 11, 1988. The authority to administer the other provisions of the Act has been redelegated to the Assistant Administrator for Ocean Services and Coastal Zone Management of NOAA by NOAA Circular 83-38, Directive 05-50, September 21, 1983, as amended.

The State of California nominated the Monterey Bay area in 1977, along with nine other offshore marine areas, for consideration for designation as national marine sanctuaries. In response to these nominations, NOAA selected the Channel Islands, the Point Reyes-Farallon Islands, and the Monterey Bay areas for further consideration. In December 1978, NOAA released an issue paper on these three sites, presenting several boundary and regulatory options for each site. Public hearings were held and, based on the responses, NOAA, on August 10, 1979, declared all three sites as active candidates for designation as national marine sanctuaries.

On September 21, 1980, the Channel Islands National Marine Sanctuary was designated and on January 16, 1981, the Point Reyes-Farallon Islands National Marine Sanctuary (later renamed the Gulf of the Farallones National Marine Sanctuary) was designated. On December 14, 1983 (see 48 FR 56253), NOAA removed the Monterey Bay area from the list of active candidates.

On November 7, 1988, Public Law 100-627, which amends and authorizes appropriations for title III of the Act, was signed into law. Section 205(a)(3) of Public Law 100-627 directs that the Secretary of Commerce designate the Monterey Bay National Marine Sanctuary.

On January 6, 1989, NOAA announced (54 FR 448) that the Monterey Bay area had again become an active candidate for designation as a national marine sanctuary. On January 25 and 26, 1989, NOAA sponsored two public scoping meetings in Monterey and Santa Cruz to solicit public comment on the scope and significance of issues involved in designating the Sanctuary. The public response was extremely favorable to proceeding with the evaluation.

On August 3, 1990 NOAA published a proposed Designation Document and proposed implementing regulations and announced the availability of the Draft Environmental Impact Statement/Management Plan (DEIS/MP) (55 FR 31786). Public hearings to receive comments on the proposed designation, proposed regulations, and DEIS/MP were held on September 12, 1990 in Monterey; on September 13, 1990 in Santa Cruz; and on September 14, 1990 in Half Moon Bay, California. All comments received by NOAA in response to the **Federal Register** notice and at the public hearings were considered and, where appropriate, were incorporated. A summary of the significant comments on the proposed regulations and the regulatory elements of the DEIS/MP and NOAA's responses to them follow. The comments are both presented and responded to in greater detail in appendix F of the FEIS/MP.

(1) *Comment:* NOAA should extend its preferred Boundary Alternative 2 both north and south and choose Boundary Alternative 5. Boundary Alternative 5 would protect critical nesting and migratory paths between Monterey and San Mateo County coasts, create a continuous protected management regime between the Gulf of the Farallones National Marine Sanctuary and the proposed Monterey Bay National Marine Sanctuary, provide a greater buffer to sensitive areas such as Año Nuevo and the Fitzgerald Marine Reserve, and protect a greater area of the southern California sea otter range and habitat.

Response: NOAA agrees. The FEIS/MP-preferred Boundary Alternative 5 incorporates a north and south extension of the DEIS/MP-preferred Boundary Alternative 2. Boundary Alternative 5 received the vast majority of support from the public during the public comment period. Boundary Alternative 5 has been chosen as preferred because it integrates important coastal, nearshore and deep-ocean canyon resource zones under one management regime. These zones include the Monterey submarine canyon—the focal point of the Sanctuary; Monterey Bay itself; the Big Sur and San Mateo coastal area, including Año Nuevo and the Fitzgerald Marine Reserve; the adjacent continental shelf, slope and rise; certain highly productive shoreline and intertidal areas, such as Pescadero Marsh and Elkhorn Slough; and the deep ocean environments of the Ascension, Monterey Bay, Big Sur and Partington Canyon complexes.

The boundary expansion excludes a small area of approximately 71 square nautical miles off the north coast of San Mateo County and the City and County of San Francisco. The excluded area encompasses the anticipated discharge plume of the combined sewer overflow component of the City and County of San Francisco's sewage treatment program, the shipping channel providing access to and from San Francisco Bay, and the Golden Gate dredged material disposal site associated with this channel. NOAA has determined that the nature and level of these activities are not appropriate for inclusion within a national marine sanctuary. By excluding this small area from the Sanctuary, NOAA will be able to focus Sanctuary management on the long-term protection of other areas that contain nationally significant resources and qualities and are less heavily impacted by human activity. By excluding the anticipated discharge plume of the combined sewer overflow from the Sanctuary, a buffer zone has been created protecting Sanctuary resources and qualities from the discharge.

The boundary expansion not only encompasses additional resources but also will provide enhanced protection from potential human threats to the north and south. For example, to the north, off of the San Mateo coast, potential new dredged material disposal and oil and gas development activities are under consideration within the Sanctuary boundary. To the south, the pristine area of the Big Sur coast and sea otter habitat would be encompassed and protected by the Sanctuary regime.

(2) *Comment:* Oil and gas development within the Sanctuary should either be prohibited or regulated. Concerns range from impacts of potential toxic wastes released from oil-drilling platforms, reduced tourism due to diminished scenic views, lack of adequate emergency oil response capabilities, to catastrophic blow outs.

Response: NOAA agrees. The regulations prohibit exploring for, developing or producing oil or gas throughout the entire Sanctuary. Such economic development and construction of man-made structures would severely disrupt the natural and aesthetic qualities of the area and be inconsistent with the purposes of the Sanctuary. Although certain man-made structures may be permissible in the future for limited purposes such as research or natural resource protection, the threats from oil and gas activities to Sanctuary resources and qualities warrant prohibition. Threats include not only catastrophic events such as oil spills associated with blow-outs, rupture of pipelines or loading of tankers but also long-term chronic events such as discharge of drilling fluids, cuttings and air emissions. Offshore oil and gas activities have never been conducted in the Monterey Bay area. The area would suffer aesthetic disturbance ranging from the presence of offshore rig structures to building of shore facilities and the necessary transportation of personnel and equipment to and from the offshore rigs.

(3) *Comment:* NOAA should either regulate or prohibit vessel traffic within the Sanctuary area. Specifically:

(1) Traffic should be prohibited unless vessels are bound for a destination within the Sanctuary;

(2) Size of vessels to be regulated or prohibited from the Sanctuary area should be clarified;

(3) Vessels should either be routed offshore and avoid the Sanctuary area completely, or traffic lanes should be developed along the Sanctuary edges; and

(4) Vessels traveling along the Sanctuary boundary should be limited to specific port access routes and shipping lanes established by the United States Coast Guard (USCG) and NOAA.

Response: The Designation Document lists vessel operations as being subject to Sanctuary regulation. However, upon designation only the operation of personal water craft is being regulated as part of the Sanctuary regime (see comment responses 18 and 19). There are no Sanctuary regulations planned at this time for the traffic regulation of other vessels. NOAA is currently working with the USCG, the primary source of vessel traffic regulation, to determine the need for additional measures to ensure protection of Sanctuary resources and qualities from vessel traffic. These consultations aim to determine which resources are most at risk, which vessel traffic practices are most threatening and which regulations or restrictions would be most appropriate to alleviate potential threats, including those, if any, from foreign vessels. Because the disposal of dredged material outside the Sanctuary (see Comment/Response (9) below) will necessitate the transport of these materials through the Sanctuary, NOAA will also work closely with the U.S. Army Corps of Engineers (COE) and U.S. Environmental Protection Agency (EPA) on such transport activities.

These ongoing consultations build upon recent Federal and State legislation (since publication of the DEIS/MP in August 1990) that further protects Sanctuary resources and

qualities from vessel traffic. Specifically, the National Oil Pollution Act of 1990 establishes double hull requirements for tank vessels. Most tank vessels over 5,000 gross tons will be required to have double hulls by 2010, while vessels under 5,000 gross tons will be required to have a double hull or a double containment system by 2015. All newly constructed tankers must contain a double hull (or double containment system if under 5,000 gross tons), while existing vessels are phased out over a period of years. In addition, SB 2040, California's Oil Spill Prevention and Response Act, requires numerous prevention as well as mitigation measures aimed at protecting marine resources from oil spills particularly from tankers.

Vessel traffic separation zones off of San Francisco, implemented by the USCG, also help protect Sanctuary resources and qualities.

If it appears that regulation of vessel traffic as part of the Sanctuary regime may be necessary, NOAA will make such determination in consultation with the USCG, COE, EPA, other affected Federal and State agencies and the International Maritime Organization (IMO) through the USCG. If it is determined that such regulation is necessary, NOAA will develop the necessary regulations, also in coordination with those agencies. Coordination among agencies is intended to focus ongoing efforts to provide adequate protection to the Sanctuary and to emphasize the sensitivity of Sanctuary resources and qualities.

(4) *Comment:* If spills cannot be prevented entirely, a contingency plan should exist for emergency response and cleanup. To facilitate response action, NOAA should work with, and build upon, the efforts of other organizations and agencies already developing plans for the area.

Response: NOAA agrees and will work with, and build upon, the efforts of others. The FEIS/MP identifies existing oil spill contingency plans and efforts in the Monterey Bay area. The Monterey Bay National Marine Sanctuary requires its own contingency plan to ensure that resources are protected during events that threaten the environment. A prototype sanctuary contingency plan is almost complete, and will be tested at the Channel Islands National Marine Sanctuary. Once implementation experience has been gained, the plan will be adapted to other sanctuary sites, including Monterey Bay.

(5) *Comment:* Agreements should be established between various local, regional, State, and Federal agencies to ensure adequate cleanup response.

Response: Under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, the USCG serves as the Federal on-scene coordinator to organize all containment, removal and disposal efforts, and resources during a spill event. If a spill occurs, NOAA will take an active role, to the extent allowable, to participate, coordinate, and actively protect natural resources. During the planning phase, NOAA will work with the existing response mechanism, and will cooperate with local government, industry, organizations and interested individuals to implement a comprehensive contingency plan. A top priority for the Sanctuary Manager will be to meet with those involved with contingency planning to coordinate Sanctuary roles and responsibilities during an emergency response situation.

(6) *Comment:* Depositing or discharging from any location within the boundary of the Sanctuary or from beyond the boundary of the Sanctuary should be prohibited. The regulation of discharges to improve water quality is a significant concern.

Response: The regulations prohibit depositing or discharging most material and other matter from any location within the boundary of the Sanctuary, and from beyond the boundary of the Sanctuary if such matter subsequently enters the Sanctuary and injures resources or qualities.

NOAA has entered into a Memorandum of Agreement (MOA) with the State of California, EPA and the Association of Monterey Bay Area Governments regarding the Sanctuary regulations relating to water quality within State waters within the Sanctuary. With regard to permits, the MOA encompasses (i) National Pollutant Discharge Elimination System (NPDES) permits issued by the State of California under section 13377 of the California Water Code and (ii) Waste Discharge Requirements issued by the State of California under section 13263 of the California Water Code. The MOA specifies how the Sanctuary certification process for existing permits and review process for new or revised (including renewal) permits will be administered within State water[illegible]thin the Sanctuary in coord[illegible]ation with the State permit program. The MOA also addresses integration and coordination of research and monitoring efforts and the development of a comprehensive water quality protection program for the Sanctuary.

(7) *Comment:* NOAA should clarify in the FEIS/MP what harbors will be excluded and why.

Response: The FEIS/MP includes a specific section on harbors. Pillar Point, Santa Cruz, Moss Landing (except waters, and submerged lands thereunder, of Elkhorn Slough east of the U.S. Highway One bridge to the boundary of the Elkhorn Slough National Estuarine Research Reserve), and Monterey harbors shoreward from their respective International Collision at Sea regulation (Colreg.) demarcation lines are not part of the Sanctuary. NOAA excluded these harbor areas from the Sanctuary because they do not possess resources and qualities warranting Sanctuary protection.

(8) *Comment:* Dredging is essential to maintaining viable working harbors. However, because of potential degradation to the environment, dredging should be prohibited within the Sanctuary. NOAA should clearly state how regulations will affect current dredging activities in the Sanctuary.

Response: Most harbor areas do not lie within the Sanctuary (see Comment/Response (7) above) and therefore are not affected by the Sanctuary dredging prohibitions. In addition, existing activities relating to the maintenance of the harbors have been exempted from Sanctuary regulation. NOAA will work closely with COE and EPA to ensure that Sanctuary resources and qualities are protected, while allowing essential dredging activities to be conducted.

(9) *Comment:* Ocean dumping is a threat to the marine environment and should be entirely prohibited within the Sanctuary area. NOAA should also specify whether Federally authorized dredged material disposal sites SF-12 and SF-14 will remain available for future dredging projects that would otherwise qualify for State and Federal permits.

Response: The Sanctuary regulations prohibit the designation and use of any new ocean dredged material disposal sites within the Sanctuary. The ocean disposal of dredged material is subject to stringent regulation under title I of the MPRSA. NOAA will work closely with COE and EPA to ensure Sanctuary resources and qualities are protected from future dredged material disposal activities.

With regard to the COE dredged material disposal activities: (a) Those activities located within the Sanctuary boundary will continue to be regulated under section 103 of the MPRSA and section 404 of the Clean Water Act. These activities have previously undergone intense public scrutiny and

environmental oversight by EPA. Any proposed new activities at existing sites, *i.e.*, activities not pursuant to and in compliance with an existing permit or approval, will be subject to the review process of § 944.11.

(b) Those activities located at existing sites outside the Sanctuary boundary and at the authorized disposal site that will result from the disposal site study underway on the effective date of Sanctuary designation will be regulated primarily under section 103 of the MPRSA and section 404 of the Clean Water Act and will not be regulated under the Sanctuary regulatory regime. Because of the intensive environmental evaluation of disposal sites and disposal activities by COE and EPA, NOAA does not anticipate that any site designated for disposal of dredged material will impact Sanctuary resources. Therefore, the Sanctuary regulatory prohibition on discharges does not apply to dredged material deposited outside the Sanctuary at existing disposal sites off of the Golden Gate (see appendix IV to the regulations) and will not apply to dredged material deposited outside the Sanctuary at the authorized disposal site that will result from the disposal site study underway on the effective date of Sanctuary designation, provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval. The future disposal site will be located within one of the Long-Term Management Strategy Ocean Study Areas described in appendix IV. When that site is authorized, appendix IV will be updated to incorporate its precise location. COE will coordinate closely with NOAA concerning the management of dredged material disposal activities at the new site.

(10) *Comment:* The regulatory regime for aquaculture and kelp harvesting activities within the Sanctuary remains unclear. Currently, aquaculture development is the responsibility of the California Department of Fish and Game (CDF&G), and because of this, aquaculture operations requiring seabed alterations should be excluded from Sanctuary regulations, and allowed to continue.

Response: Neither kelp harvesting nor aquaculture is being regulated as part of the Sanctuary regime upon designation. Both activities are included in the Designation Document as activities subject to future regulation should be need arise. NOAA will coordinate with the CDF&G, which is responsible for managing kelp harvesting and aquaculture operations.

(11) *Comment:* The Sanctuary should include all waters in the Elkhorn Slough National Estuarine Research Reserve (ESNERR), and this relationship should be formalized. It is important to create a link between the Monterey Bay Sanctuary and the Reserve, even if this means exempting Moss Landing Harbor. An agreement should be developed between NOAA and the Moss Landing Harbor District to ensure the success of the two programs as well as coordinating the management plans and objectives of both sites.

Response: NOAA agrees it is important to coordinate closely with the ESNERR to ensure the success of both sites. The Sanctuary includes all waters, and submerged lands thereunder, in the Slough up to the ESNERR boundary. NOAA agrees that links should be fostered since missions and goals are similar. NOAA supports the exchange of information, research, education and staff expertise between the two programs. Meeting the objectives for both sites, as well as implementing the management plans, can be coordinated through the Sanctuary Advisory Committee and the ESNERR Advisory Committee. NOAA encourages Sanctuary and ESNERR staff to participate actively in this process.

However, regardless of their similarities, the two programs must remain separate because the National Estuarine Reserve Research System Program regulations prohibit the inclusion of reserves within sanctuaries (15 CFR 921.4(c)).

After consultation with the Moss Landing Harbor District, NOAA has determined the most appropriate method of linking the two sites is to exclude from the Sanctuary Moss Landing Harbor east of the Colregs. line and west of the Highway One bridge, and to include the waters of Elkhorn Slough east of the Highway One bridge to the boundary of the ESNERR with overlapping jurisdiction with the Moss Landing Harbor District over the Moss Landing Harbor.

(12) *Comment:* There is a need for landward protection and controls on nearshore development. Adequate protection of the ocean environment must include management of the adjacent coastal and upland zones. NOAA should extend its jurisdiction to include beaches, dunes, uplands, and wetland habitats adjacent to the proposed Sanctuary.

Response: NOAA agrees that protection and management of the land portion of the coastal zone is necessary for adequate protection of the ocean environment. NOAA will coordinate with existing coastal management authorities, such as COE, EPA, the California Coastal Commission, State Water Resources and Regional Water Quality Control Boards and State Lands Commission, regarding potential land- and water-based threats and impacts to the Sanctuary. The physical boundary of this sanctuary encompasses ocean and coastal waters up to the mean high-water line. NOAA intends to protect the Sanctuary from the impacts of coastal development via its regulation of discharges or deposits from beyond the boundary of the Sanctuary that subsequently enter the Sanctuary and injure a Sanctuary resource or quality.

(13) *Comment:* NOAA should clarify whether it will limit the amount of silt in the sand used for beach nourishment. Even though the sand may be placed above the high tide mark, erosion may move silt into the Bay.

Response: NOAA will work with COE, EPA and other appropriate authorities to determine the impacts of beach nourishment programs. If it should appear that a particular project would injure Sanctuary resources or qualities, NOAA may impose terms and conditions pursuant to 15 CFR 944.10 and 944.11.

(14) *Comment:* Protection of historical and cultural resources within the Sanctuary is a significant concern. NOAA should prohibit moving, injuring, or possessing historical resources within the Sanctuary. However, Sanctuary regulations should not apply to activities permitted by the State within State waters under the Shipwreck and Historic Maritime Resources Program.

Response: NOAA agrees that it is necessary to protect and manage historical and cultural resources within the Sanctuary boundary. The regulations include a prohibition on moving, removing, possessing or injuring, or attempting to move, remove or injure these resources.

The Abandoned Shipwreck Act of 1987 gives States the title to certain abandoned shipwrecks in State waters. Under the MPRSA, the Sanctuaries and Reserves Division, NOAA, has managerial responsibilities for abandoned shipwrecks within National Marine Sanctuaries, including those located in State waters, for the purpose of protecting them. NOAA will coordinate with State agencies to ensure that historical and cultural resources, as well as living marine resources, within the Sanctuary are protected.

(15) *Comment:* The prohibition on the taking of marine mammals and seabirds within the Sanctuary is redundant with the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA) and the Migratory Bird Treaty Act (MBTA).

Response: While marine mammals, migratory seabirds and endangered species are protected under these acts, NOAA believes that the higher penalties afforded under the MPRSA will provide a stronger deterrent.

The MBTA sets maximum criminal fines at either $500 or $2,000 per violation, depending on the violation. The MMPA sets maximum civil penalties at $10,000 and maximum criminal fines at $20,000. The ESA sets maximum civil penalties at $500, $12,000 or $25,000 per violation, depending on the violation; maximum criminal fines are set at $50,000. (All three statutes also provide for imprisonment for criminal violations.)

The MPRSA (under section 307) allows NOAA to assess civil penalties as high as $50,000 for each violation. In addition, monies collected under the MPRSA are available to enhance the National Marine Sanctuary Program.

(16) *Comment:* Many commenters stated fishing should not be prohibited within the Sanctuary. Instead, fisheries resource regulation should remain under the jurisdiction of the State of California, the National Marine Fisheries Service (NMFS) and the Pacific Fisheries Management Council (PFMC). Other commenters requested NOAA to regulate harmful fishing activities such as gill-netting and shark finning. NOAA's position should be clarified in the FEIS/MP.

Response: Fishing is not being regulated as part of the Sanctuary regime and is not included in the Designation Document as an activity subject to future regulation. Fisheries management will remain under the existing jurisdiction of the State of California, NMFS and PFMC. Sanctuary prohibitions that may indirectly affect fishing activities have been written to explicitly exempt aquaculture, kelp harvesting and traditional fishing activities.

Existing fishery management agencies are primarily concerned with the regulation and management of fish stocks for a healthy fishery. In contrast, the sanctuary program has a different and broader mandate under the MPRSA to protect all sanctuary resources on an ecosystem wide basis. Thus, while fishery agencies may be concerned about certain fishing efforts and techniques in relation to fish stock abundance and distribution the Sanctuary program is also concerned about the potential incidental impacts of specific fishery technique on all sanctuary resources including benthic habitats or marine mammals as well as the role the target species plays in the health of the ecosystem. In the case of the Monterey Bay area fish resources are already extensively managed by existing authorities.

Should problems arise in the future NOAA would consult with the State, PFMC and NMFS as well as the industry to determine an appropriate course of action.

(17) *Comment:* Many commenters requested NOAA to prohibit motorized aircraft from flying over the Sanctuary. Other commenters stated Federal Aviation Regulations (FARs) already adequately protect Sanctuary resources from aircraft impacts, making additional regulations unnecessary. In addition, new regulations may hinder cooperative emergency response plans, routine helicopter operations, and rescue attempts.

Response: The regulations prohibit flying motorized aircraft at less than 1,000 feet above the Sanctuary within four zones. Generally, these zones are from Point Santa Cruz north, Carmel Bay south (overlapping the California Sea Otter Game Refuge), and around Moss Landing and Elkhorn Slough (see appendix II for specific zones).

NOAA recognizes that overflights are regulated under the FARs. Unlike the FARs, however, Sanctuary overflight regulations are intended to protect the living marine resources of the Sanctuary from disturbance by low-flying aircraft and in this case require flying at higher altitudes than normally required by the FARs. The prohibition does not apply to overflights that:

(1) Are necessary to respond to an emergency threatening life, property or the environment;

(2) Are necessary for valid law enforcement purposes; or

(3) Conducted by the Department of Defense and specifically exempted by NOAA after consultation with that Department.

(18) *Comment:* A more precise definition of "thrill craft" is needed.

Response: NOAA has changed the term "thrill craft" in the proposed regulations to "motorized personal water craft" (MPWC) in the final regulations and revised the definition to include vessels up to fifteen feet. This category of vessel was selected because of the threat posed to Sanctuary resources by their operation.

(19) *Comment:* Thrill craft should be prohibited throughout the Sanctuary. The danger these craft pose to the biological resources of the area, such as marine mammals and kelp beds, as well as other users of the area such as divers and surfers necessitates a prohibition or regulation of personal water craft. In addition, MPWC should be prohibited in "areas of biological significance," including those with high human-use levels such as beaches; diving, swimming and surfing areas; state parks; and reserves. Besides the potential danger to recreationists, MPWC disrupt low-intensity area uses. In addition, many commenters found the operation of MPWC to be incompatible with the existence of the Sanctuary for reasons unquantifiable.

Response: NOAA recognizes the threat posed by MPWC operation to the conservational, recreational, ecological and esthetic resources and qualities of the Sanctuary. As a result, the regulations have been revised to prohibit the operation of MPWC within the Sanctuary, except within four zones and access routes (15 CFR 944.5(a)(8)). Generally, these areas are located off the harbors of Pillar Point, Santa Cruz, Moss Landing, and Monterey. They were chosen to avoid injury to kelp beds, sea otters and other marine mammals, seabirds and other marine life and to minimize conflicts with other recreational users and because these areas are accessible from launch areas and encompass areas traditionally used by MPWC. Restriction of MPWC operation to these areas of the Sanctuary will also reduce esthetic disturbance.

A prohibition of MPWC operation in the Sanctuary except in the four areas is designed to increase resource protection while still allowing opportunities for this form of recreation in the Sanctuary. There has been at least one reported collision in the Monterey Bay area between a jet ski and sea otters. Collisions with and other disturbance of marine mammals elsewhere from MPWC have also occurred. The small size, maneuverability and high speed of these craft is what causes these craft to pose a threat to resources. Resources such as sea otters and seabirds are either unable to avoid these craft or are frequently alarmed enough to significantly modify their behavior such as cessation of feeding or abandonment of young. Also other, more benign, uses of the Sanctuary such as sailing, kayaking, surfing and diving are interfered with during the operation of MPWC. Further, as indicated above, restriction of operation of MPWC to the specified zones and access routes will reduce esthetic disturbance. The zones and access routes where the MPWC can still operate allow the MPWC operators to continue this form of recreation albeit in areas away from those other forms of recreation and beyond those areas inhabited by marine mammals and seabirds and other sensitive marine life. By establishing defined MPWC

operating areas, this approach provides for more effective enforcement to protect sensitive marine life and for less confusion to MPWC operators and other recreationists than would the establishment of minimum approach distances governing approaches by MPWC to sensitive marine life or other recreational uses. NOAA intends to install buoys to mark the boundaries of the MPWC operating areas.

(20) *Comment:* NOAA should choose DEIS/MP management plan alternative 2, which proposes that full-time staffing be implemented immediately after designation. The Sanctuary is important, and the commitment of a full-time and immediate staff is necessary to initiate Sanctuary programs.

Response: NOAA's preferred management plan is a variation of alternative 2. This plan would establish the Sanctuary headquarters soon after designation and immediately provide full-time staffing of approximately five personnel to ensure that the Sanctuary program is implemented quickly and efficiently. NOAA's preferred management plan will build upon public support from the designation process and will increase opportunities for interpretation and research programs soon after designation. Additional staff and satellite facilities will be phased in after designation.

(21) *Comment:* NOAA should clearly identify how the Sanctuary Advisory Committee (SAC) will be set up, who will be on it, and how it will function.

Response: One of the Sanctuary Manager's first priorities will be to create the SAC according to the process and guidelines of the Federal Advisory Committee Act (FACA). See appendix A of the FEIS/MP. It is NOAA's goal to have wide representation on the SAC, and the Manager will consider the comments of all interested parties. NOAA will draft a charter, make membership recommendations, which will include appropriate governmental and non-governmental representatives, to the Secretary of Commerce, and coordinate with the General Services Administration's review of the SAC formation and accomplishments. The SAC will function strictly in an advisory capacity. Once the Sanctuary Manger is selected, terms of office, committee composition and function will be defined in accordance with FACA.

(22) *Comment:* NOAA should clarify the relationship between Department of Defense (DOD) national defense exemptions from prohibited activities and oil and gas activities.

Response: The Minerals Management Service (MMS) in the Department of the Interior (DOI) is responsible for hydrocarbon development lease sales in Federal waters, not DOD. While the Sanctuary regulations allow DOD to conduct certain prohibited activities, they do not allow DOD to conduct any oil, gas or mineral activity in the Sanctuary.

II. Designation Document

Section 304(a)(4) of the Act requires that the terms of designation set forth the geographic area included within the Sanctuary; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational or esthetic value; and the types of activities that will be subject to regulation by the Secretary to protect those characteristics. This section also specifies that the terms of designation may be modified only by the same procedures by which the original designation was made. Thus the terms of designation serve as a constitution for the Sanctuary.

The Designation Document for the Monterey Bay National Marine Sanctuary follows:

Designation Document for the Monterey Bay National Marine Sanctuary

Under the authority of title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (the "Act"), 16 U.S.C. 1431 *et seq.*, Monterey Bay and its surrounding waters offshore central California, and the submerged lands under Monterey Bay and its surrounding waters, as described in Article II, are hereby designated as the Monterey Bay National Marine Sanctuary for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical and esthetic resources and qualities of the area.

Article I. Effect of Designation

The Act authorizes the issuance of such final regulations as are necessary and reasonable to implement the designation, including managing and protecting the conservation, recreational, ecological, historical, research, educational and esthetic resources and qualities of the Monterey Bay National Marine Sanctuary. Section 1 of Article IV of this Designation Document lists activities of the types that either are to be regulated on the effective date of designation or may have to be regulated at some later date in order to protect Sanctuary resources and qualities. Listing does not necessarily mean that a type of activity will be regulated; however, if a type of activity is not listed it may not be regulated, except on an emergency basis, unless section 1 of Article IV is amended to include the type of activity by the same procedures by which the original designation was made.

Article II. Description of the Area

The Monterey Bay National Marine Sanctuary (the "Sanctuary") boundary encompass a total of approximately 4,024 square nautical miles (approximately 13,800 square kilometers) of coastal and ocean waters, and the submerged lands thereunder, in and surrounding Monterey Bay, off the central coast of California. The northern terminus of the boundary is located along the southern boundary of the Gulf of Farallones National Marine Sanctuary and runs westward to approximately 123°07'W. The boundary then extends south in an arc which generally follows the 500 fathom isobath. At approximately 37°03'N, the boundary arcs south to 122°25'W, 36°10'N, due west of Partington Point. The boundary again follows the 500 fathom isobath south to 121°41'W, 35°33'N, due west of Cambria. The boundary then extends shoreward towards the mean high-water line. The landward boundary is defined by the mean high-water line between the Gulf of Farallones National Marine Sanctuary and Cambria, exclusive of a small area off the north coast of San Mateo County and the City and County of San Francisco between Point Bonita and Point San Pedro. Pillar Point, Santa Cruz, Moss Landing, and Monterey harbors are all excluded from the Sanctuary boundary shoreward from their respective International Collision at Sea regulation (Colreg.) demarcation lines except for Moss Landing Harbor, where all of the Elkhorn Slough east of the Highway One bridge is included within the Sanctuary boundary. Appendix I to this Designation Document sets forth the precise Sanctuary boundary.

Article III. Characteristics of the Area That Give It Particular Value

The Monterey Bay area is characterized by a combination of oceanic conditions and undersea topography that provides for a highly productive ecosystem and a wide variety of marine habitat. The area is characterized by a narrow continental shelf fringed by a variety of coastal types. The Monterey Submarine Canyon is unique in its size, configuration, and proximity to shore. This canyon system provides habitat for pelagic communities and, along with other distinct bathymetric features, may modify currents and act to enrich local waters

through strong seasonal upwelling. Monterey Bay itself is a rare geological feature, as it is one of the few large embayments along the Pacific coast.

The Monterey Bay area has a highly diverse floral and faunal component. Algal diversity is extremely high and the concentrations of pinnipeds, whales, otters, and some seabird species is outstanding. The fish stocks, particularly in Monterey Bay, are abundant and the variety of crustaceans and other invertebrates is high.

In addition there are many direct and indirect human uses of the area. The most important economic activity directly dependent on the resources is commercial fishing, which has played an important role in the history of Monterey Bay and continues to be of great economic value.

The diverse resources of the Monterey Bay area are enjoyed by the residents of this area as well as the numerous visitors. The population of Monterey and Santa Cruz counties is rapidly expanding and is based in large part on the attractiveness of the area's natural beauty. The high water quality and the resulting variety of biota and their proximity to shore is one of the prime reasons for the international renown of the area as a prime tourist location. The quality and abundance of the natural resources has attracted man from the earliest prehistoric times to the present and as a result the area contains significant historical, *e.g.*, archaeological and paleontological, resources, such as Costanoan Indian midden deposits, aboriginal remains and sunken ships and aircraft.

The biological and physical characteristics of the Monterey Bay area combine to provide outstanding opportunities for scientific research on many aspects of marine ecosystems. The diverse habitats are readily accessible to researchers. Thirteen major research and education facilities are found within the Monterey Bay area. These institutions are exceptional resources with a long history of research and large databases possessing a considerable amount of baseline information on the Bay and its resources. Extensive marine and coastal education and interpretive efforts complement Monterey Bay's many research activities. For example, the Monterey Bay Aquarium has attracted millions of visitors who have experienced the interpretive exhibits of the marine environment. Point Lobos Ecological Reserve, Elkhorn Slough National Estuarine Research Reserve, Long Marine Laboratory and Año Nuevo State Reserve all have excellent docent programs serving the public, and marine related programs for school groups and teachers.

The Final Environmental Impact Statement/Management Plan provides more detail on the characteristics of the Monterey Bay area that give it particular value.

Article IV. Scope of Regulations

Section 1. Activities subject to regulation

The following activities are subject to regulation, including prohibition, to the extent necessary and reasonable to ensure the protection and management of the conservation, ecological, recreational, research, educational, historical and esthetic resources and qualities of the area:

a. Exploring for, developing or producing oil, gas or minerals (*e.g.*, clay, stone, sand, metalliferous ores, gravel, non-metalliferous ores or any other solid material or other matter of commercial value) within the Sanctuary;

b. Discharging or depositing, from within the boundary of the Sanctuary, any material or other matter, except dredged material deposited at disposal sites authorized prior to the effective date of Sanctuary designation, provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on the effective date of Sanctuary designation;

c. Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter, except dredged material deposited at the authorized disposal sites described in appendix II of this Designation Document, provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval;

d. Taking, removing, moving, catching, collecting, harvesting, feeding, injuring, destroying or causing the loss of, or attempting to take, remove, move, catch, collect, harvest, feed, injure, destroy or cause the loss of, a marine mammal, sea turtle, seabird, historical resource or other Sanctuary resource;

e. Drilling into, dredging or otherwise altering the seabed of the Sanctuary; or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary;

f. Possessing within the Sanctuary a Sanctuary resource or any other resource, regardless of where taken, removed, moved, caught, collected or harvested, that, if it had been found with the Sanctuary, would be a Sanctuary resource;

g. Flying a motorized aircraft above the Sanctuary;

h. Operating a vessel (*i.e.*, water craft of any description) in the Sanctuary;

i. Aquaculture or kelp harvesting within the Sanctuary; and

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

Section 2. Emergencies

Where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss or injury, any and all activities, including those not listed in section 1 of this Article, are subject to immediate temporary regulation, including prohibition.

Article V. Effect on Leases, Permits, Licenses and Rights

Pursuant to section 304(c)(1) of the Act, 16 U.S.C. 1434(c)(1), no valid lease, permit, license, approval or other authorization issued by any Federal, State or local authority of competent jurisdiction, or any right of subsistence use or access, may be terminated by the Secretary of Commerce or designee as a result of this designation or as a result of any Sanctuary regulation if such authorization or right was in existence on the effective date of this designation. The Secretary of Commerce or designee, however, may regulate the exercise (including, but not limited to, the imposition of terms and conditions) of such authorization or right consistent with the purposes for which the Sanctuary is designated.

In no event may the Secretary or designee issue a permit authorizing, or otherwise approve: (1) The exploration for, development of or production of oil, gas or minerals within the Sanctuary; (2) the discharge of primary-treated sewage (except for regulation, pursuant to section 304(c)(1) of the Act, of the exercise of valid authorizations in existence on the effective date of Sanctuary designation and issued by other authorities of competent jurisdiction); or (3) the disposal of dredged material within the Sanctuary other than at sites authorized by the U.S. Environmental Protection Agency (in consultation with the U.S. Army Corps of Engineers) prior to the effective date of designation. Any purported authorizations issued by other authorities after the effective date of Sanctuary designation for any of these activities within the Sanctuary shall be invalid.

Article VI. Alteration of this Designation

The terms of designation, as defined under section 304(a) of the Act, may be modified only by the same procedures by which the original designation is made, including public hearings, consultation with interested Federal, State and local agencies, review by the appropriate Congressional committees and Governor of the State of California, and approval by the Secretary of Commerce or designee.

Appendix I. Monterey Bay National Marine Sanctuary Boundary Coordinates

(Appendix based on North American Datum of 1983.)

APPROXIMATELY 4,024 SQUARE NAUTICAL MILES

Point	Latitude	Longitude
1	37 52 56.09055	122 37 39.12564
2	37 39 59.08176	122 45 3.78307
3	37 36 58.39164	122 46 9.73671
4	37 34 17.30224	122 48 14.38141
5	37 31 47.55649	122 51 35.56769
6	37 30 34.11030	122 54 22.12170
7	37 29 39.05898	123 00 27.70792
8	37 30 29.47603	123 05 46.22767
9	37 31 17.86945	123 07 47.83383
10	37 27 10.93594	123 08 24.32210
11	37 20 35.37491	123 06 54.12763
12	37 13 50.21605	123 06 15.50600
13	37 07 48.76810	123 01 43.10994
14	37 03 46.60999	122 54 45.39513
15	37 02 06.30955	122 46 35.02125
16	36 55 17.56782	122 46 21.41121
17	36 48 22.74244	122 48 56.29007
18	36 41 30.91516	122 49 19.40739
19	36 34 45.76070	122 46 26.96722
20	36 28 24.18076	122 43 32.43527
21	36 22 20.70312	122 39 26.42026
22	36 16 43.93586	122 34 26.77255
23	36 11 44.53838	122 28 37.16141
24	36 07 26.88968	122 21 54.97541
25	36 04 07.06898	122 14 39.75824
26	36 01 26.22233	122 07 00.19066
27	35 59 45.46381	121 59 56.36189
28	35 58 59.12170	121 50 26.47831
29	35 58 53.63866	121 45 22.82363
30	35 55 45.60623	121 42 40.28540
31	35 50 15.84256	121 43 08.20193
32	35 43 14.28690	121 42 43.79121
33	35 35 41.88635	121 41 25.07414
34	35 33 11.75999	121 37 49.74192
35	35 33 17.45869	121 05 52.89691
36	37 35 39.79180	122 31 14.98033
37	37 36 49.21739	122 37 00.22577
38	37 46 00.98983	122 39 00.40486
39	37 49 05.69080	122 31 46.30542

Appendix II. Dredged Material Disposal Sites Adjacent to the Monterey Bay National Marine Sanctuary

(Appendix based on North American Datum of 1983.)

As of the effective date of Sanctuary designation, the U.S. Army Corps of Engineers operates the following dredged material disposal sites adjacent to the Sanctuary off of the Golden Gate:

Point	Latitude	Longitude
1	37 45.875	122 34.140
2	37 44.976	122 37.369
3	37 44.491	122 37.159
4	37 45.406	122 33.889
5	37 45.875	122 34.140

In addition, the U.S. Environmental Protection Agency, as of the effective date of Sanctuary designation, is (in consultation with the U.S. Army Corps of Engineers) in the process of establishing a dredged material disposal site outside the northern boundary of the Monterey Bay National Marine Sanctuary. When that disposal site is authorized, this appendix will be updated to incorporate its precise location. The site will be located outside the Monterey Bay National Marine Sanctuary and any other existing national marine sanctuary and within one of the following Long-Term Management Strategy ocean study areas:

Study Area 3

The area described by the following points and a five-nautical-mile-wide zone west of the western boundary of that area:

Point	Latitude	Longitude
1	37 25.850	123 21.928
2	37 25.783	123 21.928
3	37 25.733	123 21.918
4	37 25.666	123 21.910
5	37 25.630	123 21.896
6	37 25.566	123 21.875
7	37 25.513	123 21.859
8	37 25.451	123 21.820
9	37 25.394	123 21.779
10	37 25.334	123 21.698
11	37 25.268	123 21.595
12	37 25.180	123 21.458
13	37 25.139	123 21.358
14	37 25.057	123 21.240
15	37 24.992	123 21.167
16	37 24.878	123 21.093
17	37 24.766	123 21.034
18	37 24.700	123 20.975
19	37 24.602	123 20.872
20	37 24.521	123 20.783
21	37 24.449	123 20.682
22	37 24.391	123 20.599
23	37 24.342	123 20.509
24	37 24.296	123 20.421
25	37 24.245	123 20.340
26	37 24.193	123 20.238
27	37 24.147	123 20.134
28	37 24.103	123 20.031
29	37 24.062	123 19.934
30	37 24.017	123 19.839
31	37 23.962	123 19.682
32	37 23.906	123 19.517
33	37 23.855	123 19.386
34	37 23.790	123 19.278
35	37 23.728	123 19.125
36	37 23.644	123 18.966
37	37 23.562	123 18.836
38	37 23.482	123 18.707
39	37 23.387	123 18.556
40	37 23.254	123 18.437
41	37 23.123	123 18.319
42	37 22.977	123 18.231
43	37 22.820	123 18.142
44	37 22.685	123 18.113
45	37 22.555	123 18.083
46	37 22.392	123 18.068
47	37 22.229	123 18.054
48	37 22.051	123 18.039
49	37 21.868	123 18.023
50	37 21.697	123 18.023
51	37 21.547	123 18.010
52	37 21.401	123 17.995
53	37 21.173	123 17.980
54	37 20.978	123 17.965
55	37 20.767	123 17.950
56	37 20.588	123 17.936
57	37 20.458	123 17.921
58	37 20.285	123 17.894
59	37 20.179	123 17.876
60	37 20.084	123 17.876
61	37 19.986	123 17.882
62	37 19.877	123 17.894
63	37 19.792	123 17.921
64	37 19.694	123 17.950
65	37 19.592	123 17.988
66	37 19.489	123 18.056
67	37 19.352	123 18.134
68	37 19.223	123 18.231
69	37 19.126	123 18.305
70	37 19.026	123 18.378
71	37 18.914	123 18.482
72	37 18.833	123 18.556
73	37 18.719	123 18.658
74	37 18.615	123 18.764
75	37 18.492	123 18.880
76	37 18.378	123 18.998
77	37 18.265	123 19.101
78	37 18.151	123 19.190
79	37 18.070	123 19.264
80	37 18.004	123 19.328
81	37 17.951	123 19.393
82	37 17.884	123 19.454
83	37 17.805	123 19.525
84	37 17.735	123 19.567
85	37 17.641	123 19.600
86	37 17.565	123 19.617
87	37 17.489	123 19.622
88	37 17.401	123 19.617
89	37 17.352	123 19.606
90	37 17.306	123 19.583
91	37 17.272	123 19.558
92	37 17.248	123 19.514
93	37 25.802	123 0.617
94	37 25.850	123 21.928

The portion of the area described by the above points that lies within the Monterey Bay National Marine Sanctuary as described in Appendix I is excluded.

Study Area 4

The area described by the following points and a five-nautical-mile-wide zone west of the western boundary of that area:

Point	Latitude	Longitude
1	37 17.496	123 7.528
2	37 17.499	123 14.071
3	37 17.389	123 14.285
4	37 17.279	123 14.412
5	37 17.178	123 14.537
6	37 17.047	123 14.651
7	37 16.949	123 14.754
8	37 16.814	123 14.879
9	37 16.664	123 15.026

Point	Latitude	Longitude
10	37 16.568	123 15.118
11	37 16.451	123 15.219
12	37 16.348	123 15.308
13	37 16.206	123 15.383
14	37 16.090	123 15.446
15	37 15.999	123 15.484
16	37 15.818	123 15.547
17	37 15.637	123 15.585
18	37 15.482	123 15.585
19	37 15.314	123 15.598
20	37 15.184	123 15.610
21	37 15.055	123 15.635
22	37 14.912	123 15.673
23	37 14.783	123 15.698
24	37 14.667	123 15.712
25	37 14.551	123 15.724
26	37 14.421	123 15.749
27	37 14.292	123 15.799
28	37 14.168	123 15.850
29	37 14.072	123 15.887
30	37 13.956	123 15.938
31	37 13.801	123 16.001
32	37 13.672	123 16.064
33	37 13.568	123 16.102
34	37 13.451	123 16.178
35	37 13.322	123 16.229
36	37 13.193	123 16.266
37	37 13.063	123 16.279
38	37 12.973	123 16.304
39	37 12.830	123 16.330
40	37 12.650	123 16.355
41	37 12.456	123 16.367
42	37 12.275	123 16.387
43	37 12.122	123 16.349
44	37 11.967	123 16.312
45	37 11.853	123 16.269
46	37 11.754	123 16.216
47	37 11.631	123 16.142
48	37 11.537	123 16.067
49	37 11.473	123 15.994
50	37 11.420	123 15.930
51	37 11.380	123 15.872
52	37 11.344	123 15.825
53	37 11.279	123 15.698
54	37 11.227	123 15.547
55	37 11.188	123 15.421
56	37 11.150	123 15.269
57	37 11.116	123 15.124
58	37 11.098	123 14.980
59	37 11.085	123 14.828
60	37 11.072	123 14.626
61	37 11.059	123 14.437
62	37 11.052	123 14.359
63	37 11.033	123 14.259
64	37 11.004	123 14.158
65	37 10.978	123 14.078
66	37 10.942	123 13.978
67	37 10.890	123 13.877
68	37 10.847	123 13.802
69	37 10.804	123 13.727
70	37 10.712	123 13.614
71	37 10.648	123 13.531
72	37 10.564	123 13.439
73	37 10.508	123 13.370
74	37 10.502	123 7.506
75	37 17.496	123 7.528

Study Area 5

The area described by the following points and a five-nautical-mile-wide zone west of the western boundary of that area:

Point	Latitude	Longitude
1	37 43.444	123 23.516
2	37 43.436	123 30.053
3	37 34.568	123 30.053
4	37 34.574	123 20.234
5	37 34.661	123 19.507
6	37 34.725	123 19.376
7	37 34.725	123 19.376
8	37 35.031	123 19.452
9	37 35.935	123 19.081
10	37 36.769	123 18.542
11	37 37.698	123 17.788
12	37 37.765	123 17.743
13	37 37.789	123 17.827
14	37 37.838	123 17.911
15	37 37.887	123 17.996
16	37 37.937	123 18.105
17	37 37.998	123 18.202
18	37 38.085	123 18.359
19	37 38.183	123 18.529
20	37 38.270	123 18.674
21	37 38.356	123 18.832
22	37 38.455	123 18.977
23	37 38.554	123 19.134
24	37 38.640	123 19.255
25	37 38.726	123 19.364
26	37 38.825	123 19.497
27	37 38.911	123 19.606
28	37 38.985	123 19.703
29	37 39.071	123 19.811
30	37 39.195	123 19.981
31	37 39.318	123 20.138
32	37 39.404	123 20.272
33	37 39.478	123 20.356
34	37 39.565	123 20.465
35	37 39.664	123 20.574
36	37 39.762	123 20.695
37	37 39.840	123 20.791
38	37 39.992	123 20.889
39	37 39.997	123 20.966
40	37 40.095	123 21.095
41	37 40.181	123 21.192
42	37 40.268	123 21.288
43	37 40.330	123 21.373
44	37 40.416	123 21.470
45	37 40.516	123 21.563
46	37 40.616	123 21.667
47	37 40.736	123 21.785
48	37 40.860	123 21.906
49	37 40.963	123 22027
50	37 41.107	123 22.148
51	37 41.230	123 22.269
52	37 41.378	123 22.390
53	37 41.515	123 22.499
54	37 41.669	123 22.607
55	37 41.803	123 22.704
56	37 41.920	123 22.788
57	37 42.036	123 22.825
58	37 42.174	123 22.889
59	37 42.295	123 22.957
60	37 42.421	123 23.012
61	37 42.563	123 23.105
62	37 42.704	123 23.165
63	37 42.826	123 23.225
64	37 43.005	123 23.310
65	37 43.088	123 23.358
66	37 43.205	123 23.410
67	37 43.327	123 23.467
68	37 43.376	123 23.482
69	37 43.444	123 23.515

End of Designation Document

III. Summary of Final Management Plan

The FEIS/MP for the Monterey Bay National Marine Sanctuary sets forth the Sanctuary's location and provides details on the most important resources and uses of the Sanctuary. The FEIS/MP describes the resource protection, research, education and interpretive programs, and details the specific activities to be taken in each program. The FEIS/MP includes a detailed discussion, by program area, of agency roles and responsibilities. The goals and objectives for the Sanctuary are:

Resource Protection

The highest priority management goal is to protect the marine environment, resources and qualities of the Sanctuary. The specific objectives of protection efforts are to:

(1) Coordinate policies and procedures among agencies sharing responsibility for protection and management of resources;

(2) Encourage participation by interested agencies and organizations in the development of procedures to address specific management concerns (*e.g.*, monitoring and emergency-response programs);

(3) Develop an effective and coordinated program for the enforcement of Sanctuary regulations;

(4) Enforce Sanctuary regulations in addition to other regulations already in place;

(5) Promote public awareness of, and voluntary compliance with, Sanctuary regulations and objectives, through an educational/interpretive program stressing resource sensitivity and wise use;

(6) Ensure that the water quality of Monterey Bay is maintained at a level consonant with Sanctuary designation;

(7) Establish mechanisms for coordination among all the agencies participating in Sanctuary management;

(8) Ensure that the appropriate management agencies incorporates research results and scientific data into effective resource protection strategies; and

(9) Reduce threats to Sanctuary resources and qualities.

Research Program

Effective management of the Sanctuary requires the initiation of a Sanctuary research program. The purpose of Sanctuary research activities is to improve understanding of the Monterey Bay area environment, resources and qualities, and to resolve specific management problems, some of which may involve resources common to both the Bay and nearby State parks, refuges, and reserves. Research results will be used in interpretive programs for visitors and others interested in the Sanctuary, as well as for protection and management of resources and qualities.

Specific objectives for the research program are to:

(1) Establish a framework and procedures for administering research to ensure that research projects are

responsive to management concerns and that results contribute to improve management of the Sanctuary;

(2) Incorporate research results into the interpretive/education program in a format useful for the general public;

(3) Focus and coordinate data collection efforts on the physical, chemical, geological and biological oceanography of the Sanctuary;

(4) Encourage studies that integrate research from the variety of coastal habitats with nearshore and open ocean processes;

(5) Initiate a monitoring program to assess environmental changes as they occur due to natural and human processes;

(6) Identify the range of effects on the environment that would result from predicted changes in human activity or natural phenomena; and

(7) Encourage information exchange among all the organizations and agencies undertaking management-related research in the Sanctuary to promote more informed management.

Education Program

The goal for education programs is to improve public awareness and understanding of the significance of the Sanctuary and the need to protect its resources and qualities.

The management objectives designed to meet this goal are to:

(1) Provide the public with information on the Sanctuary and its goals and objectives, with an emphasis on the need to use Sanctuary resources and qualities wisely to ensure their long-term viability;

(2) Broaden support for the Sanctuary management by offering programs suited to visitors with a range of diverse interests;

(3) Provide for public involvement by encouraging feedback on the effectiveness of education programs, collaboration with Sanctuary management staff in extension and outreach programs, and participation in other volunteer programs; and

(4) Collaborate with other organizations to provide educational services complementary to the Sanctuary program.

Visitor Use

The Sanctuary goal for visitor management is to facilitate, to the extent compatible with the primary objective of resource protection, public and private uses of the resources of the Sanctuary not prohibited pursuant to other authorities.

Specific management objectives are to:

(1) Provide relevant information about Sanctuary regulations, use policies and standards;

(2) Collaborate with public and private organizations in promoting compatible uses of the Sanctuary;

(3) Encourage the public who use the Sanctuary to respect sensitive Sanctuary resources and qualities and

(4) Monitor and assess the levels of use to identify and control potential degradation of resources and qualities and minimize potential user conflicts.

The Sanctuary will be managed from a headquarters located in the Monterey Bay region.

IV. Summary of Regulations

The regulations set forth the boundary of the Sanctuary; prohibit a relatively narrow range of activities; establish procedures for applying for national marine sanctuary permits to conduct prohibited activities; establish certification procedures for existing leases, licenses, permits, approvals, other authorizations or rights authorizing the conduct of a prohibited activity; establish notification and review procedures for applications for leases, licenses, permits, approvals or other authorizations to conduct a prohibited activity; set forth the maximum per-day penalties for violating Sanctuary regulations; and establish procedures for administrative appeals.

Specifically, the regulations add a new part 944 to title 15, Code of Federal Regulations.

Section 944.1 sets forth as the purpose of the regulations to implement the designation of the Monterey Bay National Marine Sanctuary by regulating activities affecting the Sanctuary consistent with the terms of that designation in order to protect and manage the conservation, ecological, recreational, research, educational, historical and esthetic resources and qualities of the area.

Section 944.2 and appendix I following § 944.12 set forth the boundary of the Sanctuary.

Section 944.3 defines various terms used in the regulations. Other terms appearing in the regulations are defined at 15 CFR 922.2 and/or in the MPRSA.

Section 944.4 allows all activities except those prohibited by § 944.5 to be undertaken subject to the requirements of any emergency regulation promulgated pursuant to § 944.6, subject to all prohibitions, restrictions and conditions validly imposed by any other authority of competent jurisdiction, and subject to the liability established by section 312 of the Act.

Section 944.5 prohibits a variety of activities and thus makes it unlawful for any person to conduct them or cause them to be conducted. However, any of the prohibited activities except for: (1) The exploration for, development of or production of oil, gas or minerals in the Sanctuary, (2) the discharge of primary-treated sewage within the Sanctuary (except for certification, pursuant to § 944.10, of valid authorizations in existence on the effective date of Sanctuary designation and issued by other authorities of competent jurisdiction), or (3) the disposal of dredged material within the Sanctuary other than at sites authorized by EPA (in consultation with COE) prior to the effective date of designation could be conducted lawfully if one of the following four situations applies:

(1) The activity is necessary to respond to an emergency threatening life, property or the environment; authorized by a National Marine Sanctuary permit issued under section 944.9; or authorized by a Special Use permit issued under Section 310 of the Act.

(2) With regard to Department of Defense activities: The activity is an existing military activity; or the activity is a new activity and exempted by the Director of the Office of Ocean and Coastal Resource Management or designee after consultation between the Director or designee and the Department of Defense. The regulations require that the Department of Defense carry out its activities in a manner that avoids to the maximum extent practicable any adverse impact on Sanctuary resources and qualities and that it, in the event of threatened or actual destruction of, loss of, or injury to a Sanctuary resource or quality resulting from an untoward incident, including but not limited to spills and groundings, caused by it, promptly coordinate with the Director or designee for the purpose of taking appropriate actions to respond to and mitigate the harm and, if possible, restore or replace the Sanctuary resource or quality. The final regulation regarding Department of Defense activities differs from the proposed regulation principally by:

(i) Making all military activities (as specifically identified in FEIS/MP) currently being carried out by the Department of Defense exempt from the Sanctuary regulatory prohibitions, not just those determined necessary for the national defense;

(ii) Adding the requirement to avoid to the maximum extent practicable any adverse impacts; and

(iii) Adding the requirement of prompt coordination, in the event of an

untoward incident, for the purpose of taking appropriate actions.

(3) The activity is authorized by a certification by the Director of the Office of Ocean and Coastal Resource Management or designee under § 944.10 of a valid lease, permit, license or other authorization issued by any Federal, State or local authority of competent jurisdiction and in existence on (or conducted pursuant to any valid right of subsistence use or access in existence on) the effective date of this designation, subject to complying with any terms and conditions imposed by the Director or designee as he or she deems necessary to achieve the purposes for which the Sanctuary was designated.

(4) The activity is authorized by a valid lease, permit, license, approval or other authorization issued by any Federal, State or local authority of competent jurisdiction after the effective date of Sanctuary designation, provided that the Director of the Office of Ocean and Coastal Resource Management or designee was notified of the application in accordance with the requirements of § 944.11, the applicant complies with the requirements of § 944.11, the Director or designee notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities.

The first activity prohibited is exploring for, developing or producing oil, gas or minerals within the Sanctuary. The resources and qualities of the Monterey Bay area, particularly sea otters, sea birds, and pinnipeds that use the haul-out sites, kelp forests and rocks along the Monterey Bay coast, and the high water quality of the area, are especially vulnerable to oil and gas activities in the area. A prohibition on oil and gas activities within the Sanctuary boundary will provide partial protection from oil and gas activities for the resources and qualities within the boundary. Only partial protection would be provided due to the remaining threat from oil and gas activities outside of the Sanctuary boundary and from vessel traffic, particularly oil tankers, transiting through and near the Sanctuary. A prohibition on mineral activities within the Sanctuary is consistent with the prohibition on alteration of or construction on the seabed as discussed below. "Mineral" is defined to mean clay, stone, sand, gravel, metalliferous ore, nonmetalliferous ore or any other solid material or other matter of commercial value.

The second activity prohibited is depositing or discharging from any location within the boundary of the Sanctuary materials or other substances except: (1) Fish, fish parts, chumming materials or bait used in or resulting from traditional fishing operations in the Sanctuary; (2) biodegradable effluent incidental to vessel use and generated by marine sanitation devices approved in accordance with section 312 of the Federal Water Pollution Control Act, as amended, (FWPCA), 33 U.S.C. 1322 *et seq.*; (3) water generated by routine vessel operations (*e.g.*, cooling water, deck wash down and graywater as defined by section 312 of the FWPCA) excluding oily wastes from bilge pumping; (4) engine exhaust, and (5) dredged materials deposited at disposal sites authorized by COE or EPA prior to the effective date of Sanctuary designation, provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on the effective date of Sanctuary designation.

This prohibition is necessary in order to protect Sanctuary resources and qualities from the effects of pollutants deposited or discharged into the Sanctuary.

Disposal activities at the existing sites within the Sanctuary are allowed provided such disposal is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on the effective date of Sanctuary designation. Once existing permits expire, additional disposal at such previously approved or permitted sites must be approved by NOAA in accordance with § 944.11. All other disposal of dredged material within the Sanctuary is prohibited. Point source discharges, including, but not limited to, desalination plants, are allowed provided such discharge is certified by NOAA in accordance with § 944.10 or approved by NOAA in accordance with § 944.11. After expiration of current permits, discharges from municipal treatment plants will be subject to the review process of § 944.11. At a minimum, secondary treatment will be required. Depending on the risk to Sanctuary resources and qualities, greater treatment may be required.

The third activity prohibited is depositing or discharging, from beyond the boundary of the Sanctuary, materials or other matter that subsequently enter the Sanctuary and injure a Sanctuary resource or quality, except for the first four exclusions discussed above for the second prohibited activity, dredged material deposited outside the Sanctuary at disposal sites off of the Golden Gate authorized prior to the effective date of Sanctuary designation, and dredged material deposited outside the Sanctuary at the duly authorized disposal site that will result from the disposal site study underway on the effective date of Sanctuary designation, provided that the dredged material disposal is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval. The future disposal site will be located within one of the Long-Term Management Strategy Ocean Study Areas described in appendix IV. When that disposal site is authorized, appendix IV will be updated to incorporate its precise location. The intent of this prohibition is to protect the Sanctuary resources and qualities from the harmful effects of land and sea-generated non-point and point source pollution.

The fourth activity prohibited is moving, removing or injuring or attempting to move, remove or injure a Sanctuary historical resource. Historical resources in the marine environment are fragile, finite and non-renewable. This prohibition is designed to protect these resources so that they may be researched and information about their contents and type made available for the benefit of the public. This prohibition does not apply to moving, removing or injury resulting incidentally from kelp harvesting, aquaculture or traditional fishing operations.

The fifth activity prohibited is drilling into, dredging or otherwise altering the seabed of the Sanctuary; or constructing, placing or abandoning any structure, material or other matter on the seabed of the Sanctuary, except if any of the above results incidentally from: (1) Anchoring vessels; (2) kelp harvesting, aquaculture or traditional fishing operations; (3) installation of navigation aids; (4) harbor maintenance in the areas necessarily associated with Federal Projects in existence on the effective date of Sanctuary designation, including dredging of entrance channels and repair, replacement or rehabilitation of breakwaters and jetties; or (5) construction, repair, replacement or rehabilitation of docks or piers. Federal Projects are any water resources development projects conducted by COE or operating under a permit or other authorization issued by COE and authorized by Federal law.

The intent of this prohibition is to protect the resources and qualities of the Sanctuary from the harmful effects of activities such as, but not limited to, archaeological excavations, drilling into the seabed, strip mining, laying of pipelines and outfalls, and offshore commercial development, which may disrupt and/or destroy sensitive marine

benthic habitats, such as kelp beds, invertebrate populations, fish habitats, and estuaries and sloughs.

The sixth activity prohibited is taking marine mammals, sea turtles or seabirds in or above the Sanctuary, except as permitted by regulations, as amended, promulgated under the Marine Mammal Protection Act, as amended, (MMPA), 16 U.S.C. 1361 *et seq.*, the Endangered Species Act, as amended, (ESA), 16 U.S.C. 1531 *et seq.*, and the Migratory Bird Treaty Act, as amended, (MBTA), 16 U.S.C. 703 *et seq.* The term "taking" includes all forms of harassment. The MMPA, ESA and MBTA prohibit the taking of species protected under those Acts. The prohibition overlaps with the MMPA, ESA, and MBTA but also extends protection for Sanctuary resources on an environmentally holistic basic and provides a greater deterrent with civil penalties of up to $50,000 per taking. The prohibition covers all marine mammals, sea turtles and seabirds in or above the Sanctuary.

The seventh activity prohibited is flying motorized aircraft at less than 1,000 feet (305 m) above the Sanctuary within four specified zones (See appendix II for the zones). This area-specific prohibition on overflights below 1,000 feet (305 m) is designed to limit potential noise impacts, particularly those that might startle hauled-out seals and sea lions, sea otters or birds nesting along the shoreline margins of the Sanctuary.

The eighth activity prohibited is the operation of motorized personal water craft within the Sanctuary except in four specified zones and access routes to and from these zones (see appendix III for the zones and routes). This regulation is intended to provide enhanced resource protection by prohibiting operation of motorized personal water craft in areas of high marine mammal and seabird concentrations, kelp forest areas, river mouths, estuaries, lagoons and other similar areas where sensitive marine resources are concentrated and most vulnerable to disturbance and other injury from personal water craft. The regulation is also intended to allow the continuation of this form of recreation while minimizing conflicts with other recreational users, as well as reducing esthetic disturbance.

Both the ninth and tenth prohibitions serve to facilitate enforcement actions for violations of Sanctuary regulations. The ninth prohibition is the possession within the Sanctuary of any historical resource or marine mammal, sea turtle or seabird, regardless of where the resource was taken, except in compliance with the ESA, MMPA and MBTA and the tenth prohibition is interfering with, obstructing, delaying or preventing investigations, searches, seizures of disposition of seized property in connection with enforcement of the Act or any regulation or permit issued under the Act.

Section 944.6 authorizes the regulation, including prohibition, on a temporary basis of any activity where necessary to prevent or minimize the destruction of, loss of, or injury to a Sanctuary resource or quality, or minimize the imminent risk of such destruction, loss or injury.

Section 944.7 sets forth the maximum statutory civil penalty for violating a regulation—$50,000. Each day of a continuing violation constitutes a separate violation. Section 944.8 repeats the provision in section 312 of the Act that any person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for response costs and damages resulting from such destruction, loss or injury, and any vessel used to destroy, cause the loss of, or injure any sanctuary resource is liable in rem to the United States for response costs and damages resulting from such destruction, loss or injury. The purpose of these sections is to notify the public of the liability for violating a Sanctuary regulation or the Act.

Regulations setting forth the procedures governing administrative proceedings for assessment of civil penalties, permit sanctions and denials for enforcement reasons, issuance and use of written warnings, and release or forfeiture of seized property appear at 15 CFR part 904.

Section 944.9 sets forth the procedures for applying for a National Marine Sanctuary permit to conduct a prohibited activity and the criteria governing the issuance, denial, amendment, suspension and revocation of such permits. A permit may be granted by the Director of the Office for Ocean and Coastal Resource Management or designee if he or she finds that the activity will have only negligible short-term adverse effects on Sanctuary resources and qualities and will: Further research related to Sanctuary resources; further the educational, natural or historical resource value of the Sanctuary; further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; assist in the management of the Sanctuary; or further salvage or recovery operations in connection with an abandoned shipwreck in the Sanctuary title to which is held by the State of California. In deciding whether to issue a permit, the Director or designee is required to consider such factors as the professional qualifications and financial ability of the applicant as related to the proposed activity, the duration of the activity and the duration of its effects, the appropriateness of the methods and procedures proposed by the applicant for the conduct of the activity, the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities, the cumulative effects of the activity, and the end value of the activity. In addition, the Director or designee is authorized to consider any other factors she or he deems appropriate.

Section 944.10 sets forth procedures for requesting certification of leases, licenses, permits, approvals, other authorizations or rights in existence on the date of Sanctuary designation authorizing the conduct of an activity prohibited under paragraphs (a) (2)–(9) of § 944.5. Pursuant to paragraph (f) of § 944.5, the prohibitions in paragraphs (a) (2)–(9) of § 944.5 do not apply to any activity authorized by a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal, State or local authority of competent jurisdiction, or by any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, provided that the holder of such authorization or right complies with the requirements of § 944.10 (*e.g.*, notifies the Director or designee of the existence of, requests certification of, and provides requested information regarding such authorization or right) and complies with any terms and conditions on the exercise of such authorization or right imposed as a condition of certification by the Director or designee as she or he deems necessary to achieve the purposes for which the Sanctuary was designated.

Section 944.10 allows the holder 90 days from the effective date of Sanctuary designation to request certification. The holder is allowed to conduct the activity without being in violation of paragraphs (a) (2)–(9) of § 944.5 pending final agency action on his or her certification request, provided the holder has complied with all requirements of § 944.10.

Section 944.10 also allows the Director or designee to request additional information from the holder and to seek the views of other persons.

As a condition of certification, the Director or designee will impose such terms and conditions on the exercise of such lease, permit, license, approval, other authorization or right as she or he

deems necessary to achieve the purposes for which the Sanctuary was designated. This is consistent with the Secretary's authority under section 304(c)(2) of the Act. (Section 944.10 has no application to oil, gas or mineral activities as there is no existing lease, permit, license, approval, other authorization or right for any of these activities within the Sanctuary.)

The MOA entered into by NOAA, the State of California, EPA and the Association of Monterey Bay Area Governments regarding the Sanctuary regulations relating to water quality within State waters within the Sanctuary (discussed under Comment/Response (6) under section I. Background of this notice) specifies how the process of § 944.10 will be administered within State waters within the Sanctuary in coordination with the State permit program.

The holder may appeal any action conditioning, amending, suspending or revoking any certification in accordance with the procedures set forth in § 944.12.

Any amendment, renewal or extension not in existence as of the date of Sanctuary designation of a lease, permit, license, approval, other authorization or right is subject to the provisions of § 944.11.

Section 944.11 states that consistent with paragraph (g) of § 944.5, the prohibitions of paragraphs (a)(2)–(9) of § 944.5 do not apply to any activity authorized by any valid lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation by any Federal, State or local authority of competent jurisdiction, provided that the applicant notifies the Director or designee of the application for such authorization within 15 days of the date of filing of the application or of the effective date of Sanctuary designation, whichever is later, that the applicant is in compliance with the other provisions of § 944.11, that the Director or designee notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and that the applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities. In order to ensure maintenance of program-wide consistency regarding these activities, which may address issues or uses of a highly sensitive nature on the local level, the authority granted the Director under § 944.11 to object to or impose terms or conditions on the exercise of any valid lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation will not be delegated or otherwise assigned to other Federal officials below the Director's level.

Section 944.11 allows the Director or designee to request additional information from the applicant and to seek the views of other persons.

An application for an amendment to, an extension of, or a renewal of an authorization is also subject to the provisions of § 944.11.

The MOA entered into by NOAA, the State of California, EPA and the Association of Monterey Bay Area Governments regarding the Sanctuary regulations relating to water quality within State waters within the Sanctuary specifies how the process of § 944.11 will be administered within State waters within the Sanctuary in coordination with the State permit program.

The applicant may appeal any objection by, or terms or conditions imposed by, the Director to the Assistant Administrator or designee in accordance with the procedures set forth in § 944.12.

Section 944.12 sets forth the procedures for appealing to the Assistant Administrator or designee actions of the Director or designee with respect to: (1) The granting, conditioning, amendment, denial, suspension or revocation of a National Marine Sanctuary permit under § 944.9 or a Special Use permit under section 310 of the Act; (2) the granting, denial, conditioning, amendment, suspension or revocation of a certification under § 944.10; or (3) the objection to issuance or the imposition of terms and conditions under § 944.11.

Prior to conditioning the exercise of existing leases, permits, licenses, approvals, other authorizations or rights or conditioning or objecting to proposed authorizations NOAA intends to consult with relevant issuing agencies as well as owners, holders or applicants. NOAA's policy is to encourage best available management practices to minimize non-point source pollution entering the Sanctuary and, for municipal sewage discharge, to require, at a minimum, secondary treatment and sometimes tertiary treatment or more, depending on predicted effects on Sanctuary resources and qualities.

v. Miscellaneous Rulemaking Requirements

Executive Order 12291

Under Executive Order 12291, the Department must judge whether the regulations in this notice are "major" within the meaning of section 1 of the Order, and therefore subject to the requirement that a Regulatory Impact Analysis be prepared. The Administrator of NOAA has determined that the regulations in this motive are not major because they are not likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

The regulations in this motive allow all activities to be conducted in the Sanctuary other than a relatively narrow range of prohibited activities. The procedures in these regulations for applying for National Marine Sanctuary permits to conduct prohibited activities, for requesting certifications for pre-existing leases, licenses, permits, approvals, other authorizations or rights authorizing the conduct of a prohibited activity, and for notifying NOAA of applications for leases, licenses, permits, approvals or other authorizations to conduct a prohibited activity will all act to lessen any adverse economic effect on small entities. The regulations, in total, will not have a significant economic impact on a substantial number of small entities, and when they were proposed the General Counsel of the Department of Commerce so certified to the Chief Counsel for Advocacy of the Small Business Administration. As a result, neither an initial nor final Regulatory Flexibility Analysis was prepared.

Paperwork Reductions Act

This rule contains collection of information requirements subject to the requirements of the Paperwork Reduction Act (Pub. L. 96–511). The collection of information requirements contained in the rule have been reviewed by the Office of Management and Budget (OMB) under section 3504(h) of the Paperwork Reduction Act and have been approved under OMB Control No. 0648–0141. Comments from the public on the collection of information requirements contained in this rule are invited and should be addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (attn: Desk Officer for NOAA) and to Richard Roberts, room 305, 6010 Executive Boulevard, Rockville, MD 20852.

Executive Order 12612

A Federalism Assessment (FA) was prepared for the proposed designation, draft management plan and proposed implementing regulations. The FA concluded that all were fully consistent with the principles, criteria and requirements set forth in sections 2 through 5 of Executive Order 12612, Federalism Considerations in Policy Formulation and Implementation (52 FR 41685, Oct. 26, 1987). Copies of the FA are available upon request to the Office of Ocean and Coastal Resource Management at the address listed above.

National Environmental Policy Act

In accordance with Section 304(a)(2) of the Act (16 U.S.C. 1434(a)(2)) and the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370(a)), a DEIS/MP was prepared for the designation and the proposed regulations. As required by section 304(a)(2) of the Act, the DEIS/MP included the resource assessment report required by section 303(b)(3) of the Act (16 U.S.C. 1433(b)(3)), maps depicting the boundary of the area proposed to be designated, and the existing and potential uses and resources of the area. Copies of the DEIS/MP were made available for public review on August 3, 1990, with comments due on October 3, 1990. Public hearings were held in Monterey, Santa Cruz and Half Moon Bay, California from September 12 to 14, 1990. All comments were reviewed and, where appropriate, incorporated into the FEIS/MP and these regulations. Copies of the FEIS/MP are available upon request (see address section).

Executive Order 12630

This rule does not have takings implications within the meaning of Executive Order 12630 sufficient to require preparation of a Takings Implications Assessment under that order. It would not appear to have an effect on private property sufficiently severe as effectively to deny economically viable use of any distinct legally potential property interest to its owner or to have the effect of, or result in, a permanent or temporary physical occupation, invasion, or deprivation. While the prohibition on the exploration, development and production of oil, gas and minerals from the Sanctuary might have a takings implication if it abrogated an existing lease for OCS tracts within the Sanctuary or an approval of an exploration or development and production plan, no OCS leases have been sold for tracts within the Sanctuary and no exploration or production and development plans have been filed or approved.

List of Subjects in 15 CFR Part 944

Administrative practice and procedure, Coastal zone, Education, Environmental protection, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: September 15, 1992.

W. Stanley Wilson,

Assistant Administrator for Ocean Services and Coastal Zone Management.

Accordingly, for the reason set forth above, 15 CFR chapter IX is amended as follows:

SUBCHAPTER B—OCEAN AND COASTAL RESOURCE MANAGEMENT

Parts 921–943 [Transferred to Subchapter B]

1. Subchapter B heading is added to read as set forth above.

2. Parts 921 through 943 are transferred from subchapter A to subchapter B.

3. Part 944—is added to subchapter B to read as follows:

PART 944—MONTEREY BAY NATIONAL MARINE SANCTUARY

Sec.

944.1 Purpose.
944.2 Boundary.
944.3 Definitions.
944.4 Allowed activities.
944.5 Prohibited activities.
944.6 Emergency regulations.
944.7 Penalties for violations of regulations.
944.8 Response costs and damages.
944.9 National Marine Sanctuary permits—application procedures and issuance criteria.
944.10 Certification of pre-existing leases, licenses, permits, approvals, other authorizations or rights to conduct a prohibited activity.
944.11 Notification and review of applications for leases, licenses, permits, approvals or other authorizations to conduct a prohibited activity.
944.12 Appeals of administrative action.

Appendix I to Part 944—Monterey Bay National Marine Sanctuary Boundary Coordinates

Appendix II to Part 944—Zones Within the Sanctuary Where Overflights Below 1000 Feet Are Prohibited

Appendix III to part 944—Zones and Access Routes Within the Sanctuary Where the Operation of Personal Water Craft Is Allowed

Appendix IV to Part 944—Dredged Material Disposal Sites Adjacent to the Monterey Bay National Marine Sanctuary

Authority: Sections 302, 303, 304, 305, 307, 310 and 312 of title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (16 U.S.C. 1431 *et seq.*).

§ 944.1 Purpose.

The purpose of the regulations in this part is to implement the designation of the Monterey Bay National Marine Sanctuary by regulating activities affecting the Sanctuary consistent with the terms of that designation in order to protect and manage the conservation, ecological, recreational, research, educational, historical and esthetic resources and qualities of the area.

§ 944.2 Boundary.

(a) The Monterey Bay National Marine Sanctuary consists of an area of approximately 4,024 square nautical miles of coastal and ocean waters, and the submerged lands thereunder, in and surrounding Monterey Bay, off the central coast of California.

(b) The northern terminus of the boundary is located along the southern boundary of the Gulf of Farallones National Marine Sanctuary and runs westward to approximately 123°07′W. The boundary then extends south in an arc which generally follows the 500 fathom isobath. At approximately 37°03′N, the boundary arcs south to 122°25′W, 36°10′N, due west of Partington Point. The boundary again follows the 500 fathom isobath south to 121°41′W, 35°33′N, due west of Cambria. The boundary then extends shoreward towards the mean high-water line. The landward boundary is defined by the mean high-water line between the Gulf of Farallones National Marine Sanctuary and Cambria, exclusive of a small area off the north coast of San Mateo County and the City and County of San Francisco between Point Bonita and Point San Pedro. Pillar Point, Santa Cruz, Moss Landing and Monterey harbors are excluded from the Sanctuary boundary shoreward from their respective International Collision at Sea regulation (Colreg.) demarcation lines except for Moss Landing Harbor, where all of Elkhorn Slough east of the Highway One bridge is included within

the Sanctuary boundary. The precise boundary of the Sanctuary appears in appendix I to this part.

§ 944.3 Definitions.

(a) The following definitions apply to this part:

Act means Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (16 U.S.C. 1431 *et seq.*).

Administrator or *Under Secretary* means the Administrator of the National Oceanic and Atmospheric Administration/Under Secretary of Commerce for Oceans and Atmosphere.

Assistant Administrator means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

Director means the Director of the Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration.

Effective date of Sanctuary designation means the date the regulations in this part implementing the designation of the Sanctuary become effective.

Federal Project means any water resources development project conducted by the U.S. Army Corps of Engineers or operating under a permit or other authorization issued by the Corps of Engineers and authorized by Federal law.

Historical resource means any resource possessing historical, cultural, archaeological or paleontological significance, including sites, structures, districts and objects significantly associated with or representative of earlier people, cultures and human activities and events. Historical resources include historical properties as defined in the National Historic Preservation Act, as amended, and implementing regulations, as amended.

Injure means to change adversely, either in the long or short term, a chemical, biological or physical attribute of, or the viability of. To "injure" therefore includes, but is not limited to, to cause the loss of and to destroy.

Mineral means clay, stone, sand, gravel, metalliferous ore, nonmetalliferous ore or any other solid material or other matter of commercial value.

Motorized personal water craft means any motorized vessel that is less than fifteen feet in length as manufactured, is capable of exceeding a speed of fifteen knots, and has the capacity to carry not more than the operator and one other person while in operation. The term includes, but is not limited to, jet skis, wet bikes, surf jets, miniature speed boats, air boats and hovercraft.

Person means any private individual, partnership, corporation or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Sanctuary means the Monterey Bay National Marine Sanctuary.

Sanctuary quality means any particular and essential characteristic of the Sanctuary, including, but not limited to, water quality, sediment quality and air quality.

Sanctuary resource means any living or non-living resource of the Sanctuary that contributes to its conservation, recreational, ecological, historical, research, educational or esthetic value, including, but not limited to, the substratum of the Monterey Bay area, bottom formations, coralline algae, marine plants and algae, invertebrates, plankton, fish, birds, sea turtles, marine mammals and historical resources.

Take or *taking* means the following:

(1)(i) For any sea turtle, marine mammal or seabird listed as either endangered or threatened pursuant to the Endangered Species Act, the term means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or injure, or to attempt to engage in any such conduct;

(ii) For any other sea turtle, marine mammal or seabird, the term means to harass, hunt, capture, kill, collect or injure, or to attempt to engage in any such conduct.

(2) For the purpose of both paragraphs (1) (i) and (ii), of this definition the term includes, but is not limited to, any of the following activities: Collecting any dead or injured sea turtle, marine mammal or seabird, or any part thereof; restraining or detaining any sea turtle, marine mammal or seabird, or any part thereof, no matter how temporarily; tagging any sea turtle, marine mammal or seabird; operating a vessel or aircraft or doing any other act that results in the disturbing or molesting of any sea turtle, marine mammal or seabird.

Vessel means a watercraft of any description capable of being used as a means of transportation in/on the waters of the Sanctuary.

(b) Other terms appearing in the regulations in this part are defined at 15 CFR 922.2 and/or in the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 33 U.S.C. 1401 *et seq.* and 16 U.S.C. 1431 *et seq.*

§ 944.4 Allowed activities.

All activities except those prohibited by § 944.5 may be undertaken subject to any emergency regulations promulgated pursuant to § 944.6, subject to all prohibitions, restrictions and conditions validly imposed by any other authority of competent jurisdiction, and subject to the liability established by section 312 of the Act (see § 944.8).

§ 944.5 Prohibited activities.

(a) Except as specified in paragraphs (c) through (h) of this § 944.5, the following activities are prohibited and thus unlawful for any person to conduct or cause to be conducted:

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

(2) Discharging or depositing, from within the boundary of the Sanctuary, any material or other matter except:

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

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

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

(iv) Engine exhaust; or

(v) Dredged material deposited at disposal sites authorized by the U.S. Environmental Protection Agency (EPA) (in consultation with the U.S. Army Corps of Engineers (COE)) prior to the effective date of Sanctuary designation, provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on the effective date of Sanctuary designation.

(3) Discharging or depositing, from beyond the boundary of the Sanctuary, any material or other matter that subsequently enters the Sanctuary and injuries a Sanctuary resource or quality, except those listed in paragraphs (a)(2)(i) through (iv) of this § 944.5 and dredged material deposited at the authorized disposal sites described in appendix IV to this part, provided that the dredged material disposal is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval.

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

from kelp harvesting, aquaculture or traditional fishing operations.

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

(i) Anchoring vessels;

(ii) Aquaculture, kelp harvesting or traditional fishing operations;

(iii) Installation of navigation aids;

(iv) Harbor maintenance in the areas necessarily associated with Federal Projects in existence on the effective date of Sanctuary designation, including dredging of entrance channels and repair, replacement or rehabilitation of breakwaters and jetties; or

(v) Construction, repair, replacement or rehabilitation of docks or piers.

(6) Taking any marine mammal, sea turtle or seabird in or above the Sanctuary, except as permitted by regulations, as amended, promulgated under the Marine Mammal Protection Act, as amended, (MMPA), 16 U.S.C. 1361 *et seq.*, the Endangered Species Act, as amended, (ESA), 16 U.S.C. 1531 *et seq.*, and the Migratory Bird Treaty Act, as amended, (MBTA), 16 U.S.C. 703 *et seq.*

(7) Flying motorized aircraft, except as necessary for valid law enforcement purposes, at less than 1000 feet above any of the four zones within the Sanctuary described in Appendix II to this Part.

(8) Operating motorized personal water craft within the Sanctuary except within the four designated zones and access routes within the Sanctuary described in appendix III to this part.

(9) Possessing within the Sanctuary (regardless of where taken, moved or removed from), except as necessary for valid law enforcement purposes, any historical resource, or any marine mammal, sea turtle or seabird taken in violation of regulations, as amended, promulgated under the MMPA, ESA or MBTA.

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

(b) The regulations in this part shall be applied to foreign persons and foreign vessels in accordance with generally recognized principles of international law, and in accordance with treaties, conventions and other international agreements to which the United States is a party.

(c) The prohibitions in paragraphs (a)(2) through (10) of this § 944.5 do not apply to activities necessary to respond to emergencies threatening life, property or the environment.

(d)(1) All Department of Defense activities shall be carried out in a manner that avoids to the maximum extent practicable any adverse impacts on Sanctuary resources and qualities. The prohibitions in paragraphs (a)(2) through (9) of this § 944.5 do not apply to existing military activities carried out by the Department of Defense, as specifically identified in the Final Environmental Impact Statement and Management Plan for the Proposed Monterey Bay National Marine Sanctuary (NOAA, 1992). (Copies of the FEIS/MP are available from the Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., suite 714, Washington, DC 20235.) New activities may be exempted from the prohibitions in paragraphs (a)(2) through (9) of this § 944.5 by the Director or designee after consultation between the Director or designee and the Department of Defense.

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

(e) The prohibitions in paragraphs (a)(2) through (9) of this § 944.5 do not apply to any activity executed in accordance with the scope, purpose, terms and conditions of a National Marine Sanctuary permit issed pursuant to § 944.9 or a Special Use permit issued pursuant to section 310 of the Act.

(f) The prohibitions in paragraphs (a)(2) through (9) of this § 944.5 do not apply to any activity authorized by a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal, State or local authority of competent jurisdiction, or by any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, provided that the holder of such authorization or right complies with § 944.10 and with any terms and conditions on the exercise of such authorization or right imposed by the Director or designee as a condition of certification as he or she deems necessary to achieve the purposes for which the Sanctuary was designated.

(g) The prohibitions in paragraphs (a)(2) through (9) of this § 944.5 do not apply to any activity authorized by any lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation and issued by any Federal, State or local authority of competent jurisdiction, provided that the applicant complies with § 944.11, the Director or designee notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization, and the applicant complies with any terms and conditions the Director or designee deems necessary to protect Sanctuary resources and qualities. Amendments, renewals and extensions of authorizations in existence on the effective date of designation constitute authorizations issued after the effective date.

(h) Notwithstanding paragraphs (e) and (g) of this § 944.5, in no event may the Director or designee issue a National Marine Sanctuary permit under § 944.9 or a Special Use permit under section 310 of the Act authorizing, or otherwise approve: The exploration for, development or production of oil, gas or minerals within the Sanctuary; the discharge of primary-treated sewage within the Sanctuary (except by certification, pursuant to § 944.10, of valid authorizations in existence on the effective date of Sanctuary designation and issued by other authorities of competent jurisdiction); or the disposal of dredged material within the Sanctuary other than at sites authorized by EPA (in consultation with COE) prior to the effective date of Sanctuary designation. Any purported authorizations issued by other authorities after the effective date of Sanctuary designation for any of these activities within the Sanctuary shall be invalid.

§ 944.6 Emergency regulations.

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

§ 944.7 Penalties for violations of regulations.

(a) Each violation of the Act, any regulation in this part, or any permit issued pursuant thereto, is subject to a civil penalty of not more than $50,000. Each day of a continuing violation constitutes a separate violation.

(b) Regulations setting forth the procedures governing administrative proceedings for assessment of civil penalties, permit sanctions and denials for enforcement reasons, issuance and use of written warnings, and release or forfeiture of seized property appear at 15 CFR part 904.

§ 944.8 Response costs and damages.

Under section 312 of the Act, any person who destroys, causes the loss of, or injures any Sanctuary resource is liable to the United States for response costs and damages resulting from such destruction, loss or injury, and any vessel used to destroy, cause the loss of, or injure any Sanctuary resource is liable in rem to the United States for response costs and damages resulting from such destruction, loss or injury.

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

(a) A person may conduct an activity prohibited by § 944.5 (a)(2) through (9) if conducted in accordance with the scope, purpose, terms and conditions of a permit issued under this § 944.9.

(b) Applications for such permits should be addressed to the Director of the Office of Ocean and Coastal Resource Management; Attn: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235. An application must include a detailed description of the proposed activity including a timetable for completion of the activity and the equipment, personnel and methodology to be employed. The qualifications and experience of all personnel must be set forth in the application. The application must set forth the potential effects of the activity, if any, on Sanctuary resources and qualities. Copies of all other required licenses, permits, approvals or other authorizations must be attached.

(c) Upon receipt of an application, the Director or designee may request such additional information from the applicant as he or she deems necessary to act on the application and may seek the views of any persons.

(d) The Director or designee, at his or her discretion, may issue a permit, subject to such terms and conditions as he or she deems appropriate, to conduct an activity prohibited by § 944.5(a)(2) through (9) if the Director or designee finds that the activity will have only negligible short-term adverse effects on Sanctuary resources and qualities and will: Further research related to Sanctuary resources and qualities; further the educational, natural or historical resource value of the Sanctuary; further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; assist in managing the Sanctuary; or further salvage or recovery operations in connection with an abandoned shipwreck in the Sanctuary title to which is held by the State of California. In deciding whether to issue a permit, the Director or designee shall consider such factors as: The professional qualifications and financial ability of the applicant as related to the proposed activity; the duration of the activity and the duration of its effects; the appropriateness of the methods and procedures proposed by the applicant for the conduct of the activity; the extent to which the conduct of the activity may diminish or enhance Sanctuary resources and qualities; the cumulative effects of the activity; and the end value of the activity. In addition, the Director or designee may consider such other factors as he or she deems appropriate.

(e) A permit issued pursuant to this § 944.9 is nontransferable.

(f) The Director or designee may amend, suspend or revoke a permit issued pursuant to this § 944.9 for good cause. The Director or designee may deny a permit application pursuant to this § 944.9, in whole or in part, if it is determined that the permittee or applicant has acted in violation of the terms or conditions of a permit or of the regulations in this part or for other good cause. Any such action shall be communicated in writing to the permittee or applicant by certified mail and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are set forth in subpart D of 15 CFR part 904.

(g) It shall be a condition of any permit issued that the permit or a copy thereof be displayed on board all vessels or aircraft used in the conduct of the activity.

(h) The Director or designee may, *inter alia*, make it a condition of any permit issued that any data or information obtained under the permit be made available to the public.

(i) The Director or designee may, *inter alia*, make it a condition of any permit issued that a NOAA official be allowed to observe any activity conducted under the permit and/or that the permit holder submit one or more reports on the status, progress or results of any activity authorized by the permit.

(j) The applicant for or holder of a National Marine Sanctuary permit may appeal the denial, conditioning, amendment, suspension or revocation of the permit in accordance with the procedures set forth in § 944.12.

§ 944.10 Certification of pre-existing leases, licenses, permits, approvals, other authorizations or rights to conduct a prohibited activity.

(a) The prohibitions set forth in § 944.5(a)(2) through (9) do not apply to any activity authorized by a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal, State or local authority of competent jurisdiction, or by any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, provided that:

(1) The holder of such authorization or right notifies the Director or designee, in writing, within 90 days of the effective date of Sanctuary designation, of the existence of such authorization or right and requests certification of such authorization or right;

(2) The holder complies with the other provisions of this § 944.10; and

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

(b) The holder of a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal, State or local authority of competent jurisdiction, or of any valid right of subsistence use or access in existence on the effective date of Sanctuary designation, authorizing an activity prohibited by § 944.5(a) (2) through (9) may conduct the activity without being in violation of § 944.5, pending final agency action on his or her certification request, provided the holder is in compliance with this § 944.10.

(c) Any holder of a valid lease, permit, license, approval or other authorization in existence on the effective date of Sanctuary designation and issued by any Federal, State or local authority of competent jurisdiction, or any holder of a valid right of subsistence use or access in existence on the effective date of Sanctuary designation, may request the Director or designee to issue a finding as to whether the activity for which the authorization has been issued, or the right given, is prohibited under § 944.5(a) (2) through (9).

(d) Requests for findings or certifications should be addressed to the

Director, Office of Ocean and Coastal Resource Management; Attn: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235. A copy of the lease, permit, license, approval or other authorization must accompany the request.

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

(f) The Director or designee may amend any certification made under this § 944.10 whenever additional information becomes available justifying such an amendment.

(g) The Director or designee shall communicate any decision on a certification request or any action taken with respect to any certification made under this § 944.10, in writing, to both the holder of the certified lease, permit, license, approval, other authorization or right, and the issuing agency, and shall set forth the reason(s) for the decision or action taken.

(h) Any time limit prescribed in or established under this § 944.10 may be extended by the Director or designee for good cause.

(i) The holder may appeal any action conditioning, amending, suspending or revoking any certification in accordance with the procedures set forth in § 944.12.

(j) Any amendment, renewal or extension not in existence on the effective date of Sanctuary designation of a lease, permit, license, approval, other authorization or right is subject to the provisions of § 944.11.

(k)(1) The National Oceanic and Atmospheric Administration (NOAA) has entered into a Memorandum of Agreement (MOA) with the State of California, EPA and the Association of Monterey Bay Area Governments regarding the Sanctuary regulations relating to water quality within State waters within the Sanctuary. With regard to permits, the MOA encompasses:

(i) National Pollutant Discharge Elimination System (NPDES) permits issued by the State of California under section 13377 of the California Water Code; and

(ii) Waste Discharge Requirements issued by the State of California under section 13263 of the California Water Code.

(2) The MOA specifies how the certification process of this § 944.10 will be administered within State waters within the Sanctuary in coordination with the State permit program.

(3) The MOA may be obtained from the Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., suite 714, Washington, DC 20235.

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

(a)(1) The prohibitions set forth in § 944.5(a)(2) through (9) do not apply to any activity authorized by any valid lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation by any Federal, State or local authority of competent jurisdiction, provided that:

(i) The applicant notifies the Director or designee, in writing, of the application for such authorization (and of any application for an amendment, renewal or extension of such authorization) within fifteen (15) days of the date of application or of the effective date of Sanctuary designation, whichever is later;

(ii) The applicant complies with the other provisions of this § 944.11;

(iii) The Director or designee notifies the applicant and authorizing agency that he or she does not object to issuance of the authorization (or amendment, renewal or extension); and

(iv) The applicant complies with any terms and conditions the Director deems necessary to protect Sanctuary resources and qualities.

(2) The authority granted the Director under this § 944.11 to object to or impose terms or conditions on the exercise of any valid lease, permit, license, approval or other authorization issued after the effective date of Sanctuary designation may not be delegated or otherwise assigned to other Federal officials below the Director's level.

(b) Any potential applicant for a lease, permit, license, approval or other authorization from any Federal, State or local authority (or for an amendment, renewal or extension of such authorization) may request the Director or designee to issue a finding as to whether the activity for which an application is intended to be made is prohibited by § 944.5(a)(2) through (9).

(c) Notifications of filings of applications and requests for findings should be addressed to the Director, Office of Ocean and Coastal Resource Management; Attn: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235. A copy of the application must accompany the notification.

(d) The Director or designee may request additional information from the applicant as he or she deems necessary to determine whether to object to issuance of such lease, license, permit, approval or other authorization (or to issuance of an amendment, extension or renewal of such authorization), or what terms and conditions are necessary to protect Sanctuary resources and qualities. The information requested must be received by the Director or designee within 45 days of the postmark date of the request. The Director or designee may seek the views of any persons on the application.

(e) The Director, or designee if there are no objections, terms or conditions, shall notify, in writing, the agency to which application has been made of his or her review of the application and possible objection to issuance. After review of the application and information received with respect thereto, the Director, or designee if there are no objections, terms or conditions, shall notify both the agency and applicant, in writing, whether he or she has an objection to issuance and what terms and conditions he or she deems necessary to protect Sanctuary resources and qualities. The Director shall state the reason(s) for any objection or the reason(s) that any terms and conditions are deemed necessary to protect Sanctuary resources and qualities.

(f) The Director may amend the terms and conditions deemed necessary to protect Sanctuary resources and qualities whenever additional information becomes available justifying such an amendment.

(g) Any time limit prescribed in or established under this § 944.11 may be extended by the Director or designee for good cause.

(h) The applicant may appeal any objection by, or terms or conditions imposed by, the Director to the Assistant Administrator or designee in accordance with the procedures set forth in § 944.12.

(i)(1) NOAA has entered into a Memorandum of Agreement (MOA) with

the State of California, EPA and the Association of Monterey Bay Area Governments regarding the Sanctuary regulations relating to water quality within State waters within the Sanctuary. With regard to permits, the MOA encompasses:

(i) National Pollutant Discharge Elimination System (NPDES) permits issued by the State of California under section 13377 of the California Water Code; and

(ii) Waste Discharge Requirements issued by the State of California under section 13263 of the California Water Code.

(2) The MOA specifies how the process of this § 944.11 will be administered within State waters within the Sanctuary in coordination with the State permit program.

§ 944.12 Appeals of administrative action.

(a) Except for permit actions taken for enforcement reasons (see subpart D of 15 CFR part 904 for applicable procedures), an applicant for, or a holder of, a § 944.9 National Marine Sanctuary permit, an applicant for, or a holder of, a section 310 of the Act Special Use permit, a § 944.10 certification requester or a § 944.11 applicant (hereinafter appellant) may appeal to the Assistant Administrator or designee:

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

(2) The conditioning, amendment, suspension or revocation of a certification under § 944.10; or

(3) The objection to issuance or the imposition of terms and conditions under § 944.11

(b) An appeal under paragraph (a) of this § 944.12 must be in writing, state the action(s) by the Director or designee appealed and the reason(s) for the appeal, and be received within 30 days of receipt of notice of the action by the Director or designee. Appeals should be addressed to the Assistant Administrator, Office of Ocean and Coastal Resource Management, Attn: Sanctuaries and Reserves Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235.

(c) While the appeal is pending, appellants requesting certification pursuant to § 944.10 who are in compliance with such section may continue to conduct their activities without being in violation of the prohibitions in § 944.5 (a)(2) through (9). All other appellants may not conduct their activities without being subject to the prohibitions in § 944.5 (a)(1) through (10).

(d) The Assistant Administrator or designee may request the appellant to submit such information as the Assistant Administrator or designee deems necessary in order for him or her to decide the appeal. The information requested must be received by the Assistant Administrator or designee within 45 days of the postmark date of the request. The Assistant Administrator may seek the views of any other persons. The Assistant Administrator or designee may hold an informal hearing on the appeal. If the Assistant Administrator or designee determines that an informal hearing should be held, the Assistant Administrator or designee may designate an officer before whom the hearing shall be held. The hearing officer shall give notice in the Federal Register of the time, place and subject matter of the hearing. The appellant and the Director or designee may appear personally or by counsel at the hearing and submit such material and present such arguments as deemed appropriate by the hearing officer. Within 60 days after the record for the hearing closes, the hearing officer shall recommend a decision in writing to the Assistant Administrator or designee.

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

(f) Any time limit prescribed in or established under this § 944.12 other than the 30 day limit for filing an appeal may be extended by the Assistant Administrator, designee or hearing officer for good cause.

Appendix I to Part 944—Monterey Bay National Marine Sanctuary Boundary Coordinates

(Appendix Based on North American Datum of 1983.)

APPROXIMATELY 4,024 SQUARE NAUTICAL MILES

Point	Latitude	Longitude
1	37 52 56.09055	122 37 39.12564
2	37 39 59.06176	122 45 3.79307
3	37 36 58.39164	122 46 9.73871
4	37 34 17.30224	122 48 14.38141
5	37 31 47.55649	122 51 35.56769
36	37 30 34.11030	122 54 22.12170
7	37 29 39.05866	123 00 27.70792
8	37 30 29.47603	123 05 46.22767
9	37 31 17.66845	123 07 47.63363
10	37 27 10.93594	123 08 24.32210
11	37 20 35.37491	123 07 54.12763
12	37 13 50.21805	123 06 15.50600
13	37 07 48.76810	123 01 43.10994
14	37 03 46.60999	122 54 45.39513
15	37 02 06.30955	122 46 35.02125
16	36 55 17.56782	122 48 21.41121
17	36 48 22.74244	122 48 56.29007
18	36 41 30.91516	122 48 19.40739
19	36 34 45.76070	122 46 26.96772
20	36 28 24.18076	122 43 32.43527
21	36 22 20.70312	122 39 28.42026
22	36 16 43.93588	122 34 26.77255
23	36 11 44.53838	122 28 37.16141
24	36 07 26.88988	122 21 54.97541
25	36 04 07.08898	122 14 39.75924
26	36 01 28.22233	122 07 00.19068
27	35 59 45.46381	121 58 56.36189
28	35 58 59.12170	121 50 26.47931
29	35 58 53.63866	121 45 22.82363
30	35 55 45.60623	121 42 40.28540
31	35 50 15.84256	121 43 09.20193
32	35 43 14.26690	121 42 43.79121
33	35 35 41.88635	121 41 25.07414
34	35 33 11.75999	121 37 49.74192
35	35 33 17.45869	121 05 52.89891
36	37 35 39.73180	122 31 14.96033
37	37 36 49.21739	122 37 00.22577
38	37 46 00.98983	122 39 00.40466
39	37 49 05.69080	122 31 46.30542

Appendix II to Part 944—Zones Within the Sanctuary Where Overflights Below 1000 Feet Are Prohibited

The four zones are:

(1) From mean high water out to three nautical miles between a line extending from Point Santa Cruz on a southwesterly heading of 220° and a line extending from 2.0 nautical miles north of Pescadero Point on a southwesterly heading of 240°;

(2) From mean high water out to three nautical miles between a line extending from the Carmel River mouth on a westerly heading of 270° and a line extending due west along latitude 35° 33' 17.5612 off of Cambria;

(3) From mean high water and within a five nautical mile arc drawn from a center point at the end of Moss Landing Pier; and

(4) Over the waters of Elkhorn Slough east of the Highway One bridge to Elkhorn Road.

Appendix III to Part 944—Zones and Access Routes Within the Sanctuary Where the Operation of Motorized Personal Water Craft Is Allowed

The four zones and access routes are:

(1) The approximately one [1.0] square nautical mile area off Pillar Point Harbor from launch ramp (37°30' N. 122°29' W) through harbor entrance to the northern

boundary of Zone One bounded by (a) 37°29.6' N (breakwater buoy), 122°29' W; (b) 37°28.8' N (bell buoy), 122°28.9' W; (c) 37°28.8' N, 122°28' W; and (d) 37°29.6' N, 122°28' W.

(2) The approximately three [3.0] square nautical mile area off of Santa Cruz Small Craft Harbor ramp from 36°57.4' N along a 100 yard wide access route due south along 122° W to the northern boundary of Zone Two (marked by the whistle buoy at 10 fathom curve) bounded by (a) 36°55' N, 122°02' W; (b) 36°55' N, 121°58' W; (c) 36°56.5' N, 121°58' W; and (d) 36°56.5' N, 122°02' W;

(3) The approximately five [5.0] square nautical mile area off of Moss Landing Harbor/Elkhorn Yacht Club Launch Ramp from 36°48.5' N along a 100 yeard wide access route due west along harbor entrance to the eastern boundary of Zone Three bounded by (a) 36°50' N, 121°49.3' W; (b) 36°50' N, 121°50.8' W; (c) 36°46.7' N, 121°50.8' W; (d) 36°46.7' N, 121°49' W; (e) 36°47.8' N, 121°48.2' W; and (f) 36°48.9' N, 121°48.2' W; and

(4) The approximately five [5.0] square nautical mile area off of the U.S. Coast Guard Pier (Monterey Harbor) Launch Ramp from 36°36.5' N, 121°53.5' W along a 100 yard wide access route due north to the southern boundary of Zone Four bounded by (a) 36°38.7' N, 121°55.4' W; (b) 36°36.9' N, 121°52.5' W; (c) 36°38.3' N, 121°51.3' W; and (d) 36°40' N, 121°54.4' W.

Appendix IV to Part 944—Dredged Material Disposal Sites Adjacent to the Monterey Bay National Marine Sanctuary

(Appendix based on North American Datum of 1983.)

As of the effective date of Sanctuary designation, the U.S. Army Corps of Engineers operates the following dredged material disposal sites adjacent to the Sanctuary off of the Golden Gate:

Point	Latitude	Longitude
1	37 45.875	122 34.140
2	37 44.978	122 37.369
3	37 44.491	122 37.159
4	37 45.406	122 33.889
5	37 45.875	122 34.140

In addition, the U.S. Environmental Protection Agency, as of the effective date of Sanctuary designation, is (in consultation with the U.S. Army Corps of Engineers) in the process of establishing a dredged material disposal site outside the northern boundary of the Monterey Bay National Marine Sanctuary. When that disposal site is authorized, this appendix will be updated to incorporate its precise location. The site will be located outside the Monterey Bay National Marine Sanctuary and any other existing national marine sanctuary and within one of the following Long-Term Management Strategy ocean study areas:

Study Area 3

The area described by the following points and a five-nautical-mile-wide zone west of the western boundary of that area:

Point	Latitude	Longitude
1	37 25.850	123 21.926
2	37 25.783	123 21.928
3	37 25.733	123 21.919
4	37 25.688	123 21.910
5	37 25.630	123 21.896
6	37 25.566	123 21.875
7	37 25.513	123 21.859
8	37 25.451	123 21.820
9	37 25.394	123 21.779
10	37 25.334	123 21.698
11	37 25.268	123 21.595
12	37 25.160	123 21.456
13	37 25.139	123 21.358
14	37 25.057	123 21.240
15	37 25.992	123 21.167
16	37 24.878	123 21.093
17	37 24.765	123 21.034
18	37 24.700	123 20.975
19	37 24.602	123 20.872
20	37 24.521	123 20.783
21	37 24.449	123 20.682
22	37 24.391	123 20.599
23	37 24.342	123 20.503
24	37 24.298	123 20.421
25	37 24.245	123 20.340
26	37 24.193	123 20.238
27	37 24.147	123 20.134
28	37 24.103	123 20.031
29	37 24.062	123 19.934
30	37 24.017	123 19.839
31	37 23.952	123 19.662
32	37 23.906	123 19.517
33	37 23.855	123 19.396
34	37 23.790	123 19.278
35	37 23.728	123 19.125
36	37 23.644	123 18.968
37	37 23.562	123 18.836
38	37 23.482	123 18.707
39	37 23.367	123 18.556
40	37 23.254	123 18.437
41	37 23.123	123 18.319
42	37 22.977	123 18.231
43	37 22.820	123 18.142
44	37 22.685	123 18.113
45	37 22.555	123 18.083
46	37 22.392	123 18.068
47	37 22.229	123 18.054
48	37 22.051	123 18.039
49	37 21.868	123 18.023
50	37 21.697	123 18.023
51	37 21.547	123 18.010
52	37 21.401	123 17.995
53	37 21.173	123 17.980
54	37 20.978	123 17.965
55	37 20.767	123 17.950
56	37 20.588	123 17.936
57	37 20.458	123 17.921
58	37 20.265	123 17.894
59	37 20.179	123 17.876
60	37 20.084	123 17.876
61	37 19.966	123 17.882
62	37 19.877	123 17.894
63	37 19.792	123 17.921
64	37 19.694	123 17.950
65	37 19.592	123 17.999
66	37 19.489	123 18.056
67	37 19.352	123 18.134
68	37 19.223	123 18.231
69	37 19.126	123 18.305
70	37 19.028	123 18.378
71	37 18.914	123 18.482
72	37 18.833	123 18.556
73	37 18.719	123 18.658
74	37 18.615	123 18.764
75	37 18.492	123 18.880
76	37 18.378	123 18.996
77	37 18.265	123 19.101
78	37 18.151	123 19.190
79	37 18.070	123 19.264
80	37 18.004	123 19.326
81	37 17.951	123 19.393
82	37 17.884	123 19.454
83	37 17.805	123 19.525
84	37 17.735	123 19.567
85	37 17.641	123 19.600
86	37 17.565	123 19.617
87	37 17.489	123 19.622
88	37 17.401	123 19.617
89	37 17.352	123 19.606
90	37 17.305	123 19.583
91	37 17.273	123 19.558
92	37 17.248	123 19.514
93	37 25.802	123 0.617
94	37 25.850	123 21.926

The portion of the area described by the above points that lies within the Monterey Bay National Marine Sanctuary as described in Appendix I is excluded.

Study Area 4

The area described by the following points and a five-nautical-mile-wide zone west of the western boundary that area: Table follows

Point	Latitude	Longitude
1	37 17.496	123 7.528
2	37 17.499	123 14.071
3	37 17.383	123 14.265
4	37 17.279	123 14.412
5	37 17.176	123 14.537
6	37 17.047	123 14.651
7	37 16.949	123 14.754
8	37 16.814	123 14.879
9	37 16.664	123 15.026
10	37 16.568	123 15.118
11	37 16.451	123 15.219
12	37 16.348	123 15.306
13	37 16.206	123 15.383
14	37 16.090	123 15.446
15	37 15.999	123 15.484
16	37 15.818	123 15.547
17	37 15.637	123 15.585
18	37 15.482	123 15.585
19	37 15.314	123 15.596
20	37 15.184	123 15.610
21	37 15.055	123 15.635
22	37 14.912	123 15.673
23	37 14.783	123 15.698
24	37 14.667	123 15.712
25	37 14.551	123 15.724
26	37 14.421	123 15.749
27	37 14.292	123 15.799
28	37 14.188	123 15.850
29	37 14.072	123 15.887
30	37 13.956	123 15.938
31	37 13.801	123 16.001
32	37 13.672	123 16.064
33	37 13.566	123 16.102
34	37 13.451	123 16.176
35	37 13.322	123 16.229
36	37 13.193	123 16.266
37	37 13.063	123 16.279
38	37 12.973	123 16.304
39	37 12.830	123 16.330
40	37 12.650	123 16.355
41	37 12.456	123 16.367
42	37 12.275	123 16.367
43	37 12.122	123 16.349
44	37 11.987	123 16.312
45	37 11.853	123 16.269
46	37 11.754	123 16.216
47	37 11.631	123 16.142
48	37 11.537	123 16.067
49	37 11.473	123 15.994
50	37 11.420	123 15.930
51	37 11.380	123 15.872
52	37 11.344	123 15.825
53	37 11.279	123 15.698

Point	Latitude	Longitude
54	37 11.227	123 15.547
55	37 11.188	123 15.421
56	37 11.150	123 15.269
57	37 11.116	123 15.124
58	37 11.098	123 14.980
59	37 11.085	123 14.828
60	37 11.072	123 14.626
61	37 11.059	123 14.437
62	37 11.052	123 14.359
63	37 11.033	123 14.259
64	37 11.004	123 14.158
65	37 10.978	123 14.078
66	37 10.942	123 13.978
67	37 10.890	123 13.877
68	37 10.847	123 13.802
69	37 10.804	123 13.727
70	37 10.712	123 13.614
71	37 10.648	123 13.531
72	37 10.564	123 13.439
73	37 10.508	123 13.370
74	37 10.502	123 7.508
75	37 17.496	123 7.528

Study Area 5

The area described by the following points and a five-nautical-mile-wide zone west of the western boundary that area:

Point	Latitude	Longitude
1	37 43.444	123 23.515
2	37 43.436	123 30.053
3	37 34.568	123 30.053
4	37 34.574	123 20.234
5	37 34.661	123 19.507
6	37 34.725	123 19.376
7	37 34.725	123 19.376
8	37 35.031	123 19.452
9	37 35.935	123 19.081
10	37 36.769	123 18.542
11	37 37.698	123 17.786
12	37 37.765	123 17.743
13	37 37.789	123 17.827
14	37 37.838	123 17.911
15	37 37.887	123 17.996
16	37 37.937	123 18.105
17	37 37.998	123 18.202
18	37 38.085	123 18.359
19	37 38.183	123 18.529
20	37 38.270	123 18.674
21	37 38.356	123 18.832
22	37 38.455	123 18.977
23	37 38.554	123 19.134
24	37 38.640	123 19.255
25	37 38.726	123 19.364
26	37 38.825	123 19.497
27	37 38.911	123 19.606
28	37 38.985	123 19.703
29	37 39.071	123 19.811
30	37 39.195	123 19.961
31	37 39.318	123 20.136
32	37 39.404	123 20.272
33	37 39.478	123 20.356
34	37 39.565	123 20.465
35	37 39.664	123 20.574
36	37 39.762	123 20.695
37	37 39.840	123 20.791
38	37 39.922	123 20.889
39	37 39.997	123 20.966
40	37 40.095	123 21.095
41	37 40.181	123 21.192
42	37 40.268	123 21.288
43	37 40.330	123 21.373
44	37 40.416	123 21.470
45	37 40.516	123 21.563
46	37 40.616	123 21.667
47	37 40.736	123 21.786
48	37 40.860	123 21.906
49	37 40.983	123 22.027
50	37 41.107	123 22.148
51	37 41.230	123 22.269
52	37 41.378	123 22.390
53	37 41.515	123 22.499
54	37 41.669	123 22.607
55	37 41.803	123 22.704
56	37 41.920	123 22.788
57	37 42.036	123 22.825
58	37 42.174	123 22.889
59	37 42.295	123 22.957
60	37 42.421	123 23.012
61	37 42.583	123 23.106
62	37 42.704	123 23.165
63	37 42.826	123 23.225
64	37 43.005	123 23.310
65	37 43.088	123 23.358
66	37 43.205	123 23.410
67	37 43.327	123 23.467
68	37 43.376	123 23.482
69	37 43.444	123 23.515

[FR Doc. 92-22612 Filed 9-17-92; 8:45 am]
BILLING CODE 3510-08-M

17.
Coastal Zone Management Act of 1972 as amended

COASTAL ZONE MANAGEMENT ACT OF 1972

(PL 92-583, 16 U.S.C. 1451 *et seq.*, October 27, 1972; Amended by PL 93-612, January 2, 1975; PL 94-370, July 26, 1976; PL 95-219, December 28, 1977; PL 95-372, September 18, 1978; PL 96-464, October 17, 1980; PL 98-620, November 11, 1984; PL 99-272, April 7, 1986; PL 99-626, November 7, 1986; PL 101-508, November 5, 1990)

SHORT TITLE

SEC. 301. This title may be cited as the "Coastal Zone Management Act of 1972".

CONGRESSIONAL FINDINGS

SEC. 302. The Congress finds that —

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.

(b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation.

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.

(d) The habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destructions by man's alterations.

[302(a) amended by PL 101-508]

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost.

[302(f) added by PL 96-464; amended by PL 101-508]

(f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation, and industrial activities in the Great Lakes, territorial sea, exclusive economic zone, and Outer Continental Shelf are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters.

[Former 302(f)—(i) redesignated as (g)—(j) by PL 96-464].

(g) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values.

(h) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

(i) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

(j) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet state and local needs resulting from new or expanded energy activity in or affecting the coastal zone.

[302(k)—(m) added by PL 101-508]

(k) Land uses in the coastal zone, and the uses of adjacent lands which drain into the coastal zone, may significantly affect the quality of coastal waters and habitats, and efforts to control coastal water pollution from land use activities must be improved.

(l) Because global warming may result in a substantial sea level rise with serious adverse effects in the

coastal zone, coastal states must anticipate and plan for such an occurrence.

(m) Because of their proximity to and reliance upon the ocean and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of state ocean resource plans as part of their federally approved coastal zone management programs.

CONGRESSIONAL DECLARATION OF POLICY

[303 revised by PL 96-464]

SEC. 303. The Congress finds and declares that it is the national policy—

(1) to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations;

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for—

[303(2) introductory paragraph amended by PL 101-508]

(A) the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone,

(B) the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands.

[303 (2)(B) amended, former (C)—(I) redesignated as new (D)—(J) and new (C) added by PL 101-508]

(C) the management of coastal development to improve, safeguard, and restore the quality of coastal waters, and to protect natural resources and existing uses of those waters.

(D) priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(E) public access to the coasts for recreation purposes,

(F) assistance in the redevelopment of deteriorating urban waterfronts and ports, and sensitive preservation and restoration of historic, cultural, and esthetic coastal features,

(G) the coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(H) continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(I) the giving of timely and effective notification of, and opportunities for public and local government participation in, coastal management decisionmaking,

[303(2)(I) amended by PL 101-508]

(J) assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone, and improved coordination between State and Federal coastal zone management agencies and State and wildlife agencies, and

[303(2)(J) amended by PL 101-508]

(K) the study and development, in any case in which the Secretary considers it to be appropriate, of plans for addressing the adverse effects upon the coastal zone of land subsidence and of sea level rise; and

[303(2)(K) amended by PL 101-508]

(3) to encourage the preparation of special area management plans which provide for increased specificity in protecting significant natural resources, reasonable coastal-dependent economic growth, improved protection of life and property in hazardous areas, including those areas likely to be affected by land subsidence, sea level rise, or fluctuating water levels of the Great Lakes, and improved predictability in governmental decisionmaking;

[303(3) amended by PL 101-508]

(4) to encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as of the Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this title;

[303(4) amended and (5) and (6) added by PL 101-508]

(5) to encourage coordination and cooperation with and among the appropriate Federal, State, and local agencies, and international organizations where appropriate, in collection, analysis, synthesis, and dissemination of coastal management information, research results, and technical assistance, to support State and

Federal regulation of land use practices affecting the coastal and ocean resources of the United States; and

(6) to respond to changing circumstances affecting the coastal environment and coastal resource management by encouraging States to consider such issues as ocean uses potentially affecting the coastal zone.

DEFINITIONS

SEC. 304. For the purposes of this title —

(1) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 et seq.), the Act of March 2, 1917 (48 U.S.C. 749), the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, as approved by the Act of March 24, 1976 (48 U.S.C. 1681 note), or section 1 of the Act of November 20, 1963 (48 U.S.C. 1705, as applicable. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise.

[304(1) amended by PL 101-508]

(2) The term "coastal resource of national significance" means any coastal wetland, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value.

[New 304(2) added by PL 96-464 and former 304(2)—(16) redesignated as (3)—(17) by PL 96-464]

(3) The term "coastal waters" means (A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadsteads, and estuary-type areas such as bays, shallows, and marshes and (B) in other areas, those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, lagoons, bayous, ponds, and estuaries.

(4) The term "coastal state" means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this title, the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa.

[304(4) amended by PL 96-464]

(5) The term "coastal energy activity" means any of the following activities if, and to the extent that (A) the conduct, support, or facilitation of such activity requires and involves the siting, construction, expansion, or operation of any equipment or facility; and (B) any technical requirement exists which, in the determination of the Secretary, necessitates that the siting, construction, expansion, or operation of such equipment or facility be carried out in, on in close proximity to, the coastal zone of any coastal state:

(i) Any outer Continental Shelf energy activity.

(ii) Any transportation, conversion, treatment, transfer, or storage of liquefied natural gas.

(iii) Any transportation, transfer, or storage of oil, natural gas, or coal (including, but not limited to, by means of any deep-water port, as defined in section 3(10) of the Deepwater Port Act of 1974 (33 U.S.C. 1502(10))).

For purposes of this paragraph, the siting, construction, expansion, or operation of any equipment or facility shall be 'in close proximity to the coastal zone of any coastal state if such siting, construction, expansion, or operation has, or is likely to have, a significant effect on such coastal zone.

(6) The term "energy facilities" means any equipment or facility which is or will be used primarily —

(A) in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource; or

(B) for the manufacture, production, or assembly of equipment, machinery, products, or devices which are involved in any activity described in subparagraph (A).

The term includes, but is not limited to (i) electric generating plants; (ii) petroleum refineries and associated facilities; (iii) gasification plants; (iv) facilities used for the transportation, conversion, treatment, transfer, or storage of liquefied natural gas; (v) uranium enrichment or nuclear fuel processing facilities; (vi) oil and gas facilities, including platforms, assembly plants, storage depots, tank farms, crew and supply bases, and refining complexes; (vii) facilities including deepwater ports, for the transfer of petroleum; (viii) pipelines and transmission facilities; and (ix) terminals which are associated with any of the foregoing.

(6a) The term 'enforceable policy' means State policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone.
[304(6a) added by the PL 101-508]

(7) The term "estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term includes estuary-type areas of the Great Lakes.

(8) The term "estuarine sanctuary" means a research area which may include any part or all of an estuary and any island, transitional area, and upland in, adjoining, or adjacent to such estuary, and which constitute to the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over a period of time the ecological relationships within the area.

(9) The term "Fund" means the Coastal Energy Impact Fund established by section 308(h).

(10) The term "land use" means activities which are conducted in, or on the shorelands within, the coastal zone, subject to the requirements outlined in section 307(g).

(11) The term "local government" means any political subdivision of, or any special entity created by, any coastal state which (in whole or part) is located in, or has authority over, such state's coastal zone and which (A) has authority to levy taxes, or to establish and collect user fees, or (B) provides any public facility or public service which is financed in whole or part by taxes or user fees. The term includes, but is not limited to, any school district, fire district, transportation authority, and any other special purpose district or authority.

(12) The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this title, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone.

(13) The term "outer continental shelf energy activity" means any exploration for, or any development or production of, oil or natural gas from the outer continental shelf (as defined in section 2(a) of the Outer Continental Shelf Lands Act (43 U.S.C. 1331(a)), or the siting, construction, expansion, or operation of any new or expanded energy facilities directly required by such exploration, development, or production.

(14) The term "person" means any individual; any corporation, partnership, association, or other entity organized or existing under the laws of any state; the Federal Government; any state, regional, or local government; or any entity of any such Federal, state, regional, or local government.

(15) The term "public facilities and public services" means facilities or services which are financed, in whole or in part, by any state or political subdivision thereof, including, but not limited to, highways and secondary roads, parking, mass transit, docks, navigation aids, fire and police protection, water supply, waste collection and treatment (including drainage), schools and education, and hospitals and health care. Such term may also include any other facility or service so financed which the Secretary finds will support increased population.

(16) The term "Secretary" means the Secretary of Commerce.

(17) The term 'special area management plan' means a comprehensive plan providing for natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies; standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas within the coastal zone.

[304(17) added by PL 96-464]

(18) The term "water use" means a use, activity, or project conducted in or on waters within the coastal zone.
[304(18) revised by PL 101-508]

MANAGEMENT PROGRAM DEVELOPMENT GRANTS

SEC. 305. (a) In fiscal years 1991, 1992, and 1993, the Secretary may make a grant annually to any coastal state without an approved program if the coastal state demonstrates to the satisfaction of the Secretary that the grant will be used to develop a management program consistent with the requirements set forth in section 306. The amount of any such grant shall not exceed $200,000 in any fiscal year, and shall require State matching funds according to a 4-to-1 ratio of Federal-to-State contributions. After an initial grant is made to a coastal state pursuant to this subsection, no subsequent grant shall be made to that coastal state pursuant to this subsection unless the Secretary finds that the coastal state is satisfactorily developing its management program. No coastal state is eligible to receive more than two grants pursuant to this subsection.

(b) Any coastal state which has completed the development of its management program shall submit such program to the Secretary for review and approval pursuant to section 306.
[305 revised by PL 101-508]

ADMINISTRATIVE GRANTS

[306 revised by PL 101-508]

SEC. 306. (a) The Secretary may make grants to any coastal state for the purpose of administering that state's management program, if the state matches any such grant according to the following ratios of Federal-to-State contributions for the applicable fiscal year:

(1) For those States for which programs were approved prior to enactment of the Coastal Zone Act Reauthorization Amendments of 1990, 1 to 1 for any fiscal year.

(2) For programs approved after enactment of the Coastal Zone Act Reauthorization Amendments of 1990, 4 to 1 for the first fiscal year, 2.3 to 1 for the second fiscal year, 1.5 to 1 for the third fiscal year, and 1 to 1 for each fiscal year thereafter.

(b) The Secretary may make a grant to a coastal state under subsection (a) only if the Secretary finds that the management program of the coastal state meets all applicable requirements of this title and has been approved in accordance with subsection (d);

(c) Grants under this section shall be allocated to coastal states with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the program, population of the area, and other relevant factors. The Secretary shall establish, after consulting with the coastal states, maximum and minimum grants for any fiscal year to promote equity between coastal states and effective coastal management.

(d) Before approving a management program submitted by a coastal state, the Secretary shall find the following:

(1) The State has developed and adopted a management program for its coastal zone in accordance with rules and regulations promulgated by the Secretary, after notice, and with the opportunity of full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303.

(2) The management program includes each of the following required program elements:

(A) An identification of the boundaries of the coastal zone subject to the management program.

(B) A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters.

(C) An inventory and designation of areas of particular concern within the coastal zone.

(D) An identification of the means by which the State proposes to exert control over the land uses and water uses referred to in subparagraph (B), including a list of relevant State constitutional provisions, laws, regulations, and judicial decisions.

(E) Broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(F) A description of the organizational structure proposed to implement such management program, including the responsibilities and interrelationships of local, areawide, State, regional, and interstate agencies in the management process.

(G) A definition of the term 'beach' and a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological, or cultural value.

(H) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities.

(I) A planning process for assessing the effects of, and studying and evaluating ways to control, or lessen the impact of, shoreline erosion, and to restore areas adversely affected by such erosion.

(3) The State has—

(A) coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone—

(i) existing on January 1 of the year in which the State's management program is submitted to the Secretary; and

(ii) which have been developed by a local government, an areawide agency, a regional agency, or an interstate agency; and

(B) established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (6) and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of those local governments and agencies in carrying out the purposes of this title; except that the Secretary shall not find any mechanism to be effective for purposes of this subparagraph unless it requires that—

(i) the management agency, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, shall send a notice of the management program decision to any local government whose zoning authority is affected;

(ii) within the 30-day period commencing on the date of receipt of that notice, the local government may

submit to the management agency written comments on the management program decision, and any recommendation for alternatives; and

(iii) the management agency, if any comments are submitted to it within the 30-day period by any local government—

(I) shall consider the comments;

(II) may, in its discretion, hold a public hearing on the comments; and

(III) may not take any action within the 30-day period to implement the management program decision.

(4) The State has held public hearings in the development of the management program.

(5) The management program and any changes thereto have been reviewed and approved by the Governor of the State.

(6) The Governor of the State has designated a single State agency to receive and administer grants for implementing the management program.

(7) The State is organized to implement the management program.

(8) The management program provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.

(9) The management program includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values.

(10) The State, acting through its chosen agency or agencies (including local governments, areawide agencies, regional agencies, or interstate agencies) has authority for the management of the coastal zone in accordance with the management program. Such authority shall include power—

(A) to administer land use and water use regulations to control development to ensure compliance with the management program, and to resolve conflicts among competing uses; and

(B) to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(11) The management program provides for any one or a combination of the following general techniques for control of land uses and water uses within the coastal zone:

(A) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement.

(B) Direct State land and water use planning and regulation.

(C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any State or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(12) The management program contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses and water uses of regional benefit.

(13) The management program provides for—

(A) the inventory and designation of areas that contain one or more coastal resources of national significance; and

(B) specific and enforceable standards to protect such resources.

(14) The management program provides for public participation in permitting processes, consistency determinations, and other similar decisions.

(15) The management program provides a mechanism to ensure that all State agencies will adhere to the program.

(16) The management program contains enforceable policies and mechanisms to implement the applicable requirements of the Coastal Nonpoint Pollution Control Program of the State required by section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990.

(c) A coastal state may amend or modify a management program which it has submitted and which has been approved by the Secretary under this section, subject to the following conditions:

(1) The State shall promptly notify the Secretary of any proposed amendment, modification, or other program change and submit it for the Secretary's approval. The Secretary may suspend all or part of any grant made under this section pending State submission of the proposed amendments, modification, or other program change.

(2) Within 30 days after the date the Secretary receives any proposed amendment, the Secretary shall notify the State whether the Secretary approves or disapproves the amendment, or whether the Secretary finds it is necessary to extend the review of the proposed amendment for a period not to exceed 120 days after the date the Secretary received the proposed amendment. The Secretary may extend this period only as necessary to meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). If the Secretary does not notify the coastal state that the Secretary approves or disapproves the amendment with-

in that period, then the amendment shall be conclusively presumed as approved.

(3)(A) Except as provided in subparagraph (B), a coastal state may not implement any amendment, modification, or other change as part of its approved management program unless the amendment, modification, or other change is approved by the Secretary under this subsection.

(B) The Secretary, after determining on a preliminary basis, that an amendment, modification, or other change which has been submitted for approval under this subsection is likely to meet the program approval standards in this section, may permit the State to expend funds awarded under this section to begin implementing the proposed amendment, modification, or change. This preliminary approval shall not extend for more than 6 months and may not be renewed. A proposed amendment, modification, or change which has been given preliminary approval and is not finally approved under this paragraph shall not be considered an enforceable policy for purposes of section 307.

[*Editor's note:* Sec. 6206(b) of PL 101-508 provides:

"(b) Additional Program Requirements.—Each State which submits a management program for approval under section 306 of the Coastal Zone Management Act of 1972, as amended by this subtitle (including a State which submitted a program before the date of enactment of this Act), shall demonstrate to the Secretary—

(1) that the program complies with section 306(d)(14) and (15) of that Act, by not later than 3 years after the date of the enactment of this Act; and

(2) that the program complies with section 306(d)(16) of that Act, by not later than 30 months after the date of publication of final guidance under section 6217(g) of this Act."]

RESOURCE MANAGEMENT IMPROVEMENT GRANTS

[306A added by PL 96-464]

SEC. 306A. (a) For purposes of this section—

(1) The term 'eligible coastal state' means a coastal state that for any fiscal year for which a grant is applied for under this section—

((A) has a management program approved under section 306; and

(B) in the judgment of the Secretary, is making satisfactory progress in activities designed to result in significant improvement in achieving the coastal management objectives specified in section 303(2)(A) through (I).

(2) The term 'urban waterfront and port' means any developed area that is densely populated and is being used for, or has been used for, urban residential recreational, commercial, shipping or industrial purposes.

(b) The Secretary may make grants to any eligible coastal state to assist that state in meeting one or more of the following objectives:

(1) The preservation or restoration of specific areas of the state that (A) are designated under the management program procedures required by section 306 (d)(9) because of their conservation recreational, ecological, or esthetic values, or (B) contain one or more coastal resources of national significance, or for the purpose of restoring and enhancing shellfish production by the purchase and distribution of clutch material on publicly owned reef tracts.

[306A(b)(1) amended by PL 101-508]

(2) The redevelopment of deteriorating and underutilized urban waterfronts and ports that are designated under section 305(b)(3) in the state's management program as areas of particular concern.

(3) The provision of access of public beaches and other public coastal areas and to coastal waters in accordance with the planning process required under section 305(b)(7).

(c) (1) Each grant made by the Secretary under this section shall be subject to such terms and conditions as may be appropriate to ensure that the grant is used for purposes consistent with this section.

(2) Grants made under this section may be used for—

(A) the acquisition of fee simple and other interests in land;

(B) low-cost construction projects determined by the Secretary to be consistent with the purposes of this section, including but not limited to, paths, walkways, fences, parks, and the rehabilitation of historic buildings and structures; except that not more than 50 per centum of any grant made under this section may be used for such construction projects;

(C) in the case of grants made for objectives described in subsection (b)(2)—

(i) the rehabilitation or acquisition of piers to provide increased public use, including compatible commercial activity,

(ii) the establishment of shoreline stabilization measures including the installation or rehabilitation of bulkheads for the purpose of public safety or increasing public access and use, and

(iii) the removal or replacement of pilings where such action will provide increased recreational use of urban waterfront areas,

but activities provided for under this paragraph shall not be treated as construction projects subject to the limitations in paragraph (B);

(D) engineering designs, specifications, and other appropriate reports; and

(E) educational, interpretive, and management costs and such other related costs as the Secretary determines to be consistent with the purposes of this section.

(d)(1) The Secretary may make grants to any coastal state for the purpose of carrying out the project or purpose for which such grants are awarded, if the state matches any such grant according to the following ratios of Federal to state contribution for the applicable fiscal year: 4 to 1 for fiscal 1986; 2.3 to 1 for fiscal year 1987; 1.5 to 1 for fiscal year 1988; and 1 to 1 for each fiscal year after fiscal year 1988.

[Former 306A(d)(1) deleted and new (d)(1) added by PL 99-272]

(2) Grants provided under this section may be used to pay a coastal state's share of costs required under any other Federal program that is consistent with the purposes of this section.

(3) The total amount of grants made under this section to any eligible coastal state for any fiscal year may not exceed an amount equal to 10 per centum of the total amount appropriated to carry out this section for such fiscal year.

(e) With the approval of the Secretary, an eligible coastal state may allocate to a local government, an areawide agency designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, a regional agency, or an interstate agency, a portion of any grant made under this section for the purpose of carrying out this section; except that such an allocation shall not relieve that state of the responsibility for ensuring that any funds so allocated are applied in furtherance of the state's approved management program.

(f) In addition to providing grants under this section, the Secretary shall assist eligible coastal states and their local governments in identifying and obtaining other sources of available Federal technical and financial assistance regarding the objectives of this section.

COORDINATION AND COOPERATION

SEC. 307. (a) In carrying out his functions and responsibilities under this title, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) The Secretary shall not approve the management program submitted by a state pursuant to section 306 unless the views of Federal agencies principally affected by such program have been adequately considered.

(c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

(B) After any final judgment, decree, or order of any Federal court that is appealable under section 1291 or 1292 of title 28, United States Code, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) is not likely to result in such compliance, the President may, upon written request from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.

(C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 306(d)(6) at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.

[307(c)(1) revised by PL 101-508]

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs.

[307(c)(2) amended by PL 101-508]

(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's

certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

[307(c)(3)(A) amended by PL 101-508]

(B) After the management program of any coastal state has been approved by the Secretary under section 306, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use or natural resource of the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with the enforceable policies of such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until —

[307(c)(3)(B) introductory text amended by PL 101-508]

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A), except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed; or

[(ii) revised by PL 95-372, September 18, 1978]

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

(d) State and local governments submitting applications for Federal assistance under other Federal programs, in or outside of the coastal zone, affecting any land or water use of natural resource of the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of title IV of the Intergovernmental Coordination Act of 1968 (82 Stat. 1098). Federal agencies shall not approve proposed projects that are inconsistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project in consistent with the purposes of this title or necessary in the interest of national security.

[307(d) amended by PL 101-508]

(e) Nothing in this title shall be construed —

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the

United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

(f) Notwithstanding any other provision of this title, nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended, or the Clean Air Act, as amended, or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this title and shall be the water pollution control and air pollution control requirements applicable to such program.

(g) When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 306 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use program which may be hereafter enacted, the Secretary, prior to approving such program, shall obtain the concurrence of the Secretary of the Interior, or such other Federal official as may be designated to administer the national land use program with respect to that portion of the coastal zone management program affecting such inland areas.

(h) In case of serious disagreement between any Federal agency and a coastal state —

(1) in the development or the initial implementation of a management program under section 305; or

(2) in the administration of a management program approved under section 306;

the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

(i) With respect to appeals under subsections (c)(3) and (d) which are submitted after the date of the enactment of the Coastal Zone Act Reauthorization Amendments of 1990, the Secretary shall collect an application fee of not less than $200 for minor appeals and not less than $500 for major appeals, unless the Secretary, upon consideration of an applicant's request for a fee waiver, determines that the applicant is unable to pay the fee. The Secretary shall collect such other fees as are necessary to recover the full costs of administering and processing such appeals under subsection (c).
[307(i) added by PL 101-508]

COASTAL ZONE MANAGEMENT FUND

[308 revised by PL 95-372; PL 101-508]

SEC. 308. (a)(1) The obligations of any coastal state or unit of general purpose local government to repay loans made pursuant to this section as in effect before the date of the enactment of the Coastal Zone Act Reauthorization Amendments of 1990, and any repayment schedule established pursuant to this Act as in effect before that date of enactment, are not altered by any provision of this title. Such loans shall be repaid under authority of this subsection and the Secretary may issue regulations governing such repayment. If the Secretary finds that any coastal state or unit of local government is unable to meet its obligations pursuant to this subsection because the actual increases in employment and related population resulting from coastal energy activity and the facilities associated with such activity do not provide adequate revenues to enable such State or unit to meet such obligations in accordance with the appropriate repayment schedule, the Secretary shall, after review of the information submitted by such State or unit, take any of the following actions:

(A) Modify the terms and conditions of such loan.

(B) Refinance the loan.

(C) Recommend to the Congress that legislation be enacted to forgive the loan.

(2) Loan repayments made pursuant to this subsection shall be retained by the Secretary as offsetting collections, and shall be deposited into the Coastal Zone Management Fund established under subsection (b).

(b)(1) The Secretary shall established and maintain a fund, to be known as the 'Coastal Zone Management Fund' (hereinafter in this section referred to as the 'Fund'), which shall consist of amounts retained and deposited into the Fund under subsection (a).

(2) Subject to amounts provided in appropriation Acts, amounts in the Fund shall be available to the Secretary for use for the following:

(A) Expenses incident to the administration of this title, in an amount not to exceed—

(i) $5,000,000 for fiscal year 1991;

(ii) $5,225,000 for fiscal year 1992;

(iii) $5,460,125 for fiscal year 1993;

(iv) $5,705,830 for fiscal year 1994; and

(v) $5,962,593 for fiscal year 1995.

(B) After use under subparagraph (A)—

(i) projects to address management issues which are regional in scope, including interstate projects;

(ii) demonstration projects which have high potential for improving coastal zone management, especially at the local level;

(iii) emergency grants to State coastal zone management agencies to address unforeseen or disaster-related circumstances;

(iv) appropriate awards recognizing excellence in coastal zone management as provided in section 314;

(v) program development grants as authorized by section 305; and

(vi) to provide financial support to coastal States for use for investigating and applying the public trust doctrine to implement State management programs approved under section 306.

(3) On December 1 of each year, the Secretary shall transmit to the Congress an annual report on the Fund, including the balance of the Fund and an itemization of all deposits into and disbursements from the Fund in the preceding fiscal year.

COASTAL ZONE ENHANCEMENT GRANTS

[309 revised by PL 96-464; PL 101-508]

SEC. 309. (a) For purposes of this section, the term 'coastal zone enhancement objective' means any of the following objectives:

(1) Protection, restoration, or enhancement of the existing coastal wetlands base, or creation of new coastal wetlands.

(2) Preventing or significantly reducing threats to life and destruction of property by eliminating development and redevelopment in high-hazard areas, managing development in other hazard areas, and anticipating and managing the effects of potential sea level rise and Great Lakes level rise.

(3) Attaining increased opportunities for public access, taking into account current and future public access needs, to coastal areas of recreational, historical, aesthetic, ecological, or cultural value.

(4) Reducing marine debris entering the Nation's coastal and ocean environment by managing uses and activities that contribute to the entry of such debris.

(5) Development and adoption of procedures to assess, consider, and control cumulative and secondary impacts of coastal growth and development, including the collective effect on various individual uses or activities on coastal resources, such as coastal wetlands and fishery resources.

(6) Preparing and implementing special area management plans for important coastal areas.

(7) Planning for the use of ocean resources.

(8) Adoption of procedures and enforceable policies to help facilitate the siting of energy facilities and Government facilities and energy-related activities and Government activities which may be of greater than local significance.

(b) Subject to the limitations and goals established in this section, the Secretary may make grants to coastal states to provide funding for development and submission for Federal approval of program changes that support attainment of one or more coastal zone enhancement objectives.

(c) The Secretary shall evaluate and rank State proposals for funding under this section, and make funding awards based on those proposals, taking into account the criteria established by the Secretary under subsection (d). The Secretary shall ensure that funding decisions under this section take into consideration the fiscal and technical needs of proposing States and the overall merit of each proposal in terms of benefits to the public.

(d) Within 12 months following the date of enactment of this section, and consistent with the notice and participation requirements established in section 317, the Secretary shall promulgate regulations concerning coastal zone enhancement grants that establish—

(1) specific and detailed criteria that must be addressed by a coastal state (including the State's priority needs for improvement as identified by the Secretary after careful consultation with the State) as part of the State's development and implementation of coastal zone enhancement objectives;

(2) administrative or procedural rules or requirements as necessary to facilitate the development and implementation of such objectives by costal states; and

(3) other funding award criteria as are necessary or appropriate to ensure that evaluations of proposals, and decisions to award funding, under this section are based on objective standards applied fairly and equitably to those proposals.

(e) A State shall not be required to contribute any portion of the cost of any proposal for which funding is awarded under this section.

(f) Beginning in fiscal year 1991, not less than 10 percent and not more than 20 percent of the amounts appropriated to implement sections 306 and 306A of this title shall be retained by the Secretary for use in implementing this section, up to a maximum of $10,000,000 annually.

(g) If the Secretary finds that the State is not undertaking the actions committed to under the terms of the grant, the Secretary shall suspend the State's eligibility for further funding under this section for at least one year.

TECHNICAL ASSISTANCE

[310 added by PL 101-508]

SEC. 310. (a) The Secretary shall conduct a program of technical assistance and managment-oriented research necessary to support the development and implementation of State coastal management program amendments under section 309, and appropriate to the furtherance of international cooperative efforts and technical assistance in coastal zone management. Each department, agency, and instrumentality of the executive branch of the Federal Government may assist the Secretary, on a reimbursable basis or otherwise, in carrying out the purposes of this section, including the furnishing of information to the extent permitted by law, the transfer of personnel with their consent and without prejudice to their position

and rating, and the performance of any research, study, and technical assistance which does not interfere with the performance of the primary duties of such department, agency, of instrumentality. The Secretary may enter into contracts or other arrangements with any qualified person for the purposes of carrying out this subsection.

(b)(1) The Secretary shall provide for the coordination of technical assistance, studies, and research activities under this section with any other such activities that are conducted by or subject to the authority of the Secretary.

(2) The Secretary shall make the results of research and studies conducted pursuant to this section available to coastal states in the form of technical assistance publications, workshops, or other means appropriate.

(3) The Secretary shall consult with coastal states on a regular basis regarding the development and implementation of the program established by this section.

PUBLIC HEARINGS

SEC. 311. All public hearings required under this title must be announced at least thirty days prior to the hearing date. At the time of the announcement, all agency materials pertinent to the hearings, including documents, studies, and other data, must be made available to the public for review and study. As similar materials are subsequently developed, they shall be made available to the public as they become available to the agency.

REVIEW OF PERFORMANCE

[312 revised by PL 96-464]

SEC. 312. (a) The Secretary shall conduct a continuing review of the performance of coastal states with respect to coastal management. Each review shall include a written evaluation with an assessment and detailed findings concerning the extent to which the state has implemented and enforced the program approved by the Secretary, addressed the coastal management needs identified in section 303(2)(A) through (K), and adhered to the terms of any grant, loan, or cooperative agreement funded under this title.

[312(a) amended by PL 101-508]

(b) In evaluating a coastal state's performance, the Secretary shall conduct the evaluation in an open and public manner, and provide full opportunity for public participation, including holding public meetings in the State being evaluated and providing opportunities for the submission of written and oral comments by the public. The Secretary shall provide the public with at least 45 days' notice of such public meetings by placing a notice in the Federal Register, by publication of timely notices in newspapers of general circulation within the State being evaluated, and by communications with persons and organizations known to be interested in the evaluation. Each evaluation shall be prepared in report form and shall include written responses to the written comments received during the evaluation process. The final report of the evaluation shall be completed within 120 days after the last public meeting held in the State being evaluated. Copies of the evaluation shall be immediately provided to all persons and organizations participating in the evaluation process.

[312(b) revised by PL 101-508]

(c)(1) The Secretary may suspend payment of any portion of financial assistance extended to any coastal state under this title, and may withdraw any unexpended portion of such assistance, if the Secretary determines that the coastal state is failing to adhere to (A) the management program or a State plan developed to manage a national estuarine reserve established under section 315 of this title, or a portion of the program or plan approved by the Secretary, or (B) the terms of any grant or cooperative agreement funded under this title.

(2) Financial assistance may not be suspended under paragraph (1) unless the Secretary provides the Governor of the coastal state with—

(A) written specifications and a schedule for the actions that should be taken by the State in order that such suspension of financial assistance may be withdrawn; and

(B) written specifications stating how those funds from the suspended financial assistance shall be expended by the coastal state to take the actions referred to in subparagraph (A).

(3) The suspension of financial assistance may not last for less than 6 months or more than 36 months after the date of suspension.

[312(c) amended by PL 99-272; revised by PL 101-508]

(d) The Secretary shall withdraw approval of the management program of any coastal state and shall withdraw financial assistance available to that State under this title as well as any unexpended portion of such assistance, if the Secretary determines that the coastal state has failed to take the actions referred to in subsection (c)(2)(A).

[312(d) revised by PL 101-508]

(e) Management program approval and financial assistance may not be withdrawn under subsection (d), unless the Secretary gives the coastal state notice of the proposed withdrawal and an opportunity for a public hearing on the proposed action. Upon the withdrawal of management program approval under this subsection (d), the Secretary shall provide the coastal state with written specifications of the actions that should be taken, or not engaged in, by the state in order that such withdrawal may be canceled by the Secretary.

(f) [Repealed]
[312(f) repealed by PL 101-508]

[*Editor's note:* Section 9(b) of PL 96-464 provides:
"(b) Within two hundred and seventy days after the date of the enactment of this Act, the Secretary of Commerce shall issue such regulations as may be necessary or appropriate to administer section 312 of the Coastal Zone Management Act of 1972 (as amended by subsection (a)* of this section)."]

RECORDS AND AUDIT

SEC. 313. (a) Each recipient of a grant under this title or of financial assistance under Sec. 308 shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition of the funds received under the grant and of the proceeds of such assistance, the total cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall —

(1) after any grant is made under this title or any financial assistance is provided under section 308(d); and

(2) until the expiration of 3 years after —

(A) completion of the project, program, or other undertaking for which such grant was made or used, or

(B) repayment of the loan or guaranteed indebtedness for which such financial assistance was provided,

have access for purposes of audit and examination to any record, book, document, and paper which belongs to or is used or controlled by, any recipient of the grant funds or any person who entered into any transaction relating to such financial assistance and which is pertinent for purposes of determining if the grant funds or the proceeds of such financial assistance are being, or were, used in accordance with the provisions of this title.

[The second 313 was added by PL 101-508]

WALTER B. JONES EXCELLENCE IN COASTAL ZONE MANAGEMENT AWARDS

SEC. 313. (a) The Secretary shall, using sums in the Coastal Zone Management Fund established under section 308, implement a program to promote excellence in coastal zone management by identifying and acknowledging outstanding accomplishments in the field.

(b) The Secretary shall select annually—

(1) one individual, other than an employee or officer of the Federal Government, whose contribution to the field of coastal zone management has been the most significant;

(2) 5 local governments which have made the most progress in developing and implementing the coastal zone management principles embodied in this title; and

(3) up to 10 graduate students whose academic study promises to contribute materially to development of new or improved approaches to coastal zone management.

(c) In making selections under subsection (b)(2) the Secretary shall solicit nominations from the coastal states, and shall consult with experts in local government planning and land use.

(d) In making selections under subsection (b)(3) the Secretary shall solicit nominations from coastal states and the National Sea Grant College Program.

(e) Using sums in the Coastal Zone Management Fund established under section 308, the Secretary shall establish and execute appropriate awards, to be known as the 'Walter B. Jones Awards', including—

(1) cash awards in an amount not to exceed $5,000 each;

(2) research grants; and

(3) public ceremonies to acknowledge such awards.

ADVISORY COMMITTEE

SEC. 314. [Repealed]
[314 repealed by PL 99-272]

NATIONAL ESTUARINE RESEARCH RESERVE SYSTEM

[315 head amended by PL 101-508]

SEC. 315. (a) Establishment of the System.—There is established the National Estuarine Reserve Research System (hereinafter referred to in this section as the 'System') that consists of—

(1) each estuarine sanctuary designated under this section as in effect before the date of the enactment of the Coastal Zone Management Reauthorization Act of 1985; and

(2) each estuarine area designated as a national estuarine reserve under subsection (b).

Each estuarine sanctuary referred to in paragraph (1) is hereby designated as a national estuarine reserve.

(b) Designation of National Estuarine Reserves.—After the date of the enactment of the Coastal Zone Management Reauthorization Act of 1985, the Secretary may designate an estuarine area as a national estuarine reserve if—

(1) the Governor of the coastal State in which the area is located nominates the area for that designation; and

(2) the Secretary finds that—

(A) the area is a representative estuarine ecosystem that is suitable for long-term research and contributes to the biogeographical and typological balance of the System;

*Subsection (a) revised Section 312 of this Act.

(B) the law of the coastal State provides long-term protection for reserve resources to ensure a stable environment for research;

(C) designation of the area as a reserve will serve to enhance public awareness and understanding of estuarine areas, and provide suitable opportunities for public education and interpretation; and

(D) the coastal State in which the area is located has complied with the requirements of any regulations issued by the Secretary to implement this section.

(c) Estuarine Research Guidelines.—The Secretary shall develop guidelines for the conduct of research within the System that shall include—

(1) a mechanism for identifying, and establishing priorities among, the coastal management issues that should be addressed through coordinated research within the System;

(2) the establishment of common research principles and objectives to guide the development of research programs within the System;

(3) the identification of uniform research methodologies which will ensure comparability of data, the broadest application of research results, and the maximum use of the System for research purposes;

(4) the establishment of performance standards upon which the effectiveness of the research efforts and the value of reserves within the System in addressing the coastal management issues identified in subsection (1) may be measured; and

(5) the consideration of additional sources of funds for estuarine research than the funds authorized under this Act, and strategies for encouraging the use of such funds within the System, with particular emphasis on mechanisms established under subsection (d).

In developing the guidelines under this section, the Secretary shall consult with prominent members of the estuarine research community.

(d) Promotion and Coordination of Estuarine Research.—The Secretary shall take such action as is necessary to promote and coordinate the use of the System for research purposes including—

(1) requiring that the National Oceanic and Atmospheric Administration, in conducting or supporting estuarine research give priority consideration to research that uses the System; and

(2) consulting with other Federal and State agencies to promote use of one or more reserves within the System by such agencies when conducting estuarine research.

(e) Financial Assistance.—(1) The Secretary may, in accordance with such rules and regulations as the Secretary shall promulgate, make grants—

(A) to a coastal State—

(i) for purposes of acquiring such lands and waters, and any property interests therein, as are necessary to ensure the appropriate long-term management of an area as a national estuarine reserve,

(ii) for purposes of operating or managing a national estuarine reserve and constructing appropriate reserve facilities, or

(iii) for purposes of conducting educational or interpretive activities; and

(B) to any coastal State or public or private person for purposes of supporting research and monitoring within a national estuarine reserve that are consistent with the research guidelines developed under subsection (c).

(2) Financial assistance provided under paragraph (1) shall be subject to such terms and conditions as the Secretary considers necessary or appropriate to protect the interests of the United States, including requiring coastal States to execute suitable title documents setting forth the property interest or interests of the United States in any lands and waters acquired in whole or part with such financial assistance.

(3)(A) The amount of the financial assistance provided under paragraph (1)(A)(i) with respect to the acquisition of lands and waters, or interests therein, for any one national estuarine reserve may not exceed an amount equal to 50 percent of the costs of the lands, waters, and interests therein or $5,000,000, whichever amount is less.

[315(e)(3)(A) amended by PL 101-508]

(B) The amount of the financial assistance provided under paragraph (1)(A)(ii) and (iii) and paragraph (1)(B) may not exceed 70 percent of the costs incurred to achieve the purposes described in those paragraphs with respect to a reserve; except that the amount of the financial assistance provided under paragraph (1)(A)(iii) may be up to 100 percent of any costs for activities that benefit the entire System.

[315(e)(3)(B) amended by PL 101-508]

(f) Evaluation of System Performance.—(1) The Secretary shall periodically evaluate the operation and management of each national estuarine reserve, including education and interpretive activities, and the research being conducted within the reserve.

(2) If evaluation under paragraph (1) reveals that the operation and management of the reserve is deficient, or that the research being conducted within the reserve is not consistent with the research guidelines developed under subsection (c), the Secretary may suspend the eligibility of that reserve for financial assistance under subsection (e) until the deficiency or inconsistency is remedied.

(3) The secretary may withdraw the designation of an estuarine area as a national estuarine reserve if evalua-

tion under paragraph (1) reveals that—

(A) the basis for any one or more of the findings made under subsection (b)(2) regarding that area no longer exists; or

(B) a substantial portion of the research conducted within the area, over a period of years, has not been consistent with the research guidelines developed under subsection (c).

(g) Report.—The Secretary shall include in the report required under section 316 information regarding—

(1) new designations of national estuarine reserves;

(2) any expansion of existing national estuarine reserves;

(3) the status of the research program being conducted within the System; and

(4) a summary of the evaluations made under subsection (f).

[315 amended by PL 96-464; revised by PL 99-272]

COASTAL ZONE MANAGEMENT REPORT

[316 head revised by PL 96-464]

SEC. 316. (a) The Secretary shall consult with the Congress on a regular basis concerning the administration of this title and shall prepare and submit to the President for transmittal to the Congress a report summarizing the administration of this title during each period of two consecutive fiscal years. Each report, which shall be transmitted to the Congress not later than April 1 of the year following the close of the biennial period to which it pertains, shall include, but not be restricted to (1) an identification of the state programs approved pursuant to this title during the preceding Federal fiscal year and a description of those programs; (2) a listing of the states participating in the provisions of this title and a description of the status of each state's programs and its accomplishments during the preceding Federal fiscal year; (3) an itemization of the allocation of funds to the various coastal states and a breakdown of the major projects and areas on which these funds were expended; (4) an identification of any state programs which have been reviewed and disapproved and a statement of the reasons for such action; (5) a summary of evaluation findings prepared in accordance with subsection (a) of section 312, and a description of any sanctions imposed under subsections (c) and (d) of this section; (6) a listing of all activities and projects which, pursuant to the provisions of subsection (c) or subsection (d) of section 307, are not consistent with an applicable approved state management program; (7) a summary of the regulations issued by the Secretary or in effect during the preceding Federal fiscal year; (8) a summary of a coordinated national strategy and program for the Nation's coastal zone including identification and discussion of Federal, regional, state, and local responsibilities and functions therein; (9) a summary of outstanding problems arising in the administration of this title in order of priority; (10) a description of the economic, environmental, and social consequences of energy activity affecting the coastal zone and an evaluation of the effectiveness of financial assistance under section 308 in dealing with such consequences; (11) a description and evaluation of applicable interstate and regional planning and coordination mechanisms developed by the coastal states; (12) a summary and evaluation of the research, studies, and training conducted in support of coastal zone management; and (13) such other information as may be appropriate.

[316(a) amended by PL 96-464]

(b) The report required by subsection (a) shall contain such recommendations for additional legislation as the Secretary deems necessary to achieve the objectives of this title and enhance its effective operation.

(c) (1) The Secretary shall conduct a systematic review of Federal programs, other than this title, that affect coastal resources for purposes of identifying conflicts between the objectives and administration of such programs and the purposes and policies of this title. Not later than 1 year after the date of the enactment of this subsection, the Secretary shall notify each Federal agency having appropriate jurisdiction of any conflict between its program and the purposes and policies of this title identified as a result of such review.

(2) The Secretary shall promptly submit a report to the Congress consisting of the information required under paragraph (1) of this subsection. Such report shall include recommendations for changes necessary to resolve existing conflicts among Federal laws and programs that affect the uses of coastal resources.

[316(c) added by PL 96-464]

RULES AND REGULATIONS

SEC 317. The Secretary shall develop and promulgate, pursuant to section 553 of title 5, United States Code, after notice and opportunity for full participation by relevant Federal agencies, state agencies, local governments, regional organizations, port authorities, and other interested parties, both public and private, such rules and regulations as may be necessary to carry out the provisions of this title.

AUTHORIZATION OF APPROPRIATIONS

SEC. 318. (a) There are authorized to be appropriated to the Secretary —

[318(a) revised by PL 96-464; PL 99-272; PL 101-508]

(1) such sums, not to exceed $750,000 for each of the fiscal years occurring during the period beginning October 1, 1990, and ending September 30, 1993, as may be necessary for grants under section 305, to remain available until expended;

(2) such sums, not to exceed $42,000,000 for the fiscal year ending September 30, 1991, $48,890,000 for the fiscal year ending September 30, 1992, $58,870,000 for the fiscal year ending September 30, 1993, $67,930,000 for the fiscal year ending September 30, 1994, and $90,090,000 for the fiscal year ending September 30, 1995, as may be necessary for grants under sections 306, 306A, and 309, to remain available until expended;

(3) such sums, not to exceed $6,000,000 for the fiscal year ending September 30, 1991, $6,270,000 for the fiscal year ending September 30, 1992, $6,552,000 for the fiscal year ending September 30, 1993, $6,847,000 for the fiscal year ending September 30, 1994, and $7,155,000 for the fiscal year ending September 30, 1995, as may be necessary for grants under section 315, to remain available until expended; and

(4) such sums, not to exceed $10,000,000 for each of the fiscal years occurring during the period beginning October 1, 1990, and ending September 30, 1995, as may be necessary for activities under section 310 and for administrative expenses incident to the administration of this title; except that expenditures for such administrative expenses shall not exceed $5,000,000 in any such fiscal year.

(b) There are authorized to be appropriated until October 1, 1986, to the Fund, such sums, not to exceed $800,000,000, for the purposes of carrying out the provisions of section 308, other than subsection (b), of which not to exceed $150,000,000 shall be for purposes of subsections (c)(1), (c)(2) and (c)(3) of such section.

[318(b) amended by PL 96-464]

(c) Federal funds received from other sources shall not be used to pay a coastal state's share of costs under section 306 or 309.

[318(c) amended by PL 96-464]

(d) The amount of any grant, or portion of a grant, made to a State under any section of this Act which is not obligated by such State during the fiscal year, or during the second fiscal year after the fiscal year, for which it was first authorized to be obligated by such State shall revert to the Secretary. The Secretary shall add such reverted amount to those funds available for grants under the section for such reverted amount was originally made available.

[318(d) added by PL 99-626]

[*Editor's note:* In addition to amending existing sections of the Coastal Zone Management Act of 1972 and adding new sections to the Act, PL 94-370 includes the following sections:]

SEC. 15. ADMINISTRATION

(a) [Repealed by PL 95-219]

(b) [Superseded by subsection (b) of PL 95-219. See editor's note below.]

(c) [Repealed by PL 99-272]

SEC. 16. SHELLFISH SANITATION REGULATIONS.

(a) The Secretary of Commerce shall —

(1) undertake a comprehensive review of all aspects of the molluscan shellfish industry, including, but not limited to, the harvesting, processing, and transportation of such shellfish; and

(2) evaluate the impact of Federal law concerning water quality on the molluscan shellfish industry.

The Secretary of Commerce shall, not later than April 30, 1977, submit a report to the Congress of the findings, comments, and recommendations (if any) which result from such review and evaluation.

(b) The Secretary of Health, Education, and Welfare shall not promulgate final regulations concerning the national shellfish safety program before June 30, 1977. At least 60 days prior to the promulgation of any such regulations, the Secretary of Health, Education, and Welfare, in consultation with the Secretary of Commerce, shall publish an analysis (1) of the economic impact of such regulations on the domestic shellfish industry, and (2) the cost of such national shellfish safety program relative to the benefits that it is expected to achieve.

[*Editor's note:* In addition to repealing Section 15(a) of PL 94-370, subsection (b) of PL 95-219 amended Section 5316 of Title 5, United States Code as follows:

"(140) Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(141) Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

(142) Assistant Administrators (3), National Oceanic and Atmospheric Administration.

(143) General Counsel, National Oceanic and Atmospheric Administration."]

[*Editor's note:* Sections 2 through 11 and 13 of PL 96-464 amended and have been incorporated into the existing language of this Act. Section 12 of PL 96-464 follows:]

SEC. 12. CONGRESSIONAL DISAPPROVAL PROCEDURE.

(a) (1) The Secretary, after promulgating a final rule, shall submit such final rule to the Congress for review in accordance with this section. Such final rule shall be delivered to each House of the Congress on the same date and to each House of the Congress while it is in session. Such final rule shall be referred to the Committee on Commerce, Science, and Transportation

of the Senate and to the Committee on Merchant Marine and Fisheries of the House, respectively.

(2) Any such final rule shall become effective in accordance with its terms unless, before the end of the period of sixty calendar days of continuous session, after the date such final rule is submitted to the Congress, both Houses of the Congress adopt a concurrent resolution disapproving such final rule.

(b) (1) The provisions of this subsection are enacted by the Congress—

(A) as an exercise in the rulemaking power of the House of Representatives and as such they are deemed a part of the Rules of the House of Representatives but applicable only with respect to the procedure to be followed in the House of Representatives in the case of concurrent resolutions which are subject to this section, and such provisions supersede other rules only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time in the same manner and to the same extent as in the case of any other rule of that House.

(2) Any concurrent resolution disapproving a final rule of the Secretary shall, upon introduction or receipt from the other House of the Congress, be referred immediately by the presiding officer of such House to the Committee on Commerce, Science, and Transportation of the Senate or to the Committee on Merchant Marine and Fisheries of the House, as the case may be.

(3) (A) When a committee has reported a concurrent resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the concurrent resolution. The motion shall be highly privileged in the House of Representatives, and shall not be debatable. An amendment to such motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate in the House of Representatives on the concurrent resolution shall be limited to not more than ten hours which shall be divided equally between those favoring and those opposing such concurrent resolution and a motion further to limit debate shall not be debatable. In the House of Representatives, an amendment to, or motion to recommit, the concurrent resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such concurrent resolution was agreed to or disagreed to.

(4) Appeals from the decision of the Chair relating to the application of the rules of the House of Representatives to the procedure relating to a concurrent resolution shall be decided without debate.

(5) Notwithstanding any other provision of this subsection, if a House has approved a concurrent resolution with respect to any final rule of the Secretary, then it shall not be in order to consider in such House any other concurrent resolution with respect to the same final rule.

(c) (1) If a final rule of the Secretary is disapproved by the Congress under subsection (a)(2), then the Secretary may promulgate a final rule which relates to the same acts or practices as the final rule disapproved by the Congress in accordance with this subsection. Such final rule—

(A) shall be based upon—

(i) the rulemaking record of the final rule disapproved by the Congress; or

(ii) such rulemaking record and the record established in supplemental rulemaking proceedings conducted by the Secretary in accordance with section 553 of title 5, United States Code, in any case in which the Secretary determines that it is necessary to supplement the existing rulemaking record; and

(B) may contain such changes as the Secretary considers necessary or appropriate.

(2) The Secretary after promulgating a final rule under this subsection, shall submit the final rule to the Congress in accordance with subsection (a)(1).

(d) Congressional inaction on, or rejection of a concurrent resolution of disapproval under this section shall not be construed as an expression of approval of the final rule involved, and shall not be construed to create any presumption of validity with respect to such final rule.

(e) (1) Any interested party may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this section. The district court immediately shall certify all questions of the constitutionality of this section to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(2) Notwithstanding any other provision of law, any decision on a matter certified under paragraph (1) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought not later than twenty days after the decision of the court of appeals.

(3) [Repealed]

[12(e)(3) repealed by PL 98-620]

(f) (1) For purposes of this section—

(A) continuity of session is broken only by an adjournment sine die; and

(B) days on which the House of Representatives is not in session because of an adjournment of more

than five days to a day certain are excluded in the computation of the periods specified in subsection (a)(2) and subsection (b).

(2) If an adjournment sine die of the Congress occurs after the Secretary has submitted a final rule under subsection (a)(1), but such adjournment occurs—

(A) before the end of the period specified in subsection (a)(2); and

(B) before any action necessary to disapprove the final rule is completed under subsection (a)(2);

then the Secretary shall be required to resubmit the final rule involved at the beginning of the next regular session of the Congress. The period specified in subsection (a)(2) shall begin on the date of such resubmission.

(g) For purposes of this section:

(1) The term "Secretary" means the Secretary of Commerce.

(2) The term "concurrent resolution" means a concurrent resolution the matter after the resolving clause of which is as follows: "That the Congress disapproves the final rule promulgated by the Secretary of Commerce dealing with the matter of , which final rule was submitted to the Congress on .". (The blank spaces shall be filled appropriately.)

(3) The term "rule" means any rule promulgated by the Secretary pursuant to the Coastal Zone Management Act (16 U.S.C. 1450 et. seq.).

(h) The provisions of this section shall take effect on the date of the enactment of this Act and shall cease to have any force or effect after September 30, 1985.

[*Editor's note*: Sec. 6217 of P.L. 101-508 did not amend the Coastal Zone Management Act of 1972, but provides the following:

PROTECTING COASTAL WATERS

SEC. 6217. (a) In General. — (1) Program development. — Not later than 30 months after the date of the publication of final guidance under subsection (g), each State for which a management program has been approved pursuant to section 306 of the Coastal Zone Management Act of 1972 shall prepare and submit to the Secretary and the Administrator a Coastal Nonpoint Pollution Control Program for approval pursuant to this section. The purpose of the program shall be to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters, working in close conjunction with other State and local authorities.

(2) Program coordination. — A State program under this section shall be coordinated closely with State and local water quality plans and programs developed pursuant to sections 208, 303, 319, and 320 of the Federal Water Pollution Control Act (33 U.S.C. 1288, 1313, 1329, and 1330) and with State plans developed pursuant to the Coastal Zone Management Act of 1972, as amended by this Act. The program shall serve as an update and expansion of the State nonpoint source management program developed under section 319 of the Federal Water Pollution Control Act, as the program under that section relates to land and water uses affecting coastal waters.

(b) Program Contents. — Each State program under this section shall provide for the implementation, at a minimum, of management measures in conformity with the guidance published under subsection (g), to protect coastal waters generally and shall also contain the following:

(1) Identifying land uses. — The identification of, and a continuing process for identifying, land uses which, individually or cumulatively, may cause or contribute significantly to a degradation of —

(A) those coastal waters where there is a failure to attain or maintain applicable water quality standards or protect designated uses, as determined by the State pursuant to its water quality planning processes; or

(B) those coastal waters that are threatened by reasonably foreseeable increases in pollution loadings from new or expanding sources.

(2) Identifying critical coastal areas. — The identification of, and a continuing process for identifying, critical coastal areas adjacent to coastal waters referred to in paragraph (1)(A) and (B), within which any new land uses or substantial expansion of existing land uses shall be subject to management measures in addition to those provided for in subsection (g).

(3) Management measures. — The implementation and continuing revision from time to time of additional management measures applicable to the land uses and areas identified pursuant to paragraphs (1) and (2) that are necessary to achieve and maintain applicable water quality standards under section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313) and protect designated uses.

(4) Technical assistance. — The provision of technical and other assistance to local governments and the public for implementing the measures referred to in paragraph (3), which may include assistance in developing ordinances and regulations, technical guidance, and modeling to predict and assess the effectiveness of such measures, training, financial incentives, demonstration projects, and other innovations to protect coastal water quality and designated uses.

(5) Public participation. — Opportunities for public participation in all aspects of the program, including the use of public notices and opportunities for comment, nomination procedures, public hearings, technical and financial assistance, public education, and other means.

(6) Administrative coordination.—The establishment of mechanisms to improve coordination among State agencies and between State and local officials responsible for land use programs and permitting, water quality permitting and enforcement, habitat protection, and public health and safety, through the use of joint project review, memoranda of agreement, or other mechanisms.

(7) State coastal zone boundary modification.—A proposal to modify the boundaries of the State coastal zone as the coastal management agency of the State determines is necessary to implement the recommendations made pursuant to subsection (e). If the coastal management agency does not have the authority to modify such boundaries, the program shall include recommendations for such modifications to the appropriate State authority.

(c) Program Submission, Approval, and Implementation.—(1) Review and approval.—Within 6 months after the date of submission by a State of a program pursuant to this section, the Secretary and the Administrator shall jointly review the program. The program shall be approved if—

(A) the Secretary determines that the portions of the program under the authority of the Secretary meet the requirements of this section and the Administrator concurs with the determination; and

(B) the Administrator determines that the portions of the program under the authority of the Administrator meet the requirements of this section and the Secretary concurs with that determination.

(2) Implementation of approved program.—If the program of a State is approved in accordance with paragraph (1), the State shall implement the program, including the management measures included in the program pursuant to subsection (b), through—

(A) changes to the State plan for control of nonpoint source pollution approved under section 319 of the Federal Water Pollution Control Act; and

(B) changes to the State coastal zone management program developed under section 306 of the Coastal Zone Management Act of 1972, as amended by this Act.

(3) Withholding coastal management assistance.—If the Secretary finds that a coastal State has failed to submit an approvable program as required by this section, the Secretary shall withhold for each fiscal year until such a program is submitted a portion of grants otherwise available to the State for the fiscal year under section 306 of the Coastal Zone Management Act of 1972, as follows:

(A) 10 percent for fiscal year 1996.

(B) 15 percent for fiscal year 1997.

(C) 20 percent for fiscal year 1998.

(D) 30 percent for fiscal year 1999 and each fiscal year thereafter.

The Secretary shall make amounts withheld under this paragraph available to coastal States having programs approved under this section.

(4) Withholding water pollution control assistance.—If the Administrator finds that a coastal State has failed to submit an approvable program as required by this section, the Administrator shall withhold from grants available to the State under section 319 of the Federal Water Pollution Control Act, for each fiscal year until such a program is submitted, an amount equal to a percentage of the grants awarded to the State for the preceding fiscal year under that section, as follows:

(A) For fiscal year 1996, 10 percent of the amount awarded for fiscal year 1995.

(B) For fiscal year 1997, 15 percent of the amount awarded for fiscal year 1996.

(C) For fiscal year 1998, 20 percent of the amount awarded for fiscal year 1997.

(D) For fiscal year 1999 and each fiscal year thereafter, 30 percent of the amount awarded for fiscal year 1998 or other preceding fiscal year.

The Administrator shall make amounts withheld under this paragraph available to States having programs approved pursuant to this subsection.

(d) Technical Assistance.—The Secretary and the Administrator shall provide technical assistance to coastal States and local governments in developing and implementing programs under this section. Such assistance shall include—

(1) methods for assessing water quality impacts associated with coastal land uses;

(2) methods for assessing the cumulative water quality effects of coastal development;

(3) maintaining and from time to time revising an inventory of model ordinances, and providing other assistance to coastal States and local governments in identifying, developing, and implementing pollution control measures; and

(4) methods to predict and assess the effects of coastal land use management measures on coastal water quality and designated uses.

(e) Inland Coastal Zone Boundaries.—(1) Review.—The Secretary, in consultation with the Administrator of the Environmental Protection Agency, shall, within 18 months after the effective date of this title, review the inland coastal zone boundary of each coastal State program which has been approved or is proposed for approval under section 306 of the Coastal Zone Management Act of 1972, and evaluate whether the State's coastal zone boundary extends inland to the extent necessary to control the land and water uses that have a significant impact on coastal waters of the State.

(2) Recommendation.—If the Secretary, in consultation with the Administrator, finds that modifications to

the inland boundaries of a State's coastal zone are necessary for that State to more effectively manage land and water uses to protect coastal waters, the Secretary, in consultation with the Administrator, shall recommend appropriate modifications in writing to the affected State.

(f) Financial Assistance.—(1) In general.—Upon request of a State having a program approved under section 306 of the Coastal Zone Management Act of 1972, the Secretary, in consultation with the Administrator, may provide grants to the State for use for developing a State program under this section.

(2) Amount.—The total amount of grants to a State under this subsection shall not exceed 50 percent of the total cost to the State of developing a program under this section.

(3) State share.—The State share of the cost of an activity carried out with a grant under this subsection shall be paid from amounts from non-Federal sources.

(4) Allocation.—Amounts available for grants under this subsection shall be allocated among States in accordance with regulations issued pursuant to section 306(c) of the Coastal Zone Management Act of 1972, except that the Secretary may use not more than 25 percent of amounts available for such grants to assist States which the Secretary, in consultation with the Administrator, determines are making exemplary progress in preparing a State program under this section or have extreme needs with respect to coastal water quality.

(g) Guidance for Coastal Nonpoint Source Pollution Control.—(1) In General.—The Administrator, in consultation with the Secretary and the Director of the United States Fish and Wildlife Service and other Federal agencies, shall publish (and periodically revise thereafter) guidance for specifying management measures for sources of nonpoint pollution in coastal waters.

(2) Content.—Guidance under this subsection shall include, at a minimum—

(A) a description of a range of methods, measures, or practices, including structural and nonstructural controls and operation and maintenance procedures, that constitute each measure;

(B) a description of the categories and subcategories of activities and locations for which each measure may be suitable;

(C) an identification of the individual pollutants or categories or classes of pollutants that may be controlled by the measures and the water quality effects of the measures;

(D) quantitative estimates of the pollution reduction effects and costs of the measures;

(E) a description of the factors which should be taken into account in adapting the measures to specific sites or locations; and

(F) any necessary monitoring techniques to accompany the measures to assess over time the success of the measures in reducing pollution loads and improving water quality.

(3) Publication.—The Administrator, in consultation with the Secretary shall publish—

(A) proposed guidance pursuant to this subsection not later than 6 months after the date of the enactment of this Act; and

(B) final guidance pursuant to this subsection not later than 18 months after such effective date.

(4) Notice and comment.—The Administrator shall provide to coastal States and other interested persons an opportunity to provide written comments on proposed guidance under this subsection.

(5) Management measures.—For purposes of this subsection, the term "management measures" means economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives.

(h) Authorizations of Appropriations.—

(1) Administrator.—There is authorized to be appropriated to the Administrator for use for carrying out this section not more than $1,000,000 for each of fiscal years 1992, 1993, and 1994.

(2) Secretary.—(A) Of amounts appropriated to the Secretary for a fiscal year under section 318(a)(4) of the Coastal Zone Management Act of 1972, as amended by this Act, not more than $1,000,000 shall be available for use by the Secretary for carrying out this section for that fiscal year, other than for providing in the form of grants under subsection (f).

(B) There is authorized to be appropriated to the Secretary for use for providing in the form of grants under subsection (f) not more than—

(i) $6,000,000 for fiscal year 1992;

(ii) $12,000,000 for fiscal year 1993;

(iii) $12,000,000 for fiscal year 1994; and

(iv) $12,000,000 for fiscal year 1995.

(i) Definitions.—In this section—

(1) the term "Administrator" means the Administrator of the Environmental Protection Agency;

(2) the term "coastal State" has the meaning given the term "coastal state" under section 304 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453);

(3) each of the terms "coastal waters", and "coastal zone" has the meaning that term has in the Coastal Management Act of 1972;

(4) the term "coastal management agency" means a State agency designated pursuant to section 306(d)(6) of the Coastal Zone Management Act of 1972;

(5) the term "land use" includes a use of waters adjacent to coastal waters; and

(6) the term "Secretary" means the Secretary of Commerce.]

18.
1990 Amendments to the Coastal Zone Management Act, a summary by the Coastal Zone Information Center

1990 AMENDMENTS

TO THE

COASTAL ZONE MANAGEMENT ACT:

A SUMMARY

Coastal Zone Information Center
Office of Ocean and Coastal Resource Management
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COASTAL ZONE MANAGEMENT ACT REAUTHORIZATION

On November 5, 1990, the President signed the Coastal Zone Management Act Amendments of 1990 (the Act), which reauthorized for five years the coastal zone management and estuarine research reserve programs. Approved by Congress just before it recessed for the November elections, the Act is designed to modernize and strengthen the Coastal Zone Management Act (CZMA) to address the new and emerging coastal issues of the 1990s. The Act makes a number of changes to the CZMA, including the addition of Outer Continental Shelf oil and gas lease sales to the Federal consistency provisions, the establishment of state coastal water quality protection programs, and the creation of a new enhancement grants program.

The final version of the five-year CZMA reauthorization, which was tied strategically to the Omnibus Budget Reconciliation Act of 1990, was negotiated by conferees from the Senate Commerce, Science and Transportation Committee and the House Merchant Marine and Fisheries Committee, as part of the House-Senate conference on the budget deficit reconciliation package. The conferees worked with the Senate Environment and Public Works Committee and the House Public Works and Transportation Committee to reach a compromise regarding the coastal water quality provisions. The final language reflects a compromise between the House-passed CZMA reauthorization bill, H.R. 5665, and a similar Senate measure (S. 2782).

Federal Consistency

The final bill amends the Federal consistency provisions (Section 307) to overturn the Supreme Court's 1984 decision in Secretary of the Interior v. California and make clear that Outer Continental Shelf (OCS) oil and gas lease sales are subject to the requirements of Section 307(c)(1). The new language clarifies that all Federal agency activities, including OCS oil and gas lease sales and the designation of ocean dumping sites, whether in or outside of the coastal zone, are subject to the consistency requirements of Section 307(c)(1) of the CZMA if they affect natural resources, land uses or water uses in the coastal zone. This is in keeping with NOAA's current regulations, which say that the geographic scope of Federal consistency review is based on the effect of a Federal activity on coastal zone uses and resources, not on the location of the activity.

In the conference report on the bill, the House and Senate conferees provided a clarification regarding a Federal agency's determination of whether a specific Federal agency activity may affect any natural resource, land use, or water use in the coastal zone. The conferees stated that this determination "is to include effects in the coastal

including cumulative and secondary effects. Therefore, the term 'affecting' is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable."

A new provision is added to the CZMA, Section 307(c)(2), which authorizes the President to exempt a specific Federal project if the President determines that it is in the paramount interest of the U.S. This exemption can only arise after a Federal court has determined that the Federal agency activity is inconsistent with a state CZM program. The provision is based on similar exemption provisions in other environmental statutes, including the Clean Water Act and the Clean Air Act. The Act clarifies that the exemption can not be applicable to a class of Federal agency activities, only to a specific activity.

Coastal Nonpoint Pollution Control

The Act established a new, stand alone provision which requires states and territories with federally-approved CZM programs to develop a Coastal Nonpoint Pollution Control Program (CNPCP). The program, which must be submitted to NOAA and the Environmental Protection Agency for approval, will be implemented through changes to both the state coastal management and nonpoint source management programs (Section 319 of the Clean Water Act). The purpose of the program is to develop and implement management measures for nonpoint source pollution control to restore and protect coastal waters, working in close conjunction with other state and local authorities. The statute defines "management measures" as "economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives."

Under this new section, EPA must publish guidance, in consultation with NOAA and other Federal agencies, specifying management measures for sources of nonpoint pollution in coastal waters. The guidance must include: (1) a description of a range of methods, measures, or practices, including structural and nonstructural controls and operation and maintenance procedures, that constitute each measure; (2) a description of the categories and subcategories of activities and locations for which each measure may be suitable; (3) an identification of the individual pollutants or categories or classes of pollutants that may be controlled by the measures and the water quality effects of the measures; (4) quantitative estimates of the pollution reduction effects of the measures; (5) a description of the factors which should be taken into account in adapting the measures to specific sites or locations; and (6) any necessary monitoring techniques to accompany the measures to assess over time the success of the measures in reducing pollution loads and improving water quality. Draft guidance must be published six

months after enactment, with final guidance due within 18 months. Coastal states and other interested parties must have an opportunity to provide written comments on the draft guidance.

States have 30 months from issuance of final guidance to comply with this requirement. States which fail to submit approvable programs could lose up to 30 percent of their funding under Section 306 of the CZMA and Section 319 of the Clean Water Act. In addition to providing management measures, the programs must contain, among other things: identification of land uses which individually or cumulatively may cause or contribute significantly to the degradation of certain coastal waters; identification of "critical coastal areas" within which any new land uses or substantial expansion of existing land uses will be subject to the management measures; implementation of additional management measures applicable to the land uses and identified coastal areas that are necessary to achieve and maintain applicable water quality standards under Section 303 of the Clean Water Act; provision of technical assistance to local governments and the public for implementing the management measures; opportunities for public participation in all aspects of the program; and establishment of mechanisms to improve coordination among state agencies and between state and local officials.

NOAA and EPA are required to provide technical assistance to coastal states and local governments in developing and implementing programs under this section. The assistance must include: methods for assessing water quality impacts associated with coastal land uses; methods for assessing the cumulative water quality effects of coastal development; maintaining an inventory of model ordinances, and providing other assistance to coastal states and local governments in identifying, developing and implementing pollution control measures; and methods to predict and assess the effects of coastal land use management measures on coastal water quality and designated uses.

The Act also requires the Secretary of Commerce, in consultation with EPA, to review the inland coastal zone boundary of each coastal state with a federally-approved program and evaluate whether the state's coastal zone boundary extends inland to the extent necessary to control the land and water uses that have a significant impact on coastal waters of the state. This review must be completed within 18 months of enactment. If the Secretary finds that modifications are necessary for a state to more effectively manage land and water uses to protect coastal waters, he must recommend appropriate modifications in writing to the state.

CZM Program Enhancements

CZMA's Section 309 was revised to establish a new enhancements grant program to encourage states to continually improve their federally-approved CZM programs in one or more of eight identified areas. The "Coastal Zone Enhancement Objectives"

include: (1) coastal wetlands management and protection; (2) natural hazards management (including the potential for sea and Great Lakes level rise); (3) public access improvements; (4) reduction of marine debris; (5) assessment of cumulative and secondary impacts of coastal development; (6) special area management planning; (7) ocean resource planning; and (8) siting of coastal energy and government facilities.

Beginning in Fiscal Year 1991, the Secretary is authorized to make grants (not less than 10 percent and not more than 20 percent of the amounts appropriated under Sections 306 and 306A of the CZMA) to coastal states to provide funding for development and submission for Federal approval of program changes that support attainment of one or more of the coastal zone enhancement objectives. As part of this effort, the Secretary is required to evaluate and rank state proposals for funding, and make funding awards based on those proposals. The Secretary has the authority to suspend a state's eligibility for funding under Section 309 for at least one year, if the Secretary finds that the state is not undertaking the actions committed to under the terms of the 309 grant.

NOAA must issue regulations relating to the new Section 309 within 12 months of enactment (by November 5, 1991). The regulations must establish: "(1) specific and detailed criteria that must be addressed by a coastal state (including the state's priority needs for improvement as identified by the Secretary after careful consultation with the state) as part of the state's development and implementation of coastal zone enhancement objectives; (2) administrative or procedural rules or requirements as necessary to facilitate the development and implementation of such objectives by coastal states; and (3) other funding award criteria as are necessary or appropriate to ensure that evaluations of proposals, and decisions to award funding, under this section are based on objective standards applied fairly and equitably to those proposals."

Coastal Zone Management Fund

The Act repeals the Coastal Energy Impact Program (CEIP), but requires that repayments of the remaining $87.5 million in program loans still outstanding be deposited into a new "Coastal Zone Management Fund" as they are repaid. Section 308(b)(2) authorizes the Secretary to expend amounts in the Fund for administration of the CZM program and for specified discretionary activities: regional and interstate projects (formerly Section 309); demonstration projects; emergency assistance; excellence awards pursuant to Section 313; program development grants pursuant to Section 305; and to assist states in applying the public trust doctrine in the implementation of their CZM programs. In recent years, annual loan repayments have ranged from a low of $4 million to a high of $15 million, with an annual average of some $6-8 million. The House and Senate conferees anticipate an annual expenditure of between $6 million and $8 million through the CZM Fund, subject to appropriation.

Coastal Zone Management Review

The Act provides new authority under Section 312 to impose "interim sanctions" on a state program for up to three years if the state is failing to adhere to its federally-approved program. The Secretary is authorized to suspend financial assistance awards, if he/she determines that the coastal state is failing to adhere to (A) the federally-approved coastal management program or a state plan developed to manage a National Estuarine Reserve established under Section 315, or a portion of the program or plan approved by the Secretary, or (B) the terms of any grant or cooperative agreement. Before suspending financial assistance, the Secretary must provide the Governor of the coastal state with written specifications and a schedule for the actions that should be taken by the State in order that the suspension be withdrawn, and written specifications stating how those funds from the suspended financial assistance will be expended by the coastal state to take actions identified by the Secretary. The suspension of financial assistance may not last for less than six months or more than 36 months.

The House and Senate conferees also revised the procedures for carrying out evaluations of State CZM programs and National Estuarine Research Reserves. In addition to mandating "full" public participation in the evaluation of state programs, the changes require: a 45-day notice for public meetings; written response to all written comments on the evaluation; and completion of the final evaluation report within 120 days after the last public meeting held in the state.

Other provisions of the 1990 CZMA Amendments include:

* **a new section 310 which requires the Secretary to provide technical assistance** and management-oriented research to support development and implementation of state CZM programs, and appropriate to the furtherance of international cooperative efforts and technical assistance in coastal zone management;

* **minor modifications to the National Estuarine Research Reserve System** including an increase in the maximum amount of Federal financial assistance for land or water acquisition at Reserve sites and an increase in the Federal share of costs for managing a reserve and constructing facilities;

* **authorization for NOAA to make annual achievement awards** to individuals and local governments who have been recognized for outstanding accomplishments in the field of coastal zone management;

* **a doubling of the authorization levels for the CZM program,** from the fiscal year 1990 level of $51.6 million -- of which $41 million was appropriated -- to $120.1 million for Fiscal Year 1995; and

* **clarification that the seaward coastal zone boundary** extends only to the limit of state ownership and title (in most cases, three nautical miles), an issue that was clouded when President Ronald Reagan extended the U.S. territorial sea to 12 miles in 1988.

The implementation of these major, new CZMA provisions will be a challenge, and will require much work and close cooperation at the Federal, state and local level and with the public and private sectors. OCRM has already begun to organize its activities in order to meet the tight timelines for guidance and regulations as required by the 1990 Amendments. There is a 12-month statutory deadline for the enhancement grant regulations. In addition, there are revisions to Section 312 that are effective immediately and conflict with NOAA's current regulations. In order to meet these immediate requirements, OCRM anticipates conducting a phased rulemaking with the first phase limited to the enhancement grants program and program evaluations. We expect to complete issue papers on these subjects in late February or early March. The issue papers will be widely distributed. OCRM will look forward to your comments and your future involvement in the office's implementation activities.

For additional information, contact the Coastal Zone Information Center, Office of Ocean and Coastal Resource Management, NOAA, 1825 Connecticut Ave., N.W. Washington, D.C. 20235; (202) 606-4115

19.
Marine Protection, Research, and Sanctuaries Act PRS of 1972, as amended (without 1992 amendments)

MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT OF 1972

(Enacted by P.L. 92-532, October 23, 1972, 86 Stat. 1052, 33 U.S.C. 1401 et seq., and 16 U.S.C. 1431 et seq.; Amended by P.L. 93-254, March 22, 1974; P.L. 93-472, October 26, 1974; P.L. 94-62, July 25, 1975; P.L. 94-326, June 30, 1976; P.L. 95-153, November 4, 1977; P.L. 96-332, August 29, 1980; P.L. 96-381, October 6, 1980; P.L. 96-470, October 19, 1980; P.L. 96-572, December 22, 1980; P.L. 97-16, June 23, 1981; P.L. 97-109, December 26, 1981; PL 97-375, December 21, 1982; PL 97-424, January 6, 1983; PL 98-498, October 19, 1984; PL 99-272, April 7, 1986; PL 99-499, October 17, 1986; PL 99-662, November 17, 1986; PL 100-4, February 4, 1987; PL 100-17, April 2, 1987; PL 100-536, October 28, 1988; PL 100-627, November 7, 1988; PL 100-688, November 18, 1988; PL 101-593, November 16, 1990)

This Act may be cited as the "Marine Protection, Research, and Sanctuaries Act of 1972."

Finding, Policy, and Purpose

Sec. 2. (a) Unregulated dumping of material into ocean waters endangers human health, welfare, and amenities, and the marine environment, ecological systems, and economic potentialities.

(b) The Congress declares that it is the policy of the United States to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(c) It is the purpose of this Act to regulate (1) the transportation by any person of material from the United States and, in the case of United States vessels, aircraft, or agencies, the transportation of material from a location outside the United States, when in either case the transportation is for the purpose of dumping the material into ocean waters, and (2) the dumping of material transported by any person from a location outside the United States if the dumping occurs in the territorial sea or the contiguous zone of the United States.

Sec. 3. For the purposes of this Act the term—

(a) "Administrator" means the Administrator of the Environmental Protection Agency.

(b) "Ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(c) "Material" means matter of any kind or description, including, but not limited to, dredged material, solid waste, incinerator residue, garbage, sewage, sewage sludge, munitions, radiological, chemical, and biological warfare agents, radioactive materials, chemicals, biological and laboratory waste, wreck or discarded equipment, rock, sand, excavation debris, and industrial, municipal, agricultural, and other waste; but such term does not mean sewage from vessels within the meaning of section 312 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1322). Oil within the meaning of section 311 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321), shall be included only to the extent that such oil is taken on board a vessel or aircraft for the purpose of dumping.

(d) "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, the territories and possessions of the United States, and the Trust Territory of the Pacific Islands.

(e) "Person" means any private person or entity, or any officer, employee, agent, department, agency, or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

(f) "Dumping" means a disposition of material: Provided, That it does not mean a disposition of any effluent from any outfall structure to the extent that such disposition is regulated under the provisions of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251-1376) under the provisions of section 13 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. 407), or under the provisions of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011, et seq.), nor does it mean a routine discharge of effluent incidental to the propulsion of, or operation of motor-driven equipment on, vessels: Provided further, That it does not mean the construction of any fixed structure or artificial island nor the intentional placement of any device in ocean waters or on or in the submerged land beneath such waters, for a purpose other than disposal, when such construction or such placement is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program: And provided further, That it does not include the deposit of oyster shells or other materials when such deposit is made for the purpose of developing, maintaining, or harvesting fisheries resources and is otherwise regulated by Federal or State law or occurs pursuant to an authorized Federal or State program.

(g) "District court of the United States" includes the District Court of Guam, the District Court of the Virgin Islands, the District Court of Puerto Rico, the District Court of the Canal Zone, and in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii, which court shall have jurisdiction over actions arising therein.

(h) "Secretary" means the Secretary of the Army.

(i) "Dredged material" means any material excavated or dredged from the navigable waters of the United States.

(j) "High-level radioactive waste" means the aqueous waste resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated waste from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels, or irradiated fuel from nuclear power reactors.

(k) "Medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

[New 3(k) added by PL 100-688]

(l) "Transport" or "transportation" refers to the carriage and related handling of any material by a vessel, or by any other vehicle, including aircraft.

[Former 3(k) and (l) redesignated as (l) and (m) by PL 100-688]

(m) "Convention" means the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

TITLE I – OCEAN DUMPING

Prohibited Acts

Sec. 101. (a) Except as may be authorized by a permit issued pursuant to section 102 or section 103 of this title, and subject to regulations issued pursuant to section 108 of this title,

(1) no person shall transport from the United States, and

(2) in the case of a vessel or aircraft registered in the United States or flying the United States flag or in the case of a United States department, agency, or instrumentality, no person shall transport from any location any material for the purpose of dumping it into ocean waters.

(b) Except as may be authorized by a permit issued pursuant to section 102 of this title, and subject to regulations issued pursuant to section 108 of this title, no person shall dump any material transported from a location outside the United States (1) into the territorial sea of the United States, or (2) into a zone contiguous to the territorial sea of the United States, extending to a line twelve nautical miles seaward from the base line from which the breadth of the territorial sea is measured, to the extent that it may affect the territorial sea or the territory of the United States.

[*Editor's note:* Section 4 of P.L. 95-153 provided for a ban on dumping of sewage sludge to take effect at the end of 1981. The following is the relevant section:

Sec. 4. (a) and (b) [Repealed]

[Former 4 (a) and (b) of PL 95-153 as amended by PL 96-572, repealed by PL 100-688]

(a) Notwithstanding section 104B of the Marine Protection, Research, and Sanctuaries Act of 1972, after December 31, 1981, the Administrator may issue emergency permits under title I of such Act for the dumping of industrial waste into ocean waters, or into waters described in such section 101(b), if the Administrator determines that there has been demonstrated to exist an emergency, requiring the

dumping of such waste, which poses an unacceptable risk relating to human health and admits of no other feasible solution. As used herein, "emergency" refers to situations requiring action with a marked degree of urgency.

[Former 4(c) of PL 95-153 amended and redesignated as (a) by PL 100-688]

(b) For purposes of this section, the term "industrial waste" means any solid, semisolid, or liquid waste generated by a manufacturing or processing plant.

[New Sec. 4(b) of PL 95-153 added by PL 100-688]

(d) [Repealed]

[Sec. 4(d) of PL 95-153 repealed by PL 100-688]]

Environmental Protection Agency Permits

Sec. 102. (a) Except in relation to dredged material, as provided for in section 103 of this title, and in relation to radiological, chemical, and biological warfare agents, high-level radioactive waste, and medical waste, for which no permit may be issued, the Administrator may issue permits, after notice and opportunity for public hearing, for the transportation from the United Staes or, in the case of a vessel or aircraft registered in the United States or flying the United States flag, in the case of an agency or instrumentality of the United States, for the transportation from a location outside the United States, of material for the purpose of dumping it into ocean waters, or for the dumping of material into the waters described in section 101(b), where the Administrator determines that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. The Administrator shall establish and apply criteria for reviewing and evaluating such permit applications, and, in establishing or revising such criteria, shall consider, but not be limited in his consideration to, the following:

(A) The need for the proposed dumping.

(B) The effect of such dumping on human health and welfare, including economic, esthetic, and recreational values.

(C) The effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches.

(D) The effect of such dumping on marine ecosystems, particularly with respect to–

(i) the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes,

(ii) potential changes in marine ecosystem diversity, productivity, and stability, and

(iii) species and community population dynamics.

(E) The persistence and permanence of the effects of the dumping.

(F) The effect of dumping particular volumes and concentrations of such materials.

(G) Appropriate locations and methods of disposal or recycling, including land-based alternatives and the probable impact of requiring use of such alternate locations or methods upon considerations affecting the public interest.

(H) The effect on alternate uses of oceans, such as scientific study, fishing, and other living resource exploitation, and nonliving resource exploitation.

(I) In designating recommended sites, the Administrator shall utilize wherever feasible locations beyond the edge of the Continental Shelf.

In establishing or revising such criteria, the Administrator shall consult with Federal, State, and local officials, and interested members of the general public, as may appear appropriate to the Administrator. With respect to such criteria as may affect the civil works program of the Department of the Army, the Administrator shall also consult with the Secretary. In reviewing applications for permits, the Administrator shall make such provision for consultation with interested Federal and State agencies as he deems useful or necessary. No permit shall be issued for a dumping of material which will violate applicable water quality standards.

To the extent that he may do so without relaxing the requirements of this title, the Administrator, in establishing or revising such criteria, shall apply the standards and criteria binding upon the United States under the Convention, including its Annexes.

[102(a) amended by PL 100-688]

(b) The Administrator may establish and issue various categories of permits, including the general permits described in section 104(c).

(c) The Administrator may, considering the criteria established pursuant to subsection (a) of this section, designate recommended sites or times for dumping and, when he finds it necessary to protect critical areas, shall, after consultation with the Secretary, also designate sites or times within which certain materials may not be dumped.

(d) No permit is required under this title for the transportation for dumping or the dumping of fish wastes, except when deposited in harbors or other protected or enclosed coastal waters, or where the Administrator finds that such deposits could endanger health, the environment, or ecological systems in a specific location. Where the Administrator makes such a finding, such material

may be deposited only as authorized by a permit issued by the Administrator under this section.

(c) In the case of transportation of material, by an agency or instrumentality of the United States or by a vessel or aircraft registered in the United States or flying the United States flag, from a location in a foreign State Party to the Convention, a permit issued pursuant to the authority of that foreign State Party, in accordance with Convention requirements, and which otherwise could have been issued pursuant to subsection (a) hereof, shall be accepted, for the purposes of this title, as if it were issued by the Administrator under the authority of this section: *Provided*, That in the case of an agency or instrumentality of the United States, no application shall be made for a permit to be issued pursuant to the authority of a foreign State Party to the Convention unless the Administrator concurs in the filing of such application.

[102(e) amended by PL 96-572]

Corps of Engineers Permits

Sec. 103. (a) Subject to the provisions of subsections (b), (c), and (d) of this section, the Secretary may issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it into ocean waters, where the Secretary determines that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities.

(b) In making the determination required by subsection (a), the Secretary shall apply those criteria, established pursuant to section 102(a), relating to the effects of the dumping. Based upon an evaluation of the potential effect of a permit denial on navigation, economic and industrial development, and foreign and domestic commerce of the United States, the Secretary shall make an independent determination as to the need for the dumping. The Secretary shall also make an independent determination as to other possible methods of disposal and as to appropriate locations for the dumping. In considering appropriate locations, he shall, to the extent feasible, utilize the recommended sites designated by the Administrator pursuant to section 102(c).

(c) Prior to issuing any permit under this section, the Secretary shall first notify the Administrator of his intention to do so. In any case in which the Administrator disagrees with the determination of the Secretary as to compliance with the criteria established pursuant to section 102(a) relating to the effects of the dumping or with the restrictions established pursuant to section 102(c), relating to critical areas, the determination of the Administrator shall prevail. Unless the Administrator grants a waiver pursuant to subsection (d), the Secretary shall not issue a permit which does not comply with such criteria and with such restrictions.

(d) If, in any case, the Secretary finds that, in the disposition of dredged material, there is no economically feasible method or site available other than a dumping site the utilization of which would result in noncompliance with the criteria established pursuant to section 102(a) relating to the effects of dumping or with the restrictions established pursuant to section 102(c) relating to critical areas, he shall so certify and request a waiver from the Administrator of the specific requirements involved. Within thirty days of the receipt of the waiver request, unless the Administrator finds that the dumping of the material will result in an unacceptably adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries (including spawning and breeding areas), or recreational areas, he shall grant the waiver.

(e) In connection with Federal projects involving dredged material, the Secretary may, in lieu of the permit procedure, issue regulations which will require the application to such projects of the same criteria, other factors to be evaluated, the same procedures, and the same requirements which apply to the issuance of permits under subsections (a), (b), (c), and (d) of this section.

Permit Conditions

Sec. 104. (a) Permits issued under this title shall designate and include (1) the type of material authorized to be transported for dumping or to be dumped; (2) the amount of material authorized to be transported for dumping or to be dumped; (3) the location where such transport for dumping will be terminated or where such dumping will occur; (4) the length of time for which the permits are valid and their expiration date; (5) any special provisions deemed necessary by the Administrator or the Secretary, as the case may be, after consultation with the Secretary of the Department in which the Coast Guard is operating, for the monitoring and surveillance of the transportation or dumping; and (6) such other matters as the Administrator or the Secretary, as the case may be, deems appropriate.

(b) The Administrator or the Secretary, as the case may be, may prescribe such processing fees for permits and such reporting requirements for actions taken pursuant to permits issued by him under this title as he deems appropriate.

(c) Consistent with the requirements of sections 102 and 103, but in lieu of a requirement for specific permits

in such case, the Administrator or the Secretary, as the case may be, may issue general permits for the transportation for dumping, or dumping, or both, of specified materials or classes of materials for which he may issue permits, which he determines will have a minimal adverse environmental impact.

(d) Any permit issued under this title shall be reviewed periodically and, if appropriate, revised. The Administrator or the Secretary, as the case may be, may limit or deny the issuance of permits, or he may alter or revoke partially or entirely the terms of permits issued by him under this title, for the transportation for dumping, or for the dumping, or both, of specified materials or classes of materials, where he finds that such materials cannot be dumped consistently with the criteria and other factors required to be applied in evaluating the permit application. No action shall be taken under this subsection unless the affected person or permittee shall have been given notice and opportunity for a hearing on such action as proposed.

(e) The Administrator or the Secretary, as the case may be, shall require an applicant for a permit under this title to provide such information as he may consider necessary to review and evaluate such application.

(f) Information received by the Administrator or the Secretary, as the case may be, as a part of any application or in connection with any permit granted under this title shall be available to the public as a matter of public record, at every stage of the proceeding. The final determination of the Administrator or the Secretary, as the case may be, shall be likewise available.

(g) A copy of any permit issued under this title shall be placed in a conspicuous place in the vessel which will be used for the transportation or dumping authorized by such permit, and an additional copy shall be furnished by the issuing official to the Secretary of the department in which the Coast Guard is operating, or its designee.

(h) Notwithstanding any provision of title I of the Marine Protection, Research, and Sanctuaries Act of 1972 to the contrary, during the two-year period beginning on the date of enactment of this subsection, no permit may be issued under such title I that authorizes the dumping of any low-level radioactive waste unless the Administrator of the Environmental Protection Agency determines—

(1) that the proposed dumping is necessary to conduct research—

(A) on new technology related to ocean dumping, or

(B) to determine the degree to which the dumping of such substance will degrade the marine environment;

(2) that the scale of the proposed dumping is limited to the smallest amount of such material and the shortest duration of time that is necessary to fulfill the purposes of the research, such that the dumping will have minimal adverse impact upon human health, welfare, and amenities, and the marine environment, ecological systems, economic potentialities, and other legitimate uses;

(3) after consultation with the Secretary of Commerce, that the potential benefits of such research will outweigh any such adverse impact; and

(4) that the proposed dumping will be preceded by appropriate baseline monitoring studies of the proposed dump site and its surrounding environment.

Each permit issued pursuant to this subsection shall be subject to such conditions and restrictions as the Administrator determines to be necessary to minimize possible adverse impacts of such dumping.

[104(h) added by PL 97-424]

(i)(1) Two years after the date of enactment of this subsection, the Administrator may not issue a permit under this title for the disposal of radioactive waste material until the applicant, in addition to complying with all other requirements of this title, prepares, with respect to the site at which the disposal is proposed, a Radioactive Material Disposal Impact Assessment which shall include—

(A) a listing of all radioactive materials in each container to be disposed, the number of containers to be dumped, the structural diagrams of each container, the number of curies of each material in each container, and the exposure levels in rems at the inside and outside of each container;

(B) an analysis of the environmental impact of the proposed action, at the site at which the applicant desires to dispose of the material, upon human health and welfare and marine life;

(C) any adverse environmental effects at the site which cannot be avoided should the proposal be implemented;

(D) an analysis of the resulting environmental and economic conditions if the containers fail to contain the radioactive waste material when initially deposited at the specific site;

(E) a plan for the removal or containment of the disposed nuclear material if the container leaks or decomposes;

(F) a determination by each affected State whether the proposed action is consistent with its approved Coastal Zone Management Program;

(G) an analysis of the economic impact upon other users of marine resources;

(H) alternatives to the proposed action;

(I) comments and results of consultation with State

officials and public hearings held in the coastal States that are nearest to the affected areas;

(J) a comprehensive monitoring plan to be carried out by the applicant to determine the full effect of the disposal on the marine environment, living resources, or human health, which plan shall include, but not be limited to, the monitoring of exterior container radiation samples, the taking of water and sediment samples, and fish and benthic animal samples, adjacent to the containers, and the acquisition of such other information as the Administrator may require; and

(K) such other information which the Administrator may require in order to determine the full effects of such disposal.

(2) The Administrator shall include, in any permit to which paragraph (1) applies, such terms and conditions as may be necessary to ensure that the monitoring plan required under paragraph (1)(J) is fully implemented, including the analysis by the Administrator of the samples required to be taken under the plan.

(3) The Administrator shall submit a copy of the assessment prepared under paragraph (1) with respect to any permit to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on Environment and Public Works of the Senate.

(4) (A) Upon a determination by the Administrator that a permit to which this subsection applies should be issued, the Administrator shall transmit such a recommendation to the House of Representatives and the Senate.

(B) No permit may be issued by the Administrator under this Act for the disposal of radioactive materials in the ocean unless the Congress, by approval of a resolution described in paragraph (D) within 90 days of continuous session of the Congress beginning on the date after the date of receipt by the Senate and the House of Representatives of such recommendation, authorizes the Administrator to grant a permit to dispose of radioactive material under this Act.

(C) For purposes of this subsection—

(1) continuity of session of the Congress is broken only by an adjournment sine die;

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the 90 day calendar period.

(D) For the purposes of this subsection, the term 'resolution' means a joint resolution, the resolving clause of which is as follows: 'That the House of Representatives and the Senate approve and authorize the Administrator of the Environmental Protection Agency to grant a permit to ____ under the Marine Protection, Research, and Sanctuaries Act of 1972 to dispose of radioactive materials in the ocean as recommended by the Administrator to the Congress on ____, 19 ____.'; the first blank space therein to be filled with the appropriate applicant to dispose of nuclear material and the second blank therein to be filled with the date on which the Administrator submits the recommendation to the House of Representatives and the Senate.

[104](i) added by PL 97-424(i)(4)(D) amended by PL 100-17]

Special Provisions Regarding Certain Dumping Sites

[104A added by PL 99-662]

Sec. 104A. (a) New York Bight Apex.— (1) For purposes of this subsection—

(A) The term "Apex" means the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(B) The term "Apex site" means that site within the Apex at which the dumping of municipal sludge occurred before October 1, 1983.

(C) The term "eligible authority" means any sewerage authority or other unit of State or local government that on November 2, 1983, was authorized under court order to dump municipal sludge at the Apex site.

(2) No person may apply for a permit under this title in relation to the dumping of, or the transportation for purposes of dumping, municipal sludge within the Apex unless that person is an eligible authority.

(3) The Administrator may not issue, or renew, any permit under this title that authorizes the dumping of, or the transportation for purposes of dumping, municipal sludge within the Apex after the earlier of—

(A) December 15, 1987; or

(B) the day determined by the Administrator to be the first day on which municipal sludge generated by eligible authorities can reasonably be dumped at a site designated under section 102 other than a site within the Apex.

(b) Restriction on Use of the 106-Mile Site. — The Administrator may not issue or renew any permit under this title which authorizes any person, other than a person that is an eligible authority within the meaning of subsection (a)(1)(C), to dump, or to transport for the purposes of dumping, municipal sludge within the site designated under section 102(c) by the Administrator and known as the "106-Mile Ocean Waste Dump Site" (as described in 49 F.R. 19005).

[*Editor's Note*: Section 1004 of PL 100-688 provides:

"Sec. 1004. Enforcement Monitoring Report.

Not later than 6 months after the date of the enactment of this Act, the Administrator of the Environmental Protection Agency (hereinafter in this title referred to as the "Administrator"), in consultation with the Secretary of Transportation, shall submit a report to the Congress which outlines progress made in using electronic monitoring equipment, and other means to monitor and prevent dumping of sewage sludge outside the site designated by the Administrator under section 102(c) and known as the "106-Mile Ocean Waste Dump Site" (as described in 49 F.R. 19005), and by vessels in transit to that site."]

[The text of Section 104A as added by PL 100-4 was repealed by PL 100-688. The text of the repealed Section was identical to that of current Section 104A.]

Sec. 104B. Ocean Dumping of Sewage Sludge and Industrial Waste.

[104B added by PL 100-688]

(a) Termination of Dumping—

(1) Prohibitions on Dumping. Notwithstanding any other provision of law—

(A) on and after the 270th day after the date of the enactment of this section, no person (including a person described in section 104A(a)(1)(C)) shall dump into ocean waters, or transport for the purpose of dumping into ocean waters, sewage sludge or industrial waste, unless such person—

(i) has entered into a compliance agreement or enforcement agreement which meets the requirements of subsection (c)(2) or (3), as applicable; and

(ii) has obtained a permit issued under section 102 which authorizes such transportation and dumping; and

(B) after December 31, 1991, it shall be unlawful for any person to dump into ocean waters, or to transport for the purposes of dumping into ocean waters, sewage sludge or industrial waste.

(2) Prohibition on New Entrants. — The Administrator shall not issue any permit under this Act which authorizes a person to dump into ocean waters, or to transport for the purposes of dumping into ocean waters, sewage sludge or industrial waste, unless that person was authorized by a permit issued under section 102 or by a court order to dump into ocean waters, or to transport for the purpose of dumping into ocean waters, sewage sludge or industrial waste on September 1, 1988.

(b) Special Dumping Fees.—

(1) In General. — Subject to paragraph (4), any person who dumps into ocean waters, or transports for the purpose of dumping into ocean waters, sewage sludge or industrial waste shall be liable for a fee equal to—

(A) $100 for each dry ton (or equivalent) of sewage sludge or industrial waste transported or dumped by the person on or after the 270th day after the date of the enactment of this section and before January 1, 1990;

(B) $150 for each dry ton (or equivalent) of sewage sludge or industrial waste transported or dumped by the person on or after January 1, 1990, and before January 1, 1991; and

(C) $200 for each dry ton (or equivalent) of sewage sludge or industrial waste transported or dumped by the person on or after January 1, 1991, and before January 1, 1992.

(2) Payment of fees. — Of the amount of fees under paragraph (1) for which a person is liable, such person—

(A) shall pay into a trust account established by the person in accordance with subsection (e) a sum equal to 85 percent of such amount;

(B) shall pay to the Administrator a sum equal to $15 per dry ton (or equivalent) of sewage sludge and industrial waste transported or dumped by such person, for use for agency activities as provided in subsection (f)(1);

(C) subject to paragraph (5) shall pay into the Clean Oceans Fund established by the State in which the person is located a sum equal to 50 percent of the balance of such amount after application of subparagraphs (A) and (B); and

(D) subject to paragraph (5), shall pay to the State in which the person is located a sum equal to the balance of such amount after application of subparagraphs (A), (B), and (C), for deposit into the water pollution control revolving fund established by the State under title VI of the Federal Water Pollution Control Act, as provided in subsection (f)(2).

(3) Schedule for payment. — Fees under this subsection shall be paid on a quarterly basis.

(4) Waiver of fees. — (A) The Administrator shall waive all fees under this subsection, other than the portion of fees required to be paid to the Administrator under paragraph (2)(B) for agency activities, for any person who has entered into a compliance agreement which meets the requirements of subsection (c)(2).

(B) The Administrator shall reimpose fees under this subsection for a person for whom such fees are waived under subparagraph (A) if the Administrator determines that—

(i) the person has failed to comply with the terms of a compliance agreement which the person entered into under subsection (c)(2); and

(ii) such failure is likely to result in the person not being able to terminate by December 31, 1991, dumping of sewage sludge or industrial waste into ocean waters.

(C) The Administrator may waive fees reimposed for a person under subparagraph (B) if the Administrator determines that the person has returned to compliance

with a compliance agreement which the person entered into under subsection (c)(2).

(5) Payments Prior to Establishment of Account. — (A) In any case in which a State has not established a Clean Oceans Fund or a water pollution control revolving fund under title VI of the Federal Water Pollution Control Act, fees required to be paid by a person in that State under paragraph (2)(C) or (D), as applicable, shall be paid to the Administrator.

(B) Amounts paid to the Administrator pursuant to this paragraph shall be held by the Administrator in escrow until the establishment of the fund into which such amounts are requited to be paid under paragraph (2), or until the last day of the 1-year period beginning on the date of such payment, whichever is earlier, and thereafter—

(i) if such fund has been established, shall be paid by the Administrator into the fund; or

(ii) if such fund has not been established, shall revert to the general fund of the Treasury.

(c) Compliance Agreements and Enforcement Agreements.—

(1) In General. — As a condition of issuing a permit under section 102 which authorizes a person to transport or dump sewage sludge or industrial waste, the Administrator shall require that, before the issuance of such permit, the person and the State in which the person is located enter into with the Administrator—

(A) a compliance agreement which meets the requirements of paragraph (2); or

(B) an enforcement agreement which meets the requirements of paragraph (3).

(2) Compliance Agreements. — An agreement shall be a compliance agreement for purposes of this section only if—

(A) it includes a plan negotiated by the person, the State in which the person is located, and the Administrator that will, in the opinion of the Administrator, if adhered to by the person in good faith, result in the phasing out and termination of ocean dumping, and transportation for the purpose of ocean dumping, of sewage sludge and industrial waste by such person by not later than December 31, 1991, through the design, construction, and full implementation of an alternative system for the management of sewage sludge and industrial waste transported or dumped by the person;

(B) it includes a schedule which—

(i) in the opinion of the Administrator, specifies reasonable dates by which the person shall complete the various activities that are necessary for the timely implementation of the alternative system referred to in subparagraph (A); and

(ii) meets the requirements of paragraph (4);

(C) it requires the person to notify in a timely manner the Administrator and the Governor of the State of any problems the person has in complying with the schedule referred to in subparagraph (B);

(D) it requires the Administrator and the Governor of the State to evaluate on an ongoing basis the compliance of the person with the schedule referred to in subparagraph (B);

(E) it requires the person to pay in accordance with this section all fees and penalties the person is liable for under this section; and

(F) it authorizes the person to use interim measures before completion of the alternative system referred to in subparagraph (A).

(3) Enforcement Agreements. — An agreement shall be an enforcement agreement for purposes of this section only if —

(A) it includes a plan negotiated by the person, the State in which the person is located, and the Administrator that will, in the opinion of the Administrator, if adhered to by the person in good faith, result in the phasing out and termination of ocean dumping, and transportation for the purpose of ocean dumping, of sewage sludge and industrial waste by such person through the design, construction, and full implementation of an alternative system for the management of sewage sludge and industrial waste transported or dumped by the person;

(B) it includes a schedule which—

(i) in the opinion of the Administrator, specifies reasonable dates by which the person shall complete the various activities that are necessary for the timely implementation of the alternative system referred to in subparagraph (A); and

(ii) meets the requirements of paragraph (4);

(C) it requires the person to notify in a timely manner the Administrator and the Governor of the State of any problems the person has in complying with the schedule referred to in subparagraph (B);

(D) it requires the Administrator and the Governor of the State to evaluate on an ongoing basis the compliance of the person with the schedule referred to in subparagraph (B);

(E) it requires the person to pay in accordance with this section all fees and penalties the person is liable for under this section; and

(F) it authorizes the person to use interim measures before completion of the alternative system referred to in subparagraph (A).

(4) Schedules. — A schedule included in a compliance agreement pursuant to paragraph (2)(B) or an enforcement agreement pursuant to paragraph (3)(B) shall establish deadlines for—

(A) preparation of engineering designs and related specifications for the alternative system referred to in paragraph (2)(A) or paragraph (3)(A), as applicable;

(B) compliance with appropriate Federal, State, and local statutes, regulations, and ordinances;

(C) site and equipment acquisitions for such alternative system;

(D) construction and testing of such alternative system;

(E) operation of such alternative system at full capacity; and

(F) any other activities, including interim measures, that the Administrator considers necessary or appropriate.

(5) Clean Oceans Funds. — (A) Each State that is a party to a compliance agreement or an enforcement agreement under this subsection shall establish an interest bearing account, to be known as a Clean Oceans Fund, into which a person shall pay fees and penalties in accordance with subsections (b)(2)(C) and (d)(2)(C)(i), respectively.

(B) A state which establishes a Clean Oceans Fund pursuant to this paragraph shall allocate and pay from the fund each year, to each person in the State which has entered into a compliance agreement or enforcement agreement under this subsection, a portion of amounts in the fund on the last day of that year which is equal to the sum of—

(i) amounts paid by the person into the fund in that year as fees pursuant to subsection (b)(2)(C) and as penalties pursuant to subsection (d)(2)(C)(i);

(ii) amounts paid by the Administrator into the fund in that year as fees held in escrow for the person pursuant to subsection (b)(5)(B); and

(iii) interest on such amounts.

(C) Amounts allocated and paid to a person pursuant to subparagraph (B)—

(i) shall be used for the purposes described in subsection (e)(2)(B); and

(ii) may be used for matching Federal grants.

(D) A Clean Oceans Fund established by a State pursuant to this paragraph shall be subject to such accounting, reporting, and other requirements as may be established by the Administrator to assure accountability of payments into and out of the fund.

(6) Public Participation. — The Administrator shall provide an opportunity for public comment regarding the establishment and implementation of compliance agreements and enforcement agreements entered into pursuant to this section.

(d) Penalties.—

(1) In General. — In lieu of any other civil penality under this Act, any person who has entered into a compliance agreement or enforcement agreement under subsection (c) and who dumps or transports sewage sludge or industrial waste in violation of subsection (a)(1)(B) shall be liable for a civil penalty, to be assessed by the Administrator, as follows:

(A) For each dry ton (or equivalent) of sewage sludge or industrial waste dumped or transported by the person in violation of this subsection in calendar year 1992, $600.

(B) For each dry ton (or equivalent) of sewage sludge or industrial waste dumped or transported by the person in violation of this subsection in any year after calendar year 1992, a sum equal to—

(i) the amount of penalty per dry ton (or equivalent) for a violation occurring in the preceding calendar year, plus

(ii) a percentage of such amount equal to 10 percent of such amount, plus an additional 1 percent of such amount for each full calendar year since December 31, 1991.

(2) Payment Of Penalty. — Of the amount of penalties under paragraph (1) for which a person is liable, such person—

(A) shall pay into a trust account established by the person in accordance with subsection (e) a sum which is a percentage of such amount equal to—

(i) 90 percent of such amount, reduced by

(ii) 5 percent of such amount for each full calendar year since December 31, 1991;

(B) shall pay to the Administrator a sum equal to $15 per dry ton (or equivalent) of sewage sludge and industrial waste transported or dumped by such person in that year, for use for agency activities as provided in subsection (f)(1);

(C) for violations in any year before calendar year 1995—

(i) subject to paragraph (4), shall pay into the Clean Oceans Fund established by the State in which the person is located a sum equal to 50 percent of the balance of such amount; and

(ii) subject to paragraph (4), shall pay to the State in which the person is located a sum equal to the portion of such amount which is not paid as provided in subparagraphs (A), (B), and (C), for deposit into the water pollution control revolving fund established by the State under title VI of the Federal Water Pollution Control Act, as provided in subsection (f)(2); and

(D) for violations in any year after calendar year 1994, shall pay to the State in which the person is located a sum equal to the balance of such amount, for use by the State for providing assistance under subsection (f)(3).

(3) Schedule for Payment. — Penalties under this subsection shall be paid on a quarterly basis.

(4) Payments Prior to Establishment of Account. — In any case in which a State has not established a Clean Oceans Fund or a water pollution control revolving fund under title VI of the Federal Water Pollution Control Act, penalties required to be paid by a person in that State under paragraph (2)(C)(i) or (ii), as applicable, shall be paid to the Administrator for holding and payment or reversion, as applicable, in the same manner as fees are held and paid or revert under subsection (b)(5).

(e) Trust Account.—

(1) In General. — A person who enters into a compliance agreement or an enforcement agreement under subsection (c) shall establish a trust account for the payment and use of fees and penalties under this section.

(2) Trust Account Requirements. — An account shall be a trust account for purposes of this subsection only if it meets, to the satisfaction of the Administrator, the following requirements:

(A) Amounts in the account may be used only with the concurrence of the person who establishes the account and the Administrator; except that the person may use amounts in the account for a purpose authorized by subparagraph (B) after 60 days after notification of the Administrator if the Administrator does not disapprove such use before the end of such 60-day period.

(B) Amounts in the account may be used only for projects which will identify, develop, and implement—

(i) an alternative system, and any interim measures, for the management of sewage sludge and industrial waste, including but not limited to any such system or measures utilizing resource recovery, recycling, thermal reduction, or composting techniques; or

(ii) improvements in pretreatment, treatment, and storage techniques for sewage sludge and industrial waste to facilitate the implementation of such alternative system or interim measures.

(C) Upon a finding by the Administrator that a person did not pay fees or penalties into an account as required by this section, or did not use amounts in the account in accordance with this subsection, the balance of the amounts in the account shall be paid to the State in which the person is located, for deposit into the water pollution control revolving fund established by the State under title VI of the Federal Water Pollution Control Act, as provided in subsection (f)(2).

(3) Use of Unexpended Amounts. — Upon a determination by the Administrator that a person has terminated ocean dumping of sewage sludge or industrial waste, the balance of amounts in an account established by the person under this subsection shall be paid to the person for use—

(A) for debts incurred by the person in complying with this Act or the Federal Water Pollution Control Act;

(B) in meeting the requirements of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) which apply to the person, including operations and maintenance; and

(C) for matching Federal grants.

(4) Use for Matching Federal Grants. — Amounts in a trust account under this subsection may be used for matching Federal grants.

(f) Use of Fees and Penalties.—

(1) Agency Activities. — Of the total amount of fees and penalties paid to the Administrator in a fiscal year pursuant to subsections (b)(2)(B) and (d)(2)(B), respectively—

(A) not to exceed one-third of such total amount shall be used by the Administrator for—

(i) costs incurred or expected to be incurred in undertaking activities directly associated with the issuance under this Act of permits for the transportation or dumping of sewage sludge and industrial waste, including the costs of any environmental assessment of the direct effects of dumping under the permits;

(ii) preparation of reports under subsection (i); and

(iii) such other research, studies, and projects the Administrator considers necessary for, and consistent with, the development and implementation of alternative systems for the management of sewage sludge and industrial waste;

(B) not to exceed one-third of such total amount shall be transferred to the Secretary of the department in which the Coast Guard is operating for use for—

(i) Coast Guard surveillance of transportation and dumping of sewage sludge and industrial waste subject to this Act; and

(ii) such enforcement activities conducted by the Coast Guard with respect to such transportation and dumping as may be necessary to ensure to the maximum extent practicable complete compliance with the requirements of this Act; and

(C) not to exceed one-third of such total amount shall be transferred to the Under Secretary of Commerce for Oceans and Atmosphere for use for —

(i) monitoring, research, and related activities consistent with the program developed pursuant to subsection (j)(1); and

(ii) preparing annual reports to the Congress pursuant to subsection (j)(4) which describe the results of such monitoring, research, and activities.

(2) Deposits into State Water Pollution Control Revolving Fund. — (A) Amounts paid to a State pursuant to subsection (b)(2)(D), (d)(2)(C)(ii), or (e)(2)(C) shall be deposited into the water pollution control revolving fund established by the State pursuant to title VI of the Federal Water Pollution Control Act.

(B) Amounts deposited into a State water pollution

control revolving fund pursuant to this paragraph—

(i) shall not be used by the State to provide assistance to the person who paid such amounts for development or implementation of any alternative system;

(ii) shall not be considered to be State matching amounts under title VI of the Federal Water Pollution Control Act; and

(iii) shall not be subject to State matching requirements under such title.

(3) Penalty Payments to States After 1994. — (A) Amounts paid to a State as penalties pursuant to subsection (d)(2)(D) may be used by the State—

(i) for providing assistance to any person in the State—

(I) for implementing a management program under section 319 of the Federal Water Pollution Control Act;

(II) for developing and implementing a conservation and management plan under section 320 of such Act; or

(III) for implementing technologies and management practices necessary for controlling pollutant inputs adversely affecting the New York Bight, as such inputs are identified in the New York Bight Restoration Plan prepared under section 2301 of the Marine Plastic Pollution Research and Control Act of 1987; and

(ii) for providing assistance to any person in the State who was not required to pay such penalties for construction of treatment works (as defined in section 212 of the Federal Water Pollution Control Act) which are publicly owned.

(B) Amounts paid to a State as penalties pursuant to subsection (d)(2)(D) which are not used in accordance with subparagraph (A) shall be deposited into the water pollution control revolving fund established by the State under title VI of the Federal Water Pollution Control Act. Amounts deposited into such a fund pursuant to this subparagraph—

(i) shall not be used by the State to provide assistance to the person who paid such amounts;

(ii) shall not be considered to be State matching amounts under title VI of the Federal Water Pollution Control Act; and

(iii) shall not be subject to State matching requirements under such title.

(4) Deposits into Treasury as Offsetting Collections. — Amounts of fees and penalties paid to the Administrator pursuant to subsection (b)(2)(B) or (d)(2)(B) which are used by an agency in accordance with paragraph (1) shall be deposited into the Treasury as offsetting collections of the agency.

(g) Enforcement.—

(1) In General. — Whenever, on the basis of any information available, the Administrator finds that a person is dumping or transporting sewage sludge or industrial waste in violation of subsection (a)(1), the Administrator shall issue an order requiring such person to terminate such dumping or transporting (as applicable) until such person—

(A) enters into a compliance agreement or an enforcement agreement under subsection (c); and

"(B) obtains a permit under section 102 which authorizes such dumping or transporting.

"(2) Requirements of Order.—Any order issued by the Administration under this subsection—

"(A) shall be delivered by personal service to the person named in the order;

(B) shall state with reasonable specificity the nature of the violation for which the order is issued; and

(C) shall require that the person named in the order, as a condition of dumping into ocean waters, or transporting for the purpose of dumping into ocean waters, sewage sludge or industrial waste —

(i) shall enter into a compliance agreement or an enforcement agreement uder subsection (c); and

(ii) shall obtain a permit under section 102 which authorizes such dumping or transporting.

(3) Actions. — The Administrator may request the Attorney General to commence a civil action for appropriate relief, including a temporary or permanent injunction and the imposition of civil penalties authorized by subsection (d)(1), for any violation of subsection (a)(1) or of an order issued by the Administrator under this section. Such an action may be brought in the district court of the United States for the district in which the defendant is located, resides, or is doing business, and such court shall have jurisdiction to restrain such violation and require compliance with subsection (a)(1) and any such order.

(h) State Progress Reports. —

(1) In General. — The Governor of each State that is a party to a compliance agreement or an enforcement agreement under subsection (c) shall submit to the Administrator on September 30 of 1989 and of every year thereafter until the Administrator determines that ocean dumping of sewage sludge and industrial waste by persons located in that State has terminated, a report which describes —

(A) the efforts of each person located in the State to comply with a compliance agreement or enforcement agreement entered into by the person pursuant to subsection (c), including the extent to which such person has complied with deadlines established by the schedule included in such agreement;

(B) activity of the State regarding permits for the construction and operation of each alternative system; and

(C) an accounting of amounts paid into and withdrawn from a Clean Oceans Fund established by the State.

(2) Failure to Submit Report. — If a State fails to submit a report in accordance with this subsection, the Administrator shall withhold funds reserved for such State under section 205(g) of the Federal Water Pollu-

tion Control Act (33 U.S.C. 1285(g)). Funds withheld pursuant to this paragraph may, at the discretion of the Administrator, be restored to a State upon compliance with this subsection.

(i) EPA Progress Reports.—

(1) In General. — Not later than December 31 of 1989 and of each year thereafter until the Administrator determines that ocean dumping of sewage sludge and industrial waste has terminated, the Administrator shall prepare and submit to the Congress a report on—

(A) progress being made by persons issued permits under section 102 for transportation or dumping of sewage sludge or industrial waste in developing alternative systems for managing sewage sludge and industrial waste;

(B) the efforts of each such person to comply with a compliance agreement or enforcement agreement entered into by the person pursuant to subsection (c), including the extent to which such person has complied with deadlines established by the schedule included in such agreement;

(C) progress being made by the Administrator and others in identifying and implementing alternative systems for the management of sewage sludge and industrial waste; and

(D) progress being made toward the termination of ocean dumping of sewage sludge and industrial waste.

(2) Referral to Congressional Committees. — Each report submitted to the Congress under this subsection shall be referred to each standing committee of the House of Representatives and of the Senate having jurisdiction over any part of the subject matter of the report.

(j) Environmental Monitoring.—

(1) In General. — The Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall design a program for monitoring environmental conditions—

(A) at the Apex site (as that term is defined in section 104A);

(B) at the site designated by the Administrator under section 102(c) and known as the "106-Mile Ocean Waste Dump Site" (as described in 49 F.R. 19005);

(C) at the site at which industrial waste is dumped; and

(D) within the potential area of influence of the sewage sludge and industrial waste dumped at those sites.

(2) Program Requirements. — The program designed under paragraph (1) shall include, but is not limited to—

(A) sampling of an appropriate number of fish and shellfish species and other organisms to assess the effects of environmental conditions on living marine organisms in these areas; and

(B) use of satellite and other advanced technologies in conducting the program.

(3) Monitoring Activities. — The Administrator and the Under Secretary of Commerce for Oceans and Atmosphere shall each conduct monitoring activities consistent with the program designed under paragraph (1).

(4) Reports. — (A) Not later than 1 year after the date of the enactment of this section, the Administrator, in cooperation with the Under Secretary of Commerce for Oceans and Atmosphere, shall submit to the Congress a report describing the program designed pursuant to paragraph (1).

(B) Not later than December 31 of each year after the submission of a report under subparagraph (A), the Administrator and the Under Secretary of Commerce for Oceans and Atmosphere shall report to the Congress the results of monitoring activities conducted during the previous year under the program designed pursuant to paragraph (1).

(k) Definitions. — For purposes of this section—

(1) the term "alternative system" means any method for the management of sewage sludge or industrial waste which does not require a permit under this Act;

(2) the term "Clean Oceans Fund" means such a fund established by a State in accordance with subsection (c)(5);

(3) the term "excluded material" means—

(A) any dredged material discharged by the United States Army Corps of Engineers or discharged pursuant to a permit issued by the Secretary in accordance with section 103; and

(B) any waste from a tuna cannery operation located in American Samoa or Puerto Rico discharged pursuant to a permit issued by the Administrator under section 102;

(4) the term "industrial waste" means any solid, semisolid, or liquid waste generated by a manufacturing or processing plant, other than an excluded material;

(5) the term "interim measure" means any short-term method for the management of sewage sludge or industrial waste, which—

(A) is issued before implementation of an alternative system; and

(B) does not require a permit under this Act; and

(6) the term "sewage sludge" means any solid, semisolid, or liquid waste generated by a wastewater treatment plant, other than an excluded material.

Sec. 104C. Prohibition on Disposal of Sewage Sludge at Landfills on Staten Island.

[104C added by PL 100-688]

(a) In General. — No person shall dispose of sewage

sludge at any landfill located on Staten Island, New York.

(b) Exclusion From Penalties.—

(1) In General. — Subject to paragraph (2), a person who violates this section shall not be subject to any penalty under this Act.

(2) Injunction. — Paragraph (1) shall not prohibit the bringing of an action for, or the granting of, an injunction under section 105 with respect to a violation of this section.

(c) Definition. — For purposes of this section, the term "sewage sludge" has the meaning such term has in section 104B.

Penalties

Sec. 105. (a) Any person who violates any provision of this title, or of the regulations promulgated under this title, or a permit issued under this title shall be liable to a civil penalty of not more than $50,000 for each violation to be assessed by the Administrator. In additon, any person who violates this title or any regulation issued under this title by engaging in activity involving the dumping of medical waste shall be liable for a civil penalty of not more than $125,000 for each violation, to be assessed by the Administrator after written notice and an opportunity for a hearing. No penalty shall be assessed until the person charged shall have been given notice and an opportunity for a hearing of such violation. In determining the amount of the penalty, the gravity of the violation, prior violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation shall be considered by said Administrator. For good cause shown, the Administrator may remit or mitigate such penalty. Upon failure of the offending party to pay the penalty the Administrator may request the Attorney General to commence an action in the appropriate district court of the United States for such relief as may be appropriate.

[105(a) amended by PL 100-688]

(b)(1) In additon to any action which may be brought under subsection (a) of this section, a person who knowingly violates this title, regulations promulgated under this title, or a permit issued under this title shall be fined not more than $50,000 or imprisoned for not more than one year, or both.

[105(b)(1) designated by PL 100-688]

(2) In addition to any action which may be brought udner subsection (a), any person—

(A) who knowingly violates any provision of this title by engaging in activity involving the dumping into ocean waters of medical waste shall upon conviction be fined not more than $250,000, or imprisoned for not more than 5 years, or both; and

(B) convicted of a violation involving such activity shall forfeit to the United States any property constituting or derived from any proceeds the person obtained, directly or indirectly, as a result of such violation, and any of the property of the person which was used, or intended to be used in any manner or part, to commit or to facilitate the commission of the violation.

[105(b)(2) added by PL 100-688]

(c) For the purpose of imposing civil penalties and criminal fines under this section each day of a continuing violation shall constitute a separate offense as shall the dumping from each of several vessels, or other sources.

(d) The Attorney General or his delegate may bring actions for equitable relief to enjoin an imminent or continuing violation of this title, of regulations promulgated under this title, or of permits issued under this title, and the district courts of the United States shall have jurisdiction to grant such relief as the equities of the case may require.

(e) A vessel, except a public vessel within the meaning of section 13 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1163), used in a violation, shall be liable in rem for any civil penalty assessed or criminal fine imposed and may be proceeded against in any district court of the United States having jurisdiction thereof; but no vessel shall be liable unless it shall appear that one or more of the owners, or bareboat charterers, was at the time of the violation a consenting party or privy to such violation.

(f) If the provisions of any permit issued under section 102 or 103 are violated, the Administrator or the Secretary, as the case may be, may revoke the permit or may suspend the permit for a specified period of time. No permit shall be revoked or suspended unless the permittee shall have been given notice and opportunity for a hearing on such violation and proposed suspension or revocation.

(g) (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this title. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced–

(A) prior to sixty days after notice of the violation has been given to the Administrator or the Secretary, and to

any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this title.

(3) (A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Administrator or Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

(h) No person shall be subject to a civil penalty or to a criminal fine or imprisonment for dumping materials from a vessel if such materials are dumped in an emergency to safeguard life at sea. Any such emergency dumping shall be reported to the Administrator under such conditions as he may prescribe.

Relationship to Other Laws

Sec. 106. (a) After the effective date of this title, all licenses, permits, and authorizations other than those issued pursuant to this title shall be void and of no legal effect, to the extent that they purport to authorize any activity regulated by this title, and whether issued before or after the effective date of this title.

(b) The provisions of subsection (a) shall not apply to actions taken before the effective date of this title under the authority of the Rivers and Harbors Act of 1899 (30 Stat. 1151), as amended (33 U.S.C. 401 et seq.).

(c) Prior to issuing any permit under this title, if it appears to the Administrator that the disposition of material, other than dredged material, may adversely affect navigation in the territorial sea of the United States, or in the approaches to any harbor of the United States, or may create an artificial island on the Outer Continental Shelf, the Administrator shall consult with the Secretary and no permit shall be issued if the Secretary determines that navigation will be unreasonably impaired.

(d) After the effective date of this title, no State shall adopt or enforce any rule or regulation relating to any activity regulated by this title. Any State may, however, propose to the Administrator criteria relating to the dumping of materials into ocean waters within its jurisdiction, or into other ocean waters to the extent that such dumping may affect waters within the jurisdiction of such State, and if the Administrator determines, after notice and opportunity for hearing, that the proposed criteria are not inconsistent with the purposes of this title, may adopt those criteria and may issue regulations to implement such criteria. Such determination shall be made by the Administrator within one hundred and twenty days of receipt of the proposed criteria. For the purposes of this subsection, the term "State" means any State, interstate or regional authority, Federal territory or Commonwealth or the District of Columbia.

(e) Nothing in this title shall be deemed to affect in any manner or to any extent any provision of the Fish and Wildlife Coordination Act as amended (16 U.S.C. 661-666c).

(f) In addition to other provisions of law and notwithstanding the specific exclusion relating to dredged material in the first sentence in section 102(a) of this Act, the dumping of dredged material in Long Island Sound from any Federal project (or pursuant to Federal authorization) or from a dredging project by a non-Federal applicant exceeding 25,000 cubic yards shall comply with the criteria established pursuant to the second sentence of section 102(a) of the Act relating to the effects of dumping. Subsection (d) of this section shall not apply to this subsection.

[106(f) added by PL 96-572]

(g) Savings Clause. — Nothing in this Act shall restrict, affect or modify the rights of any person (1) to seek damages or enforcement of any standard or limitation under State law, including State common law, or (2) to seek damages under other Federal law, including maritime tort law, resulting from noncompliance with any requirement of this Act or any permit under this Act.

[106(g) added by PL 99-499]

Enforcement

Sec. 107. (a) The Administrator or the Secretary as the case may be, may, whenever appropriate, utilize by agreement, the personnel, services and facilities of other Federal departments, agencies, and instrumentalities, or State agencies or instrumentalities, whether on a reim-

bursable or a nonreimbursable basis, in carrying out his responsibilities under this title.

(b) The Administrator or the Secretary may delegate responsibility and authority for reviewing and evaluating permit applications, including the decision as to whether a permit will be issued, to an officer of his agency, or he may delegate, by agreement, such responsibility and authority to the heads of other Federal departments or agencies, whether on a reimbursable or nonreimbursable basis.

(c) The Secretary of the department in which the Coast Guard is operating shall conduct surveillance and other appropriate enforcement activity to prevent unlawful transportation of material for dumping, or unlawful dumping. Such enforcement activity shall include, but not be limited to, enforcement of regulations issued by him pursuant to section 108, relating to safe transportation, handling, carriage, storage, and stowage. The Secretary of the department in which the Coast Guard is operating shall supply to the Administrator and to the Attorney General, as appropriate, such information of enforcement activities and such evidentiary material assembled as they may require in carrying out their duties relative to penalty assessments, criminal prosecutions, or other actions involving litigation pursuant to the provisions of this title.

Regulations

Sec. 108. In carrying out the responsibilities and authority conferred by this title, the Administrator, the Secretary, and the Secretary of the department in which the Coast Guard is operating are authorized to issue such regulations as they may deem appropriate.

International Cooperation

Sec. 109. The Secretary of State, in consultation with the Administrator, shall seek effective international action and cooperation to insure protection of the marine environment, and may, for this purpose, formulate, present, or support specific proposals in the United Nations and other competent international organizations for the development of appropriate international rules and regulations in support of the policy of this Act.

Effective Date and Savings Provisions

Sec. 110. (a) This title shall take effect six months after the date of the enactment of this Act.

(b) No legal action begun, or right of action accrued, prior to the effective date of this title shall be affected by any provision of this title.

Authorization of Appropriations

Sec. 111. There are authorized to be appropriated for purposes of carrying out this title, not to exceed $12,000,000 for each of fiscal years 1989, 1990, and 1991.

[111 amended by PL 96-572; PL 97-16; revised by PL 100-536]

Sec. 112. The Administrator shall on or before February 1 of each year report to the Congress on the administration of this title during the preceding fiscal year, including recommendations for additional legislation if deemed necessary.

[112 revised by PL 96-470]

TITLE II – COMPREHENSIVE RESEARCH ON OCEAN DUMPING

Sec. 201. The Secretary of Commerce, in coordination with the Secretary of the Department in which the Coast Guard is operating and with the Administrator shall, within six months of the enactment of this Act [October 23, 1972], initiate a comprehensive and continuing program of monitoring and research regarding the effects of the dumping of material into ocean waters or other coastal waters where the tide ebbs and flows or into the Great Lakes or their connecting waters.

[201 amended by PL 99-272]

Sec. 202. (a)(1) The Secretary of Commerce, in close consultation with other appropriate Federal departments, agencies, and instrumentalities shall, within six months of the enactment of this Act, initiate a comprehensive and continuing program of research with respect to the possible long-range effects of pollution, overfishing, and man-induced changes of ocean ecosystems. These responsibilities shall include the scientific assessment of damages to the natural resources from spills of petroleum or petroleum products. In carrying out such research, the Secretary of Commerce shall take into account such factors as existing and proposed international policies affecting oceanic problems, economic considerations involved in both the protection and the use of the oceans, possible alternatives to existing programs, and ways in which the health of the oceans may best be preserved for the benefit of succeeding generations of mankind.

[202(a) amended by PL 96-381; (a)(1) designated and amended by PL 99-272]

(2) The Secretary of Commerce shall ensure that the program under this section complements, when appropriate, the activities undertaken by other Federal agencies pursuant to title I and section 203. That program shall include but not be limited to —

(A) the development and assessment of scientific techniques to define and quantify the degradation of the marine environment;

(B) the assessment of the capacity of the marine environment to receive materials without degradation;

(C) continuing monitoring programs to assess the health of the marine environment, including but not limited to the monitoring of bottom oxygen concentrations, contaminant levels in biota, sediments, and the water column, diseases in fish and shellfish, and changes in types and abundance of indicator species;

(D) the development of methodologies, techniques, and equipment for disposal of waste materials to minimize degradation of the marine environment.

[202(a)(2) added by PL 99-272]

(b) In carrying out his responsibilities under this section, the Secretary of Commerce, under the foreign policy guidance of the President and pursuant to international agreements and treaties made by the President with the advice and consent of the Senate, may act alone or in conjunction with any other nation or group of nations, and shall make known the results of his activities by such channels of communication as may appear appropriate.

(c) Each department, agency, and independent instrumentality of the Federal Government is authorized and directed to cooperate with the Secretary of Commerce in carrying out the purposes of this section and, to the extent permitted by law, to furnish such information as may be requested.

[Former 202(c) as amended by PL 96-470 was deleted and former subsections (d) and (e) were redesignated as (c) and (d), respectively, by PL 99-272]

(d) The Secretary of Commerce, in carrying out his responsibilities under this section, shall, to the extent feasible utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities (including those of the Coast Guard for monitoring purposes), and is authorized to enter into appropriate interagency agreements to accomplish this action.

(3) The Secretary of Commerce shall ensure that the comprehensive and continuing research program conducted under this subsection is consistent with the comprehensive plan for ocean pollution research and development and monitoring prepared under section 4 of the National Ocean Pollution Planning Act of 1978 (33 U.S.C. 1703).

[202(a)(3) added by PL 100-627]

Sec. 203. (a) The Administrator of the Environmental Protection Agency shall—

(1) conduct research, investigations, experiments, training, demonstrations, surveys, and studies for the purpose of—

(A) determining means of minimizing or ending, as soon as possible after the date of the enactment of this section, the dumping into ocean waters, or waters described in section 101(b), of material which may unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities, and

(B) developing disposal methods as alternatives to the dumping described in subparagraph (A); and

(2) encourage, cooperate with, promote the coordination of, and render financial and other assistance to appropriate public authorities, agencies, and institutions (whether Federal, State, interstate, or local) and appropriate private agencies, institutions, and individuals in the conduct of research and other activities described in paragraph (1).

(b) Nothing in this section shall be construed to affect in any way the December 31, 1981, termination date, established in section 4 of the Act of November 4, 1977 (Public Law 95-153; 33 U.S.C. 1412a) for the ocean dumping of sewage sludge.

[203 revised by PL 96-381]

(c) The Administrator, in cooperation with the Secretary, the Secretary of Commerce, and other officials of appropriate Federal, State, and local agencies, shall assess the feasibility in coastal areas of regional management plans for the disposal of waste materials. Such plans should integrate where appropriate Federal, State, regional, and local waste disposal activities into a comprehensive regional disposal strategy. These plans should address, among other things —

(1) the sources, quantities, and types of materials that require and will require disposal;

(2) the environmental, economic, social, and human health factors (and the methods used to assess these factors) associated with disposal alternatives;

(3) the improvements in production processes, methods of disposal, and recycling to reduce the adverse effects associated with such disposal alternatives;

(4) the applicable laws and regulations governing waste disposal; and

(5) improvements in permitting processes to reduce administrative burdens.

[203(c) added by PL 99-272]

(d) The Administrator, in cooperation with the Secretary of Commerce, shall submit to the Congress and the President, not later than one year after the date of enactment of this provision, a report on sewage sludge disposal in the New York City metropolitan region. The report shall —

(1) consider the factors listed in subsection (c) as they relate to landfilling, incineration, ocean dumping, or any other feasible disposal or reuse/recycling option;

(2) include an assessment of the cost of these alternatives; and

(3) recommend such regulatory or legislative changes

as may be necessary to reduce the adverse impacts associated with sewage sludge disposal.

[203(d) added by PL 99-272]

Annual Report

Sec. 204. (a) In March of each year, the Secretary of Commerce shall report to the Congress on his activities under this title during the previous fiscal year. The report shall include —

(1) the Secretary's findings made under section 201, including an evaluation of the short-term ecological effects and the social and economic factors involved with the dumping;

(2) the results of activities undertaken pursuant to section 202;

(3) with the concurrence of the Administrator and after consulting with officials of other appropriate Federal agencies, an identification of the short and long-term research requirements associated with activities under title I, and a description of how Federal research under titles I and II will meet those requirements; and

(4) activities of the Department of Commerce under section 5 of the Act of March 10, 1934 (48 Stat. 401; 16 U.S.C. 665).

(b) In March of each year, the Administrator shall report to the Congress on his activities during the previous fiscal year under section 203.

[205 added by PL 96-572; revised and redesignated as 204 by PL 99-272]

(c) On October 31 of each year, the Under Secretary shall report to the Congress the specific programs that the National Oceanic and Atmospheric Administration and the Environmental Protection Agency carried out pursuant to this title in the previous fiscal year, specifically listing the amount of funds allocated to those specific programs in the previous fiscal year.

[204(c) added by PL 100-627]

Sec. 205. There are authorized to be appropriated for the first fiscal year after this Act is enacted and for the next two fiscal years thereafter such sums as may be necessary to carry out this title, but the sums appropriated for any such fiscal year may not exceed $6,000,000. There are authorized to be appropriated not to exceed $1,500,000 for the transition period (July 1 through September 30, 1976), not to exceed $5,600,000 for fiscal year 1977, not to exceed $6,500,000 for fiscal year 1978, not to exceed $11,396,000 for fiscal year 1981, not to exceed $12,000,000 for fiscal year 1982, not to exceed $10,635,000 for fiscal year 1986, not to exceed $11,114,000 for fiscal year 1987, not to exceed $13,500,000 for fiscal year 1989, and not to exceed $14,500,000 for fiscal year 1990.

[204 amended by PL 96-381; amended and redesignated as 205 by PL 99-272; amended by PL 100-627]

TITLE III — NATIONAL MARINE SANCTUARIES

[Title III revised by PL 98-498]

Sec. 301. Findings, Purposes, and Policies.

(a) Findings. — The Congress finds that —

(1) this Nation historically has recognized the importance of protecting special areas of its public domain, but these efforts have been directed almost exclusively to land areas above the high-water mark;

(2) certain areas of the marine environment possess conservation, recreational, ecological, historical, research, educational, or esthetic qualities which give them special national significance;

(3) while the need to control the effects of particular activities has led to enactment of resource-specific legislation, these laws cannot in all cases provide a coordinated and comprehensive approach to the conservation and management of special areas of the marine environment;

(4) a Federal program which identifies special areas of the marine environment will contribute positively to marine resources conservation and management; and

(5) such a Federal program will also serve to enhance public awareness, understanding, appreciation, and wise use of the marine environment.

(b) Purposes and Policies. — The purposes and policies of this title are —

(1) to identify areas of the marine environment of special national significance due to their resource or human-use values;

(2) to provide authority for comprehensive and coordinated conservation and management of these marine areas that will complement existing regulatory authorities;

(3) to support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas;

(4) to enhance public awareness, understanding, appreciation, and wise use of the marine environment; and

(5) to facilitate, to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities.

Sec. 302. Definitions.

As used in this title, the term —

(1) "Draft management plan" means the plan described in section 304(a)(1)(E);

(2) "Magnuson Act" means the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.);

(3) "marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, consistent with international law;

(4) "Secretary" means the Secretary of Commerce;

[302(4) and (5) amended by PL 100-627]

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

(6) "damages" includes—

(A) compensation for—

(i)(I) the coast of replacing, restoring, or acquiring the equivalent of a sanctuary resource; and

(II) the value of the lost use of a sanctuary resource pending its restoration or replacement or the acquisition of an equivalent sanctuary resource; or

(ii) the value of a sanctuary resource if the sanctuary resource cannot be restored or replaced or if the equivalent of such resource cannot be acquired; and

(B) the cost of damage assessments under section 312(b)(2);

[302(6)—(8) added by PL 100-627]

(7) "response costs" means the costs of actions taken by the Secretary to minimize destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risks of such destruction, loss, or injury; and

(8) "sanctuary resource" means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary.

[*Editor's note:* Subsection (c) of Section 204 of PL 100-627 provides:

"(c) Effective Date. — Amounts in the form of damages received by the United States after November 30, 1986, for destruction or loss of, or injury to, a sanctuary resource (as that term is defined in section 302(8) of the Act (as amended by this Act)) shall be subject to section 312 of the Act (as amended by this Act.)"]

Sec. 303. Sanctuary Designation Standards.

(a) Standards.—The Secretary may designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation if the Secretary—

(1) determines that the designation will fulfill the purposes and policies of this title; and

(2) finds that—

(A) the area is of special national significance due to its resource or human-use values;

(B) existing State and Federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;

(C) designation of the area as a national marine sanctuary will facilitate the objectives in subparagraph (B); and

(D) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.

(b) Factors and Consultations Required in Making Determinations and Findings.—

(1) Factors.—For purposes of determining if an area of the marine environment meets the standards set forth in subsection (a), the Secretary shall consider—

(A) the area's natural resource and ecological qualities, including its contribution to biological productivity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, and the biogeographic representation of the site;

(B) the area's historical, cultural, archaeological, or paleontological significance;

(C) the present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

(D) the present and potential activities that may adversely affect the factors identified in subparagraphs (A), (B), (C);

(E) the existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of this title;

(F) the manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

(G) the public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

(H) the negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development; and

(I) the socioeconomic effects of sanctuary designation.

(2) Consultation.—In making determinations and findings, the Secretary shall consult with—

(A) the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate;

(B) the Secretaries of State, Defense, Transportation, and the Interior, the Administrator, and the heads of other interested Federal agencies;

(C) the responsible officials or relevant agency heads of the appropriate State and local government entities, including coastal zone management agencies, that will or are likely to be affected by the establishment of the area as a national marine sanctuary;

(D) the appropriate officials of any Regional Fishery Management Council established by section 302 of the Magnuson Act (16 U.S.C. 1852) that may be affected by the proposed designation; and

(E) other interested persons.

(3) Resource Assessment Report.—In making determinations and findings, the Secretary shall draft, as part of the environmental impact statement referred to in section 304(a)(1), a resource assessment report documenting present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial or recreational uses. The Secretary, in consultation with the Secretary of the Interior, shall draft a resource assessment section for the report regarding any commercial or recreational resource uses in the area under consideration that are subject to the primary jurisdiction of the Department of the Interior.

Sec. 304. Procedures for Designation and Implementation.

(a) Sanctuary Proposal.—

(1) Notice.—In proposing to designate a national marine sanctuary, the Secretary shall—

(A) issue, in the Federal Register, a notice of the proposal, proposed regulations that may be necessary and reasonable to implement the proposal, and a summary of the draft management plan;

(B) provide notice of the proposal in newspapers of general circulation or electronic media in the communities that may be affected by the proposal; and

(C) on the same day the notice required by subparagraph (A) is issued, the Secretary shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a prospectus on the proposal which shall contain—

(i) the terms of the proposed designation;

(ii) the basis of the findings made under section 303(a) with respect to the area;

(iii) an assessment of the considerations under section 303(b)(1);

(iv) proposed mechanisms to coordinate existing regulatory and management authorities within the area;

(v) the draft management plan detailing the proposed goals and objectives, management responsibilities, resource studies, interpretive and educational programs, and enforcement, including surveillance activities for the area;

(vi) an estimate of the annual cost of the proposed designation, including costs of personnel, equipment and facilities, enforcement, research, and public education;

(vii) the draft environmental impact statement;

(viii) an evaluation of the advantages of cooperative State and Federal management if all or part of a proposed marine sanctuary is within the territorial limits of any State or is superjacent to the subsoil and seabed within the seaward boundary of a State, as that boundary is established under the Submerged Lands Act (43 U.S.C. 1301 et seq.); and

(ix) the proposed regulations referred to in subparagraph (A).

[*Editor's note:* Section 205(b) of PL 100-627 provides:

"(b) Submission of Prospectuses.—The Secretary of Commerce shall submit a prospectus under section 304(a)(1)(C) and (a)(5) of the Act (16 U.S.C. 1434(a)(1)(C) and (a)(5)) to the Committee on Merchant Marine and Fisheries of the House of Representatives and to the Committee on Commerce, Science, and Transportation of the Senate—

(1) with respect to the Stellwagen Bank National Marine Sanctuary, as generally described in the Federal Register notice of August 4, 1983, not later than September 30, 1990; and

(2) with respect to the Northern Puget Sound National Marine Sanctuary, as generally described as the Washington State Nearshore area in the Federal Register notice of August 4, 1983, not later than March 31, 1991."]

(2) Environmental Impact Statement.—The Secretary shall—

(A) prepare a draft environmental impact statement, as provided by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), on the proposal that includes the resource assessment report required under section 303(b)(3), maps depicting the boundaries of the proposed designated area, and the existing and potential uses and resources of the area; and

(B) make copies of the draft environmental impact statement available to the public.

(3) Public Hearing.—No sooner than thirty days after issuing a notice under this subsection, the Secretary shall hold at least one public hearing in the coastal area or areas that will be most affected by the proposed designation of the area as a national marine sanctuary for the purpose of receiving the views of interested parties.

(4) Terms of Designation. — The terms of designation of a sanctuary shall include the geographic area proposed to be included within the sanctuary, the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic value, and the types of activities that will be subject to regulation by the Secretary to protect those characteristics. The terms of designation may be modified only by the same procedures by which the original designation is made.

(5) Fishing Regulations. — The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the United States Fishery Conservation Zone as the Council may deem necessary to implement the proposed designation. Draft regulations prepared by the Council, or a Council determination that regulations are not necessary pursuant to this paragraph, shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council's action fails to fulfill the purposes and policies of this title and the goals and objectives of the proposed designation. In preparing the draft regulations, a Regional Fishery Management Council shall use as guidance the national standards of section 301(a) of the Magnuson Act (16 U.S.C. 1851) to the extent that the standards are consistent and compatible with the goals and objectives of the proposed designation. The Secretary shall prepare the fishing regulations, if the Council declines to make a determination with respect to the need for regulations, makes a determination which is rejected by the Secretary, or fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations shall be drafted, approved, and issued in the same manner as the original regulations.

(6) Committee Action. — After receiving the prospectus under subsection (a)(1)(C), the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate may each hold hearings on the proposed designation and on the matters set forth in the prospectus. If within the forty-five day period of continuous session of Congress beginning on the date of submission of the prospectus, either Committee issues a report concerning matters addressed in the prospectus, the Secretary shall consider this report before publishing a notice to designate the national marine sanctuary.

(b) Taking Effect of Designations. —

(1) Notice. — In designating a national marine sanctuary, the Secretary shall publish in the Federal Register notice of the designation together with final regulations to implement the designation and any other matters required by law, and submit such notice to the Congress. The Secretary shall advise the public of the availability of the final management plan and the final environmental impact statement with respect to such sanctuary. The Secretary shall issue a notice of designation with respect to a proposed national marine sanctuary site not later than 30 months after the date a notice declaring the site to be an active candidate for sanctuary designation is published in the Federal Register under regulations issued under this Act, or shall publish not later than such date in the Federal Register findings regarding why such notice has not been published. No notice of designation may occur until the expiration of the period for Committee action under subsection (a)(6). The designation (and any of its terms not disapproved under this subsection) and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on the day on which such notice is published unless —

[304(b)(1) amended by PL 100-627]

(A) the designation or any of its terms is disapproved by enactment of a joint resolution of disapproval described in paragraph (3); or

(B) in the case of a natural marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State.

[*Editor's note:* Section 205(a) of PL 100-627 states:

"(a) Issuance of Notice of Designation.—The Secretary of Commerce shall issue a notice of designation under section 304(b)(1) of the Act (16 U.S.C. 1434(b)(1))—

(1) with respect to the proposed Cordell Banks National Marine Sanctuary as generally described in the Federal Register notice of June 30, 1983, not later than December 31, 1988;

(2) with respect to the Flower Garden Banks National Marine Sanctuary as generally described in the Federal Register notice of August 2, 1984, not later than March 31, 1989;

(3) with respect to the Monterey Bay National Marine Sanctuary as generally described in the Federal

Register notice of December 31, 1979, not later than December 31, 1989; and

(4) with respect to the Western Washington Outer Coast National Marine Sanctuary as generally described in the Federal Register notice of August 4, 1983, not later than June 30, 1990."]

(2) Withdrawal of Designation. — If the Secretary considers that actions taken under paragraph (1)(A) or (B) will affect the designation of a national marine sanctuary in a manner that the goals and objectives of the sanctuary cannot be fulfilled, the Secretary may withdraw the entire designation. If the Secretary does not withdraw the designation, only those terms of the designation not disapproved under paragraph (1)(A) or not certified under paragraph (1)(B) shall take effect.

(3) Resolution of Disapproval. — For the purposes of this subsection, the term 'resolution of disapproval' means a joint resolution which states after the resolving clause the following: "That the Congress disapproves the national marine sanctuary designation entitled that was submitted to Congress by the Secretary of Commerce on .", the first blank space being filled with the title of the designation and the second blank space being filled with the date on which the notice was submitted to Congress. In the event that the disapproval is addressed to one or more terms of the designation, the joint resolution shall state after the resolving clause the following: "That the Congress approves the national marine sanctuary designation entitled that was submitted to Congress by the Secretary of Commerce on but disapproves the following terms of such designation: .", the first blank space being filled with the title of the designation, the second blank space being filled with the date on which the notice was submitted to Congress, and the third blank space referencing each term of the designation which is disapproved.

(4) Procedures. —

(A) In computing the forty-five-day periods of continuous session of Congress pursuant to subsection (a)(6) and paragraph (1) of this subsection —

(i) continuity of session is broken only by an adjournment of Congress sine die; and

(ii) the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain are excluded.

(B) When the committee to which a joint resolution has been referred has reported such a resolution, it shall at any time thereafter be in order to move to proceed to the consideration of the resolution. The motion shall be privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) This subsection is enacted by Congress as an exercise of the rulemaking power of each House of Congress, respectively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the case of resolutions described in this subsection. This subsection supersedes other rules only to the extent that they are inconsistent therewith, and is enacted with full recognition of the constitutional right of either House to change the rules (so far as those relate to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

(c) Access and Valid Rights. —

(1) Nothing in this title shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access if the lease, permit, license, or right —

(A) was in existence on the date of enactment of the Marine Sanctuaries Amendments of 1984, with respect to any national marine sanctuary designated before that date; or

(B) is in existence on the date of designation of any national marine sanctuary, with respect to any national marine sanctuary designated after the date of enactment of the Marine Sanctuaries Amendments of 1984.

(2) The exercise of a lease, permit, license, or right is subject to regulation by the Secretary consistent with the purposes for which the sanctuary is designated.

Sec. 305. Application of Regulations and International Negotiations.

(a) Regulations. — The regulations issued under section 304 shall be applied in accordance with generally recognized principles of international law, and in accordance with the treaties, conventions, and other agreements to which the United States is a party. No regulation shall apply to a person who is not a citizen, national, or resident alien of the United States, unless in accordance with—

(1) generally recognized principles of international law;

(2) an agreement between the United States and the foreign state of which the person is a citizen; or

(3) an agreement between the United States and the flag state of a foreign vessel, if the person is a crewmember of the vessel.

(b) Negotiations. — The Secretary of State, in consultation with the Secretary, shall take appropriate action

to enter into negotiations with other governments to make necessary arrangements for the protection of any national marine sanctuary and to promote the purposes for which the sanctuary is established.

Sec. 306. Research and Education.

The Secretary shall conduct research and educational programs as are necessary and reasonable to carry out the purposes and policies of this title.

[307 revised by PL 100-627]

(a) In General.—The Secretary shall conduct such enforcement activities as are necessary and reasonable to carry out this title.

(b) Powers of Authorized Officers.—Any person who is authorized to enforce this title may—

(1) board, search, inspect, and seize any vessel suspected of being used to violate this title or any regulation or permit issued under this title and any equipment, stores, and cargo of such vessel;

(2) seize wherever found any sanctuary resource taken or retained in violation of this title or any regulation or permit issued under this title;

(3) seize any evidence of a violation of this title or of any regulation or permit issued under this title;

(4) execute any warrant or other process issued by any court of competent jurisdiction; and

(5) exercise any other lawful authority.

(c) Civil Penalties.—

(1) Civil penalty.—Any person subject to the jurisdiction of the United States who violates this title or any regulation or permit issued under this title shall be liable to the United States for a civil penalty of not more than $50,000 for each such violation, to be assessed by the Secretary. Each day of a continuing violation shall constitute a separate violation.

(2) Notice.—No penalty shall be assessed under this subsection until after the person charged has been given notice and an opportunity for a hearing.

(3) In Rem Jurisdiction.—A vessel used in violating this title or any regulation or permit issued under this title shall be liable in rem for any civil penalty assessed for such violation and may be proceeded against in any district court of the United States having jurisdiction.

(4) Review of Civil Penalty.—Any person against whom a civil penalty is assessed under this subsection may obtain review in the United States district court for the appropriate district by filing a complaint in such court not later than 30 days after the date of such order.

(5) Collection of Penalties.—If any person fails to pay an assessment of a civil penalty under this section after it has become a final and unappealable order, or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(6) Compromise or Other Action by Secretary.—The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is or may be imposed under this section.

(d) Forfeiture.—

(1) In General.—Any vessel (including the vessel's equipment, stores, and cargo) and other item used, and any sanctuary resource taken or retained, in any manner, in connection with or as a result of any violation of this title or of any regulation or permit issued under this title shall be subject to forfeiture to the United States pursuant to a civil proceeding under this subsection.

(2) Application of the Customs Laws.—The Secretary may exercise the authority of any United States official granted by any relevant customs law relating to the seizure, forfeiture, condemnation, disposition, remission, and mitigation of property in enforcing this title.

(3) Disposal of Sanctuary Resources.—Any sanctuary resource seized pursuant to this title may be disposed of pursuant to an order of the appropriate court, or, if perishable, in a manner prescribed by regulations promulgated by the Secretary. Any proceeds from the sale of such sanctuary resource shall for all purposes represent the sanctuary resource so disposed of in any subsequent legal proceedings.

(4) Presumption.—For the purposes of this section there is a rebuttable presumption that all sanctuary resources found on board a vessel that is used or seized in connection with a violation of this title or of any regulation or permit issued under this title were taken or retained in violation of this title or of a regulation or permit issued under this title.

(e) Payment of Storage, Care, and Other Costs.—

(1) In General.—Notwithstanding any other law, the Secretary may use amounts received under this section in the form of civil penalties, forfeitures of property, and costs imposed under paragraph (2) to pay—

(A) the reasonable and necessary costs incurred by the Secretary in providing temporary storage, care, and maintenance of any sanctuary resource or other property seized under this section pending disposition of any civil proceeding relating to any alleged violation with respect to which such property or sanctuary resource was seized; and

(B) a reward to any person who furnishes information leading to an assessment of a civil penalty, or to a forfeiture of property, for a violation of this title or of any regulation or permit issued under this title.

(2) Liability for Costs.—Any person assessed a civil penalty for a violation of this title or of any regulation or permit issued under this title, and any claimant in a forfeiture action brought for such a violation, shall be liable for the reasonable costs incurred by the Secretary in storage, care, and maintenance of any sanctuary resource or other property seized in connection with the violation.

(f) Subpoenas.—In the case of any hearing under this section which is determined on the record in accordance with the procedures provided for under section 554 of title 5, United States Code, the Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may administer oaths.

(g) Use of Resources of State and Other Federal Agencies.—The Secretary shall, whenever appropriate, use by agreement the personnel, services, and facilities of State and other Federal departments, agencies, and instrumentalities, on a reimbursable or nonreimbursable basis, to carry out the Secretary's responsibilities under this section.

(h) Coast Guard Authority Not Limited.—Nothing in this section shall be considered to limit the authority of the Coast Guard to enforce this or any other Federal law under section 89 of title 14, United States Code.

(i) Injunctive Relief.—If the Secretary determines that there is an imminent risk of destruction or loss of or injury to a sanctuary resource, or that there has been actual destruction or loss of, or injury to, a sanctuary resource which may give rise to liability under section 312, the Attorney General, upon request of the Secretary, shall seek to obtain such relief as may be necessary to abate such risk or actual destruction, loss, or injury, or to restore or replace the sanctuary resource, or both. The district courts of the United States shall have jurisdiction in such a case to order such relief as the public interest and the equities of the case may require.

Sec. 308 [Repealed by PL 100-627]

Sec. 308. Severability.

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of this Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

[Former 309 redesignated as 308 by PL 100-627]

Sec. 309. Promotion And Coordination of Research

[New 309 added by PL 100-627]

The Secretary shall take such action as is necessary to promote and coordinate the use of national marine sanctuaries for research purposes including—

(1) requiring that the National Oceanic and Atmospheric Administration, in conducting or supporting marine research, give priority to research involving national marine sanctuaries; and

(2) consulting with other Federal and State agencies to promote use by such agencies of one or more sanctuaries for marine research.

Sec. 310. Special Use Permits.

[310 added by PL 100-627]

(a) Issuance of Permits.—The Secretary may issue special use permits which authorize the conduct of specific activities in a national marine sanctuary if the secretary determines such authorization is necessary—

(1) to establish conditions of access to and use of any sanctuary resource; or

(2) to promote public use and understanding of a sanctuary resource.

(b) Permit Terms.—A permit issued under this section—

(1) shall authorize the conduct of an activity only if that activity is compatible with the purposes for which the sanctuary is designated and with protection of sanctuary resources;

(2) shall not authorize the conduct of any activity for a period of more than 5 years unless renewed by the Secretary;

(3) shall require that activities carried out under the permit be conducted in a manner that does not destroy, cause the loss of, or injure sanctuary resources; and

(4) shall require the permittee to purchase and maintain comprehensive general liability insurance against claims arising out of activities conducted under the permit and to agree to hold the United States harmless against such claims.

(c) Fees.—

(1) Assessment and Collection.—The Secretary may assess and collect fees for the conduct of any activity under a permit issued under this section.

(2) Amount.—The amount of a fee under this subsection shall be equal to the sum of—

(A) costs incurred, or expected to be incurred, by the Secretary in issuing the permit;

(B) costs incurred, or expected to be incurred, by the Secretary as a direct result of the conduct of the activity for which the permit is issued, including costs of monitoring the conduct of the activity; and

(C) an amount which represents the fair market value of the use of the sanctuary resource and a reasonable return to the United States Government.

(3) Use of Fees.—Amounts collected by the Secretary in the form of fees under this section may be used by the Secretary—

(A) for issuing and administering permits under this section; and

(B) for expenses of designating and managing national marine sanctuaries.

(d) Violations.—Upon violation of a term or condition of a permit issued under this section, the Secretary may—

(1) suspend or revoke the permit without compensation to the permittee and without liability to the United States;

(2) assess a civil penalty in accordance with section 307; or

(3) both.

(e) Reports.—Each person issued a permit under this section shall submit an annual report to the Secretary not later than December 31 of each year which describes activities conducted under that permit and revenues derived from such activities during the year.

(f) Fishing.—Nothing in this section shall be considered to require a person to obtain a permit under this section for the conduct of any fishing activities in a national marine sanctuary.

Sec. 311. Cooperative Agreements And Donations.

[311 added by PL 100-627]

(a) Cooperative Agreements.—The Secretary may enter into cooperative agreements with any nonprofit organization—

(1) to aid and promote interpretive, historical, scientific, and educational activities; and

(2) for the solicitation of private donations for the support of such activities.

(b) Donations.—The Secretary may accept donations of funds, property, and services for use in designating and administering national marine sanctuaries under this title.

Sec. 312. Destruction Or Loss Of, Or Injury To, Sanctuary Resources.

[312 added by PL 100-627]

(a) Liability.—

(1) In General.—Subject to paragraph (3), any person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.

(2) Liability In Rem.—Any vessel used to destroy, cause the loss of, or injure any sanctuary resource shall be liable in rem to the United States for response costs and damages resulting from such destruction, loss, or injury.

(3) Defenses.—A person is not liable under this subsection if that person establishes that—

(A) the destruction or loss of, or injury to, the sanctuary resource was caused solely by an act of God, an act of war, or an act or omission of a third party, and the person acted with due care;

(B) the destruction, loss, or injury was caused by an activity authorized by Federal or State law; or

(C) the destruction, loss, or injury was negligible.

(b) Response Actions And Damage Assessment.—

(1) Response Actions.—The Secretary may undertake all necessary actions to prevent or minimize the destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risk of such destruction, loss, or injury.

(2) Damage Assessment.—The Secretary shall assess damages to sanctuary resources in accordance with section 302(6).

(c) Civil Actions For Response Costs And Damages.—The Attorney General, upon request of the Secretary, may commence a civil action in the United States district court for the appropriate district against any person or vessel who may be liable under subsection (a) for response costs and damages. The Secretary, acting as trustee for sanctuary resources for the United States, shall submit a request for such an action to the Attorney General whenever a person may be liable for such costs or damages.

(d) Use Of Recovered Amounts.—Response costs and damages recovered by the Secretary under this section and civil penalties under section 307 shall be retained by the Secretary in the manner provided for in section 107(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9607(f)(1)), and used as follows:

(1) Response Costs And Damage Assessments.—Twenty percent of amounts recovered under this section, up to a maximum balance of $750,000, shall be used to finance response actions and damage assessments by the Secretary.

(2) Restoration, Replacement, Management, And Improvement.—Amounts remaining after the operation of paragraph (1) shall be used, in order of priority—

(A) to restore, replace, or acquire the equivalent of the sanctuary resources which were the subject of the action;

(B) to manage and improve the national marine sanctuary within which are located the sanctuary resources which were the subject of the action; and

(C) to manage and improve any other national marine sanctuary.

(3) Use Of Civil Penalties.—Amounts recovered under section 307 in the form of civil penalties shall be used by the Secretary in accordance with section 307(e) and paragraphs (2)(B) and (C) of this subsection.

(4) Federal-State Coordination.—Amounts recovered under this section with respect to sanctuary resources

lying within the jurisdiction of a State shall be used under paragraphs (2)(A) and (B) in accordance with an agreement entered into by the Secretary and the Governor of that State.

Sec. 313. Authorization Of Appropriations.

[313 added by PL 100-627]

There are authorized to be appropriated to the Secretary to carry out this title the following:

(1) General Administration. — For general administration of this title —

(A) $1,800,000 for fiscal year 1989;

(B) $1,900,000 for fiscal year 1990;

(C) $2,000,000 for fiscal year 1991; and

(D) $2,100,000 for fiscal year 1992.

(2) Management of Sanctuaries. — For management of national marine sanctuaries designated under this title—

(A) $2,000,000 for fiscal year 1989;

(B) $2,500,000 for fiscal year 1990;

(C) $3,000,000 for fiscal year 1991; and

(D) $3,250,000 for fiscal year 1992.

(3) Site Review And Analysis. — For review and analysis of sites for designation under this title as national marine sanctuaries —

(A) $450,000 for fiscal year 1989;

(B) $500,000 for fiscal year 1990;

(C) $550,000 for fiscal year 1991; and

(D) $600,000 for fiscal year 1992.

Sec. 314. U.S.S. Monitor Artifacts and Materials.

[314 added by PL 100-627]

(a) Congressional Policy. — In recognition of the historical significance of the wreck of the United States ship Monitor to coastal North Carolina and to the area off the coast of North Carolina known as the Graveyard of the Atlantic, the Congress directs that a suitable display of artifacts and materials from the United States ship Monitor be maintained permanently at an appropriate site in coastal North Carolina.

(b) Interpretation And Display Of Artifacts. —

(1) Submission Of Plan. — The Secretary shall, within six months after the date of the enactment of this section, submit to the Committee on Merchant Marine and Fisheries of the House of Representatives a plan for a suitable display in coastal North Carolina of artifacts and materials of the United States ship Monitor.

(2) Contents Of Plan. — The plan submitted under subsection (a) shall, at a minimum, contain —

(A) an identification of appropriate sites in coastal North Carolina, either existing or proposed, for display of artifacts and materials of the United States ship Monitor;

(B) an identification of suitable artifacts and materials, including artifacts recovered or proposed for recovery, for display in coastal North Carolina;

(C) an interpretive plan for the artifacts and materials which focuses on the sinking, discovery, and subsequent management of the wreck of the United States ship Monitor; and

(D) a draft cooperative agreement with the State of North Carolina to implement the plan.

(c) Disclaimer. — This section shall not affect the following:

(1) Responsibilities Of Secretary. — The responsibilities of the Secretary to provide for the protection, conservation, and display of artifacts and materials from the United States ship Monitor.

(2) Authority Of Secretary. — The authority of the Secretary to designate the Mariner's Museum, located at Newport News, Virginia, as the principal museum for coordination of activities referred to in paragraph (1).

TITLE IV—REGIONAL MARINE RESEARCH PROGRAMS

[Title IV added by PL 101-593]

Sec. 401. Purposes. The purpose of this title is to establish regional research programs, under effective Federal oversight, to—

(1) set priorities for regional marine and coastal research in support of efforts to safeguard the water quality and ecosystem health of each region; and

(2) carry out such research through grants and improved coordination.

Sec. 402. Definitions. As used in this title, the term—

(1) 'Board' means any Regional Marine Research board established pursuant to section 403(a);

(2) 'Federal agency' means any department, agency, or other instrumentality of the Federal Government, including any independent agency or establishment of the Federal Government and any government corporation;

(3) 'local government' means any city, town, borough, county, parish, district, or other public body which is a political subdivision of a State and which is created pursuant to State law;

(4) 'marine and coastal waters' means estuaries, waters of the estuarine zone, including wetlands, any other waters seaward of the historic height of tidal influence, the territorial seas, the contiguous zone, and the ocean;

(5) 'nonprofit organization' means any organization, association, or institution described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation pursuant to section 501(a) of such Code;

(6) 'region' means 1 of the 9 regions described in section 403(a); and

(7) 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Sec. 403. Regional Marine Research Boards (a) Establishment.—A Regional Marine Research board shall be established for each of the following regions:

(1) the Gulf of Maine region, comprised of the marine and coastal waters off the State of Maine, New Hampshire and Massachusetts (north of Cape Cod);

(2) the greater New York bight region, comprised of the marine and coastal waters off the States of Massachusetts (south of Cape Cod), Rhode Island, Connecticut, New York, and New Jersey, from Cape Cod to Cape May;

(3) the mid-Atlantic region, comprised of the marine and coastal waters off the States of New Jersey, Delaware, Maryland, Virginia, and North Carolina, from Cape May to Cape Fear;

(4) the South Atlantic region, comprised of the marine and coastal waters off the States of North Carolina, South Carolina, Georgia, and Florida, from Cape Fear to the Florida Keys, including the marine and coastal waters off Puerto Rico and the United States Virgin Islands;

(5) the Gulf of Mexico region, comprised of the marine and coastal waters off the States of Florida, Alabama, Mississippi, Louisiana, and Texas along the Gulf coast from the Florida Keys to the Mexican border;

(6) the California region, comprised of the marine and coastal waters off the State of California, from Point Reyes to the Mexican border;

(7) the North Pacific region, comprised of the marine and coastal waters off the States of California, Oregon, and Washington, from Point Reyes to the Canadian border;

(8) the Alaska region, comprised of the marine and coastal waters off the State of Alaska; and

(9) insular Pacific region, comprised of the marine and coastal waters off the State of Hawaii, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

The Great Lakes Research Office authorized under section 118(d) of the Federal Water Pollution Control Act (33 U.S.C. 1268(d)) shall be responsible for research in the Great Lakes region and shall be considered the Great Lakes counterpart to the research program established pursuant to this title.

(b) Membership.—

(1) Composition.—Each Board shall be comprised of 11 members of which—

(A) 3 members shall be appointed by the Administrator of the National Oceanic and Atmospheric Administration, including 1 member who shall be a Sea Grant Program Director from a State within such region, who shall serve as chairman of the board;

(B) 2 members shall be appointed by the Administrator of the Environmental Protection Agency; and

(C) 6 members shall be appointed by Governors of States located within the region.

(2) Qualifications.—Each individual appointed as a member of a Board shall possess expertise, pertinent to the region concerned, in scientific research, coastal zone management, fishery management, water quality management, State and loval government, or any other area which is directly relevant to the functions of the Board. A majority of the members of each Board shall be trained in a field of marine or aquatic science and shall be currently engaged in research or research administration.

(3) Terms.—Each appointed member of a Board shall serve for a term of 4 years.

(4) Vacancies.—In the event of a vacancy, a replacement member shall be appointed in the same manner and in accordance with the same requirements as the member being replaced and shall serve the remainder of the term of the replaced member.

(5) Reimbursement of Expenses.—Each appointed member of a Board may be paid actual travel expenses, and per diem in lieu of subsistence expenses when away from the member's usual place of residence, in accordance with section 5703 of title 5, United States Code, when engaged in the actual performance of Board duties.

(c) Functions.—Each Board shall, in accordance with the provisions of this title—

(1) develop and submit to the Administrators of the National Oceanic and Atmospheric Administration and the Environmental Protection Agency a marine research plan, including periodic amendments thereto, that meets the requirements of section 404;

(2) provide a forum for coordinating research among research institutions and agencies;

(3) provide for review and comment on research plans by affected users and interests, such as the commercial and recreational fishing industries, other marine industries, State and local government entities, and environmental organizations;

(4) ensure that the highest quality of research projects will be conducted to carry out the comprehensive plan; and

(5) prepare, for submission to Congress, a periodic report on the marine environmental research issues and activities within the region in accordance with section 406 of this title.

(d) Powers.—Each Board shall be authorized to—

(1) cooperate with Federal agencies, with States and with local government entities, interstate and regional agencies, other public agencies and authorities, nonprofit institutions, laboratories, and organizations, or other appropriate persons, in the preparation and support of marine research in the region;

(2) enter into contracts, cooperative agreements or grants to State and local governmental entities, other public agencies or institutions, and non-profit institutions and organizations for purposes of carrying out the provisions of this title;

(3) collect and make available through publications and other appropriate means, the results of, and other information pertaining to, the research conducted in the region;

(4) call conferences on regional marine research and assessment issues, giving opportunity for interested persons to be heard and present papers at such conferences;

(5) develop and stimulate, in consultation with the Department of State, joint marine research projects with foreign nations;

(6) utilize facilities and personnel of existing Federal agencies, including scientific laboratories and research facilities;

(7) accept, and for all general purposes of this Act, utilize funds from other sources, including but not limited to State and local funds, university funds, and donations; and

(8) acquire secret processes, inventions, patent applications, patents, licenses, and property rights, by purchase, license, lease, or donation.

(e) Administration.—

(1) Practices and Procedures.—Each Board shall determine its organization, and prescribe its practices and procedures for carrying out its functions under this title. Each Board should use existing research administrative capability to the extent practicable.

(2) Committees and Subcommittees.—Each Board shall establish such committees and subcommittees as are appropriate in the performance of its functions.

(3) Staff and Support.—Each Board is authorized to hire such staff as are necessary to carry out the functions of the Board.

(f) Termination.—Each Board shall cease to exist on October 1, 1999, unless extended by Congress.

Sec. 404. Regional Research Plans

(a) Development and Amendment of Regional Plans.—

(1) In General.—Each Board shall develop a comprehensive 4-year marine research plan for the region for which the Board is responsible, and shall amend the plan at such times as the Board considers necessary to reflect changing conditions, but no less frequently than once every 4 years.

(2) Review and Consideration of National Plan.—In the development and amendment of its research plan, the Board shall consider findings and recommendations of the national plan developed pursuant to the National Ocean Pollution Planning Act of 1978 (33 U.S.C. 1701 et seq.).

(b) Contents of Plan.—Such marine research plan shall include—

(1) an overview of the environmental quality conditions in the coastal and marine waters of the region and expected trends in these conditions;

(2) a comprehensive inventory and description of all marine research related to water quality and ecosystem health expected to be conducted in the region during the 4-year term of the research plan;

(3) a statement and explanation of the marine research needs and priorities applicable to the marine and coastal waters of the region over the upcoming 10-year period with emphasis on the upcoming 3-to-5 year period;

(4) an assessment of how the plan will incorporate existing marine, coastal, and estuarine research and management in the region, including activities pursuant to section 320 of the Federal Water Pollution Control Act (33 U.S.C. 1330) and section 315 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1461); and

(5) a general description of marine research and monitoring objectives and timetables for achievement through the funding of projects under this title during the 4-year period covered by the plan so as to meet the priorities specified in the plan in accordance with paragraph (3).

(c) Plan Review and Approval.—

(1) In General.—When a Board has developed a marine research plan, including amendments thereto, the Board shall submit the plan to the Administrator of the National Oceanic and Atmospheric Administration and the Administration of the Environmental Protection Agency, who shall jointly determine whether the plan meets the requirements of subsection (b).

(2) Time for Approval or Disapproval.—The Administrator of the National Oceanic and Atmospheric Administration and the Administrator of the Environmental Protection Agency, shall jointly approve or disapprove such research plan within 120 days after receiving the plan.

(3) Action after Disapproval.—In the case of disapproval of such research plan, the Administrator of the National Oceanic and Atmospheric Administration and the Administrator of the Environmental Protection Agency shall jointly notify the appropriate Board in writing, stating in detail the revisions necessary to obtain approval of the plan. Such Administrators shall approve or disapprove the revised plan within 90 days after receiving the revised plan from the Board.

Sec. 405. Research Grant Program

(a) Program Administration.—The Administrator of the National Oceanic and Atmospheric Administration shall administer a grant program to support the administrative functions of each Board.

(b) Research Grants.—(1) Each Board may annually submit a grant application to the Administrator of the National Oceanic and Atmospheric Administration to fund projects aimed at achieving the research priorities set forth in each research plan, including amendments thereto, developed and approved pursuant to section 404.

(2) Projects eligible for funding under this section shall include research, investigations, studies, surveys, or demonstrations with respect to—

(A) baseline assessment of marine environmental quality, including chemical, physical, and biological indicators of environmental quality;

(B) effects or potential effects of contaminants, including nutrients, toxic chemicals and heavy metals, on the environment, including marine and aquatic organisms;

(C) effects of modification of habitats, including coastal wetlands, seagrass beds and reefs, on the environment, including marine organisms;

(D) assessment of impacts of pollutant sources and pollutant discharges into the coastal environment;

(E) transport, dispersion, transformation, and fate and effect of contaminants in the marine environment;

(F) marine and estuarine habitat assessment and restoration;

(G) methods and techniques for modeling environmental quality conditions and trends;

(H) methods and techniques for sampling of water, sediment, marine and aquatic organisms, and demonstration of such methods and techniques;

(I) the effects on human health and the environment of contaminants or combinations of contaminants at various levels, whether natural or anthropogenic, that are found in the marine environment;

(J) environmental assessment of potential effects of major coastal and offshore development projects in the region;

(K) assessment of the effects of climate change on marine resources in the region; and

(L) analysis and interpretation of research data for the benefit of State and local environmental protection and resource management agencies in the region.

(3) Grant applications submitted pursuant to this subsection shall include—

(A) a description of the specific research projects to be conducted;

(B) identification of the organization responsible for each project and the principal investigator directing the project;

(C) a budget statement for each project;

(D) a schedule of milestones and interim products for each research project;

(E) a description of the relationship of the proposed project to the goals, objectives, and priorities of the research plan for the region and to other research projects; and

(F) any other information which may be required by the Administrator.

(c) Review and Approval of Project Proposals.—(1) The Administrator of the National Oceanic and Atmospheric Administration shall review the annual grant application and, with the concurrence of the Administrator of the Environmental Protection Agency, approve such grant application with such conditions as are determined to be appropriate based on peer reviews conducted pursuant to paragraph (2).

(2) The Administrator of the National Oceanic and Atmospheric Administration shall develop a system of peer review of grant applications which shall ensure that only the highest quality research is approved for funding and that each project is reviewed by research scientists outside the region concerned.

(d) Reporting.—Any recipient of a grant under this section shall report to the appropriate Board, not later than 18 months after award of the grant, on the activities of such recipient conducted pursuant to this subsection. Such report shall include narrative summaries and technical data in such form as the Administrator of the National Oceanic and Atmospheric Administration may require.

Sec. 406. Report on Research Program (a) Preparation and Submission of Report.— Each Board receiving a grant under section 405 shall, not later than 2 years after the approval of its comprehensive plan under section 405 and at 2-year intervals thereafter, prepare and submit to the Administrator of the National Oceanic and Atmospheric Administration and the Administrator of the Environmental Protection Agency a report describing—

(1) the findings and conclusions of research projects conducted in the region;

(2) recommendations for improvements in the design

or implementation of programs for the protection of the marine environment; and

(3) available data and information concerning ecosystem health within the region.

(b) Transmittal to Congress.— Upon receipt of a report prepared by a Board under subsection (a), the Administrator of the National Oceanic and Atmospheric Administration and the Administrator of the Environmental Protection Agency shall transmit a copy of such report to the Committees on Commerce, Science, and Transportation and on Environment and Public Works of the Senate and to the Committee on Merchant Marine and Fisheries of the House of Representatives.

Sec. 407. Authorization of Appropriations

(a) In General.— For purposes of carrying out the provisions of this title, there are authorized to be appropriated $18,000,000 for each of the fiscal years 1992 through 1996.

(b) Allocation.—(1) Of funds appropriated in any fiscal year, not more than $500,000 shall be reserved for administration of this title by the National Oceanic and Atmospheric Administration and the Environmental Protection Agency.

(2) Funds appropriated in a fiscal year which are available after allocation pursuant to paragraph (1), shall be used to support the administrative costs of Boards established pursuant to subsection 403(a), provided that such funding does not exceed $300,000 for each research Board in each fiscal year.

(3) Seventy-five percent of funds appropriated in a fiscal year available after allocation pursuant to paragraphs (1) and (2), shall be allocated equally among Boards located in regions submitting research project grant applications pursuant to section 405(b).

(4) Twenty-five percent of funds appropriated in a fiscal year available after allocation pursuant to paragraphs (1) and (2), shall be allocated among Boards located in regions submitting research project grant applications pursuant to section 405(b) which, in the judgment of the Administrator of the National Oceanic and Atmospheric Administration, in consultation with the Administrator of the Environmental Protection Agency, propose the most needed and highest quality research.

MISCELLANEOUS PROVISIONS OF PUBLIC LAW 100–627

Sec. 206. Study of Areas For Designation As Or Inclusion In National Marine Sanctuaries.

(a) Study. —

(1) In General. — The Secretary of Commerce shall conduct a study of the areas described in subsection (c) for purposes of making determinations and findings in accordance with section 303(a) of the Act (16 U.S.C. 1433(a)) —

(A) regarding whether or not all or any part of such areas are appropriate for designation as national marine sanctuaries in accordance with the Act; and

(B) regarding whether or not all or any part of the areas described in subsection (c)(1), (2), and (3) should be added to and administered as part of the Key Largo National Marine Sanctuary or the Looe Key National Marine Sanctuary.

(2) Report. — Not later than 2 years after the date of the enactment of this Act, the Secretary of Commerce shall submit a report to the Committee on Merchant Marine and Fisheries of the House of Representatives and to the Committee on Commerce, Science, and Transportation of the Senate which sets forth the determinations and findings referred to in paragraph (1).

(b) Designation Or Expansion Of Marine Sanctuaries. — If as a result of a study conducted pursuant to subsection (a) the Secretary of Commerce makes the determinations and findings set forth in section 303(a) of the Act (16 U.S.C. 1433(a)) with respect to all or any part of the areas described in subsection (c), the Secretary of Commerce, in accordance with the procedures for the designation of national marine sanctuaries set forth in section 304 of the Act (16 U.S.C. 1434) —

(1) shall designate such areas of parts of such areas as national marine sanctuaries; or

(2) shall, with respect to all or any part of the areas described in subsections (c)(1), (2), and (3), add such areas or parts of such areas to the Key Largo National Marine Sanctuary or the Looe Key National Marine Sanctuary;

as the Secretary of Commerce considers appropriate.

(c) Areas Described. — The areas referred to in subsections (a) and (b) are the following:

(1) American Shoal. — The portion of the marine environment in the Florida Keys in the vicinity of American Shoal, including the part of such environment located generally between such shoal and the Marquesas Keys.

(2) Sombrero Key. — The portion of the marine environment in the Florida Keys in the vicinity of and surrounding Sombrero Key.

(3) Alligator Reef. — The portion of the marine environment in the Florida Keys in the vicinity of and surrounding Alligator Reef, including the portion located generally between such reef and the Key Largo National Marine Sanctuary.

(4) Santa Monica Bay. — The portion of the marine environment off the coast of California commonly referred to as Santa Monica Bay, consisting of an area

described generally as follows: Beginning at the point known as Point Dume near the western extent of Santa Monica Bay, proceed generally southeast along the shoreline to the point known as Point Vincente near the southern extent of Santa Monica Bay; then west to the 900 meter bathymetric contour; then generally northwest along the 900 meter bathymetric contour to a point due west of Point Dume; then east to Point Dume at the point of beginning.

(d) Definition Of Marine Evironment. — For the purposes of this section, the term "marine environment" has the meaning such term has in section 302(3) of the Act (16 U.S.C. 1432(b)).

Sec. 209. Channel Islands National Marine Sanctuary Protection.

(a) Report. — The Secretary of Transportation, not later than 6 months after the date of the enactment of this Act, shall transmit to Congress —

(1) the provisions of international conventions and United States laws and regulations which reduce the risk of a vessel collision or incident resulting in damage to the environment in the Channel Islands National Marine Sanctuary;

(2) the provisions of the National Contingency Plan for removal of oil and hazardous substances prepared under section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) which enable the Secretary to effectively respond to an oil pollution incident in or affecting the Channel Islands National Marine Sanctuary;

(3) a list of pollution exercises conducted under that National Contingency Plan in the Santa Barbara Channel before the date of the enactment of this Act, and a schedule of pollution exercises scheduled to be conducted under that plan in that channel during the 12 months following the date of the enactment of this Act; and

(4) a report on the establishment —

(A) under the Ports and Waterways Safety Act (33 U.S.C. 1221 et seq.) of safety fairways off the coast of California; and

(B) of the Long Beach NAVTEX in Long Beach, California.

(b) Study Review And Report. — The Secretary of Transportation shall review all Federal, State, and local studies conducted on the hazards of shipping operations and the risks those operations pose to the environment and natural resources of the Channel Islands National Marine Sanctuary, and report to the Congress not later than 6 months after the date of the enactment of this Act on the status and recommendations of each of those studies. The Secretary shall include in the report a recommendation on whether an alternate vessel traffic separation scheme would reduce the risks of shipping operations to the environment and natural resources in the Channel Islands National Marine Sanctuary.

(c) Proposal Of Designation of Area To Be Avoided. — The Secretary of Transportation shall prepare and submit a proposal to the International Maritime Organization to designate the portion of the Channel Islands National Marine Sanctuary which is outside of the Santa Barbara Channel Traffic Separation Scheme, as an area to be avoided. The Secretary shall ensure that the proposal would not result in undue interference with international vessel traffic in the Santa Barbara Channel, with operations associated with the United States Navy Pacific Missile Test Range, or with enjoyment of the Channel Islands National Marine Sanctuary under the title III of the National Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.).

Sec. 210. Regulations.

Not later than one year after the date of the enactment of this Act, the Secretary of Commerce —

(1) shall propose regulations implementing the amendments made by this title; and

(2) shall issue final regulations implementing the amendments made by the Marine Sanctuaries Amendments of 1984.

20.
National Marine Sanctuaries: Challenge and Opportunity

A report to the
National Oceanic and Atmospheric Administration
(THE POTTER REPORT)

National Marine Sanctuaries: Challenge and Opportunity

A Report to

the

National Oceanic and Atmospheric Administration

Marine Sanctuaries Review Team

February 22, 1991

Contents

Introduction and Summary vii

Background 7

History of Marine Sanctuaries 9

History of panel 10

Recommendations 11

Program Leadership 11

The Administration, NOAA and the Marine Sanctuaries program should commit themselves to a leadership role in protecting the resources entrusted to them.

Program Vision 12

NOAA should identify and endorse a clear vision of what it believes the Marine Sanctuaries program should become, consistent with its statutory mandate.

Program Mission 13

A mission statement should be articulated, identifying the steps necessary to achieve this vision.

Budget 15

The Administration should request, and the Congress should authorize, a budget adequate to accomplish the purposes of the individual sanctuaries, to establish new sanctuaries and to administer the program. For these three functions, an adequate budget would be on the order of $30 million.

Improving the Designation Process 15

Adequate resources must continue to be available to the sanctuary designation process. Rather than divert these resources, new funding and personnel resources are needed to manage effectively the sanctuaries already in the system.

Transfers of Resources and Responsibility to the Field 16

Headquarters should be charged with placing sanctuary managers, setting policy for sanctuary operations, providing strong and effective guidance where appropriate, and monitoring sanctuary operations to see that policies and guidelines are being followed. At the same time, much responsibility for sanctuary managements and operations should be decentralized and assigned to regional managers or sanctuary managers who are closer to the sanctuaries themselves

Responsibilities of Sanctuary Managers 16

The program must attract, train and support effective sanctuary managers. Once in place, managers should be encouraged to work closely with local groups and institutions.

Personnel 17

The program needs to identify, retain or attract, and train high-caliber personnel.

Visibility 17
The sanctuaries program needs to be given higher visibility and status within the agency, with other agencies and with the public. It should be elevated to Office status within the agency.

Priorities 18
A high priority should be assigned to strengthening the management of existing sanctuaries and utilizing the tremendous opportunities to develop strong effective model sanctuaries in Florida and California. In addition, priority should be given to new sanctuaries that will enhance biogeographic representation and plug gaps in the existing system.

Cooperation with Other Programs 19
The Marine Sanctuaries program must develop effective, cooperative and supportive working relationships with other institutions and organizations with related interests.

Experience in Other Programs 21
NOAA should carefully examine and evaluate similar programs now in place or under development in other countries.

Criteria, Number and Size 22
At a minimum, each of the biogeographical provinces in U.S. waters should be represented in the system, with one in each of these being sufficiently large to offer reasonable assurance that these regions will be adequately represented. In addition, sanctuaries should be established to protect natural and historical areas that contain rare, critical, unique, outstanding or otherwise special resources, and there should be further analysis of how much representation is required in the system.

Outside Review 23
Regular independent review should be a continuing element of the sanctuary program.

Creation of Supporting Institution 24
NOAA should explore the possibility of a national nonprofit organization that is in a position to advise and encourage the marine sanctuary program; local cooperating organizations can also be of great value to the operation of sanctuary programs.

User Fees and Outside Support 24
Part of the costs of the sanctuary program should be borne by the constituencies it serves.

Review of Existing Intergovernmental Agreements 25
Existing intergovernmental arrangements with state and local authorities should be reexamined and, where appropriate, renegotiated by NOAA.

Name of the Program 25
The name of the program should not be changed.

Zoning 25
NOAA should devise and adopt an appropriate zoning system for national marine sanctuaries as a priority matter, beginning with the new, large sanctuaries now in the designation process.

Relationship with National Estuarine Research Reserves Program 26
The Marine Sanctuaries Program and the National Estuarine Research Reserve Program have much in common and should continue to be encouraged to work closely together in the future, as they have in the past.

Development of Research and Education Agendas 27
NOAA should develop clear research and education agendas for the Marine Sanctuaries Program. These agendas should be fully integrated with the research and education agendas of other NOAA agencies and also, to the maximum extent possible, integrate these agendas with those performed outside NOAA by other federal agencies, and private and international organizations.
NOAA should ensure that all its coastal and marine programs are appropriately represented on the National Research Council's Committee on the Coastal Ocean.

Panel Conclusion: 27
If the issues discussed in this report are clearly addressed by the Administration and the Congress, the Marine Sanctuaries program can achieve success and meet the expectations created when it was established in 1972. All that is required is the resolve to make it happen.

Appendices:

Members, National Marine Sanctuaries Review Team ..... *A*

Great Barrier Reef Marine Park—pertinent facts ..... *B*

Program Comparison—Sanctuaries and Estuaries Programs ..... *C*

Programs at Existing National Marine Sanctuaries ..... *D*

Resolution on Safeguarding Oceans and Water Resources ..... *E*
Adopted at Interparliamentary Conference on the Global Environment, Washington, D.C., May 2, 1990

Introduction and Summary

The United States has long been at the forefront of international efforts to set aside national parks and other reserves on land, beginning with the establishment of the world's first national part at Yellowstone. One of the early champions of this movement was President Teddy Roosevelt, and he is still honored for his efforts.

This Administration now has a unique but fleeting opportunity to make a strong commitment to a new and equally high standard of stewardship in America's oceans and Great Lakes. The American public, increasingly aware of their heritage of marine resources, will support positive and immediate action to advance a strong and effective program to invigorate the National Marine Sanctuaries Program.

A successful sanctuaries program would not require a large staff, nor would it demand a disproportionate share of funds at a time when the pressure on all funding is heavy indeed. The program's budget has been so small, particularly when compared to similar programs in other agencies, that it could be multiplied tenfold without serious strain—sending a powerful signal to the rest of the world of this country's commitment to responsible environmental citizenship.

Among the major public benefits of a of a renewed Marine Sanctuaries Program would be opportunities to help restore depleted fisheries and promote environmentally sound recreation. The program can build on a solid track record of fostering cooperation among federal and state agencies charged with managing marine environments, and allow these agencies to conduct sanctuary-focused research into the impacts of environmental perturbations and other causes as well. Climate change, the maintenance of marine biodiversity and the accumulation of badly-needed resource data over long timeframes will be important products of this research program.

The Exxon Valdez disaster in Prince William Sound demonstrated dramatically the vulnerability of our marine environments and the public outcry than can result when these environments are seen to be mismanaged. The time to react to the mounting threats to all of our coastal and offshore environments is *now*, before the accumulated impacts become either irreversible, or reversible at costs that would produce severe strains on an already overburdened national treasury. A rejuvenated Marine Sanctuaries Program will proclaim a clear symbol of this Administration's intention to act.

We see a clear vision of what this program might become in the future:

By the year 2000, the National Marine Sanctuaries Program will manage a comprehensive and integrated system of the nation's most significant marine areas. This management will be based on ecologically sound, well-researched principles of resource protection and sustainable use and will focus as well on improving public understanding of the nation's marine heritage and in extending sound marine resource management principles to areas beyond sanctuary boundaries.

The steps that remain to be taken to achieve this vision are clear:

- The Administration should request, and the Congress should provide, a budget that is adequate to carry out this program.
- Priorities should be established to establish the Florida Keys and the sanctuaries on the central California coast as the centerpieces of this renewed effort.

- The National Marine Sanctuaries program should undertake an aggressive program to communicate this program to other agencies in government and to the public, and should work hard to establish cooperative relationships with the groups and organizations who share a stake in its success.

The vision is within our grasp. To achieve it, we need only stretch out our hands and our imaginations.

Background

In November, 1990, this panel was asked by NOAA's Assistant Administrator for Ocean Services to review the National Marine Sanctuaries Program and to make recommendations on ways to improve it. This report identifies a number of potential opportunities to revitalize the sanctuaries system, and to enhance its position in the foreground of international efforts to protect and preserve a critical element of man's heritage.

While the panel is critical of some elements of the program, it concluded that the inadequacies of the past several years were due not so much to neglect or malign indifference to the marine resources involved as they were to an ambivalence about the nature of, and need for, active leadership and management of a complex set of biological and social systems, coupled with the always difficult problem of competition for scarce personnel and funds.

The personnel associated with the program have helped and supported the efforts of the study effort. Our requests for information have been promptly met, and the cooperation of the program managers has been generous.

It seems scarcely necessary, in these days of heightened environmental awareness, to underscore the importance of coastal and marine resources to a healthy and functioning ecosystem. A few excerpts from current and authoritative sources put these issues into perspective:

> "...the margins of the sea are affected by man almost everywhere, and encroachment on coastal areas continues worldwide. Habitats are being lost irretrievably to the construction of harbors and industrial installations, to the development of tourist facilities and mariculture, and to the growth of settlements and cities. Although difficult to quantify, destruction of beaches, coral reefs and wetlands, including mangrove forests, as well as increasing erosion of the shore, are evident all over the world. If unchecked, this trend will lead to global deterioration in the quality and productivity of the marine environment."
>
> *GESAMP: The State of the Marine Environment; UNEP Regional Seas Reports and Studies No. 115, 1990*

> "The coastal zone is where land, sea and atmosphere interact, and has the highest biological productivity on earth. It is also home to most of the world's population, who depend on its resources and largely determine its state of health. Global change due to growth in resource consumption and population will have its biggest impacts in the coastal zone. Six out of ten people live within 60 kilometers of coastal waters, and two-thirds of the world's cities with populations of 2.5 million or more are near tidal estuaries. Within the next 20-30 years, the population of the coastal zone is projected to almost double.
>
> "The more people use the oceans for waste disposal, the fewer living resources will be available. The ecosystems and resources of the coastal zone are rapidly deteriorating due to intense and increasing human pressure, including poorly planned and regulated urban, industrial, commercial and agricultural development, and overexploitation of living resources. Coastal engineering and development projects are modifying coastal ecosystems on a very large scale. Wetlands, coral reefs, and seagrass beds are the ecosystems most at risk.
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> • • •
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> "Billions of dollars and thousands of lifetimes have been spent worldwide to understand and regulate human impact on the sea and its resources. But the efforts have not even approached

what is needed. Most often, they have focused on symptoms rather than causes. In general, we have not yet grasped the concepts needed to manage relations between people and the oceans. The challenge for the next 20 years is to redress this basic misunderstanding and develop suitable institutions and management mechanisms.

• • •

"Priority actions—

"Ecosystems that most urgently need protection from unplanned or poorly regulated coastal development include estuaries, saltmarshes, mangroves, and otherwetlands; seagrass beds; and coral reefs. Governments should greatly accelerate the establishment and effective management of coastal and marine protected areas. Where possible, the protected areas should be integrated as part of a comprehensive planning mechanism for all uses of coastal ecosystems (as pioneered by the Great Barrier Reef Marine Park Authority in Australia)."

Caring for the World: A Strategy for Sustainability (2nd Draft, 1990), prepared by IUCN, UNEP and the World Wide Fund for Nature

"Whereas...The Global water cycle is essential to life on earth...and Short-term economic benefits from exploitation of ocean and water resources deprive future generations, diminish the quality of life, disrupt international stability and global security, and even threaten life itself;

NOW, therefore, be it resolved that...nations join together in international convention and by individual action in an effort to...

• • •

• Develop and implement comprehensive national and international plans to manage activities in the coastal zone...(and)

• • •

• Protect marine biodiversity and productivity by developing mechanisms to preserve sensitive coastal areas such as wetlands, barrier islands, estuaries, coral reefs, and other critical wildlife habitats.

Resolution unanimously adopted at the Interparliamentary Conference on the Global Environment, Washington, D.C., May 2, 1990 (Appendix E to this report)

The National Marine Sanctuaries Program provides a unique opportunity for this Administration to make a strong commitment to a new standard of environmental stewardship. A relatively small investment of resources could produce enormous returns in the form of a model resource protection system.

A successful sanctuaries program would not require a large staff, nor would it demand a disproportionate share of funds at a time when the pressure on all funding is heavy indeed. The program's budget has been so small, by comparison to similar programs in other agencies, that it could be increased tenfold without serious strain—sending a powerful signal to Americans and the rest of the world of this country's renewed commitment to responsible environmental citizenship.

History of Marine Sanctuaries

The Marine Protection, Research and Sanctuaries Act of 1972 (sometimes called the Ocean Dumping bill) passed both Houses of Congress without serious opposition. The marine sanctuaries provisions of the legislation (Title III of the Act) were a product of earlier congressional concerns to protect specific coastal regions. The principal purpose of the legislation was identified as protection of threatened coastal and marine resources. Although the issue of "multiple use" was raised from time to time during the debate, the concept was never fully discussed, nor were the ambiguities in the concept ever discussed, still less resolved.

Following enactment of the legislation, not much happened for several years. The first marine sanctuaries were established in 1975, one of them when the legislation was found to offer protection for the wreck of the *Monitor*—a fortuitous conjunction of need and resource, since no other laws on the books at the time were adequate to handle a job that all conceded was important.

The next four sanctuaries (Channel Islands, Gray's Reef, Looe Key and the Gulf of the Farallones) were created in the closing days of the Carter Administration. The Reagan Administration was strongly opposed to the program, but Congressional support, coupled with tacit NOAA assistance, kept it alive through eight lean years. One tiny site, Fagatele Bay in American Samoa, was designated in that period. Independent studies of the program in 1980 and 1981 by the Congressional Research Service and the General Accounting Office supported the view that the sanctuaries program filled important needs that were not otherwise being met.

The Cordell Bank was designated in 1989, bringing the total to eight areas, with several others under active review. Congressional impatience with the pace and operation of the program had also escalated; the results of this impatience produced direct legislative involvement in the selection and in some cases designation of the Florida Keys, Monterey Bay, Stellwagen Bank, Flower Garden Banks, Washington Outer Coast and Northern Puget Sound areas, shortcutting a process that, to some observers, had become glacial.

History of panel

The members of the panel (identified in Appendix A) were invited to serve as an independent review team in October 1990. The twelve members of the panel are associated with a range of institutions and organizations concerned with coastal and marine issues. No panel members speak for their organizations in this endeavor—each represents his or her view alone, informed by contacts within that organization and experience acquired in connection with its activities.

The panel first met in November 1990 to receive a briefing from people associated with NOAA and/or the sanctuary program, and from G. Carleton Ray and M. Geraldine McCormick-Ray, consultants who were asked to prepare a report on the sanctuaries program and to assist the panel in its efforts. This report, entitled "A Future for Marine Sanctuaries," proved to be a highly useful resource to the panel.

The panel next met on Key Largo in January 1991 to talk with people actively involved in sanctuary operations and to visit the Key Largo Sanctuary itself. The panel's co-chairman visited the Channel Islands Sanctuary office and spoke with state and local officials involved in the California sanctuary program. The panel last convened in February 1991, when it met to complete and present its final report.

The panel was also given copies of a NOAA internal review report of the program, dated August 30, 1990, reflecting the results of a May, 1990, retreat designed to evaluate the program and to help prepare for an anticipated reauthorization of the program in 1992.

Recommendations

In general, the panel has concluded that this program affords this Administration a rare opportunity to take important and bold steps to protect and enhance these important parts of our heritage, and in the process, to create a model for the rest of the world of how to respond to this challenge. What makes the program particularly attractive is that these results can be accomplished with a relatively small investment of time, effort and funds.

In the past, NOAA's administration of the Marine Sanctuaries Program has lacked leadership, focus, resources and visibility, and the program has suffered for it. It has generally been treated as the runt of the NOAA litter, receiving only occasional pats on the head as executive and legislative attention was focused on its larger and better endowed siblings.

We consider it unproductive to discuss the failings of the program in detail; in a sense, it is not even particularly important. In fact, given the serious limitations imposed upon it, it has achieved some notable successes. What matters today is where it can and should go from here. It is for this reason that we prefer to concentrate on the positive directions the program should take from this point onward.

Program Leadership

The objective of the Marine Sanctuaries Program should be to develop a global reputation for enlightened resource management. This objective is within NOAA's grasp, should it choose to reach out and take it.

NOAA should look at examples of successful programs in similar areas. One excellent place to begin would be to examine closely the history and operation of the Great Barrier Reef Marine Park in Australia. That undertaking (relying in part, as it happens, on the U.S. legislation that created the Marine Sanctuaries program) has been a pioneer in its field, and we can learn much from it. A brief summary of some pertinent facts about the Great Barrier Reef Marine Park is included as Appendix B. To be sure, there are important differences between the two programs, but there are important similarities as well. Some of their initiatives and concepts might travel well.

From its inception, NOAA has been cautious about assuming the mantle of management of resources entrusted to it. There has always been a certain tension between the worlds of science and information development, on the one hand, and active management or involvement with resources on the other; the marine sanctuaries program has not been spared from this split focus. We believe that the sanctuaries program *does* require active management, and that NOAA should accept the fact and acknowledge that it can and will carry out the job.

NOAA should be willing and able to provide leadership to the sanctuary program, should announce this to the world, and should then carry it out to the best of its abilities. If it cannot or will not, it should acknowledge that to be the case and step aside in favor of another agency of government that is willing to do the job. It is no secret that other candidates exist, and would welcome the opportunity.

Regulations can be defended and supported if they are designed to meet an identified and accepted objective and are no more restrictive than they need to be to accomplish that purpose. If sanctuary management is, and is seen to be, fair and competent by the communities and activities affected by their programs, these communities and activities will support the program. Cooperative programs have already been developed for the management of sanctuary operations in the Florida Keys, and these might be used as models in other regions as well.

Successful management of any program or resource implies the ability and willingness to regulate, and to enforce those regulations when necessary. This does not, however, connote heavy-handed, harsh or insensitive law enforcement. On the other hand, regulations must be enforced, if they are to be believable.

The two sanctuaries in the Florida Keys offer a useful model of enlightened regula-

tion, based on education of the visitors to the sanctuaries.

The United Nations Conference on Environment and Development (UNCED) in Brazil in 1992 would be an ideal place for this nation to demonstrate the initiatives that this panel urges for enlightened stewardship of these important natural and cultural resources.

Recommendation:

The Administration, NOAA and the Marine Sanctuaries program should commit themselves to a leadership role in protecting the resources entrusted to them.

Program Vision

Today the Marine Sanctuaries Program lacks a clear statement of its vision. We found that some individuals did have a vision for the program, but that vision was not widely shared, nor did every vision coincide. The panel spent considerable time identifying what it felt to be a positive and acceptable vision for the program, attempting to define a sense of where the program should be if it were to achieve the goals that we felt reasonable and achievable.

> ***By the year 2000, the National Marine Sanctuaries Program will manage a comprehensive and integrated system of the nation's most significant marine areas. This management will be based on ecologically sound, well-researched principles of resource protection and sustainable use and will focus as well on improving public understanding of the nation's marine heritage and in extending sound marine resource management principles to areas beyond sanctuary boundaries.***

In support of this vision, the panel identified the following objectives:

- By the beginning of the next century there should be in place a national marine resources program to identify and manage the resources of the Nation's coastal and offshore waters and Great Lakes. This program will fully evaluate the ecological, cultural, historic, recreational, economic and esthetic values of these resources, and provide a foundation for a reasoned and comprehensive management plan to protect these vital assets.

- We will have made significant progress toward the development of an integrated network of coastal and marine protected areas through strengthening existing sanctuaries, identifying and designating additional sites within the twelve biogeographical provinces surrounding the Nation. Habitats and living resources in these areas will be identified and provided with whatever protection is necessary to ensure their sustainable existence as elements of functioning biological and ecosystems; cultural resources will be similarly protected.

- Adequate funding and resources will be available to allow the National Marine Sanctuaries Program to achieve these important objectives. This will be made possible through increased public support and awareness, innovative funding mechanisms and better use of existing resources within and outside the program.

- The principal goals of the program will be to protect and sustain the use of our biological and cultural heritage. Educational and interpretive programs will communicate to citizens of this and other nations the strength and value of our marine heritage. In this way the educational and interpretive programs will develop a strong constituency for its future. Research and monitoring programs will allow us to evaluate local and global forces that affect these resources.

- It will be necessary to consolidate and coordinate the public and private

agencies concerned with these resources as a means of developing an integrated, multiple-use system for their development and protection. Only in this way can the conflicting demands upon these resources be reconciled in such a way as to establish the minimum amount of interference consistent with the overriding need to protect their existence and to conserve them for the use of future generations. The program will be characterized by a willingness to learn and to cooperate in defining and achieving objectives shared by government agencies, non-government agencies and private citizens and groups.

- Decisive action will be necessary to allow this program to achieve its objectives. Leadership will be required at the national level to support it and to ensure the commitment of adequate financial and human resources. Without this support, the program must inevitably fail; with this support, it can only succeed.

Our vision may not be that of NOAA, which certainly can and should feel free to identify and incorporate its own concept of what the program should be and become. It is not important that ours be the vision adopted; it is essential that *some* vision be adopted, and that it be made widely known within the agency, within the government and public affected by the marine sanctuary program.

Recommendation:

NOAA should identify and endorse a clear vision of what it believes the Marine Sanctuaries program should become, consistent with its statutory mandate.

Program Mission

The panel concluded that the Marine Sanctuaries Program lacks a clear statement of its mission: today the priorities that must be established within the agency to accomplish its objectives, once established. In defining the purposes of the original legislation, the Congress took important steps to establish a mission statement, but its conception of its mission should reflect the events that have occurred since then. We suggest the following mission statement, with the clear recognition that Administration policy may suggest alternatives, but again with the adjuration that *some* statement of mission be adopted and published.

We propose the following:

The principal mission of the program is to identify, manage and protect areas of the marine environment of special national significance. To the extent that the following objectives are consistent with this purpose, it is also the mission of the program:

- to identify and designate a representative network of biogeographically representative ecosystems to ensure the continuing biodiversity of our coastal and marine areas, linked to an international system of biosphere and wilderness reserves aimed at maintaining the diversity of the Earth's natural living communities;
- to use the authority provided by its own and other legislative instruments for comprehensive and coordinated conservation and management of these marine areas, and areas that affect them directly;
- to develop coordinated plans for the protection and management of these areas with appropriate federal, state and local agencies of government, and with other public and private interests that are concerned with the continuing health and resilience of these areas;
- to support, promote, and coordinate scientific research (especially long-term monitoring and other long-term research projects) on the resources of these marine areas and changes that may be taking place within them;

- to enhance public awareness, understanding, appreciation and wise use of the marine environment;
- to facilitate all public and private uses of these marine areas not prohibited pursuant to other authorities;
- to create models of and incentives for ways to protect and conserve these marine areas;
- to maintain, restore and enhance the diversity of the biological resources by providing places of refuge for exploited species that depend upon these areas to survive and propagate themselves; and
- to make a positive contribution to global programs encouraging conservation and sustainable use of resources.

It would be a useful and important step for NOAA, once it has defined a statement and mission for the program that it finds congenial and acceptable, to set goals to be met as the sanctuary program goes forward. These goals should be as specific as circumstances will allow, and should incorporate specific timetables and programmatic milestones.

Some of those goals will not be achieved within the timeframe contemplated. This should be considered not as a disaster, but as an occasion to review those goals, to identify those events that made it impossible to achieve them, and to define more realistic objectives in the future.

It must be pointed out that this goal-setting process implies an ability to monitor events, both in headquarters and in the field, that does not appear to exist today. This situation should be rectified and much clearer communications should be established in both directions in the chain of command.

Recommendation:

A mission statement should be articulated, identifying the steps necessary to achieve this vision.

Budget

The existing budget for the Marine Sanctuaries Program is quite inadequate to meet the demands made upon it today, far less tomorrow, if the program is to be revitalized. An annual budget of $4 million does not begin to meet the needs of the sanctuary program in place today, to say nothing of the program as it has been and is likely to be further extended by Congressional initiative.

While the panel was not able to specify a definitive budget for the program, we can recommend a process for constructing an adequate budget. There are currently eight sanctuaries in the system, and another eight well on the way to designation. An adequate budget for the Florida Keys National Sanctuary alone would be $7–8 million. The California sanctuaries, as a group (Channel Islands, Monterey Bay, the Gulf of the Farallones and Cordell Bank), should probably receive a similar level of funding.

NOAA should build the sanctuaries budget in three components: (1) a budget for operating the sanctuaries themselves, which would allow each sanctuary to accomplish its fundamental purpose, (2) a separate budget for selecting and designating new sanctuaries, and (3) a budget for administering the program itself. Final funding for the program should allocate amounts for each of these components. We estimate that this process would produce a budget on the order of $30 million.

Although this would represent a major increase in the budget for the program, the returns on this investment would be at least as great, in our view. To put this into perspective, it might be noted that such a budget would be approximately 3% of the budget of the National Park Service for the coming year.

The panel was intrigued by the concept of a regime in which federal funds might be matched by contributions from state or local sources, or perhaps be augmented by the activities of a private foundation, as already described. If such a system could be estab-

lished, the leverage of federal funds might be considerably increased.

Can the program achieve the position that we envision as a model of environmental resource management without additional funds? We do not believe that it can.

Recommendation:

The Administration should request, and the Congress should authorize, a budget adequate to accomplish the purposes of the individual sanctuaries, to establish new sanctuaries and to administer the program. For these three functions, an adequate budget would be on the order of $30 million.

Improving the Designation Process

A substantial part of the budget for, and management of, the marine sanctuary program is now committed to the process of preparing environmental impact statements and the designation of new sanctuaries. Not harmful in itself, this process is draining scarce resources from the actual management of the sanctuaries already in existence. More than half of the personnel in the program office work in Washington, D.C. As the program grows, the balance between the field and headquarters staff should be reexamined and the duties and responsibilities of headquarters staff redefined.

The designation process should be tied directly to the program's mission and vision. Emphasis should be placed on designating areas for the purpose of integrated ecosystem management of marine areas, using the criteria identified in this report (Criteria, Number and Size, page 22).

NOAA should explore the possibility of assigning parts of this process to other competent agencies within the Department, where this can be done without vitiating the integrity of the work that they also handle. It should also reevaluate its priorities between acquiring new sanctuaries and adequately dealing with those already in the system. There is very little sense to biting off new pieces when it is already incapable of digesting the old ones. If the Congress chooses to impose new burdens on the program by designating additional sanctuaries to be manages and work to be done, the Congress should also provide the necessary funds and support to allow this job to be done competently and thoroughly.

At present, the sanctuary designation process is estimated to require two and a half years. This may be necessary, but it may also be that this process could be shortened. This question deserves attention.

The sanctuary Program Development Plan is now more than eight years old—it is possible that it is still perfectly suited to the program, but that should be determined anew. In like manner, the Site Evaluation List and the process for determining what gets placed on it should be examined in the light of whatever decision the agency makes on the future of the sanctuary program.

The Ray report bears on this point:

"A thorough revision of the SEL is necessary to resolve how ecologically scaled representativeness may be achieved—i.e., at regional, local, and inter-regional scales — and to define what a "nationally significant" sanctuary system should be. Sanctuaries established on a hierarchy of scales are required to address such issues as sustainable resource use, biodiversity, and global change. This is a challenging scientific question that requires state-of-the-art GIS, modelling, and interpretation."

Recommendation:

Adequate resources must continue to be available to the sanctuary designation process. Rather than divert these resources, new funding and personnel resources are needed to manage effectively he sanctuaries already in the system.

Transfers of Resources and Responsibility to the Field

The responsibilities of the sanctuary headquarters office should be clearly established, and the lines of authority should be clearly drawn. One step that should be taken at the headquarters level would be to bring in national research and education coordinators, to work with appropriate people in the field and in other agencies as well. Specific responsibilities that should be assigned to these individuals would include: (1) monitoring ongoing projects; (2) developing research and education agendas to support sanctuary activities; (3) developing program priorities and helping to arrive at an overall program budget; (4) facilitating communication of the results of programs developed within individual sanctuaries; and (5) developing guidelines for research and education activities and helping to define job descriptions for people handling these duties in the field.

Having achieved this, it is the panel's view that there may be merit to relocating regional managers from headquarters to new regional offices much nearer to the field sites. The sanctuaries are, after all, the program's *raison d'etre* and the places where the program will ultimately succeed or fail. Such regional centers need only accommodate the existing regional management framework located in Washington, and they should wherever practicable use space and support staff already available to the sanctuary program or its partner agencies in the states. The establishment of effective ways to maintain regular communication upward to headquarters and outward to site managers and partner agencies must be an integral part of this structural adjustment.

Recommendation:

Headquarters should be charged with placing sanctuary managers, setting policy for sanctuary operations, providing strong and effective guidance where appropriate, and monitoring sanctuary operations to see that policies and guidelines are being followed. At the same time, much responsibility for sanctuary management and operations should be decentralized and assigned to regional managers, or sanctuary managers that are closer to the sanctuaries themselves.

Responsibilities of Sanctuary Managers

A first-rate sanctuary program will need first-rate people to operate the sanctuaries, and we ought not to settle for less. The current selection process relies heavily upon assignments from the NOAA Corps, provides little or no opportunity for adequate training of managers, nor does it provide the guidance and resources they need to do the job properly.

If NOAA expects their field personnel to work effectively with state and local organizations, it must include, as an important element of the selection process, the ability to locate these people. Once in place, regional and sanctuary managers should be given encouragement and authority to handle field operations without constant reference to headquarters for decisions that should be made in the field. Responsibility must be assignable, and with it, accountability.

Permits for nonconsumptive scientific research and educational activities ought to be delegated to field offices instead of being referred to Washington, as they now are. If the field offices fail to fulfill their responsibilities, the solution is to find the right people in the field—not to further separate authority from responsibility by clasping it to headquarters' bosom. Clearly some permits, involving significant risk to the integrity of specific areas, should still be discussed at length with agencies and people elsewhere, but this decision ought properly to be a function of the discretion vested in the management of the system.

Regional and sanctuary managers should be encouraged to develop new initiatives and innovative programs with local communities and organizations. An excellent start has

been made in the Channel Islands sanctuary to develop a range of educational materials and programs, using resources cooperatively developed with schools, museums, colleges and other community groups. This kind of effort should be given wide encouragement within NOAA in general, not just within the sanctuary program.

Managers should be enabled and assisted to develop better lines of communication between sanctuaries, as well as up and down the chain of command. Periodic meetings of sanctuary managers, augmented by electronic mail capabilities, will help all stay abreast of new developments, as well as take advantage of new concepts that appear to be working in one or more of the individual sanctuaries.

As the sanctuary program develops, it will inevitably be necessary to shape it to meet local conditions. When and as the Florida Keys sanctuary takes shape, it will clearly be beyond the ability of a single manager to administer the entire area, as well as work with state and local officials concerned with the area. Similarly, as the sanctuary system in California, and perhaps in the state of Washington, matures, it will almost certainly be necessary to break these areas into subsets, perhaps under the supervision of an overall sanctuary supervisor. Here again it will be important to allow the delegation of authority to the appropriate officials in the field.

Recommendation:

The program must attract, train and support effective sanctuary managers. Once in place, managers should be encouraged to work closely with local groups and institutions.

Personnel

Many of the goals and objectives that we believe reasonable for this program to achieve depend upon the adequacy of financial and personnel resources if they are to be achieved. Today those resources are clearly insufficient. Requesting adequate financial resources is the responsibility of the Executive Branch; providing these resources is that of the Legislative Branch.

A successful marine sanctuaries program will ultimately stand or fall on the quality of the personnel who carry it out. This is no reflection upon the capabilities of the people currently involved in the sanctuaries program; it is a clear call to identify and select the right people to make it work in the future. While there are undeniable advantages inherent in drawing site management personnel from the NOAA Corps, it is important that steps be taken to develop and maintain a cadre of non-Corps managers who can make a long-term commitment to the marine sanctuaries program as a career.

The program we propose is exciting and will attract highly competent and motivated personnel. These people exist. They should be identified, recruited where necessary, trained and given the tools to allow them to do the job.

Recommendation:

The program needs to identify, retain or attract and train high-caliber personnel.

Visibility

The Marine Sanctuaries program today is a well-kept secret with respect to other agencies in NOAA, the Department of Commerce, the Federal Government and the public at large. Most of those who know something about it seem to have reservations about its adequacy or importance. Even in the areas where sanctuaries are located, it is often not easy to find the sanctuary office, let alone people who are familiar with and supportive of sanctuary operations.

With all these constituencies, the sanctuary program needs, and would profit from, much wider visibility and awareness of what it means, and what it could mean to them. We are particularly sensitive to the need to

develop closer cooperative relationships with people in the communities directly affected by sanctuary operations, and with those who are most likely to visit and use sanctuaries, but these are far from their only potential supporters.

Many more people have heard, and have strong positive feelings, about the Grand Canyon and the Great Barrier Reef than will ever visit them. The Florida Keys, to take one example, could achieve that kind of public support and encouragement if NOAA were to develop the public awareness and understanding that it could, if it were to seize the opportunity.

The panel feels strongly that the program should be elevated in importance within NOAA, removing it from the relative obscurity in which it now languishes and placing it at a point in which the Administrator is directly involved. If the Sanctuaries Program were redesigned as a Program Office within the National Ocean Service, at the level of the four other offices within that service (Charting and Geodetic Services, Ocean and Earth Sciences, Ocean Resources Conservation, and Assessment and Ocean and Coastal Resource Management), it would provide a measure of visibility and vitality that it critically requires. If the program is to achieve the kind of preeminence that we believe it capable of, and assume the leadership role that we contemplate, it must clearly assume a larger role within the agency.

Recommendation:

The sanctuaries program needs to be given higher visibility and status within the agency, with other agencies and with the public. It should be elevated to Office status within the agency.

Priorities

The panel has looked carefully at the priorities that appear to exist today, and at what it considers those priorities might be, if the program were to be reorganized and reconstituted.

In terms of the Sanctuaries Program itself, the panel considered it a matter of highest priority to put into place as soon as possible an effective, well-managed operating model. For a number of reasons, chiefly having to do with the integrity and geographical reach of the system, we recommend that the proposed Florida Keys National Marine Sanctuary be so designated and established.

The highest level of priority should be given to strengthening the management of existing sanctuaries and developing more effective, well-managed operating models from the sanctuaries now in the process. For different reasons, the sanctuaries currently under development for the Florida Keys and the Central California sanctuaries offer outstanding opportunities. NOAA should recognize this, take full advantage of the opportunity and make a priority of the rapid development of these excellent models.

Given its integrity, geographic reach and its international reputation, the Florida Keys is an excellent choice to be brought on line as soon as this can be done. This would involve an open and complete public planning process, a well-designed research and monitoring agenda, an expanded enforcement program patterned after the one already in the Key Largo and Looe Key sanctuaries, and an education and outreach program. It would also require adequate staffing, clear rules and regulations, adequate facilities, the continuation of an already well-designed and defined working arrangement between the federal and state governments, with participation as appropriate on the part of local authorities, an adequate operations budget and the infusion of additional trained and competent managers. It will probably be useful to subdivide the management of the Florida Keys Sanctuary into as many as four subdivisions under the overall direction of a sanctuary supervisor, retaining close working arrangements between the subdivisions.

Similarly, the marine resources of Monterey Bay and the Central California coast, combined with their visibility and the extraordinary level of public support for resource

protection and the sanctuary program in the area, offer an important opportunity to the sanctuary program. The strong public support in the area makes this priority particularly attractive, since it virtually assures success if an effective sanctuary system can be established. Equally importantly, the informed and environmentally-oriented community in the area will view this effort as a failure unless the sanctuary's boundaries and regulations provide real protection from threats to this system's integrity, including oil and gas activities, vessel traffic, overfishing and pollution. The operational elements mentioned in connection with the Florida Keys sanctuary will also be important for this effort.

Although these would surely be ambitious undertakings, the time effort and resources required to create such model operations would be well repaid in heightened public appreciation and support for the Marine Sanctuaries Program.

It is also important to assign some sense of priorities in the designation and establishment of sanctuaries themselves. Individual sanctuaries may, and usually will, satisfy a number of criteria. It would be useful and important for the sanctuary system to encompass areas adjacent to the United States in such a way as to incorporate a true sample of each of the twelve biogeographical provinces that have been identified in U.S. waters. As it happens, the Florida Keys precisely meets this criterion. Within these provinces, it should further be possible to take steps to protect and enhance their biodiversity, and this is an important element of an effective sanctuary system.

A number of values are likely to be incorporated in any existing or proposed sanctuary. Some of these values will be present, to some degree, in most areas. Principal among these are the biological and ecological values that they contain, but other values are to be found as well: recreational, economic, esthetic and cultural/historical. How these are to be ranked or weighted is a complex decision, not within our capability to resolve at this time. Still, it is important to recognize that this multiplicity of values does exist and that enhancing and protecting these values is a vital element of this program.

Recommendation:

A high priority should be assigned to strengthening the management of existing sanctuaries and utilizing the tremendous opportunities to develop strong effective model sanctuaries in Florida and California. In addition, priority should be given to new sanctuaries that will enhance biogeographic representation and plug gaps in the existing system.

Cooperation with Other Programs

At present, the sanctuary program is small and is not generally known within other agencies of government, or to the public at large. Where it is known, it is frequently regarded as an irritant or as essentially irrelevant to ongoing activities.

This program cannot achieve its objectives acting alone, nor should it attempt to do so. Others, inside and outside government, have parallel or complementary objectives, and it is only good sense to work with these to achieve a purpose that all can support. A vigorous outreach program would, we believe, pay handsome dividends.

Heightening the visibility of the program will be an important step in this direction—people can't help you do your job if they don't know what it is or who you are. The other half of the equation involves selling your program—letting people know how they themselves will *benefit* from what it is you are trying to accomplish.

There are already several federal agencies whose programs intersect those of the Marine Sanctuaries Program. Many of them are within NOAA (Hazardous Materials, Strategic Assessment, Endangered Species, Marine Mammals, Sea Grant, NMFS, Coastal Zone Management are included in this list, and there are almost certainly oth-

ers). Sanctuaries and their operation intersect with several other existing NOAA programs, and some thoughtful work should be done on the best way to integrate these. Among these, NMFS, Sea Grant, CZM, etc. are currently performing research that could be done in marine sanctuaries, thus satisfying needs of both agencies. For example, marine mammals can be found, some of them also endangered or threatened, in the California sanctuaries. Precisely ***who*** assumes ***what*** role for their protection and management may not be clear—it certainly was not clear to us. Other agencies in the federal government have extensive responsibilities that affect coastal and marine ecosystems, such as the Department of the Interior, the Corps of Engineers and the Environmental Protection Agency.

State governments also have considerable powers and duties that affect the management of resources, as well as education, research and law enforcement. Close working relationships with state agencies is an essential element of an adequate marine sanctuaries system, and important strides have already been taken in this direction. Cooperation with the State of Florida is strong and effective, and should serve as a model for such efforts in other states.

All services of NOAA, and its state partners in the sanctuaries program, should examine the merits of using these sanctuaries as their public "windows" on the marine environment—places wherein not only the sanctuaries program itself but also other NOAA and state marine environmental management and research programs can reach a much broader public audience than is currently available to them. The benefits of heightened cooperation among agencies, and of much greater public awareness and understanding of marine environmental issues, and government initiatives to address them, will be obvious.

Local communities have perhaps the strongest direct interest in a workable marine sanctuary program, since it is here that the use of the sanctuaries takes place. In some cases today, relationships with local institutions are already close and supportive, but there are, of course, always additional steps that might be taken.

In situations where other agencies share enforcement and protection responsibilities with the Marine Sanctuaries Program (e.g., marine mammals and endangered species), memoranda of understanding should be developed, specifying what tasks each should take on . These memoranda should be used to strengthen and enhance, not weaken, the program's protective mandate.

The Chairman of the Great Barrier Reef Marine Park Authority, has commented eloquently on this point: "...it will be clear that the key to any successful program will be public support. This only comes from deliberate and enthusiastic involvement of the public in all elements of planning and research. I cannot emphasize this point too strongly. Bureaucrats, who often judge the value of their lives according to the power they have wielded either publicly or coverdly, fight like the devil to prevent the public from having any real say. This is a formula for failure. If you want to do what we have done, you will need to work very closely with the Non Government Organisations (NGOs) as your allies. None of the above implies that the public actually has the decision making power. Neither does it suggest that you will ever get agreement from all of the public, nor that you will get full agreement from any sector of the public (e.g., an NGO). However, as Churchill said about democracy 'it is a very poor system, but it is much better than any alternative'." (Letter from Graeme Kelleher to Frank Potter, December 20, 1990.)

NOAA should develop an energetic and comprehensive program to increase public awareness and support of marine sanctuaries. One step might be to provide a range of materials for public education, such as interpretive exhibits, formal and informal education materials, public television programs, videotapes and other educational materials. These could be made available in local communities through aquaria, museums, dive shops and other organizations interested in water activities. The Great Barrier Reef Marine Park Authority has developed just such

an array of informational materials, and it plays an important role in ensuring that program's justly deserved international reputation. We are not here proposing yet another barrage of brochures and glossy handouts, but material with some depth and weight, that will inform what we believe to be an interested and supportive constituency for the rejuvenated program.

The story that NOAA should be communicating is that of the positive impact that a healthy marine ecosystem can have, and the steps that are necessary to achieve this objective. Where concentrated tourist use of a sanctuary can threaten the quality of conditions in the sanctuary, that story must be told. NOAA has already produced materials for some of the waters for which it is responsible in Florida, and this effort deserves to be amplified and communicated to a wider audience.

National and local organizations with environmental concerns are an obvious constituency for the marine sanctuary program, and here NOAA's record is mixed. In some regions, good working relationships have evolved, and in others, bureaucratic dragons thrive. It would be very much worth the effort to improve these connections wherever possible, enabling organizations with strong local and national memberships to pass on the message that the process of cleaning up and protecting critical marine areas has begun and that this is an issue in which everyone has an important stake.

A critical element of this message is that these systems, like most environmental systems, are ones for which a longer-term vision is necessary than is customary in decision making today, particularly in the public sector. In the recent past, there has grown up a doctrine of discounting assets for the future. Such a concept may perhaps make sense when applied to standard economic assets and values—it makes no sense at all when applied to the physical environment that supports life on this planet. To treat the future of an essential element of a support system that involves tiny elements of an ecosystem, such as microbes and algae, and large elements of that system, such as trees, whales and man, as irrelevant in the very near future (a discount rate of 10% assumes a zero value in less than eight years) is, it seems to us, a philosophy that is leading us in the wrong direction. NOAA could play an important role in reversing this trend.

Recommendation:

The Marine Sanctuaries program must develop effective, cooperative and supportive working relationships with other institutions and organizations with related interests.

Experience in Other Programs

We have already mentioned the Great Barrier Reef Marine Park as an important potential model for the U.S. system. NOAA could profit from a careful review of that park, with particular attention being paid to the success which it has achieved, as well as the problems that it still faces. The working arrangement that has evolved over the years between the Australian national and state authorities may suggest similar possibilities for consideration as the U.S. system develops. The Florida Keys sanctuary is a place where such insights might be invaluable.

Other nations have taken steps that might offer useful information on opportunities and risks for an ambitious program for marine sanctuaries. Canada, England, New Zealand and Scotland have all done some innovative work in this field. The office of the World Conservation Union (formerly International Union for the Conservation of Nature) in Gland, Switzerland has developed a large database of national laws and regulations that might be particularly useful in designing such a system.

A relatively small amount of time and energy spent in examining these experiences

might be well invested in seizing opportunities and avoiding problems in the United States Marine Sanctuaries Program.

Recommendation:

NOAA should carefully examine and evaluate similar programs now in place or under development in other countries.

Criteria, Number and Size

The number of the units in the National Marine Sanctuaries Program, as well as their size, will be determined by the designation of sites based on a clear set of site selection criteria. These criteria focus attention on the marine areas that best fulfill the goals and objectives of the program.

Site selection criteria may be divided into two broad categories:

A) Outstanding marine areas (on a relatively large geographical scale) representative of the biogeographical provinces of the U.S. coast and,

B) Areas that meet one or more of the following criteria:

- They contain habitats and/or living resources that are unique in their occurrence.
- They contain unique or outstanding ecological, biological, geological, oceanographic, cultural or historical resources.
- They contain habitats critical to rare, threatened or endangered species.
- They contain habitat critical to the conservation of living marine resources.
- They represent relatively pristine/undisturbed coastal marine resources
- They are areas in which harvest refugia (reproductive refuges) should be designated to maintain or replenish depleted living resources.
- They are areas of particularly high natural productivity.
- They are significant in maintaining biodiversity in coastal marine ecosystems.

The marine sanctuary system today contains several distinct areas, each with its own unique set of resources, problems, and opportunities. These are located in five of the twelve recognized biogeographical provinces in U.S. coastal waters. Beginning off the coast of Maine and proceeding in order, they are: Acadian, Virginian, Carolinian, West Indian, Louisianian, Vera Cruzan, Californian, Oregonian, Sitkan, Aleutian, Arctic/Subarctic and Indo-Pacific. (For a more complete description of these, refer to Figure 1 and Table 1 in Appendix B, "A Future for Marine Sanctuaries."

Five of these now contain sanctuaries that meet at least some of these criteria; when and if Stellwagen Bank, Norfolk Canyon and Flower Garden Bank are added, this will bring the total to eight. In the case of the Florida Keys, Channel Islands, Gulf of the Farallones, and Cordell Banks, the units provide sufficient resources to protect biodiversity and offer an opportunity to create one or more reproductive refuges where depleted species could recover.

In giving attention to the completion of the marine sanctuary system, it is important that the sanctuaries program not attempt to be all things to all who bring their expectations to them. Early scientific attention should be given to the thorny question of how much representation of a biogeographic province is "enough." It should be borne in mind that the ideal would be for sanctuaries to be capable of management as functioning ecosystems. The regions encompassed should be large enough to be managed with full regard to those elements and resources that allow them to function as ecosystems. Useful guidance may perhaps be taken from the Brunddand Commission's recommendation that 12% of the Earth's surface should be set aside within protected areas, although the

adequacy of that standard in marine environments warrants more study—it may be too low.

The larger sanctuary units (like the Florida Keys or Monterey Bay) can provide the focus and marshal the resources necessary for a coordinated long-term research and monitoring program. Such an effort could be directed toward achieving comprehensive understanding of the systems ecology of marine areas of significant size and scope. Models developed for these areas will be useful not only to inform the ongoing resource management for the specific sanctuary units, but also as models which might be applied to other and larger marine areas throughout the world.

It is understood that while the National Marine Sanctuary Program can hope to develop informed and comprehensive management plans for the sanctuary units themselves, the effective management of the majority of marine resources, both living and non-living, will require the coordinated efforts and significant levels of research funding from other NOAA offices as well as other agencies of government.

We are unquestionably seeing increasing signs of accelerating degradation of living marine resources. Marine sanctuaries offer the possibility of arresting, and perhaps even reversing that process, at least in some areas. In fact, this is already happening in some sanctuaries, although on a very small scale: Large fish are beginning to return to Looe Key after limitations were placed on the manner in which they may be taken.

The global climate change that may already be occurring may be particularly relevant to fragile marine ecosystems. Today we have little ability to monitor those changes. Further, it might be possible— and if possible, it would certainly be enormously useful—to use marine sanctuary areas as laboratories to develop insights into relationships of resource protection to its long-term sustainable use.

The last twenty years has seen the evolution of the concept of "biosphere reserves," or areas to be protected as critical elements of important ecosystems. The concept has taken hold on land, and a number of areas have been established that meet the criteria established for such regions. Marine sanctuaries would be a perfect example of what might be done with such a concept, and the Florida Keys Marine Sanctuary may be ideally situated for such status. The Man and Biosphere program should be reviewed in the light of its particular and potential relevance to a revitalized Marine Sanctuary program. Here again, NOAA is confronted by a real opportunity.

Recommendation:

At a minimum, each of the biogeographical provinces in U.S. waters should be represented in the system, with one in each of these being sufficiently large to offer reasonable assurance that these regions will be adequately represented. In addition, sanctuaries should be established to protect natural and historical areas that contain rare, critical, unique, outstanding or otherwise special resources, and there should be further analysis of how much representation is required in the system.

Outside Review

The panel has had an excellent, albeit limited, opportunity to examine the overall direction of the marine sanctuary program. Some deficiencies and shortcomings have been disclosed that, from the advantage of distance, seem fairly obvious, although they may not have seemed so to people charged with everyday operation of the program.

The program should continue to use outside review as a check on its progress. We are not requesting reappointment, but we do recommend that some comparable institution be created. Whether such a panel should be created as an "Advisory Committee," with all the attendant rules and obligations that such committees are subject to, is beyond the scope of our review. Another possibility is that such a panel be given

authority comparable to that of the Marine Mammal Commission, which can make recommendations to the Secretaries of Commerce and Interior that *must* be responded to.

Individual sanctuaries could also profit from closer involvement with advisory groups. Some may feel that this could make it impossible to reach decisions—that operating in a "goldfish bowl" may inhibit sound decision processes. We find this argument uncompelling and suggest that local communities may find it much easier to support sanctuary activities if they are allowed to play a greater role in guiding their operations.

Recommendation:

Regular independent review should be a continuing element of the sanctuary program.

Creation of Supporting Institution

Organizations, some with federal charters, exist to fill these roles with respect to other programs. The National Park Service and Fish and Wildlife Service have such organizations associated with them .

Such organizations can serve as foci for national publicity programs, as centers for private fundraising to support individual areas, and to act as interfaces with local or commercial ventures anxious to play a positive role in furthering program objectives. Interactions between such organizations and their federal counterparts can be valuable for all concerned.

Recommendation:

NOAA should explore the possibility of a national nonprofit organization that is in a position to advise and encourage the marine sanctuary program; local cooperating organizations can also be of great value to the operation of sanctuary programs.

User Fees and Outside Support

In recent years, the concept of "user fees" has been widely discussed as a supplement to regular legislative appropriations. We are unable to specify what those fees should cover, what their level should be, or how they should be collected, but we do note the success of the "Golden Eagle Passport" program in the National Park System, and suggest it as a useful example for further study with respect to the sanctuary system.

Fines and penalties from ship groundings and other violations of regulations are currently allocated to the sanctuaries themselves; this practice should be continued, and perhaps even amplified by making certain that all those funds be allocated to the sanctuary in which the violation occurred. Similarly, vessel confiscations as a result of criminal activities may continue to provide an important asset to the program.

NOAA may also wish to look into the possibility of establishing concession arrangements for activities associated with sanctuary operations, although we are aware that this is an area not without controversy, and that we may conceivably be opening Pandora's Box in suggesting it. Accordingly we do no more at this point than suggest it for further consideration.

Recommendation:

Part of the costs of the sanctuary program should be borne by the constituencies it serves.

Review of existing intergovernmental agreements

The sanctuary system has evolved and changed in the years since its inception. Arrangements that may have worked well in the past should be reviewed in the light of new circumstances and conditions. For example, the State of California has been assigned responsibility for regulatory enforcement in sanctuaries in and near state waters. Its enforcement budget and program are clearly inadequate to meet the demands on the system. Most of the funds supporting enforcement come from permit fees levied upon fishermen who operate in coastal waters. State enforcement agents are understandably reluctant to enforce regulations upon these fishermen, since vigorous enforcement might well drive some marginal operators out of business, thus further eroding the financial base of the enforcement program. The result, in the Channel Islands, at least, is that the local sea urchin and abalone resources have been devastated by overfishing; paradoxically, scarcely any of these animals can now be found within the Channel Island sanctuary itself. The "Tragedy of the Commons" reasserts itself, and we are the poorer for it.

A more useful example may suggest itself from the cooperative working arrangements with enforcement personnel in Florida. Here the concept of "interpretive enforcement" seems to work well, as it does in Australia, where enforcement responsibilities have been undertaken by officials of Queensland. In these cases, enforcement officers exist as an important element of public contact, not just as police officers checking permits and visitor activities, but also as helping visitors understand what activities may be harmful to the reef and how to avoid these.

Our remarks should not be taken as necessarily critical of California, but as suggestions that we may be able to learn useful lessons from other places, and that those examples could perhaps replicate themselves in new territories. In a similar vein, the educational programs that have been developed in California and Georgia (in connection with the Gray's Bank sanctuary) could well suggest themselves as useful models elsewhere in the sanctuary system.

Time has passed since the sanctuary system was first established, and NOAA ought now to be in a position to derive some useful experience from the history of individual sanctuaries, and to explore the possibility of transferring this experience elsewhere within the entire sanctuary system.

Recommendation:

Existing intergovernmental arrangements with state and local authorities should be reexamined and, where appropriate, renegotiated by NOAA.

Name of the program

There has been considerable discussion about the value of changing the name of the program. The panel concludes that the program's name should not be changed without a clear and compelling reason to do so.

Recommendation:

The name of the program should not be changed.

Zoning

One characteristic of successful marine protected area programs is that they provide a complex and sophisticated conception of multiple use of marine resources, while at the same time ensuring the protection of vulnerable species, communities and habitats. Use of these resources can be separated by boundaries of space, time or both. Zoning of large sanctuaries is very much an option, and this is a practice that has been implemented with great success on the Great Barrier Reef. (Included with Appendix B is a matrix showing zoning practices in the

Cairns Section of the Great Barrier Reef.) Zoning is also an important management tool in many other international marine protected area programs.

Zoning systems have also been suggested for sanctuaries in this country. Once the system begins to include large areas, such as the proposed Florida Keys Sanctuary, an effective zoning system will become an essential management tool. Within a properly designed sanctuary system some species and habitats will receive almost complete protection, but this is certainly not the case for all areas, at all times and in all places. There will undoubtedly be a requirement for zones of strict preservation, or "harvest refugia," but there will also be zones within which varying intensities and types of resource use can be accommodated. Zonation will always province a degree of protection not available outside sanctuary boundaries.

NOAA has already initiated the study of zoning concepts, both internally and in discussions with managers of protected areas in other nations. This work must continue, with a view to putting in place effective zoning systems when management plans are prepared during the designation process for large new sanctuaries such as the Florida Keys sanctuary, and those proposed for Monterey Bay, the Outer Washington Coast and Puget Sound. An important part of this task will be to determine what resource uses and scales of use are appropriate to the various zoning categories that are identified.

Recommendation:

NOAA should devise and adopt an appropriate zoning system for national marine sanctuaries as a priority matter, beginning with the new, large sanctuaries now in the designation process.

Relationship with National Estuarine Research Reserves Program

Another thorny and ultimately unresolved issue has to do with the relationship between the marine sanctuary program and the estuarine research reserve program authorized by the Coastal Zone Management Act (which, not entirely coincidentally, was also enacted into law in 1972). The programs have much in common, and NOAA, not unreasonably, moved both programs into the same office.

A comparison of the two programs (Appendix C), is instructive, showing the similarities between the two programs, as well as the differences, which are also important. If, as we suggest, the sanctuaries program should be elevated within NOAA, and perhaps moved elsewhere within the agency, it will also be important to maintain good working relationships between the sanctuary and estuaries programs.

> "These programs both have strong features that can be enhanced via synergism. Some estuarine and marine sanctuaries coexist in an ecological and regional context, especially over wide continental shelves.... Management of these can be coordinated and directed toward land/sea ecosystem protection. Coordination could benefit program management, education, and research, as well as simplify management."

We concur completely.

Recommendation:

The Marine Sanctuaries Program and the National Estuarine Research Reserve Program have much in common and should continue to be encouraged to work closely together in the future, as they have in the past.

Development of research and education agendas

Here, we can do no better than to cite the Ray report once again:

> "The NMSP, with experience gained from Estuarine Research Reserves and other programs such as the National Park Service, should develop a research agenda that is directed towards conservation and management, but that is also open to basic research. This requires that a research coordinator at a senior level be hired to help identify research needs at national and site levels, and to develop a research and monitoring PDP. Efforts should be made to develop projects that can address the major environmental problems of the '90s and that are cognizant of the many on-going programs of NOAA and other agencies, as well as internationally.
>
> "Similar to the Research Agenda, an Education Agenda would guide educational goals and differentiate between education and public relations. Such an Agenda could determine how best to utilize services that can complement both the Program and local interests."

A clear agenda for research and education would go far to demonstrate to the public NOAA's commitment to a vital, functioning marine sanctuary system.

The National Research Council has created a Committee on the Coastal Ocean to focus on coastal ocean science, particularly on issues that are not currently receiving adequate attention, and that might benefit from a fresh assessment effort using data and information available today.

The sanctuaries program is not represented on this Committee, but it should be, because this Committee's efforts are concentrated on precisely the kinds of issues that an ongoing and alert sanctuary program must deal with.

Recommendation:

NOAA should develop clear research and education agendas for the Marine Sanctuaries Program. These agendas should be fully integrated with the research and education agendas of other NOAA agencies and also, to the maximum extent possible, integrate these agendas with those performed outside NOAA by other federal agencies, and private and international organizations.

NOAA should ensure that all its coastal and marine programs are appropriately represented on the National Research Council's Committee on the Coastal Ocean.

Panel Conclusion:

If the issues discussed in this report are clearly addressed by the Administration and the Congress, the Marine Sanctuaries program can achieve success and meet the expectations created when it was established in 1972. All that is required is the resolve to make it happen.

Appendix A

Members, Marine Sanctuaries Review Panel

Brown, Jim; Executive Training Director, NAUI

Calkins, Jay; Director of Marine Extension, Sea Grant, Georgia

Dykstra, Jake; President (ret), Pt. Judith Cooperative

Humke, John; Vice-President for Agency Relations, Nature Conservancy

McVety, Pamela; Director, Division of Marine Resources , Florida Department of Natural Resources

Naab, Michael; Director, Maritime Preservation, National Trust for Historic Preservation

Peschke, John; American Petroleum Institute

Potter, Frank; Secretary–General, International Network for Environmental Policy

Sobel, Jack; Director, Marine Protected Resources Program, Center for Marine Conservation

Taylor, Sarah; Executive Director, Critical Area Commission

Webster, Steven; Education Director, Monterey Bay Aquarium

Yurick, Douglas; Assistant to the Assistant Deputy Minister, Canadian Parks Service

Appendix B

GREAT BARRIER REEF MARINE PARK —PERTINENT FACTS

The Great Barrier Reef Marine Park in Australia, currently some 350,000 square kilometers in area, was established as a marine park by the Great Barrier Reef Marine Park Act of 1975. It stretches along the northeast coast of Queensland for roughly 2,000 kilometers, and contains within its boundaries roughly 2,900 individual reefs. At its northern end, the Great Barrier Reef is narrow, consisting mainly of "ribbon" reefs; to the south it widens, and is characterized by "patch" reefs.

That legislation, drawing in part upon precedents in the United States' enactment of the Marine Protection, Research and Sanctuaries Act of 1972, created a Marine Park Authority, a Consultative Committee to advise the government and the Authority on matters pertaining to the Park. The Act also requires zoning plans for all areas within the Park, with extensive public participation and involvement; these must be submitted to the Parliament for review.

Ministerial Council

In 1979, the Great Barrier Reef Ministerial Council was established to coordinate policy on the Reef with the Parliament. The Council has four members, two from each house. The Council is chaired by the Minister for the Environment, currently the Honourable Ros Kelly.

Consultative Committee

This is a 12-16 member advisory body set up to represent various interests in the Reef. Named by Minister and Authority, it represents interests including tourism, fishing, conservation, science and the Aboriginal and local government communities.

Reef planning and zoning

The planning process is elaborate and extensive—visitors to the park are invited to make recommendations for improvement in the zoning plans as they are being developed and amended. At present, the park has four subdivisions: the Mackay/Capricorn Section is the southernmost of these, followed by the Central Section, the Cairns Section and the Far Northern Section, ending at the northern tip of the continent. The Cairns Section was recently rezoned by the Authority following a period of extensive public comment and review, increased from three to five months to accommodate needs for broad representation.

Attached is a matrix showing various activities permitted (in this case the Capricornia section) on the Reef, together with a summary of the zoning plan and process.

Staffing

The Authority has a small office (staff of four) in Canberra, and a larger office in Townsville, immediately adjacent to the Reef itself. At present, The Authority employs roughly 100 people.

Aquarium

Also in Townsville is an aquarium, operated by the Authority and paid for by admission fees and Aquarium shop sales. In 1989-90, approximately 200,000 people visited the Aquarium, diminishing to some extent the pressure upon the Reef itself, and informing the public about the need to use the Reef more wisely.

In 1989-90, the Parliament appropriated $1 million (Australian $) to provide working capital for the Aquarium. Receipts from Aquarium activities were approximately $1.618 million from the Aquarium.

Human use of the Reef

The Marine Park Authority estimates the value of Reef-related activities to be on the order of $1 million per year, in terms of tourist income to the area. In 1986-7, the last year for which figures are available, the Authority estimated an estimated 162,000 visitor trips to the Reef, resulting in 1, 018,000 visitor nights spent at resorts in the area, and the contribution of $175.6 million at resorts in the area.

Budget

For the fiscal year ended June 30, 1990, revenues for the Park Authority were $12.492,874. Of this amount, $9.266 million was contributed by the Commonwealth, $2.191, 140 was contributed by Queensland for day-to-day management, and the balance was miscellaneous revenues (permit fees, fines, etc.).

For the same period, expenses were $11,647,583 ($1.534 administration; $1.902 research and monitoring; $1.269 planning and management; $1.201 education and information; $948 environmental impact management and $4.791 to Queensland for day-to-day management).

Management and enforcement

There is in place a complex arrangement between the Commonwealth and the state of Queensland covering management of the area and the cost of building and maintaining the capital assets associated with it. In essence, much of the day-to-day, hands-on activity associated with the operation of the park has been delegated to the various agencies within the Queensland government, chiefly the Queensland National Parks and Wildlife Service.

Zoning

"The Great Barrier Reef Marine Park is not a National Park. It is a multiple-use protected area, fitting the definition of Category VIII of the classification system used by IUCN, the World Conservation Union (8). It also meets the criteria for selection and management as a Biosphere Reserve (Category IX), although it has not been formally proposed or established as one. The Reef was inscribed on the World Heritage List in 1981 as a natural site (Category X).

"Through the use of zoning, conflicting activities are separated, areas are provided which are suitable for particular activities and some areas are protected from use. Levels of protection within the Park vary from almost complete absence of restriction on activity in some zones to zones within which almost no human activities are permitted. The only activities which are prohibited throughout the Park are oil exploration, mining (other than for approved research purposes), littering, spearfishing with SCUBA and the taking of large specimens of certain species of fish.

"In the zoning plans which have been developed so far, there are three major categories of zones. They are:

1 Preservation zones and Scientific Research zones	Equivalent to IUCN Category 1, Scientific Research/Strict Nature Reserve. The only human activity permitted is strictly controlled scientific research.
2. Marine National Park zones	Equivalent to IUCN Category 11, National Park. The major uses permitted are scientific, educational and recreational.
3. General Use zones	Equivalent to IUCN Categories IV, Managed Nature Reserve and VI, Resource Reserves. Uses are held at levels which do not jeopardize the ecosystem or its major elements. Commercial and recreational fishing are generally permitted, although bottom trawling is prohibited in one of these two zones.

"The zones are fixed during the life of a zoning plan (generally five years). They are complemented by generally smaller areas which give special protection from time to time to animal breeding or nesting sites, to sites in general use and other zones which are required to be protected to allow appreciation of nature free from fishing or collecting and to sites suitable for scientific research.

"Because there has been a dramatic increase in the use of the Marine Park by tourists, the existing zoning system, which focuses on fishing, is proving inadequate. There is

increasing competition for tourism use of particular sites. Usually these sites are near major areas of coastal development (e.g. Cairns or Townsville) or have particular attributes which make them suitable for tourism - the Whitsunday Islands, for example.

"At a special conference arranged by the Authority in late 1988, participants agreed that there was a need to incorporate into the zoning system a tourism strategy. This strategy would identify those areas which are particularly suited to tourism development and those that should be retained in their natural state, undisturbed by such development.

"The strategy is being implemented through the zoning system, initially in the rezoning of the Cairns Section of the Marine Park. It will be extended to the other three Sections as they are rezoned during the next five years. Initial zoning of the entire Marine Park was completed on schedule in 1988—Australia's Bicentenary.

"A major constraint in zoning for tourism has been that many tourists like to observe the natural qualities of the Great Barrier Reef undisturbed by fishing. Modern technology allows them to do this from semi-submersible vessels and from underwater observatories. If carried out with care these activities can have very little if any effect on the Reef's ecosystem. They are, in other words, compatible with the Authority's goal. The need to provide for such activities in zones which are protected from fishing has led the Authority to consider adopting a slightly different zoning system as follows:

Zone Name	Relation to Previous Zoning System
1. Preservation Zone	Incorporates old Preservation and Scientific Research Zones
2. Marine National Park Zone	Same as old Marine National Park B Zone
3. Marine Park Recreation Zone	Same as old Marine National Park A Zone
4. General Use (No Trawling) Zone	Same as old General Use B Zone
5. General Use Zone	Same as old General Use A Zone

"The new names have been designed to describe more accurately the qualities of the zones. The major change proposed to the zoning system is to divide each of the zones other than the Preservation Zone into two categories:

"Category 1 - no structures (for example, floating hotels, pontoons or mariculture) will be permitted. Mooring buoys may be permitted.

"Category 2 - such structures are permitted provided they meet environmental guidelines. A permit is required.

"The adoption of this new zoning scheme will allow the Authority, in association with interested members of the public and with other agencies, to develop and apply tourism strategy for the whole of the Great Barrier Reef. The aim will be to ensure that the whole Reef will not become dotted with tourist and other structures while at the same time providing for careful development on reefs which are suitable for that purpose. The strategy should allow the Authority to continue to provide for protection of the Great

Barrier Reef while allowing careful development —in other words, to provide for sustainable development."

Source: "Sustainable Development of the Great Barrier Reef Marine Park," Graeme Kelleher, Chairman, Great Barrier Reef Marine Park Authority)

Conclusions

Management and operation of the Great Barrier Reef has much to commend it as a model for dealing with problems associated with the United States Marine Sanctuary Program. It seems particularly relevant to the Florida Keys sanctuary recently designated by Congressional initiative, although there are other useful lessons to be derived as well.

One significant distinction that must be borne in mind is that at the time the Great Barrier Reef was established, much of the Reef area was still essentially undeveloped. This factor diminished substantially the burden that would have to be borne as a new regulatory regime evolves in the Florida keys.

Appendix C

Program Comparison—Sanctuaries and Estuaries*

	Estuarine Sanctuaries	Marine Sanctuaries
Authorizing legislation	Coastal Zone Management Act Sec. 315 National Estuarine Reserve Research System	Marine Protection, Research, Sanctuaries Act
Date of Authorization	1972	1972
Legislative purpose	To preserve representative estuarine areas so they may provide long-term scientific & educational value	To preserve or restore areas for their conservation, recreation, ecology, or esthetics To identify areas of the marine environment of special national significance due to the resource or human-use values; To provide authority for comprehensive and coordinated conservation & management of these marine areas that will complement existing regulatory authorities; To support, promote, and coordinate scientific research on, and monitoring of these marine areas To enhance public awareness, understanding, appreciation, and wise use of the marine environment To facilitate, to the extent compatible with the primary objective of resource protection, all public & private uses of the resources of these marine areas not prohibited pursuant to other authorities
Who designates?	The Secretary of Commerce AFTER the Governor nominates the area	The Secretary of Commerce, AFTER consultation with the Committee on Merchant Marine & Fisheries of the House of Reps.; the Committee on Commerce, Science, and Transportation of the Senate; Secretaries of State, Defense, the Interior, Transportation; the Administrator; the heads of other interested Federal agencies; the responsible officials or relevant officials or relevant agency heads of the appropriate State & local government entities, including CZM agencies, that will be or are affected by establishment; the appropriate officials of any Regional Fishery Management Council affected by the proposed designation; other interested persons.

* Source: G.C. and G.M. Ray, 1990

Designation process		The Secretary shall issue notice in *Federal Register*. in newspaper. It will submit to Committee on Merchant Marine & Fisheries & the Committee on Commerce, Science, and Transportation of the Senate
Habitat type	Estuarine ecosystem	Ocean waters lying within territorial limits of any State or superjacent to the subsoil. And the seabed within the seaward boundary of a coastal state where the water ebbs and flows. And those waters as far seaward as the outer Continental Shelf as defined in the Convention of the Continental Shelf. And including Great Lakes and its connecting waters.
Legislative Criteria for designation	Representative estuarine ecosystems suitable for long-term research and contributes to biogeographical & typological balance of the System The law of coastal state provides long- term protection for reserve resources to ensure stable environment for research That designation will serve to enhance public awareness & understanding of estuarine areas & provide suitable opportunities for public education & interpretation The state has complied with requirements of any regulation issued by the Secretary to implement this section	National significance due to its resources, culture, or human use values Where existing State & Federal authorities are inadequate to insure coordinated & comprehensive conservation & management of the area, including resource protection, scientific research, protection, & public education. Natural resource & ecological qualities, including contributions to biological diversity, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, & biogeographic representation of the site Historical, cultural, archaeological or paleontological significance Present and potential uses of area that depend on maintenance of area's resources, including commercial & recreational fishing, subsistance uses, other commercial & recreational activities, & research & education Present and potential activities that may adversely affect the factors identified above. Existing State and Federal regulatory & management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes & policies of the title The manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, & its suitability for monitoring & enforcement activities

		Public benefits to be derived from sanctuary status, with emphasis on the benefits of long- term protection of nationally significant resources, vital habitats, & resources which generate tourism Negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development Socioeconomic effects of sanctuary designation
Legislative Research Guidelines	Provides guidelines for research & for promotion and coordination of research	Nonexistent
Legislative funding	Based on 50/50 match between State and Federal Gov. for acquisi tion, development, & operation. The amount of financial assistance for acquisition of lands & waters, or interests therein, for any one national estuarine sanctuary may not exceed an amount equal to 50% of the costs of the lands, waters, and interests therein or $4,000,000.00, which ever amount is less. The amount of financial assistance for acquisition of lands & waters, or interests therein, for any one national estuarine reserve may not exceed an amount equal to 50 % of costs incurred to achieve described purposes	Entirely Federal
OPERATIONAL EXPENDITURES for each site for 1990	All = $70,000.00/year	Channel Islands ..... $506,000.00 Key Largo ..... 716,000.00 Gulf Farallones ..... 445,181.00 Looe Key ..... 445,000.00 Gray's Reef ..... 162,000.00 Monitor ..... 125,000.00 Fagatele Bay ..... 120,000.00 Cordell Bank 9,000.00
FUNDS/SITE 1988 1989 1990(est) 1991(est)	 $150,000.00, $132,000.00 $145,000.00 $134,000.00	 $260,000.00 ratio = 1/58 $139,000.00 = 1/95 $173,000.00 = 1/84 $184,000.00 = 1/89

Legislated evalutaiton of performance	The Secretary shall periodically evaluate the operation & management of each national estuarine reserve. Includes education & interpretative activities, & research being conducted within the reserve. If evaluation reveals the operation & management of the reserve is deficient or the research conducted is not consistent with research guidelines described, the Secretary may suspend eligibility of that reserve for financial assistance until deficiency or inconsistency is remedied.	
REPORTING	Coastal Zone Management Report for two consecutive fiscal years, April 1 following the close of the biennial The Secretary shall include in the report information on new designations, expansion of existing reserves, status of research pro gram, and summary of the evaluations made	Resource Assessment Report. The Secretary of Commerce shall draft a resource assessment (as part of EIS) documenting present & potential uses of the area, including commercial & recreational fishing, research and education, minerals & energy development, subsistence uses, & other commercial & recreational uses. The Secretary, in consultation with the Secretary of Interior, shall draft a resource assessment section for the report regarding any commercial or recreational resource uses in the area under consideration that are subject to primary jurisdiction of Dept. of Interior.
Program management	Marine & Estuarine Management Division	Marine & Estuarine Management Division
Program Planning	Document is non-existent	Program Development Plan, 1982
Program Research Purposes	Defined	Not defined.
STAFF (number) **Headquarters (for both)** 1988 1989 1990	Existing (May): Division Chief's Office. Tech. Proj. Mgt. Atl. & Great Lakes. Gulf & Caribbean.	17 25 30 *3 (Chief, Secretary, Program Specialist)* *7 (Branch Chief, Typist, Mar. Archaeo, Res. Proj Manager, Res. Prog. Spec., Edu. Proj. Manager, Edu. Prog. Spec.)* *7 (Reg. manager, Sec., San. Proj. Manager., Prog managers=4)* *4 (Reg. manager, San. Proj. manager, Prog. Spec. Biol)*

	Pacific..	*6 (Reg. manager, Typist, Sen. Proj. Manager, Prog. Spec=3)*
1991		32
On-site NOAA paid		
1988	0	7
1989	0	9
1990	0	20
1991(est)	0	35
On-site Non-NOAA paid		
1988	65	17
1989	70	18
1990	75	20
1991(est)	80	18
Number of designated sites		
1988	17	7
1989	18	8
1990	19	8
1991(est)	21/21	12
Program MISSION	Non-existent Its purpose is to create natural field labs in which to gather data & make studies of the natural & human processes occurring in estuaries.	Establishment of a system of national marine sanctuaries based on identification, and comprehensive management of special marine areas for the long-term benefit & enjoyment of the public
Program GOALS	Preservation of estuarine habitat, including endangered species & wildlife	Enhance resource protection through the implementation of a comprehensive, long-term management plan tailored to the specific resources; Promote & coordinate research to expand scientific knowledge of significant marine resources & improve management decision- making Enhance public awareness, understanding, and wise use of the marine environment through public interpretive & recreational programs Provide for optimum compatible public & private use of special marine areas
INITIATE State designation	State	Site Evaluation List

NUMBER & YEAR OF DESIGNATED SITES		
1972	0	0
1973	0	0
1974	1	0
1975	0	2
1976	2	0
1977	0	0
1978	1	0
1979	1	0
1980	4	1
1981	2	3
1982	3	0
1983	0	0
1984	1	0
1985	0	0
1986	1	1
1987	0	0
1988	1	0
1989	1	1
TOTAL - Square kilometers	1,025.8 km^2	7,047 km^2
Time, to designate		30 months

FUNDING
(in thousands)

	Estuarine Sanctuaries			Marine Sanctuaries		
	Authorized	Approp.	Spent	Authorized	Approp.	Spent
1972	n.a.	n.a.	n.a.	$10,000	0	0
1973	na	na	na	$10,000	0	0
1974	$9,000	$4,000	$ 824	$10,000	0	NOAA
1975	$9,000	0	$1,500	$10,000	0	NOAA
1976	$9,000	0	$800	$ 6,200	0	NOAA
1977	$9,000	$1,500	$2,450	$500	0	NOAA
1978	$9,000	$300	$300	$500	0	NOAA
1979	$9,000	$3,000	$1,941	$500	$500	$49
1980	$9,000	$3,000	$4,010	$ 1,750	$ 1,750	$176
1981	$9,000	$3,000	$2,077	$ 2,250	$ 2,250	$1,983
1982	$9,000	$2,000	$2,948	$ 2,250	$ 2,250	$1,625
1983	$9,000	$2,930	$2,511	$ 2,250	$ 2,250	$1,786
1984	$9,000	$2,930	$2,254	$ 2,264	$ 2,264	$1,880
1985	$9,000	$2,930	$4,542	$ 3,000	$ 2,982	$2,146
1986	$2,500	$2,059	$2,165	$ 3,300	$ 2,750	$1,896
1987	$3,800	$2,859	$2,944	$ 3,500	$ 2,796	$2,144
1988	$4,500	$2,859	$2,907.8	$ 3,900	$ 2,620	$2,728
1989	$5,000	$2,790	$2,894.6	$ 4,250	$ 2,529	$2,336
1990	$5,500	$3,490	$3,490	$ 4,900	$ 3,122	$ 3,795

Appendix D

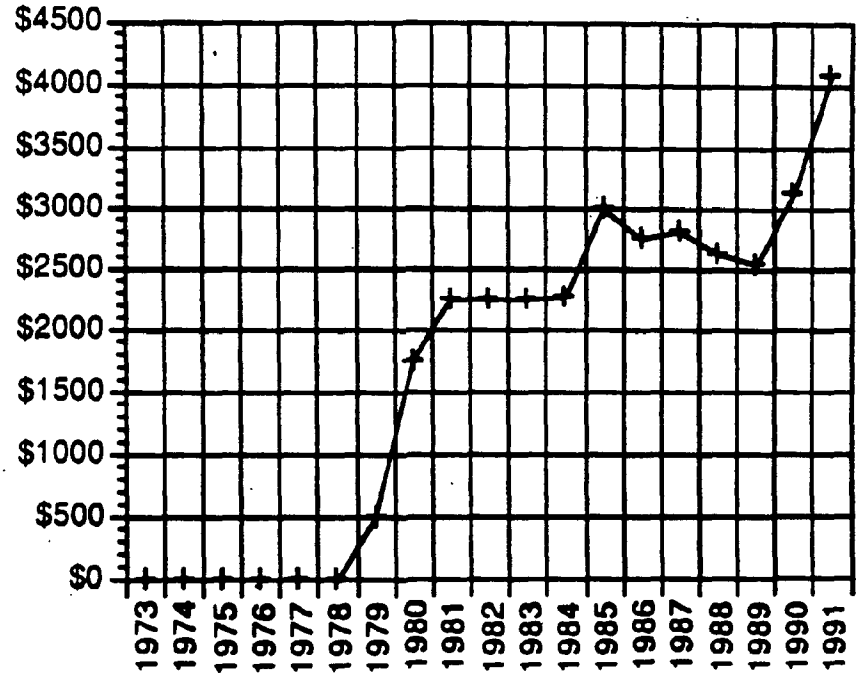
Programs at Existing National Marine Sanctuaries

The nature of the existing program at the sanctuaries in existence as of the end of 1990 may be briefly described as follows:

Budget

For several years after the program was authorized, the marine sanctuaries program had no budget at all—what little activity that took place was paid for from general NOAA funds. Beginning in 1979, a line item was included in the NOAA budget for marine sanctuary programs. That authorized amount increased in the ensuing years to a level slightly in excess of $4 million for the current fiscal year.

The budget for the program, drawn as a line chart, appears as follows:



This chart still does not tell the entire story. Some of the program's costs are covered by salaries paid to NOAA commissioned officers, which come from a different location in the budget. Also, cooperative arrangements with state agencies are not reflected in this budget.

Activities at individual sanctuaries

The chart on the next page represents NOAA's indication of activities conducted at the sanctuaries currently in the system. Every activity marked with a checkmark is said to take place within the sanctuary indicated. The chart does not indicate the level of activity involved, which may range from a full-time task force committed to the element, or may merely involve part-time or volunteer actions.

Appendix E

SAFEGUARDING OCEANS AND WATER RESOURCES

Resolutions adopted at
The Interparliamentary Conference
on the Global Environment
Washington, D.C.,

May 2, 1990

Whereas:

- The global water cycle is essential to life on earth;
- The scale of human activity has caused changes at every level of this cycle: polluting the earth's water and oceans; endangering human health; shifting the distribution of water by large-scale development; and reducing aquatic life due to pollution, over-harvesting, destruction of habitats, and alteration of ecosystems on local, regional, and global scales;
- The best way to protect water resources is to keep pollution from entering waters;
- High-seas driftnet fishing and other destructive activities disrupt marine life throughout the world's oceans; and
- Short-term economic benefits from exploitation of ocean and water resources deprive future generations, diminish the quality of life, disrupt international stability and global security, and even threaten life itself.

NOW, therefore, be it resolved that:

- It is in our interest and that of future generations to address the exploitation of ocean and water resources to prevent further irrevocable damage;
- Ocean and water resources are so important to life that a precautionary approach should be used in allowing discharge of potentially harmful pollutants and wastes. Where there is reason to believe that adverse effects of discharges are likely, even in the face of scientific uncertainty, such discharges should be prohibited;
- Policies must be adopted to stop pollution at its source, with highest priority placed on measures that prevent the creation and dispersal of environmental contaminants;
- Changing our practices requires strengthening and enforcing environmental laws on all levels, based on equity within and between communities, regions and nations and on the requirement that these resources be managed in such a way that they may be bequeathed in a healthy condition;
- Policies must be adopted that ensure future land development in a manner sustainable to the global water cycle;
- Worldwide efforts should be made to develop and share new practices and technologies that minimize pollutants resulting from industrial, agricultural, and other human activities;

- Polluters should pay for the control of pollution and the damages they cause. But this principle is not sufficient to protect oceans and freshwater. It must be accompanied by incentives or fee systems to prevent overuse and exploitation of water resources;

- Expand international programs of research and technology development to protect, manage and restore our marine and freshwater resources. These programs should be internationally funded and should ensure the active participation by developing countries. The need for further research should not be used as an excuse to delay protective actions; and

- Establish strong international systems for monitoring and enforcement of international conventions, treaties, and laws and for the protection of ocean and water resources.

AND in furtherance of these goals, be it resolved that nations join together in international convention and by individual action in an effort to:

- Properly treat and disinfect sewage and sludge before discharge to the water or land or use for agriculture or other purposes;

- Establish policies and programs to:

  -- minimize the use of toxic substances and the generation of toxic wastes, including bans on certain chemicals that are highly toxic;

  -- clean up abandoned hazardous waste sites to prevent contamination of surface and ground waters; and

  -- implement the Basel Convention regarding the international transportation and management of hazardous waste;

- Prohibit ocean dumping of harmful or potentially harmful wastes;

- Limit urban and agricultural runoff containing harmful substances through land use controls and agricultural practices that minimize the use of fertilizers and pesticides and control soil erosion;

- Establish policies to avert and respond to oil spills and regulate offshore drilling discharges by:

-- increasing penalties and liability for spills at the national and international levels;

-- requiring double hulls and bottoms for oil tankers and improving navigation and licensing requirements;

-- establishing an international fund for emergency response and clean up of oil spills and compensation for damages that result from spills to be paid for by a fee on oil from exporting and consuming countries;

- Reduce the use of plastics and properly dispose of plastics and other debris to prevent pollution to beaches, oceans and coastal waters and reduce the threat to marine life;

- Prevent acid rain by promoting energy efficiency and conservation and requiring pollution control technologies on power plants, industry and automobiles;

21.
NATIONAL MARINE SANCTUARIES PROGRAM
Title III
1992 Amendments

One Hundred Second Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Friday, the third day of January, one thousand nine hundred and ninety-two

HR 5617

An Act

To provide Congressional approval of a Governing International Fishery Agreement, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Oceans Act of 1992".

TITLE I—APPROVAL OF GOVERNING INTERNATIONAL FISHERY AGREEMENT

SEC. 1001. APPROVAL OF AGREEMENT.

Notwithstanding section 203 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1823), the governing international fishery agreement between the Government of the United States of America and the Government of the Republic of Estonia, as contained in the message to Congress from the President of the United States dated June 24, 1992, is approved by the Congress as a governing international fishery agreement for the purposes of such Act and shall enter into force and effect with respect to the United States on the date of enactment of this title.

TITLE II—NATIONAL MARINE SANCTUARIES PROGRAM

SEC. 2001. SHORT TITLE.

This title may be cited as the "National Marine Sanctuaries Program Amendments Act of 1992".

Subtitle A—Amendments to Marine Protection, Research, and Sanctuaries Act of 1972

SEC. 2101. FINDINGS, PURPOSES, AND POLICIES.

(a) FINDINGS.—Section 301(a) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431(a)) is amended—

(1) in paragraph (2) by inserting ", and in some cases international," after "national";

(2) in paragraph (4)—

(A) by inserting ", research," after "conservation"; and

(B) by striking "and" after the semicolon at the end;

(3) in paragraph (5) by striking the period at the end and inserting "; and"; and

(4) by adding at the end the following:

"(6) protection of these special areas can contribute to maintaining a natural assemblage of living resources for future generations.".

(b) PURPOSES AND POLICIES.—Section 301(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431(b)) is amended to read as follows:

"(b) PURPOSES AND POLICIES.—The purposes and policies of this title are—

"(1) to identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance;

"(2) to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner which complements existing regulatory authorities.

"(3) to support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas, especially long-term monitoring and research of these areas;

"(4) to enhance public awareness, understanding, appreciation, and wise use of the marine environment;

"(5) to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities;

"(6) to develop and implement coordinated plans for the protection and management of these areas with appropriate Federal agencies, State and local governments, Native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of these marine areas;

"(7) to create models of, and incentives for, ways to conserve and manage these areas;

"(8) to cooperate with global programs encouraging conservation of marine resources; and

"(9) to maintain, restore, and enhance living resources by providing places for species that depend upon these marine areas to survive and propagate.".

SEC. 2102. *DEFINITIONS.*

(a) MARINE ENVIRONMENT.—Section 302(3) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1432(3)) is amended by adding "including the exclusive economic zone," after "jurisdiction,".

(b) DAMAGES.—Section 302(6) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1432(6)) is amended—

(1) in subparagraph (A)(ii) by striking "and" at the end;

(2) in subparagraph (B) by adding "and" at the end; and

(3) by adding at the end the following:

"(C) the reasonable cost of monitoring appropriate to the injured, restored, or replaced resources,".

(c) RESPONSE COSTS.—Section 302(7) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1432(7)) is amended by inserting "or authorized" after "taken".

(d) EXCLUSIVE ECONOMIC ZONE.—Section 302 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1432) is amended (1) by striking the period at the end of paragraph (8) and inserting "; and"; and (2) by adding after paragraph (8) the following:

"(9) 'exclusive economic zone' means the exclusive economic zone as defined in the Magnuson Fishery Conservation and Management Act.".

(e) TECHNICAL CORRECTION.—Section 302 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1432) is amended—

(1) in paragraph (1) by striking "304(a)(1)(E)" and inserting "304(a)(1)(C)(v)"; and

(2) in paragraph (5) by striking "and" after the semicolon.

SEC. 2103. SANCTUARY DESIGNATION STANDARDS.

(a) STANDARDS.—Section 303(a)(2)(B) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1433(a)(2)(B)) is amended by inserting "or should be supplemented" after "inadequate".

(b) FACTORS AND CONSULTATIONS.—

(1) Section 303(b)(1)(A) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1433(b)(1)(A)) is amended by inserting "maintenance of critical habitat of endangered species," after "assemblages,"

(2) Section 303(b)(3) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1433(b)(3)) is amended—

(A) by inserting ", governmental," after "other commercial" and inserting ", governmental," after "any commercial";

(B) by adding at the end the following: "The Secretary, in consultation with the Secretary of Defense, the Secretary of Energy, and the Administrator, shall draft a resource assessment section for the report, including information on any past, present, or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary. Public disclosure by the Secretary of such information shall be consistent with national security regulations."; and

(C) by striking "304(a)(1)" and inserting "304(a)(2)".

SEC. 2104. PROCEDURES FOR DESIGNATION AND IMPLEMENTATION.

(a) SANCTUARY PROPOSAL.—Section 304(a) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434(a)) is amended—

(1) by striking "prospectus" whenever it appears and inserting "documents";

(2) in paragraph (1)(C) by striking "a prospectus on the proposal which shall contain—" and inserting "documents, including an executive summary, consisting of—"; and

(3) in paragraph (5)—

(A) by striking "United States Fishery Conservation Zone" and inserting "Exclusive Economic Zone"; and

(B) by adding at the end: "The Secretary shall also cooperate with other appropriate fishery management authorities with rights or responsibilities within a proposed sanctuary at the earliest practicable stage in drafting any sanctuary fishing regulations.".

(b) TAKING EFFECT OF DESIGNATIONS.—Section 304(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434(b)) is amended—

(1) in paragraph (1) by striking the dash after "unless" and all that follows and inserting ", in the case of a national

marine sanctuary that is located partially or entirely within the seaward boundary of any State, the Governor affected certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area of the sanctuary lying within the seaward boundary of the State.";

(2) in paragraph (2)—

(A) striking "paragraph (1) (A) or (B)" and inserting "paragraph (1)";

(B) by striking "not disapproved under paragraph (1)(A) or "; and

(C) by striking "paragraph (1)(B)" and inserting "paragraph (1)"; and

(3) by striking paragraph (3) and redesignating paragraph (4) as paragraph (3).

(c) ACCESS AND VALID RIGHTS.—Section 304(c)(1) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434(c)(1)) is amended to read as follows:

"(1) Nothing in this title shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access that is in existence on the date of designation of any national marine sanctuary.".

(d) INTERAGENCY COOPERATION; REVIEW OF MANAGEMENT PLAN.—Section 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434) is amended by adding at the end the following new subsections:

"(d) INTERAGENCY COOPERATION.—

"(1) REVIEW OF AGENCY ACTIONS.—

"(A) IN GENERAL.—Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary.

"(B) AGENCY STATEMENTS REQUIRED.—Subject to any regulations the Secretary may establish each Federal agency proposing an action described in subparagraph (A) shall provide the Secretary with a written statement describing the action and its potential effects on sanctuary resources at the earliest practicable time, but in no case later than 45 days before the final approval of the action unless such Federal agency and the Secretary agree to a different schedule.

"(2) SECRETARY'S RECOMMENDED ALTERNATIVES.—If the Secretary finds that a Federal agency action is likely to destroy, cause the loss of, or injure a sanctuary resource, the Secretary shall (within 45 days of receipt of complete information on the proposed agency action) recommend reasonable and prudent alternatives, which may include conduct of the action elsewhere, which can be taken by the Federal agency in implementing the agency action that will protect sanctuary resources.

"(3) RESPONSE TO RECOMMENDATIONS.—The agency head who receives the Secretary's recommended alternatives under paragraph (2) shall promptly consult with the Secretary on the alternatives. If the agency head decides not to follow the

alternatives, the agency head shall provide the Secretary with a written statement explaining the reasons for that decision.

"(e) REVIEW OF MANAGEMENT PLANS.—Not more than five years after the date of designation of any national marine sanctuary, and thereafter at intervals not exceeding five years, the Secretary shall evaluate the substantive progress toward implementing the management plan and goals for the sanctuary, especially the effectiveness of site-specific management techniques, and shall revise the management plan and regulations as necessary to fulfill the purposes and policies of this title.".

SEC. 2105. APPLICATION OF REGULATIONS; INTERNATIONAL COOPERATION.

(a) ENFORCEABILITY; INTERNATIONAL COOPERATION.—Section 305 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1435) is amended—

(1) in subsection (a)—

(A) by striking "The" in the first sentence and inserting in lieu thereof "This title and the"; and

(B) by inserting "or be enforced against" immediately after "apply to"; and

(2) by adding at the end the following new subsection:

"(c) INTERNATIONAL COOPERATION.—The Secretary, in consultation with the Secretary of State and other appropriate Federal agencies, shall cooperate with other governments and international organizations in furtherance of the purposes and policies of this title and consistent with applicable regional and mutilateral arrangements for the protection and management of special marine areas.".

(b) TECHNICAL AMENDMENT.—The section heading for section 305 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1435) is amended by striking all after "REGULATIONS" and inserting in lieu thereof "; INTERNATIONAL NEGOTIATIONS AND COOPERATION.".

SEC. 2106. PROHIBITED ACTIVITIES.

Section 306 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1436) is amended to read as follows:

"SEC. 306. PROHIBITED ACTIVITIES.

"It is unlawful to—

"(1) destroy, cause the loss of, or injure any sanctuary resource managed under law or regulations for that sanctuary;

"(2) possess, sell, deliver, carry, transport, or ship by any means any sanctuary resource taken in violation of this section;

"(3) interfere with the enforcement of this title; or

"(4) violate any provision of this title or any regulation or permit issued pursuant to this title.".

SEC. 2107. ENFORCEMENT.

(a) CIVIL PENALTIES.—

(1) Section 307(c)(1) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1437(c)(1)) is amended by striking "$50,000" and inserting "$100,000".

(2) Section 307(c)(3) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1437(c)(3)) is amended—

(A) by striking "and may be proceeded" and all that follows through "jurisdiction"; and

(B) by adding at the end the following sentence: "Such penalty shall constitute a maritime lien on the vessel and may be recovered in an action in rem in the district court of the United States having jurisdiction over the vessel.".

(b) PROCEEDS FROM CIVIL FORFEITURES.—Section 307(d)(1) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1437(d)(1)) is amended by adding at the end the following new sentence: "The proceeds from forfeiture actions under this subsection shall constitute a separate recovery in addition to any amounts recovered as civil penalties under this section or as civil damages under section 312. None of those proceeds shall be subject to set-off.".

(c) USE OF RECEIVED AMOUNTS.—Section 307(e) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1437(e)) is amended by striking paragraph (1) and inserting the following:

"(1) EXPENDITURES.—

"(A) Notwithstanding any other law, amounts received by the United States as civil penalties, forfeitures of property, and costs imposed under paragraph (2) shall be retained by the Secretary in the manner provided for in section 107(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act.

"(B) Amounts received under this section for forfeitures and costs imposed under paragraph (2) shall be used to pay the reasonable and necessary costs incurred by the Secretary to provide temporary storage, care, maintenance, and disposal of any sanctuary resource or other property seized in connection with a violation of this title or any regulation or permit issued under this title.

"(C) Amounts received under this section as civil penalties and any amounts remaining after the operation of subparagraph (B) shall be used, in order of priority, to—

"(i) manage and improve the national marine sanctuary with respect to which the violation occurred that resulted in the penalty or forfeiture;

"(ii) pay a reward to any person who furnishes information leading to an assessment of a civil penalty, or to a forfeiture of property, for a violation of this title or any regulation or permit issued under this title; and

"(iii) manage and improve any other national marine sanctuary.".

(d) CONFORMING AMENDMENT.—Section 312(d) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1443(d)) is amended—

(1) by striking "and civil penalties under section 307";

(2) by striking paragraph (3); and by redesignating paragraph (4) as paragraph (3).

(e) ENFORCEABILITY.—Section 307 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1437) is amended by adding at the end the following new subsection:

"(j) AREA OF APPLICATION AND ENFORCEABILITY.—The area of application and enforceability of this title includes the territorial sea of the United States, as described in Presidential Proclamation 5928 of December 27, 1988, which is subject to the sovereignty

of the United States, and the United States exclusive economic zone, consistent with international law.".

SEC. 2108. RESEARCH, MONITORING, AND EDUCATION.

Section 309 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1440) is amended to read as follows:

"SEC. 309. RESEARCH, MONITORING, AND EDUCATION.

"(a) IN GENERAL.—The Secretary shall conduct research, monitoring, evaluation, and education programs as are necessary and reasonable to carry out the purposes and policies of this title.

"(b) PROMOTION AND COORDINATION OF SANCTUARY USE.—The Secretary shall take such action as is necessary and reasonable to promote and coordinate the use of national marine sanctuaries for research, monitoring, and education purposes. Such action may include consulting with Federal agencies, States, local governments, regional agencies, interstate agencies, or other persons to promote use of one or more sanctuaries for research, monitoring, and education, including coordination with the National Estuarine Research Reserve System.".

SEC. 2109. COOPERATIVE AGREEMENTS; DONATIONS, AND ACQUISITIONS.

"Section 311 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1442) is amended to read as follows:

"SEC. 311. COOPERATIVE AGREEMENTS, DONATIONS, AND ACQUISITIONS.

"(a) COOPERATIVE AGREEMENTS, GRANTS AND OTHER AGREEMENTS.—The Secretary may enter into cooperative agreements, financial agreements, grants, contracts, or other agreements with States, local governments, regional agencies, interstate agencies, or other persons to carry out the purposes and policies of this title.

"(b) AUTHORIZATION TO SOLICIT DONATIONS.—The Secretary may enter into such agreements with any nonprofit organization authorizing the organization to solicit private donations to carry out the purposes and policies of this title.

"(c) DONATIONS.—The Secretary may accept donations of funds, property, and services for use in designating and administering national marine sanctuaries under this title. Donations accepted under this section shall be considered as a gift or bequest to or for the use of the United States.

"(d) ACQUISITIONS.—The Secretary may acquire by purchase, lease, or exchange, any land, facilities, or other property necessary and appropriate to carry out the purposes and policies of this title.".

SEC. 2110. DESTRUCTION OR LOSS OF, OR INJURY TO, SANCTUARY RESOURCES.

(a) LIABILITY FOR INTEREST.—Section 312(a)(1) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1443(a)(1)) is amended to read as follows:

"(1) LIABILITY TO UNITED STATES.—Any person who destroys, causes the loss of, or injures any sanctuary resource is liable to the United States for an amount equal to the sum of—

"(A) the amount of response costs and damages resulting from the destruction, loss, or injury; and

"(B) interest on that amount calculated in the manner described under section 1005 of the Oil Pollution Act of 1990.".

(b) LIABILITY IN REM.—Section 312(a)(2) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1443(a)(2)) is amended by adding at the end the following: "The amount of that liability shall constitute a maritime lien on the vessel and may be recovered in an action in rem in any district court of the United States that has jurisdiction over the vessel.".

(c) LIMITS TO LIABILITY.—Section 312(a) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1443(a)) is amended by adding at the end the following:

"(4) LIMITS TO LIABILITY.—Nothing in sections 4281–4289 of the Revised Statutes of the United States or section 3 of the Act of February 13, 1893, shall limit the liability of any person under this title.".

(d) RESPONSE ACTIONS.—Section 312(b)(1) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1443(b)(1)) is amended by inserting "or authorize" of "undertake".

(e) USE OF RECOVERED AMOUNTS.—Section 312(d) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1443(d)) is amended in paragraph (3), as redesignated by this Act, by inserting "the court decree or settlement agreement and" after "in accordance with".

SEC. 2111. AUTHORIZATION OF APPROPRIATIONS.

Section 313 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1444) is amended to read as follows:

"SEC. 313. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated to the Secretary to carry out this title the following—

"(1) $8,000,000 for fiscal year 1993;

"(2) $12,500,000 for fiscal year 1994;

"(3) $15,000,000 for fiscal year 1995; and

"(4) $20,000,000 for fiscal year 1996.".

SEC. 2112. ADVISORY COUNCILS AND SHORT TITLE.

The Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.) is amended by adding at the end the following new sections:

"SEC. 315. ADVISORY COUNCILS.

"(a) ESTABLISHMENT.—The Secretary may establish one or more advisory councils (in this section referred to as an 'Advisory Council') to provide assistance to the Secretary regarding the designation and management of national marine sanctuaries. The Advisory Councils shall be exempt from the Federal Advisory Committee Act.

"(b) MEMBERSHIP.—Members of the Advisory Councils may be appointed from among—

"(1) persons employed by Federal or State agencies with expertise in management of natural resources;

"(2) members of relevant Regional Fishery Management Councils established under section 302 of the Magnuson Fishery Conservation and Management Act; and

"(3) representatives of local user groups, conservation and other public interest organizations, scientific organizations, educational organizations, or others interested in the protection and multiple use management of sanctuary resources.

"(c) LIMITS ON MEMBERSHIP.—For sanctuaries designated after the date of enactment of the National Marine Sanctuaries Program Amendments Act of 1992, the membership of Advisory Councils shall be limited to no more than 15 members.

"(d) STAFFING AND ASSISTANCE.—The Secretary may make available to an Advisory Council any staff, information, administrative services, or assistance the Secretary determines are reasonably required to enable the Advisory Council to carry out its functions.

"(e) PUBLIC PARTICIPATION AND PROCEDURAL MATTERS.—The following guidelines apply with respect to the conduct of business meetings of an Advisory Council:

"(1) Each meeting shall be open to the public, and interested persons shall be permitted to present oral or written statements on items on the agenda.

"(2) Emergency meetings may be held at the call of the chairman or presiding officer.

"(3) Timely notice of each meeting, including the time, place, and agenda of the meeting, shall be published locally and in the Federal Register.

"(4) Minutes of each meeting shall be kept and contain a summary of the attendees and matters discussed.

"SEC. 318. SHORT TITLE.

"This title may be cited as 'The National Marine Sanctuaries Act'.".

Subtitle B—Miscellaneous

SEC. 2201. GRAVEYARD OF THE ATLANTIC ARTIFACTS.

(a) ACQUISITION OF SPACE.—Pursuant to section 314 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1445) and consistent with the Cooperative Agreement entered into in October, 1989, between the National Oceanic and Atmospheric Administration and the Mariner's Museum of Newport News, Virginia, the Secretary of Commerce shall make a grant for the acquisition of space in Hatteras Village, North Carolina, for—

(1) the display and interpretation of artifacts recovered from the area of the Atlantic Ocean adjacent to North Carolina generally known as the Graveyard of the Atlantic, including artifacts recovered from the Monitor National Marine Sanctuary; and

(2) administration and operations of the Monitor National Marine Sanctuary.

(b) AUTHORIZATION.—To carry out the responsibilities of the Secretary of Commerce under this section, there are authorized to be appropriated to the Secretary of Commerce a total of $800,000 for fiscal years 1993 and 1994, to remain available until expended.

(c) FEDERAL SHARE.—Not more than two-thirds of the cost of space acquired under this section may be paid with amounts provided pursuant to this section.

SEC. 2202. STELLWAGEN BANK NATIONAL MARINE SANCTUARY.

(a) DESIGNATION.—The area described in subsection (b) is designated as the Stellwagen Bank National Marine Sanctuary (hereafter in this section referred to as the "Sanctuary").

(b) AREA.—The Sanctuary shall consist of all submerged lands and waters, including living and nonliving marine resources within those waters, bounded by the area described as Boundary Alternative 3 in the Draft Environmental Impact Statement and Management Plan for the Proposed Stellwagen Bank National Marine Sanctuary, published by the Department of Commerce in January 1991, except that the western boundary shall be modified as follows:

(1) The southwestern corner of the Sanctuary shall be located at a point off Provincetown, Massachusetts, at the following coordinates: 42 degrees, 7 minutes, 44.89 seconds (latitude), 70 degrees, 28 minutes, 15.44 seconds (longitude).

(2) The northwestern corner of the Sanctuary shall be located at a point off Cape Ann, Massachusetts, at the following coordinates: 42 degrees, 37 minutes, 53.52 seconds (latitude), 70 degrees, 35 minutes, 52.38 seconds (longitude).

(c) MANAGEMENT.—The Secretary of Commerce shall issue a management plan for the Sanctuary in accordance with section 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434), as amended by this title.

(d) SAND AND GRAVEL MINING ACTIVITIES PROHIBITED.—Notwithstanding any other provision of law, exploration for, and mining of, sand and gravel and other minerals in the Sanctuary is prohibited.

(e) CONSULTATION.—In accordance with the procedures established in section 304(e) of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended by this title, the appropriate Federal agencies shall consult with the Secretary on proposed agency actions in the vicinity of the Sanctuary that may affect sanctuary resources.

(f) AUTHORIZATION.—There are authorized to be appropriated to the Secretary of Commerce for carrying out the purposes of this section $570,000 for fiscal year 1993 and $250,000 for fiscal year 1994.

(g) OFFICE.—The Secretary of Commerce shall consider establishing a satellite office for the Stellwagen Bank National Marine Sanctuary in Provincetown, Gloucester, or Hull, Massachusetts.

SEC. 2203. MONTEREY BAY NATIONAL MARINE SANCTUARY.

(a) ISSUANCE OF DESIGNATION NOTICE.—Notwithstanding section 304(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434(b)), the designation of the Monterey Bay National Marine Sanctuary (hereafter in this section the "Sanctuary"), as described in the notice of designation submitted to the Congress on September 15, 1992, shall take effect on September 18, 1992.

(b) OIL AND GAS ACTIVITIES PROHIBITED.—Notwithstanding any other provision of law, no leasing, exploration, development, or production of oil or gas shall be permitted within the Sanctuary as provided by section 944.5 of the Final Environmental Impact Statement and Management Plan for the Monterey Bay National Marine Sanctuary, published by the Department of Commerce in June 1992.

(c) CONSULTATION.—Section 304(e) of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended by this title, shall apply to the Sanctuary as designated by the Secretary of Commerce.

(d) VESSEL TRAFFIC.—Within 18 months after the date of enactment of this title, the Secretary of Commerce and the Secretary of Transportation, in consultation with the State of California and with adequate opportunity for public comment, shall report to Congress on measures for regulating vessel traffic in the Sanctuary if it is determined that such measures are necessary to protect sanctuary resources.

SEC. 2204. ENHANCING SUPPORT FOR NATIONAL MARINE SANCTUARIES.

(a) IN GENERAL.—Beginning on the date of enactment of this title, the Secretary shall conduct a 2-year pilot project to enhance funding for designation and management of national marine sanctuaries.

(b) PROJECT.—The project shall consist of—

(1) the creation, adoption, and publication in the Federal Register by the Secretary of a symbol for the national marine sanctuary program, or for individual national marine sanctuaries;

(2) the solicitation of persons to be designated as official sponsors of the national marine sanctuary program or of individual national marine sanctuaries;

(3) the designation of persons by the Secretary as official sponsors of the national marine sanctuary program or of individual sanctuaries;

(4) the authorization by the Secretary of the use of any symbol published under paragraph (1) by official sponsors of the national marine sanctuary program or of individual national marine sanctuaries;

(5) the establishment and collection by the Secretary of fees from official sponsors for the manufacture, reproduction or use of the symbols published under paragraph (1);

(6) the retention of any fees assessed under paragraph (5) by the Secretary in an interest-bearing revolving fund; and

(7) the expenditure of any fees and any interest in the fund established under paragraph (6), without appropriation, by the Secretary to designate and manage national marine sanctuaries.

(c) CONTRACT AUTHORITY.—The Secretary may contract with any person for the creation of symbols or the solicitation of official sponsors under subsection (b).

(d) RESTRICTIONS.—The Secretary may restrict the use of the symbols published under subsection (b), and the designation of official sponsors of the national marine sanctuary program or of individual national marine sanctuaries to ensure compatibility with the goals of the national marine sanctuary program.

(e) PROPERTY OF UNITED STATES.—Any symbol which is adopted by the Secretary and published in the Federal Register under subsection (b) is deemed to be the property of the United States.

(f) PROHIBITED ACTIVITIES.—(1) It is unlawful for any person—

(A) designated as an official sponsor to influence or seek to influence any decision by the Secretary or any other Federal official related to the designation or management of a national

marine sanctuary, except to the extent that a person who is not so designated may do so;

(B) to represent himself or herself to be an official sponsor absent a designation by the Secretary;

(C) to manufacture, reproduce, or use any symbol adopted by the Secretary absent designation as an official sponsor and without payment of a fee to the Secretary; and

(D) to violate any regulation promulgated by the Secretary under this section.

(2) Violation of this subsection shall be considered a violation of title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.).

(g) REPORT.—No later than 30 months after the date of enactment of this Act, the Secretary shall submit a report on the pilot project to Congress regarding the success of the program in providing additional funds for management and operation of national marine sanctuaries.

(h) DEFINITIONS.—In this section—

(1) the term "national marine sanctuary" or "national marine sanctuaries" means a national marine sanctuary or sanctuaries designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.), or by other law in accordance with title III of the Marine Protection, Research, and Sanctuaries Act of 1972;

(2) the term "official sponsor" means any person designated by the Secretary who is authorized to manufacture, reproduce, or use any symbol created, adopted, and published in the Federal Register under this section for a fee paid to the Secretary; and

(3) the term "Secretary" means the Secretary of Commerce.

SEC. 2205. TECHNICAL CORRECTIONS RELATING TO COASTAL ZONE MANAGEMENT ACT OF 1972.

(a) AMENDMENT OF COASTAL ZONE MANAGEMENT ACT OF 1972.—Except as otherwise expressly provided, whenever in this section an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(b) TECHNICAL CORRECTIONS.—

(1) The Act is amended by—

(A) striking "coastal State" each place it appears and inserting "coastal state";

(B) striking "coastal States" each place it appears and inserting "coastal states"; and

(C) striking "coastal State's" each place it appears and inserting "coastal state's".

(2) Section 6203(b)(1) of the Coastal Zone Act Reauthorization Amendments of 1990 (104 Stat. 1388–301, relating to section 303(2) of the Coastal Zone Management Act of 1972) is amended by striking "as well as the" the first place it appears and inserting "as well as to".

(3) Section 6204(a) of the Coastal Zone Act Reauthorization Amendments of 1990 (104 Stat. 1388–302, relating to section 304(1) of the Coastal Zone Management Act of 1972) is amended—

(A) in the matter preceding paragraph (1) by striking "The third sentence of section" and inserting "Section";

(B) in paragraph (1) by inserting after "period at the end" the following: "of the third sentence"; and

(C) in paragraph (2) by inserting after "territorial sea.'" the following: "at the end of the second sentence".

(4) Section 6204(b) of the Coastal Zone Act Reauthorization Amendments of 1990 (104 Stat. 1388–302) is amended by striking "following'" and inserting "following:".

(5) Section 304(1) (16 U.S.C. 1453(1)) is amended in the second sentence—

(A) by striking "the outer limit of" the first place it appears; and

(B) by striking "1705," and inserting "1705),".

(6) Section 304(2) (16 U.S.C. 1453(2)) is amended by striking "the term" and inserting "The term".

(7) Section 304(9) (16 U.S.C. 1453(9)) is amended to read as follows:

"(9) The term 'Fund' means the Coastal Zone Management Fund established under section 308(b).".

(8) Section 306(b) (16 U.S.C. 1455(b)) is amended by striking the semicolon at the end and inserting a period.

(9) Section 6216(a) of the Coastal Zone Act Reauthorization Amendments of 1990 (104 Stat. 1388–314, relating to section 306A(b)(1) of the Coastal Zone Management Act of 1972) is amended by striking "306a(b)(1)" and inserting "306A(b)(1)".

(10) Section 306A(a)(1)(B) (16 U.S.C. 1455a(a)(1)(B)) is amended by striking "specified" and all that follows through the end of the sentence and inserting "specified in section 303(2)(A) through (K).".

(11) Section 306A(b) (16 U.S.C. 1455a(b)) is amended—

(A) in paragraph (2) by striking "that are designated" and all that follows through the end of the paragraph and inserting "that are designated in the state's management program pursuant to section 306(d)(2)(C) as areas of particular concern."; and

(B) in paragraph (3) by—

(i) striking "access of" and inserting "access to"; and

(ii) striking "in accordance with" and all that follows through the end of the paragraph and inserting "in accordance with the planning process required under section 306(d)(2)(G).".

(12) Section 306A(c) (16 U.S.C. 1455a(c)) is amended in paragraph (2)(C) in the matter following clause (iii) by striking "shall not by" and inserting "shall not be".

(13) Section 6208(b)(3)(B) of the Coastal Zone Act Reauthorization Amendments of 1990 (104 Stat. 1388–308, relating to section 307(c)(3)(B) of the Coastal Zone Management Act of 1972) is amended by inserting "with" after "complies".

(14) Section 307(i) (16 U.S.C. 1456(i)) is amended—

(A) by inserting "(1)" after "(i)";

(B) in paragraph (1) (as designated by subparagraph (A) of this paragraph) by striking the second sentence; and

(C) by adding at the end the following:

"(2)(A) The Secretary shall collect such other fees as are necessary to recover the full costs of administering and processing such appeals under subsection (c).

"(B) If the Secretary waives the application fee under paragraph (1) for an applicant, the Secretary shall waive all other fees under this subsection for the applicant.

"(3) Fees collected under this subsection shall be deposited into the Coastal Zone Management Fund established under section 308.".

(15) Section 6209 of the Coastal Zone Act Reauthorization Amendments of 1990 (104 Stat. 1388–308, relating to section 308 of the Coastal Zone Management Act of 1972) is amended in the matter preceding the quoted material by striking "1456" and inserting "1456a".

(16) Section 308(a)(1) (16 U.S.C. 1456a(a)(1)) is amended in the first sentence by striking "pursuant to this Act" and inserting "pursuant to this title".

(17) Section 308(b)(1) (16 U.S.C. 1456a(b)(1)) is amended by striking "(hereinafter" and all that follows through "'Fund')".

(18) Section 308(b)(1) (16 U.S.C. 1456a(b)(1)) is amended by inserting after "subsection (a)" the following: "and fees deposited into the Fund under section 307(i)(3)".

(19) The first section 313 (16 U.S.C. 1459) is amended—

(A) in subsection (a) by striking "section 308" and inserting "section 308, as in effect before the date of the enactment of the Coastal Zone Act Reauthorization Amendments of 1990,"; and

(B) in paragraph (1) of subsection (b) by striking "section 308(d)" and all that follows through the end of the paragraph and inserting "section 308, as in effect before the date of the enactment of the Coastal Zone Act Reauthorization Amendments of 1990; and".

(20) The second section 313 (16 U.S.C. 1460, relating to Walter B. Jones excellence in coastal zone management awards) is amended—

(A) by redesignating that section as section 314;

(B) in subsection (a) by inserting after "under section 308" the following: "and other amounts available to carry out this title (other than amounts appropriated to carry out sections 305, 306, 306A, 309, 310, and 315)"; and

(C) in subsection (e) by inserting after "under section 308" the following: "and other amounts available to carry out this title (other than amounts appropriated to carry out sections 305, 306, 306A, 309, 310, and 315)".

(21) Section 315(a) (16 U.S.C. 1461(a)) is amended by striking "National Estuarine Reserve Research System" and inserting "National Estuarine Research Reserve System".

(22) Section 315(c)(4) (16 U.S.C. 1461(c)(4)) is amended by striking "subsection (1)" and inserting "paragraph (1)".

(23) Section 316(a) (16 U.S.C. 1462(a)) is amended in clause (5) by striking "subsections (c) and (d) of this section" and inserting "subsections (c) and (d) of section 312".

(24) Section 6217(i)(3) of the Coastal Zone Act Reauthorization Amendments of 1990 (104 Stat. 1388–319, relating to definitions under that Act) is amended—

(A) by striking the comma; and

(B) by inserting "Zone" after "Coastal".

SEC. 2206. RESEARCH TO IMPROVE MANAGEMENT.

(a) FLORIDA NATIONAL MARINE SANCTUARY.—Section 7(a) of the Florida Keys National Marine Sanctuary and Protection Act (16 U.S.C. 1433 note) is amended by striking paragraph (4); by redesignating paragraphs (5) through (8) as paragraphs (6) through (9), respectively; and by inserting after paragraph (3) the following new paragraphs:

"(4) identify priority needs for research and amounts needed to—

"(A) improve management of the Sanctuary, and in particular, the coral reef ecosystem within the Sanctuary; and

"(B) identify clearly the cause and effect relationships between factors threatening the health of the coral reef ecosystem in the Sanctuary;

"(5) establish a long-term ecological monitoring program and data base, including methods to disseminate information on the management of the coral reef ecosystem;".

(b) DEADLINES NOT AFFECTED.—The amendments made by subsection (a) shall not be construed to modify, by implication or otherwise, the deadlines established under—

(1) section 7(a) of the Florida Keys National Marine Sanctuary and Protection Act regarding completion of the comprehensive management plan and final regulations; or

(2) section 8(a) of that Act regarding development of the water quality protection program.

SEC. 2207. OLYMPIC COAST NATIONAL MARINE SANCTUARY.

No oil or gas leasing or preleasing activity shall be conducted within the area designated as the Olympic Coast National Marine Sanctuary in accordance with Public Law 100–627.

SEC. 2208. PROVASOLI-GUILLARD CENTER FOR CULTURE OF MARINE PHYTOPLANKTON.

(a) FINDINGS.—The Congress finds the following:

(1) The oceans cover 70 percent of the surface of the Earth.

(2) The foundation of the food webs and fisheries productivity of the oceans rests with microscopic plants known as phytoplankton.

(3) Phytoplankton serve as a vital natural resource in the oceans.

(4) By serving as primary agents in control of the flux of atmospheric carbon dioxide to the deep ocean, phytoplankton influence climate and the rate of global warming.

(5) There is limited knowledge of the biology, physiology, chemistry, and taxonomy of phytoplankton, and it is of vital interest to this Nation to improve the body of knowledge relating to phytoplankton to benefit this Nation and other countries.

(6) The Provasoli-Guillard Center for the Culture of Marine Phytoplankton located in West Boothbay Harbor, Maine, houses a phytoplankton collection that contains species from each of the ocean environments of the World, and is recognized as the largest collection of phytoplankton in the World.

(7) The Provasoli-Guillard Center for the Culture of Marine Phytoplankton is of vital interest to oceanographers in this Nation and throughout the World, and provides cultures of phytoplankton for critical research on global issues.

(b) DESIGNATION.—In light of the findings under subsection (a), the Provasoli-Guillard Center for the Culture of Marine Phytoplankton located in West Boothbay Harbor, Maine, is designated as a National Center and Facility.

SEC. 2209. FLORIDA KEYS NATIONAL MARINE SANCTUARY.

(a) IMPLEMENTATION.—Section 8 of the Florida Keys National Marine Sanctuary and Protection Act (16 U.S.C. 1433 note) is amended by adding at the end the following new subsection:

"(d) IMPLEMENTATION.—(1) The Administrator of the Environmental Protection Agency and the Governor of the State of Florida shall implement the program required by this section, in cooperation with the Secretary of Commerce.

"(2)(A) The Regional Administrator of the Environmental Protection Agency shall with the Governor of the State of Florida establish a Steering Committee to set guidance and policy for the development and implementation of such program. Membership shall include representatives of the Environmental Protection Agency, the National Park Service, the United States Fish and Wildlife Service, the Army Corps of Engineers, the National Oceanic and Atmospheric Administration, the Florida Department of Community Affairs, the Florida Department of Environmental Regulation, the South Florida Water Management District, and the Florida Keys Aqueduct Authority; three individuals in local government in the Florida Keys; and three citizens knowledgeable about such program.

"(B) The Steering Committee shall, on a biennial basis, issue a report to Congress that—

"(i) summarizes the progress of the program;

"(ii) summarizes any modifications to the program and its recommended actions and plans; and

"(iii) incorporates specific recommendations concerning the implementation of the program.

"(C) The Administrator of the Environmental Protection Agency and the Administrator of the National Oceanic and Atmospheric Administration shall cooperate with the Florida Department of Environmental Regulation to establish a Technical Advisory Committee to advise the Steering Committee and to assist in the design and prioritization of programs for scientific research and monitoring. The Technical Advisory Committee shall be composed of scientists from Federal agencies, State agencies, academic institutions, private non-profit organizations, and knowledgeable citizens.

"(3)(A) The Regional Administrator of the Environmental Protection Agency shall appoint a Florida Keys Liaison Officer. The Liaison Officer, who shall be located within the State of Florida, shall have the authority and staff to—

"(i) assist and support the implementation of the program required by this section, including administrative and technical support for the Steering Committee and Technical Advisory Committee;

"(ii) assist and support local, State, and Federal agencies in developing and implementing specific action plans designed to carry out such program;

"(iii) coordinate the actions of the Environmental Protection Agency with other Federal agencies, including the National Oceanic and Atmospheric Administration and the National Park Service, and State and local authorities, in developing

strategies to maintain, protect, and improve water quality in the Florida Keys;

"(iv) collect and make available to the public publications, and other forms of information that the Steering Committee determines to be appropriate, related to the water quality in the vicinity of the Florida Keys; and

"(v) provide for public review and comment on the program and implementing actions.

"(4)(A) There are authorized to be appropriated to the Administrator of the Environmental Protection Agency $2,000,000 for fiscal year 1993, $3,000,000 for fiscal year 1994, and $4,000,000 for fiscal year 1995, for the purpose of carrying out this section.

"(B) There are authorized to be appropriated to the Secretary of Commerce $300,000 for fiscal year 1993, $400,000 for fiscal year 1994, and $500,000 for fiscal year 1995, for the purpose of enabling the National Oceanic and Atmospheric Administration to carry out this section.

"(C) Amounts appropriated under this paragraph shall remain available until expended.

"(D) No more than 15 percent of the amount authorized to be appropriated under subparagraph (A) for any fiscal year may be expended in that fiscal year on administrative expenses.".

(b) TECHNICAL AMENDMENT.—Section 8(c) of the Florida Keys National Marine Sanctuary and Protection Act (16 U.S.C. 1433 note) is amended by striking "paragraph (1)" and inserting in lieu thereof "subsection (a)".

Subtitle C—Hawaiian Islands Humpback Whale Sanctuary

SEC. 2301. SHORT TITLE.

This subtitle may be cited as the "Hawaiian Islands National Marine Sanctuary Act".

SEC. 2302. FINDINGS.

The Congress finds the following:

(1) Many of the diverse marine resources and ecosystems within the Western Pacific region are of national significance and importance.

(2) There are at present no ocean areas in the Hawaiian Islands designated as national marine sanctuaries or identified on the Department of Commerce's Site Evaluation List of sites to be investigated as potential candidates for designation as a national marine sanctuary under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.).

(3) The Hawaiian Islands consist of eight major islands and 124 minor islands, with a total land area of 6,423 square miles and a general coastline of 750 miles.

(4) The marine environment adjacent to and between the Hawaiian Islands is a diverse and unique subtropical marine ecosystem.

(5) The Department of Commerce recently concluded in its Kahoolawe Island National Marine Sanctuary Feasibility Study that there is preliminary evidence of biological, cultural, and historical resources adjacent to Kahoolawe Island to merit further investigation for national marine sanctuary status.

(6) The Department of Commerce also concluded in its Kahoolawe Island National Marine Sanctuary Feasibility Study that there are additional marine areas within the Hawaiian archipelago which merit further consideration for national marine sanctuary status and that the national marine sanctuary program could enhance marine resource protection in Hawaii.

(7) The Hawaiian stock of the endangered humpback whale, the largest of the three North Pacific stocks, breed and calve within the waters of the main Hawaiian Islands.

(8) The marine areas surrounding the main Hawaiian Islands, which are essential breeding, calving, and nursing areas for the endangered humpback whale, are subject to damage and loss of their ecological integrity from a variety of disturbances.

(9) The Department of Commerce recently promulgated a humpback whale recovery plan which sets out a series of recommended goals and actions in order to increase the abundance of the endangered humpback whale.

(10) An announcement of certain Hawaiian waters frequented by humpback whales as an active candidate for marine sanctuary designation was published in the Federal Register on March 17, 1982 (47 FR 11544).

(11) The existing State and Federal regulatory and management programs applicable to the waters of the main Hawaiian Islands are inadequate to provide the kind of comprehensive and coordinated conservation and management of humpback whales and their habitat that is available under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.).

(12) Authority is needed for comprehensive and coordinated conservation and management of humpback whales and their habitat that will complement existing Federal and State regulatory authorities.

(13) There is a need to support, promote, and coordinate scientific research on, and monitoring of, that portion of the marine environment essential to the survival of the humpback whale.

(14) Public education, awareness, understanding, appreciation, and wise use of the marine environment are fundamental to the protection and conservation of the humpback whale.

(15) The designation, as a national marine sanctuary, of the areas of the marine environment adjacent to the main Hawaiian Islands which are essential to the continued recovery of the humpback whale is necessary for the preservation and protection of this important national marine resource.

(16) The marine sanctuary designated for the conservation and management of humpback whales could be expanded to include other marine resources of national significance which are determined to exist within the sanctuary.

SEC. 2303. DEFINITIONS.

In this subtitle, the following definitions apply:

(1) The term "adverse impact" means an impact that independently or cumulatively damages, diminishes, degrades, impairs, destroys, or otherwise harms.

(2) The term "Sanctuary" means the Hawaiian Islands Humpback Whale National Marine Sanctuary designated under section 2305.

(3) The term "Secretary" means the Secretary of Commerce.

SEC. 2304. POLICY AND PURPOSES.

(a) POLICY.—It is the policy of the United States to protect and preserve humpback whales and their habitat within the Hawaiian Islands marine environment.

(b) PURPOSES.—The purposes of this subtitle are—

(1) to protect humpback whales and their habitat in the area described in section 2305(b);

(2) to educate and interpret for the public the relationship of humpback whales to the Hawaiian Islands marine environment;

(3) to manage such human uses of the Sanctuary consistent with this subtitle and title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended by this Act; and

(4) to provide for the identification of marine resources and ecosystems of national significance for possible inclusion in the sanctuary designated in section 2305(a).

SEC. 2305. DESIGNATION OF SANCTUARY.

(A) DESIGNATION.—Subject to subsection (c), the area described in subsection (b) is designated as the Hawaiian Islands Humpback Whale National Marine Sanctuary under title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1451 et seq.), as amended by this title.

(b) AREA INCLUDED.—(1) Subject to subsections (c) and (d), the area referred to in subsection (a) consists of the submerged lands and waters off the coast of the Hawaiian Islands seaward of the upper reaches of the wash of the waves on shore—

(A) to the one hundred fathom (one hundred and eighty-three meter) isobath adjoining the islands of Lanai, Maui, and Molokai, including Penguin Bank but excluding the area within 3 nautical miles of the upper reaches of the waves on the shore of Kahoolawe Island;

(B) to the deep water area of Pailolo Channel from Cape Halawa, Molokai, to Nakalele Point, Maui, and southward; and

(C) to the one hundred fathom (one hundred and eighty-three meter) isobath adjoining the Kilauea National Wildlife Refuge on the island of Kauai.

(2XA) On January 1, 1996, the area of the marine environment within 3 nautical miles of the upper reaches of the wash of the waves on the shore of Kahoolawe Island is designated a part of the Sanctuary, unless during the 3-month period immediately preceding January 1, 1996, the Secretary certifies in writing to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives that the area is not suitable for inclusion in the Sanctuary. If such certification is made, it shall be accompanied by a written explanation of the Secretary's reasoning in support of the certification.

(B) After a certification of unsuitability is made under subparagraph (A), the Secretary shall annually make a finding concerning the suitability of the area for inclusion in the Sanctuary and submit

to such congressional committees a report on that finding and the reasons thereof. If the Secretary finds that the area is suitable for inclusion in the Sanctuary, the area is designated a part of the Sanctuary on the 30th day after such report is submitted.

(C) Upon designation of the area under subparagraph (A) or (B), the area shall be managed as if it has been designated under section 2305, and the Secretary shall—

(i) publish a notice in the Federal Register announcing the designation and identifying the area; and

(ii) issue such regulations for the area as are necessary to fulfill the Secretary's responsibilities under this subtitle and title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1431 et seq.).

(3) The Secretary shall generally identify and depict the Sanctuary on National Oceanic and Atmospheric Administration charts. Those charts shall be maintained on file and kept available for public examination during regular business hours at the Office of Ocean and Coastal Resource Management of the National Oceanic and Atmospheric Administration. The Secretary shall update the charts to reflect any boundary modification under subsection (d), and any additional designation under paragraph (2) of this subsection.

(c) EFFECT OF OBJECTION BY GOVERNOR.—(1) If within 45 days after the date of the enactment of this title the Governor of Hawaii certifies to the Secretary that the designation (including the prospective additional designation under subsection (b)(2) of the area within 3 nautical miles of Kahoolawe Island) is unacceptable, the designation shall not take effect in the area of the Sanctuary lying within the seaward boundary of the State of Hawaii.

(2) If within 45 days after the date of issuance of the comprehensive management plan and implementing regulations under section 2306 the Governor of Hawaii certifies to the Secretary that the management plan, any implementing regulation, or any term of the plan or regulations is unacceptable, the management plan, regulation, or term, respectively, shall not take effect in the area of the Sanctuary lying within the seaward boundary of the State of Hawaii.

(3) If the Secretary considers that an action taken under paragraph (1) or (2) will affect the Sanctuary in a manner that the goals and objectives of this subtitle cannot be fulfilled, the Secretary may terminate the entire designation under subsection (a). At least thirty days prior to such termination, the Secretary shall submit written notification of the proposed termination to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives.

(d) BOUNDARY MODIFICATIONS.—No later than the date of issuance of the draft environmental impact statement for the Sanctuary under section 304(a)(1)(C)(vii) of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1434(a)(1)(C)(vii)), the Secretary, in consultation with the Governor of Hawaii, if appropriate, may make modifications to the boundaries of the Sanctuary as necessary to fulfill the purpose of this subtitle. The Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a written notification of such modifications.

SEC. 2306. COMPREHENSIVE MANAGEMENT PLAN.

(a) PREPARATION OF PLAN.—The Secretary, in consultation with interested persons and appropriate Federal, State, and local government authorities, shall develop and issue not later than 18 months after the date of enactment of this title a comprehensive management plan and implementing regulations to achieve the policy and purposes of this subtitle. In developing the plan and regulations, the Secretary shall follow the procedures specified in sections 303 and 304 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1433 and 1434), as amended by this title. Such comprehensive management plan shall—

(1) facilitate all public and private uses of the Sanctuary (including uses of Hawaiian natives customarily and traditionally exercised for subsistence, cultural, and religious purposes) consistent with the primary objective of the protection of humpback whales and their habitat;

(2) set forth the allocation of Federal and State enforcement responsibilities, as jointly agreed by the Secretary and the State of Hawaii;

(3) identify research needs and establish a long-term ecological monitoring program with respect to humpback whales and their habitat;

(4) identify alternative sources of funding needed to fully implement the plan's provisions and supplement appropriations under section 2307 of this subtitle and section 313 of the Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. 1444);

(5) ensure coordination and cooperation between Sanctuary managers and other Federal, State, and local authorities with jurisdiction within or adjacent to the Sanctuary; and

(6) promote education among users of the Sanctuary and the general public about conservation of humpback whales, their habitat, and other marine resources.

(b) PUBLIC PARTICIPATION.—The Secretary shall provide for participation by the general public in development of the comprehensive management plan or any amendment thereto.

SEC. 2307. AUTHORIZATION OF APPROPRIATIONS.

For carrying out this subtitle, there are authorized to be appropriated to the Secretary $500,000 for fiscal year 1993 and $300,000 for fiscal year 1994. Of the amounts appropriated under this section for fiscal year 1993—

(1) not less than $50,000 shall be used by the Western Pacific Regional Team to evaluate potential national marine sanctuary sites for inclusion on the Department of Commerce's Site Evaluation List; and

(2) not less than $50,000 shall be used to continue the investigation of biological, cultural, and historical resources adjacent to Kahoolawe Island.

TITLE III—MARINE MAMMAL STRANDINGS

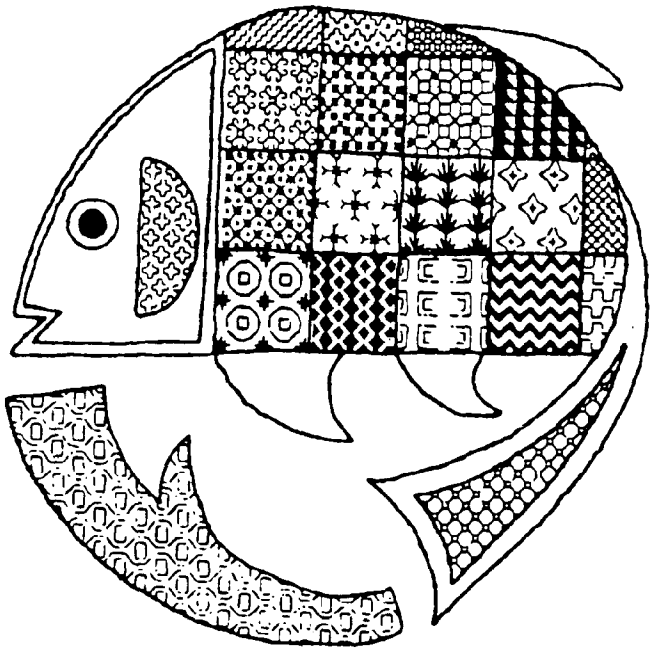
SEC. 3001. SHORT TITLE.

This title may be cited as the "Marine Mammal Health and Stranding Response Act".

22.
Magnuson Fishing Conservation and Management Act

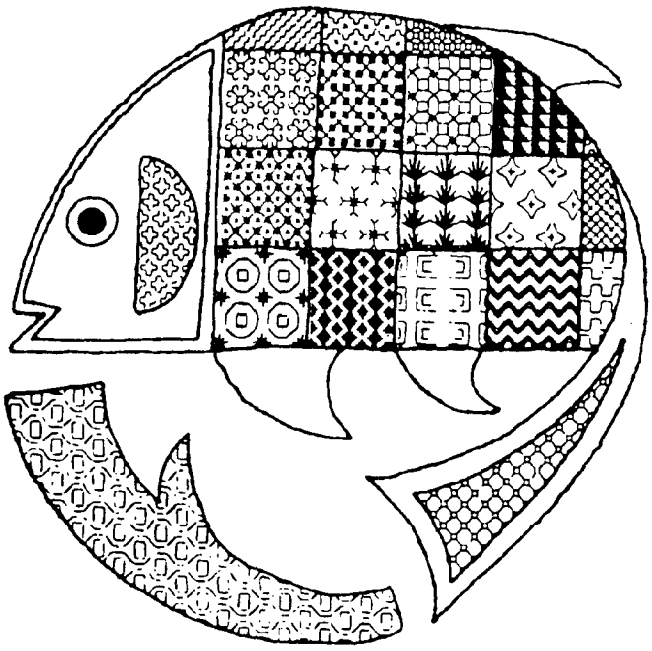
Magnuson Fishery Conservation and Management Act

As Amended Through November 28, 1990



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service

Magnuson Fishery Conservation and Management Act



U.S. DEPARTMENT OF COMMERCE
Robert A. Mosbacher, Secretary

National Oceanic and Atmospheric Administration
John A. Knauss, Under Secretary

National Marine Fisheries Service
Dr. William W. Fox, Assistant Administrator

MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT

Public Law 94-265

As amended through November 28, 1990

AN ACT

To provide for the conservation and management of the fisheries, and for other purposes.

TABLE OF CONTENTS

Sec. 2. Findings, purposes, and policy.
Sec. 3. Definitions.

TITLE I -- UNITED STATES RIGHTS AND AUTHORITY REGARDING FISH AND FISHERY RESOURCES

Sec. 101. United States sovereign rights to fish and fishery management authority.
Sec. 102. Exclusion for highly migratory species. [effective until 1/1/92]
Sec. 102. Highly migratory species. [effective 1/1/92]

TITLE II -- FOREIGN FISHING AND INTERNATIONAL FISHERY AGREEMENTS

Sec. 201. Foreign fishing.
Sec. 202. International fishery agreements.
Sec. 203. Congressional oversight of governing international fishery agreements.
Sec. 204. Permits for foreign fishing.
Sec. 205. Import prohibitions.
Sec. 206. Large-scale driftnet fishing.

TITLE III -- NATIONAL FISHERY MANAGEMENT PROGRAM

Sec. 301. National standards for fishery conservation and management.
Sec. 302. Regional fishery management councils.
Sec. 303. Contents of fishery management plans.
Sec. 304. Action by Secretary.
Sec. 305. Implementation of fishery management plans.
Sec. 306. State jurisdiction.
Sec. 307. Prohibited acts.
Sec. 308. Civil penalties and permit sanctions.
Sec. 309. Criminal offenses.
Sec. 310. Civil forfeitures.
Sec. 311. Enforcement.
Sec. 313. North Pacific fisheries research plan.

TITLE IV -- MISCELLANEOUS PROVISIONS

Sec. 406. Authorization of appropriations.

Numbers in boldface indicate the number of the Public Law that amended the following provision. Boldface comments marked with asterisks were inserted by the editors.

SEC. 2. FINDINGS, PURPOSES, AND POLICY

(a) FINDINGS.--The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

95-354

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

101-627

(8) The collection of reliable data is essential to the effective conservation, management, and scientific understanding of the fishery resources of the United States.

(b) **PURPOSES.**--It is therefore declared to be the purposes of the Congress in this Act--

99-659, 101-627

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by exercising (A) sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish [except highly migratory species,]* within the exclusive economic zone established by Presidential Proclamation 5030, dated March 10, 1983, and (B) exclusive fishery management authority beyond the exclusive economic zone over such anadromous species and Continental Shelf fishery resources;

*** The bracketed phrase is deleted effective 1/1/92.**

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

101-627

(5) to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

95-354, 96-561

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development.

(c) **POLICY.**--It is further declared to be the policy of the Congress in this Act--

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act;

101-627

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; considers the effects of fishing on immature fish and encourages development of practical measures that avoid unnecessary waste of fish; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this Act;

99-659, 101-627

(5) to support and encourage active United States efforts to obtain internationally acceptable agreements which provide for effective conservation and management of fishery resources, and to secure agreements to regulate fishing by vessels or persons beyond the exclusive economic zones of any nation; and

101-627

(6) to foster and maintain the diversity of fisheries in the United States.

SEC. 3. DEFINITIONS 16 U.S.C. 1802

As used in this Act, unless the context otherwise requires--

(1) The term "anadromous species" means species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters.

(2) The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that--

(i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;

(ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and

(iii) there will be a multiplicity of options available with respect to future uses of these resources.

(3) The term "Continental Shelf" means the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such areas.

99-659

(4) The term "Continental Shelf fishery resources" means the following:

COLENTERATA

Bamboo Coral--Acanella spp.;
Black Coral--Antipathes spp.;
Gold Coral--Callogorgia spp.;
Precious Red Coral--Corallium spp.;
Bamboo Coral--Keratoisis spp.; and
Gold Coral--Parazoanthus spp.

CRUSTACEA

Tanner Crab--Chionoecetes tanneri;
Tanner Crab--Chionoecetes opilio;
Tanner Crab--Chionoecetes angulatus;
Tanner Crab--Chionoecetes bairdi;
King Crab--Paralithodes camtschatica;
King Crab--Paralithodes platypus;
King Crab--Paralithodes brevipes;
Lobster--Homarus americanus;
Dungeness Crab--Cancer magister;
California King Crab--Paralithodes californiensis;
California King Crab--Paralithodes rathbuni;
Golden King Crab--Lithodes aequispinus;
Northern Stone Crab--Lithodes maja;
Stone Crab--Menippe mercenaria; and
Deep-sea Red Crab--Geryon quinquedens.

MOLLUSKS

Red Abalone--Haliotis rufescens;
Pink Abalone--Haliotis corrugata;
Japanese Abalone--Haliotis kamtschatkana;
Queen Conch--Strombus gigas;
Surf Clam--Spisula solidissima; and
Ocean Quahog--Arctica islandica.

SPONGES

Glove Sponge--Spongia cheiris;
Sheepswool Sponge--Hippiospongia lachne;
Grass Sponge--Spongia graminea; and
Yellow Sponge--Spongia barbera.

If the Secretary determines, after consultation with the Secretary of State, that living organisms of any other sedentary species are, at the harvestable stage, either--

(A) immobile on or under the seabed, or

(B) unable to move except in constant physical contact with the seabed or subsoil,

of the Continental Shelf which appertains to the United States, and publishes notices of such determination in the Federal Register, such sedentary species shall be considered to be added to the foregoing list and included in such term for purposes of this Act.

(5) The term "Council" means any Regional Fishery Management Council established under section 302.

99-659

(6) The term "exclusive economic zone" means the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States.

99-659, 101-627

(7) The term "fish" means finfish, mollusks, crustaceans, and all other forms of marine animal and plant life other than marine mammals[, birds, and highly migratory species] and birds.*

*** The underlined phrase replaces the bracketed phrase effective 1/1/92.**

(8) The term "fishery" means--

(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(B) any fishing for such stocks.

(9) The term "fishery resource" means any fishery, any stock of fish, any species of fish, and any habitat of fish.

(10) The term "fishing" means--

(A) the catching, taking, or harvesting of fish;

(B) the attempted catching, taking, or harvesting of fish;

(C) any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(D) any operations at sea in support of, or in preparation for, any activity described in subparagraphs (A) through (C).

Such term does not include any scientific research activity which is conducted by a scientific research vessel.

(11) The term "fishing vessel" means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for--

(A) fishing; or

(B) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

(12) The term "foreign fishing" means fishing by a vessel other than a vessel of the United States.

(13) The term "high seas" means all waters beyond the territorial sea of the United States and beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States.

101-627

(14) The term "highly migratory species" means [species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean.] tuna species, marlin (Tetrapturus spp. and Makaira spp.), oceanic sharks, sailfishes (Istiophorus spp.), and swordfish (Xiphias gladius).*

*** The bracketed definition is in effect for section 102 until 1/1/92, and is then deleted; the underlined definition is in effect for other sections.**

(15) The term "international fishery agreement" means any bilateral or multilateral treaty, convention, or agreement which relates to fishing and to which the United States is a party.

101-627

(16) The term "large-scale driftnet fishing" means a method of fishing in which a gillnet composed of a panel or panels of webbing, or a series of such gillnets, with a total length of one and one-half miles or more is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing.

(17) The term "Marine Fisheries Commission" means the Atlantic States Marine Fisheries Commission, the Gulf States Marine Fisheries Commission, or the Pacific Marine Fisheries Commission.

101-627

(18) The term "migratory range" means the maximum area at a given time of the year within which fish of an anadromous species or stock thereof can be expected to be found, as determined on the basis of scale pattern analysis, tagging studies, or other reliable scientific information, except that the term does not include any part of such area which is in the waters of a foreign nation.

(19) The term "national standards" means the national standards for fishery conservation and management set forth in section 301.

101-627

(20) The term "observer" means any person required or authorized to be carried on a vessel for conservation and management purposes by regulations or permits under this Act.

(21) The term "optimum", with respect to the yield from a fishery, means the amount of fish--

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor.

(22) The term "person" means any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

(23) The term "Secretary" means the Secretary of Commerce or his designee.

(24) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States.

(25) The term "stock of fish" means a species, subspecies, geographical grouping, or other category of fish capable of management as a unit.

(26) The term "treaty" means any international fishery agreement which is a treaty within the meaning of section 2 of article II of the Constitution.

101-627

(27) The term "tuna species" means the following:
Albacore Tuna--Thunnus alalunga;
Bigeye Tuna--Thunnus obesus;
Bluefin Tuna--Thunnus thynnus;
Skipjack Tuna--Katsuwonus pelamis; and
Yellowfin Tuna--Thunnus albacares.

(28) The term "United States", when used in a geographical context, means all the States thereof.

95-354

(29) The term "United States fish processors" means facilities located within the United States for, and vessels of the United States used or equipped for, the processing of fish for commercial use or consumption.

95-354

(30) The term "United States harvested fish" means fish caught, taken, or harvested by vessels of the United States within any fishery for which a fishery management plan prepared under title III or a preliminary fishery management plan prepared under section 201(h) has been implemented.

97-453, 100-239

(31) The term "vessel of the United States" means--

(A) any vessel documented under chapter 121 of title 46, United States Code;

(B) any vessel numbered in accordance with chapter 123 of title 46, United States Code, and measuring less than 5 net tons;

(C) any vessel numbered in accordance with chapter 123 of title 46, United States Code, and used exclusively for pleasure; or

(D) any vessel not equipped with propulsion machinery of any kind and used exclusively for pleasure.

16 U.S.C. 1802

101-627

(32) The term "waters of a foreign nation" means any part of the territorial sea or exclusive economic zone (or the equivalent) of a foreign nation, to the extent such territorial sea or exclusive economic zone is recognized by the United States.

TITLE I -- UNITED STATES RIGHTS AND AUTHORITY REGARDING FISH AND FISHERY RESOURCES

SEC. 101. UNITED STATES SOVEREIGN RIGHTS TO FISH AND FISHERY MANAGEMENT AUTHORITY

16 U.S.C. 1811

99-659

(a) IN THE EXCLUSIVE ECONOMIC ZONE.--Except as provided in section 102, the United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.

99-659, 101-627

(b) BEYOND THE EXCLUSIVE ECONOMIC ZONE.--The United States claims, and will exercise in the manner provided for in this Act, exclusive fishery management authority over the following:

(1) All anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any waters of a foreign nation.

(2) All Continental Shelf fishery resources beyond the exclusive economic zone.

SEC. 102. [EXCLUSION FOR]* HIGHLY MIGRATORY SPECIES

16 U.S.C. 1812

99-659, 101-627

[The sovereign rights and exclusive fishery management authority asserted by the United States under section 101 over fish do not include, and may not be construed to extend to, highly migratory species of fish.]*

The United States shall cooperate directly or through appropriate international organizations with those nations involved in fisheries for highly migratory species with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout their range, both within and beyond the exclusive economic zone.*

*** The bracketed material is in effect until 1/1/92, when it is deleted and the underlined paragraph takes effect.**

TITLE II -- FOREIGN FISHING AND INTERNATIONAL FISHERY AGREEMENTS

SEC. 201. FOREIGN FISHING

95-354, 99-659

(a) IN GENERAL.--After February 28, 1977, no foreign fishing is authorized within the exclusive economic zone, or for anadromous species or Continental Shelf fishery resources beyond the exclusive economic zone, unless such foreign fishing--

(1) is authorized under subsection (b) or (c);

(2) is not prohibited by subsection (g); and

(3) is conducted under, and in accordance with, a valid and applicable permit issued pursuant to section 204.

(b) EXISTING INTERNATIONAL FISHERY AGREEMENTS.--Foreign fishing described in subsection (a) may be conducted pursuant to an international fishery agreement (subject to the provisions of section 202(b) or (c)), if such agreement--

(1) was in effect on the date of enactment of this Act; and

(2) has not expired, been renegotiated, or otherwise ceased to be of force and effect with respect to the United States.

(c) GOVERNING INTERNATIONAL FISHERY AGREEMENTS.--Foreign fishing described in subsection (a) may be conducted pursuant to an international fishery agreement (other than a treaty) which meets the requirements of this subsection if such agreement becomes effective after application of section 203. Any such international fishery agreement shall hereafter in this Act be referred to as a "governing international fishery agreement". Each governing international fishery agreement shall acknowledge the exclusive fishery management authority of the United States, as set forth in this Act. It is the sense of the Congress that each such agreement shall include a binding commitment, on the part of such foreign nation and its fishing vessels, to comply with the following terms and conditions:

(1) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such agreement, will abide by all regulations promulgated by the Secretary pursuant to this Act, including any regulations promulgated to implement any applicable fishery management plan or any preliminary fishery management plan.

97-453

(2) The foreign nation, and the owner or operator of any fishing vessel fishing pursuant to such agreement, will abide by the requirement that--

(A) any officer authorized to enforce the provisions of this Act (as provided for in section 311) be permitted--

(i) to board, and search or inspect, any such vessel at any time,

(ii) to make arrests and seizures provided for in section 311(b) whenever such officer has reasonable cause to believe, as a result of such a search or inspection, that any such vessel or any person has committed an act prohibited by section 307, and

(iii) to examine and make notations on the permit issued pursuant to section 204 for such vessel;

(B) the permit issued for any such vessel pursuant to section 204 be prominently displayed in the wheelhouse of such vessel;

(C) transponders, or such other appropriate position-fixing and identification equipment as the Secretary of the department in which the Coast Guard is operating determines to be appropriate, be installed and maintained in working order on each such vessel;

(D) United States observers required under subsection (i) be permitted to be stationed aboard any such vessel and that all of the costs incurred incident to such stationing, including the costs of data editing and entry and observer monitoring, be paid for, in accordance with such subsection, by the owner or operator of the vessel;

(E) any fees required under section 204(b)(10) be paid in advance;

(F) agents be appointed and maintained within the United States who are authorized to receive and respond to any legal process issued in the United States with respect to such owner or operator; and

(G) responsibility be assumed, in accordance with any requirements prescribed by the Secretary, for the reimbursement of United States citizens for any loss of, or damage to, their fishing vessels, fishing gear, or catch which is caused by any fishing vessel of that nation;

and will abide by any other monitoring, compliance, or enforcement requirement related to fishery conservation and management which is included in such agreement.

95-354

(3) The foreign nation and the owners or operators of all of the fishing vessels of such nation shall not, in any year, harvest an amount of fish which exceeds such nation's allocation of the total allowable level of foreign fishing, as determined under subsection (e).

97-453

(4) The foreign nation will--

(A) apply, pursuant to section 204, for any required permits;

(B) deliver promptly to the owner or operator of the appropriate fishing vessel any permit which is issued under that section for such vessel;

(C) abide by, and take appropriate steps under its own laws to assure that all such owners and operators comply with, section 204(a) and the applicable conditions and restrictions established under section 204(b)(7); and

(D) take, or refrain from taking, as appropriate, actions of the kind referred to in subsection (e)(1) in order to receive favorable allocations under such subsection.

96-561, 101-267

(d) TOTAL ALLOWABLE LEVEL OF FOREIGN FISHING.--The total allowable level of foreign fishing, if any, with respect to any fishery subject to the exclusive fishery management authority of the United States, shall be that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States, as determined in accordance with this Act.

(e) ALLOCATION OF ALLOWABLE LEVEL.--

96-61, 96-561, 97-453, 97-623, 98-623, 99-659

(1) (A) The Secretary of State, in cooperation with the Secretary, may make allocations to foreign nations from the total allowable level of foreign fishing which is permitted with respect to each fishery subject to the exclusive fishery management authority of the United States.

(B) From the determinations made under subparagraph (A), the Secretary of State shall compute the aggregate of all of the fishery allocations made to each foreign nation.

(C) The Secretary of State shall initially release to each foreign nation for harvesting up to 50 percent of the allocations aggregate computed for such nation under subparagraph (B), and such release of allocation shall be apportioned by the Secretary of State, in cooperation with the Secretary, among the individual fishery allocations determined for that nation under subparagraph (A). The basis on which each apportionment is made under this subparagraph shall be stated in writing by the Secretary of State.

(D) After the initial release of fishery allocations under subparagraph (C) to a foreign nation, any subsequent release of an allocation for any fishery to such nation shall only be made--

(i) after the lapse of such period of time as may be sufficient for purposes of making the determination required under clause (ii); and

(ii) if the Secretary of State and the Secretary, after taking into account the size of the allocation for such fishery and the length and timing of the fishing season, determine in writing that such nation is complying with the purposes and intent of this paragraph with respect to such fishery.

If the foreign nation is not determined under clause (ii) to be in such compliance, the Secretary of State shall reduce, in a manner and quantity he considers to be appropriate (I) the remainder of such allocation, or (II) if all of such allocation has been released, the next allocation of such fishery, if any, made to such nation.

(E) The determinations required to be made under subparagraphs (A) and (D)(ii), and the apportionments required to be made under subparagraph (C), with respect to a foreign nation shall be based on--

(i) whether, and to what extent, such nation imposes tariff barriers or nontariff barriers on the importation, or otherwise restricts the market access, of both United States fish and fishery products, particularly fish and fishery products for which the foreign nation has requested an allocation;

(ii) whether, and to what extent, such nation is cooperating with the United States in both the advancement of existing and new opportunities for fisheries exports from the United States through the purchase of fishery products from United States processors, and the advancement of fisheries trade through the purchase of fish and fishery products from United States fishermen, particularly fish and fishery products for which the foreign nation has requested an allocation;

(iii) whether, and to what extent, such nation and the fishing fleets of such nation have cooperated with the United States in the enforcement of United States fishing regulations;

(iv) whether, and to what extent, such nation requires the fish harvested from the exclusive economic zone for its domestic consumption;

(v) whether, and to what extent, such nation otherwise contributes to, or fosters the growth of, a sound and economic United States fishing industry, including minimizing gear conflicts with fishing operations of United States fishermen, and transferring harvesting or processing technology which will benefit the United States fishing industry;

(vi) whether, and to what extent, the fishing vessels of such nation have traditionally engaged in fishing in such fishery;

(vii) whether, and to what extent, such nation is cooperating with the United States in, and making substantial contributions to, fishery research and the identification of fishery resources; and

(viii) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.

96-61, 96-118

(2) (A) For the purposes of this paragraph--

(i) The term "certification" means a certification made by the Secretary that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling. A certification under this section shall also be deemed a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)).

(ii) The term "remedial period" means the 365-day period beginning on the date on which a certification is issued with respect to a foreign country.

(B) If the Secretary issues a certification with respect to any foreign country, then each allocation under paragraph (1) that--

(i) is in effect for that foreign country on the date of issuance; or

(ii) is not in effect on such date but would, without regard to this paragraph, be made to the foreign country within the remedial period;

shall be reduced by the Secretary of State, in consultation with the Secretary, by not less than 50 percent.

(C) The following apply for purposes of administering subparagraph (B) with respect to any foreign country:

(i) If on the date of certification, the foreign country has harvested a portion, but not all, of the quantity of fish specified under any allocation, the reduction under subparagraph (B) for that allocation shall be applied with respect to the quantity not harvested as of such date.

(ii) If the Secretary notified the Secretary of State that it is not likely that the certification of the foreign country will be terminated under section 8(d) of the Fishermen's Protective Act of 1967 before the close of the period for which an allocation is applicable or before the close of the remedial period (whichever close first occurs) the Secretary of State, in consultation with the Secretary, shall reallocate any portion of any reduction made under subparagraph (B) among one or more foreign countries for which no certification is in effect.

(iii) If the certification is terminated under such section 8(d) during the remedial period, the Secretary of State shall return to the foreign country that portion of any allocation reduced under subparagraph (B) that was not reallocated under clause (ii); unless the harvesting of the fish covered by the allocation is otherwise prohibited under this Act.

(iv) The Secretary may refund or credit, by reason of reduction of any allocation under this paragraph, any fee paid under section 204.

(D) If the certification of a foreign country is not terminated under section 8(d) of the Fishermen's Protective Act of 1967 before the close of the last day of the remedial period, the Secretary of State--

(i) with respect to any allocation made to that country and in effect (as reduced under subparagraph (B)) on such last day, shall rescind, effective on and after the day after such last day, any unharvested portion of such allocation; and

(ii) may not thereafter make any allocation to that country under paragraph (1) until the certification is terminated.

95-354, 99-386

(f) **FOREIGN ALLOCATION REPORT.**--The Secretary and the Secretary of State shall prepare and submit a report to the Congress and the President, not later than July 1 of each year, setting forth--

(1) a list of species of all allocations made to foreign nations pursuant to subsection (e) and all permits issued pursuant to section 204(b)(6)(B); and

(2) all tariff and nontariff trade barriers imposed by such nations on the importation of such species from the United States.

95-354

(g) **RECIPROCITY.**--Foreign fishing shall not be authorized for the fishing vessels of any foreign nation unless such nation satisfies the Secretary and the Secretary of State that such nation extends substantially the same fishing privileges to fishing vessels of the United States, if any, as the United States extends to foreign fishing vessels.

95-354

(h) **PRELIMINARY FISHERY MANAGEMENT PLANS.**--The Secretary, when notified by the Secretary of State that any foreign nation has submitted an application under section 204(b), shall prepare a preliminary fishery management plan for any fishery covered by such application if the Secretary determines that no fishery management plan for that fishery will be prepared and implemented, pursuant to title III, before March 1, 1977. To the extent practicable, each such plan--

(1) shall contain a preliminary description of the fishery and a preliminary determination as to--

(A) the optimum yield from such fishery;

(B) when appropriate, the capacity and extent to which United States fish processors will process that portion of such optimum yield that will be harvested by vessels of the United States; and

(C) the total allowable level of foreign fishing with respect to such fishery;

(2) shall require each foreign fishing vessel engaged or wishing to engage in such fishery to obtain a permit from the Secretary;

(3) shall require the submission of pertinent data to the Secretary, with respect to such fishery, as described in section 303(a)(5); and

(4) may, to the extent necessary to prevent irreversible effects from overfishing, with respect to such fishery, contain conservation and management measures applicable to foreign fishing which--

(A) are determined to be necessary and appropriate for the conservation and management of such fishery,

(B) are consistent with the national standards, the other provisions of this Act, and other applicable law, and

(C) are described in section 303(b)(2), (3), (4), (5), and (7).

Each preliminary fishery management plan shall be in effect with respect to foreign fishing for which permits have been issued until a fishery management plan is prepared and implemented, pursuant to title III, with respect to such fishery. The Secretary may, in accordance with section 553 of title 5, United States Code, also prepare and promulgate interim regulations with respect to any such preliminary plan. Such regulations shall be in effect until regulations implementing the applicable fishery management plan are promulgated pursuant to section 305.

(i) FULL OBSERVER COVERAGE PROGRAM.--

96-561, 99-569

(1) (A) Except as provided in paragraph (2), the Secretary shall establish a program under which a United States observer will be stationed aboard each foreign fishing vessel while that vessel is engaged in fishing within the exclusive economic zone.

(B) The Secretary shall by regulation prescribe minimum health and safety standards that shall be maintained aboard each foreign fishing vessel with regard to the facilities provided for the quartering of, and the carrying out of observer functions by, United States observers.

99-659

(2) The requirement in paragraph (1) that a United States observer be placed aboard each foreign fishing vessel may be waived by the Secretary if he finds that--

(A) in a situation where a fleet of harvesting vessels transfers its catch taken within the exclusive economic zone to another vessel, aboard which is a United States observer, the stationing of United States observers on only a portion of the harvesting vessel fleet will provide a representative sampling of the by-catch of the fleet that is sufficient for purposes of determining whether the requirements of the applicable management plans for the by-catch species are being complied with;

(B) the time during which a foreign fishing vessel will engage in fishing within the exclusive economic zone will be of such short duration that the placing of a United States observer aboard the vessel would be impractical; or

(C) for reasons beyond the control of the Secretary, an observer is not available.

97-453

(3) Observers, while stationed aboard foreign fishing vessels, shall carry out such scientific, compliance monitoring, and other functions as the Secretary deems necessary or appropriate to carry out the purposes of this Act; and shall cooperate in carrying out such other scientific programs relating to the conservation and management of living resources as the Secretary deems appropriate.

(4) In addition to any fee imposed under section 204(b)(10) of this Act and section 10(e) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1980(e)) with respect to foreign fishing for any year after 1980, the Secretary shall impose, with respect to each foreign fishing vessel for which a permit is issued under such section 204, a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel. The failure to pay any surcharge imposed under this paragraph shall be treated by the Secretary as a failure to pay the permit fee for such vessel under section 204(b)(10). All surcharges collected by the Secretary under this paragraph shall be deposited in the Foreign Fishing Observer Fund established by paragraph (5).

(5) There is established in the Treasury of the United States the Foreign Fishing Observer Fund. The Fund shall be available to the Secretary as a revolving fund for the purpose of carrying out this subsection. The Fund shall consist of the surcharges deposited into it as required under paragraph (4). All payments made by the Secretary to carry out this subsection shall be paid from the Fund, only to the extent and in the amounts provided for in advance in appropriation Acts. Sums in the Fund which are not currently needed for the purposes of this subsection shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

97-453

(6) If at any time the requirement set forth in paragraph (1) cannot be met because of insufficient appropriations, the Secretary shall, in implementing a supplementary observer program:

(A) certify as observers, for the purposes of this subsection, individuals who are citizens or nationals of the United States and who have the requisite education or experience to carry out the functions referred to in paragraph (3);

(B) establish standards of conduct for certified observers equivalent to those applicable to Federal personnel;

(C) establish a reasonable schedule of fees that certified observers or their agents shall be paid by the owners and operators of foreign fishing vessels for observer services; and

(D) monitor the performance of observers to ensure that it meets the purposes of this Act.

97-453, 99-659

(j) RECREATIONAL FISHING.--Notwithstanding any other provision of this title, foreign fishing vessels which are not operated for profit may engage in recreational fishing within the exclusive economic zone and the waters within the boundaries of a State subject to obtaining such permits, paying such reasonable fees, and complying with such conditions and restrictions as the Secretary and the Governor of the State (or his designee) shall impose as being necessary or appropriate to insure that the fishing activity of such foreign vessels within such zone or waters, respectively, is consistent with all applicable Federal and State laws and any applicable fishery management plan implemented under section 305. The Secretary shall consult with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating in formulating the conditions and restrictions to be applied by the Secretary under the authority of this subsection.

SEC. 202. INTERNATIONAL FISHERY AGREEMENTS 16 U.S.C. 1822

(a) NEGOTIATIONS.--The Secretary of State--

(1) shall renegotiate treaties as provided for in subsection (b);
(2) shall negotiate governing international fishery agreements described in section 201(c);
(3) may negotiate boundary agreements as provided for in subsection (d);
(4) shall, upon the request of and in cooperation with the Secretary, initiate and conduct negotiations for the purpose of entering into international fishery agreements--
(A) which allow fishing vessels of the United States equitable access to fish over which foreign nations assert exclusive fishery management authority, and
(B) which provide for the conservation and management of anadromous species and highly migratory species; and
(5) may enter into such other negotiations, not prohibited by subsection (c), as may be necessary and appropriate to further the purposes, policy, and provisions of this Act.

99-659

(b) TREATY RENEGOTIATION.--The Secretary of State, in cooperation with the Secretary, shall initiate, promptly after the date of enactment of this Act, the renegotiation of any treaty which pertains to fishing within the exclusive economic zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area, and which is in any manner inconsistent with the purposes, policy, or provisions of this Act, in order to conform such treaty to such purposes, policy, and provisions. It is the sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after such date of enactment.

99-659

(c) INTERNATIONAL FISHERY AGREEMENTS.--No international fishery agreement (other than a treaty) which pertains to foreign fishing within the exclusive economic zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area--

(1) which is in effect on June 1, 1976, may thereafter be renewed, extended, or amended; or

(2) may be entered into after May 31, 1976;

by the United States unless it is in accordance with the provisions of section 201(c).

99-659

(d) BOUNDARY NEGOTIATIONS.--The Secretary of State, in cooperation with the Secretary, may initiate and conduct negotiations with any adjacent or opposite foreign nation to establish the boundaries of the exclusive economic zone of the United States in relation to any such nation.

101-627

(e) HIGHLY MIGRATORY SPECIES AGREEMENTS.--

(1) EVALUATION.--The Secretary of State, in cooperation with the Secretary, shall evaluate the effectiveness of each existing international fishery agreement which pertains to fishing for highly migratory species. Such evaluation shall consider whether the agreement provides for--

(A) the collection and analysis of necessary information for effectively managing the fishery, including but not limited to information about the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the catch and bycatch levels in the fishery, and the present and probable future condition of any stock of fish involved;

(B) the establishment of measures applicable to the fishery which are necessary and appropriate for the conservation and management of the fishery resource involved;

(C) equitable arrangements which provide fishing vessels of the United States with (i) access to the highly migratory species that are the subject of the agreement and (ii) a portion of the allowable catch that reflects the traditional participation by such vessels in the fishery;

(D) effective enforcement of conservation and management measures and access arrangements throughout the area of jurisdiction; and

(E) sufficient and dependable funding to implement the provisions of the agreement, based on reasonable assessments of the benefits derived by participating nations.

(2) ACCESS NEGOTIATIONS.--The Secretary of State, in cooperation with the Secretary, shall initiate negotiations with respect to obtaining access for vessels of the United States fishing for tuna species within the exclusive economic zones of other nations on reasonable terms and conditions.

(3) REPORTS.--The Secretary of State shall report to the Congress--

(A) within 12 months after the date of enactment of this subsection, on the results of the evaluation required under paragraph (1), together with recommendations for addressing any inadequacies identified; and

(B) within six months after such date of enactment, on the results of the access negotiations required under paragraph (2).

(4) NEGOTIATION.--The Secretary of State, in consultation with the Secretary, shall undertake such negotiations with respect to international fishery agreements on highly migratory species as are necessary to correct inadequacies identified as a result of the evaluation conducted under paragraph (1).

16 U.S.C. 1822

(5) SOUTH PACIFIC TUNA TREATY.--It is the sense of the Congress that the United States Government shall, at the earliest opportunity, begin negotiations for the purpose of extending the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, signed at Port Moresby, Papua New Guinea, April 2, 1987, and it[s] Annexes, Schedules, and implementing agreements for an additional term of 10 years on terms and conditions at least as favorable to vessels of the United States and the United States Government.

99-659

(f) NONRECOGNITION.--It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to an exclusive economic zone (or the equivalent) beyond such nation's territorial sea, to the extent that such sea is recognized by the United States, if such nation--

(1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States;

(2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement; or

(3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.

SEC. 203. CONGRESSIONAL OVERSIGHT OF GOVERNING INTERNATIONAL FISHERY AGREEMENTS 16 U.S.C. 1823

(a) IN GENERAL.--No governing international fishery agreement shall become effective with respect to the United States before the close of the first 60 calendar days of continuous session of the Congress after the date on which the President transmits to the House of Representatives and to the Senate a document setting forth the text of such governing international fishery agreement. A copy of the document shall be delivered to each House of Congress on the same day and shall be delivered to the Clerk of the House of Representatives, if the House is not in session, and to the Secretary of the Senate, if the Senate is not in session.

(b) REFERRAL TO COMMITTEES.--Any document described in subsection (a) shall be immediately referred in the House of Representatives to the Committee on Merchant Marine and Fisheries, and in the Senate to the Committees on Commerce and Foreign Relations.

(c) COMPUTATION OF 60-DAY PERIOD.--For purposes of subsection (a)--

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(d) CONGRESSIONAL PROCEDURES.--

(1) RULES OF THE HOUSE OF REPRESENTATIVES AND SENATE.-- The provisions of this section are enacted by the Congress--

(A) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of fishery agreement resolutions described in paragraph (2), and they supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as they relate to the procedure of that House) at any time, and in the same manner and to the same extent as in the case of any other rule of that House.

(2) DEFINITION.--For purposes of this subsection, the term "fishery agreement resolution" refers to a joint resolution of either House of Congress--

(A) the effect of which is to prohibit the entering into force and effect of any governing international fishery agreement the text of which is transmitted to the Congress pursuant to subsection (a); and

(B) which is reported from the Committee on Merchant Marine and Fisheries of the House of Representatives or the Committee on Commerce or the Committee on Foreign Relations of the Senate, not later than 45 days after the date on which the document described in subsection (a) relating to that agreement is transmitted to the Congress.

(3) PLACEMENT ON CALENDAR.--Any fishery agreement resolution upon being reported shall immediately be placed on the appropriate calendar.

(4) FLOOR CONSIDERATION IN THE HOUSE.--

(A) A motion in the House of Representatives to proceed to the consideration of any fishery agreement resolution shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(B) Debate in the House of Representatives on any fishery agreement resolution shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. It shall not be in order to move to recommit any fishery agreement resolution or to move to reconsider the vote by which any fishery agreement resolution is agreed to or disagreed to.

(C) Motions to postpone, made in the House of Representatives with respect to the consideration of any fishery agreement resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(D) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any fishery agreement resolution shall be decided without debate.

(E) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of any fishery agreement resolution shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions in similar circumstances.

(5) FLOOR CONSIDERATION IN THE SENATE.--

(A) A motion in the Senate to proceed to the consideration of any fishery agreement resolution shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(B) Debate in the Senate on any fishery agreement resolution and on all debatable motions and appeals in connection therewith shall be limited to not more than 10 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(C) Debate in the Senate on any debatable motion or appeal in connection with any fishery agreement resolution shall be limited to not more than 1 hour, to be equally divided between, and controlled by, the mover of the motion or appeal and the manager of the resolution, except that if the manager of the resolution is in favor of any such motion or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee. The majority leader and the minority leader, or either of them, may allot additional time to any Senator during the consideration of any debatable motion or appeal, from time under their control with respect to the applicable fishery agreement resolution.

(D) A motion in the Senate to further limit debate is not debatable. A motion to recommit any fishery agreement resolution is not in order.

SEC. 204. PERMITS FOR FOREIGN FISHING 16 U.S.C. 1824

99-659

(a) IN GENERAL.--After February 28, 1977, no foreign fishing vessel shall engage in fishing within the exclusive economic zone, or for anadromous species or Continental Shelf fishery resources beyond such zone, unless such vessel has on board a valid permit issued under this section for such vessel.

(b) APPLICATIONS AND PERMITS UNDER GOVERNING INTERNATIONAL FISHERY AGREEMENTS.--

99-659

(1) ELIGIBILITY.--Each foreign nation with which the United States has entered into a governing international fishery agreement shall submit an application to the Secretary of State each year for a permit for each of its fishing vessels that wishes to engage in fishing described in subsection (a). No permit issued under this section may be valid for longer than a year; and section 558(c) of title 5, United States Code, does not apply to the renewal of any such permit.

(2) FORMS.--The Secretary, in consultation with the Secretary of State and the Secretary of the department in which the Coast Guard is operating, shall prescribe the forms for permit applications submitted under this subsection and for permits issued pursuant to any such application.

95-354, 97-453, 99-659

(3) CONTENTS.--Any application made under this subsection shall specify--

(A) the name and official number or other identification of each fishing vessel for which a permit is sought, together with the name and address of the owner thereof;

(B) the tonnage, hold capacity, speed, processing equipment, type and quantity of fishing gear, and such other pertinent information with respect to characteristics of each such vessel as the Secretary may require;

(C) each fishery in which each such vessel wishes to fish;

(D) the estimated amount of tonnage of fish which will be caught, taken, or harvested in each such fishery by each such vessel during the time the permit is in force;

(E) the amount or tonnage of United States harvested fish, if any, which each such vessel proposes to receive at sea from vessels of the United States;

(F) the ocean area in which, and the season or period during which, such fishing will be conducted; and

(G) all applicable vessel safety standards imposed by the foreign country, and shall include written certification that the vessel is in compliance with those standards;

and shall include any other pertinent information and material which the Secretary may require.

95-354, 96-470, 97-453, 99-659

(4) TRANSMITTAL FOR ACTION.--Upon receipt of any application which complies with the requirements of paragraph (3), the Secretary of State shall publish a notice of receipt of the application in the Federal Register. Any such notice shall summarize the contents of the applications from each nation included therein with respect to the matters described in paragraph (3). The Secretary of State shall promptly transmit--

(A) such application, together with his comments and recommendations thereon, to the Secretary;

(B) a copy of the application to the Secretary of the department in which the Coast Guard is operating; and

(C) a copy or a summary of the application to the appropriate Council.

97-453

(5) ACTION BY COUNCIL.--After receiving a copy or summary of an application under paragraph (4)(C), the Council may prepare and submit to the Secretary such written comments on the application as it deems appropriate. Such comments shall be submitted within 45 days after the date on which the application is received by the Council and may include recommendations with respect to approval of the application and, if approval is recommended, with respect to appropriate conditions and restrictions thereon. Any interested person may submit comments to such Council with respect to any such application. The Council shall consider any such comments in formulating its submission to the Secretary.

95-453, 99-659

(6) APPROVAL.--

(A) After receipt of any application transmitted under paragraph (4)(A), the Secretary shall consult with the Secretary of State and, with respect to enforcement, with the Secretary of the department in which the Coast Guard is operating. The Secretary, after taking into consideration the views and recommendations of such Secretaries, and any comments submitted by any Council under paragraph (5), may approve, subject to subparagraph (B), the application, if he determines that the fishing described in the application will meet the requirements of this Act, or he may disapprove all or any portion of the application.

(B) (i) In the case of any application which specifies that one or more foreign fishing vessels propose to receive at sea United States harvested fish from vessels of the United States, the Secretary may approve the application unless the Secretary determines, on the basis of the views, recommendations, and comments referred to in subparagraph (A) and other pertinent information, that United States fish processors have adequate capacity, and will utilize such capacity, to process all United States harvested fish from the fishery concerned.

(ii) The amount or tonnage of United States harvested fish which may be received at sea during any year by foreign fishing vessels under permits approved under this paragraph may not exceed that portion of the optimum yield of the fishery concerned which will not be utilized by United States fish processors.

(iii) In deciding whether to approve any application under this subparagraph, the Secretary may take into account, with respect to the foreign nation concerned, such other matters as the Secretary deems appropriate.

95-354

(7) ESTABLISHMENT OF CONDITIONS AND RESTRICTIONS.--The Secretary shall establish conditions and restrictions which shall be included in each permit issued pursuant to any application approved under paragraph (6) and which must be complied with by the owner or operator of the fishing vessel for which the permit is issued. Such conditions and restrictions shall include the following:

(A) All of the requirements of any applicable fishery management plan, or preliminary fishery management plan, and the regulations promulgated to implement any such plan.

(B) The requirement that no permit may be used by any vessel other than the fishing vessel for which it is issued.

(C) The requirements described in section 201(c)(1), (2), and (3).

(D) If the permit is issued other than pursuant to an application approved under paragraph (6)(B), the restriction that the foreign fishing vessel may not receive at sea United States harvested fish from vessels of the United States.

(E) If the permit is issued pursuant to an application approved under paragraph (6)(B), the maximum amount or tonnage of United States harvested fish which may be received at sea from vessels of the United States.

(F) Any other condition and restriction related to fishery conservation and management which the Secretary prescribes as necessary and appropriate.

96-470

(8) NOTICE OF APPROVAL.--The Secretary shall promptly transmit a copy of each application approved under paragraph (6) and the conditions and restrictions established under paragraph (7) to--

(A) the Secretary of State for transmittal to the foreign nation involved;

(B) the Secretary of the department in which the Coast Guard is operating; and

(C) any Council which has authority over any fishery specified in such application.

(9) DISAPPROVAL OF APPLICATIONS.--If the Secretary does not approve any application submitted by a foreign nation under this subsection, he shall promptly inform the Secretary of State of the disapproval and his reasons therefore. The Secretary of State shall notify such foreign nation of the disapproval and the reasons therefor. Such foreign nation, after taking into consideration the reasons for disapproval, may submit a revised application under this subsection.

96-561, 99-272, 101-627

(10) FEES.--

(A) Fees shall be paid to the Secretary by the owner or operator of any foreign fishing vessel for which a permit has been issued pursuant to this section. The Secretary, in consultation with the Secretary of State, shall establish a schedule of reasonable fees that shall apply nondiscriminatorily to each foreign nation.

(B) Amounts collected by the Secretary under this paragraph shall be deposited in the general fund of the Treasury.

(11) ISSUANCE OF PERMITS.--If a foreign nation notifies the Secretary of State of its acceptance of the conditions and restrictions established by the Secretary under paragraph (7), the Secretary of State shall promptly transmit such notification to the Secretary. Upon payment of the applicable fees established pursuant to paragraph (10), the Secretary shall thereupon issue to such foreign nation, through the Secretary of State, permits for the appropriate fishing vessels of that nation. Each permit shall contain a statement of all conditions and restrictions established under paragraph (7) which apply to the fishing vessel for which the permit is issued.

(c) REGISTRATION PERMITS.--The Secretary of State, in cooperation with the Secretary, shall issue annually a registration permit for each fishing vessel of a foreign nation which is a party to an international fishery agreement under which foreign fishing is authorized by section 201(b) and which wishes to engage in fishing described in subsection (a). Each such permit shall set forth the terms and conditions contained in the agreement that apply with respect to such fishing, and shall include the additional requirement that the owner or operator of the fishing vessel for which the permit is issued shall prominently display such permit in the wheelhouse of such vessel and show it, upon request, to any officer authorized to enforce the provisions of this Act (as provided for in section 311). The Secretary of State, after consultation with the Secretary and the Secretary of the department in which the Coast Guard is operating, shall prescribe the form and manner in which applications for registration permits may be made, and the forms of such permits. The Secretary of State may establish, require the payment of, and collect fees for registration permits; except that the level of such fees shall not exceed the administrative costs incurred by him in issuing such permits.

SEC. 205. IMPORT PROHIBITIONS 16 U.S.C. 1825

101-627

(a) DETERMINATIONS BY SECRETARY OF STATE.-- If the Secretary of State determines that--

(1) he has been unable, within a reasonable period of time, to conclude with any foreign nation an international fishery agreement allowing fishing vessels of the United States equitable access to fisheries over which that nation asserts exclusive fishery management authority, <u>including fisheries for tuna species,*</u> as recognized by the United States, in accordance with [traditional] fishing activities of such vessels, if any, and under terms not more restrictive than those established under sections 201(c) and (d) and 204(b)(7) and (10), because such nation has (A) refused to commence negotiations, or (B) failed to negotiate in good faith;

(2) any foreign nation is not allowing fishing vessels of the United States to engage in fishing for [highly migratory] tuna* species in accordance with an applicable international fishery agreement, whether or not such nation is a party thereto;

*** Bracketed phrases are deleted effective 1/1/92; underlined phrases take effect 1/1/92.**

(3) any foreign nation is not complying with its obligations under any existing international fishery agreement concerning fishing by fishing vessels of the United States in any fishery over which that nation asserts exclusive fishery management authority; or

(4) any fishing vessel of the United States, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea is recognized by the United States, is seized by any foreign nation--

(A) in violation of an applicable international fishery agreement;

(B) without authorization under an agreement between the United States and such nation; or

(C) as a consequence of a claim of jurisdiction which is not recognized by the United States;

he shall certify such determination to the Secretary of the Treasury.

(b) PROHIBITIONS.--Upon receipt of any certification from the Secretary of State under subsection (a), the Secretary of the Treasury shall immediately take such action as may be necessary and appropriate to prohibit the importation into the United States--

(1) of all fish and fish products from the fishery involved, if any; and

(2) upon recommendation of the Secretary of State, such other fish or fish products, from any fishery of the foreign nation concerned, which the Secretary of State finds to be appropriate to carry out the purposes of this section.

(c) REMOVAL OF PROHIBITION.--If the Secretary of State finds that the reasons for the imposition of any import prohibition under this section no longer prevail, the Secretary of State shall notify the Secretary of the Treasury, who shall promptly remove such import prohibition.

(d) DEFINITIONS.--As used in this section--

(1) The term "fish" includes any highly migratory species.

(2) The term "fish products" means any article which is produced from or composed of (in whole or in part) any fish.

101-267
SEC. 206. LARGE-SCALE DRIFTNET FISHING

(a) SHORT TITLE.--This section incorporates and expands upon provisions of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 and may be cited as the "Driftnet Act Amendments of 1990".

(b) FINDINGS.--The Congress finds that--

(1) the continued widespread use of large-scale driftnets beyond the exclusive economic zone of any nation is a destructive fishing practice that poses a threat to living marine resources of the world's oceans, including but not limited to the North and South Pacific Ocean and the Bering Sea;

(2) the use of large-scale driftnets is expanding into new regions of the world's oceans, including the Atlantic Ocean and Caribbean Sea;

(3) there is a pressing need for detailed and reliable information on the number of seabirds, sea turtles, nontarget fish, and marine mammals that become entangled and die in actively fished large-scale driftnets and in large-scale driftnets that are lost, abandoned, or discarded;

(4) increased efforts, including reliable observer data and enforcement mechanisms, are needed to monitor, assess, control, and reduce the adverse impact of large-scale driftnet fishing on living marine resources;

(5) the nations of the world have agreed in the United Nations, through General Assembly Resolution Numbered 44-225, approved December 22, 1989, by the General Assembly, that a moratorium should be imposed by June 30, 1992, on the use of large-scale driftnets beyond the exclusive economic zone of any nation;

(6) the nations of the South Pacific have agreed to a moratorium on the use of large-scale driftnets in the South Pacific through the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, which was agreed to in Wellington, New Zealand, on November 29, 1989; and

(7) increasing population pressures and new knowledge of the importance of living marine resources to the health of the global ecosystem demand that greater responsibility be exercised by persons fishing or developing new fisheries beyond the exclusive economic zone of any nation.

(c) POLICY.--It is declared to be the policy of the Congress in this section that the United States should--

(1) implement the moratorium called for by the United Nations General Assembly in Resolution Numbered 44-225;

(2) support the Tarawa Declaration and the Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific; and

(3) secure a permanent ban on the use of destructive fishing practices, and in particular large-scale driftnets, by persons or vessels fishing beyond the exclusive economic zone of any nation.

(d) INTERNATIONAL AGREEMENTS.--The Secretary, through the Secretary of State and the Secretary of the department in which the Coast Guard is operating, shall seek to secure international agreements to implement immediately the findings, policy, and provisions of this section, and in particular an international ban on large-scale driftnet fishing. The Secretary, through the Secretary of State, shall include, in any agreement which addresses the taking of living marine resources of the United States, provisions to ensure that--

(1) each large-scale driftnet fishing vessel of a foreign nation that is party to the agreement, including vessels that may operate independently to develop new fishing areas, which operate beyond the exclusive economic zone of any nation, is included in such agreement;

(2) each large-scale driftnet fishing vessel of a foreign nation that is party to the agreement, which operates beyond the exclusive economic zone of any nation, is equipped with satellite transmitters which provide real-time position information accessible to the United States;

(3) statistically reliable monitoring by the United States is carried out, through the use of on-board observers or through dedicated platforms provided by foreign nations that are parties to the agreement, of all target and nontarget fish species, marine mammals, sea turtles, and sea birds entangled or killed by large-scale driftnets used by fishing vessels of foreign nations that are parties to the agreement;

(4) officials of the United States have the right to board and inspect for violations of the agreement any large-scale driftnet fishing vessels operating under the flag of a foreign nation that is party to the agreement at any time while such vessel is operating in designated areas beyond the exclusive economic zone of any nation;

(5) all catch landed or transshipped at sea by large-scale driftnet fishing vessels of a foreign nation that is a party to the agreement, and which are operated beyond the exclusive economic zone of any nation, is reliably monitored and documented;

(6) time and area restrictions are imposed on the use of large-scale driftnets in order to prevent interception of anadromous species;

(7) all large-scale driftnets used are constructed, insofar as feasible, with biodegradable materials which break into segments that do not represent a threat to living marine resources;

(8) all large-scale driftnets are marked at appropriate intervals in a manner that conclusively identifies the vessel and flag nation responsible for each such driftnet;

(9) the taking of nontarget fish species, marine mammals, sea turtles, seabirds, and endangered species or other species protected by international agreements to which the United States is a party is minimized and does not pose a threat to existing fisheries or the long-term health of living marine resources; and

(10) definitive steps are agreed upon to ensure that parties to the agreement comply with the spirit of other international agreements and resolutions concerning the use of large-scale driftnets beyond the exclusive economic zone of any nation.

(e) **REPORT.**--Not later than January 1, 1991, and every year thereafter until the purposes of this section are met, the Secretary, after consultation with the Secretary of State and the Secretary of the department in which the Coast Guard is operating, shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report--

(1) describing the steps taken to carry out the provisions of this section, particularly subsection (c);

(2) evaluating the progress of those efforts, the impacts on living marine resources, including available observer data, and specifying plans for further action;

(3) identifying and evaluating the effectiveness of unilateral measures and multilateral measures, including sanctions, that are available to encourage nations to agree to and comply with this section, and recommendations for legislation to authorize any additional measures that are needed if those are considered ineffective;

(4) identifying, evaluating, and making any recommendations considered necessary to improve the effectiveness of the law, policy, and procedures governing enforcement of the exclusive management authority of the United States over anadromous species against fishing vessels engaged in fishing beyond the exclusive economic zone of any nation;

(5) containing a list and description of any new fisheries developed by nations that conduct, or authorize their nationals to conduct, large-scale driftnet fishing beyond the exclusive economic zone of any nation; and

(6) containing a list of the nations that conduct, or authorize their nationals to conduct, large-scale driftnet fishing beyond the exclusive economic zone of any nation in a manner that diminishes the effectiveness of or is inconsistent with any international agreement governing large-scale driftnet fishing to which the United States is a party or otherwise subscribes.

(f) **CERTIFICATION.**--If at any time the Secretary, in consultation with the Secretary of State and the Secretary of the department in which the Coast Guard is operating, identifies any nation that warrants inclusion in the list described under subsection (e)(6), the Secretary shall certify that fact to the President. Such certification shall be deemed to be a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)).

(g) **EFFECT ON SOVEREIGN RIGHTS.**--This section shall not serve or be construed to expand or diminish the sovereign rights of the United States, as stated by Presidential Proclamation Numbered 5030, dated March 10, 1983, and reflected in this Act or other existing law.

(h) **DEFINITION.**--As used in this section, the term "living marine resources" includes fish, marine mammals, sea turtles, and seabirds and other waterfowl.

16 U.S.C. 1851

TITLE III -- NATIONAL FISHERY MANAGEMENT PROGRAM

SEC. 301. NATIONAL STANDARDS FOR FISHERY CONSERVATION AND MANAGEMENT

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

98-623

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

97-453

(b) GUIDELINES.-- The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.

SEC. 302. REGIONAL FISHERY MANAGEMENT COUNCILS

97-453, 101-627

(a) ESTABLISHMENT.--There shall be established, within 120 days after the date of the enactment of this Act, eight Regional Fishery Management Councils, as follows:

(1) NEW ENGLAND COUNCIL.--The New England Fishery Management Council shall consist of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except as provided in section 304(f)(3)). The New England Council shall have 17 voting members, including 11 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(2) MID-ATLANTIC COUNCIL.--The Mid-Atlantic Fishery Management Council shall consist of the States of New York, New Jersey, Delaware, Pennsylvania, Maryland, and Virginia and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except as provided in section 304(f)(3)). The Mid-Atlantic Council shall have 19 voting members, including 12 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(3) SOUTH ATLANTIC COUNCIL.--The South Atlantic Fishery Management Council shall consist of the States of North Carolina, South Carolina, Georgia, and Florida and shall have authority over the fisheries in the Atlantic Ocean seaward of such States (except as provided in section 304(f)(3)). The South Atlantic Council shall have 13 voting members, including 8 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(4) CARIBBEAN COUNCIL.--The Caribbean Fishery Management Council shall consist of the Virgin Islands and the Commonwealth of Puerto Rico and shall have authority over the fisheries in the Caribbean Sea and Atlantic Ocean seaward of such States (except as provided in section 304(f)(3)). The Caribbean Council shall have 7 voting members, including 4 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(5) GULF COUNCIL.--The Gulf of Mexico Fishery Management Council shall consist of the States of Texas, Louisiana, Mississippi, Alabama, and Florida and shall have authority over the fisheries in the Gulf of Mexico seaward of such States (except as provided in section 304(f)(3)). The Gulf Council shall have 17 voting members, including 11 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(6) PACIFIC COUNCIL.--The Pacific Fishery Management Council shall consist of the States of California, Oregon, Washington, and Idaho and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Council shall have 13 voting members, including 8 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

(7) NORTH PACIFIC COUNCIL.--The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. The North Pacific Council shall have 11 voting members, including 7 appointed by the Secretary in accordance with subsection (b)(2) (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington).

(8) WESTERN PACIFIC COUNCIL.--The Western Pacific Fishery Management Council shall consist of the States of Hawaii, American Samoa, Guam, and the Northern Mariana Islands and shall have authority over the fisheries in the Pacific Ocean seaward of such States and of the Commonwealths, territories, and possessions of the United States in the Pacific Ocean area. The Western Pacific Council shall have 13 voting members, including 8 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each of the following States: Hawaii, American Samoa, Guam, and the Northern Mariana Islands).

Each Council shall reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority.

97-453, 99-659, 101-627

(b) VOTING MEMBERS.--

(1) The voting members of each Council shall be:

(A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the Secretary in accordance with subsection (b)(2).

(2) (A) The members of each Council required to be appointed by the Secretary must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned. Within nine months after the date of enactment of the Fishery Conservation Amendments of 1990, the Secretary shall, by regulation, prescribe criteria for determining whether an individual satisfies the requirements of this subparagraph.

(B) The Secretary, in making appointments under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council. On January 31, 1991, and each year thereafter, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report on the actions taken by the Secretary to ensure that such fair and balanced apportionment is achieved. The report shall--

(i) list the fisheries under the jurisdiction of each Council, outlining for each fishery the type and quantity of fish harvested, fishing and processing methods employed, the number of participants, the duration and range of the fishery, and other distinguishing characteristics;

(ii) assess the membership of each Council in terms of the apportionment of the active participants in each such fishery; and

(iii) state the Secretary's plans and schedule for actions to achieve a fair and balanced apportionment on the Council for the active participants in any such fishery.

(C) The Secretary shall appoint the members of each Council from a list of individuals submitted by the Governor of each applicable constituent State. A Governor may not submit the names of individuals to the Secretary for appointment unless the Governor has determined that each such individual is qualified under the requirements of subparagraph (A) and unless the Governor has, to the extent practicable, first consulted with representatives of the commercial and recreational fishing interests of the State regarding those individuals. Each such list shall include the names and pertinent biographical data of not less than three individuals for each applicable vacancy and shall be accompanied by a statement by the Governor explaining how each such individual meets the requirements of subparagraph (A). The Secretary shall review each list submitted by a Governor to ascertain if the individuals on the list are qualified for the vacancy on the basis of such requirements. If the Secretary determines that any individual is not qualified, the Secretary shall notify the appropriate Governor of that determination. The Governor shall then submit a revised list or resubmit the original list with an additional explanation of the qualifications of the individual in question. An individual is not eligible for appointment by the Secretary until that individual complies with the applicable financial disclosure requirements under subsection (k).

(D) Whenever the Secretary makes an appointment to a Council, the Secretary shall make a public announcement of such appointment not less than 45 days before the first day on which the individual is to take office as a member of the Council.

(3) Each voting member appointed to a Council by the Secretary in accordance with subsection (b)(2) shall serve for a term of 3 years; except that the Secretary may designate a shorter term if necessary to provide for balanced expiration to terms of office. No member appointed after January 1, 1986, may serve more than three consecutive terms. Any term completed prior to January 1, 1986, shall not be counted in determining the number of consecutive terms served by any Council member.

(4) Successors to the voting members of any Council shall be appointed in the same manner as the original voting members. Any individual appointed to fill a vacancy occurring prior to the expiration of any term of office shall be appointed for the remainder of that term.

(5) The Secretary may remove for cause any member of a Council required to be appointed by the Secretary in accordance with subsection (b)(2) if the Council concerned first recommends removal by not less than two-thirds of the members who are voting members. A removal recommendation of a Council must be in writing and accompanied by a statement of the reasons upon which the recommendation is based.

(c) NONVOTING MEMBERS.--

(1) The nonvoting members of each Council shall be:

(A) The regional or area director of the United States Fish and Wildlife Service for the geographical area concerned, or his designee.

(B) The commander of the Coast Guard district for the geographical area concerned, or his designee; except that, if two Coast Guard districts are within such geographical area, the commander designated for such purpose by the commandant of the Coast Guard.

(C) The Executive Director of the Marine Fisheries Commission for the geographical area concerned, if any, or his designee.

(D) One representative of the Department of State designated for such purpose by the Secretary of State, or his designee.

(2) The Pacific Council shall have one additional nonvoting member who shall be appointed by, and serve at the pleasure of, the Governor of Alaska.

96-561, 101-627

(d) COMPENSATION AND EXPENSES.--The voting members of each Council, who are not employed by the Federal Government or any State or local government, shall, until January 1, 1992, receive compensation at the daily rate for GS-18 of the General Schedule, and after December 31, 1991, at the daily rate for GS-16 of the General Schedule, when engaged in the actual performance of duties for such Council. The voting members of each Council, any nonvoting member described in subsection (c)(1)(C), and the nonvoting member appointed pursuant to subsection (c)(2) shall be reimbursed for actual expenses incurred in the performance of such duties, and other nonvoting members and Council staff members may be reimbursed for actual expenses.

101-627

(e) TRANSACTION OF BUSINESS.--

(1) A majority of the voting members of any Council shall constitute a quorum, but one or more such members designated by the Council may hold hearings. All decisions of any Council shall be by majority vote of the voting members present and voting.

(2) The voting members of each Council shall select a Chairman for such Council from among the voting members.

(3) Each Council shall meet at appropriate times and places in any of the constituent States of the Council at the call of the Chairman or upon the request of a majority of its voting members.

(4) If any voting member of a Council disagrees with respect to any matter which is transmitted to the Secretary by such Council, such member may submit a statement to the Secretary setting forth the reasons for such disagreement. The regional director of the National Marine Fisheries Service serving on the Council, or the regional director's designee, shall submit such a statement, which shall be made available to the public upon request, if the regional director disagrees with any such matter.

97-453

(f) STAFF AND ADMINISTRATION.--

(1) Each Council may appoint, and assign duties to, an executive director and such other full- and part-time administrative employees as the Secretary determines are necessary to the performance of its functions.

(2) Upon the request of any Council, and after consultation with the Secretary, the head of any Federal agency is authorized to detail to such Council, on a reimbursable basis, any of the personnel of such agency, to assist such Council in the performance of its functions under this Act.

(3) The Secretary shall provide to each Council such administrative and technical support services as are necessary for the effective functioning of such Council.

(4) The Administrator of General Services shall furnish each Council with such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States.

(5) The Secretary and the Secretary of State shall furnish each Council with relevant information concerning foreign fishing and international fishery agreements.

(6) Each Council shall determine its organization, and prescribe its practices and procedures for carrying out its functions under this Act, in accordance with such uniform standards as are prescribed by the Secretary. The procedures of a Council, and of its scientific and statistical committee and advisory panels established under subsection (g), must be consistent with the procedural guidelines set forth in subsection [j](2). Each Council shall publish and make available to the public a statement of its organization, practices, and procedures.

(7) The Secretary shall pay--

(A) the compensation and expenses provided for in subsection (d);

(B) appropriate compensation to employees appointed under paragraph (1);

(C) the amounts required for reimbursement of other Federal agencies under paragraphs (2) and (4);

(D) the actual expenses of the members of the committees and panels established under subsection (g); and

(E) such other costs as the Secretary determines are necessary to the performance of the functions of the Councils.

101-627

(g) COMMITTEES AND PANELS.--

(1) Each Council shall establish and maintain, and appoint the members of, a scientific and statistical committee to assist it in the development, collection, and evaluation of such statistical, biological, economic, social, and other scientific information as is relevant to such Council's development and amendment of any fishery management plan.

(2) Each Council shall establish such other advisory panels as are necessary or appropriate to assist it in carrying out its functions under this Act.

(3) (A) Each Council shall establish and maintain a fishing industry advisory committee which shall provide information and recommendations on, and assist in the development of, fishery management plans and amendments to such plans.

(B) Appointments to a committee established under subparagraph (A) shall be made by each Council in such a manner as to provide fair representation to commercial fishing interests in the geographical area of authority of the Council.

(4) Decisions and recommendations made by committees and panels established under this subsection shall be considered to be advisory in nature.

95-354, 97-453, 101-627

(h) FUNCTIONS.--Each Council shall, in accordance with the provisions of this Act--

(1) prepare and submit to the Secretary a fishery management plan with respect to each fishery (except as provided in section 304(f)(3)) within its geographical area of authority that requires conservation and management and, from time to time, such amendments to each such plan as are necessary;

(2) prepare comments on any application for foreign fishing transmitted to it under section 204(b)(4)(C), and any fishery management plan or amendment transmitted to it under section 304(c)(2);

(3) conduct public hearings, at appropriate times and in appropriate locations in the geographical area concerned, so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this Act (and for purposes of this paragraph, the term "geographical area concerned" may include an area under the authority of another Council if the fish in the fishery concerned migrate into, or occur in, that area or if the matters being heard affect fishermen of that area; but not unless such other Council is first consulted regarding the conduct of such hearings within its area);

(4) submit to the Secretary such periodic reports as the Council deems appropriate, and any other relevant report which may be requested by the Secretary;

(5) review on a continuing basis, and revise as appropriate, the assessments and specifications made pursuant to section 303(a)(3) and (4) with respect to the optimum yield from, the capacity and extent to which United States fish processors will process United States harvested fish from, and the total allowable level of foreign fishing in, each fishery (except as provided in section 304(f)(3)) within its geographical area of authority; and

(6) conduct any other activities which are required by, or provided for in, this Act or which are necessary and appropriate to the foregoing functions.

99-659, 101-627

(i) FISHERY HABITAT CONCERNS.--(1) Each Council--

(A) may comment on and make recommendations concerning any activity undertaken, or proposed to be undertaken, by any State or Federal agency that, in the view of the Council, may affect the habitat of a fishery resource under its jurisdiction; and

(B) shall comment on and make recommendations concerning any such activity that, in the view of the Council, is likely to substantially affect the habitat of an anadromous fishery resource under its jurisdiction.

(2) Within 45 days after receiving a comment or recommendation under paragraph (1) from a Council, a Federal agency shall provide a detailed response, in writing, to the Council regarding the matter. In the case of a comment or recommendation under paragraph (1)(B), the response shall include a description of measures being considered by the agency for mitigating or offsetting the impact of the activity on such habitat.

97-453, 99-659, 101-627

(j) PROCEDURAL MATTERS.--

(1) The Federal Advisory Committee Act (5 U.S.C. App. 1) shall not apply to the Councils or to the scientific and statistical committees or advisory panels of the Councils.

(2) The following guidelines apply with respect to the conduct of business at meetings of a Council, and of the scientific and statistical committee and advisory panels of a Council:

(A) Unless closed in accordance with paragraph (3), each regular meeting and each emergency meeting shall be open to the public.

(B) Emergency meetings shall be held at the call of the chairman or equivalent presiding officer.

(C) Timely public notice of each regular meeting and each emergency meeting, including the time, place, and agenda of the meeting, shall be published in local newspapers in the major fishing ports of the Council's region (and in other major fishing ports having a direct interest in the affected fishery) and such notice may be given by such other means as will result in wide publicity. Timely notice of each regular meeting shall also be published in the Federal Register.

(D) Interested persons shall be permitted to present oral or written statements regarding the matters on the agenda at meetings.

(E) Minutes of each meeting shall be kept and shall contain a record of the persons present, an accurate description of matters discussed and conclusions reached, and copies of all statements filed.

(F) Subject to the procedures established by the Council under paragraph (4), and the guidelines prescribed by the Secretary under section 303(d), relating to confidentiality, the administrative record, including minutes required under subparagraph (E), of each meeting, and records or other documents which were made available to or prepared for or by the Council, committee, or panel incident to the meeting, shall be available for public inspection and copying at a single location in the offices of the Council.

(3) (A) Each Council, scientific and statistical committee, and advisory panel--

(i) shall close any meeting, or portion thereof, that concerns matters or information that bears a national security classification; and

(ii) may close any meeting, or portion thereof, that concerns matters or information that pertains to national security, employment matters, or briefings on litigation in which the Council is interested; and

(B) If any meeting or portion is closed, the Council concerned shall notify local newspapers in the major fishing ports within its region (and in other major, affected fishing ports), including in that notification the time and place of the meeting. This subparagraph does not require notification regarding any brief closure of a portion of a meeting in order to discuss employment or other internal administrative matters. Subparagraphs (D) and (F) of paragraph (2) shall not apply to any meeting or portion thereof that is so closed.

(4) Each Council shall establish appropriate procedures applicable to it and to its committee and advisory panels for ensuring confidentiality of the statistics that may be submitted to it by Federal or State authorities, and may be voluntarily submitted to it by private persons; including, but not limited to, procedures for the restriction of Council employee access and the prevention of conflicts of interest; except that such procedures, in the case of statistics submitted to the Council by a State or by the Secretary under section 303(d), must be consistent with the laws and regulations of that State, or with the procedures of the Secretary, as the case may be, concerning the confidentiality of the statistics.

(5) Each Council shall specify those procedures that are necessary or appropriate to ensure that the committees and advisory panels established under subsection (g) are involved, on a continuing basis, in the development and amendment of fishery management plans.

(6) At any time when a Council determines it appropriate to consider new information from a State or Federal agency or from a Council advisory body, the Council shall give comparable consideration to new information offered at that time by interested members of the public. Interested parties shall have a reasonable opportunity to respond to new data or information before the Council takes final action on conservation and management measures.

99-659

(k) DISCLOSURE OF FINANCIAL INTEREST.--

(1) For purposes of this subsection, the term "affected individual" means an individual who--

(A) is nominated by the Governor of a State for appointment as a voting member of a Council in accordance with subsection (b)(2);

(B) is a voting member of a Council appointed under subsection (b)(2); or

(C) is the executive director of a Council.

(2) Each affected individual must disclose any financial interest held by--

(A) that individual;

(B) the spouse, minor child, or partner of that individual; and

(C) any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee;

in any harvesting, processing, or marketing activity that is being, or will be, undertaken within any fishery over which the Council concerned has jurisdiction.

(3) The disclosure required under paragraph (2) shall be made--

(A) in the case of an affected individual referred to in paragraph (1)(A), before appointment by the Secretary; and

(B) in the case of an affected individual referred to in paragraph (1)(B) or (C), within 45 days of taking office.

(4) An affected individual referred to in paragraph (1)(B) or (C) must update his or her disclosure form at any time any such financial interest is acquired, or substantially changed, by any person referred to in paragraph (2)(A), (B), or (C).

(5) The financial interest disclosures required by this subsection shall--

(A) be made on such forms, in accordance with such procedures, and at such times, as the Secretary shall by regulation prescribe; and

(B) be kept on file, and made available for public inspection at reasonable hours, at the Council offices.

(6) The participation by an affected individual referred to in paragraph (1)(B) or (C) in an action by a Council during any time in which that individual is not in compliance with the regulations prescribed under paragraph (5) may not be treated as cause for the invalidation of that action.

(7) Section 208 of title 18, United States Code, does not apply to an affected individual referred to in paragraph (1)(B) or (C) during any time in which that individual is in compliance with the regulations prescribed under paragraph (5).

SEC. 303. CONTENTS OF FISHERY MANAGEMENT PLANS 16 U.S.C. 1853

95-354, 99-659, 101-627

(a) **REQUIRED PROVISIONS.**--Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall--

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are--

(A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing, and to protect, restore, and promote the long-term health and stability of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this Act, regulations implementing recommendations by international organizations in which the United States participates (including but not limited to closed areas, quotas, and size limits), and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interest in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify--

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States;

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors;

(6) consider and provide for temporary adjustments, after consultation with the Coast Guard and persons utilizing the fishery, regarding access to the fishery for vessels otherwise prevented from harvesting because of weather or other ocean conditions affecting the safe conduct of the fishery; except that the adjustment shall not adversely affect conservation efforts in other fisheries or discriminate among participants in the affected fishery;

(7) include readily available information regarding the significance of habitat to the fishery and assessment as to the effects which changes to that habitat may have upon the fishery;

(8) in the case of a fishery management plan that, after January 1, 1991, is submitted to the Secretary for review under section 304(a) (including any plan for which an amendment is submitted to the Secretary for such review) or is prepared by the Secretary, assess and specify the nature and extent of scientific data which is needed for effective implementation of the plan; and

(9) include a fishery impact statement for the plan or amendment (in the case of a plan or amendment thereto submitted to or prepared by the Secretary after October 1, 1990) which shall assess, specify, and describe the likely effects, if any, of the conservation and management measures on--

(A) participants in the fisheries affected by the plan or amendment; and

(B) participants in the fisheries conducted in adjacent areas under the authority of another Council, after consultation with such Council and representatives of those participants.

97-453, 99-659, 101-627

(b) DISCRETIONARY PROVISIONS.--Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may--

(1) require a permit to be obtained from, and fees to be paid to, the Secretary, with respect to--

(A) any fishing vessel of the United States fishing, or wishing to fish, in the exclusive economic zone or for anadromous species or Continental Shelf fishery resources beyond such zone;

(B) the operator of any such vessel; or

(C) any United States fish processor who first receives fish that are subject to the plan;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this Act;

(5) incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery;

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account--

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations;

(7) require fish processors who first receive fish that are subject to the plan to submit data (other than economic data) which are necessary for the conservation and management of the fishery;

(8) require that observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized;

(9) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region; and

(10) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

97-453

(c) **PROPOSED REGULATIONS.**--The proposed regulations which the Council deems necessary or appropriate for purposes of carrying out a plan or amendment to a plan shall be submitted to the Secretary simultaneously with the plan or amendment for action by the Secretary under sections 304 and 305.

99-659, 101-627

(d) **CONFIDENTIALITY OF STATISTICS.**--Any statistic submitted to the Secretary by any person in compliance with any requirement under subsections (a) and (b) shall be confidential and shall not be disclosed; except--

(1) to Federal employees and Council employees who are responsible for management plan development and monitoring;

(2) to State employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person; or

(3) when required by court order.

The Secretary shall, by regulation, prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary may release or make public any such statistics in any aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such statistics. Nothing in this subsection shall be interpreted or construed to prevent the use for conservation and management purposes by the Secretary, or with the approval of the Secretary, the Council, of any statistic submitted in compliance with a requirement under subsection (a) or (b).

97-453

(e) **DATA COLLECTION PROGRAMS.**--If a Council determines that additional information and data (other than information and data that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations) would be beneficial for the purposes of--

(1) determining whether a fishery management plan is needed for a fishery; or

(2) preparing a fishery management plan;

the Council may request that the Secretary implement a data collection program for the fishery which would provide the types of information and data (other than information and data that would disclose proprietary or confidential commercial or financial information regarding fishing operations or fish processing operations) specified by the Council. The Secretary shall approve such a data collection program if he determines that the need is justified, and shall promulgate regulations to implement the program within 60 days after such determination is made. If the Secretary determines that the need for a data collection program is not justified, he shall inform the Council of the reasons for such determination in writing. The determinations of the Secretary under this subsection regarding a Council request shall be made within a reasonable period of time after he receives that request.

101-627

(f) RESTRICTION ON USE OF CERTAIN DATA.--The Secretary shall promulgate regulations to restrict the use, in civil enforcement or criminal proceedings under this Act, the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.), or the Endangered Species Act (16 U.S.C. 1531 et seq.), of information collected by voluntary fishery data collectors, including sea samplers, while aboard any vessel for conservation and management purposes if the presence of such a fishery data collector aboard is not required by any of such Acts or regulations thereunder.

SEC. 304. ACTION BY THE SECRETARY 16 U.S.C. 1854

97-453, 99-659

(a) ACTION BY THE SECRETARY AFTER RECEIPT OF PLAN.--

(1) After the Secretary receives a fishery management plan, or amendment to a plan, which was prepared by a Council, the Secretary shall--

(A) immediately make a preliminary evaluation of the management plan or amendment for purposes of deciding if it is consistent with the national standards and sufficient in scope and substance to warrant review under this subsection and--

(i) if that decision is affirmative, implement subparagraphs (B), (C), and (D) with respect to the plan or amendment, or

(ii) if that decision is negative--

(I) disapprove the plan or amendment, and

(II) notify the Council, in writing, of the disapproval and of those matters specified in subsection (b)(2)(A), (B) and (C) as they relate to the plan or amendment;

(B) immediately commence a review of the management plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law;

(C) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the receipt date; and

(D) by the 15th day after the receipt date--

(i) make such changes in the proposed regulations submitted for the plan or amendment under section 303(c) as may be necessary for the implementation of the plan, and

(ii) publish such proposed regulations, including any changes made thereto under clause (i), in the Federal Register together with an explanation of those changes which are substantive.

(2) In undertaking the review required under paragraph (1)(B), the Secretary shall--

(A) take into account the data, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery access adjustments referred to in section 303(a)(6).

(3) (A) The Secretary shall take action under this section on any fishery management plan or amendment to a plan which the Council characterizes as being a final plan or amendment.

(B) For purposes of this section, the term "receipt date" means the 5th day after the day on which a Council transmits to the Secretary a fishery management plan, or an amendment to a plan, that it characterizes as a final plan or amendment.

97-453, 99-659

(b) REVIEW BY THE SECRETARY.--

(1) A plan or amendment shall take effect and be implemented in accordance with section 305(a) if--

(A) the Secretary does not notify the Council in writing of--

(i) his disapproval under subsection (a)(1)(A)(ii), or

(ii) his disapproval, or partial disapproval, under paragraph (2), of the plan or amendment before the close of the 95th day after the receipt date; or

(B) at any time subsequent to the 60th day after the receipt date and before such 95th day, the Secretary notifies the Council in writing that he does not intend to disapprove, or partially disapprove, the plan or amendment.

(2) If after review under subsection (a) the Secretary determines that the plan or amendment is not consistent with the criteria set forth in paragraph (1)(B) of that subsection, the Secretary shall notify the Council in writing of his disapproval or partial disapproval of the plan or amendment. Such notice shall specify--

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

(3) (A) If the Secretary disapproves a proposed plan or amendment under subsection (a)(1)(A)(ii), or disap-proves, or partially disapproves, a proposed plan or amendment under paragraph (2), the Council may submit a revised plan or amendment, accompanied by appropriately revised proposed regulations, to the Secretary.

(B) After the Secretary receives a revised plan or amendment under subparagraph (A) or (C)(ii), the Secretary shall immediately--

(i) commence a review of the plan or amendment to determine whether it complies with the criteria set forth in subsection (a)(1)(B);

(ii) publish in the Federal Register a notice stating that the revised plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 30-day period beginning on the date (hereinafter in this paragraph referred to as the "revised receipt date") the plan or amendment was submitted to the Secretary under subparagraph (A) or (C)(ii); and

(iii) review the revised proposed regulations, if any, submitted by the Council and make such changes to them as may be necessary for the implementation of the plan, and thereafter publish such revised proposed regulations (as so changed) in the Federal Register together with an explanation of each of such changes that is substantive.

(C) (i) Before the close of the 60th day after the revised receipt date, the Secretary, after taking into account any data, views, or comments received under subparagraph (B)(ii), shall complete the review required under subparagraph (B)(i) and determine whether the plan or amendment complies with the criteria set forth in subsection (a)(1)(B). If the Secretary determines that a plan or amendment is not in compliance with such criteria, he shall immediately notify the Council of his disapproval of the plan or amendment.

(ii) After notifying a Council of disapproval under clause (i), the Secretary shall promptly provide to the Council a written statement of the reasons on which the disapproval was based and advise the Council that it may submit a further revised plan or amendment, together with appropriately revised proposed regulations, for review and determination under this paragraph.

(D) A revised plan or amendment shall take effect and be implemented in accordance with section 305(a) if the Secretary does not notify the Council, in writing, by the close of the 60th day after the revised receipt date of his disapproval of the plan or amendment.

97-453, 99-659

(c) PREPARATION BY THE SECRETARY.--

(1) The Secretary may prepare a fishery management plan, with respect to any fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this Act, and any other applicable law, if--

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management; or

(B) the Secretary disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment, as the case may be.

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea. The Secretary shall also prepare such proposed regulations as he deems necessary or appropriate to carry out each plan or amendment prepared by him under this paragraph.

(2) (A) Whenever, under paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall immediately--

(i) submit such plan or amendment, and proposed regulations to implement such plan or amendment, to the appropriate Council for consideration and comment;

(ii) publish in the Federal Register a notice stating that the plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the plan or amendment was submitted under clause (i); and

(iii) by the 15th day after the date of submission under clause (i), submit for publication in the Federal Register the proposed regulations to implement the plan or amendment.

(B) The appropriate Council must submit its comments and recommendations, if any, regarding the plan or amendment to the Secretary before the close of the 60-day period referred to in subparagraph (A)(ii). After the close of such 60-day period, the Secretary, after taking into account any such comments and recommendations, as well as any views, data, or comments submitted under subparagraph (A)(ii), may implement such plan or amendment under section 305(a).

(3) Notwithstanding paragraph (1), the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system described in section 303(b)(6), unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

97-453

(d) ESTABLISHMENT OF FEES.--The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1). The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

99-659, 101-627

(e) FISHERIES RESEARCH.--

(1) Within one year after the date of enactment of the Fishery Conservation Amendments of 1990, and at least every three years thereafter, the Secretary shall develop and publish in the Federal Register a strategic plan for fisheries research for the five years immediately following such publication. The plan shall--

(A) identify and describe a comprehensive program with a limited number of priority objectives for research in each of the areas specified in paragraph (2);

(B) indicate the goals and timetables for the program described in subparagraph (A); and

(C) provide a role for affected commercial fishermen in such research, including involvement in field testing.

(2) The areas of research referred to in paragraph (1) are as follows:

(A) Research to support fishery conservation and management, including research on the economics of fisheries and biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution on fish populations, the impact of wetland and estuarine degradation, and other matters bearing upon the abundance and availability of fish.

(B) Conservation engineering research, including the study of fish behavior and the development and testing of new gear technology and fishing techniques to minimize the harvest of nontarget species and promote efficient harvest of target species.

(C) Information management research, including the development of a fishery information base and an information management system that will permit the full use of data in the support of effective fishery conservation and management.

(3) In developing the plan required under paragraph (1), the Secretary shall consult with relevant Federal agencies, scientific and technical experts, and other interested persons, public and private, and shall publish a proposed plan in the Federal Register for the purpose of receiving public comment on the plan. The Secretary shall ensure that affected commercial fishermen are actively involved in the development of the portion of the plan pertaining to conservation engineering research. Upon final publication in the Federal Register, the plan shall be submitted by the Secretary to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives.

101-627

(f) FISHERIES UNDER AUTHORITY OF MORE THAN ONE COUNCIL.--

(1) Except as provided in paragraph (3), if any fishery extends beyond the geographical area of authority of any one Council, the Secretary may--

(A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or

(B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

(3) (A) The Secretary shall have authority over any highly migratory species fishery that is within the geographical area of authority of more than one of the following Councils: New England Council, Mid-Atlantic Council, South Atlantic Council, Gulf Council, and Caribbean Council.

(B) In accordance with the provisions of this Act and any other applicable law, the Secretary shall--

(i) identify research and information priorities, including observer requirements and necessary data collection and analysis for the conservation and management of highly migratory species;

(ii) prepare and amend fishery management plans with respect to highly migratory species fisheries to which this paragraph applies; and

(iii) diligently pursue, through international entities (such as the International Commission for the Conservation of Atlantic Tunas), international fishery management measures with respect to fishing for highly migratory species.

(C) In preparing or amending any fishery management plan under this paragraph, the Secretary shall--

(i) conduct public hearings, at appropriate times and in appropriate locations in the geographical areas concerned, so as to allow interested persons an opportunity to be heard in the preparation and amendment of the plan;

(ii) consult with and consider the comments and views of commissioners and advisory groups appointed under Acts implementing relevant international fishery agreements pertaining to highly migratory species;

(iii) consult with and consider the comments and views of affected Councils;

(iv) evaluate the likely effects, if any, of conservation and management measures on participants in the fisheries affected by the plan and minimize, to the extent practicable, any disadvantage to United States fishermen in relation to foreign competitors; and

(v) review, on a continuing basis (and promptly whenever a recommendation pertaining to fishing for highly migratory species has been made under a relevant international fishery agreement), and revise as appropriate, the conservation and management measures included in the plan.

(D) Conservation and management measures contained in any fishery management plan under this paragraph shall--

(i) take into consideration traditional fishing patterns of fishing vessels of the United States and the operating requirements of the fisheries;

(ii) be fair and equitable in allocating fishing privileges among United States fishermen and not have economic allocation as the sole purpose; and

(iii) promote international conservation.

(E) With respect to a highly migratory species for which the United States is authorized to harvest an allocation or quota under a relevant international fishery agreement, the Secretary shall provide fishing vessels of the United States with a reasonable opportunity to harvest such allocation or quota.

(F) In implementing the provisions of this paragraph, the Secretary shall consult with--

(i) the Secretary of State;

(ii) commissioners and advisory groups appointed under Acts implementing relevant international fishery agreements pertaining to highly migratory species; and

(iii) appropriate Councils.

101-627

(g) INCIDENTAL HARVEST RESEARCH.--

(1) Within 9 months after the date of enactment of the Fishery Conservation Amendments of 1990, the Secretary shall, after consultation with the Gulf of Mexico Fishery Management Council and South Atlantic Fishery Management Council, establish by regulation a 3-year program to assess the impact on fishery resources of incidental harvest by the shrimp trawl fishery within the authority of such Councils.

(2) The program established pursuant to paragraph (1) shall provide for the identification of stocks of fish which are subject to significant incidental harvest in the course of normal shrimp trawl fishing activity.

(3) For stocks of fish identified pursuant to paragraph (2), with priority given to stocks which (based upon the best available scientific information) are considered to be overfished, the Secretary shall conduct--

(A) a program to collect and evaluate data on the nature and extent (including the spatial and temporal distribution) of incidental mortality of such stocks as a direct result of shrimp trawl fishing activities;

(B) an assessment of the status and condition of such stocks, including collection of information which would allow the estimation of life history parameters with sufficient accuracy and precision to support sound scientific evaluation of the effects of various management alternatives on the status of such stocks; and

(C) a program of data collection and evaluation for such stocks on the magnitude and distribution of fishing mortality and fishing effort by sources of fishing mortality other than shrimp trawl fishing activity.

(4) The Secretary shall, in cooperation with affected interests, commence a program to design, and evaluate the efficacy of, technological devices and other changes in fishing technology for the reduction of incidental mortality of nontarget fishery resources in the course of shrimp trawl fishing activity. Such program shall take into account local conditions and include evaluation of any reduction in incidental mortality, as well as any reduction or increase in the retention of shrimp in the course of normal fishing activity.

(5) The Secretary shall, upon completion of the programs required by this subsection, submit a detailed report on the results of such programs to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives.

(6) (A) Except as provided in this paragraph, the Secretary may not implement any measures under this Act to reduce incidental mortality of nontarget fishery resources in the course of shrimp trawl fishing which would restrict the period during which shrimp are harvested or would require the use of any technological device or other change in fishing technology.

(B) The prohibition contained in subparagraph (A) shall cease on January 1, 1994.

(C) This paragraph does not apply to any law or regulation in effect on the date of enactment of this paragraph, nor does it limit in any way the Secretary's authority to take action, including any limitation on entry permitted by this Act, for the conservation and management of the shrimp fishery resource.

101-627

Note: Notwithstanding the amendments made by subsections (a) and (g) [of section 108 of Pub. L. 101-627], any fishery management plan or amendment which--

(1) addresses a highly migratory species fishery to which section 304(f)(3) of the Magnuson Fishery Conservation and Management Act (as amended by this Act [101-627]) applies,

(2) was prepared by one or more Regional Fishery Management Councils, and

(3) was in force and effect on January 1, 1990,

shall remain in force and effect until superseded by a fishery management plan prepared by the Secretary, and regulations implementing that plan.

101-627

(d) ATLANTIC SEA SCALLOP FISHERY MANAGEMENT PLAN.--

(1) The New England Fishery Management Council may submit to the Secretary of Commerce an amendment to the Atlantic Sea Scallop Fishery Management Plan. Any amendment submitted under this section shall--

(A) contain measures providing for the conservation and management of Atlantic sea scallops, that are not based primarily on the scallop meat count but which may include controls on scallop harvesting effort; and

(B) consider the views of fishermen and fish processors involved in the Atlantic sea scallop fishery.

(2) If no amendment is submitted under paragraph (1) before one year after the date of enactment of this Act, the Secretary of Commerce is encouraged to prepare the amendment described in paragraph (1) under section 304 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1854).

SEC. 305. IMPLEMENTATION OF FISHERY MANAGEMENT PLANS 16 U.S.C. 1855

97-453, 101-627

(a) IMPLEMENTATION.--The Secretary shall promulgate each regulation that is necessary to carry out a plan or amendment--

(1) within 110 days after the plan or amendment was received by him for action under section 304(a), if such plan or amendment takes effect under section 304(b)(1);

(2) within 75 days after a revised plan or amendment was received by him under section 304(b), if such plan or amendment takes effect under paragraph (3)(D) of such section; or

(3) within such time as he deems appropriate in the case of a plan or amendment prepared by him under section 304(c) or (f)(3).

101-627

(b) JUDICIAL REVIEW.--

(1) Regulations promulgated by the Secretary under this Act and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, United States Code, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that--

(A) section 705 of such title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

(2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

(3) (A) Notwithstanding any other provision of law, the Secretary shall file a response to any petition filed in accordance with paragraph (1), not later than 45 days after the date the Secretary is served with that petition, except that the appropriate court may extend the period for filing such a response upon a showing by the Secretary of good cause for that extension.

(B) A response of the Secretary under this paragraph shall include a copy of the administrative record for the regulations that are the subject of the petition.

(4) Upon a motion by the person who files a petition under this subsection, the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.

97-453, 101-627

(c) EMERGENCY ACTIONS.--

(1) If the Secretary finds that an emergency exists involving any fishery, he may promulgate emergency regulations necessary to address the emergency, without regard to whether a fishery management plan exists for such fishery.

(2) If a Council finds that an emergency exists involving any fishery within its jurisdiction, whether or not a fishery management plan exists for such fishery--

(A) the Secretary shall promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by unanimous vote of the members who are voting members, requests the taking of such actions; and

(B) the Secretary may promulgate emergency regulations under paragraph (1) to address the emergency if the Council, by less than a unanimous vote, requests the taking of such action.

(3) Any emergency regulation which changes any existing fishery management plan or amendment shall be treated as an amendment to such plan for the period in which such regulation is in effect. Any emergency regulation promulgated under this subsection--

(A) shall be published in the Federal Register together with the reasons therefor;

(B) shall remain in effect for not more than 90 days after the date of such publication, except that any such regulation may, by agreement of the Secretary and the Council, be promulgated for one additional period of not more than 90 days; and

(C) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination, except for emergency regulations promulgated under paragraph (2) in which case such early termination may be made only upon the agreement of the Secretary and the Council concerned.

101-627

(d) **RESPONSIBILITY OF THE SECRETARY.**--The Secretary shall have general responsibility to carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act. The Secretary may promulgate such regulations, in accordance with section 553 of title 5, United States Code, as may be necessary to discharge such responsibility or to carry out any other provision of this Act.

97-453, 101-627

(e) **EFFECT OF CERTAIN LAWS ON CERTAIN TIME REQUIREMENTS.**--The Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and Executive Order Numbered 12291, dated February 17, 1981, shall be complied with within the time limitations specified in subsection [a] or section 304(a) and (b) as they apply to the functions of the Secretary under such provisions.

SEC. 306. STATE JURISDICTION

97-453, 98-623

(a) IN GENERAL.--

(1) Except as provided in subsection (b), nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

(2) For the purposes of this Act, except as provided in subsection (b), the jurisdiction and authority of a State shall extend

(A) to any pocket of waters that is adjacent to the State and totally enclosed by lines delimiting the territorial sea of the United States pursuant to the Geneva Convention on the Territorial Sea and Contiguous Zone or any successor convention to which the United States is a party;

(B) with respect to the body of water commonly known as Nantucket Sound, to the pocket of water west of the seventieth meridian west of Greenwich; and

(C) to the waters of southeastern Alaska (for the purpose of regulating fishing for other than any species of crab) that are--

(i) north of the line representing the international boundary at Dixon Entrance and the westward extension of that line; east of 138 degrees west longitude; and not more than three nautical miles seaward from the coast, from the lines extending from headland to headland across all bays, inlets, straits, passes, sounds, and entrances, and from any island or group of islands, including the islands of the Alexander Archipelago (except Forrester Island); or

(ii) between the islands referred to in clause (i) (except Forrester Island) and the mainland.

(3) Except as otherwise provided by paragraph (2), a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State.

99-659

(b) EXCEPTION.--

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that--

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the exclusive economic zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

97-191, 101-627

(c) EXCEPTION REGARDING FOREIGN FISH PROCESSING IN INTERNAL WATERS.--

(1) A foreign fishing vessel may engage in fish processing within the internal waters of a State if, and only if--

(A) the vessel is qualified for purposes of this paragraph pursuant to paragraph (4)(C); and

(B) the owner or operator of the vessel applies to the Governor of the State for, and (subject to paragraph (2)) is granted, permission for the vessel to engage in such processing and the application specifies the species to be processed.

(2) The Governor of a State may not grant permission for a foreign fishing vessel to engage in fish processing under paragraph (1)--

(A) for a fishery which occurs in the waters of more than one State or in the exclusive economic zone, except after--

(i) consulting with the appropriate Council and Marine Fisheries Commission, and

(ii) considering any comments received from the Governor of any other State where the fishery occurs; and

(B) if the Governor determines that fish processors within the State have adequate capacity, and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in the State.

(3) Nothing in this subsection may be construed as relieving a foreign fishing vessel from the duty to comply with all applicable Federal and State laws while operating within the internal waters of a State incident to permission obtained under paragraph (1)(B).

(4) For purposes of this subsection--

(A) The term "fish processing" includes, in addition to processing, the performance of any other activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, or transportation.

(B) The phrase "internal waters of a State" means all waters within the boundaries of a State except those seaward of the baseline from which the territorial sea is measured.

(C) A foreign fishing vessel shall be treated as qualified for purposes of paragraph (1) if the foreign nation under which it is flagged will be a party to (i) a governing international fishery agreement or (ii) a treaty described in section 201(b) of this Act (16 U.S.C. 1821(b)) during the time the vessel will engage in the fish processing for which permission is sought under paragraph (1)(B).

99-509
Note: For purposes of processing pink salmon within the internal waters of the State of Alaska, the geographic area bounded on the north by a parallel of latitude of 64 degrees, 23 minutes, on the south by a parallel of latitude of 63 degrees, 51 minutes, on the east by the baseline from which the territorial sea is measured, and on the west by the outer limit of the territorial sea, shall be considered to be internal waters of the State of Alaska for the purposes of Section 306(c)(4)(B) of the Fishery Conservation and Management Act (16 U.S.C. 1856(c)(4)(B)) until September 30, 1993.

SEC. 307. PROHIBITED ACTS 16 U.S.C. 1857

It is unlawful--

99-659, 101-224, 101-627
(1) for any person--

(A) to violate any provision of this Act or any regulation or permit issued pursuant to this Act;

(B) to use any fishing vessel to engage in fishing after the revocation, or during the period of suspension, of an applicable permit issued pursuant to this Act;

(C) to violate any provision of, or regulation under, an applicable governing international fishery agreement entered into pursuant to section 201(c);

(D) to refuse to permit any officer authorized to enforce the provisions of this Act (as provided for in section 311) to board a fishing vessel subject to such person's control for the purposes of conducting any search or inspection in connection with the enforcement of this Act or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

(E) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in subparagraph (D);

(F) to resist a lawful arrest for any act prohibited by this section;

(G) to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any fish taken or retained in violation of this Act or any regulation, permit, or agreement referred to in subparagraph (A) or (C);

(H) to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section;

(I) to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United States fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act;

(J) to ship, transport, offer for sale, sell, or purchase, in interstate or foreign commerce, any whole live lobster of the species Homarus americanus, that--

(i) is smaller than the minimum possession size in effect at the time under the American Lobster Fishery Management Plan, as implemented by regulations published in part 649 of title 50, Code of Federal Regulations, or any successor to that plan, implemented under this title;

(ii) is bearing eggs attached to its abdominal appendages; or

(iii) bears evidence of the forcible removal of extruded eggs from its abdominal appendages;

(K) to knowingly steal, or without authorization, to remove, damage, or tamper with--

(i) fishing gear owned by another person, which is located in the exclusive economic zone, or

(ii) fish contained in such fishing gear, or to attempt to do so;

(L) to forcibly assault, resist, oppose, impede, intimidate, or interfere with any observer on a vessel under this Act;

(M) to engage in large-scale driftnet fishing that is subject to the jurisdiction of the United States, including use of a fishing vessel of the United States to engage in such fishing beyond the exclusive economic zone of any nation; or

(N) to strip pollock of its roe and discard the flesh of the pollock.

97-191, 97-453

(2) for any vessel other than a vessel of the United States, and for the owner or operator of any vessel other than a vessel of the United States, to engage--

(A) in fishing within the boundaries of any State, except recreational fishing permitted under section 201(j);

(B) in fishing, except recreational fishing permitted under section 201(j), within the exclusive economic zone, or for any anadromous species or Continental Shelf fishery resources beyond such zone, unless such fishing is authorized by, and conducted in accordance with, a valid and applicable permit issued pursuant to section 204(b) or (c); or

(C) except as permitted under section 306(c), in fish processing (as defined in paragraph (4)(A) of such section) within the internal waters of a State (as defined in paragraph (4)(B) of such section);

16 U.S.C. 1857

95-354, 101-627

(3) for any vessel of the United States, and for the owner or operator of any vessel of the United States, to transfer directly or indirectly, or attempt to so transfer, any United States harvested fish to any foreign fishing vessel, while such foreign vessel is within the exclusive economic zone, unless the foreign fishing vessel has been issued a permit under section 204 which authorizes the receipt by such vessel of United States harvested fish of the species concerned;

100-629

(4) for any fishing vessel other than a vessel of the United States to operate, and for the owner or operator of a fishing vessel other than a vessel of the United States to operate such vessel, in the exclusive economic zone, if--

(A) all fishing gear on the vessel is not stored below deck or in an area where it is not normally used, and not readily available, for fishing; or

(B) all fishing gear on the vessel which is not so stored is not secured and covered so as to render it unusable for fishing;

unless such vessel is authorized to engage in fishing in the area in which the vessel is operating; and

101-627

(5) for any vessel of the United States, and for the owner or operator of any vessel of the United States, to engage in fishing in the waters of a foreign nation in a manner that violates an international fishery agreement between that nation and the United States that has been subject to Congressional oversight in the manner described in section 203, or any regulations issued to implement such an agreement; except that the binding provisions of such agreement and implementing regulations shall have been published in the Federal Register prior to such violation.

SEC. 308. CIVIL PENALTIES AND PERMIT SANCTIONS 16 U.S.C. 1858

101-627

(a) ASSESSMENT OF PENALTY.--Any person who is found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, to have committed an act prohibited by section 307 shall be liable to the United States for a civil penalty. The amount of the civil penalty shall not exceed $100,000 for each violation. Each day of a continuing violation shall constitute a separate offense. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

99-659

(b) REVIEW OF CIVIL PENALTY.--Any person against whom a civil penalty is assessed under subsection (a) may obtain review thereof in the United States district court for the appropriate district by filing a complaint in such court within 30 days from the date of such order and by simultaneously serving a copy of such complaint by certified mail on the Secretary, the Attorney General and the appropriate United States Attorney. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed, as provided in section 2112 of title 28, United States Code. The findings and order of the Secretary shall be set aside by such court if they are not found to be supported by substantial evidence, as provided in section 706(2) of title 5, United States Code.

(c) ACTION UPON FAILURE TO PAY ASSESSMENT.--If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

99-659

(d) IN REM JURISDICTION.--A fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used in the commission of an act prohibited by section 307 shall be liable in rem for any civil penalty assessed for such violation under section 308 and may be proceeded against in any district court of the United States having jurisdiction thereof. Such penalty shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States having jurisdiction over the vessel.

99-659

(e) COMPROMISE OR OTHER ACTION BY SECRETARY.--The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section.

97-453, 99-659

(f) SUBPOENAS.--For the purposes of conducting any hearing under this section, the Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contempt or refusal to obey a subpoena served upon any person pursuant to this subsection, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

101-627

(g) PERMIT SANCTIONS.--

(1) In any case in which (A) a vessel has been used in the commission of an act prohibited under section 307, (B) the owner or operator of a vessel or any other person who has been issued or has applied for a permit under this Act has acted in violation of section 307, or (C) any civil penalty or criminal fine imposed on a vessel or owner or operator of a vessel or any other person who has been issued or has applied for a permit under any fishery resource law statute enforced by the Secretary has not been paid and is overdue, the Secretary may--

(i) revoke any permit issued with respect to such vessel or person, with or without prejudice to the issuance of subsequent permits;

(ii) suspend such permit for a period of time considered by the Secretary to be appropriate;

(iii) deny such permit; or

(iv) impose additional conditions and restrictions on any permit issued to or applied for by such vessel or person under this Act and, with respect to foreign fishing vessels, on the approved application of the foreign nation involved and on any permit issued under that application.

(2) In imposing a sanction under this subsection, the Secretary shall take into account--

(A) the nature, circumstances, extent, and gravity of the prohibited acts for which the sanction is imposed; and

(B) with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require.

(3) Transfer of ownership of a vessel, by sale or otherwise, shall not extinguish any permit sanction that is in effect or is pending at the time of transfer of ownership. Before executing the transfer of ownership of a vessel, by sale or otherwise, the owner shall disclose in writing to the prospective transferee the existence of any permit sanction that will be in effect or pending with respect to the vessel at the time of the transfer.

(4) In the case of any permit that is suspended under this subsection for nonpayment of a civil penalty or criminal fine, the Secretary shall reinstate the permit upon payment of the penalty or fine and interest thereon at the prevailing rate.

(5) No sanctions shall be imposed under this subsection unless there has been prior opportunity for a hearing on the facts underlying the violation for which the sanction is imposed, either in conjunction with a civil penalty proceeding under this section or otherwise.

SEC. 309. CRIMINAL OFFENSES 16 U.S.C. 1859

99-659, 100-66, 101-627

(a) OFFENSES.--A person is guilty of an offense if he commits any act prohibited by--

(1) section 307(1)(D), (E), (F), (H), (I), or (L); or

(2) section 307(2).

97-453, 101-627

(b) PUNISHMENT.--Any offense described in subsection (a)(1) is punishable by a fine of not more than $100,000, or imprisonment for not more than 6 months, or both; except that if in the commission of any such offense the person uses a dangerous weapon, engages in conduct that causes bodily injury to any observer described in section 307(1)(L) or any officer authorized to enforce the provisions of this Act (as provided for in section 311), or places any such observer or officer in fear of imminent bodily injury, the offense is punishable by a fine of not more than $200,000, or imprisonment for not more than 10 years, or both. Any offense described in subsection (a)(2) is punishable by a fine of not more than $200,000.

(c) JURISDICTION.--There is Federal jurisdiction over any offense described in this section.

SEC. 310. CIVIL FORFEITURES 16 U.S.C. 1860

97-453

(a) IN GENERAL.--Any fishing vessel (including its fishing gear, furniture, appurtenances, stores, and cargo) used, and any fish (or the fair market value thereof) taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by section 307 (other than any act for which the issuance of a citation under section 311(c) is sufficient sanction) shall be subject to forfeiture to the United States. All or part of such vessel may, and all such fish (or the fair market value thereof) shall, be forfeited to the United States pursuant to a civil proceeding under this section.

(b) JURISDICTION OF DISTRICT COURTS.--Any district court of the United States which has jurisdiction under section 311(d) shall have jurisdiction, upon application by the Attorney General on behalf of the United States, to order any forfeiture authorized under subsection (a) and any action provided for under subsection (d).

99-659

(c) JUDGMENT.--If a judgment is entered for the United States in a civil forfeiture proceeding under this section, the Attorney General may seize any property or other interest declared forfeited to the United States, which has not previously been seized pursuant to this Act or for which security has not previously been obtained under subsection (d). The provisions of the customs laws relating to--

(1) the seizure, forfeiture, and condemnation of property for violation of the customs law;

(2) the disposition of such property or the proceeds from the sale thereof; and

(3) the remission or mitigation of any such forfeiture; shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, unless such provisions are inconsistent with the purposes, policy, and provisions of this Act.

16 U.S.C. 1860

99-659

(d) PROCEDURE.--

(1) Any officer authorized to serve any process in rem which is issued by a court having jurisdiction under section 311(d) shall--

(A) stay the execution of such process; or

(B) discharge any fish seized pursuant to such process; upon the receipt of a satisfactory bond or other security from any person claiming such property. Such bond or other security shall be conditioned upon such person (i) delivering such property to the appropriate court upon order thereof, without any impairment of its value, or (ii) paying the monetary value of such property pursuant to an order of such court. Judgment shall be recoverable on such bond or other security against both the principal and any sureties in the event that any condition thereof is breached, as determined by such court. Nothing in this paragraph may be construed to require the Secretary, except in the Secretary's discretion or pursuant to the order of a court under section 311(d), to release on bond any seized fish or other property or the proceeds from the sale thereof.

(2) Any fish seized pursuant to this Act may be sold, subject to the approval and direction of the appropriate court, for not less than the fair market value thereof. The proceeds of any such sale shall be deposited with such court pending the disposition of the matter involved.

101-627

(e) REBUTTABLE PRESUMPTION.--

(1) For purposes of this section, it shall be a rebuttable presumption that all fish found on board a fishing vessel which is seized in connection with an act prohibited by section 307 were taken and retained in violation of this Act.

(2) For purposes of this Act, it shall be a rebuttable presumption that any fish of a species which spawns in fresh or estuarine waters and migrates to ocean waters that is found on board a vessel is of United States origin if the vessel is within the migratory range of the species during that part of the year to which the migratory range applies.

SEC. 311. ENFORCEMENT 16 U.S.C. 1861

96-470, 97-453

(a) RESPONSIBILITY.--The provisions of this Act shall be enforced by the Secretary and the Secretary of the department in which the Coast Guard is operating. Such Secretaries may, by agreement, on a reimbursable basis or otherwise, utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency, in the performance of such duties.

97-453

(b) POWERS OF AUTHORIZED OFFICERS.--

(1) Any officer who is authorized (by the Secretary, the Secretary of the department in which the Coast Guard is operating, or the head of any Federal or State agency which has entered into an agreement with such Secretaries under subsection (a)) to enforce the provisions of this Act may--

(A) with or without a warrant or other process--

(i) arrest any person, if he has reasonable cause to believe that such person has committed an act prohibited by section 307;

(ii) board, and search or inspect, any fishing vessel which is subject to the provisions of this Act;

(iii) seize any fishing vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this Act;

(iv) seize any fish (wherever found) taken or retained in violation of any provision of this Act; and

(v) seize any other evidence related to any violation of any provision of this Act;

(B) execute any warrant or other process issued by any court of competent jurisdiction; and

(C) exercise any other lawful authority.

(2) Subject to the direction of the Secretary, a person charged with law enforcement responsibilities by the Secretary who is performing a duty related to enforcement of a law regarding fisheries or other marine resources may make an arrest without a warrant for an offense against the United States committed in his presence, or for a felony cognizable under the laws of the United States, if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony. The arrest authority described in the preceding sentence may be conferred upon an officer or employee of a State agency, subject to such conditions and restrictions as are set forth by agreement between the State agency, the Secretary, and, with respect to enforcement operations within the exclusive economic zone, the Secretary of the department in which the Coast Guard is operating.

(c) ISSUANCE OF CITATIONS.--If any officer authorized to enforce the provisions of this Act (as provided for in this section) finds that a fishing vessel is operating or has been operated in violation of any provision of this Act, such officer may, in accordance with regulations issued jointly by the Secretary and the Secretary of the department in which the Coast Guard is operating, issue a citation to the owner or operator of such vessel in lieu of proceeding under subsection (b). If a permit has been issued pursuant to this Act for such vessel, such officer shall note the issuance of any citation under this subsection, including the date thereof and the reason therefor, on the permit. The Secretary shall maintain a record of all citations issued pursuant to this subsection.

(d) JURISDICTION OF COURTS.--The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this Act. In the case of Guam, and any Commonwealth, territory, or possession of the United States in the Pacific Ocean, the appropriate court is the United States District Court for the District of Guam, except that in the case of American Samoa, the appropriate court is the United States District Court for the District of Hawaii. Any such court may, at any time--

(1) enter restraining orders or prohibitions;

(2) issue warrants, process in rem, or other process;

(3) prescribe and accept satisfactory bonds or other security; and

(4) take such other actions as are in the interest of justice.

99-659, 101-627

(e) PAYMENT OF STORAGE, CARE, AND OTHER COSTS.--

(1) Notwithstanding any other provision of law, the Secretary or the Secretary of the Treasury may pay from sums received as fines, penalties, and forfeitures of property for violations of any provisions of this Act or of any other fishery resource law enforced by the Secretary, including the Lacey Act Amendments of 1981 (16 U.S.C. 3371 et seq.)--

(A) the reasonable and necessary costs incurred in providing temporary storage, care, and maintenance of seized fish or other property pending disposition of any civil or criminal proceeding alleging a violation of any provision of this Act or any other fishery resource law enforced by the Secretary with respect to that fish or other property;

(B) a reward to any person who furnishes information which leads to an arrest, conviction, civil penalty assessment, or forfeiture of property for any violation of any provision of this Act or any other fishery resource law enforced by the Secretary;

(C) any expenses directly related to investigations and civil or criminal enforcement proceedings, including any necessary expenses for equipment, training, travel, witnesses, and contracting services directly related to such investigations or proceedings;

(D) any valid liens or mortgages against any property that has been forfeited;

(E) claims of parties in interest to property disposed of under section 612(b) of the Tariff Act of 1930 (19 U.S.C. 1612(b)) or under other provisions of the customs laws, as made applicable by section 310(c) of this Act to seizures made by the Secretary under this Act, in amounts determined by the Secretary to be applicable to such claims at the time of seizure; and

(F) reimbursement to any Federal or State agency, including the Coast Guard, for services performed, or personnel, equipment, or facilities utilized, under any agreement with the Secretary entered into pursuant to subsection (a), or any similar agreement authorized by law.

(2) Any person assessed a civil penalty for, or convicted of, any violation of this Act shall be liable for the cost incurred in storage, care, and maintenance of any fish or other property seized in connection with the violation.

99-659

(f) DEFINITIONS.--For purposes of this section--

(1) The term "provisions of this Act" includes (A) any regulation or permit issued pursuant to this Act, and (B) any provision of, or regulation issued pursuant to, any international fishery agreement under which foreign fishing is authorized by section 201(b) or (c), with respect to fishing subject to the exclusive fishery management authority of the United States.

(2) The term "violation of any provision of this Act" includes (A) the commission of any act prohibited by section 307, and (B) the violation of any regulation, permit, or agreement referred to in paragraph (1).

101-627

SEC. 313. NORTH PACIFIC FISHERIES RESEARCH PLAN 16 U.S.C. 1862

(a) IN GENERAL.--The North Pacific Fishery Management Council may prepare, in consultation with the Secretary, a fisheries research plan for all fisheries under the Council's jurisdiction except salmon fisheries which--

(1) requires that observers be stationed on fishing vessels engaged in the catching, taking, or harvesting of fish and on United States fish processors fishing for or processing species under the jurisdiction of the Council, including the Northern Pacific halibut fishery, for the purpose of collecting data necessary for the conservation, management, and scientific understanding of any fisheries under the Council's jurisdiction; and

(2) establishes a system of fees to pay for the costs of implementing the plan.

(b) STANDARDS.--(1) Any plan or plan amendment prepared under this section shall be reasonably calculated to--

(A) gather reliable data, by stationing observers on all or a statistically reliable sample of the fishing vessels and United States fish processors included in the plan, necessary for the conservation, management, and scientific understanding of the fisheries covered by the plan;

(B) be fair and equitable to all vessels and processors;

(C) be consistent with applicable provisions of law; and

(D) take into consideration the operating requirements of the fisheries and the safety of observers and fishermen.

(2) Any system of fees established under this section shall--

(A) provide that the total amount of fees collected under this section not exceed the combined cost of (i) stationing observers on board fishing vessels and United States fish processors, (ii) the actual cost of inputting collected data, and (iii) assessments necessary for a risk-sharing pool implemented under subsection (e) of this section, less any amount received for such purpose from another source or from an existing surplus in the North Pacific Fishery Observer Fund established in subsection (d) of this section;

(B) be fair and equitable to all participants in the fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(C) provide that fees collected not be used to pay any costs of administrative overhead or other costs not directly incurred in carrying out the plan;

(D) not be used to offset amounts authorized under other provisions of law;

(E) be expressed as a percentage, not to exceed one percentum, of the value of fish and shellfish harvested under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(F) be assessed against all fishing vessels and United States fish processors, including those not required to carry an observer under the plan, participating in fisheries under the jurisdiction of the Council, including the Northern Pacific halibut fishery;

(G) provide that fees collected will be deposited in the North Pacific Fishery Observer Fund established under subsection (d) of this section;

(H) provide that fees collected will only be used for implementing the plan established under this section; and

(I) meet the requirements of section 9701(b) of title 31, United States Code.

(c) ACTION BY SECRETARY.--(1) Within 60 days after receiving a plan or plan amendment from the North Pacific Council under this section, the Secretary shall review such plan or plan amendment and either (A) remand such plan or plan amendment to the Council with comments if it does not meet the requirements of this section, or (B) publish in the Federal Register proposed regulations for implementing such plan or plan amendment.

(2) During the 60-day public comment period, the Secretary shall conduct a public hearing in each State represented on the Council for the purpose of receiving public comments on the proposed regulations.

(3) Within 45 days of the close of the public comment period, the Secretary, in consultation with the Council, shall analyze the public comment received and publish final regulations for implementing such plan.

(4) If the Secretary remands a plan or plan amendment to the Council for failure to meet the requirements of this section, the Council may resubmit such plan or plan amendment at any time after taking action the Council believes will address the defects identified by the Secretary. Any plan or plan amendment resubmitted to the Secretary will be treated as an original plan submitted to the Secretary under paragraph (1) of this subsection.

(d) FISHERY OBSERVER FUND.--There is established in the Treasury a North Pacific Fishery Observer Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purpose of carrying out the provisions of this section, subject to the restrictions in subsection (b)(2) of this section. The Fund shall consist of all monies deposited into it in accordance with this section. Sums in the Fund that are not currently needed for the purposes of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

(e) SPECIAL PROVISIONS REGARDING OBSERVERS.--(1) The Secretary shall review--

(A) the feasibility of establishing a risk sharing pool through a reasonable fee, subject to the limitations of subsection (b)(2)(E) of his section, to provide coverage for vessels and owners against liability from civil suits by observers, and

(B) the availability of comprehensive commercial insurance for vessel and owner liability against civil suits by observers.

(2) If the Secretary determines that a risk sharing pool is feasible, the Secretary shall establish such a pool, subject to the provisions of subsection (b)(2) of this section, unless the Secretary determines that--

(A) comprehensive commercial insurance is available for all fishing vessels and United States fish processors required to have observers under the provisions of this section, and

(B) such comprehensive commercial insurance will provide a greater measure of coverage at a lower cost to each participant.

TITLE IV -- MISCELLANEOUS PROVISIONS 16 U.S.C. 1882

95-354, 97-61, 97-453, 99-659, 101-627

SEC. 406. AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated to the Secretary, for purposes of carrying out the provisions of this Act, not to exceed the following sums:

(1) $5,000,000 for the fiscal year ending June 30, 1976.

(2) $5,000,000 for the transitional fiscal quarter ending September 30, 1976.

(3) $25,000,000 for the fiscal year ending September 30, 1977.

(4) $30,000,000 for the fiscal year ending September 30, 1978.

(5) $30,000,000 for the fiscal year ending September 30, 1979.

(6) $33,000,000 for the fiscal year ending September 30, 1980.

(7) $40,000,000 for the fiscal year ending September 30, 1981.

(8) $47,000,000 for the fiscal year ending September 30, 1982.

(9) $59,000,000 for the fiscal year ending September 30, 1983.

(10) $64,000,000 for the fiscal year ending September 30, 1984.

(11) $69,000,000 for the fiscal year ending September 30, 1985.

(12) $69,000,000 for the fiscal year ending September 30, 1986.

(13) $70,800,000 for the fiscal year ending September 30, 1987.

(14) $72,900,000 for the fiscal year ending September 30, 1988.

(15) $75,000,000 for the fiscal year ending September 30, 1989.

(16) $77,200,000 for the fiscal year ending September 30, 1990.

(17) $94,000,000 for the fiscal year ending September 30, 1991, of which $6,500,000 shall be used for enforcement and $5,000,000 shall be used to increase research and assessment efforts.

(18) $98,000,000 for the fiscal year ending September 30, 1992.

(19) $102,000,000 for the fiscal year ending September 30, 1993.

23.
Endangered Species Act

ENDANGERED SPECIES ACT OF 1973

As Amended Through 1988

An Act to provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America assembled, That:

This Act may be cited as the "Endangered Species Act of 1973".

Table of Contents

Sec. 2. Findings, purposes, and policy 2
Sec. 3. Definitions 4
Sec. 4. Determination of endangered species and threatened species 8
Sec. 5. Land acquisition 19
Sec. 6. Cooperation with the States 20
Sec. 7. Interagency cooperation 27
Sec. 8. International cooperation 40
Sec. 8A. Convention implementation 42
Sec. 9. Prohibited acts 44
Sec. 10. Exceptions 49
Sec. 11. Penalties and enforcement 60
Sec. 12. Endangered plants 67
Sec. 13. Conforming amendments 67
Sec. 14. Repealer 69
Sec. 15. Authorization of appropriations 69
Sec. 16. Effective date 70
Sec. 17. Marine Mammal Protection Act of 1972 70
Sec. 18. Annual cost analysis by the Fish and Wildlife Service 70
Provision of Public Law 100-478 which did not amend the Endangered Species Act but is relevant to the National Marine Fisheries Service -- Sea Turtle Conservation 71

(PL 93-205, December 28, 1973; amended by PL 94-325, June 30, 1976; PL 94-359, July 12, 1976; PL 95-212, December 19, 1977; PL 95-632, November 10, 1978; PL 96-159, December 28, 1979; PL 97-304, October 13, 1982; PL 99-659, November 14, 1986; PL 100-478, October 7, 1988)

This copy of the Endangered Species Act is provided for information only. Before relying on any portion of the Act as it appears here, reference should be made to the official report of the Act in the United States Code.

FINDINGS, PURPOSES, AND POLICY

Sec. 2. (a) Findings.- The Congress finds and declares that -

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to -

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes.- The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species are threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy.-

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of the Act.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

DEFINITIONS

Sec. 3. For purposes of this Act -

(1) The term "**alternative courses of action**" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term "**commercial activity**" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided, however, That it does not include exhibition of commodities by museums or similar cultural or historic organizations.

(3) The terms "**conserve**," "**conserving**," and "**conservation**" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term "**Convention**" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term "**critical habitat**" for a threatened or endangered species means-

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "**endangered species**" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

(7) The term "**Federal agency**" means any department, agency, or instrumentality of the United States.

(8) The term "**fish or wildlife**" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "**foreign commerce**" includes among other things, any transaction-

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term "**import**" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) The term "**permit or license applicant**" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7 of this Act, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) of this Act to such agency action.

(12) The term "**person**" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(13) The term "**plant**" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(14) The term "**Secretary**" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(15) The term "**species**" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(16) The term "**State**" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(17) The term "**State agency**" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(18) The term "**take**" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(19) The term "**threatened species**" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(20) The term "**United States**", when used in a geographical context includes all States.

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

Sec. 4. (a) Generally.-

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970--

(A) in any case in which the Secretary of Commerce determines that such species should--

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable--

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations. -

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been--

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he

determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that--

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this Act are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of Title 5, United States Code, (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall--

(A) not less than 90 days before the effective date of the regulation--

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the cmmment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either--

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is

endangered or threatened, unless the Secretary deems that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor section 553 of Title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if--

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat,

such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists.-

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

(2) The Secretary shall-

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should-

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

(d) Protective regulations.- Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) of this Act, in the case of fish or wildlife, or section 9(a)(2) of this Act, in the case of plants,

with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases.- The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that--

(1) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(2) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(3) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.

(f) Recovery plans.-

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan--

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) Monitoring.-

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this Act are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section.

(2) The Secretary shall make prompt use of the authority under paragraph 7 of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) Agency guidelines.- publication in Federal Register; scope; proposals and amendments; notice and opportunity for comments - The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to--

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

(2) criteria for making the findings required under such subsection with respect to petitions;

(3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and

(4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition.- If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

LAND ACQUISITION

Sec. 5. (a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture.- The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary-

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a et seq.), the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661 et seq.), and the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.), as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc. - Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 4601-4 et seq.), may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

COOPERATION WITH STATES

Sec. 6. (a) Generally.- In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements.- The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 401 of the Act of June 15, 1935 (49 Stat. 383; 16 U.S.C. 715s).

(c) Cooperative agreements.-

(1) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program-

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or that under the State program-

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) of this Act or section 9(a)(1) of this Act with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this Act the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program-

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or that under the State program-

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) of this Act with respect to the taking of any resident endangered or threatened species.

(d) Allocation of funds.-

(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to subparagraph (C) of section 4(b)(3) of this Act and recovered species pursuant to section 4(g) of this Act. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of--

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this Act;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State;

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

(F) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well being of any such species; and

(G) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this Act are again necessary.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for

(A) the actions to be taken by the Secretary and the States;

(B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species;

(C) the estimated cost of these actions; and

(D) the share of such costs to be borne by the Federal Government and by the States; except that-

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

(e) Review of State programs.- Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) Conflicts between Federal and State laws.- Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively

(1) permit what is prohibited by this Act or by any regulation which implements this Act, or

(2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. This Act shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined.

(g) Transition.-

(1) For purposes of this subsection, the term "establishment period" means, with respect to any State, the period beginning on December 28, 1973, and ending on whichever of the following dates first occurs:

(A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislature of such State which commences after December 28, 1973, or

(B) the date of the close of the 15-month period following December 28, 1973.

(2) The prohibitions set forth in or authorized pursuant to sections 4(d) and 9(a)(1)(B) of this Act shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State-

(A) which is then a party to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when-

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of section 553 of title 5, United States Code, or any other provision of this Act; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) Regulations.- The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) Appropriations.-

(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration

fund under section 3 of the Act of September 2, 1937 (16 U.S.C. 669b), and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

INTERAGENCY COOPERATION

Sec. 7. (a) Federal agency actions and consultations.-

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 of this Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

(b) Opinion of Secretary.-

(1)(A) Consultation under subsection (a)(2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or,

subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that--

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of title 16, United States Code;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of title 16, United States Code, with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment.-

(1) To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources.- After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee.-

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5, United States Code.

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act (5 U.S.C. 552a), the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations.- form and contents of exemption application - Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to-

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption - report to the Committee.-

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial

review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary--

(A) determine that the Federal agency concerned and the exemption applicant have--

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5, United States Code.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subqection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption.-

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person-

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that-

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action-

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless-

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State.- violation of international treaty or other international obligation of United States - Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons.- Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major federal action - environmental impact statement.- An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): Provided, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality.-

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the precedilg qentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable.- The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review.- Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for peview. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as

provided in section 2112 of title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species.- Notwithstanding sections 4(d) and 9(a)(1)(B) and (C) of this Act, sections 1371 and 1372 of title 16, United States Code: or any regulation promulgated to implement any such section--

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas.- In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act (42 U.S.C.A. §5121 et seq.), the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act (42 U.S.C.A. §§ 5171 or 5172), and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

INTERNATIONAL COOPERATION

Sec. 8. (a) Financial assistance.- As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1306 of title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 (7 U.S.C. 1691 et seq.) or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 4 of this Act. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 15 of this Act.

(b) Encouragement of foreign programs.- In order to carry out further the provisions of this Act, the Secretary, through the Secretary of State, shall encourage-

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel.- After consultation with the Secretary of State, the Secretary may-

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations.- After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this Act.

CONVENTION IMPLEMENTATION

Sec. 8A. (a) Management Authority and Scientific Authority.- The Secretary of the Interior (hereinafter in this section referred to as the "Secretary") is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

(b) Management Authority functions.- The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

(c) Scientific Authority functions - determinations.-

(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

(2) The Secretary shall base the determinations and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) Reservations by the United States under Convention.- If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) Wildlife Preservation in Western Hemisphere.-

(1) The Secretary of the Interior (hereinafter in this subsection referred to as the "Secretary"), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the "Western Convention"). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other

agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to--

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

PROHIBITED ACTS

Sec. 9. (a) Generally.-

(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to-

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

(2) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of plants listed pursuant to section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

(b) Species held in captivity or controlled environment.-

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act: Provided, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 4 of this Act, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a)(1) of this section shall not apply to--

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i); until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements

shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention.-

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if-

(A) such fish or wildlife is not an endangered species listed pursuant to section 4 of this Act but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act.

(d) Imports and exports.-

(1) In general - It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business--

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(2) Requirements - Any person required to obtain permission under paragraph (1) of this subsection shall--

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) Regulations - The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) Restriction on consideration of value or amount of African elephant ivory imported or exported - In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.

(e) Reports.- It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 4 of this Act as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this Act or to meet the obligations of the Convention.

(f) Designation of ports.-

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 4 of this Act as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at

a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this Act and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons, if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc-4(d) of title 16, United States Code, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations.- It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

EXCEPTIONS

Sec. 10. (a) Permits.-

(1) The Secretary may permit, under such terms and conditions as he shall prescribe--

(A) any act otherwise prohibited by section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or

(B) any taking otherwise prohibited by section 9(a)(1)(B) of this Act if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies--

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that--

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions.-

(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 4 of this Act will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 9(a) of this Act to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of section 668cc-3 of title 16, United States Code; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term "undue economic hardship" shall include, but not be limited to:

(A) substantial economic loss resulting from inability caused by this Act to perform contracts with respect to

species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;

(B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this Act; or

(C) curtailment of subsistence taking made unlawful under this Act by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) Notice and review.- The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) Permit and exemption policy.- The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 2 of this Act.

(e) Alaskan natives. -

(1) Except as provided in paragraph (4) of this subsection the provisions of this Act shall not apply with respect to the taking of any endangered species or threatened species, or the

importation of any such species taken pursuant to this section, by--

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village;

if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection--

(i) The term "subsistence" includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

(ii) The term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations

and consistent with the policy of this Act. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by section 1373 of title 16, United States Code, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f) Pre-Act endangered species parts exemption; application and certification; regulation; validity of sales contract; separability of provisions; renewal of exemption; expiration of renewal certification.-

(1) As used in this subsection--

(A) The term "pre-Act endangered species part" means--

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term "scrimshaw product" means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions:

(A) The prohibition on exportation from the United States set forth in section 9(a)(1)(A) of this Act.

(B) Any prohibition set forth in section 9(a)(1)(E) or (F) of this Act.

(3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application--

(A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;

(B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;

(C) is accompanied by such documentation as the Secretary may required to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and

(D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.

(4) If the Secretary approves any application for exemption made under this subsection, he shall issue to the applicant a certificate of exemption which shall specify--

(A) any prohibition in section 9(a) of this Act which is exempted;

(B) the pre-Act endangered species parts to which the exemption applies;

(C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and

(D) any term or condition prescribed pursuant to paragraph (5)(A) or (B), or both, which the Secretary deems necessary or appropriate.

(5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. Such regulations may set forth--

(A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;

to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this Act. No regulation prescribed by the Secretary to carry out the purposes of this subsection shall be subject to section 4(f)(2)(A)(i) of this Act.

(6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under section 9(a)(1)(F) of this Act.

(B) In the event that this paragraph is held invalid, the validity of the remainder of this Act, including the remainder of this subsection, shall not be affected.

(7) Nothing in this subsection shall be construed to--

(A) exonerate any person from any act committed in violation of paragraphs (1)(A), (1)(E), or (1)(F) of section 9(a) of this Act prior to July 12, 1976; or

(B) immunize any person from prosecution for any such act.

(8)(A)(i) Any valid certificate of exemption which was renewed after October 13, 1982, and was in effect on March 31, 1988, shall be deemed to be renewed for a six-month period beginning on October 7, 1988. Any person holding such a certificate may apply to the Secretary for one additional renewal of such certificate for a period not to exceed 5 years beginning on October 7, 1988.

(NOTE - So in original. No. cl. (ii) has been enacted.)

(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the previous

certificate shall remain in effect during the period of the renewal.

(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph.

(D) No person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce, any pre-Act finished scrimshaw product unless such person holds a valid certificate of exemption issued by the Secretary under this subsection, and unless such product or the raw material for such product was held by such person on October 13, 1982.

(9) Repealed. Pub.L. 100-478, Title I, § 1011(d), Oct. 7, 1988, 102 Stat. 2314

(g) Burden of proof.- In connection with any action alleging a violation of section 9 of this Act, any person claiming the benefit of any exemption or permit under this Act shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) Certain antique articles - importation - port designation - application for return of articles.-

(1) Sections 4(d) and 9(a) and (c) of this Act do not apply to any article which--

(A) is not less than 100 years of age

(B) is composed in whole or in part of any endangered species or threatened species listed under section 4 of this Act;

(C) has not been repaired or modified with any part of any such species on or after December 28, 1973; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1)(A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1)(A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before November 10, 1978, any article described in paragraph (1) which--

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under section 4 of this Act;

(B) was forfeited to the United States before November 10, 1978, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under section 11 of this Act; and

(C) is in the custody of the United States on November 10, 1978; may, before the close of the one-year period beginning on November 10, 1978, make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this Act.

(i) Noncommercial transshipments.- Any importation into the United States of fish or wildlife shall, if--

(1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;

(2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;

(3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;

(4) the applicable requirements of the Convention have been satisfied; and

(5) such importation is not made in the course of a commercial activity,

be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act while such fish or wildlife remains in the control of the United States Customs Service.

(j) Experimental populations.-

(1) For purposes of this subsection, the term "experimental population" means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this Act, each member of an experimental population shall be treated as a threatened species; except that--

(i) solely for purposes of section 7 of this Act (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under section 4 of this Act; and

(ii) critical habitat shall not be designated under this Act for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

PENALTIES AND ENFORCEMENT

Sec. 11. (a) Civil penalties.-

(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this Act, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 9 of this Act, may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than $12,000 for each such violation. Any person who otherwise violates any provision of this Act, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than $500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of Title 5, United States Code. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction

to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this Act, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal violations.-

(1) Any person who knowingly violates any provision of this Act, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F); (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 9 of this Act shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this Act shall, upon conviction, be fined not more than $25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this Act or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this Act or any regulation, permit or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this Act, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her

family, or any other individual, from bodily harm from any endangered or threatened species.

(c) District court jurisdiction.- The several district courts of the United States, including the courts enumerated in section 460 of Title 28 shall have jurisdiction over any actions arising under this Act. For the purpose of this Act, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(d) Rewards and certain incidental expenses.- The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violation of this Act or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this Act or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this Act with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 6(d) of the Act of November 16, 1981 (16 U.S.C. 3375(d)), as penalties or fines, or from forfeitures of property, exceed $500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 6(i) of this Act.

(e) Enforcement.-

(1) The provisions of this Act and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this Act.

(2) The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this Act and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this Act may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this Act if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this Act. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this Act, as the Secretary shall by regulation prescribe.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this Act, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this Act, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to subsection (b)(1) of this section.

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the

disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as such provisions of law are applicable and not inconsistent with the provisions of this Act; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this Act, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this Act or regulation issued under authority thereof.

(f) Regulations.- The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this Act, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this Act including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this Act. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) Citizen suits.-

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 of this Act which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section--

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section--

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 6(g)(2)(B)(ii) of this Act to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the

request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class or persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

(h) Coordination with other laws.- The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this Act with the administration of the animal quarantine laws (21 U.S.C. 101-105, 111-135b, and 612-614) and section 306 of the Tariff Act of 1930 (19 U.S.C. 1306). Nothing in this Act or any amendment made by this Act shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this Act shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930 (19 U.S.C. § 1202 et seq.), including, without limitation, section 527 of that Act (19 U.S.C. 1527), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

ENDANGERED PLANTS

Sec. 12. The Secretary of the Smithsonian Institution, in conjunction with other affected agencies, is authorized and directed to review (1) species of plants which are now or may become endangered or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after December 28, 1973, the results of such review including recommendations for new legislation or the amendment of existing legislation.

CONFORMING AMENDMENTS

Sec. 13. (a) Subsection 4(c) of the Act of October 15, 1966 (80 Stat. 928, 16 U.S.C. 668dd(c)), is further amended by revising the second sentence thereof to read as follows: "With the exception of endangered species and threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973 in States wherein a cooperative agreement does not exist pursuant to section 6(c) of that Act, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system."

(b) Subsection 10(a) of the Migratory Bird Conservation Act (45 Stat. 1224, 16 U.S.C. 715i(a) and subsection 401(a) of the Act of June 15, 1935 (49 Stat. 383, 16 U.S.C. 715s(a)), are each amended by striking out "threatened with extinction" and inserting in lieu thereof the following: "listed pursuant to section 4 of the Endangered Species Act of 1973 as endangered species or threatened species,".

(c) Section 7(a)(1) of the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-9(a)(1)) is amended by striking out:

"Threatened Species. - For any national area which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction."

and inserting in lieu thereof the following:

"Endangered Species and Threatened Species. - For lands, waters, or interests therein, the acquisition of which is authorized under section 5(a) of the Endangered Species Act of 1973, needed for the purpose of conserving endangered or threatened species of fish or wildlife or plants."

(d) The first sentence of section 2 of the Act of September 28, 1962, as amended (76 Stat. 653, 16 U.S.C. 460k-1), is amended to read as follows:

"The Secretary is authorized to acquire areas of land, or interests therein, which are suitable for-

"(1) incidental fish and wildlife-oriented recreational development,

"(2) the protection of natural resources,

"(3) the conservation of endangered species or threatened species listed by the Secretary pursuant to section 4 of the Endangered Species Act of 1973, or

"(4) carrying out two or more of the purposes set forth in paragraphs (1) through (3) of this section, and are adjacent to, or within, the said conservation areas, except that the acquisition of any land or interest therein pursuant to this section shall be accomplished only with such funds as may be appropriated therefor by the Congress or donated for such purposes, but such property shall not be acquired with funds obtained from the sale of Federal migratory bird hunting stamps."

(e) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) is amended -

(1) by striking out "Endangered Species Conservation Act of 1969" in section 3(1)(B) thereof and inserting in lieu thereof the following: "Endangered Species Act of 1973';

(2) by striking out "pursuant to the Endangered Species Act of 1969" in section 101(a)(3)(B) thereof and inserting in lieu thereof the following: "or threatened species pursuant to the Endangered Species Act of 1973";

(3) by striking out "endangered under the Endangered Species Act of 1969" in section 102(b)(3) thereof and inserting in lieu thereof the following: "an endangered species or threatened species pursuant to the Endangered Species Act of 1973"; and

(4) by striking out "of the Interior such revisions of the Endangered Species List, authorized by the Endangered Species Conservation Act of 1969," in section 202(a)(6) thereof and inserting thereof the following: "such revisions of the endangered species list and threatened species list published pursuant to section 4(c)(1) of the Endangered Species Act of 1973".

(f) Section 2(l) of the Federal Environmental Pesticide Control Act of 1972 (Public Law 92-516) is amended by striking out the words "by the Secretary of the Interior under Public Law 91-135" and inserting in lieu thereof the words "or threatened by the Secretary pursuant to the Endangered Species Act of 1973".

REPEALER

Sec. 14. The Endangered Species Conservation Act of 1969 (sections 1 through 3 of the Act of October 15, 1966, and sections 1 through 6 of the Act of December 5, 1969; 16 U.S.C. 668aa-668cc-6), is repealed.

AUTHORIZATION OF APPROPRIATIONS

Sec. 15. (a) In general.- Except as provided in subsections (b), (c), and (d) of this section, there are authorized to be appropriated--

(1) not to exceed $35,000,000 for fiscal year 1988, $36,500,000 for fiscal year 1989, $38,000,000 for fiscal year 1990, $39,500,000 for fiscal year 1991, and $41,500,000 for fiscal year 1992 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

(2) not to exceed $5,750,000 for fiscal year 1988, $6,250,000 for each of fiscal years 1989 and 1990, and $6,750,000 for each of fiscal years 1991 and 1992 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act; and

(3) not to exceed $2,200,000 for fiscal year 1988, $2,400,000 for each of fiscal years 1989 and 1990, and $2,600,000 for each of fiscal years 1991 and 1992, to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the Convention which pertain to the importation or exportation of plants.

(b) Exemptions from Act.- There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under sections 7(e), (g), and (h) of this Act not to exceed $600,000 for each of fiscal years 1988, 1989, 1990, 1991, and 1992.

(c) Convention implementation.- There are authorized to be appropriated to the Department of the Interior for purposes of carrying out section 8a(e) of this Act not to exceed $400,000 for each of fiscal years 1988, 1989, and 1990, and $500,000 for each of fiscal years 1991 and 1992, and such sums shall remain available until expended.

EFFECTIVE DATE

Sec. 16. This Act shall take effect on the date of its enactment.

CONSTRUCTION WITH MARINE MAMMAL PROTECTION ACT OF 1972

Sec. 17. Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.).

ANNUAL COST ANALYSIS BY THE FISH AND WILDLIFE SERVICE

Sec. 18. On or before January 15, 1990, and each January 15 thereafter, the Secretary of the Interior, acting through the Fish and Wildlife Service, shall submit to the Congress an annual report covering the preceding fiscal year which shall contain--

(1) an accounting on a species by species basis of all reasonably identifiable Federal expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act; and

(2) an accounting on a species by species basis of all reasonably identifiable expenditures made primarily for the conservation of endangered or threatened species pursuant to this Act by States receiving grants under section 6 of this Act.

Provision of Public Law 100-478 which did not amend the Endangered Species Act but is relevant to the National Marine Fisheries Service

SEA TURTLE CONSERVATION

(a) Delay of Regulations.--The Secretary of Commerce shall delay the effective date of regulations promulgated on June 29, 1987, relating to sea turtle conservation, until May 1, 1990, in inshore areas, and until May 1, 1989, in offshore areas, with the exception that regulations already in effect in the Canaveral area of Florida shall remain in effect. The regulations for the inshore area shall go into effect beginning May 1, 1990, unless the Secretary determines that other conservation measures are proving equally effective in reducing sea turtle mortality by shrimp trawling. If the Secretary makes such a determination, the Secretary shall modify the regulations accordingly.

(b) Study.--

(1) In general.--The Secretary of Commerce shall contract for an independent review of scientific information pertaining to the conservation of each of the relevant species of sea turtles to be conducted by the National Academy of Sciences with such individuals not employed by Federal or State government other than employees of State universities and having scientific expertise and special knowledge of sea turtles and activities that may affect adversely sea turtles.

(2) Purposes of review.--The purposes of such independent review are--

(i) to further long-term conservation of each of the relevant species of sea turtles which occur in the waters of the United States;

(ii) to further knowledge of activities performed in the waters and on the shores of the United States, Mexico and other nations which adversely affect each of the relevant species of sea turtles;

(iii) to determine the relative impact which each of the activities found to be having an adverse effect on each of the relevant species of turtles has upon the status of each such species;

(iv) to assist in identifying appropriate conservation and recovery measures to address each of the activities which affect adversely each of the relevant species of sea turtles;

(v) to assist in identifying appropriate reproductive measures which will aid in the conservation of each of the relevant species of sea turtles;

(vi) in particular to assist in determining whether more or less stringent measures to reduce the drowning of sea turtles in shrimp nets are necessary and advisable to provide for the conservation of each of the relevant species of sea turtles and whether such measures should be applicable to inshore and offshore areas as well as to various geographical locations; and

(vii) to furnish information and other forms of assistance to the Secretary for his use in reviewing the status of each of the relevant species of sea turtles and in carrying out other responsibilities contained under this Act and law.

(3) Scope of review.--The terms and outlines of such independent review shall be determined by a panel to be appointed by the President of the National Academy of Sciences, except that such review shall include, at a minimum, the following information:

(i) estimates of the status, size, age structure and, where possible, sex structure of each of the relevant species of sea turtles;

(ii) the distribution and concentration, in terms of United States geographic zones, of each of the relevant species of sea turtles;

(iii) the distribution and concentration of each of the relevant species of sea turtles, in the waters of the United States, Mexico and other nations during the developmental, migratory and reproductive phases of their lives;

(iv) identification of all causes of mortality, in the waters and on the shores of the United States, Mexico and other nations for each of the relevant species of sea turtles;

(v) estimates of the magnitude and significance of each of the identified causes of turtle mortality;

(vi) estimates of the magnitude and significance of present or needed head-start or other programs designed to increase the production and population size of each of the relevant species of sea turtles;

(vii) description of the measures taken by Mexico and other nations to conserve each of the relevant species of sea turtles in their waters and on their shores, along with a description of the efforts to enforce these measures and an assessment of the success of these measures;

(viii) the identification of nesting and/or reproductive locations for each of the relevant species of sea turtles in the waters and on the shores of the United States, Mexico and other nations and measures that should be undertaken at each location as well as a description of worldwide efforts to protect such species of turtles.

(4) Completion and submission of review.--Such independent review shall be completed after an opportunity is provided for individuals with scientific and special knowledge of sea turtles and activities that may affect adversely sea turtles to present relevant information to the panel. It shall then be submitted by the Secretary, together with recommendations by the Secretary in connection therewith, to the Committee on Environment and Public Works of the United States Senate and the Committee on Merchant Marine and Fisheries of the United States House of Representatives on or before April 1, 1989. In the event the independent review cannot be completed by April 1, 1989, then the panel shall give priority to completing the independent review as it applies to the Kemp's ridley sea turtle and submitting the same to the Secretary by that date, or as expeditiously as possible, and thereafter shall complete as expeditiously as possible the remaining work of the independent review.

(5) Review of status.--After receipt of any portion of the independent eview from the panel, the Secretary shall review the status of each of the relevant species of sea turtles.

(6) Recommendations of secretary.--The Secretary, after receipt of any portion of the independent review from the panel, shall consider, along with the requirements of existing law, the following before making recommendations:

(i) reports from the panel conducting the independent review;

(ii) written views and information of interested parties;

(iii) the review of the status of each of the relevant species of sea turtles;

(iv) the relationship of any more or less stringent measures to reduce the drowning of each of the relevant

species of sea turtles in shrimp nets to the overall conservation plan for each such species;

(v) whether increased reproductive or other efforts in behalf of each of the relevant species of sea turtles would make no longer necessary and advisable present or proposed conservation regulations regarding shrimping nets;

(vi) whether certain geographical areas such as, but not limited to, inshore areas and offshore areas, should have more stringent, less stringent or different measures imposed upon them in order to reduce the drowning of each of the relevant species of sea turtles in shrimp nets;

(vii) other reliable information regarding the relationship between each of the relevant species of sea turtles and shrimp fishing and other activities in the waters of the United States, Mexico and other nations of the world; and

(viii) the need for improved cooperation among departments, agencies and entities of Federal and State government, the need for improved cooperation with other nations and the need for treaties or international agreements on a bilateral or multilateral basis.

(7) Modification of regulations.--For good cause, the Secretary may modify the regulations promulgated on June 29, 1987, relating to sea turtle conservation, in whole or part, as the Secretary deems advisable.

(8) Secretary and educational efforts.--The Secretary shall undertake an educational effort among shrimp fishermen, either directly or by contract with competent persons or entities, to instruct fishermen in the usage of the turtle excluder device or any other device which might be imposed upon such fishermen;

(9) Sea turtle coordination.--In order to coordinate the protection, conservation, reproductive, educational and recovery efforts with respect to each of the relevant species of sea turtles in accordance with existing law, the National Marine Fisheries Service shall designate an individual as Sea Turtle Coordinator to establish and carry out an effective, long-term sea turtle recovery program.

(10) Purpose of this section.--Section 8 is intended to assist the Secretary in making recommendations and in carrying out his duties under law, including the Endangered Species Act (16

U.S.C. 1531 et seq.), and nothing herein affects, modifies or alters the Secretary's powers or responsibilities to review, determine or redetermine, at any time, his obligations under law.

(11) Definitions.--For the purposes of this section, the terms:

(i) **"relevant species of sea turtles"** means the Kemp's ridley sea turtle, United States breeding populations of the loggerhead, the leatherback, and the green sea turtle, and other significant breeding populations of the loggerhead, the leatherback and the green sea turtle;

(ii) **"status"** means whether a given species of turtle is endangered, threatened or recovered;

(iii) **"size"** means the size of a given species of sea turtle; and

(iv) **"age and sex structure"** shall be considered to mean the distribution of juveniles, subadults and adults within a given species or population of sea turtles, and males and females within a given species or population of sea turtles.

(c) Authorization of Appropriations.--There are authorized to be appropriated to the Department of Commerce $1,500,000 through fiscal year 1989 to carry out this section.

24.
Marine Mammal Protection Act

Marine Mammal Protection Act of 1972

As Amended Through 1988

Marine Mammal Protection Act of 1972

As Amended Through 1988

An Act to protect marine mammals; to establish a Marine Mammal Commission; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America assembled, That:

This Act, with the following table of contents, may be cited as the "Marine Mammal Protection Act of 1972".

This copy of the Marine Mammal Protection Act is provided for information only. Before relying on any portion of the Act as it appears here, reference should be made to the official report of the Act in the United States Code.

TABLE OF CONTENTS

Sec. 2. Findings and declaration of policy. 1
Sec. 3. Definitions. 2
Sec. 4. Effective date. 5

Title I - Conservation and Protection of Marine Mammals

Sec. 101. Moratorium and exceptions. 6
Sec. 102. Prohibitions. 13
Sec. 103. Regulations on taking of marine mammals. 16
Sec. 104. Permits. 18
Sec. 105. Penalties. 28
Sec. 106. Vessel fine, cargo forfeiture, and rewards. 29
Sec. 107. Enforcement. 30
Sec. 108. International program. 32
Sec. 109. Federal cooperation with States. 35
Sec. 110. Marine mammal research grants. 44
Sec. 111. Commercial fisheries gear development. 46
Sec. 112. Regulations and administration. 47
Sec. 113. App. to other treaties and conventions. 48
Sec. 114. Interim exemption for commercial fisheries. 49
Sec. 115. Status review; conservation plans. 62
Sec. 116. Authorization of appropriations. 65

Title II - Marine Mammal Commission

Sec. 201. Establishment of Commission. 66
Sec. 202. Duties of Commission. 67
Sec. 203. Committee of Scientific Advisors. 69
Sec. 204. Commission reports. 70
Sec. 205. Coordination with other Federal agencies. 70
Sec. 206. Administration of Commission. 70
Sec. 207. Authorization of appropriations. 71

Study on Mortality of Atlantic Dolphin. 72

(The Act (PL 92-522), approved October 21, 1972, has been amended also by PL 93-205 (the Endangered Species Act), December 28, 1973; PL 94-265 (the Magnuson Fisheries Conservation and Management Act), April 13, 1976; PL 95-136, October 18, 1977; PL 95-316, July 10, 1978; PL 97-58, October 9, 1981; PL 97-389 (the Fisheries Amendments of 1982), December 29, 1982; PL 98-364, July 17, 1984; PL 99-659, November 14, 1986; and PL 100-711, November 23, 1988.)

FINDINGS AND DECLARATION OF POLICY

Sec. 2. The Congress finds that -

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent

feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

(Pub. L. 92-522, 2, Oct. 21, 1972, 86 Stat. 1027; as amended Pub. L. 97-58, 1(b)(1), Oct. 9, 1981, 95 Stat. 979. Codified at 16 U.S.C. 1361.)

(Short Title of 1988 Amendments. Pub.L. 100-711, 1, Nov. 2, 1988, 102 Stat. 4755, provided: "That this Act may be cited as the 'Marine Mammal Protection Act Amendments of 1988'.")

DEFINITIONS

Sec. 3. For the purposes of this Act -

(1) The term "**depletion**" or "**depleted**" means any case in which

(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act, determines that a species or population stock is below its optimum sustainable population;

(B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 109 of this title, determines that such species or stock is below its optimum sustainable population; or

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(2) The terms "**conservation**" and "**management**" mean the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population. Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.

(3) The term "**district court of the United States**" includes the District Court of Guam, District Court of the Virgin Islands, District Court of Puerto Rico, District Court of the Canal Zone, and, in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii.

(4) The term "**humane**" in the context of the taking of a marine mammal means that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.

(5) The term "**marine mammal**" means any mammal which -

(A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or

(B) primarily inhabits the marine environment (such as the polar bear); and, for the purposes of this Act, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.

(6) The term "**marine mammal product**" means any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.

(7) The term "**moratorium**" means a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products, except as provided in this Act.

(8) The term "**optimum sustainable population**" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

(9) The term "**person**" includes -

(A) any private person or entity, and

(B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(10) The term "**population stock**" or "**stock**" means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.

(11) The term "**Secretary**" means -

(A) the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this Act with respect to members of the order Cetacea and members, other than walruses, of the order Pinnipedia, and

(B) the Secretary of the Interior as to all responsibility, authority, funding, and duties under this Act with respect to all other marine mammals covered by this Act.

(12) The term "**take**" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

(13) The term "**United States**" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, American Samoa, Guam, and Northern Mariana Islands.

(14) The term "**waters under the jurisdiction of the United States**" means -

(A) the territorial sea of the United States, and

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

(Pub. L. 92-522, 3, Oct. 21, 1972, 86 Stat. 1028; Pub. L. 93-205, 13(e)(1), Dec. 28, 1973, 87 Stat. 903; Pub. L. 94-265, title IV, 404(a), Apr. 13, 1976, 90 Stat. 360; Pub. L. 97-58, 1(a), (b)(2), Oct. 9, 1981, 95 Stat. 979. Codified at 16 U.S.C. 1362.)

EFFECTIVE DATE

Sec 4. The provisions of the Act shall take effect upon the expiration of the sixty-day period following the date of its enactment.

(Pub. L. 92-522, 4, Oct. 21, 1972, 86 Stat. 1029. Codified in a note to 16 U.S.C. 1361. The original date of enactment of the 1972 Act was Oct. 21, 1972.)

TITLE I - CONSERVATION AND PROTECTION OF MARINE MAMMALS

MORATORIUM AND EXCEPTIONS

Sec. 101. (a) Imposition; exceptions - There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(1) Consistent with the provisions of section 104 of this title, permits may be issued by the Secretary for taking and importation for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock if -

(A) the taking proposed in the application for any such permit, or

(B) the importation proposed to be made,

is first reviewed by the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act. The Commission and Committee shall recommend any proposed taking or importation which is consistent with the purposes and policies of section 2 of this title. The Secretary shall, if he grants approval for importation, issue to the importer concerned a certificate to that effect which shall be in such form as the Secretary of the Treasury prescribes and such importation may be made upon presentation of the certificate to the customs officer concerned.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 104 of this title subject to regulations prescribed by the Secretary in accordance with section 103 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the

course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary -

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States;

(B) in the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, shall require that the government of the exporting nation provide documentary evidence that -

(i) the government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and

(ii) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such harvesting,

except that the Secretary shall not find that the regulatory program, or the average rate of incidental taking by vessels, of a harvesting nation is comparable to that of the United States for purposes of clause (i) or (ii) of this paragraph unless -

(I) the regulatory program of the harvesting nation includes, by no later than the beginning of the 1990 fishing season, such

prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities as are made applicable to United States vessels;

(II) the average rate of the incidental taking by vessels of the harvesting nation is no more than 2.0 times that of United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of United States vessels during the same period by the end of the 1990 fishing season and thereafter;

(III) the total number of eastern spinner dolphin (Stenella longirostris) incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in such year and the total number of coastal spotted dolphin (Stenella attenuata) incidentally taken by such vessels in such seasons does not exceed 2 percent of the total number of all marine mammals incidentally taken by such vessels in such year;

(IV) the rate of incidental taking of marine mammals by the vessels of the harvesting nation during the 1989 and subsequent fishing seasons is monitored by the porpoise mortality observer program of the Inter-American Tropical Tuna Commission or an equivalent international program in which the United States participates and is based upon observer coverage that is equal to that achieved for United States vessels during the same period, except that the Secretary may approve an alternative observer program if the Secretary determines, no less than sixty days after publication in the Federal Register of the Secretary's proposal and reasons therefor, that such an alternative observer program will provide sufficiently reliable documentary evidence

of the average rate of incidental taking by a harvesting nation; and

(V) the harvesting nation complies with all reasonable requests by the Secretary for cooperation in carrying out the scientific research program required by section 104(h)(3) of this title;

(C) shall require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such ban on importation to the United States; and

(D) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as such ban is in effect.

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this Act to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, 104, and 111 of this title permitting and governing such taking and importing, in accordance with such determinations: Provided, however, That the Secretary, in making such determinations must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this Act: Provided, further, however, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions

and policies of this Act. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

(B) Except for scientific research purposes or enhancing the survival or recovery of a species or stock as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

(4)(A) During any period of five consecutive years, the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice and opportunity for public comment -

(i) finds that the total of such taking during such five-year period will have a negligible impact on such species or stock; and

(ii) provides guidelines pertaining to the establishment of a cooperative system among the fishermen involved for the monitoring of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain, the permission to take marine mammals under subparagraph (A) if the Secretary finds, after notice and opportunity for public comment, that -

(i) the taking allowed under subparagraph (A) is having more than a negligible impact on the species or stock concerned; or

(ii) the policies, purposes and goals of this Act would be better served through the application of this title without regard to this subsection.

Sections 103 and 104 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(5)(A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years

each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment -

(i) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) of this section or section 109(f) of this title or, in the case of a cooperative agreement under both this Act and the Whaling Convention Act of 1949 (16 U.S.C. 916 et seq.), pursuant to section 112(c) of this title; and

(ii) prescribes regulations setting forth -

(I) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and area of similar significance, and on the availability of such species or stock for subsistence uses; and

(II) requirements pertaining to the monitoring and reporting of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that -

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 103 and 104 of this title shall not apply to the taking of marine mammals under the authority of this paragraph.

(b) Exemptions for Alaskan natives - Except as provided in section 109 of this title, the provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking -

(1) is for subsistence purposes; or

(2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing and painting; and

(3) in each case, is not accomplished in a wasteful manner.

Notwithstanding the preceding provisions of this subsection, when, under this Act, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such

regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this Act. Such regulations shall be prescribed after notice and hearing required by section 103 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.

(c) Hardship exemption - In order to minimize undue economic hardship to persons subject to this Act, other than those engaged in commercial fishing operations referred to in subsection (a)(2) of this section, the Secretary, upon any such person filing an application with him and upon filing such information as the Secretary may require showing, to his satisfaction, such hardship, may exempt such person or class of persons from provisions of this Act for no more than one year from October 21, 1972, as he determines to be appropriate.

(Pub. L. 92-522, title I, 101, Oct. 21, 1972, 86 Stat. 1029; Pub. L. 93-205, 13(e)(2), Dec. 28, 1973, 87 Stat. 903; As amended Pub. L. 97-58, 2, Oct. 9, 1981, 95 Stat. 979; As amended Pub. L. 98-364, title I, 101, July 17, 1984, 98 Stat. 440; As amended Pub.L. 99-659, Title IV, 411(a), Nov. 14, 1986, 100 Stat. 3741; Pub.L. 100-711, 4(a), 5(c), (e)(1), Nov. 23, 1988, 102 Stat. 4765, 4766, 4769, 4771. Codified at 16 U.S.C. 1371.)

(1988 Amendment. Subsec. (a)(1). Pub.L. 100-711, 5(c), substituted "Consistent with the provisions of section 104 of this title, permits" for "Permits", "research, public" for "research and for public", and added ", or enhancing the survival or recovery of a species or stock" following "public display".

Subsec. (a)(2). Pub.L. 100-711, 4(a), in subpar. (A) struck out "and" following "the United States;", and in subpar. (B) added provisions which related to finding by Secretary that regulatory program, or average rate of incidental taking by vessels, of harvesting nation is comparable to that of United States, and added subpars. (C) and (D).

Subsec. (a)(3)(B). Pub.L. 100-711, 5(e)(1), added "or enhancing the survival or recovery of a species or stock" following "scientific research purposes".)

PROHIBITIONS

Sec. 102. (a) Taking - Except as provided in sections 101, 103, 104, 109, 111, 113, and 114 of this title, it is unlawful -

(1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;

(2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party

and which was entered into before the effective date of this title or by any statute implementing any such treaty, convention, or agreement -

(A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States; or

(B) for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with the taking or importation of marine mammals or marine mammal products; and

(3) for any person, with respect to any marine mammal taken in violation of this title to possess that mammal or any product from that mammal;

(4) for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product; and

(5) for any person to use, in a commercial fishery, any means or methods of fishing in contravention of any regulations or limitations, issued by the Secretary for that fishery to achieve the purposes of this Act.

(b) Importation of pregnant or nursing mammals; depleted species or stock; inhumane taking - Except pursuant to a permit for scientific research, or for enhancing the survival or recovery of a species or stock, issued under section 104(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was -

(1) pregnant at the time of taking;

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock; or

(4) taken in a manner deemed inhumane by the Secretary.

Notwithstanding the provisions of paragraphs (1) and (2), the Secretary may issue a permit for the importation of a marine mammal, if the Secretary determines that such importation is necessary for the protection or welfare of the animal.

(c) Importation of illegally taken mammals - It is unlawful to import into the United States any of the following:

(1) Any marine mammal which was -

(A) taken in violation of this title; or

(B) taken in another country in violation of the law of that country.

(2) Any marine mammal product if -

(A) the importation into the United States of the marine mammal from which such product is made is unlawful under paragraph (1) of this subsection; or

(B) the sale in commerce of such product in the country of origin of the product is illegal;

(3) Any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.

(d) Nonapplicability of prohibitions - Subsections (b) and (c) of this section shall not apply -

(1) in the case of marine mammals or marine mammal products, as the case may be, to which subsection (b)(3) of this section applies, to such items imported into the United States before the date on which the Secretary publishes notice in the Federal Register of his proposed rulemaking with respect to the designation of the species or stock concerned as depleted; or

(2) in the case of marine mammals or marine mammal products to which subsection (c)(1)(B) or (c)(2)(B) of this section applies, to articles imported into the United States before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

(e) Retroactive effect - This Act shall not apply with respect to any marine mammal taken before the effective date of this Act, or to any

marine mammal product consisting of, or composed in whole or in part of, any marine mammal taken before such date.

(f) Commercial taking of whales - It is unlawful for any person or vessel or other conveyance to take any species of whale incident to commercial whaling in waters subject to the jurisdiction of the United States.

(Pub. L. 92-522, title I, 102, Oct. 21, 1972, 86 Stat. 1032; Pub. L. 93-205, 13(e)(3), Dec. 28, 1973, 87 Stat. 903; Pub. L. 95-136, 4, Oct. 18, 1977, 91 Stat. 1167; Pub. L. 97-58, 3(a), Oct. 9, 1981, 95 Stat. 981; Pub.L. 100-711, 2(b), 5(b), (e)(2), Nov. 23, 1988, 102 Stat. 4763, 4769, 4771. Codified at 16 U.S.C. 1372.)

(1988 Amendment. Subsec. (a). Pub.L. 100-711, 2(b), substituted "113, and 114" for "and 113".

Subsec. (b). Pub.L. 100-711, 5(b), added provisions which authorized Secretary to issue permit for importation of marine mammal. Pub.L. 100-711, 5(e)(2), substituted "research, or for enhancing the survival or recovery of a species or stock," for "research".)

REGULATIONS ON TAKING OF MARINE MAMMALS

Sec. 103. (a) Necessity and appropriateness - The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 2 of this title.

(b) Factors considered in prescribing regulations - In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations on -

(1) existing and future levels of marine mammal species and population stocks;

(2) existing international treaty and agreement obligations of the United States;

(3) the marine ecosystem and related environmental considerations;

(4) the conservation, development, and utilization of fishery resources; and

(5) the economic and technological feasibility of implementation.

(c) Allowable restrictions - The regulations prescribed under subsection (a) of this section for any species or population stock of marine mammal may include, but are not limited to, restrictions with respect to -

(1) the number of animals which may be taken or imported in any calendar year pursuant to permits issued under section 104 of this title;

(2) the age, size, or sex (or any combination of the foregoing) of animals which may be taken or imported, whether or not a quota prescribed under paragraph (1) of this subsection applies with respect to such animals;

(3) the season or other period of time within which animals may be taken or imported;

(4) the manner and locations in which animals may be taken or imported; and

(5) fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery.

(d) Procedure - Regulations prescribed to carry out this section with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing on both the Secretary's determination to waive the moratorium pursuant to section 101(a)(3)(A) of this title and on such regulations, except that, in addition to any other requirements, imposed by law with respect to agency rulemaking, the Secretary shall publish and make available to the public either before or concurrent with the Publication of notice in the Federal Register of his intention to prescribe regulations under this section -

(1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;

(2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;

(3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and

(4) any studies made by or for the Secretary or any recommendations made by or for the Secretary or the Marine Mammal Commission which relate to the establishment of such regulations.

(e) Periodic review - Any regulation prescribed pursuant to this section shall be periodically reviewed, and may be modified from time to time in such manner as the Secretary deems consistent with and necessary to carry out the purposes of this Act.

(f) Report to Congress - Within six months after the effective date of this Act and every twelve months thereafter, the Secretary shall report to the public through publication in the Federal Register and to the Congress on the current status of all marine mammal species and population stocks subject to the provisions of this Act. His report shall describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits pursuant to this title to assure the well-being of such marine mammals.

(Pub. L. 92-522, title I, 103, Oct. 21, 1972, 86 Stat. 1033. Codified at 16 U.S.C. 1373.)

PERMITS

Sec. 104. (a) Issuance - The Secretary may issue permits which authorize the taking or importation of any marine mammal.

(b) Requisite provisions - Any permit issued under this section shall -

(1) be consistent with any applicable regulation established by the Secretary under section 103 of this title, and

(2) specify -

(A) the number and kind of animals which are authorized to be taken or imported,

(B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate.

In any case in which an application for a permit cites as a reason for the proposed taking the overpopulation of a particular species or population stock, the Secretary shall first consider whether or not it would be more desirable to transplant a number of animals (but not to exceed the number requested for taking in the application) of that species or stock to a location not then inhabited by such species or stock but previously inhabited by such species or stock.

(c) Importation for display or research -

(1) Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.

(2) A permit may be issued for public display purposes only to an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary and which submits with the permit application information indicating that the applicant's facilities are open to the public on a regularly scheduled basis and that access to the facilities is not limited or restricted other than by the charging of an admission fee.

(3) A permit may be issued for scientific research purposes only to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research. No permit issued for purposes of scientific research shall authorize the killing of a marine mammal unless the applicant demonstrates that a nonlethal method for carrying out the research is not feasible. The Secretary shall not issue a permit for research which involves the lethal taking of a marine mammal from a species or stock designated as depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that

(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock; and

(ii) taking or importation is consistent

(I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)) for the species or stock, or

(II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.

(B) A permit issued in accordance with this paragraph may allow the captive maintenance of a marine mammal from a depleted species or stock only if the Secretary -

(i) determines that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;

(ii) determines that the expected benefit to the affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild; and

(iii) requires that the marine mammal or its progeny be returned to the natural habitat of the species or

stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan, or of any evaluation by the Secretary under subparagraph (A).

The Secretary may allow the public display of such a marine mammal only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.

(d) Application procedures; notice; hearing; review -

(1) The Secretary shall prescribe such procedures as are necessary to carry out this section, including the form and manner in which application for permits may be made.

(2) The Secretary shall publish notice in the Federal Register of each application made for a permit under this section. Such notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data or views, with respect to the taking or importation proposed in such application.

(3) The applicant for any permit under this section must demonstrate to the Secretary that the taking or importation of any marine mammal under such permit will be consistent with the purposes of this Act and the applicable regulations established under section 103 of this title.

(4) If within thirty days after the date of publication of notice pursuant to paragraph (2) of this subsection with respect to any application for a permit any interested party or parties request a hearing in connection therewith, the Secretary may, within sixty days following such date of publication, afford to such party or parties an opportunity for such a hearing.

(5) As soon as practicable (but not later than thirty days) after the close of the hearing or, if no hearing is held, after the last day on which data, or views, may be submitted pursuant to paragraph (2) of this subsection, the Secretary shall

(A) issue a permit containing such terms and conditions as he deems appropriate, or

(B) shall deny issuance of a permit. Notice of the decision of the Secretary to issue or to deny any permit under this para-

graph must be published in the Federal Register within ten days after the date of issuance or denial.

(6) Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to chapter 7 of title 5, United States Code, may be initiated by filing a petition for review in the United States district court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, within sixty days after the date on which such permit is issued or denied.

(e) Modification, suspension, and revocation -

(1) The Secretary may modify, suspend, or revoke in whole or in part any permit issued by him under this section -

(A) in order to make any such permit consistent with any change made after the date of issuance of such permit with respect to any applicable regulation prescribed under section 103 of this title, or

(B) in any case in which a violation of the terms and conditions of the permit is found.

(2) Whenever the Secretary shall propose any modification, suspension, or revocation of a permit under this subsection, the permittee shall be afforded opportunity, after due notice, for a hearing by the Secretary with respect to such proposed modification, suspension, or revocation. Such proposed action by the Secretary shall not take effect until a decision is issued by him after such hearing. Any action taken by the Secretary after such a hearing is subject to judicial review on the same basis as is any action taken by him with respect to a permit application under paragraph (5) of subsection (d) of this section.

(3) Notice of the modification, suspension, or revocation of any permit by the Secretary shall be published in the Federal Register within ten days from the date of the Secretary's decision.

(f) Possession of permit by issuee or his agent - Any permit issued under this section must be in the possession of the person to whom it is issued (or an agent of such person) during -

(1) the time of the authorized or taking importation;

(2) the period of any transit of such person or agent which is incident to such taking or importation; and

(3) any other time while any marine mammal taken or imported under such permit is in the possession of such person or agent.

A duplicate copy of the issued permit must be physically attached to the container, package, enclosure, or other means of containment, in which the marine mammal is placed for purposes of storage, transit, supervision, or care.

(g) Fees - The Secretary shall establish and charge a reasonable fee for permits issued under this section.

(h) General permits -

(1) Consistent with the regulations prescribed pursuant to section 103 of this title and to the requirements of section 101 of this title, the Secretary may issue general permits for the taking of such marine mammals, together with regulations to cover the use of such general permits.

(2)(A) Subject to subparagraph (B), the general permit issued under paragraph (1) on December 1, 1980 to the American Tunaboat Association is extended to authorize and govern the taking of marine mammals incidental to commercial purse seine fishing for yellowfin tuna during each year after December 31, 1984.

(B) The extension granted under subparagraph (A) is subject to the following conditions:

(i) The extension shall cease to have force and effect at the time the general permit is surrendered or terminated.

(ii) The permittee and certificate holders shall use the best marine mammal safety techniques and equipment that are economically and technologically practicable.

(iii) During the period of the extension, the terms and conditions of the general permit that are in effect on the date of the enactment of this paragraph shall apply, except that -

(I) the Secretary may make such adjustments as may be appropriate to those terms and conditions that pertain to fishing gear and fishing practice requirements and to permit administration;

(II) any such term and condition may be amended or terminated if the amendment or termination is based on the best scientific information available, including that obtained under the monitoring program required under paragraph (3)(A); and

(III) during each year of the extension, not to exceed 250 coastal spotted dolphin (Stenella attenuata) and not to exceed 2,750 eastern spinner dolphin (Stenella longirostris) may be incidentally taken under the general permit, and no accidental taking of either species is authorized at any time when incidental taking of that species is permitted.

(iv) The Secretary shall, by January 1, 1989, prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown. The Secretary may waive or otherwise modify such regulations for -

(I) a designated certificate holder on an observed trip if the Secretary determines, based on observer reports, that such restriction is not necessary because the certificate holder has consistently utilized fishing techniques and equipment so as to result in an incidental marine mammal mortality rate during sundown sets that is no higher than the average such rate for the fleet during daylight sets; or

(II) all certificate holders on observed trips if the Secretary determines that such restriction is not necessary because all cer-

tificate holders have developed and are utilizing fishing techniques and equipment that assure that the incidental marine mammal mortality rate during sundown sets will be no higher than such rate during daylight sets.

(v) The Secretary may authorize, after public notice and opportunity for comment, designated certificate holders to conduct experimental fishing operations on observed trips, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce the incidental mortality of marine mammals in the course of commercial yellowfin tuna fishing operations, and the Secretary may waive such terms and conditions of the general permit and this section, other than the quotas on incidental taking of marine mammals and the prohibition against encircling pure schools of certain species of marine mammals, as the Secretary determines to be necessary and appropriate for the conduct of such experimental fishing.

(vi) The Secretary, after public notice and opportunity for comment and consultation with the skippers' panel of experts established pursuant to the general permit, shall develop and implement by not later than the beginning of the 1990 fishing season a system of performance standards to maintain the diligence and proficiency of certificate holders in the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The system shall include such arrangements as are necessary for the identification of certificate holders whose incidental marine mammal mortality rate is consistently and substantially higher than the average rate of the fleet, and for the supplemental training and observation of such certificate holders, and provisions for suspension or revocation of certificates of inclusion of those certificate holders whose unacceptably high rate of incidental taking reflects a lack of diligence or proficiency in the use of the best marine mammal safety techniques and equipment.

(vii) It shall be unlawful to use any explosive devices other than class C explosive pest control devices in the course of commercial yellowfin tuna fishing subject to the general permit. The Secretary shall prescribe regulations, effective April 1, 1990, to prohibit or restrict the use of class C explosive pest control devices in the course of commercial yellowfin tuna fishing unless the Secretary determines, based on a study which the Secretary shall undertake, that the use of such devices does not result in physical impairment or increased mortality of marine mammals.

(viii) During the 1989 and subsequent fishing seasons, each certificated vessel shall carry on every fishing trip subject to this subsection an official observer certified by the Secretary or by the Inter-American Tropical Tuna Commission for the purpose of conducting research and observing fishing operations unless, for reasons beyond the control of the Secretary, an observer is not available for such purpose. The Secretary may waive this requirement after the 1991 fishing season and establish a less extensive observer program if the Secretary, after notice and opportunity for comment, determines that such an alternative program will provide sufficiently reliable information.

(ix) The Secretary shall annually convene meetings with representatives of conservation and environmental organizations, the commercial tuna fishing industry, and other interested persons for the purpose of discussing the results of efforts to reduce the incidental mortality and serious injury of marine mammals under this subsection as well as throughout the international fleet as a whole and developing plans for such efforts during the next year. On or before April 1, 1992, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a comprehensive report on the results of such efforts. The report shall discuss the results of the scientific research programs, performance standards, observer program, prohibition on sundown sets, development of alternative fishing techniques, and other efforts required by this section, and shall include recommendations for such action as the Secretary considers necessary and desirable to reduce

further the total mortality and serious injury of marine mammals in the course of commercial yellowfin tuna fishing throughout the international fleet.

(C) The quota on the incidental taking of coastal spotted dolphin and eastern spinner dolphin under paragraph (2)(B)(iii)(III) shall be treated -

(i) as within, and not in addition to, the overall annual quota under the general permit on the incidental taking of marine mammals; and

(ii) for purposes of paragraph (2)(B)(iii)(II), as a term of the general permit in effect on July 17, 1984.

(3)(A) The Secretary shall, commencing on January 1, 1985, undertake a scientific research program to monitor for at least five consecutive years, and periodically as necessary thereafter, the indices of abundance and trends of marine mammal population stocks which are incidentally taken in the course of commercial purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean.

(B) If the Secretary determines, on the basis of the best scientific information available (including that obtained under the monitoring program), that the incidental taking of marine mammals permitted under the general permit referred to in paragraph (2) is having a significant adverse effect on a marine mammal population stock, the Secretary shall take such action as is necessary, after notice and an opportunity for an agency hearing on the record, to modify the applicable incidental take quotas or requirements for gear and fishing practices (or both such quotas and requirements) for such fishing so as to ensure that the marine mammal population stock is not significantly adversely affected by the incidental taking.

(C) For each year after 1984, the Secretary shall include in his annual report to the public and the Congress under section 103(f) of this title a discussion of the proposed activities to be conducted each year as part of the monitoring program required by subparagraph (A).

(D) There are authorized to be appropriated to the Department of Commerce for purposes of carrying out the monitoring program required under this paragraph not to exceed

$4,000,000 for the period beginning October 1, 1984, and ending September 30, 1988.

(Pub. L. 92-522, title I, 104, Oct. 21, 1972, 86 Stat. 1034; As amended Pub. L. 98-364, title I, 102, July 17, 1984, 98 Stat. 440; Pub.L. 100-711, 4(d), 5(d), Nov. 23, 1988, 102 Stat. 4767, 4769. Codified at 16 U.S.C. 1374.)

(1988 Amendment. Subsec. (c). Pub.L. 100-711, 5(d), substituted "(1) Any permit" for "Any permit", "scientific research, public display, or enhancing the survival or recovery of a species or stock" for "display or scientific research" in two instances, and added pars. (2) to (4).

Subsec. (h)(2)(B). Pub.L. 100-711, 4(d), added cls. (iv) to (ix).)

PENALTIES

Sec. 105. (a)(1) Any person who violates any provision of this title or of any permit or regulation issued thereunder may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

(2) In any case involving an alleged unlawful importation of a marine mammal or marine mammal product, if such importation is made by an individual for his own personal or family use (which does not include importation as an accommodation to others or for sale or other commercial use), the Secretary may, in lieu of instituting a proceeding under paragraph (1), allow the individual to abandon the mammal or product, under procedures to be prescribed by the Secretary, to the enforcement officer at the port of entry.

(b) Any person who knowingly violates any provision of this title or of any permit or regulation issued thereunder shall, upon conviction, be fined not more than $20,000 for each such violation, or imprisoned for not more than one year, or both.

(Pub. L. 92-522, title I, 105, Oct. 21, 1972, 86 Stat. 1036; as amended Pub. L. 97-58, 3(b), Oct. 9, 1981, 95 Stat. 982. Codified at 16 U.S.C. 1375.)

SEIZURE AND FORFEITURE OF CARGO

Sec. 106. (a) Application of consistent provisions - Any vessel or other conveyance subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall have its entire cargo op the monetary value thereof subject to seizure and forfeiture. All provisions of law relating to the seizure, judicial forfeiture, and condemnation of cargo for violation of the customs laws, the disposition of such cargo, and the proceeds from the sale thereof, and the remission or mitigation of any such forfeiture, shall apply with respect to the cargo of any vessel or other conveyance seized in connection with the unlawful taking of a marine mammal insofar as such provisions of law are applicable and not inconsistent with the provisions of this title.

(b) Penalties - Any vessel subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall be liable for a civil penalty of not more than $25,000. Such penalty shall be assessed by the district court of the United States having jurisdiction over the vessel. Clearance of a vessel against which a penalty has been assessed, from a port of the United States, may be withheld until such penalty is paid, or until a bond or otherwise satisfactory surety is posted. Such penalty shall constitute a maritime lien on such vessel which may be recovered by action in rem in the district court of the United States having jurisdiction over the vessel.

(c) Reward for information leading to conviction - Upon the recommendation of the Secretary, the Secretary of the Treasury is authorized to pay an amount equal to one-half of the fine incurred but not to exceed $2,500 to any person who furnishes information which leads to a conviction for a violation of this title. Any officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

(Pub. L. 92-522, title I, 106, Oct. 21, 1972, 86 Stat. 1036. Codified at 16 U.S.C. 1376.)

ENFORCEMENT

Sec. 107. (a) Utilization of personnel - Except as otherwise provided in this title, the Secretary shall enforce the provisions of this title. The Secretary may utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing this title.

(b) State officers and employees - The Secretary may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this title. When so designated, such officers and employees are authorized to function as Federal law enforcement agents for these purposes, but they shall not be held and considered as employees of the United States for the purposes of any laws administered by the Director of the Office of Personnel Management.

(c) Warrants and other process for enforcement - The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process, including warrants or other process issued in admiralty proceedings in United States district courts, as may be required for enforcement of this title and any regulations issued thereunder.

(d) Execution of process; arrest; search; seizure - Any person authorized by the Secretary to enforce this title may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this title. Such a person so authorized may, in addition to any other authority conferred by law -

> (1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this title or the regulations issued thereunder;
>
> (2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this title or the regulations issued thereunder, search such vessel or conveyance and arrest such person;
>
> (3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provisions of this title or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammals products taken or retained in violation of this title or the regulations issued thereunder and shall dispose of them, in accordance with regulations prescribed by the Secretary.

(e) Disposition of seized cargo -

(1) Whenever any cargo or marine mammal or marine mammal product is seized pursuant to this section, the Secretary shall expedite any proceedings commenced under section 105(a) or (b) of this title. All marine mammals or marine mammal products or other cargo so seized shall be held by any person authorized by the Secretary pending disposition of such proceedings. The owner or consignee of any such marine mammal or marine mammal product or other cargo so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary.

(2) The Secretary may, with respect to any proceeding under section 105(a) or (b) of this title, in lieu of holding any marine mammal or marine mammal product or other cargo, permit the person concerned to post bond or other surety satisfactory to the Secretary pending the disposition of such proceeding.

(3)(A) Upon the assessment of a penalty pursuant to section 105(a) of this title, all marine mammals and marine mammal products or other cargo seized in connection therewith may be proceeded against in any court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate.

(B) Upon conviction for violation of section 105(b) of this title, all marine mammals and marine mammal products seized in connection therewith shall be forfeited to the Secretary for disposition by him in such manner as he deems appropriate. Any other property or item so seized may, at the discretion of the court, be forfeited to the United States or otherwise disposed of.

(4) If with respect to any marine mammal or marine mammal product or other cargo so seized -

(A) a civil penalty is assessed under section 105(a) of this title and no judicial action is commenced to obtain the forfeiture of such mammal or product within thirty days after such assessment, such marine mammal or marine mammal product or

other cargo shall be immediately returned to the owner or the consignee; or

(B) no conviction results from an alleged violation of section 105(b) of this title, such marine mammal or marine mammal product or other cargo shall immediately be returned to the owner or consignee if the Secretary does not, with thirty days after the final disposition of the case involving such alleged violation, commence proceedings for the assessment of a civil penalty under section 105(a) of this title.

(Note: The term "with thirty days" is as in original. Probably should be "within".)

(Pub. L. 92-522, title I, 107, Oct. 21, 1972, 86 Stat. 1037; 1978 Reorg. Plan No. 2, 102, eff. Jan. 1, 1979, 43 F.R. 36037, 92 Stat. 3783. Codified at 16 U.S.C. 1377.)

INTERNATIONAL PROGRAM

Sec. 108. (a) Duties of Secretary - The Secretary, through the Secretary of State, shall -

(1) initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of all marine mammals covered by this Act;

(2) initiate -

(A) negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which are found by the Secretary to be unduly harmful to any species or population stock of marine mammal, for the purpose of entering into bilateral and multilateral treaties with such countries to protect marine mammals, with the Secretary of State to prepare a draft agenda relating to this matter for discussion at appropriate international meetings and forums; and

(B) discussions with foreign governments whose vessels harvest yellowfin tuna with purse seines in the eastern tropical Pacific Ocean, for the purpose of concluding, through the Inter-American Tropical Tuna Commission or such other bilateral or multilateral institutions as may be appropriate, international arrangements for the conservation of marine

mammals taken incidentally in the course of harvesting such tuna, which should include provisions for

(i) cooperative research into alternative methods of locating and catching yellowfin tuna which do not involve the taking of marine mammals,

(ii) cooperative research on the status of affected marine mammal population stocks,

(iii) reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations,

(iv) limitations on incidental take levels based upon the best scientific information available, and

(v) the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable to reduce the incidental kill and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate;

(3) encourage such other agreements to promote the purposes of this Act with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of marine mammals;

(4) initiate the amendment of any existing international treaty for the protection and conservation of any species of marine mammal to which the United States is a party in order to make such treaty consistent with the purposes and policies of this Act;

(5) seek the convening of an international ministerial meeting on marine mammals before July 1, 1973, for the purposes of

(A) the negotiation of a binding international convention for the protection and conservation of all marine mammals, and

(B) the implementation of paragraph (3) of this section; and

(6) provide to the Congress by not later than one year after October 21, 1972, a full report on the results of his efforts under this section.

(b) Consultations and studies concerning North Pacific fur seals

(1) In addition to the foregoing, the Secretary shall -

(A) in consultation with the Marine Mammal Commission established by section 201 of this Act, undertake a study of the North Pacific fur seals to determine whether herds of such seals subject to the jurisdiction of the United States are presently at their optimum sustainable population and what population trends are evident; and

(B) in consultation with the Secretary of State, promptly undertake a comprehensive study of the provisions of this Act, as they relate to North Pacific fur seals, and the provisions of the North Pacific Fur Seal Convention signed on February 9, 1957, as extended (hereafter referred to in this subsection as the "Convention"), to determine what modifications, if any, should be made to the provisions of the Convention, or of this Act, or both, to make the Convention and this Act consistent with each other.

The Secretary shall complete the studies required under this paragraph not later than one year after October 21, 1972, and shall immediately provide copies thereof to Congress.

(2) If the Secretary finds -

(A) as a result of the study required under paragraph (1)(A) of this subsection, that the North Pacific fur seal herds are below their optimum sustainable population and are not trending upward toward such level, or have reached their optimum sustainable population but are commencing a downward trend, and believes the herds to be in danger of depletion; or

(B) as a result of the study required under paragraph (1)(B) of this subsection, that modifications of the Convention are desirable to make it and this Act consistent;

he shall, through the Secretary of State, immediately initiate negotiations to modify the Convention so as to

(i) reduce or halt the taking of seals to the extent required to assure that such herds attain and remain at their optimum sustainable population, or

(ii) make the Convention and this Act consistent; or both, as the case may be. If negotiations to so modify the Convention are unsuccessful, the Secretary shall, through the Secretary of State, take such steps as may be necessary to continue the existing Convention beyond its present termination date so as to continue to protect and conserve the North Pacific fur seals and to prevent a return to pelagic sealing.

(c) Description of annual results of discussions; proposals for further action - The Secretary shall include a description of the annual results of discussions initiated and conducted pursuant to subsection (a)(2)(B) of this section, as well as any proposals for further action to achieve the purposes of that subsection, in the report required under section 103(f) of this title.

(Pub. L. 92-522, title I, 108, Oct. 21, 1972, 86 Stat. 1038; As amended Pub.L. 100-711, 4(b), (c), Nov. 23, 1988, 102 Stat. 4766, 4767. Codified at 16 U.S.C. 1378.)

(1988 Amendment. Subsec. (a)(2). Pub.L. 100-711, 4(b), redesignated provisions which related to negotiations with all foreign governments engaged in commercial fishing operations found to be to any species of marine mammal as subpar. (A) and, as so redesignated, added "or population stock" following "to any species", substituted "mammals, with the" for "mammals. The", "State to prepare" for "State shall", and added "and" following "meetings and forums;", and added subpar. (B)

Subsec. (c). Pub.L. 100-711, 4(c), added subsec. (c).)

TRANSFER OF MANAGEMENT AUTHORITY

Sec. 109. (a) State enforcement of State laws or regulations prohibited without transfer to State of management authority by Secretary - No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1) of this section.

(b) Findings prerequisite to transfer of authority; State program; implementation -

(1) Subject to paragraph (2) and subsection (f) of this section, the Secretary shall transfer management authority for a species of

marine mammal to a State if the Secretary finds, after notice and opportunity for public comment, that the State has developed and will implement a program for the conservation and management of the species that -

(A) is consistent with the purposes, policies, and goals of this Act and with international treaty obligations;

(B) requires that all taking of the species be humane;

(C) does not permit the taking of the species unless and until

(i) the State has determined, under a process consistent with the standards set forth in subsection (c) of this section -

(I) that the species is at its optimum sustainable population (hereinafter in this section referred to as "OSP"), and

(II) the maximum number of animals of that species that may be taken without reducing the species below its OSP, and

(ii) the determination required under clause (i) is final and implemented under State law, and, if a cooperative allocation agreement for the species is required under subsection (d)(1) of this section, such an agreement is implemented;

(D) does not permit the taking of a number of animals of the species that exceeds the maximum number determined pursuant to subparagraph (C)(i)(II), and, in the case of taking for subsistence uses (as defined in subsection (f)(2) of this section), does not permit the taking of a number of animals that would be inconsistent with the maintenance of the species at its OSP;

(E) does not permit the taking of the species for scientific research, public display, or enhancing the survival or recovery of a species or stock, except for taking for such purposes that is undertaken by, or on behalf of, the State;

(F) provides procedures for acquiring data, and evaluating such data and other new evidence, relating to the OSP of the species, and the maximum take that would maintain the

species at that level, and, if required on the basis of such evaluation, for amending determinations under subparagraph (C)(i);

(G) provides procedures for the resolution of differences between the State and the Secretary that might arise during the development of a cooperative allocation agreement under subsection (d)(1) of this section; and

(H) provides for the submission of an annual report to the Secretary regarding the administration of the program during the reporting period.

(2) During the period between the transfer of management authority for a species to a State under paragraph (1) and the time at which the implementation requirements under paragraph (1)(C)(ii) are complied with -

(A) the State program shall not apply with respect to the taking of the species within the State for any purpose, or under any condition, provided for under section 101 of this title; and

(B) the Secretary shall continue to regulate, under this title all takings of the species within the State.

(3) After the determination required under paragraph (1)(C)(i) regarding a species is final and implemented under State law and after a cooperative allocation agreement described in subsection (d)(1) of this section, if required, is implemented for such species

(A) such determination shall be treated, for purposes of applying this title beyond the territory of the State, as a determination made in accordance with section 103 of this title and as an applicable waiver under section 101(a)(3) of this title;

(B) the Secretary shall regulate, without regard to this section other than the allocations specified under such an agreement, the taking of the species

(i) incidentally in the course of commercial fishing operations (whether provided for under section 101(a)(2) or (4) of this title), or in the course of other specified activities provided for under section 101(a)(5) of this title in the zone described in section 3(14)(B) of this title, and

(ii) for scientific research, public display, or enhancing the survival or recovery of a species or stock (other than by, or on behalf of, the State), except that any taking authorized under a permit issued pursuant to section 101(a)(1) of this title after October 9, 1981 allowing the removal of live animals from habitat within the State shall not be effective if the State agency disapproves, on or before the date of issuance of the permit, such taking as being inconsistent with the State program; and

(C) section 101(b) of this title shall not apply.

(c) Standards with which State process must comply - The State process required under subsection (b)(1)(C) of this section must comply with the following standards:

(1) The State agency with management authority for the species (hereinafter in this section referred to as the "State agency") must make an initial determination regarding the factors described in clause (i) of that subsection. The State agency must identify, and make available to the public under reasonable circumstances, the documentation supporting such initial determination. Unless request for a hearing under paragraph (2) regarding the initial determination is timely made, the initial determination shall be treated as final under State law.

(2) The State agency shall provide opportunity, at the request of any interested party, for a hearing with respect to the initial determination made by it under paragraph (1) at which interested parties may -

(A) present oral and written evidence in support of or against such determination; and

(B) cross-examine persons presenting evidence at the hearing.

The State agency must give public notice of the hearing and make available to the public within a reasonable time before commencing the hearing a list of the witnesses for the State and a general description of the documentation and other evidence that will be relied upon by such witnesses.

(3) The State agency, solely on the basis of the record developed at a hearing held pursuant to paragraph (2), must make a decision

regarding its initial determination under paragraph (1) and shall include with the record a statement of the findings and conclusions, and the reason or basis therefor, on all material issues.

(4) Opportunity for judicial review of the decision made by the State agency on the record under paragraph (3), under scope of review equivalent to that provided for in section 706(2)(A) through (E) of Title 5, United States Code, must be available under State law. The Secretary may not initiate judicial review of any such decision.

(d) Cooperative allocation agreements

(1) If the range of a species with respect to which a determination under paragraph (1)(C)(i) of subsection (b) of this section is made extends beyond the territorial waters of the State, the State agency and the Secretary (who shall first coordinate with the Marine Mammal Commission and the appropriate Regional Fishery Management Council established under section 302 of the Act of April 13, 1976 (16 U.S.C. 1852)) shall enter into a cooperative allocation agreement providing procedures for allocating, on a timely basis, such of the number of animals, as determined under paragraph (1)(C)(i)(II) of subsection (b) of this section, as may be appropriate with priority of allocation being given firstly to taking for subsistence uses in the case of the State of Alaska, and secondly to taking for purposes provided for under section 101(a) of subsection (b) this title within the zone described in section 3(14)(B) of this Act.

(2) If the State agency requests the Secretary to regulate the taking of a species to which paragraph (1) applies within the zone described in section 3(14)(B) of this title for subsistence uses or for hunting, or both, in a manner consistent with the regulation by the State agency of such taking within the State, the Secretary shall adopt, and enforce within such zone, such of the State agency's regulatory provisions as the Secretary considers to be consistent with his administration of section 101(a) of this title within such zone. The Secretary shall adopt such provisions through the issuance of regulations under section 553 of Title 5, United States Code, and with respect to such issuance the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), Executive Order Numbered 12291, dated February 17, 1981, and the thirty-day notice requirement in subsection (d) of such section 553 shall not apply. For purposes of sections 105, 106, and 107 of this title, such regulations shall be treated as having been issued under this title.

(e) Revocation of transfer of management authority -

(1) Subject to paragraph (2), the Secretary shall revoke, after opportunity for a hearing, any transfer of management authority made to a State under subsection (b)(1) of this section if the Secretary finds that the State program for the conservation and management of the species concerned is not being implemented, or is being implemented in a manner inconsistent with the provisions of this section or the provisions of the program. The Secretary shall also establish a procedure for the voluntary return by a State to the Secretary of species management authority that was previously transferred to the State under subsection (b)(1) of this section.

(2)(A) The Secretary may not revoke a transfer of management authority under paragraph (1) unless -

(i) the Secretary provides to the State a written notice of intent to revoke together with a statement, in detail, of those actions, or failures to act, on which such intent is based; and

(ii) during the ninety-day period after the date of the notice of intent to revoke -

(I) the Secretary provides opportunity for consultation between him and the State concerning such State actions or failures to act and the remedial measures that should be taken by the State, and

(II) the State does not take such remedial measures as are necessary, in the judgment of the Secretary, to bring its conservation and management program, or the administration or enforcement of the program, into compliance with the provisions of this section.

(B) When a revocation by the Secretary of a transfer of management authority to a State becomes final, or the State voluntarily returns management authority to the Secretary, the Secretary shall regulate the taking, and provide for the conservation and management, of the species within the State in accordance with the provisions of this Act (and in the case of

Alaskan Natives, section 101(b) of this title and subsection (i) of this section shall apply upon such revocation or return of management authority).

(f) Transfer of management authority to State of Alaska -

(1) The Secretary may not transfer management authority to the State of Alaska under subsection (b)(1) of this section for any species of marine mammal unless -

(A) the State has adopted and will implement a statute and regulations that insure that the taking of the species for subsistence uses -

(i) is accomplished in a nonwasteful manner,

(ii) will be the priority consumptive use of the species, and

(iii) if required to be restricted, such restriction will be based upon -

(I) the customary and direct dependence upon the species as the mainstay of livelihood,

(II) local residency, and

(III) the availability of alternative resources; and

(B) the State has adopted a statute or regulation that requires that any consumptive use of marine mammal species, other than for subsistence uses, will be authorized during a regulatory year only if the appropriate agency first makes findings, based on an administrative record before it, that -

(i) such use will have no significant adverse impact upon subsistence uses of the species, and

(ii) the regulation of such use, including, but not limited to, licensing of marine mammal hunting guides and the assignment of guiding areas, will, to the maximum extent practicable, provide economic opportunities for the residents of the rural coastal villages of Alaska who engage in subsistence uses of that species.

(2) For purposes of paragraph (1), the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of marine mammals taken for personal or family consumption; and for barter, or sharing for personal or family consumption. As used in this paragraph-

(A) The term "family" means all persons related by blood, marriage, or adoption, or any person living within a household on a permanent basis.

(B) The term "barter" means the exchange of marine mammals or their parts, taken for subsistence uses -

(i) for other wildlife or fish or their parts, or

(ii) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

(g) Environmental impact statement not required - Neither the transfer of management authority to a State under subsection (b)(1) of this section, nor the revocation or voluntary return of such authority under subsection (e) of this section, shall be deemed to be an action for which an environmental impact statement is required under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(h) Taking of marine mammals as part of official duties -

(1) Nothing in this title shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) of this title from taking, in the course of his or her duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for

(A) the protection or welfare of the mammal,

(B) the protection of the public health and welfare, or

(C) the nonlethal removal of nuisance animals.

(2) Nothing in this title shall prevent the Secretary or a person designated under section 112(c) of this title from importing a

marine mammal into the United States if such importation is necessary to render medical treatment that is not otherwise available.

(3) In any case in which it is feasible to return to its natural habitat a marine mammal taken or imported under circumstances described in this subsection, steps to achieve that result shall be taken.

(i) Regulations covering taking of marine mammals by Alaskan natives - The Secretary may (after providing notice thereof in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the affected area and providing opportunity for a hearing thereon in such area) prescribe regulations requiring the marking, tagging, and reporting of animals taken pursuant to section 101(b) of this title.

(j) Grants to develop or administer State conservation and management programs - The Secretary may make grants to States to assist them-

(1) in developing programs, to be submitted for approval under subsection (b) of this section, for the conservation and management of species of marine mammals; and

(2) in administering such programs if management authority for such species is transferred to the State under such subsection.

Grants made under this subsection may not exceed 50 per centum of the costs of developing a State program before Secretarial approval, or of administering the program thereafter.

(k) Delegation of administration and enforcement to States - The secretary is authorized and directed to enter into cooperative arrangements with the appropriate officials of any State for the delegation to such State of the administration and enforcement of this title: Provided, That any such arrangement shall contain such provisions as the Secretary deems appropriate to insure that the purposes and policies of this Act will be carried out.

(l) Authorization of appropriations

(1) There are authorized to be appropriated to the Department of the Interior, for the purposes of carrying out this section, not to exceed $400,000 for each of the fiscal years ending September 30, 1979, September 30, 1980, and September 30, 1981.

(2) There are authorized to be appropriated to the Department of Commerce, for the purposes of carrying out this section, not to exceed $225,000 for each of the fiscal years ending September 30, 1979, September 30, 1980, and September 30, 1981.

(Pub. L. 92-522, title I, 109, Oct. 21, 1972, 86 Stat. 1040; as amended Pub. L. 95-316, 1, July 10, 1978, 92 Stat. 380; Pub. L. 97-86, 4(a), Oct. 9, 1981, 95 Stat. 982; Pub.L. 100-711, 5(a), (e)(3), Nov. 23, 1988, 102 Stat. 4769, 4771. Codified at 16 U.S.C. 1379.)

(1988 Amendment. Subsec. (b)(1)(E). Pub.L. 100-711, 5(e)(3)(A), substituted "research, public display, or enhancing the survival or recovery of a species or stock" for "research and public display purposes".

Subsec. (b)(3)(B)(ii). Pub.L. 100-711, 5(e)(3)(B), substituted "research, public display, or enhancing the survival or recovery of a species or stock" for "research or public display purposes".

Subsec. (h). Pub.L. 100-711, 5(a), designated provisions which related to taking of marine mammals as part of official duties as par. (1) and, as so designated, substituted "his or her duties" for "his duties", redesignated former pars. (1) to (3) as subpars. (A) to (C), respectively, added pars. (2) and (3), and struck out provisions which related to return of mammal to its natural habitat.)

MARINE MAMMAL RESEARCH GRANTS

Sec. 110. (a) Authorization; research concerning yellowfin tuna; annual report

(1) The Secretary is authorized to make grants, or to provide financial assistance in such other form as he deems appropriate, to any Federal or State agency, public or private institution, or other person for the purpose of assisting such agency, institution, or person to undertake research in subjects which are relevant to the protection and conservation of marine mammals. In carrying out this subsection, the Secretary shall undertake a program of, and shall provide financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals. The Secretary shall include a description of the annual results of research carried out under this section in the report required under section 103(f) of this title.

(2) For purposes of identifying appropriate research into promising new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals, the Secretary shall contract for an independent review of information pertaining to

such potential alternative methods to be conducted by the National Academy of Sciences with individuals having scientific, technical, or other expertise that may be relevant to the identification of promising alternative fishing techniques. The Secretary shall request that the independent review be submitted to the Secretary on or before September 8, 1989, and the Secretary shall submit the report of the independent review, together with a proposed plan for research, development, and implementation of alternative fishing techniques, to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on or before December 5, 1989.

(b) Terms and conditions - Any grant or other financial assistance provided by the Secretary pursuant to this section shall be subject to such terms and conditions as the Secretary deems necessary to protect the interests of the United States and shall be made after review by the Marine Mammal Commission.

(c) Authorization of appropriations - There are authorized to be appropriated, for the purposes of carrying out this section, not to exceed the following sums for the following fiscal years:

(1) $2,500,000 for each of the fiscal years ending June 30, 1973, June 30, 1974, June 30, 1975, September 30, 1976, and September 30, 1977, of which one-third of the sum appropriated for any such fiscal year shall be available to the Secretary of the Interior and two-thirds of any such sum shall be available to the Secretary of Commerce.

(2) $1,200,000, all of which shall be available to the Secretary of the Interior, for the fiscal year ending September 30, 1978.

(3) $200,000, all of which shall be available to the Secretary of Commerce, for the fiscal year ending September 30, 1978.

(4)(A) $1,300,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1979.

(B) $2,700,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1979.

(5)(A) $1,500,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1980.

(B) $2,700,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1980.

(6)(A) $2,100,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1981.

(B) $2,700,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1981.

(Pub. L. 92-522, title I, 110, Oct. 21, 1972, 86 Stat. 1041; as amended Pub. L. 95-136, 1, Oct. 18, 1977, 91 Stat. 1167; Pub. L. 95-316, 2, July 10, 1978, 92 Stat. 380; Pub.L. 97-58, 5, Oct. 9, 1981, 95 Stat. 986; Pub.L. 100-711, 4(e), Nov. 23, 1988, 102 Stat. 4768. Codified at 16 U.S.C. 1380.)

(1988 Amendment. Subsec. (a). Pub.L. 100-711, 4(e), substituted "(1) The Secretary" for "The Secretary", and added par. (2).

Subsec. (a). Pub.L. 100-711, 6(1), added provisions which authorized appropriations for fiscal years 1989, 1990, 1991, 1992, and 1993.)

COMMERCIAL FISHERIES GEAR DEVELOPMENT

Sec. 111. (a) Research and development program; report to Congress; authorization of appropriations - The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following October 21, 1972, the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

(b) Reduction of level of taking of marine mammals incidental to commercial fishing operations - The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section 101(a)(2) of this title, as he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such

regulations shall be adopted pursuant to section 553 of title 5, United States Code. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

(c) Reduction of level of taking of marine mammals in tuna fishery - Additionally, the Secretary and Secretary of State are directed to commence negotiations within the Inter-American Tropical Tuna Commission in order to effect essential compliance with the regulatory provisions of this Act so as to reduce to the maximum extent feasible the incidental taking of marine mammals by vessels involved in the tuna fishery. The Secretary and Secretary of State are further directed to request the Director of Investigations of the Inter-American Tropical Tuna Commission to make recommendations to all member nations of the Commission as soon as is practicable as to the utilization of methods and gear devised under subsection (a) of this section.

(d) Research and observation - Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

(Pub. L. 92-522, title I, 111, Oct. 21, 1972, 86 Stat. 1041. Codified at 16 U.S.C. 1381.)

REGULATIONS AND ADMINISTRATION

Sec. 112. (a) Consultation with Federal agencies - The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this title.

(b) Cooperation by Federal agencies - Each Federal agency is authorized and directed to cooperate with the Secretary, in such manner as may be mutually agreeable, in carrying out the purposes of this title.

(c) Contracts, leases, and cooperative agreements - The Secretary may enter into such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes of this title and on such terms as he deems appropriate with any Federal or State agency, public or private institution, or other person.

(d) Annual review; suspension of program - The Secretary shall review annually the operation of each program in which the United States participates involving the taking of marine mammals on land. If at any time the Secretary finds that any such program cannot be administered on lands owned by the United States or in which the United States has an interest in a manner consistent with the purposes of policies of this Act, he shall suspend the operation of that program and shall include in the annual report to the public and the Congress required under section 103(f) of this title his reasons for such suspension, together with recommendations for such legislation as he deems necessary and appropriate to resolve the problem.

(Pub. L. 92-522, title I, 112, Oct. 21, 1972, 86 Stat. 1042; as amended Pub. L. 95-136, 1, Oct. 18, 1977, 91 Stat. 1167; Pub. L. 95-316, 2, July 10, 1978, 92 Stat. 380; Pub. L. 96-470, title II, 201(e), Oct. 19, 1980, 94 Stat. 2241. Codified at 16 U.S.C. 1382.)

APPLICATION TO OTHER TREATIES AND CONVENTIONS; REPEAL

Sec. 113. (a) The provisions of this title shall be deemed to be in addition to and not in contravention of the provisions of any existing international treaty, convention, or agreement, or any statute implementing the same, which may otherwise apply to the taking of marine mammals. Upon a finding by the Secretary that the provisions of any international treaty, convention, or agreement, or any statute implementing the same has been made applicable to persons subject to the provisions of this title in order to effect essential compliance with the regulatory provisions of this Act so as to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations, section 105 of this title may not apply to such persons.

(b) The proviso to the Act entitled "An Act to repeal certain laws providing for the protection of sea lions in Alaska water", approved June 16, 1934 (16 U.S.C. 659), is repealed.

(Pub. L. 92-522, title I, 113, Oct. 21, 1972, 86 Stat. 1042. Subsection (a) codified at 16 U.S.C. 1383, and subsection (b) codified at 16 U.S.C. 659.)

INTERIM EXEMPTION FOR COMMERCIAL FISHERIES

Sec. 114. (a) Effective and termination dates of preemptive provisions; law governing incidental taking of marine mammals in course of commercial yellowfin tuna fishing -

(1) During the period beginning on November 23, 1988, and ending October 1, 1993, except as provided in paragraph (2), the provisions of this section, rather than sections 101, 103, and 104 of this title, shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)). In any event it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

(2) The provisions of this section other than subsection (e)(6)(A) of this section shall not govern the incidental taking of marine mammals in the course of commercial yellowfin tuna fishing subject to section 104(h)(2) of this title.

(b) Proposed and final list of fisheries taking marine mammals; publication in Federal Register; grant of exemption; conditions; suspension of grant of exemption; administration of exemption provisions; fees -

(1) The Secretary shall, after consultation with the Marine Mammal Commission -

(A) publish in the Federal Register, for public comment, not later than sixty days after November 23, 1988, a proposed list of those fisheries, along with a statement of the marine mammals and the approximate number of vessels or persons involved in each such fishery, that have -

(i) frequent incidental taking of marine mammals;

(ii) occasional incidental taking of marine mammals; or

(iii) a remote likelihood of or no known incidental taking of marine mammals;

(B) publish in the Federal Register not later than one hundred and twenty days after November 23, 1988, a final list of the fisheries and other information required by paragraph (A), together with a summary of the provisions of this section and information sufficient to advise vessel owners on how to obtain an exemption and otherwise comply with the requirements of this section; and

(C) at least once each year thereafter, and at such other times as the Secretary considers appropriate, reexamine, based on information gathered from the program established under subsections (c), (d), (e), and (f) of this section, and other relevant sources and after notice and opportunity for public comment, the classification of fisheries and other determinations required under subparagraph (A) and publish in the Federal Register any necessary changes.

(2)(A) An exemption shall be granted by the Secretary in accordance with this section for a vessel engaged in a fishery identified under paragraph (1)(A)(i) or (ii), upon receipt by the Secretary of a completed registration form providing the name of the vessel owner, the name and description of the vessel, the fisheries in which it will be engaged, and such other information as the Secretary considers necessary. A decal or other physical evidence that the exemption is current and valid shall be issued by the Secretary at the time an exemption is granted, and so long as the exemption remains current and valid, shall be reissued annually thereafter.

(B) No exemption may be granted under this section to the owner of a vessel unless such vessel -

(i) is a vessel of the United States; or

(ii) has a valid fishing permit issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

(C) Notwithstanding any other provision of this title, exemptions granted under this section shall authorize the incidental taking of marine mammals, other than California sea otters, from any species or stock, including a population stock desig-

nated as depleted, but shall not authorize the intentional lethal taking of any Steller sea lion, any cetacean, or any marine mammals from a population stock designated as depleted.

(3)(A) Beginning two hundred and forty days after November 23, 1988, each owner of a vessel engaged in any fishery identified under paragraph (1)(A)(i) or (ii) shall, in order to engage lawfully in that fishery -

(i) have registered with the Secretary in order to obtain for each such vessel owned an exemption for the purpose of incidentally taking marine mammals in accordance with this section;

(ii) ensure that a decal or such other physical evidence of a current and valid exemption as the Secretary may require is displayed on or is in the possession of the master of each such vessel; and

(iii) report as required by subsection (c) of this section.

(B) Any owner of a vessel receiving an exemption under this section for any fishery identified under paragraph (1)(A)(i) shall, as a condition of that exemption, take on board a natural resource observer if requested to do so by the Secretary.

(C) An owner of a vessel engaged in a fishery identified under paragraph (1)(A)(i) or (ii) who -

(i) fails to obtain from the Secretary an exemption under this section;

(ii) fails to maintain a current and valid exemption; or

(iii) fails to ensure that a decal or other physical evidence of such exemption issued by the Secretary is displayed on or is in possession of the master of the vessel,

and the master of any such vessel engaged in such fishery, shall be deemed to have violated this title, and shall be subject to the penalties of this title except in the case of unknowing violations before January 1, 1990.

(D) If the owner of a vessel has obtained and maintains a current and valid exemption from the Secretary under this

section and meets the requirements set forth in this section, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the exemption applies.

(E) Each owner of a vessel engaged in any fishery not identified in paragraph (1)(A)(i) or (ii), and the master and crew members of such a vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals if such owner reports to the Secretary, in such form and manner as the Secretary may require, instances of lethal incidental taking in the course of that fishery.

(4) The Secretary shall suspend or revoke an exemption granted under this section and shall not issue a decal or other physical evidence of the exemption for any vessel until the owner of such vessel complies with the reporting requirements under subsection (c) of this section and such requirements to take on board a natural resource observer under paragraph (3)(B) as are applicable to such vessel.

(5)(A) The Secretary shall develop, in consultation with the appropriate States, Regional Fishery Management Councils, and other interested parties, the means by which the granting and administration of exemptions under this section shall be integrated and coordinated, to the maximum extent practicable, with existing fishery licenses, registrations, and related programs.

(B) The Secretary shall utilize newspapers of general circulation, fishery trade associations, electronic media, and other means of advising commercial fishermen of the provisions of this section and the means by which they can comply with its requirements.

(C) The Secretary is authorized to charge a fee for the granting of an exemption under this subsection. The level of fees charged under this subparagraph shall not exceed the administrative costs incurred in granting an exemption. Fees collected under this subparagraph shall be available to the Under Secretary of Commerce for Oceans and Atmosphere for expenses incurred in the granting and administration of exemptions under this section.

(c) Compilation of information by vessel owners; contents - The owner of each vessel holding an exemption granted under subsection (b) of this section shall regularly compile information which shall be used in a report to be submitted to the Secretary at the close of the fishing season or annually, as the Secretary may prescribe. Such report shall be submitted in such form as the Secretary may require and shall include the following:

(1) the type of fishery engaged in by the owner's vessel;

(2) the date and approximate time of any incidental taking of a marine mammal, together with the area in which the incidental taking occurred, the fishing gear used at the time of the incidental taking, and the species of fish involved; and

(3) for each incidental taking, the number and species of marine mammals involved, whether the marine mammals were deterred from gear or catch, incidentally injured, incidentally killed, or lethally removed to protect gear, catch, or human life.

If there was no incidental taking of marine mammals during the reporting period, a report stating that fact shall be filed with the Secretary.

(d) Program for enhancement and verification of information received from vessel owners; confidentiality of information -

(1) The Secretary shall establish a program to enhance the qualify of and verify information received from reports submitted by owners of vessels who have been granted an exemption under subsection (b) of this section. The program shall include, but not be limited to -

(A) education efforts regarding the information that must be submitted;

(B) interviews with fishermen; and

(C) other such information gathering and verification activities that will enable the Secretary to determine reliably the nature, type, and extent of the incidental taking of marine mammals that occurs in a fishery.

Except to the extent authorized by the provisions of subsection (e) of this section, the program shall not include placement of observers aboard exempted vessels.

(2) Information obtained under this subsection shall be subject to the confidentiality provisions of subsection (j) of this section.

(e) Observers on board exempted vessels; confidentiality of information; authorization of appropriations -

(1) For each fishery identified under subsection (b)(1)(A)(i) of this section, the Secretary shall, after consultation with the appropriate Regional Fishery Management Councils, other Federal and State agencies, and other interested parties, and subject to paragraph (6), place observers on board exempted vessels so as to monitor not less than 20 percent nor more than 35 percent of the fishing operations by vessels in the fishery to obtain statistically reliable information on the species and number of marine mammals incidentally taken in the fishery. If the Secretary determines that fewer than 20 percent of the fishing operations by vessels in the fishery will be monitored during the course of the fishing season, the Secretary shall implement the alternative observation program described in subsection (f) of this section to the extent necessary to supplement the observer program described in this subsection.

(2) When determining the distribution of observers among fisheries and between vessels in a particular fishery, the Secretary shall be guided by the following standards:

(A) the requirement to obtain the best scientific information available;

(B) the requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery;

(C) consistent with paragraph (1), the requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage; and

(D) where practicable, the need to minimize costs and avoid duplication.

(3) If the Secretary finds that, for reasons beyond his or her control, the Secretary cannot assign observers to all the fisheries identified under subsection (b)(1)(A)(i) of this section at the level of observer coverage set forth in paragraph (1), the Secretary shall allocate available observers among such fisheries, consistent with paragraph (2), according to the following priority:

(A) those fisheries that incidentally take marine mammals from any population stock designated as depleted;

(B) those fisheries that incidentally take marine mammals from population stocks that the Secretary believes are declining;

(C) those fisheries other than those described in subparagraphs (A) and (B) in which the greatest incidental take of marine mammals occur; and

(D) any other fishery identified under subsection (b)(1)(A)(i) of this section.

The Secretary may, with the consent of the vessel owner, station an observer on board a vessel engaged in a fishery not identified under subsection (b)(1)(A)(i) of this section.

(4) Information gathered by observers shall be subject to the provisions of subsection (j) of this section. Consistent with the requirements of paragraph (1), the Secretary shall, if requested by the Appropriate Regional Fishery Management Council, or in the case of a State fishery, the State, require observers to collect additional information, including but not limited to the quantities, species, and physical condition of target and non-target fishery resources and, if requested by the Secretary of the Interior, seabirds.

(5) Notwithstanding the provisions of paragraph (4), the Secretary may decline to require observers to collect information described in such paragraph, if the Secretary finds in writing, following public notice and opportunity for comment, that such information will not contribute to the protection of marine mammals or the understanding of the marine ecosystem, including fishery resources and seabirds.

(6) The Secretary shall not be required to place an observer on a vessel in a fishery if the Secretary finds that -

(A) in a situation where harvesting vessels are delivering fish to a processing vessel and the catch is not taken on board the harvesting vessel, statistically reliable information can be obtained from an observer on board the processing vessel to which the fish are delivered;

(B) the facilities of a vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; or

(C) for reasons beyond the control of the Secretary, an observer is not available.

(7)(A) An observer on a vessel (or the observer's personal representative) under the requirements of this section or section 104 of this title that is ill, disabled, injured, or killed from service as an observer on that vessel may not bring a civil action under any law of the United States for that illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought against the vessel owner for the owner's willful misconduct.

(B) This paragraph does not apply if the observer is engaged by the owner, master, or individual in charge of a vessel to perform any duties in service to the vessel.

(8) There are authorized to be appropriated to the Department of Commerce for the purposes of carrying out this subsection not to exceed $2,700,000 for fiscal year 1989 and not to exceed $8,000,000 for each of the fiscal years 1990, 1991, 1992, and 1993.

(f) Alternative observation program -

(1) The Secretary shall establish an alternative observation program to provide statistically reliable information on the species and number of marine mammals incidentally taken in those fisheries identified pursuant to subsection (b)(1)(A)(i) of this section for which the required level of observer coverage has not been met or for any other fisheries about which such reliable information is not otherwise available. The alternative program shall include, but not be limited to, direct observation of fishing activities from vessels, airplanes, or points on shore.

(2) Individuals engaged in the alternative observation program shall collect scientific information on the fisheries subject to observation, consistent with the requirements of paragraph (1) and subsection (e)(4) and (5) of this section. All information collected shall be subject to the provisions of subsection (j) of this section.

(g) Review of information and evaluation of effects of incidental taking on population stocks of marine mammals; promulgation of emergency regulations to mitigate immediate and severe impacts; action to mitigate non-immediate impacts -

(1) The Secretary shall review information regarding the incidental taking of marine mammals and evaluate the effects of such incidental taking on the affected population stocks of marine mammals.

(2) If the Secretary finds, based on the information received from the programs established under subsections (c), (d), (e), and (f) of this section, that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population stock or, in the case of Steller sea lions and North Pacific fur seals, that more than 1,350 and 50, respectively, will be incidentally killed during a calendar year, the Secretary shall consult with appropriate Regional Fishery Management Councils and State fishery managers and prescribe emergency regulations to prevent to the maximum extent practicable any further taking. Any emergency regulations prescribed under this paragraph

(A) shall, to the maximum extent practicable, avoid interfering with existing State or regional fishery management plans;

(B) shall be published in the Federal Register together with the reasons therefor;

(C) shall remain in effect for not more than one hundred and eighty days or until the end of the fishing season, whichever is earlier; and

(D) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination if the Secretary determines the reasons for the emergency regulations no longer exist.

In prescribing emergency regulations under this paragraph, the Secretary shall take into account the economics of the fishery concerned and the availability of existing technology to prevent or minimize incidental taking of marine mammals.

(3) If the Secretary finds, based on information received from the programs established under subsections (c), (d), (e), and (f) of this section, that incidental taking of marine mammals in a fishery

is not having an immediate and significant adverse impact on a marine mammal population stock but that it will likely have a significant adverse impact over a period of time longer than one year, the Secretary shall request the appropriate Regional Fishery Management Council or State to initiate, recommend, or take such action within its authority as it considers necessary to mitigate the adverse impacts, including adjustments to requirements on fishing times or areas or the imposition of restrictions on the use of vessels or gear.

(4) The Secretary shall impose appropriate conditions and restrictions on an exemption granted under subsection (b) of this section if -

(A) a Regional Fishery Management Council or State does not act in a reasonable period of time on a request made by the Secretary under paragraph (3); or

(B) if the Secretary determines after notice and opportunity for public comment that the purposes of this section would be better served by such action.

(h) Information and management system for processing and analyzing reports and information; accessibility to public - The Secretary shall design and implement an information management system capable of processing and analyzing reports received from the programs established under subsections (c), (d), (e), and (f) of this section, and other relevant sources, including Federal and State enforcement authorities, marine mammal stranding networks, and the marine mammal researchers. The information shall be made accessible to the public on a continuing basis, but in any case no later than six months after it is received, subject to the provisions of subsection (j) of this section.

(i) Utilization of services of State and Federal agencies and private entities - When carrying out the Secretary's responsibilities under subsections (b), (d), (e), (f), and (h) of this section, the Secretary shall, to the maximum extent practicable, utilize the services and programs of State agencies, Federal agencies (including programs established by Regional Fishery Management Councils), marine fisheries commissions, universities, and private entities, on a reimbursable basis or otherwise. The Secretary is authorized to enter into contracts and agreements to carry out his or her responsibilities and shall establish appropriate guidelines to ensure that other programs used or contracted for will meet the same standards as a program established by the Secretary. A person contracting with the Secretary to provide observer services under subsection (e) of this section must provide evidence of financial respon-

sibility in an amount and form prescribed by the Secretary to compensate employees (or their survivors) adequately for any illness, disability, injury, or death from service on a vessel.

(j) Confidentiality of information; exceptions -

(1) Any information collected under subsection (c), (d), (e), (f), or (h) of this section shall be confidential and shall not be disclosed except -

(A) to Federal employees whose duties require access to such information;

(B) to State employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

(C) when required by court order; or

(D) in the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

(2) The Secretary shall prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary shall release or make public any such information in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person.

(k) Regulations - The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as necessary and appropriate to carry out the purposes of this section.

(l) Suggested regime governing incidental taking of marine mammals following termination of interim exemptions -

(1) The Chairman of the Marine Mammal Commission shall, after consultation with interested parties and not later than February 1, 1990, transmit to the Secretary and make available to the public recommended guidelines to govern the incidental taking of marine mammals in the course of commercial fishing operations, other than those subject to section 104(h)(2) of this title, after October 1, 1993. Such guidelines shall be developed

by the Commission and its Committee of Scientific Advisers on Marine Mammals and shall -

(A) be designed to provide a scientific rationale and basis for determining how many marine mammals may be incidentally taken under a regime to be adopted to govern such taking after October 1, 1993;

(B) be based on sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies set forth in this Act; and

(C) to the maximum extent practicable, include as factors to be considered and utilized in determining permissible levels of such taking -

(i) the status and trends of the affected marine mammal population stocks;

(ii) the abundance and annual net recruitment of such stocks;

(iii) the level of confidence in the knowledge of the affected stocks; and

(iv) the extent to which incidental taking will likely cause or contribute to their decline or prevent their recovery to optimum sustainable population levels.

(2) The Secretary shall advise the Chairman of the Commission in writing if the Secretary determines that any additional information or explanation of the Chairman's recommendations is needed, and the Chairman shall respond in writing to any such request by the Secretary.

(3) On or before February 1, 1991, the Secretary, after consultation with the Marine Mammal Commission, Regional Fishery Management Councils, and other interested governmental and nongovernmental organizations, shall publish in the Federal Register, for public comment, the suggested regime that the Secretary considers should, if authorized by enactment of any additional legislation, govern incidental taking of marine mammals, other than those subject to section 104(h)(2) of this title, after October 1, 1993. The suggested regime shall include -

(A) the scientific guidelines to be used in determining permissible levels of incidental taking;

(B) a description of the arrangements for consultation and cooperation with other Federal agencies, the appropriate Regional Fishery Management Councils and States, the commercial fishing industry, and conservation organizations; and

(C) a summary of such regulations and legislation as would be necessary to implement the suggested regime.

(4) On or before January 1, 1992, the Secretary, after consultation with the Marine Mammal Commission, and consideration of public comment, shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives recommendations pertaining to the incidental taking of marine mammals, other than those subject to section 104(h)(2) of this title, after October 1, 1993. The recommendations shall include

(A) the suggested regime developed under paragraph (3) of this subsection as modified after comment and consultations;

(B) a proposed schedule for implementing the suggested regime; and

(C) such recommendations for additional legislation as the Secretary considers necessary or desirable to implement the suggested regime.

(m) Consultation with Secretary of Interior - The Secretary shall consult with the Secretary of the Interior prior to taking actions or making determinations under this section that affect or relate to species or population stocks of marine mammals for which the Secretary of the Interior is responsible under this Act.

(n) Owner of fixed commercial fishing gear deemed owner of vessel engaged in fishery in which gear deployed - For the purposes of this section, the owner of fixed or other commercial fishing gear that is deployed with or without the use of a vessel shall be deemed to be an owner of a vessel engaged in the fishery in which that gear is deployed.

(o) Definitions - As used in this section -

(1) the term "**fishery**" has the same meaning as it does in section 3(8) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(8)).

(2) the term "**Secretary**" means the Secretary of Commerce.

(3) the term "**vessel engaged in a fishery**" means a fishing vessel as defined in section 2101(11a) of Title 46, United States Code, or a fish processing vessel as defined in section 2101(11b) of that title, which is engaged in fishery.

(4) the term "vessel of the United States" has the same meaning as it does in section 3(27) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(27)).

(Pub.L. 92-522, Title I, 114, as added Pub.L. 100-711, 2(a)(2), Nov. 23, 1988, 102 Stat. 4755. Codified at 16 U.S.C. 1383a.)

STATUS REVIEW; CONSERVATION PLANS

Sec. 115. (a) Determinations by rule; notice and hearing; findings; final rule on status of species or stock involved -

(1) In any action by the Secretary to determine if a species or stock should be designated as depleted, or should no longer be designated as depleted, regardless of whether such action is taken on the initiative of the Secretary or in response to a petition for a status review, the Secretary shall only make such a determination by issuance of a rule, after notice and opportunity for public comment and after a call for information in accordance with paragraph (2).

(2) The Secretary shall make any determination described in paragraph (1) solely on the basis of the best scientific information available. Prior to the issuance of a proposed rule concerning any such determination, the Secretary shall publish in the Federal Register a call to assist the Secretary in obtaining scientific information from individuals and organizations concerned with the conservation of marine mammals, from persons in any industry which might be affected by the determination, and from academic institutions. In addition, the Secretary shall utilize, to the extent the Secretary determines to be feasible, informal working groups of interested parties and other methods to gather the necessary information.

(3)(A) If the Secretary receives a petition for a status review as described in paragraph (1), the Secretary shall publish a notice in the Federal Register that such a petition has been received and is available for public review.

(B) Within sixty days after receipt of the petition, the Secretary shall publish a finding in the Federal Register as to whether the petition presents substantial information indicating that the petitioned action may be warranted.

(C) If the Secretary makes a positive finding under subparagraph (B), the Secretary shall include in the Federal Register notice, a finding that -

(i) a review of the status of the species or stock will be commenced promptly; or

(ii) a prompt review of the petition is precluded by other pending status determination petitions and that expeditious progress is being made to process pending status determination petitions under this title.

In no case after making a finding under this subparagraph shall the Secretary delay commencing a review of the status of a species or stock for more than one hundred and twenty days after receipt of the petition.

(D) No later than two hundred and ten days after the receipt of the petition, the Secretary shall publish in the Federal Register a proposed rule as to the status of the species or stock, along with the reasons underlying the proposed status determination. Persons shall have at least sixty days to submit comments on such a proposed rule.

(E) Not later than ninety days after the close of the comment period on a proposed rule issued under subparagraph (D), the Secretary shall issue a final rule on the status of the species or stock involved, along with the reasons for the status determination. If the Secretary finds with respect to such a proposed rule that there is substantial disagreement regarding the sufficiency or accuracy of the available information relevant to a status determination, the Secretary may delay the issuance of a final rule for a period of not more than six months for purposes of soliciting additional information.

(F) Notwithstanding subparagraphs (D) and (E) of this paragraph and section 553 of title 5, United States Code, the Secretary may issue a final rule as to the status of a species or stock any time sixty or more days after a positive finding under subparagraph (B) if the Secretary determines there is substantial information available to warrant such final status determination and further delay would pose a significant risk to the well-being of any species or stock. Along with the final rule, the Secretary shall publish in the Federal Register detailed reasons for the expedited determination.

(b) Conservation plans; preparation and implementation -

(1) The Secretary shall prepare conservation plans -

(A) By December 31, 1989, for North Pacific fur seals;

(B) by December 31, 1990, for Steller sea lions; and

(C) as soon as possible, for any species or stock designated as depleted under this title, except that a conservation plan need not be prepared if the Secretary determines that it will not promote the conservation of the species or stock.

(2) Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population. The Secretary shall model such plans on recovery plans required under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)).

(3) The Secretary shall act expeditiously to implement each conservation plan prepared under paragraph (1). Each year, the Secretary shall specify in the annual report prepared under section 103(f) of this title what measures have been taken to prepare and implement such plans.

(Pub.L. 92-522, Title I, 115, as added Pub.L. 100-711, 3, Nov. 23, 1988, 102 Stat. 4763. Codified at 16 U.S.C. 1383b.)

AUTHORIZATION OF APPROPRIATIONS

Sec. 116. (a) Department of Commerce - There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under this title (other than section 104(h)(3) of this title), $7,223,000 for fiscal year 1982, $8,000,000 for fiscal year 1983, and $8,800,000 for each of fiscal years 1984, 1985, 1986, 1987, and 1988. There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under this title (other than section 114(e)(8) of this title), $12,250,000 for fiscal year 1989, $12,740,000 for fiscal year 1990, $13,250,000 for fiscal year 1991, $13,780,000 for fiscal year 1992, and $14,331,000 for fiscal year 1993.

(b) Department of Interior - There are authorized to be appropriated to the Department of the Interior, for purposes of carrying out such functions and responsibilities as it may have been given under this title, $1,600,000 for fiscal year 1982, $1,760,000 for fiscal year 1983, $2,000,000 for fiscal year 1984, $2,500,000 for fiscal year 1985, $3,000,000 for each of fiscal years 1986, 1987, 1988, and 1989, $3,120,000 for fiscal year 1990, $3,240,000 for fiscal year 1991, $3,370,000 for fiscal year 1992, and $3,500,000 for fiscal year 1993.

(Pub. L. 92-522, title I, 114, Oct. 21, 1972, 86 Stat. 1043; as amended Pub. L. 95-136, 2, Oct. 18, 1977, 91 Stat. 1167; Pub. L. 95-316, 3, July 10, 1978, 92 Stat. 380; Pub. L. 97-58, 7(a), (b), Oct. 9, 1981, 95 Stat. 987; Pub. L. 98-364, title I, 104(1), (2), July 17, 1984, 98 Stat. 442; Pub.L. 100-711, 6(1), (2), Nov. 23, 1988, 102 Stat. 4771. Codified at 14 U.S.C. 1384.)

(Subsec. (b). Pub.L. 100-711, 6(2), struck out "and" following "fiscal year 1985,", and substituted "1988, and 1989, $3,120,000 for fiscal year 1990, $3,240,000 for fiscal year 1991, $3,370,000 for fiscal year 1992, and $3,500,000 for fiscal year 1993" for "and 1988".)

(Prior Provisions. A prior section 116, Pub.L. 92-522, Title I, 116, formerly 114, Oct. 21, 1972, 86 Stat. 1043; Pub.L. 95-136, 2, Oct. 18, 1977, 91 Stat. 1167; Pub.L. 95-316, 3, July 10, 1978, 92 Stat. 380, renumbered Pub.L. 100-711, 2(a)(1), Nov. 23, 1988, 102 Stat. 4755, authorized appropriations for the Department of Commerce and for the Department of the Interior to carry out such functions and responsibilities as they might have been given under this title through the fiscal year ending Sept. 30, 1981.)

TITLE II - MARINE MAMMAL COMMISSION

ESTABLISHMENT OF COMMISSION

Sec. 201. (a) Designation - There is hereby established the Marine Mammal Commission (hereafter referred to in this title as the "Commission").

(b) Membership and term of office -

(1) Effective September 1, 1982, the Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate. The President shall make his selection from a list of individuals knowledgeable in the fields of marine ecology and resource management, and who are not in a position to profit from the taking of marine mammals. Such list shall be submitted to him by the Chairman of the Council on Environmental Quality and unanimously agreed to by that Chairman, the Secretary of the Smithsonian Institution, the Director of the National Science Foundation and the Chairman of the National Academy of Sciences. No member of the Commission may, during his period of service on the Commission, hold any other position as an officer or employee of the United States except as a retired officer or retired civilian employee of the United States.

(2) The term of office for each member shall be three years; except that of the members initially appointed to the Commission, the term of one member shall be for one year, the term of one member shall be for two years, and the term of one member shall be for three years. No member is eligible for reappointment; except that any member appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed (A) shall be appointed for the remainder of such term, and (B) is eligible for reappointment for one full term. A member may serve after the expiration of his term until his successor has taken office.

(c) Chairman - The President shall designate a Chairman of the Commission (hereafter referred to in this title as the "Chairman") from among its members.

(d) Compensation; reimbursement for travel expenses - Members of the Commission shall each be compensated at a rate equal to the daily equivalent of the rate for GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day such member is engaged in the actual performance of duties vested in the Commission. Each member shall be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in Government service employed intermittently.

(e) Executive Director - The Commission shall have an Executive Director, who shall be appointed (without regard to the provisions of title 5 governing appointments in the competitive service) by the Chairman with the approval of the Commission and shall be paid at a rate not in excess of the rate for GS-18 of the General Schedule under section 5332 of title 5, United States Code. The Executive Director shall have such duties as the Chairman may assign.

(Pub. L. 92-522, title II, 201, Oct. 21, 1972, 86 Stat. 1043; As amended Pub. L. 97-389, Title II, 202, Dec. 29, 1982, 96 Stat. 1951; Pub. L. 98-364, title I, 103(a), July 17, 1984, 98 Stat. 441. Codified at 16 U.S.C. 1401.)

DUTIES OF COMMISSION

Sec. 202.(a) Reports and recommendations - The Commission shall -

(1) undertake a review and study of the activities of the United States pursuant to existing laws and international conventions relating to marine mammals, including, but not limited to, the International Convention for the Regulation of Whaling, the Whaling Convention Act of 1949 (16 U.S.C. 916 et seq.), the Interim Convention on the Conservation of North Pacific Fur Seals, and the Fur Seal Act of 1966 (16 U.S.C. 1151 et seq.);

(2) conduct a continuing review of the condition of the stocks of marine mammals, of methods for their protection and conservation, of humane means of taking marine mammals, of research programs conducted or proposed to be conducted under the authority of this Act, and of all applications for permits for scientific research, public display, or enhancing the survival or recovery of a species or stock;

(3) undertake or cause to be undertaken such other studies as it deems necessary or desirable in connection with its assigned duties as to the protection and conservation of marine mammals;

(4) recommend to the Secretary and to other Federal officials such steps as it deems necessary or desirable for the protection and conservation of marine mammals;

(5) recommend to the Secretary of State appropriate policies regarding existing international arrangements for the protection and conservation of marine mammals, and suggest appropriate international arrangements for the protection and conservation of marine mammals;

(6) recommend to the Secretary such revisions of the endangered species list and threatened species list published pursuant to section 4(c)(1) of the Endangered Species Act of 1973 (16 U.S.C. 1533(c)(1)), as may be appropriate with regard to marine mammals; and

(7) recommend to the Secretary, other appropriate Federal officials, and Congress such additional measures as it deems necessary or desirable to further the policies of this Act, including provisions for the protection of the Indians, Eskimos, and Aleuts whose livelihood may be adversely affected by actions taken pursuant to this Act.

(b) Consultation with Secretary; reports to Secretary before publication. The Commission shall consult with the Secretary at such intervals as it or he may deem desirable, and shall provide each annual report required under section 204 of this title, before submission to Congress, to the Secretary for comment.

(c) Availability of reports for public inspection - The reports and recommendations which the Commission makes shall be matters of public record and shall be available to the public at all reasonable times. All other activities of the Commission shall be matters of public record and available to the public in accordance with the provisions of section 552 of title 5, United States Code.

(d) Recommendations; explanation for non-adoption - Any recommendations made by the Commission to the Secretary and other Federal officials shall be responded to by those individuals within one hundred and twenty days after receipt thereof. Any recommendations which are not followed or adopted shall be referred to the Commission together

with a detailed explanation of the reasons why those recommendations were not followed or adopted.

(Pub. L. 92-522, title II, 202, Oct. 21, 1972, 86 Stat. 1044; Pub. L. 93-205, 13(e)(4), Dec. 28, 1973, 87 Stat. 903; Pub. L. 97-58, 6(1), Oct. 9, 1981, 95 Stat. 987; Pub.L. 100-711, 5(e)(4), Nov. 23, 1988, 102 Stat. 4771. Codified at 16 U.S.C. 1402.)

(1988 Amendment. Subsec. (a)(2). Pub.L. 100-711, 5(e)(4), added ", public display, or enhancing the survival or recovery of a species or stock" following "for scientific research".)

COMMITTEE OF SCIENTIFIC ADVISORS ON MARINE MAMMALS

Sec. 203. (a) Establishment; membership - The Commission shall establish, within ninety days after its establishment, a Committee of Scientific Advisors on Marine Mammals (hereafter referred to in this title as the "Committee"). Such Committee shall consist of nine scientists knowledgeable in marine ecology and marine mammal affairs appointed by the Chairman after consultation with the Chairman of the Council on Environmental Quality, the Secretary of the Smithsonian Institution, the Director of the National Science Foundation, and the Chairman of the National Academy of Sciences.

(b) Compensation; reimbursement for travel expenses - Except for United States Government employees, members of the Committee shall each be compensated at a rate equal to the daily equivalent of the rate for GS-18 of the General Schedule under section 5332 of title 5, United States Code, for each day such member is engaged in the actual performance of duties vested in the Committee. Each member shall be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in Government service employed intermittently.

(c) Consultation with Commission on studies and recommendations; explanation for non-adoption - The Commission shall consult with the Committee on all studies and recommendations which it may propose to make or has made, on research programs conducted or proposed to be conducted under the authority of this Act, and on all applications for permits for scientific research. Any recommendations made by the Committee or any of its members which are not adopted by the Commission shall be transmitted by the Commission to the appropriate

Federal agency and to the appropriate committees of Congress with a detailed explanation of the Commission's reasons for not accepting such recommendations.

(Pub. L. 92-522, title II, 203, Oct. 21, 1972, 86 Stat. 1044. Codified at 16 U.S.C. 1403.)

REPORTS

Sec. 204. The Commission shall transmit to Congress, by January 31 of each year, a report which shall include -

(1) a description of the activities and accomplishments of the Commission during the immediately preceding year; and

(2) all the findings and recommendations made by and to the Commission pursuant to section 202 of this title together with the responses made to these recommendations.

(Pub. L. 92-522, title II, 204, Oct. 21, 1972, 86 Stat. 1045. Codified at 16 U.S.C. 1404.)

COORDINATION WITH OTHER FEDERAL AGENCIES

Sec. 205. The Commission shall have access to all studies and data compiled by Federal agencies regarding marine mammals. With the consent of the appropriate Secretary or Agency head, the Commission may also utilize the facilities or services of any Federal agency and shall take every feasible step to avoid duplication of research and to carry out the purposes of this Act.

(Pub. L. 92-522, title II, 205, Oct. 21, 1972, 86 Stat. 1045. Codified at 16 U.S.C. 1405.)

ADMINISTRATION

Sec. 206. The Commission, in carrying out its responsibilities under this title, may -

(1) employ and fix the compensation of such personnel;

(2) acquire, furnish, and equip such office space;

(3) enter into such contracts or agreements with, or provide such grants to, other organizations, both public and private;

(4) procure the services of such experts or consultants or an organization thereof as is authorized under section 3109 of title 5, United States Code (but at rates for individuals not to exceed $100 per diem); and

(5) incur such necessary expenses and exercise such other powers, as are consistent with and reasonably required to perform its functions under this title; except that no fewer than 11 employees must be employed under paragraph (1) at any time. Financial and administrative services (including those related to budgeting, accounting, financial reporting, personnel, and procurement) shall be provided the Commission by the General Services Administration, for which payment shall be made in advance, or by reimbursement from funds of the Commission in such amounts as may be agreed upon by the Chairman and the Administrator of General services.

(Pub. L. 92-522, title II, 206, Oct. 21, 1972, 86 Stat. 1045; As amended Pub. L. 97-58, 6(2), Oct. 9, 1981, 95 Stat. 987; Pub. L. 98-364, title I, 103(b), July 17, 1984, 98 Stat. 442. Codified at 16 U.S.C. 1406.)

AUTHORIZATION OF APPROPRIATIONS

Sec. 207. There are authorized to be appropriated to the Marine Mammal Commission, for purposes of carrying out this title, $672,000 for fiscal year 1982, $1,000,000 for fiscal year 1983, $1,100,000 for each of fiscal years 1984, 1985, 1986, 1987, 1988, and 1989, $1,140,000 for fiscal year 1990, $1,190,000 for fiscal year 1991, $1,230,000 for fiscal year 1992, and $1,280,000 for fiscal year 1993.

(Pub. L. 92-522, title II, 207, Oct. 21, 1972, 86 Stat. 1046; As amended Pub. L. 95-136, 3, Oct. 18, 1977, 91 Stat. 1167; Pub. L. 95-316, 4, July 10, 1978, 92 Stat. 381; Pub. L. 97-58, 7(c), Oct. 9, 1981, 95 Stat. 987; Pub. L. 98-364, title I, 104(3), July 17, 1984, 98 Stat. 442; Pub.L. 100-711, 6(3), Nov. 23, 1988, 102 Stat. 4771. Codified at 16 U.S.C. 1407.)

(1988 Amendment. Pub.L. 100-711, 6(3), struck out "and" following "fiscal year 1983,", and substituted "1988, and 1989, $1,140,000 for fiscal year 1990, $1,190,000 for fiscal year 1991, $1,230,000 for fiscal year 1992, and $1,280,000 for fiscal year 1993" for "and 1988".The following section 7, of Pub. L. 100-711, approved November 23, 1988, has not been codified.)

Notes

Study on Mortality of Atlantic Dolphin.

Section 7 of Pub. L. 100-711, Nov. 23, 1988, 102 Stat. 4771, provided that:

(a) The Secretary of Commerce shall conduct a study regarding the east coast epidemic during 1987 and 1988 which has caused substantial mortality within the North Atlantic coastal population of Atlantic bottle-nosed dolphin. The study shall examine -

(1) the cause or causes of the epidemic;

(2) the effect of the epidemic on coastal and offshore populations of Atlantic bottle-nosed dolphin;

(3) the extent to which pollution may have contributed to the epidemic;

(4) whether other species and populations of marine mammals were affected by those factors which contributed to the epidemic; and

(5) any other matters pertaining to the causes and effects of the epidemic.

(b) On or before January 1, 1989, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a plan for conducting the study required in subsection (a).

25.
Memorandum prepared by GCOS summarizing the 1992 amendments to MPRSA Title III

Reauthorization/Amendment of Title III of the MPRSA

On November 4, 1992, President Bush signed into law H.R. 5617, the Oceans Act of 1992, title II of which reauthorizes and amends title III (national marine sanctuaries) of the Marine Protection, Research, and Sanctuaries Act (MPRSA). The major provisions of title II of the bill are outlined below, with emphasis on new requirements for the sanctuaries program. The section numbers refer to title III of the MPRSA, as it would be amended by this legislation.

SUBTITLE A -- AMENDMENTS TO MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT OF 1972

Sec. 301. Findings, Purposes, and Policies. (Note: many of the changes to this section are an outgrowth of the "Potter Report.")

- Amends the finding that certain areas of the marine environment possess conservation, recreational, ecological, historical, research, educational or esthetic qualities that give them special national significance to add "and in some cases, international" significance.

- Adds a finding that "protection of these special areas can contribute to maintaining a natural assemblage of living resources for future generations."

- Clarifies that one of the purposes/policies of the Act is to provide authority for comprehensive and coordinated conservation and management (in a manner that complements existing regulatory authorities) of not only these marine areas but also "activities affecting them."

- Emphasizes support, promotion and coordination of long-term monitoring and research as a purpose/policy of the Act.

- Adds a purpose/policy to "develop and implement coordinated plans for the protection and management of these areas with appropriate Federal agencies, State and local governments, native American tribes and organizations, international organizations, and other public and private interests concerned with the continuing health and resilience of theses marine areas."

- Adds a purpose/policy to "create models of, and incentives for, ways to conserve and manage these areas."

- Adds a purpose/policy to "cooperate with global programs encouraging conservation of marine resources."

- Adds a purpose/policy to "maintain, restore, and enhance living resources by providing places for species that depend upon these marine areas to survive and propagate."

Sec. 302. Definitions.

• Clarifies that "marine environment" includes the exclusive economic zone.

• Specifies that "damages" include "the reasonable cost of monitoring appropriate to the injured, restored, or replaced resources."

• Clarifies that "response costs" include the costs of actions the Secretary of Commerce authorizes others, e.g., other agencies, to take.

Sec. 303. Sanctuary Designation Standards.

• Specifies that, in order to designate a sanctuary, the Secretary need only find that existing State and Federal authorities "should be supplemented," not that existing authorities are inadequate.

• Specifies that the Secretary is to consider maintenance of critical habitat of endangered species as a factor in determining if an area meets the sanctuary designation standards.

• Requires that the resource assessment report section of the environmental impact statement for a proposed sanctuary include information on governmental uses of the area and on any "past, present, or proposed future disposal or discharge of materials in the vicinity of the proposed sanctuary." The Secretary is to consult with the Secretary of Defense, the Secretary of Energy and the Administrator of EPA in preparing the discharge/disposal section.

Sec. 304. Procedures for Designation and Implementation.

• Eliminates the requirement of preparation of a prospectus for Congress for each proposed designation.

• Requires that the Secretary cooperate with not only the appropriate Regional Fishery Management Council, but also other appropriate fishery management authorities in drafting fishing regulations for a proposed sanctuary.

• Eliminates the subsection providing for a Congressional resolution of disapproval for proposed sanctuary designations. (Note: the House committee report states that this provision has never been used and the committee "believes that disapproval of, or amendments to, sanctuary designations can be addressed through traditional legislative procedures.")

• Requires that Federal agencies proposing actions (including licenses, leases and permits) internal or external to a sanctuary

that are likely to injure sanctuary resources consult with the Secretary. "Subject to any regulations the Secretary may establish," each such agency must provide a written statement describing the action and its potential effects on sanctuary resources. If the Secretary finds the action is likely to injure sanctuary resources, she must recommend alternatives that will protect them. If the other agency decides not to follow the alternatives, the head of that agency must provide the Secretary with a written statement explaining the reasons for that decision.

- Requires that the Secretary review sanctuary management plans and their implementation every five years.

Sec. 305. Application of Regulations; International Cooperation.

- Requires that the Secretary cooperate with foreign countries and international organizations in furtherance of the Act.

Sec. 306. Prohibited Activities.

- Explicitly provides that it is unlawful to injure any sanctuary resource managed under law or regulations for that sanctuary.

Sec. 307. Enforcement.

- Increases the maximum civil penalty from $50,000 to $100,000.

- Makes various technical improvements relating to enforcement (e.g., regarding maritime liens, separate recoveries).

- Improves existing statutory language regarding how amounts received as civil penalties, forfeiture proceeds and costs may be used.

- Clarifies that the "area of application and enforceability" of the Act includes the territorial sea and the exclusive economic zone.

Sec. 311. Cooperative Agreements, Donations, and Acquisitions.

- Authorizes the Secretary to enter into any kind of agreement, including financial aid, with any entity or individual to carry out the purposes and policies of the Act.

- Clarifies that donations to the sanctuary program "shall be considered as a gift or bequest to or for the use of the United States."

• Authorizes the Secretary to acquire land, facilities and other property as necessary and appropriate to carry out the purposes and policies of the Act.

Sec. 312. Destruction or Loss of, or Injury to, Sanctuary Resources.

• Provides that persons liable for sanctuary resource injury are liable for interest accrued as well.

Sec. 313. Authorization of Appropriations.

• $8M for '93, $12.5M for '94, $15M for '95 and $20M for '96.

Sec. 315. Advisory Councils.

• Authorizes the Secretary to establish sanctuary advisory councils. The councils are exempt from the Federal Advisory Committee Act, although subject to some requirements comparable to some provisions of that act.

SUBTITLE B -- MISCELLANEOUS

1) Mandates grant for acquisition of space in Hatteras Village, North Carolina, for display and interpretation of "Graveyard of the Atlantic" artifacts and administration and operations of the Monitor National Marine Sanctuary. Authorizes appropriations to the Secretary of $800,000 for '93 and '94 to carry out responsibilities under this section.

2) Designates Stellwagen Bank National Marine Sanctuary, modifying western boundary somewhat from the draft environmental impact statement/management plan and prohibiting sand and gravel mining activities. Authorizes appropriations to the Secretary of $570,000 for '93 and $250,000 for '94 to carry out responsibilities under this section. Directs the Secretary to consider establishing a satellite office for the sanctuary in Provincetown, Gloucester or Hull, Massachusetts.

3) Designates Monterey Bay National Marine Sanctuary, effective September 18, 1992. Prohibits oil or gas activities in the sanctuary. Requires a vessel traffic regulation study within 18 months.

4) "Enhancing support for sanctuaries." Requires the Secretary to conduct a 2-year pilot project to create a "symbol" for the sanctuary program or for individual sanctuaries, to designate official sponsors, to collect fees from the sponsors for manufacture, reproduction or use of the symbols, and, within 30 months, provide a report to Congress on the success of the project in raising funds.

5) Makes technical corrections to Coastal Zone Management Act -- unrelated to sanctuaries.

6) Requires research to improve management of Florida Keys National Marine Sanctuary, in particular the coral reef ecosystem -- amends Florida Keys National Marine Sanctuary and Protection Act.

7) Prohibits oil or gas leasing or pre-leasing activity in the Olympic Coast National Marine Sanctuary (silent on issue of boundary of the sanctuary).

8) Designates Provasoli-Guillard Center for Culture of Marine Phytoplankton as a "National Center and Facility" -- unrelated to sanctuaries.

9) Amends Florida Keys National Marine Sanctuary and Protection Act to direct EPA to establish a steering committee regarding water quality and to implement a water quality program; authorizes appropriations to the Administrator of EPA of $2M for '93, $3M for '94 and $4M for '95 to carry out responsibilities under this section; authorizes appropriations to the Secretary of $300,000 for '93, $400,000 for '94 and $500,000 for '95 to carry out responsibilities under this section.

SUBTITLE C -- HAWAII ISLANDS HUMPBACK WHALE SANCTUARY

Designates Hawaiian Islands Humpback Whale National Marine Sanctuary, primarily to protect humpback whales and their habitat. Requires the Secretary to issue a sanctuary management plan and regulations within 18 months.

26.
Summary of relevant Federal authorities (from appendix C of Monterey Bay NMS FEIS/MP)

III. Federal Authorities

Like State authorities, Federal programs vary greatly in approach and scope, ranging from fairly broad-based legislation for resource conservation and environmental protection (e.g., The National Environmental Policy Act and Magnuson Fishery Conservation and Management Act) to regulation of specific activities and resources.

A. Magnuson Fishery Conservation and Management Act (MFCMA) (16 USC § 1801 et seq.)

The MFCMA provides for the conservation and management of all fishery resources between 3 and 200 nm (5.6 and 370 km) offshore. The National Marine Fisheries Service (NMFS), NOAA, Department of Commerce is charged with establishing guidelines for and approving fishery management plans (FMPs) prepared by regional fishery management councils for selected fisheries. These plans determine the levels of commercial and sport fishing consistent with achieving and maintaining the optimum yield of each fishery. The waters of the study area are within the jurisdiction of the Pacific Fishery Management Council (PFMC).

In addition to non-benthic fishery resources located outside state waters, benthic continental shelf fishery resources located outside state waters, such as abalone, lobster, crabs, sea urchins, and corals, are also subject to management under the MFCMA. Within Federal waters the MFCMA is enforced by the U.S. Coast Guard (USCG) and NMFS. The Act empowers the Secretary of Commerce to enter into agreements with any State agency for enforcement purposes in State waters. Such an agreement exists between the CDFG and NMFS whereby both parties have been deputized to enforce each other's laws. As a result, PFMC fishery plan enforcement personnel can now enforce State law within 3 nm (5.6 km) and State officers can enforce Federal laws between 3 and 200 nm (5.6 and 370 km).

B. Endangered Species Act (ESA) (16 USC §§1531 et. seq.)

The Federal Endangered Species program provides protection for listed species of animals and plants in both State waters and the waters beyond. The U.S. Fish and Wildlife Service (FWS) and NMFS determine which species need protection and maintain a list of endangered and threatened species. One of the most significant protections provided by the Endangered Species Act is the prohibition on taking. The term "take" is defined broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct" (16 USC §1532(19)). The FWS regulations define the term "harm" to mean an act which actually kills or injures wildlife, including significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. The

regulations define the term "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering" (50 CFR 17.3).

The Endangered Species Act also provides for the indirect protection of endangered species and their habitats by establishing a consultation process designed to insure that projects authorized, funded or carried out by Federal agencies are not likely to jeopardize the continued existence of endangered or threatened species, or "result in the destruction or adverse modification of habitat of such species which is determined ... to be critical" (16 USC §1536). Critical habitat areas for endangered species are designated by the FWS and NMFS. The 1978 amendments to the Act establish a Cabinet level committee authorized to exempt Federal agencies (through an elaborate review process) from compliance with their responsibilities with regard to the jeopardy standard and critical habitat.

Several species of marine mammals found in the study area are listed as endangered or threatened species. These include: 1) sea otter, 2) grey whale, 3) fin whale, and 4) humpback whale. The blue whale, sei whale, and sperm whale, which have occasionally been sighted in the study area are also listed as endangered or threatened species.

Species of birds listed as endangered or threatened found in the study area include: 1) California brown pelican, 2) California clapper rail, 3) California least tern, 4) Southern bald eagle, and 5) American peregrine falcon, and 6) short tailed albatross.

C. Marine Mammal Protection Act (MMPA) (16 USC §1361 et seq.)

The MMPA provides protection to marine mammals in both State waters and the waters beyond. It is designed to protect all species of marine mammals. While MMPA allows states to petition for the return of management responsibility over harvest of marine mammals, California has done so only with regard to the sea otter and that petition was later withdrawn.

As specified in the MMPA, the Department of Interior, U.S. Fish and Wildlife Service (FWS), is responsible for the management of polar bears, walrus (a pinniped), northern and southern sea otters, three species of manatees, and dugong; and Department of Commerce, National Marine Fisheries Service (NMFS), is responsible for all other marine mammals. The Marine Mammal Commission advises these implementing agencies and sponsors relevant scientific research. The primary management features of the Act include: 1) a moratorium on "taking" of marine mammals; 2) the development of a management approach designed to achieve an "optimum sustainable population" (OSP) for all species or population stocks of marine

mammals; and 3) protection of populations determined to be "depleted".

MMPA defines "take" broadly to include "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 USC §1362(12)). The term "harass" has been interpreted to encompass acts unintentionally adversely affecting marine mammals, such as operation of motor boats in waters in which these animals are found. The MMPA allows certain exceptions to the moratorium. First, the Secretary may issue permits for public display or scientific research. Second, the Secretary may grant exemptions for takes of small numbers of marine mammals incidental to other lawful activities. Third, the Secretary may make a special waiver of the moratorium on taking for particular species or populations of marine mammals provided that the species or population being considered is at or above its determined optimum sustainable population. No such waiver, however, has been granted concerning any marine mammal found in the area under consideration.

Marine mammal species whose population is determined to be depleted receive additional protection. Under only limited circumstances may permits be issued for the taking of any marine mammal determined to be depleted, including but not limited to scientific research and enhancing the survival or recovery of a species or stock of depleted species. Four species of marine mammals sighted within the study area (the fin whale, the southern population of sea otter, the humpback whale, and the grey whale), and three species or populations which are possible transients (the blue whale, the sperm whale, and the sei whale), are treated as "depleted" based on their listing as endangered or threatened species under the Endangered Species Act.

The 1988 amendments to the MMPA added requirements that observers be carried aboard commercial fishing vessels to determine levels of incidental take of marine mammals. Commercial fishing activities are divided into categories on the basis of gear-type and associated levels of potential incidental take of marine mammals. For example, Category 1 vessels such as gillnetters may have to carry an observer if requested by NMFS and the Secretary of Commerce may place observers on vessels in Categories 2 and 3 with the consent of the vessel owner. This observer program has been in operation since early 1990 and although the authority for its management is with the NMFS the day-to-day operational management may be delegated to state and local authorities.

D. Migratory Bird Treaty Act (MBTA) (16 USC §703 et seq.)

The essential provision of the Migratory Bird Treaty Act, which implements conventions with Great Britain, Mexico, the USSR and Japan makes it unlawful except as permitted by regulations "to pursue, hunt, take, capture, kill... any migratory bird, any part, nest or egg" or any product of any such bird protected by the

Convention (16 USC §703). The Secretary of the Interior is charged with determining when, and to what extent, if at all, and by what means to permit these activities. Each treaty establishes a "closed season" during which no hunting is permitted. A distinction is made between game and nongame birds. The closed season for migratory birds other than game birds is year-round. Of the birds found in the study area only certain species of ducks, geese, coots, gallinules and doves are considered game birds. As specifically permitted by the Act the California Department of Fish and Game has supplemented this authority with its own regulations (see Fish and Game Code Discussion, above).

E. Clean Water Act (CWA) (33 USC §1251 et seq.)

It is the goal of the CWA to restore and maintain the chemical, physical, and biological integrity of the nation's waters. To varying degrees, navigable waters of the United States, the contiguous zone, and the oceans beyond are subject to requirements of the CWA.

The CWA's chief mechanism for preventing and reducing water pollution is the National Pollutant Discharge Elimination System (NPDES), administered by the Environmental Protection Agency (EPA). Under the NPDES program, a permit is required for the discharge of any pollutant from a point source into the navigable waters of the United States, the waters of the contiguous zone, or ocean waters. Within California state waters, EPA has delegated NPDES permitting authority to the state government.

Since oil and gas development pursuant to Federal lease sales occur beyond State waters, an NPDES permit from EPA is required for discharges associated with this activity. EPA generally grants NPDES permits for offshore oil and gas developments based on published effluent guidelines (40 CFR Part 435). Other conditions beyond these guidelines may, however, be imposed by the Regional Administrator on a case-by-case basis.

The CWA prohibits the discharge of oil or hazardous substances in quantities that may be harmful to the public health or welfare or the environment, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines and beaches into or upon the navigable waters of the U.S., adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the U.S., except, in the case of such discharges into or upon the waters of the contiguous zone or which may affect the above-mentioned natural resources, where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships.

When harmful discharges do take place, the National Contingency Plan (NCP) for the removal of oil and hazardous substance discharges (40 CFR Part 300), which is designed to minimize the impacts on marine resources, takes effect. The USCG, in cooperation with EPA, administers the NCP. The NCP establishes the organizational framework whereby oil and hazardous substance spills are to be cleaned up. To carry out the NCP, regional plans have been established; the USCG has issued such a plan for Federal Region IX which encompasses the study area. Under the plan, Coast Guard personnel are to investigate all reported offshore spills, notify the party responsible (if known) of its obligation to clean up the spill, and supervise the clean-up operation. The Coast Guard retains final authority over the procedures and equipment used in the cleanup. If the party responsible for the spill does not promptly begin cleanup operations, the Coast Guard may hire private organizations.

The CWA also requires that publicly owned sewage treatment works meet effluent limitations based on effluent reductions attainable through the application of secondary treatment by July 1, 1977 [33 USC §1311(b)(1)]. EPA does have the authority, however, to waive the July 1, 1977 deadline for secondary treatment for discharges into marine waters under certain circumstances (33 USC §1311(h)). Due to the unusual depth of marine waters off the California coast, some municipal sewage treatment works in California discharging into marine waters have requested waivers from secondary treatment requirements (43 F.R. 17484 (4/25/78)). Several communities are currently discharging wastes into marine waters in the study area (see Part II, Section 2).

Permits from the Army Corps of Engineers, (COE) which are based on EPA guidelines, are required prior to the discharge of dredged or fill materials into navigable waters that lie inside the baseline from which the territorial sea (defined to be three nautical miles of shore) is measured and fill materials into the territorial sea (33 USC § 1344; 40 CFR 230.2).

Finally, the CWA requires vessels to comply with marine sanitation regulations issued by EPA and enforced by the USCG (33 USC § 1322).

F. Rivers and Harbors Act (33 USC §§ 401 et seq.)

Section 10 (33 USC 403) prohibits the unauthorized obstruction of navigable waters of the United States. The construction of any structure or any excavation or fill activity in the navigable waters of the U.S. is prohibited without a permit from the COE. Section 13 (33 U.S.C. 407) prohibits the discharge of refuse into navigable waters of the U.S., but has been largely superseded by the CWA, discussed above.

G. Ports and Waterways Safety Act (PWSA) (33 USC §§ 1231 et seq.)

The Ports and Waterways Safety Act (PWSA), as amended by the Port and Tanker Safety Act of 1978 (and the Oil Pollution Act of 1990), is designed to promote navigation and vessel safety and the protection of the marine environment. The PWSA applies both in state waters and the waters beyond out to 200 nautical miles.

The PWSA authorizes the U.S. Coast Guard to construct, operate, maintain, improve or expand vessel traffic services and control vessel traffic in ports, harbors, and other waters subject to congested vessel traffic. The Oil Pollution Act of 1990 amends the PWSA to mandate that the USCG "require appropriate vessels which operate in the area of a vessel traffic service to utilize or comply with that service."

The absence of a major harbor in Monterey Bay and the resulting relatively low level of vessel traffic into and out of the Bay has precluded the need for a vessel traffic separation scheme (VTSS) or other formal regulatory mechanisms for ensuring vessel safety.

The U.S. Coast Guard provides two sets of customary vessel traffic lanes on navigational charts for vessels traversing the West coast. One set of customary traffic lanes is an extension of the Southern VTSS for San Francisco Bay and is intended for vessels traveling north and southbound along the coast. The other is intended primarily for east-bound traffic heading to and from ports further south in California. Adherence to these lanes is strictly voluntary. The lanes merely serve as navigational aids, indicating to mariners who are unfamiliar with the area that vessel traffic historically has followed those patterns, and that the lanes have been found to be safe.

In addition to vessel traffic control, the U.S. Coast Guard regulates other navigational and shipping activities. It has promulgated numerous regulations relating to vessel design, construction, and operation designed to minimize the likelihood of an accident and reduce vessel source pollution.

The 1978 amendments of the PWSA establish a comprehensive program for regulating the design, construction, operation, equipping, and banning of all tankers using U.S. ports to transfer oil and hazardous materials. These requirements are, for the most part, in agreement with protocols (passed in 1978) to the International Convention for the Prevention of Pollution from Ships, 1973, and the International Convention on Safety of Life at Sea, 1974.

The U.S. Coast Guard is also vested with the primary responsibility for maintaining boater safety, including the tasks

of conducting routine vessel inspections and coordinating rescue operations.

H. Act to Prevent Pollution from Ships (APPS) (33 USC §§ 1901 et seq.)

The International Convention for the Prevention of Pollution of the Sea by Oil, 1954, and the Oil Pollution Act of 1961 have been superseded by the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78) and implemented by the Act to Prevent Pollution from Ships, 1980, as amended in 1982, 1987 (APPS). APPS, in implementing Annex I of MARPOL 73/78, regulates the discharge of oil and oily mixtures from seagoing ships, including oil tankers. APPS, in implementing Annex II of MARPOL 73/78, regulates the discharge of noxious liquid substances from seagoing ships. Enforcement of the Act is the responsibility of the USCG.

When more than 12 nautical miles from the nearest land, any discharge of oil or oily mixtures into the sea from a ship subject to APPS other than an oil tanker or from machinery space bilges of an oil tanker subject to APPS is prohibited except when: 1) the oil or oily mixture does not originate from cargo pump room bilges; 2) the oil or oily mixture is not mixed with oil cargo residues; 3) the ship is not within a Special Area (the study area is not a Special Area for purposes of APPS); 4) the ship is proceeding en route; 5) the oil content of the effluent without dilution is less than 100 parts per million (ppm); and 6) the ship has in operation oily-water separating equipment, a bilge monitor, bilge alarm or combination thereof. 33 CFR 151.10(a).

The restrictions on discharges 12 nautical miles or less from the nearest land are more stringent. When within 12 nautical miles of the nearest land, any discharge of oil or oily mixtures into the sea from a ship other than an oil tanker or from machinery space bilges of an oil tanker is prohibited except when: 1) the oil or oily mixture does not originate from cargo pump room bilges; 2) the oil or oily mixture is not mixed with oil cargo residues; 3) the oil content of the effluent without dilution does not exceed 15 ppm; 4) the ship has in operation oily-water separating equipment, a bilge monitor, bilge alarm, or combination thereof; and 5) the oily-water separating equipment is equipped with a 15 ppm bilge alarm. NOTE: In the navigable waters of the U.S., the CWA, section 311(b)(3) and 40 CFR 110 govern all discharges of oil and oily mixtures. 33 CFR 151.10(b).

A tank vessel subject to APPS may not discharge an oily mixture into the sea from a cargo tank, slop tank or cargo pump bilge unless the vessel: 1) is more than 50 nautical miles from the nearest land; 2) is proceeding en route; 3) is discharging at an instantaneous rate of oil content not exceeding 60 liters per

nautical mile; 4) is an existing vessel and the total quantity of oil discharged into the sea does not exceed 1/15000 of the total quantity of the cargo that the discharge formed a part (1/30000 for new vessels); 5) discharges, with certain exceptions, through the above waterline discharge point; 6) has in operation a cargo monitor and control system that is designed for use with the oily mixture being discharged; and 7) is outside the Special Areas. 33 CFR 157.37.

APPS is amended by the Marine Plastic Pollution Research and Control Act of 1987 (MPPRCA), which implements Annex V of MARPOL 73/78 in the U.S. The MPPRCA and implementing regulations at 33 CFR 151.51 to 151.77 apply to U.S. Ships (except warships and ships owned or operated by the U.S.) everywhere, including recreational vessels, and to other ships subject to MARPOL 73/78 while in the navigable waters or the Exclusive Economic Zone of the U.S. They prohibit the discharge of plastic or garbage mixed with plastic into any waters and the discharge of dunnage, lining and packing materials that float within 25 nautical miles of the nearest land. Other unground garbage may be discharged beyond 12 nautical miles from the nearest land. Other garbage ground to less than one inch may be discharged beyond three nautical miles of the nearest land. Fixed and floating platforms and associated vessels are subject to more stringent restrictions. "Garbage" is defined as all kinds of victual, domestic and operational waste, excluding fresh fish and parts thereof, generated during the normal operations of the ship and liable to be disposed of continuously or periodically except dishwater, graywater and certain substances. 33 CFR 151.05.

I. Oil Pollution Act of 1990 (OPA) (P.L. 101-380, 33 USC 2701 et seq.)

The Oil Pollution Act of 1990 (OPA) creates a comprehensive prevention, response, liability, and compensation regime for dealing with vessel and facility-caused oil pollution. The OPA provides for environmental safeguards in oil transportation greater than those existing before its passage by: setting new standards for vessel construction, crew licensing, and manning; providing for better contingency planning; enhancing Federal response capability; broadening enforcement authority; increasing penalties; and authorizing multi-agency research and development. A one billion dollar trust fund is available to cover clean-up costs and damages not compensated by the spiller.

Title I creates a liability and compensation regime for vessel and facility-source oil pollution. Any party responsible for the discharge, or the substantial threat of discharge, of oil into navigable waters or adjoining shorelines or the Exclusive Economic Zone is liable for the removal costs and damages, including assessment costs; for injury, destruction, loss or loss of use of natural resources, injury to, or economic losses resulting from destruction of real or personal property; subsistence use of

natural resources, net lost government revenues, lost profits or impairment of earning capacity; and net costs of providing increased or additional public services during or after removal activities. NOAA has the responsibility of promulgating damage assessment regulations and following the regulations will create a rebuttable presumption in favor of a given assessment. Sums recovered by a trustee for natural resource damages will be retained in a revolving trust account to reimburse or pay costs incurred by the trustee with respect to those resources.

Title II makes numerous amendments to conform other Federal statutes, particularly section 311 of the Clean Water Act, to the provisions of the Oil Pollution Act.

Title III encourages the establishment of an international inventory of spill removal equipment and personnel.

Title IV is divided into three subtitles: A) Prevention; B) Removal; and C) Penalties and Miscellaneous. Subtitle A gives added responsibility to the Coast Guard regarding merchant marine personnel, including the review of alcohol and drug abuse and review of criminal records prior to issuance and renewal of documentation. It also amends the Ports and Waterways Safety Act to: require the Coast Guard to "require appropriate vessels which operate in an area of a vessel traffic service to utilize or comply with that service." and 2) authorize the construction, improvement and expansion of vessel traffic services.

Further, Subtitle A establishes double hull requirements for tank vessels. Most tank vessels over 5,000 gross tons will be required to have double hulls by 2010, while vessels under 5,000 gross tons will be required to have a double hull or double containment systems by 2015. All newly constructed tankers must contain a double hull (or double containment system if under 5,000 gross tons), while existing vessels are phased out over a period of years.

Subtitle B amends subsection 311(c) of the Clean Water Act, requiring the Federal Government to ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance into or on the navigable waters, on the adjoining shorelines, into or on the waters of the Exclusive Economic Zone, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the U.S. It also requires a revision and republication of the National Contingency Plan within one year which will include, among other things, a Fish and Wildlife response plan developed in consultation with NOAA and U.S. Fish and Wildlife Service. Nothing in Subtitle B preempts the rights of States to require stricter standards for removal actions.

Subtitle C alters and increases civil and administrative penalties for illegal discharges and violations of regulations promulgated under the Clean Water Act.

Title VII authorizes an oil pollution research and technology development program, including the establishment of an interagency coordinating committee that is chaired by Department Of Transportation and composed of representatives from the Departments of Energy, the Interior, Transportation, Commerce (including NOAA), and Defense, Environmental Protection Agency, Federal Emergency Management Agency, National Aeronautics and Space Administration, as well as such other Federal agencies as the President may designate.

Title IX amends the Oil Spill Liability Trust Fund and increases from $500 million to $1 billion the amount that can be spent on any single oil spill incident, of which no more than $500 million may be spent on natural resource damage, assessments and claims.

J. Federal Aviation Act (49 USC §§1301 et. seq.)

The Federal Aviation Act gives the Secretary of Transportation broad powers to promote air commerce and to regulate the use of navigable airspace to ensure aircraft safety and efficient use of such airspace. In furtherance of this mandate, the Federal Aviation Administration, within the Department of Transportation publishes aeronautical charts which provide a variety of information to pilots, including the location of sensitive areas which should be avoided.

K. Clean Air Act (CAA) (42 USC §7401 et seq.)

The Clean Air Act (CAA) sets general guidelines and minimal air quality standards on a nationwide basis in order to protect and enhance the quality of the Nation's air resources. States are responsible for developing comprehensive plans for all regions within their boundaries. Thus, as noted above, discharges of air pollutants over California state waters are subject to the control of the California Air Resources Board.

Per the CAA Amendments of 1990, section 328(a)(1) of the CAA provides that the Administrator of the EPA, following consultation with the Secretary of the Interior and the Commandant of the United States Coast Guard, "by rule, shall establish requirements to control air pollution from OCS sources located offshore of the States along the Pacific...Coast...to attain and maintain Federal and State ambient air quality standards and to comply with part C of title I....New OCS sources shall comply with such requirements on the date of promulgation."

L. Outer Continental Shelf Lands Act OCSLA (43 USC §1331 et seq.)

The Outer Continental Shelf Lands Act, (OCSLA) as amended in 1978 and 1985, establishes Federal jurisdiction over the mineral resources of the Outer Continental Shelf (OCS) beyond 3 nm (5.6 km) and gives the Secretary of Interior primary responsibility for managing OCS mineral exploration and development. The Secretary's responsibility has been delegated to the Minerals Management Service (MMS).

In unique or special areas, MMS may impose special lease stipulations designed to protect specific geological and biological phenomena. These stipulations may vary among lease sale tracts and sales.

MMS is also charged with supervising OCS operations, including approval of exploration and development and production plans and applications for pipeline rights of way on the OCS. Lessees are required to include, in exploration and development and production plans, specific information concerning emissions and their potential impacts on coastal areas. Such authority includes the enforcement of regulations made pursuant to the OCSLA (30 CFR Parts 250 and 256) and the enforcement of stipulations applicable to particular leases.

In addition to DOI, both the Army Corps of Engineers (COE) and the U.S. Coast Guard (USCG) have responsibility over OCS mineral development to the extent that such development affects navigation. (43 USC 1333) COE is responsible for ensuring, through a permit system, that OCS structures, including pipelines, platforms, drill ships, and semi-submersibles, do not obstruct navigation. USCG ensures that structures on the OCS are properly marked and that safe working conditions are maintained onboard.

M. Title I of the Marine Protection, Research, and Sanctuaries Act (MPRSA) (33 USC §§1401 et seq.).

Title I of the Marine Protection, Research, and Sanctuaries Act (MPRSA), also known as the Ocean Dumping Act, prohibits: 1) any person from transporting, without a permit, from the U.S. any material for the purpose of dumping it into ocean waters (defined to mean those waters of the open seas lying seaward of the baseline from which the territorial sea is measured) and 2) in the case of a vessel or aircraft registered in the U.S. or flying the U.S. flag or in the case of a U.S. agency, any person from transporting, without a permit, from any location any material for the purpose of dumping it into ocean waters. Title I also prohibits any person from dumping, without a permit, into the "territorial sea," or the contiguous zone extending 12 nautical miles seaward from the baseline of the territorial sea to the extent that it may affect the territorial sea or the territory of the U.S., any material

transported from a location outside of the U.S. EPA regulates, through the issuance of permits, the transportation, for the purpose of dumping, and the dumping of all materials except dredged material; COE, the transportation, for the purpose of dumping, of dredged material. The COE permits are subject to EPA review and approval.. Title I also makes it unlawful after December 31, 1991, for any person to dump into ocean waters, or to transport for the purposes of dumping into ocean waters, sewage sludge or industrial waste.

N. National Historic Preservation Act (NHPA) (16 USC §§ 470 et seq.)

The National Historic Preservation Act authorizes the Secretary of the Interior to maintain a National Register of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture". Sites have been listed on the National Register which include or are composed entirely of ocean waters and submerged lands within state waters or on the Outer Continental Shelf.

Any federal agency conducting, licensing, or assisting an undertaking which may affect a property listed or eligible for listing on the National Register must prior to the action take into account the effect of the undertaking on the property and provide the Advisory Council on Historic Preservation a reasonable opportunity to comment on the proposed action (16 USC §470f). The basic criterion applied by the Council is whether the undertaking will change the quality of the site's historic, architectural, archeological, or cultural character (36 CFR Part 800).

O. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USC §§ 9601 et seq.)

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), whose principal purpose is the cleanup of hazardous waste sites, consists of four fundamental elements. First, it creates an information-gathering and evaluation system to help Federal and state governments categorize hazardous waste sites and prioritize responses. Second, CERCLA provides Federal authority to respond to releases of hazardous substances. Response actions are carried out pursuant to the National Contingency Plan (NCP). Third, CERCLA establishes a Hazardous Substance Trust Fund to pay for removal and remedial actions and related costs. Finally, CERCLA makes persons responsible for hazardous substance releases liable for costs of removal or remedial action incurred by the Federal or state government; other necessary costs of response incurred by others; damages for injury, destruction or loss of natural resources; and costs of any health assessment or health effects study carried out pursuant to the Act.

IV. Additional Special Areas/Agencies

A. Los Padres National Forest

The United States Forest Service is responsible for the management of the Los Padres National Forest. The Forest parallels the coast from Mount Carmel (near Point Sur) in the north to the Monterey County-San Luis Obispo County boundary in the south. The Forest includes two coastal areas, one encompassing Cooper Point and Pfeiffer Point at the northern boundary of the Forest and the other extending from the Lucia vicinity (near Lopez Point) to the Monterey County-San Luis Obispo County boundary.

For management purposes, the Forest is divided into several planning units. Both coastal areas of the Forest are included within the Big Sur Coastal Planning Unit. The unit as a whole is 52 sm (83 km) long and varies from 3 to 9 sm (4.8 to 14.4 km) in width. Both coastal areas also fall within the boundaries of the California Sea Otter Game Refuge. Adjoining the Planning Unit are four State Parks, including the Julia Pfeiffer Burns State Park, which is operated in conjunction with the adjacent under-water park, and two ASBSs at Julia Pfeiffer Burns Underwater Park and the ocean area surrounding the mouth of Salmon Creek (see above).

Management policies for the Big-Sur Coastal Planning Unit are described in a recently issued Land Management Plan. The Forest Service worked closely with many governmental agencies in the formulation of the plan, including, in particular, the CDFG, which manage areas directly adjacent to the unit. It is the intent of the plan that all management policies be implemented in harmony with affected agencies.

Specific management policies of the plan which are relevant to the proposed marine sanctuary include ensuring the protection of the Salmon Creek and Julia Pfeiffer Burns Underwater Park ASBSs prior to proceeding with any resource development, maintaining a high level of water quantity and quality, and ensuring that the management of the Planning Unit is consistent with the California Coastal Plan for the Monterey Coast.

27.
CEQ NEPA regulations
40 C.F.R. Parts 1500 - 1508

Council on Environmental Quality
NEPA Regulations
40 C.F.R. Pts. 1500-1508

PART 1500—PURPOSE, POLICY, AND MANDATE

Sec.
1500.1 Purpose.
1500.2 Policy.
1500.3 Mandate.
1500.4 Reducing paperwork.
1500.5 Reducing delay.
1500.6 Agency authority.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91-190, 42 U.S.C. 4321 et seq.) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental docu-

ments with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

1501.1 Purpose.
1501.2 Apply NEPA early in the process.
1501.3 When to prepare an environmental assessment.
1501.4 Whether to prepare an environmental impact statement.
1501.5 Lead agencies.
1501.6 Cooperating agencies.
1501.7 Scoping.
1501.8 Time limits.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

§ 1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) L ration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a writt request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided,* That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

1502.1 Purpose.
1502.2 Implementation.
1502.3 Statutory requirements for statements.
1502.4 Major Federal actions requiring the preparation of environmental impact statements.
1502.5 Timing.
1502.6 Interdisciplinary preparation.
1502.7 Page limits.
1502.8 Writing.
1502.9 Draft, final, and supplemental statements.
1502.10 Recommended format.
1502.11 Cover sheet.
1502.12 Summary.
1502.13 Purpose and need.
1502.14 Alternatives including the proposed action.
1502.15 Affected environment.
1502.16 Environmental consequences.
1502.17 List of preparers.
1502.18 Appendix.
1502.19 Circulation of the environmental impact statement.
1502.20 Tiering.
1502.21 Incorporation by reference.
1502.22 Incomplete or unavailable information.
1502.23 Cost-benefit analysis.
1502.24 Methodology and scientific accuracy.
1502.25 Environmental review and consultation requirements.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in Part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in Part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related

cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the

same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

1503.1 Inviting comments.
1503.2 Duty to comment.
1503.3 Specificity of comments.
1503.4 Response to comments.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A-95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved

and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in § 1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§ 1502.19). The entire document with a new cover sheet shall be filed as the final statement (§ 1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.
1504.1 Purpose.
1504.2 Criteria for referral.
1504.3 Procedure for referrals and response.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55998, Nov. 29, 1978, unless otherwise noted.

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other Federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's rec-

ommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

1505.1 Agency decisionmaking procedures.
1505.2 Record of decision in cases requiring environmental impact statements.
1505.3 Implementing the decision.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§ 1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A-95 (Revised), part I, sections 6(c) and (d), and Part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

1506.1 Limitations on actions during NEPA process.
1506.2 Elimination of duplication with State and local procedures.
1506.3 Adoption.
1506.4 Combining documents.
1506.5 Agency responsibility.
1506.6 Public involvement.
1506.7 Further guidance.
1506.8 Proposals for legislation.
1506.9 Filing requirements.
1506.10 Timing of agency action.
1506.11 Emergencies.
1506.12 Effective date.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this

section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (*e.g.* long leadtime equipment and purchase options) made by nongovernmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under Part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national or-

ganizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (A-104), 401 M Street SW., Washington, DC 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.10.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public

health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by § 1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§ 1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are

specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in § 1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by § 1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

1508.1 Terminology.
1508.2 Act.
1508.3 Affecting.
1508.4 Categorical exclusion.
1508.5 Cooperating agency.
1508.6 Council.
1508.7 Cumulative impact.
1508.8 Effects.
1508.9 Environmental assessment.
1508.10 Environmental document.
1508.11 Environmental impact statement.
1508.12 Federal agency.
1508.13 Finding of no significant impact.
1508.14 Human environment.
1508.15 Jurisdiction by law.
1508.16 Lead agency.
1508.17 Legislation.
1508.18 Major Federal action.
1508.19 Matter.
1508.20 Mitigation.
1508.21 NEPA process.
1508.22 Notice of intent.
1508.23 Proposal.
1508.24 Referring agency.
1508.25 Scope.
1508.26 Special expertise.
1508.27 Significantly.
1508.28 Tiering.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§ 1508.1 Terminology.

The terminology of this part shall be uniform throughout the Federal Government.

§ 1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

§ 1508.3 Affecting.

"Affecting" means will or may have an effect on.

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

"Environmental impact statement" means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

"Federal agency" means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and

for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and Title I of NEPA.

§ 1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include: (1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

§ 1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Index to Parts 1500 Through 1508

Act	1508.2.
Action	1508.18, 1508.25.
Action-forcing	1500.1, 1502.1.
Adoption	1500.4(n), 1500.5(h), 1506.3
Affected Environment	1502.10(f), 1502.15.
Affecting	1502.3, 1508.3.
Agency Authority	1500.6.
Agency Capability	1501.2(a), 1507.2.
Agency Compliance	1507.1
Agency Procedures	1505.1, 1507.3.
Agency Responsibility	1508.5.
Alternatives	1501.2(c), 1502.2, 1502.10(e), 1502.14, 1505.1(e), 1505.2, 1507.2(d), 1508.25(b).
Appendices	1502.10(k), 1502.18, 1502.24.
Applicant	1501.2(d)(1), 1501.4(b), 1501.6(a), 1502.19(b), 1503.1(a)(3), 1504.3(e), 1506.1(d), 1506.5(a), 1506.5(b).
Apply NEPA Early in the Process.	1501.2.
Categorical Exclusion	1500.4(p), 1500.5(k), 1501.4(a), 1507.3(b), 1508.4.
Circulating of Environmental Impact Statement.	1502.19, 1506.3.
Classified Information	1507.3(c).
Clean Air Act	1504.1, 1508.19(a).
Combining Documents	1500.4(o), 1500.5(i), 1506.4.
Commenting	1502.19, 1503.1, 1503.2, 1503.3, 1503.4, 1506.6(f).
Consultation Requirement	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25.
Content	1508.27(a).
Cooperating Agency	1500.5(b), 1501.1(b), 1501.5(c), 1501.5(f), 1501.6, 1503.1(a)(1), 1503.2, 1503.3, 1506.3(c), 1506.5(a), 1506.5.
Cost-Benefit	1502.23.
Council on Environmental Quality.	1500.3, 1501.5(e), 1501.5(f), 1501.6(c), 1502.9(c)(4), 1504.1, 1504.2, 1504.3, 1506.6(f), 1506.9, 1506.10(e), 1506.11, 1507.3, 1508.6, 1508.24.
Cover Sheet	1502.10(a), 1502.11.
Cumulative Impact	1508.7, 1508.25(a), 1508.25(c).
Decisionmaking	1505.1, 1506.1.
Decision points	1505.1(b).
Dependent	1508.25(a).
Draft Environmental Impact Statement.	1502.9(a).
Early Application of NEPA	1501.2.
Economic Effects	1508.8.
Effective Date	1506.12.
Effects	1502.16, 1508.8.
Emergencies	1506.11.
Endangered Species Act	1502.25, 1508.27(b)(9).
Energy	1502.16(e).
Environmental Assessment	1501.3, 1501.4(b), 1501.4(c), 1501.7(b)(3), 1508.2(b)(4), 1506.5(b), 1508.4, 1508.9, 1508.10, 1508.13.
Environmental Consequences.	1502.10(g), 1502.16
Environmental Consultation Requirements	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c)
Environmental Documents	1508.10
Environmental Impact Statement	1500.4, 1501.4(c), 1501.7, 1501.3, 1502.1, 1502.2, 1502.3, 1502.4, 1502.5, 1502.6, 1502.7, 1502.8, 1502.9, 1502.10, 1502.11, 1502.12, 1502.13, 1502.14, 1502.15, 1502.16, 1502.17, 1502.18, 1502.19, 1502.20, 1502.21, 1502.22, 1502.23, 1502.24, 1502.25, 1508.2(b)(4), 1508.3, 1508.8, 1508.11.
Environmental Protection Agency.	1502.11(f), 1504.1, 1504.3, 1506.7(c), 1506.9, 1506.10, 1508.19(a).
Environmental Review Requirements.	1500.4(k), 1500.5(g), 1501.7(a)(6), 1502.25, 1503.3(c).
Expediter	1501.8(b)(2).
Federal Agency	1508.12.
Filing	1508.9.
Final Environmental Impact Statement.	1502.9(b), 1503.1, 1503.4(b).
Finding of No Significant Impact.	1500.3, 1500.4(q), 1500.5(i), 1501.4(e), 1508.13.
Fish and Wildlife Coordination Act.	1502.25.
Format for Environmental Impact Statement.	1502.10.
Freedom of Information Act	1506.6(f).
Further Guidance	1508.7.
Generic	1502.4(c)(2).
General Services Administration.	1506.6(b)(5).
Geographic	1502.4(c)(1).
Graphics	1502.8.
Handbook	1506.7(a).
Housing and Community Development Act.	1506.12, 1508.12.
Human Environment	1502.3, 1502.22, 1508.14

Impacts ..... 1508.8, 1508.25(c).
Implementing the Decision ..... 1505.3.
Incomplete or Unavailable Information. 1502.22.
Incorporation by Reference ..... 1500.4(j), 1502.21.
Index ..... 1502.10(j).
Indian Tribes ..... 1501.2(d)(2), 1501.7(a)(1), 1502.15(c), 1503.1(a)(2)(ii), 1506.6(b)(3)(ii), 1506.8, 1508.12.
Intensity ..... 1508.27(b).
Interdisciplinary Preparation ..... 1502.6, 1502.17.
Interim Actions ..... 1506.1.
Joint Lead Agency ..... 1501.5(b), 1506.2.
Judicial Review ..... 1500.3.
Jurisdiction by Law ..... 1508.15.
Lead Agency ..... 1500.5(c), 1501.1(c), 1501.5, 1501.6, 1501.7, 1501.8, 1504.3, 1506.2(b)(4), 1506.8(a), 1506.10(e), 1508.16.
Legislation ..... 1500.5(j), 1502.3, 1506.8, 1508.17, 1508.18(a).
Limitation on Action During NEPA Process. 1506.1.
List of Preparers ..... 1502.10(h), 1502.17.
Local or State ..... 1500.4(n), 1500.5(h), 1501.2(d)(2), 1501.5(b), 1501.5(d), 1501.7(a)(1), 1501.8(c), 1502.16(c), 1503.1(a)(2), 1506.2(b), 1506.6(b)(3), 1508.5, 1508.12, 1508.18
Major Federal Action 1502.3, 1508.18
Mandate 1500.3
Matter 1504.1, 1504.2, 1504.3, 1508.19
Methodology 1502.24
Mitigation ..... 1502.14(h), 1502.16(h), 1503.3(d), 1505.2(c), 1505.3, 1508.20
Monitoring ..... 1505.2(c), 1505.3
National Historic Preservation Act 1502.25
National Register of Historical Places ..... 1508.27(b)(8)
Natural or Depletable Resource Requirements. 1502.16(f)
Need for Action ..... 1502.10(d), 1502.13
NEPA Process 1508.21
Non-Federal Sponsor ..... 1501.2(d).
Notice of Intent ..... 1501.7, 1507.3(e), 1508.22
OMB Circular A-95 ..... 1503.1(a)(2)(ii), 1505.2, 1506.6(b)(3)(i)
102 Monitor ..... 1506.6(b)(2), 1506.7(c)
Ongoing Activities ..... 1506.12.
Page Limits ..... 1500.4(a), 1501.7(b), 1502.7.
Planning ..... 1500.5(a), 1501.2(b), 1502.4(a), 1508.18
Policy ..... 1500.2, 1502.4(b), 1508.18(a)
Program Environmental Impact Statement ..... 1500.4(i), 1502.4, 1502.20, 1508.18.
Programs ..... 1502.4, 1506.18(b)
Projects ..... 1508.18.
Proposal ..... 1502.4, 1502.5, 1506.8, 1508.23.
Proposed Action ..... 1502.10(a), 1502.14, 1506.2(c).
Public Health and Welfare 1504.1
Public Involvement ..... 1501.4(e), 1503.1(a)(3), 1506.6.
Purpose ..... 1500.1, 1501.1, 1502.1, 1504.1.
Purpose of Action ..... 1502.10(d), 1502.13
Record of Decision 1505.2, 1506.1
Referrals ..... 1504.1, 1504.2, 1504.3, 1506.3(d)
Referring Agency 1504.1, 1504.2, 1504.3
Response to Comments 1503.4
Rural Electrification Administration ..... 1506.1(d)
Scientific Accuracy 1502.24
Scope ..... 1502.4(a), 1502.9(a), 1508.25
Scoping ..... 1500.4(b), 1501.1(d), 1501.4(d), 1501.7, 1502.9(a), 1506.6(a)
Significantly 1502.3, 1508.27
Similar 1508.25
Small Business Associations ..... 1506.6(b)(3)(vi)
Social Effects 1508.8
Special Expertise 1508.26
Specificity of Comments ..... 1500.4(1), 1503.3
State and Areawide Clearinghouses ..... 1501.4(e)(2), 1503.1(a)(2)(ii), 1506.6(b)(3)(i)
State and Local ..... 1500.4(n), 1500.5(h), 1501.2(d)(2), 1501.5(b), 1501.5(d), 1501.7(a)(1), 1501.8(c), 1502.16(c), 1503.1(a)(2), 1506.2(b), 1506.6(b)(3), 1508.5, 1508.12, 1508.18
State and Local Fiscal Assistance Act. 1508.18(a)
Summary ..... 1500.4(h), 1502.10(b), 1502.12
Supplements to Environmental Impact Statements ..... 1502.9(c)
Table of Contents ..... 1502.10(c)
Technological Development ..... 1502.4(c)(3).
Terminology 1508.1
Tiering ..... 1500.4(i), 1502.4(d), 1502.20, 1508.28
Time Limits ..... 1500.5(e), 1501.1(e), 1501.7(b)(2), 1501.8
Timing 1502.4, 1502.5, 1506.10
Treaties 1508.17
When to Prepare an Environmental Impact Statement. 1501.3.
Wild and Scenic Rivers Act ..... 1506.8(b)(ii)
Wilderness Act ..... 1506.8(b)(ii)
Writing 1502

28.
Environmental Review ProceduresNOAA Administrative Order 216-6

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of the Chief Scientist
Washington, D.C. 20230

November 4, 1991

OCRM REC'D 11/6/91

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MEMORANDUM FOR: Distribution

FROM: David Cottingham
Director, Ecology and Conservation Office

SUBJECT: Revised NOAA Environmental Review Procedures - NAO 216-6

Attached is the revised NOAA environmental review procedures. NOAA recently reorganized its entire administrative order series. Accordingly, what had been NDM 02-10 has now become NOAA 216-6. Substantively, they are the same. In Section 2 Background, you will notice this revision includes "notable changes" and "procedural improvements." All of this was in the 1984 version, so don't worry. We added the Purpose and changed the name of this office. We will publish this revision in the Federal Register in the near future.

Please call me if you have any questions or need additional copies.

Attachment

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NOAA FORM 58-5 (1-84) TRANSMITTAL 84

National Oceanic and Atmospheric Administration	NOAA Administrative Order 216-6	
NOAA ADMINISTRATIVE ORDER SERIES	DATE OF ISSUANCE August 6, 1991	EFFECTIVE DATE June 21, 1991

SUBJECT

ENVIRONMENTAL REVIEW PROCEDURES

SECTION 1. PURPOSE.

This Order revises the National Oceanic and Atmospheric Administration (NOAA) environmental review policies and procedures. (See 45 FR 49312, dated July 24, 1980.) The revisions will improve efficiency, reduce administrative redundancies, continue the agency objectives of sound resource management, and maintain informed public involvement in Federal decision-making. This Order incorporates all requirements of the National Environmental Policy Act (NEPA) regulations issued by the Council on Environmental Quality (CEQ) (See 43 FR 55978, dated November 24, 1978), and by the Department of Commerce (DOC) in its NEPA directive, Department Administrative Order (DAO) 216-6, Implementing the National Environmental Policy Act, dated March 11, 1983. This Order also reiterates provisions in the previous version of NOAA Directives Manual (NDM) 02-10, Environmental Review Procedures, dated July 23, 1984, with respect to the environment outside the United States pursuant to Executive Order No. 12114 on Environmental Effects Abroad of Major Federal Actions (See 44 FR 1957, dated January 4, 1979), as implemented by the DOC in DAO 216-12, Environmental Effects Abroad of Major Federal Actions, dated March 11, 1983.

SECTION 2. BACKGROUND.

.01 Proposed changes are administrative and procedural improvements intended to add efficiency to NOAA's NEPA compliance efforts. These improvements stem from a better understanding of agency roles and responsibilities under NEPA. Shifts in agency direction, including new programs, also prompted this review.

.02 Notable changes in this revision include:

a. a detailed list of definitions, explanations, and acronyms with special emphasis on the use of categorical exclusions;

b. a description of the general environmental analysis process;

c. separate discussions on NEPA procedures for each category of NOAA activity; (e.g., management plans, amendments, projects, regulations, emergency regulations, etc.)

d. discussions of procedural requirements for environmental assessments and environmental impact statements; and

e. special guidance for determining "significance," including criteria applicable to fishery management plan actions.

.03 The appendices, which were included in earlier versions of NDM 02-10, have been deleted to avoid confusion resulting from changes in agency programs and procedures.

SECTION 3. REFERENCES.

.01 National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 et seq.

.02 CEQ Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR Parts 1500 to 1508, dated November 24, 1978, cited herein by CFR Part number only, e.g., CEQ sec. 1500.

.03 Executive Order (EO) No. 12114, Environmental Effects Abroad of Major Federal Actions, 44 FR 1957, dated January 4, 1979.

.04 Executive Order (EO) No. 12291, Federal Regulation, 46 FR 13193, dated February 17, 1981.

.05 NOAA Administrator's Letter No. 17, Environmental Impact Statements, dated April 3, 1978.

.06 Department Administrative Order (DAO) 216-6, Implementing the National Environmental Policy Act, dated March 11, 1983.

.07 Department Administrative Order (DAO) 216-12, Environmental Effects Abroad of Major Federal Actions, dated March 11, 1983.

SECTION 4. DEFINITIONS.

.01 Most of the terminology listed in sec. 4. and 5. of this Order are derived from regulations and directives listed in sec. 3. of this Order, particularly the CEQ NEPA regulations. (See sec. 3.02 of this Order.) The CEQ regulations should be consulted for more comprehensive explanations. Cross references to relevant CEQ sections are provided after each definition, where appropriate.

a. Amendment. A change to either a project or management plan. Each amendment should be accompanied by a brief statement or supported by a notation in the files that a categorical exclusion applies or by further environmental analysis by either an Environmental Assessment (EA), Environmental Impact Statement (EIS), or Supplemental Environmental Impact Statement (SEIS).

b. Applicant. Any party who may propose to NOAA an action that should be accompanied by an environmental analysis. Depending on the program, the applicant could be an individual, private organization, State, territory, governmental body, or foreign nation. (See sec. 6.01b.4. of this Order.)

c. Categorical Exclusion (CE). Decisions granted to certain types of actions which individually or cumulatively do not have the potential to pose significant threats to the human environment and are therefore exempted from both further analysis and requirements to prepare environmental documents (CEQ sec.

1508.4). The main text of this directive presents specific actions and general categories of other actions found to warrant a CE. The responsible program manager prepares a memorandum or notation for the file of each decision to use a CE. (See sec. 4.00p. of this Order.) A notation refers to a brief comment or mark in the NEPA records of a NOAA office. Periodic copies of such records and notations must be sent to the Ecology and Conservation Office, Office of the Chief Scientist (EC). If a memorandum is prepared, a copy must be sent to EC, in the absence of a memorandum, the RPM must notify the EC regarding the action. The RPM and EC can require an EA or EIS for an action normally covered by a CE if the proposed action could result in any significant impacts as described in sec. 4.00q., sec. 6.10, and sec. 6.11 of this Order. When appropriate, the RPM should consult with States while planning actions that may be worthy of a CE and notify such States of actions which receive a CE, as described in sec. 6.02b.3. and sec. 6.02c.3. of this Order.

d. Controversial. Refers to a substantial dispute which may concern the nature, size, or environmental effects, but not the propriety of a proposed action. (See NOAA General Counsel Opinion No. 101, dated March 8, 1983.)

e. EC. This office is responsible for ensuring NEPA compliance for NOAA under this Order and for DOC under DAO 216-6 and DAO 216-12. EC must give final clearance authority to all NEPA documents prior to public availability by signing the appropriate transmittal letters. EC also provides general guidance on preparation of environmental documents, approves criteria to determine the appropriate document to be prepared, works with Line Offices to establish categorical exclusions, establishes and/or approves criteria to define "significant," is available for consultations as requested, coordinates NOAA comments on EISs prepared by other Federal agencies, makes predecision referrals to CEQ, and monitors DOC activities for NEPA compliance.

f. Environmental Analysis Process. The systematic analysis and evaluation applied to all proposed NOAA actions not covered by a categorical exclusion. This analysis could result in the preparation of one or more of the environmental documents listed in sec. 4.00h. of this Order.

g. Environmental Assessment (EA). A document prepared by a Federal agency which presents a brief analysis of the environmental impacts of the proposed action and its alternatives, including sufficient evidence to determine that either:

1. an environmental impact statement is required; or

2. a finding of no significant impact should be declared (CEQ sec. 1508.9).

h. Environmental Document. An environmental assessment, finding of no significant impact, draft environmental impact statement, supplement to a draft environmental impact statement, final

environmental impact statement, supplement to a final environmental impact statement, or a record of decision (CEQ sec. 1508.10).

i. Environmental Impact Statement (EIS). A detailed written report which describes a proposed action, the need for the action, alternatives considered, the affected environment, the environmental consequences of the proposed action, and other reasonable alternatives. An EIS is prepared in two stages, a draft and a final; either stage may be supplemented (CEQ sec. 1508.11).

j. Finding of No Significant Impact (FONSI). A document which declares that an action will not significantly affect the human environment. A FONSI is supported by an environmental assessment (CEQ sec. 1508.13).

k. Major Federal Action. An activity, such as a project or program, which may be fully or partially funded, regulated, conducted, or approved by NOAA. "Major" reinforces but does not have a meaning independent of "significant" as defined in sec. 4.00q. and sec. 6.10c. of this Order. Such major actions require preparation of an environmental document unless covered by a categorical exclusion (CEQ sec. 1508.18). CEQ's definition of "scope" (CEQ sec. 1508.25) should be used to assist determinations of the type of document needed for NEPA compliance.

l. Management Plan. A program or policy statement that describes a resource, the need for management, alternative management strategies, possible consequences of such alternatives, and selects recommended management measures. Included, for example, are fishery, sanctuary, and State coastal management plans. Such plans may incorporate an environmental document into a single consolidated package.

m. Notice of Intent. A short Federal Register announcement of agency plans to prepare an environmental impact statement or to hold a scoping meeting. The notice may be published separately or combined with other announcements (CEQ sec. 1508.22).

n. Project. A grant, loan, loan guarantee, land acquisition, construction, license, permit, modification, regulation, or research program for which NOAA is involved in the review, approval, implementation, or other administrative action.

o. Record of Decision (ROD). A concise statement for the public record of the decision on the proposed action, the alternatives considered, the environmentally preferable alternative(s), and whether all practicable means to avoid or minimize environmental harm have been adopted (CEQ sec. 1505.2). (See sec. 6.08c. of this Order.)

p. Responsible Program Manager (RPM). The person with primary responsibility to determine the need for and ensure preparation of any environmental document. The RPM could be the director of

a NOAA office, the NEPA compliance coordinator of a Line Office (LO), or a program director in an LO. The RPM shall be designated by the Assistant Administrator responsible for the proposed action.

q. Significant. A measure of the intensity and the context of effects of a major Federal action on, or the importance of that action to, the human environment (CEQ sec. 1508.14). "Significant" is a function of the short-term, long-term, and cumulative impacts of the action on that environment. Significance is determined according to the general guidance in sec. 6.10 of this Order unless specific criteria (e.g., sec. 6.11 of this Order) are developed by a RPM. Determinations of non-significance will be made by the RPM but reviewed by EC prior to clearance. All specific criteria for "significant" must be approved by EC and published in the Federal Register as amendments to subpara. 13c of NDM 02-10 (CEQ sec. 1508.27).

r. Supplemental Environmental Impact Statement (SEIS). An environmental document prepared to amend an earlier EIS when significant change is proposed beyond the scope of analysis in the original EIS or when significant new circumstances or information arise which could affect the proposed action (CEQ sec. 1502.9). SEISs may be necessary when significant changes are proposed to an action after a final EIS has been released to the public.

SECTION 5. ACRONYMS.

The following acronyms are used in this Order:

APA - Administrative Procedure Act
CE - Categorical Exclusion
CEQ - Council on Environmental Quality
CFR - Code of Federal Regulations
CZMA - Coastal Zone Management Act
DAO - Department Administrative Order
DOC - U.S. Department of Commerce
DSM - Deep Seabed Mining
EA - Environmental Assessment
EC - Ecology and Conservation Office, Office of the Chief Scientist
EIS - Environmental Impact Statement
EO - Executive Order
EPA - U.S. Environmental Protection Agency
ESA - Endangered Species Act
FMP - Fishery Management Plan
FONSI - Finding of No Significant Impact
FR - Federal Register
FWCA - Fish and Wildlife Coordination Act
LO - NOAA Line Office (National Marine Fisheries Service; National Ocean Service; National Weather Service; National Environmental Satellite, Data and Information Service; Office of Oceanic and Atmospheric Research)
MFCMA - Magnuson Fishery Conservation and Management Act (Magnuson Act)
MMPA - Marine Mammal Protection Act

MPRSA - Marine Protection, Research, and Sanctuaries Act
NDM - NOAA Directives Manual
NEPA - National Environmental Policy Act
NOAA - National Oceanic and Atmospheric Administration
OCRM - Office of Ocean and Coastal Resource Management, National Ocean Service, NOAA
OGC - Office of General Counsel, NOAA
OTEC - Ocean Thermal Energy Conversion
ROD - Record of Decision
RPM - Responsible Program Manager
SEIS - Supplemental Environmental Impact Statement

SECTION 6. POLICY/RESPONSIBILITIES/PROCEDURES.

.01 Applying the Environmental Analysis Process.

a. General. Environmental analysis is the process undertaken by the responsible program manager (RPM) to identify the scope of issues related to the proposed action and to determine the necessary steps for NEPA compliance (CEQ sec. 1500.2). Such an analysis should be undertaken for any major Federal action proposed to be implemented in the United States or by United States citizens outside U.S. jurisdiction.

b. The Process.

1. The environmental analysis process includes all of the actions required by CEQ parts 1502 and 1503 to comply with NEPA. (See Exhibit 1 to this Order.) The series of actions are:

(a) defining the proposed action;

(b) comparing the action and potential environmental consequences to this directive for guidance on the proper type of NEPA document;

(c) preparing an environmental assessment (EA) if appropriate;

(d) preparing a finding of no significant impact or FONSI (which ends the NEPA compliance process for nonsignificant actions) or initiating planning for an environmental impact statement (EIS) based on the EA;

(e) publishing a notice of intent to prepare an EIS and a notice of intent to scope key issues in the EIS;

(f) preparing the draft EIS;

(g) distributing the draft EIS for public comment;

(h) holding a public hearing(s) on the proposed EIS;

(i) incorporating public comments and responses into a final EIS;

(j) publishing and distributing the final EIS for public comment; and

(k) releasing a record of decision summarizing the proposed action.

2. This analysis is to be coordinated by the RPM and initiated as early as possible in the planning process, regardless of whether the RPM anticipates the need for an EA or EIS. In the case of uncertainty regarding preparation of the proper environmental documents, early consultation with EC will assist the RPM in determining the best means for NEPA compliance. Consultation with EC during the early stages of document preparation should ease review and clearance at later stages of the decision-making process.

3. NEPA compliance may involve preparation of one or more environmental documents. The RPM should consult sec. 6.01b.7., sec. 6.01b.8., and sec. 6.01b.9. of this Order regarding scoping and document distribution.

4. In those cases where actions are planned by Federal or non-Federal agency applicants defined in sec. 4.00b. of this Order prior to NOAA involvement, the NEPA coordinator for the appropriate program will, upon request, supply potential applicants with guidance on the scope, timing, and content of any required environmental analysis. Possible programs and actions, plus the NOAA contact for further NEPA guidance, are listed in Exhibit 2 to this Order.

5. RPMs should consult this directive when their involvement in an action proposed by State or local agencies or Indian tribes is reasonably foreseeable and could be a major Federal action.

6. RPMs should also consult with EC and this directive before communicating with other Federal agencies regarding whether and to what extent NOAA will become involved in developing proposals for such agencies, or in the preparation of environmental analyses or documents initiated by such agencies.

7. When a proposed action involves several organizational units in NOAA, the RPMs should determine which manager should take the lead role in environmental analyses and the responsibility for preparation of any environmental document.

8. Where disagreements arise regarding NOAA's NEPA procedures for any action, EC will make the final decision. A complete statement of EC authorities and functions are presented in sec. 4.00e. of this Order. All of those EC roles may be used to support NOAA's environmental analyses.

c. Terminating the Process. NOAA may stop the environmental analysis process at any stage if program goals shift, support for a proposed action diminishes, the original analysis becomes outdated, or other special circumstances prevail. If a draft EIS has already been filed with EPA, the RPM must notify the Director, EC of any contemplated termination of the environmental analysis prior to completion of the final EIS. If the environmental analysis process is terminated, the final EIS will not be prepared. After RPM approval and EC notification, the

termination must be announced in the Federal Register. Such terminations must be explained in writing by the RPM through EC to EPA so that EPA may withdraw the draft EIS and close its file on the action. In addition, for supplemental documents only, EC must notify CEQ if the process stops after issuance of a draft supplemental EIS but before issuance of the final.

.02 Type of Environmental Documents Needed to Satisfy NEPA.

The procedures for complying with domestic laws, regulations, executive orders, and administrative orders differ depending on whether the proposed action is a management plan, an amendment to a plan, a research project or regulation, or an emergency regulation. See sec. 6.03 of this Order for guidance on NEPA compliance for international treaties, commissions, and compacts.

a. Management Plans. Management plans require either an EA or EIS; a CE does not apply to management plans unless an EA or EIS has already been prepared on the proposed action.

1. Requires an EA but not necessarily an EIS. All management plans require an EA unless the RPM decides to proceed directly with an EIS. Plans that are significant based on sec. 4.00q. of this Order, general criteria in sec. 6.10 of this Order, and any specific criteria in sec. 6.11 of this Order will require an EIS.

2. Requires an EIS. RPMs who determine that a proposed major action is significant may choose between options specified in sec. 6.02a.2.(a) and sec. 6.02a.2.(b) of this Order.

(a) Separate EIS and Management Plan. With this approach, the EIS is prepared as a separate document and is not incorporated into the related management plan. Cross references between the EIS and management plan are encouraged to minimize redundancies between texts. The EIS must comply fully with the CEQ NEPA regulations, including requirements for contents and administrative procedures. The plan and EIS may be printed under the same cover.

(b) Consolidated EIS and Management Plan. EIS contents may be combined with the contents of related management plans to yield a single "consolidated" document. These documents must still satisfy the CEQ regulations and all requirements for plan and EIS contents and administrative procedures but need not be prepared according to the CEQ recommended outline for EISs. The consolidated document must contain a detailed table of contents identifying required sections of the EIS. EC must clear the NEPA aspects of each consolidated document since the document serves as an EIS as well as a management plan. Similarly, all consolidated documents must be filed at EPA and follow the normal administrative procedures for any EIS, including public review.

3. Categorical Exclusion. No management plan may receive a categorical exclusion, i.e., all plans must be accompanied by an EA or EIS. However, regulations to implement a plan, where such regulations are addressed in the plan and related NEPA documents, are categorically excluded from further NEPA documentation. (See

sec. 6.02c.3.(f).) Management plans that address an action covered by a previous EIS or EA and that do not expand the original proposal can receive a CE if the alternatives and their impacts have not changed.

4. Other NEPA Approaches.

(a) Cooperative Document Preparation.

(i) NOAA programs should cooperate with State and local agencies to the fullest extent possible to reduce duplication in document preparation. Such cooperation will include, where possible, joint planning, joint environmental research, joint public hearings, and joint environmental documents (CEQ sec. 1506.2(b)). NOAA should work with the appropriate State or local agencies as joint lead agency in fulfilling the intent of NEPA.

(ii) Like documents prepared solely by a NOAA office, jointly prepared documents must discuss any inconsistencies of a proposed action with any approved State or local plan or law (CEQ sec. 1506.2(d)).

(b) Adoption of Other Federal Documents.

(i) NOAA programs may adopt an EA, draft EIS, or final EIS or portion thereof prepared by another Federal agency if the language satisfies the standards of the CEQ regulations and this Order.

(ii) When adopting an entire EIS without change, the RPM should recirculate the document as a final EIS. However, if the actions covered by the document are changed in a potentially significant manner, the document should be circulated as a draft and final (CEQ sec. 1506.3).

(iii) NOAA programs cannot adopt final decisions presented in documents prepared by other agencies. RPMs should prepare a new FONSI if adopting an EA, a new ROD, or an EIS.

b. Amendments to Management Plans and Regulatory Revisions. An EA or supplemental EIS may be necessary when an amendment is proposed or when additional relevant information affecting the analysis becomes available. All amendments, except those receiving a CE, require an EA or EIS. Revisions of regulations may require an EA or EIS if such revisions are not addressed in a management plan amendment or related NEPA document. If the RPM has doubt concerning significance, an EA will be used to determine whether a FONSI, SEIS, or an EIS is appropriate. Criteria included in sec. 6.10 and sec. 6.11 of this Order may aid in determining the significance of amendments. EC is available for consultation on these determinations.

1. Requires an EA but Not Necessarily an EIS.

(a) Amendments determined not to merit a CE require an EA unless the RPM decides to proceed directly with an EIS. If the EA reveals that no new significant impacts will result from the

amendment, the RPM may prepare a FONSI, integrate it with the EA, and follow the procedures set forth in sec. 6.05 of this Order. If the EA reveals significant impacts that may or will differ in context or intensity from those described in the previously published EA or EIS on the action being amended, preparation of a SEIS or new EIS will be required.

(b) Examples of actions requiring at least an EA are amendments to coastal management and fishery management plans where such amendments could result in impacts which differ significantly in content or intensity from those described in a previously published EA or EIS.

(c) When circumstances change or information becomes available bearing on the impacts of an action addressed in a previously published EA or final EIS, the circumstances or information will be reviewed by the RPM to determine whether a new EA, EIS, or supplemental EIS should be prepared, even if no amendment to a plan is contemplated.

2. Requires a New EIS or Supplemental EIS (SEIS). Amendments which do not result in a FONSI, as determined on a case-by-case basis according to sec. 6.02b.1. of this Order or that may be reasonably expected to result in new and significant impacts, require preparation of either a new EIS or SEIS based on the extent of new impacts. The guidelines for determining the need for a new EIS or SEIS are the same as for an initial EIS. (See sec. 4.00q., sec. 6.10, and sec. 6.11 of this Order.) Direct, indirect, and cumulative effects of related actions (CEQ sec. 1508.8) must be considered.

3. Categorical Exclusion.

(a) Amendments falling within the range or scope of alternatives addressed in a previous EA or EIS do not require preparation of an additional environmental document if the initial analysis is determined by the RPM to be valid and complete. Similarly, amendments falling within one of the general categories described in sec. 6.02b.3.(b) of this Order may also receive a CE. If a CE is determined to be appropriate, a memorandum or notation must be prepared for the files with a copy to EC. (See sec. 4.00c. of this Order.)

(b) Examples of CEs for amendments include, but are not limited to, the following:

(i) Routine administrative actions. Ongoing or recurring actions with limited potential for effect on the human environment, such as:

(aa) reallocations of yield within the scope of a previously published FMP or fishery regulation, and

(bb) combining management units in related FMP.

(ii) Actions of limited size or magnitude. Actions which do not result in a significant change in the original environmental action such as:

(aa) minor technical additions, corrections, or changes to a management plan or regulation, and

(bb) extension of the period of effectiveness of a management plan or regulation.

(iii) Other actions within the scope of Section 6.02b.3.(a) of this Order.

4. Other NEPA Approaches. LO's may cooperate with state or local agencies on a joint environmental document, (See sec. 6.02a.4.(a) of this Order.) or adopt a document prepared by another Federal agency. (See sec. 6.02a.4.(b) of this Order.)

c. Projects and Other Actions. NOAA is involved in some actions generally categorized as projects, including: funding and budget decisions, preproposal actions, regulations, research programs, and actions on permits and licenses. Requirements for environmental analysis for these and similar activities are described below.

1. Requires an EA but not necessarily an EIS.

(a) Projects that may have significant impacts are subject to an EA unless the RPM determines that an EIS will be prepared. If an EA is prepared, it will determine if significant impacts may occur. The general criteria in sec. 6.10 of this Order may aid RPM decisions on significance.

(b) The decision of whether to prepare an EIS hinges on the specific proposed action, the guidance in sec. 6.10 and sec. 6.11 of this Order and CEQ sec. 1501.4.

(c) The following types of actions fall within this category.

(i) Financial assistance awards for land acquisition or construction, such as those administered under the Coastal Energy Impact Program (CEIP), where such actions may result in significant impacts.

(ii) Promulgation of regulations, policies, or criteria for entire programs, i.e., not single actions addressed in sec. 6.02c.3.(f) of this Order but program-wide actions or procedures with a potential effect on the human environment. Includes, but is not limited to, regulations for national marine and estuarine sanctuaries, fishery management, deep seabed mining, ocean thermal energy conversion, and coastal management.

(iii) Acquisition, construction, or modification of new facilities budgeted by NOAA or major relocations of NOAA personnel undertaken for programmatic reasons.

(iv) Other actions, including research, that may have significant environmental impacts. (See DAO 216-6.)

(v) Proposals for legislation, as defined in CEQ sec. 1508.17.

2. Requires an EIS. An EIS is required for major Federal projects or actions determined by the RPM to be significant. (See sec. 4.00q., sec. 6.10, and 6.11 of this Order.) The RPM may proceed directly to an EIS without preparing an EA. These projects or actions include the following:

(a) Major new projects or programmatic actions that may significantly affect the environment.

(b) Actions required by law to be subject to an EIS, such as an application for any license for ownership, construction, and operation of an Ocean Thermal Energy Conversion facility or for a Deep Seabed Mining license or permit.

(c) Research projects, activities, and programs when any of the following may result:

(i) Research is to be conducted in the natural environment on a scale at which substantial air masses are manipulated (e.g., extensive cloud-seeding experiments), substantial amounts of mineral resources are disturbed (e.g., experiments to improve ocean sand mining technology), substantial volumes of water are moved (e.g., artificial upwelling studies), or substantial amounts of wildlife habitats are disturbed.

(ii) Either the conduct or the reasonably foreseeable consequences of a research activity would have a significant impact on the quality of the human environment. (See DAO 216-6.)

(iii) Research that is intended to form a major basis for development of future projects (e.g., Project Stormfury cloud-seeding) which would be considered major actions significantly affecting the environment under this Order. (See DAO 216-6.)

(iv) Research that involves the use of highly toxic agents, pathogens, or non-native species in open systems.

(d) Federal plans, studies, or reports prepared by NOAA that could determine the nature of future major actions to be undertaken by NOAA or other Federal agencies that would significantly affect the quality of the human environment.

(e) Proposals for legislation, as defined in CEQ sec. 1508.17, which require the preparation of a legislative EIS in accordance with CEQ or DAO 216-6.

3. Categorical Exclusions. The following categories of projects or other actions do not normally have the potential for a significant effect on the human environment and are therefore exempt from the preparation of either an EA or an EIS. (See sec. 4.00c. of this Order.) When several similar actions, each worthy

of a CE, are anticipated, a generic memorandum to the file may be submitted instead of a separate memorandum for each action.

(a) Research. Programs or projects of limited size and magnitude or with only short-term effects on the environment. Examples include natural resource inventories and environmental monitoring programs conducted with a variety of gear (satellite sensors, fish nets, etc.) in water, air, or land environs. Such projects may be conducted in a wide geographic area without need for an environmental document provided related environmental consequences are limited or short-term.

(b) Financial and Planning Grants. Financial support services, such as a Saltonstall-Kennedy grant, fishery loan or grant disbursement under the Fishermen's Contingency Fund or Fishing Vessel and Gear Compensation Fund, or a grant under the Coastal Zone Management Act where no environmental consequences are anticipated beyond those already analyzed in establishing such programs, laws, or regulations. If no initial analysis was prepared, this section would not require preparation of a retroactive environmental document. New financial support services and programs should undergo an environmental analysis at the time of conception to determine if a CE could apply to subsequent actions.

(c) Minor Planning Activities. Projects where the proposal is for an impact amelioration action such as planting dune grass or for minor project changes, restoration or rehabilitation projects, or improvements such as adding picnic facilities to a coastal recreation area unless such projects in conjunction with other related actions may result in a cumulative impact (CEQ sec. 1508.7).

(d) Pre-proposal Actions. Actions before a proposal exists do not require any NEPA analysis. A "proposal" exists at that stage in the development of an action when an agency subject to NEPA has a goal and begins its decision-making process, including consideration of environmental impacts, toward realization of that goal (CEQ sec. 1508.23).

(e) Programmatic Functions. The following NOAA programmatic functions with no potential for significant environmental impacts are generally exempt from the environmental documentation requirements of NEPA: routine experimental procedures; program plans and budgets; mapping, charting, and surveying services, ship support; fisheries financial support services; basic research or research grants except as provided in sec. 6.02c.3. of this Order; enforcement operations, basic environmental services, such as weather observations, communications, analyses, and predictions; environmental satellite services; environmental data and information services; air quality observations and analysis; support of international global atmospheric and Great Lakes research programs; executive direction; administrative services; and administrative support of the National Advisory Committee on Oceans and Atmosphere and other advisory bodies.

(f) Regulations Implementing Projects or Plans. When an EA or EIS has been or will be prepared for specific projects or plans serving as the basis for the following activities, implementation of regulations within the scope of the plan and related NEPA documents will receive a categorical exclusion. Examples include: coastal zone management programs; national estuarine or marine sanctuaries; fishery management plans; and regulations and waivers issued under sec. 101(a)(2), and 101(a)(3) of the MMPA.

(g) Permits. Permits for scientific research and public display under the ESA and MMPA and grants under the MMPA.

(h) Listing actions under sec. 4(a) of the ESA. Listing, delisting, and reclassifying species and designating critical habitat.

(i) Other categories of actions which would not have significant environmental impacts, including routine operations, routine maintenance, actions with short-term effects, or actions of limited size or magnitude.

d. Emergency Actions.

1. Emergency actions are promulgated:

(a) to implement management plans or amendments to plans;

(b) to establish or implement projects, e.g., coastal energy impact programs; or

(c) to take other actions, e.g., fishery management actions without a fishery management plan.

These emergency actions are subject to the same NEPA requirements as nonemergency plans, projects, and actions. Emergency actions are subject to the environmental analysis process outlined in sec. 6.01 of this Order, to the requirements and guidance of sec. 6.02 of this Order concerning the type of environmental documents needed to satisfy NEPA, and to the requirements for public involvement and scoping set forth in sec. 6.04 of this Order. Despite the emergency nature of a proposed action, RPMs must maintain contact with State government agencies to ensure that all State concerns are addressed within the time constraints of the emergency action. If time constraints limit compliance with any aspect of the environmental analysis process, the RPM should contact EC to determine alternative approaches, as discussed in sec. 6.02d.3. of this Order.

2. The RPM should determine whether an EA or an EIS will be prepared for emergency actions. The emergency action may be categorically excluded if the RPM determines that it satisfies the threshold criteria for "controversial," "major," and "significant" that apply to "non-emergency" actions. (See sec. 4.00d., sec. 4.00k., and 4.00q. of this Order.) In the event of uncertainty regarding the necessary environmental document for an

emergency action or whether a CE is appropriate, the RPM should consult with EC as early as possible regarding the appropriate course of action.

3. Those emergency actions which are determined by the RPM to receive a CE or require an EA leading to a FONSI will not be delayed by any time constraints or requirements established by NEPA or this directive. If the RPM determines that the emergency action requires preparation of an EIS, the RPM should determine whether the requirements associated with EIS preparation, filing, and public review would delay implementation of the emergency action and endanger achievement of the objectives of the action. If preparation of the EIS would not delay the emergency action sufficiently to prevent attaining the objectives, an EIS must be prepared and associated procedures satisfied before the emergency action becomes effective. If the RPM determines that time or other restrictions may limit attaining the objectives of the emergency action, the RPM should ask EC to consult CEQ about alternative arrangements.

4. Alternative arrangements must satisfy the CEQ guidance on emergencies (CEQ sec. 1506.11). Possible arrangements include shortened public review periods, review periods held concurrently with effective emergency regulations but completed before final regulations are implemented, or EC staff assistance in preparing necessary documents. These arrangements are limited to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA requirements and review.

.03 Environmental Analysis of Proposals with Potential International Implications.

a. General. This section applies to NOAA activities, or impacts thereof, which occur outside the territory of the United States, or which may affect resources not subject to the management authority of the United States, as addressed by Executive Order (EO) No. 12114 and DAO 216-12. Specifically, except as provided in sec. 6.03b. of this Order, these provisions should be followed for these categories of NOAA actions:

1. Major Federal actions significantly affecting the environment of the global commons outside the exclusive jurisdiction of any nation, e.g., the oceans, the atmosphere, the deep seabed, or Antarctica.

2. Major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action.

3. All other major Federal actions significantly affecting the environment of a foreign nation, including, but not limited to, those that provide to that nation:

(a) a product and/or a principal product, emission, or effluent which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious Public health risk, or

(b) a physical project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against radioactive substances.

4. Major Federal actions outside the United States, its territories, and possessions which significantly affect natural or ecological resources of global importance designated for protection by the President under the provisions of EO No. 12114, or, in the case of resources protected by international agreement binding on the United States, by the Secretary of State. For marine resources, "outside the United States" is defined as outside the 200-mile fishery conservation zone or 200-mile exclusive economic zone.

b. Constraints.

1. Environmental documents on actions subject to this section should be as complete and detailed as possible under the circumstances. However, in analyzing activities or impacts which occur outside the United States, it may on occasion be necessary to limit the circulation, timing, review period, or detail of an EA or EIS for one or more of the following reasons:

(a) Diplomatic considerations;

(b) National security considerations;

(c) Relative unavailability of information;

(d) Commercial confidentiality; and

(e) The extent of NOAA's role in the proposed activity.

2. When full compliance with this Order is not possible, consideration may be given to the preparation of:

(a) bilateral or multilateral environmental studies, relevant or related to the proposed actions, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant, and

(b) concise reviews of the environmental issues involved, including EAs, summary environmental analyses, or other appropriate documents.

(3) RPMs, in consultation with EC and the NOAA General Counsel (GC), will decide whether an EA or EIS should be prepared on an action under this section.

c. Special Efforts. Certain activities having environmental impacts outside the United States require special efforts because of their international environmental significance. These include activities mentioned in sec. 6.03a of this Order and those which:

1. threaten natural or ecological resources of global importance or which threaten the survival of any species;

2. may have a significant impact on any historic, cultural, or national heritage or resource of global importance, or

3. involve environmental obligations set forth in an international treaty, convention, or agreement to which the United States is a party.

d. Consultation. In preparing an environmental document for an activity which may affect another country or which is undertaken in cooperation with another country and will have environmental effects abroad, the RPM should consult with EC both in the early stages of document preparation (in order to determine the scope and nature of the environmental issues involved) and in connection with the results and significance of such documents, except when the factors listed in sec. 6.03b.1.(a), sec. 6.03b.1.(b), or sec. 6.03b.1.(d) of this Order would indicate otherwise. EC and the NOAA Office of General Counsel (GC) will consult, as appropriate, with other offices in the DOC, CEQ, and Department of State when the proposed action or its environmental consequences are likely to involve substantial policy considerations. When consulting with foreign officials, every effort must be made to take into account foreign sensitivities and to understand that one of NOAA's objectives in preparing environmental documents in cases involving effects abroad is to provide environmental information to foreign decision-makers, as well as to responsible NOAA officials. Finally, NOAA's efforts in preparing these environmental documents will be directed, in part, toward strengthening the ability of other countries to carry out their own analyses of the likely environmental effects of proposed actions.

.04 Public Involvement and Scoping.

a. General. RPMs must make every effort to involve the public early in the development of a proposed action and to ensure that public concerns are adequately considered in the decision-making process. Public involvement may be solicited through participation in advisory groups, invitation to meetings and hearings, solicitation of comments on draft and final documents, and regular contacts as appropriate. Interested persons may obtain information and status reports on EAs, EISs, and other elements of the environmental review process from the RPM or EC. RPMs will be guided by CEQ sec. 1506.6 and by NDM 21-25, Release of Mission Information and Responses to Freedom of Information Act Requests, dated March 30, 1983, in providing adequate public involvement in the environmental review process. NOAA offices should use State "single points of contact" to ensure that all appropriate State government agencies are given the opportunity to participate in the decision-making process. This applies to early planning and comments on environmental documents.

b. Scoping. Scoping is "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action" (CEQ sec. 1501.7). The fullest practicable public participation and interagency consultation will be sought to ensure the early identification of significant environmental issues related to a

proposed action. Usually scoping is conducted shortly after a decision is made to prepare an EIS. However, scoping may be used during the EA process to help determine the need for an EIS. Scoping and public involvement may be satisfied by many mechanisms, including planning meetings, public hearings, and requests for comment on discussion papers and other versions of decision and background documents.

c. Notice of Intent.

1. Scoping officially begins with publication in the Federal Register of a "notice of intent" to prepare an EIS (CEQ sec. 1501.7) but may in practice begin in the early stages of program development. The notice should be published as soon as practicable after the need for an EIS has been determined. The notice must include (CEQ sec. 1508.22):

(a) the proposed action and possible alternatives;

(b) NOAA's proposed scoping process including any meetings to be held; and

(c) the name and address of the agency contact for further information about the proposed action and the EIS.

2. When there is likely to be a lengthy period between the decision to prepare an EIS and actual preparation of the draft EIS, publication of the notice of intent may be delayed until a reasonable time in advance of preparation of that draft EIS.

3. If a RPM decides not to pursue a proposed action after a notice of intent has been published, a second notice should be published to inform the public of the change.

4. The notice of intent may be combined with similar notices required for preparation of other documents. This will minimize redundancy while still notifying the public of prospective actions.

d. Scoping Process. As part of the scoping process, the actions described in CEQ sec. 1501.7(a) must be fulfilled, when appropriate; CEQ sec. 1501.7(b) is not mandatory. If the proposed action has already been subject to a lengthy development process which has included early and meaningful opportunity for public participation, those prior activities can be substituted for this requirement. Scoping meetings should inform interested parties of the proposed action, alternatives, and solicit comments on that action. Written and verbal comments must be accepted during the waiting period after publication of the notice of intent and must be considered in the environmental analysis process. The scoping process will include, where relevant, consideration of the impact of the proposed action on: floodplains and wetlands, as described in NDM 02-12, Floodplain Management and Protection of Wetlands, dated November 10, 1979, sites included in the National Trails and Nationwide Inventory of Rivers, as required by Presidential Directive, dated August 2, 1979, sites nominated or designated by the Advisory Council on

Historic Preservation, as required by 36 CFR Part 800; the National Marine Fisheries Service's habitat conservation policy (48 FR 53142); and other appropriate laws and policies.

.05 Environmental Assessment (EA) Preparation and Approval.

a. Purpose.

1. The purpose of an EA is to determine whether significant environmental impacts could result from a proposed action. If the action is determined not to be significant, the EA and resulting FONSI will be the final environmental documents required by NEPA. If the EA reveals that significant environmental impacts may be reasonably expected to occur, then an EIS must be prepared. The contents of an EA are discussed in CEQ sec. 1508.9.

2. The EA serves to:

(a) briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI, and

(b) facilitate preparation of the EIS.

The EA must include brief discussions of the need for the action, alternatives as required by sec. 102(2)(e) of NEPA, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

3. The environmental analysis in the EA provides the basis for determining whether or not the proposed action is significant. Therefore, the EA must address those factors outlined in sec. 6.10 and sec. 6.11 of this Order. Additionally, an EA must analyze the proposed action with respect to the laws and policies listed in sec. 6.04d. of this Order.

b. Review and Clearance.

1. An EA leading to a FONSI must be submitted by the RPM to EC for NOAA review and clearance prior to public availability. The FONSI, which must be attached to or incorporated into the EA, notifies reviewers that the environmental impacts of the proposed action have been determined by the RPM to be nonsignificant for NEPA purposes. For NOAA review and clearance, the RPM must submit to EC for signature one copy of the EA and the original letter to reviewers. Details on the format and content of the letter are included in sec. 6.13 of this Order.

2. EAs should be submitted to EC at least three days prior to the requested clearance date, less time may be sufficient when EC has reviewed early versions of the EA. After NOAA clearance by EC, the RPM may publish a notice of availability in the Federal Register for those EAs with national implications or of broad interest to the public. Similarly, when EAs address unusual or new actions, the RPM may, at his or her discretion, provide up to thirty (30) days public review. The RPM may consult with EC to arrange alternative procedures for providing public involvement,

including various combinations of notices and mailings (CEQ sec. 1506.6). In certain circumstances, EC, in consultation with the RPM, may require that the proposed action not be taken until thirty (30) days after the notice of availability has been published. These circumstances include those where significant reservations based on environmental concerns have been expressed by consulting agencies or the public.

c. Significant Action. Where the proposed action is found to be potentially significant, the RPM may proceed directly with preparation of an EIS without submitting the EA for NOAA approval. Early review of draft discussion papers by EC may help to avoid future problems and to expedite subsequent review of the EIS. (See sec. 6.06 of this Order.)

.06 Environmental Impact Statement (EIS) Preparation and Approval.

a. Purpose. Should a determination be made by the RPM that significant environmental impacts could result from a proposed action, an EIS will be prepared in accordance with CEQ sec. 1502.10-1502.18. The EIS cover must clearly state whether it is a separate EIS or an EIS consolidated with a management plan, and whether the document supplements an earlier EIS. For general guidance on EIS procedures, refer to CEQ sec. 1502. Note that NOAA (Administrator's Letter No. 17) and CEQ (CEQ sec. 1502.14(e)) policy requires identification of the preferred alternative(s) in the draft EIS whenever such preferences exist and in the final EIS unless another law prohibits the expression of such a preference. When preferred alternatives do not exist, the document must provide a range of preferences or other indication of alternatives most likely to be selected. In that way, the public can focus their effort in the most effective manner.

b. Review and Clearance.

1. A preliminary version of the EIS, modified as necessary by the RPM in response to comments received from EC and other appropriate NOAA offices, constitutes the draft or final EIS. One copy of the EIS and two letters, one filing the document with the Environmental Protection Agency (EPA) and one transmitting it to all other reviewers, must be prepared by the RPM for the signature of the Chief, EC. Copies of letter formats are attached at the end of this Order. (See Exhibits A, B, C, and D to this Order.) After these letters are signed by the Chief, EC, the originating RPM will take all further actions, including filing the document at EPA and distributing it to interested parties.

2. The deadline for EC receipt of draft and final EISs submitted for clearance is five days prior to filing at EPA; less time may be sufficient in those cases where EC has reviewed earlier versions. The deadline for filing at EPA is 3:00 p.m. each Friday for publication of a "notice of availability" in the Federal Register the following Friday. Five (5) copies of draft and final EISs are required by EPA headquarters at filing unless

the proposed action affects more than one EPA region or the document is a programmatic EIS (an EIS on an entire program, e.g., deep seabed mining or the "next radar" system called NEXRAD, that could affect a large part of the nation), in which case more copies are required. Specific guidance on the number of copies needed for filing is available from EC upon request. An equivalent number of any source documents, appendices, or other supporting analyses must also be submitted to EPA at filing. (NOTE: Copies submitted to EPA at the time of filing fulfill the NEPA filing requirements and that additional copies should be sent to EPA headquarters and regional offices for actual review and comment.) All EIS copies submitted to EPA must be identical in form and content to the copies distributed or made available to the public and other interested parties.

3. Once filed by NOAA, EPA will prepare a "notice of availability" that will be published in the Federal Register, as noted above. All public review and "cooling off" periods begin the day of publication of that notice. No review period should end on a weekend or holiday.

4. Concurrent to filing with EPA, copies of each draft EIS and general transmittal letter must be sent to all Federal, State, and local government agencies, public groups, and individuals who may have an interest in the proposed action. Copies of each final EIS must be sent to parties who commented on the draft, individuals or groups specifically requesting a copy, and others as determined by the RPM. Source documents, appendices, and other supporting information should be circulated to the public when the RPM determines that reviewers would benefit from the additional information. The EIS and related documents must be made available for public inspection at locations deemed appropriate by the RPM, such as the public libraries and State "single points of contact" designated under EO 12373 or the A-95 clearing-house mechanism established by the Office of Management and Budget (41 FR 2052).

5. The public comment period on draft EISs should be at least forty-five (45) days unless a specific exemption is granted by EPA through EC for another time period. Final EISs must include comments received during the public review period of the draft EIS and respond in an appropriate manner, as described in CEQ sec. 1503.4. The "cooling off" period on final EISs is thirty (30) days, unless an exemption is granted by EPA through EC.

6. A supplemental EIS (SEIS) may be required in certain cases under CEQ sec. 1502.9(c)(1) and (2). SEISs must be prepared, circulated, and filed as prescribed by CEQ sec. 1502.9(c)(4) and in accordance with sec. 6.06 of this Order. Public comment periods for draft and final SEISs are the same as for original EISs. Requests for special exemptions from the comment period must be granted by CEQ through EC. If an SEIS is prepared, it must be introduced into any administrative record on the proposed action and distributed as described above for initial EISs. The transmittal letters to EPA and the public must state the title and publication date of the initial document to which the SEIS relates.

7. In certain cases, usually characterized by pending emergencies, negative socio-economic impacts, or threats to human health and safety, the RPM may request EC assistance in shortening the review and "cooling off" periods for initial or SEISs.

.07 Comments on Other Agencies' EISs. NEPA requires that EISs be submitted for review to any Federal agency which has jurisdiction by law or special expertise over the resources potentially affected. The Chief, EC, coordinates DOC review and comments on other agencies EISs and forwards all comments to the originating agencies. When comments are requested, copies of the incoming EIS and a letter noting the deadline for receipt of comments will be sent by EC to appropriate DOC elements. Guidance in the preparation of these comments is available in CEQ sec. 1503.3, NOAA Administrator's Letter No. 17, and from EC.

.08 Integration of NEPA and Executive Order (EO) 12114 into the NOAA Decision-Making Process.

a. Inclusion of Environmental Documents in the Decision-Making Process. Environmental documents prepared in accordance with this directive must accompany any other decision documents in the NOAA decision-making process. The alternatives and proposed action identified in all such documents must correspond. Any environmental document prepared on a proposal will be part of the administrative record of any decision, rulemaking, or adjudicatory proceedings held on that proposal.

b. Preparation of Environmental Documents for NOAA Programs. Environmental documents should be prepared at the earliest practicable time so that the environmental review process will run concurrently with and be integrated into NOAA decision-making.

c. Record of Decision. The final EIS, final regulations, or a separate Federal Register notice must clearly present NOAA's preferred alternative(s), environmentally preferable alternative(s), and any monitoring or enforcement programs in a record of decision (ROD) for public review and comment. The ROD must contain the elements listed in CEQ sec. 1505.2.

.09 Referrals to CEQ of Environmentally Unsatisfactory Actions. RPMs will notify EC of actions by other Federal agencies believed to be environmentally unsatisfactory, i.e., worthy of a "referral," under CEQ sec. 1504.3. The Chief, EC, will recommend referrals to the Under Secretary and Administrator of NOAA. EC will work closely with the RPMs to prepare the letters and support materials required in the referral process.

.10 Guidance for Defining Significance.

a. As required by NEPA sec. 102(2)(C) and CEQ sec. 1502.3, EISs must be prepared for every recommendation or report on proposals for legislation and other "major Federal actions" significantly affecting the quality of the human environment. Federal

management plans, plan amendments, actions, or projects which will or may cause a significant impact on the human environment require preparation of an EIS.

b. "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. "Major" reinforces but does not have a meaning independent of "significant." "Actions" include: new and continuing activities, including Projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures., and legislative proposals. Refer to CEQ sec. 1508.18 for additional guidance.

c. "Significant" requires consideration of both context and intensity. Context means that significance of an action must be analyzed with respect to society as a whole, the affected region and interests, and the locality. Both short- and long-term effects are relevant. Intensity refers to the severity of the impact. The following factors should be considered in evaluating intensity (CEQ sec. 1508.27):

1. Impacts may be both beneficial and adverse.

2. Degree to which public health or safety is affected.

3. Unique characteristics of the geographic area.

4. Degree to which effects are likely to be highly controversial.

5. Degree to which effects are highly uncertain or involve unique or unknown risks.

6. Degree to which the action establishes a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

7. Individually insignificant but cumulatively significant impacts.

8. Degree to which the action adversely affects entities listed in or eligible for listing in the National Register of Historic Places, or may cause loss or destruction of significant scientific, cultural, or historic resources.

9. Degree to which endangered or threatened species, or their habitat, are adversely affected.

10. Whether a violation of Federal, State, or local law for environmental protection is threatened.

d. "Affecting" means will or may have an effect (CEQ sec. 1508.3). "Effects" include direct, indirect, or cumulative effects of an ecological, aesthetic, historic, cultural, economic, social, or health nature (CEQ sec. 1508.8).

e. "Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations (CEQ sec. 1508.17). The NEPA process for proposals for legislation significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress (CEQ sec. 1506.8).

f. "Human environment" includes the relationship of people with the natural and physical environment. Although economic or social effects often result from a proposed action, such issues are not intended by themselves to require preparation of an EIS. Each EIS must discuss interrelated economic, social, and natural or physical environmental effects (CEQ sec. 1508.14).

.11 Specific Guidance for Fishery Management Plans and Amendments. The following specific guidance expands, but does not replace, the general language in sec. 6.10 of this Order. An EIS must be prepared for a FMP or amendment when the RPM determines that significant beneficial or adverse impacts may be reasonably expected to occur. When adverse impacts are possible, the following five criteria should aid the RPM in determining the appropriate course of action. If none of these criteria may be reasonably expected to occur, the RPM should prepare an environmental assessment (EA) or determine, in accordance with sec. 4.00b., sec. 6.02a.3., sec. 6.02b.3., and sec. 6.02d.2. of this Order, the applicability of a CE from further NEPA documentation. NEPA document preparers should also consult 48 FR 7402 (50 CFR 602) for guidance on the seven national standards that serve as principles for approval of all FMPs and amendments. The five criteria follow:

a. The proposed action may be reasonably expected to jeopardize the long-term productive capability of any stocks that may be affected by the action.

b. The proposed action may be reasonably expected to allow substantial damage to the ocean and coastal habitats.

c. The proposed action may be reasonably expected to have a substantial adverse impact on public health or safety.

d. The proposed action may be reasonably expected to affect adversely an endangered or threatened species or a marine mammal population.

e. The proposed action may be reasonably expected to result in cumulative adverse effects that could have a substantial effect on the target resource species or any related stocks that may be affected by the action. Two other factors to be considered in any determination of significance are controversy and socio-economic effects. Although no action should be deemed to be significant based solely on its controversial nature, this aspect should be used in weighing the decision on the proper type of analysis needed to ensure full compliance with NEPA. Socio-economic factors related to users of the resource should also be considered in determining controversy and significance.

The RPM should rely on sec. 6.10c. of this Order for further factors involved in determining when an action may be "significant."

.12 Criteria for Other NOAA Actions. (RESERVED)

.13 Guidance on Transmittal Letters for EAs and EISs.

a. All letters must be prepared on "Office of the Administrator" letterhead.

b. Letters will be dated after being signed by the Director, EC.

c. Fill in all appropriate blanks in the sample letter formats.

d. In the first sentence of Exhibit B to this Order, the first parenthetical note relates to the discussion in sec. 6.06b.2. of this Order that noted the EPA need for more than five copies of certain EISs, especially programmatic EISs and EISs on actions that may affect more than one EPA regional office.

e. Note in sec. 6.06b.2 of this Order that EAs need not be transmitted to EPA. Also, EAs on controversial actions or national issues should be distributed to the public.

f. Examples of transmittal letters are attached at the end of this Order as Exhibits A, B, C, and D to this Order.

SECTION 7. EFFECT ON OTHER ISSUANCES.

This Order supersedes NOAA Directives Manual (NDM) 02-10, Environmental Review Procedures, dated July 23, 1984. This Order replaces NDM 02-10, only because the administrative order and directives series has changed. The wording of this Order is technically the same as NDM 02-10, with the exception of differences in formatting between the two series.

D E Humphreys

Acting Director, Office of Administration

Attachment

Office of Primary Interest:
Chief Scientist
Ecology and Conservation Office (CSEC)

EXHIBIT 1

THE NEPA PROCESS

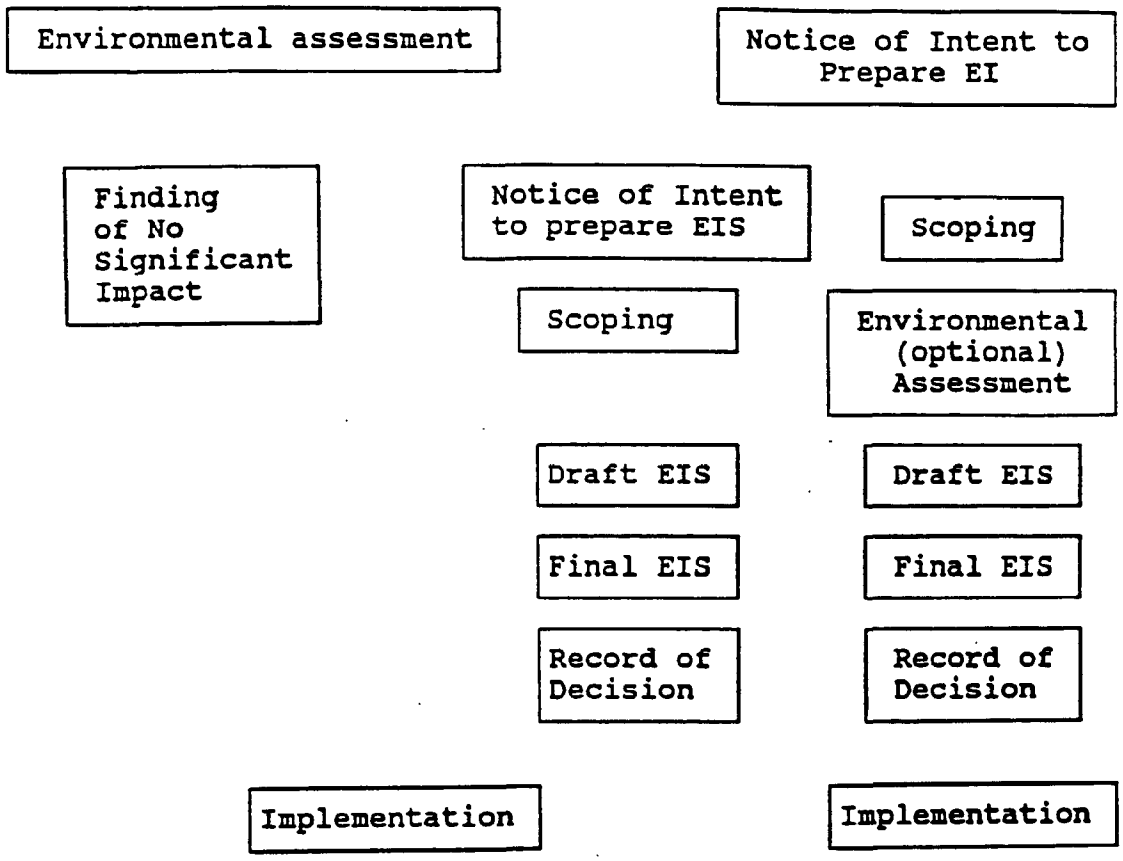

EXHIBIT 2

NOAA CONTACTS FOR COMMON ACTIONS SUBJECT TO NEPA

Program	Applicant	NOAA Contact
Coastal Zone Management Programs (Sec. 306, CZMA)	Coastal States, Territories and Commonwealths	National Ocean Service, Office of Ocean and Coastal Resource Management (OCRM), NEPA Compliance Coordinator: CZ
National Marine Sanctuaries (Title III, MPRSA)	States, private individuals and organizations	National Ocean Service, OCRM, NEPA Compliance Coordinator: SRD
Estuarine Sanctuaries and Beach Access Acquisition (Sec. 315, CZMA)	States	National Ocean Service, OCRM, NEPA Compliance Coordinator: SRD
Coastal Energy Impact Program (Sec. 308, CZMA)	Coastal States and local governments	National Ocean Service, OCRM, NEPA Compliance Coordinator: CZ
Fishery Management Plans (Sec. 305, MFCMA)	Regional Fishery Management Councils or National Marine Fisheries Service	National Marine Fisheries Service Headquarters, NEPA Coordinator
Regulations, Permits and Waivers under the MMPA [Secs. 101(a)(2), 101(a)(3), and 104, MMPA]	Private parties, scientific institutions, and foreign nations	National Marine Fisheries Service, Office of Protected Species and Habitat Conservation
Deep Seabed Mining Licenses and Permits (DSM)	Private industry	National Ocean Service, OCRM, NEPA Compliance Coordinator: OME
Ocean Thermal Energy Conversion Licenses (OTEC)	Private industry	National Ocean Service, OCRM, NEPA Compliance Coordinator: OME.

EXHIBIT A

EIS TRANSMITTAL LETTER

Dear Reviewer:

In accordance with provisions of the National Environmental Policy Act of 1969, we enclose for your review our (DRAFT/FINAL) environmental impact statement on- (TITLE OF PROJECT).

(1 P A R A G R A P H A B S T R A C T)

Any written comments or questions you may have should be submitted to the responsible official identified below by (DUE DATE FOR COMMENTS). Also, one copy of your comments should be sent to me in Room 6222, CS/EC, U.S. Department of Commerce, Washington, D.C. 20230.

RESPONSIBLE PERSON

Name
Address

Telephone Number

Thank you.

Sincerely,

(INSERT NAME)

Director
Ecology and Conservation
Office

Enclosure

EXHIBIT B

DRAFT EIS/FINAL EIS TRANSMITTAL TO EPA

(INSERT NAME)

Management Information Unit

c/o Director, Office of Federal Activities (A-104)

U.S. Environmental Protection Agency

Waterside Mall, Room 2119

401 M Street, SW

Washington, D.C. 20460

Dear (INSERT NAME):

Enclosed for your consideration are five (VERIFY NUMBER WITH EC) (APPROPRIATE DOCUMENTS, i.e., DRAFT EIS OR FINAL EIS) on (TITLE OF PROJECT).

ADDITIONAL PARAGRAPH(S) OR INFORMATION AS NECESSARY

If you have any questions about the enclosed statement, contact either the official responsible for this program (NAME OF ASSISTANT ADMINISTRATOR and TELEPHONE NUMBER) or me at 377-5181.

Concurrent with this transmittal to EPA, copies of the (DRAFT EIS/FINAL EIS) are being mailed to Federal agencies and other interested parties.

Sincerely,

(INSERT NAME)

Director
Ecology and Conservation
Office

Enclosures

EXHIBIT C

FINDING OF NO SIGNIFICANT IMPACT

TRANSMITTAL LETTER TO INTERESTED PARTIES

To All Interested Government Agencies and Public Groups:

Under the National Environmental Policy Act, an environmental review has been performed on the following action.

TITLE:

LOCATION:

SUMMARY:

RESPONSIBLE OFFICIAL: (Assistant Administrator Level with Address and Telephone Number)

The environmental review process led us to conclude that this action will not have a significant effect on the human environment. Therefore, an environmental impact statement will not be prepared. A copy of the finding of no significant impact including the supporting environmental assessment is enclosed for your information. Please submit any written comments to the responsible official named above by (DUE DATE FOR COMMENTS). Also, please send one copy of your comments to me in Room 6222, CS/EC, U.S. Department of Commerce, Washington, D.C. 20230.

Sincerely,

(INSERT NAME)

Director
Ecology and Conservation
Office

Enclosure

EXHIBIT D

FONSI TRANSMITTAL MEMO
(FROM EC TO APPROPRIATE ASSISTANT ADMINISTRATOR)

TO: (INSERT NAME)

FROM: (INSERT NAME)

SUBJECT: Finding of No Significant Impact on (TITLE)

On the basis of the information presented in the subject environmental assessment, I concur in your determination that the proposed action will not have a significant effect on the human environment in accordance with the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. Therefore, a finding of no significant impact is appropriate.

Enclosures

29.
Forty Most Asked Questions Concerning CEQ's NEPA Procedures
46 F.R. 48026

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations

March 17, 1981.

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information Only: Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations.

SUMMARY: The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act, held meetings in the ten Federal regions with Federal, State, and local officials to discuss administration of the implementing regulations. The forty most asked questions were compiled in a memorandum to agencies for the information of relevant officials. In order efficiently to respond to public inquiries this memorandum is reprinted in this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Nicholas C. Yost, General Counsel, Council on Environmental Quality, 722 Jackson Place NW., Washington, D.C. 20006; 202-395-5750.

March 16, 1981.

Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process

Subject: Questions and Answers About the NEPA Regulations

During June and July of 1980 the Council on Environmental Quality, with the assistance and cooperation of EPA's EIS Coordinators from the ten EPA regions, held one-day meetings with federal, state and local officials in the ten EPA regional offices around the country. In addition, on July 10, 1980, CEQ conducted a similar meeting for the Washington, D.C. NEPA liaisons and persons involved in the NEPA process. At these meetings CEQ discussed (a) the results of its 1980 review of Draft EISs issued since the July 30, 1979 effective date of the NEPA regulations, (b) agency compliance with the Record of Decision requirements in Section 1505 of the NEPA regulations, and (c) CEQ's preliminary findings on how the scoping process is working. Participants at these meetings received copies of materials prepared by CEQ summarizing its oversight and findings.

These meetings also provided NEPA liaisons and other participants with an opportunity to ask questions about NEPA and the practical application of the NEPA regulations. A number of these questions were answered by CEQ representatives at the regional meetings. In response to the many requests from the agencies and other participants, CEQ has compiled forty of the most important or most frequently asked questions and their answers and reduced them to writing. The answers were prepared by the General Counsel of CEQ in consultation with the Office of Federal Activities of EPA. These answers, of course, do not impose any additional requirements beyond those of the NEPA regulations. This document does not represent new guidance under the NEPA regulations, but rather makes generally available to concerned agencies and private individuals the answers which CEQ has already given at the 1980 regional meetings. The answers also reflect the advice which the Council has given over the past two years to aid agency staff and consultants in their day-to-day application of NEPA and the regulations.

CEQ has also received numerous inquiries regarding the scoping process. CEQ hopes to issue written guidance on scoping later this year on the basis of its special study of scoping, which is nearing completion.

Nicholas C. Yost,
General Counsel.

Index

1. Range of Alternatives
2. Alternatives Outside the Capability of Applicant or Jurisdiction of Agency
3. No-Action Alternative
4. Agency's Preferred Alternative
5. Proposed Action v. Preferred Alternative
6. Environmentally Preferable Alternative
7. Difference Between Sections of EIS on Alternatives and Environmental Consequences
8. Early Application of NEPA
9. Applicant Who Needs Other Permits
10. Limitations on Action During 30-Day Review Period for Final EIS
11. Limitations on Actions by an Applicant During EIS Process
12. Effective Date and Enforceability of the Regulations
13. Use of Scoping Before Notice of Intent to Prepare EIS
14. Rights and Responsibilities of Lead and Cooperating Agencies
15. Commenting Responsibilities of EPA
16. Third Party Contracts
17. Disclosure Statement to Avoid Conflict of Interest
18. Uncertainties About Indirect Effects of A Proposal
19. Mitigation Measures
20. ~~Worst Case Analysis~~ *
21. Combining Environmental and Planning Documents
22. State and Federal Agencies as Joint Lead Agencies
23. Conflicts of Federal Proposal With Land Use Plans, on Policies and Controls
24. Environmental Impact Statements on Policies, Plans or Programs
25. Appendices and Incorporation by Reference
26. Index and Keyword Index in EISs
27. List of Preparers
28. Advance or Xerox Copies of EIS
29. Responses to Comments
30. Adoption of EISs
31. Application of Regulations to Independent Regulatory Agencies
32. Supplements To Old EISs
33. Referrals
34. Records of Decision
35. Time Required for the NEPA Process
36. Environmental Assessments (EA)
37. Findings of No Significant Impact (FONSI)
38. Public Availability of EAs v. FONSIs
39. Mitigation Measures Imposed in EAs and FONSIs
40. Propriety of Issuing EA When Mitigation Reduces Impacts

Questions and Answers About the NEPA Regulations (1981)

1a. Q. What is meant by "range of alternatives" as referred to in Sec. 1505.1(e)? [1]

A. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).

1b. Q. How many alternatives have to be discussed when there is an infinite number of possible alternatives?

[1] References throughout the document are to the Council on Environmental Quality's Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act, 40 CFR Parts 1500-1508.

* This Q&A was rescinded April 25, 1986. (51 Fed. Reg. 15625 (1986))

A. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the *full spectrum* of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.

2a. Q. If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?

A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant.

2b. Q. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?

A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).

3. Q. What does the "no action" alternative include? If an agency is under a court order or legislative command to act, must the EIS address the "no action" alternative?

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.

Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would *not* be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. Section 1502.14(c). See Question 2 above. Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. Section 1500.1(a).

4a. Q. What is the "agency's preferred alternative"?

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

4b. Q. Does the "preferred alternative" have to be identified in the Draft EIS and the Final EIS or just in the Final EIS?

A. Section 1502.14(e) requires the section of the EIS on alternatives to "identify the agency's preferred alternative if one or more exists, in the draft statement, and identify such alternative in the final statement . . ." This means that if the agency has a preferred alternative at the Draft EIS stage, that alternative must be labeled or identified as such in the Draft EIS. If the responsible federal official in fact has no preferred alternative at the Draft EIS stage, a preferred alternative need not be identified there. By the time the Final EIS is filed, Section 1502.14(e) presumes the existence of a preferred alternative and requires its identification in the Final EIS "unless another law prohibits the expression of such a preference."

4c. Q. Who recommends or determines the "preferred alternative?"

A. The lead agency's official with line responsibility for preparing the EIS and assuring its adequacy is responsible for identifying the agency's preferred alternative(s). The NEPA regulations do not dictate which official in an agency shall be responsible for preparation of EISs, but agencies can identify this official in their implementing procedures, pursuant to Section 1507.3.

Even though the agency's preferred alternative is identified by the EIS preparer in the EIS, the statement must be objectively prepared and not slanted to support the choice of the agency's preferred alternative over the other reasonable and feasible alternatives.

5a. Q. Is the "proposed action" the same thing as the "preferred alternative"?

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is

internally generated..such as preparing a land management plan. the proposed action might end up as the agency's preferred alternative. On the other hand the proposed action may be granting ar application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage. on the basis of the Draft EIS and the public and agency comments. that an alternative other than the proposed action is the agency's "preferred alternative."

5b. Q. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an *amount* of information to be provided. but rather. prescribes a *level of treatment*. which may in turn require varying amounts of information. to enable a reviewer to evaluate and compare alternatives.

6a. Q. What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decision? How is the term "environment" used in the phrase?

A. Section 1505.2(b) requires that. in cases where an EIS has been prepared. the Record of Decision (ROD) must identify all alternatives that were considered. ". . . specifying the alternative or alternatives which were considered to be environmentally preferable." The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily. this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects. preserves. and enhances historic. cultural. and natural resources.

The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments. particularly when one environmental value must be balanced against another. The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative. the decisionmaker is clearly faced with a choice between that alternative and others. and must consider whether the decision accords with the Congressionally declared policies of the Act.

6b. Q. Who recommends or determines what is environmentally preferable?

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases. commentors from other agencies and the public are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

7. Q. What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. Section 1502.14. It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific. environmental impacts or effects of each of the alternatives including the proposed action. Section 1502.16. In order to avoid duplication between these two sections. most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impacts in a comparative form, including charts or tables. thus sharply defining the issues and providing a clear basis for choice among options. Section 1502.14. The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

8. Q. Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-Federal entities and are. at some stage. subject to federal approval of permits. loans. loan guarantees. insurance or other actions. What must and can agencies do to apply NEPA early in these cases?

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation. business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out. in advance of project planning. what environmental studies or other information will be required. and what mitigation requirements are likely. in connecton with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d). Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus. the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However. in such cases the agency must still evaluate independently the environmental issues

and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. Q. To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?

A. Agencies must integrate the NEPA process into other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically, the agency must "provide for cases where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See Question 8.)

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

10a. Q. What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. Sections 1505.2 and 1506.10. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude preliminary planning or design work which is needed *to support an application* for permits or assistance. Section 1506.1(d).

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. Section 1506.1(c).

10b. Q. Do these limitations on action (described in Question 10a) apply to state or local agencies that have statutorily delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?

A. Yes, these limitations do apply, without any variation from their applications to federal agencies.

11. Q. What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within the agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

12a. Q. What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a *particular environmental document*, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable." I.e., if it is feasible to do so, in preparing the final document. Section 1506.12(a).

12b. Q. Are projects authorized by Congress before the effective date of the Council's regulations grandfathered?

A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and

subject to the Council's former Guidelines.

12c. Q. Can a violation of the regulations give rise to a cause of action?

A. While a trivial violation of the regulations would not give rise to an independent cause of action, such a cause of action would arise from a substantial violation of the regulations. Section 1500.3.

13. Q. Can the scoping process be used in connection with preparation of an environmental assessment, i.e., before both the decision to proceed with an EIS and publication of a notice of intent?

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot *substitute* for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, *and* the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. Q. What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?

A. After a lead agency has been designated (Sec. 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process—primarily at the scoping and Draft EIS preparation stages. If a cooperating agency *determines* that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency *must* decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the *action* that is the subject of the environmental impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. Q. How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail of analysis and the quality of data in impact statements?

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the *information and analysis* on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. Q. What are the specific responsibilities of federal and state cooperating agencies to review draft EISs?

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in section 1503.3.

14d. Q. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

15. Q. Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under Section 309 of the Clean Air Act independent of its responsibility as a cooperating agency?

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EISs, and new regulations. 42 U.S.C. Sec. 7609. This obligation is independent of its role as a cooperating agency under the NEPA regulations.

16. Q. What is meant by the term "third party contracts" in connection with the preparation of an EIS? See Section 1506.5(c). When can "third party contracts" be used?

A. As used by EPA and other agencies, the term "third party contract" refers to the preparation of EISs by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

17a. Q. If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

17b. Q. If the firm in fact has no promise of future work or other interest in the outcome of the proposal, may the firm later bid in competition with others for future work on the project if the proposed action is approved?

A. Yes.

18. Q. How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?

A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

19a. Q. What is the scope of mitigation measures that must be discussed?

A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14.

19b. Q. How should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?

A. All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to

alert agencies or officials who *can* implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2. If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

~~20a. Q. When must a worst case analysis be included in an EIS?~~

A. If there are gaps in relevant information or scientific uncertainty pertaining to an agency's evaluation of significant adverse impacts on the human environment, an agency must make clear that such information is lacking or that the uncertainty exists. An agency must include a worst case analysis of the potential impacts of the proposal and an indication of the probability or improbability of their occurence if (a) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining the information are exorbitant, or (b) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known.

NEPA requires that impact statements, at a minimum, contain information to alert the public and Congress to all known *possible* environmental consequences of agency action. Thus, one of the federal government's most important obligations is to present in the fullest extent possible the spectrum of consequences that may result from agency decisions, and the details of their potential/consequences for the human environment.

20b. Q. What is the purpose of a worst case analysis? How is it formulated and what is the scope of the analysis?

A. The purpose of the analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider those potential consequences when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.

For example, if there are scientific uncertainty and gaps in the available information concerning the numbers of juvenile fish that would be entrained in a cooling water facility, the responsible agency must disclose and consider the possibility of the loss of the commercial or sport fishery.

In addition to an analysis of a low probability/catastrophic impact event, the worst case analysis should also include a spectrum of events of higher probability but less drastic impact.

21. Q. Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?

A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example, to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS, and vice versa. This is a reasonable functional separation of the documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both "EIS" and "management plan" or "project report." This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

22. Q. May state and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental policy act? How do they resolve differences in perspective where, for example, national and local needs may differ?

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include at least one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local agencies and the relevant federal agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant "little NEPA" state laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved state or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. Section 1506.2(d). (See Question 23).

Because there may be differences in perspective as well as conflicts among

federal, state and local goals for resources management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

23a. Q. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c).

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.

23b. Q. What constitutes a "land use plan or policy" for purposes of this discussion?

A. The term "land use plans," includes all types of formally adopted documents for land use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B and C planning process should also be included even though they are incomplete.

The term "policies" includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not yet been formally adopted by the local, regional or state legislative body.

23c. Q. What options are available for the decisionmaker when conflicts with such plans or policies are identified?

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

24a. Q. When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

24b. Q. When is an area-wide or overview EIS appropriate?

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. Q. What is the function of tiering in such cases?

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation, by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

25a. Q. When is it appropriate to use appendices instead of including information in the body of an EIS?

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling, and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodology, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

25b. Q. How does an appendix differ from incorporation by reference?

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EISs, research papers in the general literature, technical background papers or other material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available, either by citing the literature, furnishing copies to central locations, or sending copies directly to commentors upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

26a. Q. How detailed must an EIS index be?

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

26b. Q. Is a keyword index required?

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or modelling methodologies used. This technique permits the compilation of EIS data banks, by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EISs it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

27a. Q. If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

27b. Q. Should agency staff involved in reviewing and editing the EIS also be included in the list of preparers?

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

27c. Q. How much information should be included on each person listed?

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had *primary* responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines) and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

28. Q. May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires Federal agencies to file EISs with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiching of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

29a Q. What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentor said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. Q. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

30. Q. When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. Section 1506.3(a), (c). If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees, stating publicly why it did so. Section 1506.3(a).

A cooperating agency with jurisidiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in

the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. Section 1506.3(b).

31a. Q. Do the Council's NEPA regulations apply to independent regulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission?

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural provisions of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. Sections 1500.3, 1500.8, 1507.1, and 1507.3.

31b. Q. Can an Executive Branch agency like the Department of the Interior adopt an EIS prepared by an independent regulatory agency such as FERC?

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may, in accordance with Section 1506.3, adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made applicable to all federal agencies in order to avoid this result, and to achieve uniform application and efficiency of the NEPA process.

32. Q. Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

33a. Q. When must a referral of an interagency disagreement be made to the Council?

A. The Council's referral procedure is a *pre-decision* referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

33b. Q. May a referral be made after this issuance of a Record of Decision?

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). Section 1506.10(b)(2). Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

34a. Q. Must Records of Decision (RODs) be made public? How should they be made available?

A. Under the regulations, agencies must prepare a "concise *public* record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

34b. Q. May the summary section in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency may take final action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

34c. Q. What provisions should Records of Decision contain pertaining to mitigation and monitoring?

A. Lead agencies "shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals" and shall "condition funding of actions on mitigation." Section 1505.3. Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practicable mitigation measures have been adopted, and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3 (a), (b). If the proposal is to be carried out by the

federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

34d. Q. What is the enforceability of a Record of Decision?

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisons and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

35. Q. How long should the NEPA process take to complete?

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.

36a. Q. How long and detailed must an environmental assessment (EA) be?

A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10–15 pages. Some agencies expressly provide page guidelines (e.g., 10–15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

36b. Q. Under what circumstances is a lengthy EA appropriate?

A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 *and* where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

37a. Q. What is the level of detail of information that must be included in a finding of no significant impact (FONSI)?

A. The FONSI is a document in which the agency briefly explains the reasons why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment.

37b. Q. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?

A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

38. Q. Must (EAs) and FONSIs be made public? If so, how should this be done?

A. Yes, they must be available to the public. Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs. These are public "environmental documents" under Section 1506.6(b), and, therefore, agencies must give public notice of their availability. A combination of methods may be used to give notice, and the methods should be tailored to the needs of particular cases. Thus, a Federal Register notice of availability of the documents, coupled with notices in national publications and mailed to interested national groups might be appropriate for proposals that are national in scope. Local newspaper notices may be more appropriate for regional or site-specific proposals.

The objective, however, is to notify all interested or affected parties. If this is not being achieved, then the methods should be reevaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations.

39. Q. Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no requirement in the regulations in such cases for a formal Record of Decision?

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist

agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

40. Q. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

[FR Doc. 81-8734 Filed 3-20-81; 8:45 am]
BILLING CODE 3125-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 531

[Docket No. LVM 77-06; Notice 5]

Passenger Automobile Average Fuel Economy Standards; Exemption From Average Fuel Economy Standards

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Final decision to grant exemption from fuel economy standards.

SUMMARY: This notice exempts Excalibur Automobile Corporation [Excalibur] from the generally applicable average fuel economy standards of 18.0 miles per gallon (mpg) and 20.0 mpg for 1979 and 1980 model year passenger automobiles, respectively, and establishes alternative standards. The alternative standards are 11.5 mpg in the 1979 model year and 16.2 mpg in the 1980 model year.

DATES: The exemptions and alternative standards set forth in this notice apply in the 1979 and 1980 model years.

FOR FURTHER INFORMATION CONTACT: Robert Marcure, Office of Automotive Fuel Economy Standards, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, D.C. 20590 (202-755-9384).

SUPPLEMENTARY INFORMATION: The National Highway Traffic Safety Administration (NHTSA) is exempting Excalibur from the generally applicable average fuel economy standards for the 1979 and 1980 model year and establishing alternative standards applicable to that company in those model years. This exemption is issued under the authority of section 502(c) of the Motor Vehicle Information and Cost Savings Act, as amended (the Act) (15 U.S.C. 2002(c)). Section 502(c) provides that a manufacturer of passenger automobiles that manufactures fewer than 10,000 passenger automobiles annually may be exempted from the generally applicable average fuel economy standard for a particular model year if that standard is greater than the low volume manufacturer's maximum feasible average fuel economy and if the NHTSA establishes an alternative standard applicable to that manufacturer at the low volume manufacturer's maximum feasible average fuel economy. Section 502(e) of the Act (15 U.S.C. 2002(e)) requires the NHTSA to consider:

(1) Technological feasibility;

(2) Economic practicability;

(3) The effect of other Federal motor vehicle standards on fuel economy; and

(4) The need of the Nation to conserve energy.

This final rule was preceded by a notice announcing the NHTSA's proposed decision to grant an exemption to Excalibur for the 1979 and 1980 model years (45 FR 50840, July 31, 1980). No comments were received during the 45-day comment period.

Based on its conclusions that it is not technologically feasible and economically practicable for Excalibur to improve the fuel economy of its 1979 and 1980 model year automobiles above an average of 11.5 and 16.2 mpg, respectively, that other Federal automobile standards did not affect achievable fuel economy beyond the extent considered in this analysis, and that the national effort to conserve energy will be negligibly affected by the granting of the requested exemptions, this agency concludes that the maximum feasible average fuel economy for Excalibur in the 1979 and 1980 model years is 11.5 mpg and 16.2 mpg, respectively. Therefore, NHTSA is exempting Excalibur from the generally applicable standards and is establishing alternative standards of 11.5 mpg for the 1979 model year and 16.2 mpg for the 1980 model year.

In consideration of the foregoing, 49 CFR Part 531 is amended by revising § 531.5(b)(5) to read as follows:

§ 531.5 Fuel economy standards.

* * * * *

(b) The following manufacturers shall comply with the fuel economy standards indicated below for the specified model years:

* * * * *

(5) Excalibur Automobile Corporation.

30.
Federal Court Cases Involving NMS Regulations:

1. Gentile v. NOAA, et al.

2. Deaton, et al., v. U.S. DOC

3. Craft, et al., v. NPS, et al.

Shockey

FILED MAR 30 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY GENTILE	:	CIVIL ACTION
V.	:	
NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, EDWARD MILLER, PETER L. TWEEDT, ANTHONY B. CALIO, and MALCOLM BALDRIDGE	:	NO. 87-2192

MEMORANDUM AND ORDER

BECHTLE, J. MARCH 30, 1988

Presently before this court are cross-motions for summary judgment and memoranda in opposition thereto. For the reasons stated herein, plaintiff's motion for summary judgment will be denied and defendants' motion will be granted.

FACTS

The controversy stems from plaintiff Gary Gentile's application to the National Oceanographic and Atmospheric Administration ("NOAA") for a permit to perform an underwater photographic study of the U.S.S. Monitor.[1/] On August 4, 1986, defendant Edward

CLERK OF COURT

ENTERED

[1/] The U.S.S. Monitor is an ironclad Civil War warship which sank off Cape Hatteras, North Carolina, in a storm on December 31, 1862. In 1975 the U.S. Department of Commerce designated the wreck as the first national marine sanctuary pursuant to the National Marine Protection, Research and Sanctuary Act of 1972, 16 U.S.C. §1431, et seq.

M. Miller ("Miller"), the Monitor Sanctuary Project Manager, denied plaintiff's application, citing violations of safety standards for air divers set by NOAA, the U.S. Navy, and the commercial diving industry in plaintiff's proposal. Miller also cited the NOAA Deep Drone project[2/] as an additional factor not warranting the risk of plaintiff's proposed venture. Plaintiff protested the denial and simultaneously appealed the decision to the Secretary of Commerce pursuant to 15 C.F.R. §924.8.

Defendant Peter L. Tweedt ("Tweedt"), Director of the Office of Ocean and Coastal Resource Management of the National Ocean Service, affirmed the permit denial, again citing numerous safety violations. Tweedt further stated that his decision constituted final agency action.

Plaintiff waived his right to a formal hearing by failing to file a request within thirty (30) days pursuant to 15 C.F.R. §924.8(a) and (b). On April 15, 1987, plaintiff filed suit in this court seeking an injunction of defendant's enforcement of the permit denial and a declaration that the denial was arbitrary and capricious. Plaintiff alleged that in denying his permit application, the NOAA officials failed to consider his experience, expertise, and fitness to perform the dive. Furthermore, plaintiff claims that defendants Miller and Tweedt were personally biased due to their involvement in the Deep Drone project, that Miller and Tweedt had no authority to render a decision on his application, and that as an individual

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2/ This project endeavors to perform a photographic study of the wreck using the U.S. Navy's Deep Drone, a self-propelled robot.

diver, his application received treatment different from applications of educational institutions.

These allegations were the basis of plaintiff's motion to supplement the administrative record. On October 9, 1987, this court denied plaintiff's motion because the evidence offered to supplement the record failed to meet the recognized exceptions to judicial review only of the record before the agency when it made its decision.[3/] Moreover, plaintiff failed to make a sufficient showing of bad faith and pecuniary interest on the part of Miller and Tweedt to warrant supplementing the record with evidence of alleged bias. On December 1, 1987, this court denied plaintiff's motion for reconsideration.

DISCUSSION

I. Scope of Review

When confronted with a motion for summary judgment the court must take all reasonable inferences in the light most favorable to the non-moving party and ascertain whether there exists any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Scott v. Plante, 532 F.2d 939, 945 (3d Cir. 1976). In the instant matter the court is asked to set aside a

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3/ These exceptions are: (1) where the record does not disclose the factors considered by the agency, NAACP v. Wilmington Medical Center, 453 F. Supp. 1560 (E.D. Pa. 1986); (2) where new law or cases change the standard since the decision, and (3) where the record contains technical aspects warranting supplemental explanation. Conservation Law Foundation of New England v. Clark, 590 F. Supp. 1467 (D. Mass. 1984).

final NOAA decision denying plaintiff's application for a diving permit as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A). Thus, the court must ascertain whether the "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). See also, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance, 463 U.S. 29, 43 (1983); Shane Meat Co. v. U.S. Department of Defense, 800 F.2d 334, 336 (3d Cir. 1986).

II. Motions for Summary Judgment

Plaintiff's motion for summary judgment raises four questions. First, whether defendants failed to consider relevant safety factors and that NOAA Diving Coordinator Dr. J. Morgan Wells ("Wells") failed to perform a mandatory duty pursuant to NOAA Diving Regulations, to keep abreast of all new diving methods and techniques. Second, whether defendants Miller and Tweedt were personally biased against plaintiff's proposal by virtue of their involvement in the Deep Drone project. Third, whether defendants Miller and Tweedt had no authority to render a decision on the permit application, and, finally, whether the NOAA decision-makers breached a mandatory duty by not consulting with the Advisory Council on Historic Preservation ("ACHP") regarding plaintiff's permit application.

With the exception of the fourth issue, each of these claims were raised by plaintiff's motion to amend the administrative

record and were addressed by this court. See Order of October 9, 1987. In support of the first three issues plaintiff provides materials not included in the Administrative Record. Specifically, plaintiff cites an affidavit of Stephen Bielenda dated October 29, 1987, testifying to plaintiff's diving capabilities, three articles regarding the U.S.S. Monitor and the Deep Drone project, and a diving permit application and two diving manuals for the Isle Royal National Park in Michigan. None of these exhibits meet the exceptions to supplementing the Administrative Record.[4/] Moreover, on October 9, 1987, this court denied plaintiff's motion to supplement the administrative record with evidence supporting the same issues. Judicial review of agency decisions is limited to the record before the agency when it made its decision. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 240 (1971); Camp v. Pitts, 411 U.S. 138, 142 (1973). Plaintiff, and surprisingly, his counsel have presumably tossed the court's Order to the wind and foisted this improper material on the court anyhow, which in addition to having a somewhat juvenile flavor, is unprofessional as well.

In reaching their decision to deny plaintiff an application to dive the Monitor site, the NOAA considered the depth of the dive, the proposed use of compressed air, live boating, and in-water decompression techniques (AR[5/] B-4, p.113-114). Moreover, the agency

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4/ See note 3 of this Opinion for the exceptions.

5/ All subsequent references to the Administrative Record will be cited as "AR."

looked to plaintiff's experience and prior success with similar wreck dives which plaintiff provided with the proposal (AR B-23, p.233-236). In fact, Wells specifically recognized the extent of plaintiff's skills, but noted that "the probability of death or serious injury associated with such activities is very high." (AR B-19, p.164). This decision is based on relevant safety factors and cannot be considered an abuse of discretion.

Plaintiff's allegations of bias do not raise any genuine issue of material fact. As in his earlier motion to supplement the administrative record, plaintiff argues that defendants Miller and Tweedt are biased by virtue of their participation in the Deep Drone project. In its Order of October 9, 1987, this court noted that plaintiff must "make a clear and convincing showing that the official has 'an unalterably closed mind on matters critical to the disposition of the case,' . . . or that the degree of bias borders on 'fraud or at least a pecuniary interest in the outcome.'" Order of October 9, 1987, at 6. Plaintiff has altered his initial allegations to assert that defendants' bias stems from a pecuniary interest in the "protection of the funding of the NOAA budget." Plaintiff's Motion for Summary Judgment, p.10. This simply is not the type of pecuniary interest with which the courts are concerned. The officials, here Miller and Tweedt, have no pecuniary interest in their individual capacities and, consequently, have no personal bias.

Plaintiff's claim that defendant Miller's authority to render a decision on plaintiff's application was improper since the delegation was oral and not documented is also without merit. This

court repeatedly has upheld agency action based upon implied authority to delegate decision-making. See United States v. Lee, 333 F. Supp. 398 (E.D. Pa. 1971); Ashwood Manor Civic Association v. Dole, 619 F. Supp. 52 (E.D. Pa. 1985), aff'd, 779 F.2d 41 (3d Cir. 1986). Furthermore, if error, this was harmless error since defendant Tweedt himself rendered the final agency decision. (AR B-1, p.116).

Finally, plaintiff argues that defendant failed to perform a mandatory duty by not consulting the ACHP regarding the proposed dive. Plaintiff raises this issue for the first time in his motion for summary judgment. This court will treat this amendment to the complaint as consented to by defendants since they argued the issue in their response to plaintiff's motion for summary judgment. Fed.R. Civ.P. 15(a). Defendants' motion for summary judgment and reply to plaintiff argue that the NOAA decision is well-supported and reasonable agency action by impartial agency officials properly vested with authority. Defendants further argue that the duty to consult with the ACHP under 15 C.F.R. §924.6(d) is not mandatory. Rather, they conclude that they did not consult with the ACHP because such consultation would not change the NOAA decision. The ACHP functions to assess and recommend the impact of various activities on historic landmarks. National Historic Preservation Act, 16 U.S.C. §470j (1980). In the case at hand, the ACHP must review the proposed activity in the Monitor Marine Sanctuary to assess the impact on the wreck. 15 C.F.R. §294.6(d). Defendants argue that the ACHP review is the second step in the review process, following the NOAA approval on safety, and that if the proposal does not meet the safety criteria,

in the final instance as plaintiff's did not, then there is no need for ACHP review thereafter, since it would not alter the previous denial.

Plaintiff's claim for judgment on this ground must fail for two reasons. First, the duty to consult with ACHP is discretionary in that the NOAA need not consult the council on a proposal which it will not approve. In Long v. Seabrook, for example, the court held that defendant's mandatory duty was making the tax records available and that the method of implementing the duty was discretionary. 197 S.E.2d 659, 662 (S.C. 1973). In the instant case, the NOAA must consult the ACHP on proposals to dive the Monitor Marine Sanctuary. If the proposal does not meet the NOAA standards, however, then there is no need for the ACHP to assess the potential impact. Thus, there is a common sense element of discretion in this duty.

Second, the question presents neither a genuine issue nor a material fact for summary judgment purposes. Defendants concede that they did not seek ACHP review of the proposal. Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment, p.22. However, this consultation would not have changed the NOAA decision since the ACHP does not assess the safety of the proposed dive but looks only to the physical impact on the historical site. Thus, the question of whether the NOAA decision-makers should have consulted with the ACHP regarding plaintiff's permit application does not present a genuine issue of material fact since the consultation would not alter the permit denial.

CONCLUSION

For the reasons stated herein, this court finds that plaintiff has not demonstrated that a genuine issue of material fact exists sufficient to withstand defendants' motion for summary judgment. Accordingly, plaintiff's motion for summary judgment will be denied and defendants' motion for summary judgment will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY GENTILE	:	CIVIL ACTION
V.	:	
NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, EDWARD MILLER, PETER L. TWEEDT, ANTHONY B. CALIO, and MALCOLM BALDRIDGE	:	NO. 87-2192

O R D E R

AND NOW, TO WIT, this 30th day of March, 1988, upon consideration of the cross-motions for summary judgment and the memoranda filed in opposition thereto, IT IS ORDERED that plaintiff's motion for summary judgment is denied and defendants' motion for summary judgment is granted.

LOUIS C. BECHTLE, J.

U.S. DEPT. OF JUST
U.S. ATTORNEY E.D. OF
PHILA PENN
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY GENTILE	:	CIVIL ACTION
V.	:	
NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, EDWARD MILLER, PETER L. TWEEDT, ANTHONY B. CALIO, and MALCOLM BALDRIDGE	:	NO. 87-2192

O R D E R

AND NOW, TO WIT, this 1st day of December, 1987, upon consideration of the motion for reconsideration or to amend the Administrative Record of plaintiff Gary Gentile and the memorandum filed in opposition thereto, IT IS ORDERED that the motion for reconsideration or to amend the Administrative Record is denied.

LOUIS C. BECHTLE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY GENTILE	:	CIVIL ACTION
V.	:	
NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, EDWARD MILLER, PETER L. TWEEDT, ANTHONY B. CALIO, and MALCOLM BALDRIDGE.	:	NO. 87-2192

MEMORANDUM AND ORDER

BECHTLE, J. OCTOBER 9, 1987

Presently before this court is the motion to supplement the Administrative Record of plaintiff Gary Gentile, and the memorandum of defendant National Oceanographic and Atmospheric Administration ("NOAA") in opposition thereto. For the reasons stated herein, the motion of plaintiff will be denied.

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FACTS

On April 1, 1986, plaintiff Gary Gentile submitted a formal proposal pursuant to 15 C.F.R., §924.6 to NOAA requesting a permit to perform underwater photography on the U.S.S. Monitor.[1/] Plaintiff's

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1/ The U.S.S. Monitor is an ironclad Civil War warship which sank off Cape Hatteras, North Carolina, in a storm on December 31, 1862. The wreck lies 16 miles off the coast in approximately 220 feet of water. In 1975 the U.S. Department of Commerce designated the wreck as the first national marine sanctuary, pursuant to the National Marine Protection, Research and Sanctuary Act of 1972, 16 U.S.C. §1431, et seq., "[t]o ensure that the MONITOR would be preserved as a resource of national significance." U.S.S. Monitor National Marine Sanctuary Management Plan, February 1983, pp. 1, 3, 13. By virtue of its designation as a sanctuary, the NOAA issued regulations governing the issuance of permits for activities proposed within the waters of the sanctuary. 15 C.F.R. §924, et seq.

proposal contained a description of the proposed dive, planned safety precautions, the equipment he would use, as well as resumes of the project participants and a resume of his own wreck-diving experience.

On August 4, 1986, defendant Edward M. Miller, the Monitor Sanctuary Project Manager, denied plaintiff's proposal, citing violations of safety standards for air divers set by NOAA, the U.S. Navy, and the commercial diving industry, concerns about the adequacy of surface support, and the NOAA Deep Dive project, as factors not warranting the risk of plaintiff's proposed venture. Plaintiff protested the denial of the permit in a letter to defendant Miller on August 17, 1986, and simultaneously appealed the decision to the Secretary of Commerce pursuant to 15 C.F.R., §924.8.

Defendant Peter L. Tweedt, Director of the Office of Ocean and Coastal Resource Management, National Ocean Service, affirmed the denial of the permit on September 29, 1986. Defendant Tweedt specifically stated that plaintiff's proposal to dive 230-240 feet, untethered, and with SCUBA on air, violates NOAA safety standards by virtue of its extreme depth, increased risk of nitrogen narcosis, and inadequate surface assistance. Defendant Tweedt also stated that his decision constituted final agency action.

Plaintiff, by failing to file a request for a formal hearing within 30 days pursuant to 15 C.F.R., §924.8(a) and (b), waived his right to a hearing. On April 15, 1987, plaintiff filed suit in this court pursuant to the Administrative Procedure Act, 5 U.S.C. §551, alleging that in denying his request for a diving permit, the NOAA officials failed to consider plaintiff's experience, expertise, and

fitness to perform the dive, and that plaintiff's prior dives of this nature have proven safe the proposed methods and techniques. Plaintiff further alleged bias on the part of Miller and Tweedt from their involvement in the NOAA Deep Dive project, disparate treatment of his permit application as compared to those of educational institutions, and unlawful delegation of authority to defendants Tweedt and Miller.

Plaintiff seeks an injunction against NOAA enforcement of the denial and a declaration that the agency denial was arbitrary and capricious. At a pretrial conference held on June 11, 1987, this court directed that plaintiff submit this motion to supplement the Administrative Record and a supporting memorandum.

DISCUSSION

Generally, judicial review of administrative agency decisions is based solely on the record before the agency when it made its decision. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971); Camp v. Pitts, 411 U.S. 138, 142 (1973). Though remand for agency clarification is the usual course for handling an inadequate record, Volpe, 401 U.S. at 420, courts will supplement where the record does not disclose the factors which were considered by the agency, NAACP v. Wilmington Medical Center, 453 F.Supp. 280 (D.Del. 1978); Horizons International, Inc. v. Baldridge, 624 F.Supp. 1560 (E.D.Pa. 1986), where new law or cases change the standard since the decision, or where the record contains technical aspects warranting supplemental explanation, Conservation Law Foundation of New England v. Clark, 590 F.Supp. 1467 (D.Mass. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY GENTILE	:	CIVIL ACTION
V.	:	
NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, et al.	:	NO. 87-2192

O R D E R

AND NOW, TO WIT, this 9th day of October, 1987, upon consideration of the motion to supplement the Administrative Record of plaintiff Gary Gentile and the memoranda filed in support and in opposition thereto, IT IS ORDERED that the motion to supplement the Administrative Record is denied.

LOUIS C. BECHTLE, J.

In NAACP v. Wilmington Medical Center, supra, the court refused to grant plaintiff's motion to supplement the agency record absent a showing that the record does not provide an adequate factual basis for judicial review or that it does not disclose all of the factors relevant to the agency decision. 453 F.Supp. at 306. In the present matter, plaintiff does not make that showing. Plaintiff alleges that in denying his request for a diving permit, defendants failed to consider plaintiff's experience, expertise, and fitness as required by 15 C.F.R., §924.6(c), and particularly his prior successful dives similar to that proposed. Plaintiff further alleges that NOAA failed to evaluate plaintiff's diving techniques. This is not the case. The record contains plaintiff's resume and biographical sketch, as well as references to plaintiff's experience in inter-departmental correspondence. Indeed, defendant Tweedt in his letter affirming the denial of the permit and Dr. J. Morgan Wells of the NOAA both recognized plaintiff's experience but noted nonetheless that the proposal was still too risky (AR B-4 and B-19).[2/] Moreover, defendants sought external evaluations from two experts who felt that plaintiff's proposal was too great a risk to recommend NOAA approval of the permit request. These factors are clearly considered by the NOAA in its decision and are documented in the Administrative Record.

The second exception to the rule limiting judicial review to just the record before the agency when it rendered its decision is when evidence or law not previously known to the case is offered

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[2/] All references to the Administrative Record will be cited as "AR ____."

which would affect the agency decision. In Conservation Law Foundation of New England v. Clark, 590 F.Supp. 1467 (D.Mass. 1984), the court allowed defendants to supplement the record when subsequent reports substantiated prior agency predictions. Id. at 1474-1475. Plaintiff here neither offers new evidence nor cites new law or cases which would change the agency decision. Plaintiff's motion requests supplementation of the record with evidence of defendants' involvement with the Deep Dive project, plaintiff's fitness to perform the work envisioned, NOAA's evaluation of plaintiff's techniques, and records of permit approvals of institutional applicants. None of these factors would alter the agency decision.

The third exception allowing for supplementation is the presence of highly technical or unclear matters requiring explanation. Conservation Law Foundation, 590 F.Supp. at 1475. Here, plaintiff requests supplementation by way of expert testimony, affidavits or depositions, to explain the deep decompression scuba diving plaintiff proposes, the safety measures which plaintiff uses, and the dangers encountered in this type of diving. The NOAA diving rules and regulations adequately explain the terminology. Moreover, the NOAA sought and received expert opinions on the nature of deep decompression diving which are included in the record. Unlike Conservation Law Foundation where the court confronted highly technical matters in the nature of a study on the effect of off-road vehicles on the dune physiognomy, vegetation and aesthetics of a beach, id. at 1475, the court here is facing matters sufficiently explained in the record.

Finally, plaintiff requests supplementation with evidence of defendants Tweedt and Miller's participation in the Deep Dive project to illustrate their bias against his proposal. As a rule, barring bad faith or improper conduct, a reviewing court generally will not look beyond the administrative record. Quincy Oil, Inc. v. Federal Energy Administration, 468 F.Supp. 383 (D.Mass. 1979). In reviewing agency action there is a presumption of no bias on the part of the agency official which is not overcome by proof that the official has taken a public position, expressed strong views, or participated in earlier proceedings on the same issues. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1208 (D.C. Cir. 1980). To meet the standard of bad faith necessary to go beyond the administrative record, the plaintiff must make a clear and convincing showing that the official has "an unalterably closed mind on matters critical to the disposition of the case," United Steelworkers, 647 F.2d at 1209, citing Association of National Advisors, Inc. v. Federal Trade Commission, 627 F.2d 1151, 1159 (D.C. Cir. 1979), or that the degree of bias borders on "fraud on at least a pecuniary interest in the outcome." Howlett v. Walker, 417 F.Supp. 84, 86 (N.D.Ill. 1976) citing Gibson v. Berryhill, 411 U.S. 564 (1973).

Plaintiff here has not made a sufficient showing of bad faith. Plaintiff does not allege personal bias on the part of Tweedt and Miller, but rather alleges bias based upon their involvement in the NOAA Deep Dive project, an allegedly "rival" photographic survey. Plaintiff nowhere proves fraud or pecuniary interest, nor does the record reflect an "unalterably closed mind" on the part of either defendant Tweedt or Miller.

CONCLUSION

For the reasons stated herein, this court finds that plaintiff has not made the requisite showing for supplementation of the Administrative Record. Accordingly, plaintiff's motion to supplement the Administrative Record will be denied.

An appropriate Order will be entered.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

February 22, 1989

MEMORANDUM FOR: Distribution

FROM: GCEL - Linda I. Marks Linda I. Marks

SUBJECT: Deaton v. U.S. Department of Commerce, No. 86-1732 (S.D. Fla. Jan. 31, 1989)

On January 31, 1989, U.S. District Court Judge Stanley Marcus ruled on cross-motions for summary judgment pending before him for two years in this appeal of civil penalties assessed under Title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA). This is the first district court decision to review an MPRSA civil penalty case, and resulted in upholding the assessments for three of the four Respondents.

In July, 1983 a vessel charter company (Fun in the Sun) rented three sailboats to a party that included two of the Respondents. The second day out the starter motor on the engine of one of the vessels (the "Chanda") became inoperable. The sailors' attempts to reach Fun in the Sun by use of vessel radio failed. The next day the boats sailed on toward their intended destination of Key Largo, Florida. A storm arose, and although one of the boats proceeded into the nearest safe harbor, the other two (the "Chanda" and the "Golly Gee") decided to anchor up. The anchor line on the "Chanda" then broke and a tow line was connected between the two boats. The two kept on sailing and ran aground in the Key Largo National Marine Sanctuary.

We assessed penalties to the owners and operators of the "Chanda" and the "Golly Gee", and Fun in the Sun. After a hearing Judge Dolan assessed $ 50,000 in civil penalties to all the parties, apportioning the penalties by percentage of liability. One of the owners settled his case and the other parties filed this action for district court review of the penalties.

Judge Marcus first examined the standard of review appropriate to an APA review case. He ruled that findings of fact are subject to a limited review and can only be set aside if they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." However, questions of law, which were the only questions involved, are "freely reviewable." A distinction was made between questions involving statutory or regulatory interpretation, and those involving the exercise of the ALJ's discretionary power. The amount of the penalty assessment is just such an issue and will not be overturned

unless it is "unwarranted in law ... or without justification in fact."

The court found that the MPRSA imposes strict liability on those that violate its regulations. Although not stated in the plain language of the statute, Judge Marcus examined the goal of the statute, Commerce's interpretation of the MPRSA, and other environmental statutes (e.g. CERCLA, RCRA, Clean Water Act) in reaching his conclusion that strict liability applies.

The Petitioners' claim that they should not be held liable for the violation because of exigent circumstances, namely the storm that arose, was denied. The court found that the ALJ's findings concerning the proximate cause of the groundings (lack of adequate navigation skills and poor judgment) were supported by substantial evidence. The Petitioners could not escape liability because their actions created the emergency.

Judge Marcus disagreed with the Government on our assessment of a penalty to the owners of the "Golly Gee". He ruled that the Gebeleins, the owners of the "Golly Gee", did nothing that could be construed as a violation of the Sanctuary regulations. They relinquished control of a seaworthy vessel to Fun in the Sun, who, when it was chartered by the vessel operator here, chartered it in seaworthy condition. The court said that "[a]lthough an absentee vessel owner may be found liable for reef damage caused by his vessel while operated by another, under the MPRSA, for such liability to attach to the absent vessel owner there must exist, we believe, some evidence that the vessel owner's conduct was a substantial cause of the reef damage at issue." The penalty originally assessed to the Gebeleins was then reapportioned to the remaining three Petitioners (Fun in the Sun and the two vessel operators) and their penalties increased.

For our first MPRSA case I think we got a thorough and fair review and have some good precedent to cite. Thanks go to Charles Brooks of the Department of Justice and Fred Kyle. Charles will be asking that the opinion be published. A copy of the Final Order is attached.

Attachment

Distribution:

All GC Offices
Office of Administrative Law Judge
N/ORM2 - Joe Uravitch/Ralph Lopez
F/EN - Morris Pallozzi
DOJ- Irv Pianin
Florida DNR, Office of General Counsel - Dana Wiehle

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT, ATLANTA

CASE NO.: 89-5221

ALVA FRANK DEATON, FUN IN THE SUN, and CLIFFORD MIKE SEWELL,

Appellants,

vs.

UNITED STATES DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

Appellee.

NOTICE OF VOLUNTARY DISMISSAL OF APPEAL

NOTICE IS HEREBY GIVEN that Petitioner/Appellant, ALVA FRANK DEATON, voluntarily dismisses his appeal filed on March 2, 1989, in District Court Case No. 86-1732-Civ-Marcus. The Petitioner/Appellant appealed the District Court's Final Order dated January 31, 1989.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 6th day of APRIL, 1989, to: OFFICE OF ADMINISTRATIVE LAW JUDGE, U.S. Department of Commerce, Suite 6716, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; FREDERICK D. KYLE, ESQ., Office of General Counsel, Southeast Region, National Oceanic and Atmospheric Administration, 9450 Koger Boulevard, Suite 102, St. Petersburg, Florida 33702, and DR. ANTHONY J. CALIO, United States Department of Commerce, National Oceanic and Atmospheric

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By:_____
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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT, ATLANTA

CASE NO.: 89-5221

ALVA FRANK DEATON, FUN IN THE SUN, and CLIFFORD MIKE SEWELL,

Appellants,

vs.

UNITED STATES DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

Appellee.

NOTICE OF VOLUNTARY DISMISSAL OF APPEAL

NOTICE IS HEREBY GIVEN that Petitioner/Appellant, FUN IN THE SUN, voluntarily dismisses its appeal filed on March 2, 1989, in District Court Case No. 86-1732-Civ-Marcus. The appeal from the District Court's Final Order dated January 31, 1989 is being dismissed as an amicable settlement has been reached by the Petitioner/Appellant, Fun In The Sun and the National Oceanic and Atmospheric Administration. The dismissal is filed solely by Fun In The Sun. This notice shall not affect the appeal filed on behalf of Petitioners/Appellants, Alva Frank Deaton and Clifford Mike Sewell.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 6th day of April, 1989, to: OFFICE OF ADMINISTRATIVE LAW JUDGE, U.S. Department of Commerce, Suite 6716, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; FREDERICK D. KYLE, ESQ., Office of General Counsel, Southeast Region, National Oceanic and

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FUN IN SUN, INC.
320 N. Federal Highway
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By _____
JAMES A. DOVAS, PRESIDENT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-1732-CIV-MARCUS

FRANK DEATON, et al.,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF COMMERCE, etc.,

Respondent.

FINAL ORDER

FILED BY ____ D.C.

JAN 31 1989

THIS CAUSE has come before the Court upon the Petitioners' and the Respondents' cross-motions for Summary Judgment. This case arises from the grounding of the "S/V Chanda" and the "S/V Golly Gee" on the coral reef at the Key Largo Marine Sanctuary, Florida, in purported violation of Title III of the Marine Protection Research and Sanctuaries Act of 1972 as amended ("MPRSA"), 16 U.S.C. 1431 et seq. The Petitioners ask us to determine that because they did not intend to damage the coral reef they could not be liable under the Act for their actions, that absent owners and charterers are not responsible for damage to the coral reef, and, finally, that the fine imposed by the Administrative Law Judge was excessive. The Respondents urge this Court to uphold the determination by the Administrative Law Judge. Having reviewed the memoranda, the relevant statutes and regulations, and legislative history surrounding the MPRSA, we GRANT in part and DENY in part the Petitioners' Motion for Summary Judgment, and we GRANT in part and DENY in part the Respondent's Motion for Summary Judgment.

I. FACTS

The material facts are not in dispute. On July 14, 1983, Petitioner Fun in the Sun, Incorporated ("Fun in the Sun") agreed to charter three sailing vessels to a number of individuals. (Respondent's Statement of Material Facts as to Which There is No Genuine Issue at 2). Petitioners Walter C. and Susan Gebelein (the "Gebeleins") owned one of the vessels, the "S/V Golly Gee." (Id. at 1). Petitioner John K. Trainor, who has since settled with Respondent, was the owner of the "S/V Chanda." Fun in the Sun operated a sailboat charter business in Dania, Florida, in which it leased boats for the owners of those boats. (Id. at 1-2).

On July 30, 1983, Petitioners Alva F. Deaton and Clifford M. Sewell departed from the Fun in the Sun dock aboard the two vessels which they operated, the "Chanda" and the "Golly Gee," respectively, enroute to Cape Florida. (Id. at 1). A third vessel, the "S/V Myra," sailed along with them. The three vessels eventually anchored and spent the night at Cape Florida. (Id. at 2).

On July 31, 1983, the three vessels remained at Cape Florida due to problems with the starter motor on the engine of the "Chanda." (Id.). Attempts to repair the starter motor proved unsuccessful. Attempts to contact Fun in the Sun by use of the radios onboard the "Chanda" and the "Myra" also failed. In re: Alva Frank Deaton, No. 455-102 (Dept. of Commerce Feb. 6, 1986) (Admin. Rec. 12 at 5). Nevertheless, on the morning of August 1, 1983, the three vessels departed from Cape Florida for Key Largo,

Florida. Deaton, the operator of the "Chanda," had lived on Key Largo previously and expected to be able to make repairs to the starter motor there. The three vessels proceeded south, sailing offshore approximately one to one and-a-half miles seaward of the reef line. As the day wore on, the weather deteriorated to the point where Petitioner Deaton determined that it would be better to anchor up the "Chanda" rather than continue under sail power alone. (Respondent's Statement of Material Facts at 3). The "Golly Gee" remained with the "Chanda," while the "Myra" crew chose to seek safe harbor in the nearest protected port, Turtle Harbor. (Id.)

Unfortunately, the "Chanda's" anchor line broke. (Id). A tow line was affixed from the "Chanda" to the "Golly Gee." The "Golly Gee," unable to tow the "Chanda" offshore, changed heading. (Id.). The vessels proceeded in a southeasterly direction and both the "Chanda" and the "Golly Gee" finally ran aground at Grecian Rocks, at the Key Largo Marine Sanctuary. (Id.)

The National Oceanic and Atmospheric Administration ("NOAA") U.S. Department of Commerce issued Notices of Violation and Assessments ("NOVAs") against the five Petitioners for damaging the coral reef. One NOVA charged Deaton, Fun in the Sun, Sewell, and Trainor and assessed a joint and several penalty of $35,000.00. The other NOVA charged Sewell, Fun in the Sun, and the Gebeleins and jointly and severally assessed a $40,000.00 penalty against them. Petitioners sought review by Administrative Law Judge Hugh J. Dolan, who found Petitioners had committed a single violation and assessed the statutory maximum

fine of $50,000.00.[1] (Memorandum of Points and Authorities i Support of Respondent's Motion for Summary Judgment at 4) Petitioners applied for and were denied discretionary review b the Administrator of NOAA. (Petitioners' Petition for Review o Administrative Order of the United States Department of Commerce National Oceanic and Atmospheric Administration at 3) Petitioners then filed this action.

Petitioners challenge the findings of the Administrative La Judge ("ALJ") on four grounds:

> 1. The ALJ erred in finding a violation of 15 C.F.R. 929.4(a)(1) and 15 C.F.R. 929.4(h)(2) because the Petitioners did not intend to cause damage to the coral reef and because the presence of the subject vessels in the area of the coral reef was involuntary.
>
> 2. The ALJ erred in finding a violation of 15 C.F.R., §929.4(a)(1) and §929.4(h)(2) because the activity complained of is permitted under 15 C.F.R. §929.6.
>
> 3. The ALJ erred in imposing vicarious liability on the charterer and boat owners who were absent and took no part in the complained of activities.
>
> 4. The maximum $50,000.00 penalty imposed by the ALJ was unwarranted and excessive because the Petitioners had no intention of causing damage to the coral reef while performing an activity permitted under 15 C.F.R., §929.6.

II. STANDARD OF REVIEW

Our review of the Administrative Law Judge's Findings belo is governed by the Administrative Procedure Act ("APA"), 5 U.S.C §706(2)(c), which empowers a court to strike down agency action taken "in excess of statutory jurisdiction, authority, o limitations, or short of statutory right." Although factua

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findings and findings on mixed questions of fact and law are subject to a limited standard of review and are set aside only if "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" or if "unsupported by substantial evidence..."; id.; see also Swearingen Aviation Corp. v. NLRB, 568 F.2d 458, 463 (5th Cir. 1978), questions of law are freely reviewable and courts are under no obligation to defer to agency legal conclusions. See Coca-cola Co. v. Atchison, T & S. F. Ry. Co., 608 F.2d 213, 218-19 (5th Cir. 1979)(finding that Interstate Commerce Commission's legal interpretation of a tariff, like an interpretation of a statute, involved a question of law); see also First Alabama Bank of Montgomery v. Donovan, 692 F.2d 714, 718 n.5 (11th Cir. 1982)("Although bound by the 'substantial evidence' standard of review as to the factual findings of the administrative law judge, see 5 U.S.C.A. §706(2)(e), the district court was permitted to consider First Alabama's constitutional arguments de novo.") citing §706 of the APA and Coca-cola v. Atchison, supra at 218.

In the instant case, the material facts are largely undisputed and the central issues--what standard of liability does the Act impose, who is subject to liability under the Act and regulations passed pursuant thereto, and what is the scope of permitted activity under 15 C.F.R. §929.6--involve questions of statutory and regulatory construction which are freely reviewable questions of law. Although courts generally grant "great deference" to an agency's interpretation of its enabling statute, such deference

> is limited by the courts' obligation "to honor the clear meaning of the statute, as revealed by its language, purpose and history", International Brotherhood of Teamsters, Warehousemen & Helpers of America v. Daniel, 439 U.S. 551, 99 S.Ct. 790, 800 at note 20, 58 L.Ed.2d 808 (1979), and by the requirement that the agency interpretation not be clearly wrong or unreasonable.

Coca-cola v. Atchison, supra at 222 (citation omitted) Likewise, although an agency's interpretation of its ow regulation is generally given significant weight provided it is reasonable one, "a regulation may not be interpreted to say wha an agency intended to say but failed to adequately express." Id In sum, although it is impossible to precisely quantify th weight to be given an administrative agency's interpretation of statute or regulation, the interpretation is not dispositive, bu rather may be weighed along with other factors. Id. at 223 Ultimately, the legal standard to be applied is for the courts t decide and enforce. Id. citing Swearingen Aviation Corp., supra.

The question of whether the civil penalty assessed by th ALJ was unwarranted or excessive, however, is different tha those involving statutory or regulatory interpretation, and i accordingly subject to a different standard of review. Th imposition of a monetary penalty involves the exercise of th ALJ's discretionary power and the assessment of such a penalt will not be overturned unless it is "unwarranted in law ... c without justification in fact." Newton v. G.F. Goodman, 51 F.Supp. 1266, 1301 (D. N.J. 1981) citing Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185-86 (1973).

III. STANDARD OF LIABILITY UNDER THE MPRSA

The Marine Protection, Research and Sanctuaries Act is intended to recognize marine areas of national significance whose protection and beneficial use require comprehensive planning and management. S. Rep. No. 98-280, 98th Cong. 2d Sess., reprinted in, 1983 U.S. Code Cong. & Admin. News 3909. One of the expressed purposes of the Act is to provide authority for comprehensive and coordinated conservation of designated marine areas to complement existing regulatory authority. 16 U.S.C. §1431(b)(2). Toward that end, the Act authorized the Secretary of Commerce to designate as marine sanctuaries those areas of the marine environment which, among other things, are of special national significance. 16 U.S.C. §1433. Section 303(a) of the Act provided that "any person subject to the jurisdiction of the United States who violates any regulation issued pursuant to this title shall be liable to a civil penalty of not more than $50,000 for each such violation, to be assessed by the Secretary. Each day of a continuing violation shall constitute a separate violation." Compare 16 U.S.C. §1437(b)(1) (1985).

Pursuant to regulations duly issued by the Secretary of Commerce on January 16, 1976, the Key Largo National Marine Sanctuary was designated "to protect and preserve the coral reef ecosystem in its natural state and to regulate uses within the Sanctuary to insure the health and well-being of the coral and associated flora and fauna." 15 C.F.R. §929.2. Accordingly, Section 929.4(h) of the regulations in effect on August 1, 1983,

entitled "Activities prohibited within the sanctuary," provided:

(h) Operation of watercraft.

> (1) All watercraft shall be operated in accordance with applicable Federal rules and regulations. The following additional constraints will also be imposed within the boundaries of the sanctuary.
>
> (2) No watercraft should be operated in such a manner as to strike or otherwise cause damage to the natural features of the marine sanctuary.

Section 929.5 of the 1976 regulations, in effect on August 1, 1983, repeated the language of §303 of the Act authorizing the assessment of a civil penalty of not more than $50,000 for each violation of any regulation issued pursuant to the Act, and further authorized a proceeding in rem against any vessel used in violation of any such regulation.

First, Petitioners argue that the MPRSA requires that some level of intent to damage the coral reef be shown before they may be fined under the applicable regulations. See Key Largo Coral Reef Marine Sanctuary [Effective until January 9, 1984] 15 C.F.R. §§ 929.1-.9 (1983). The Commerce Department contends, however, that the statute imposes "strict liability" upon those who cause damage to a marine sanctuary. For the reasons outlined at some length below, we agree with Respondents.

Because the Act does not specify the level of culpability necessary to find a person in violation of the Act, we attempt to construe the statute's meaning by determining its legislative intent. In divining legislative intent, statutory construction begins with an examination of the literal language of a statute, United States v. Turkette, 452 U.S. 576, 580 (1981), and properly

ends there unless the statutory language is ambiguous. In Here, the statutory language germane to our inquiry states in pertinent part:

> Any person who violates any regulation under this chapter shall be liable to the United States for a civil penalty of not more than $50,000 for each such violation ....

16 U.S.C. §1437(b)(1). Although this provision does not expressly impose strict liability, neither does it require that any level of culpability be shown before a fine may be imposed. The plain language of the statute simply states that any person who violates any regulation under the Act shall be liable for civil penalty. Conspicuously absent from the statute's enforcement provision are terms like negligently, recklessly, knowingly, purposely, or any others which would denote a culpability requirement.

Although we find the conspicuous absence of any such term in §1437(b)(1) persuasive that Congress intended to impose strict liability, the absence of such terms is neither dispositive of the question, nor indicative that the Act's enforcement language is subject to only one plain meaning. Accordingly, it is appropriate in the instant case to look beyond the literal language of the Act in trying to determine whether or not Congress intended to impose strict liability when it passed the MPRSA. See Turkette, supra at 580.

First, we look to the Department of Commerce, the agency Congress has entrusted with promulgating and enforcing regulations to carry out the goals of the MPRSA, for their interpretation of the Act and the regulations promulgated

thereunder. We find persuasive the fact that the Department of Commerce has consistently interpreted the MPRSA and the regulations promulgated thereunder to mean that those who cause damage to the coral reef are subject to strict liability under the statute. In James S. Mattson, No. 405-253 (Dept. of Commerce May 29, 1985) (Westlaw, FENV, ORW) 4 O.R.W. 202, the ALJ construed the Act in this way:

> [S]trict liability is imposed on all persons associated with harming or destroying marine sanctuaries.

When faced with an issue of statutory or regulatory construction, such as the one before us today, courts will give great weight to the interpretation of the agency whose job it is to administer that statute and the regulations promulgated thereunder. See Udall v. Tallman, 380 U.S. 1, 16 (1964); Parker v. Bowen, 788 F.2d 1512, 1518 (11th Cir. 1986) (en banc) (administrative agency's interpretation of its own regulations is controlling unless it is plainly erroneous or inconsistent with the language and purposes of the regulations); see also Singer, Statutes and Statutory Construction § 31.06 at 532 (1985).

Although an examination of the legislative history of the MPRSA reveals precious little about what standard of liability Congress intended to impose when it passed the Act, see S. Rep. No. 280, 98th Cong., 2d Sess., reprinted in, 1983 U.S. Code Cong. & Admin. News 3909, other federal environmental statutes--which contain enforcement provisions strikingly similar to §1437(b)(1) of the MPRSA--have been passed with legislative histories well-explicated in House and Senate Committee Reports, as well a

in cases in which courts were called upon to construe thei statutory language. See, e.g., United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1988)(finding that the Federa Water Pollution Control Act ("Clean Water Act") does not requir fault to support penalties imposed thereunder); United States v. Price, 577 F.Supp. 1103, 1114 (D.N.J. 1983)(finding that Congres intended to impose a strict liability standard when it enacte the Comprehensive Environmental Response, Compensation Liability Act ("CERCLA")). Therefore, a comparison of the MPRS with several of these environmental statutes would be instructive One such statute is CERCLA. Congress enacted CERCLA, 42 U.S.C §§ 9601 et seq., in 1980 as a remedial response to a pervasiv and dangerous environmental problem: the cleanup of inactive an abandoned hazardous waste sites. Although CERCLA does no specifically contain any provision that expressly imposes stric liability for hazardous waste releases, courts have broadl construed its liability provisions, finding that violators of the statute are subject to liability that is strict, joint, an several. See, e.g., J.V. Peters & Co. v. EPA, 767 F.2d 263 (6t Cir. 1985); United States v. Northeast Pharmaceutical & Chem. Co., 579 F.Supp. 823, 843-44, rev'd on othr grounds, 810 F.2d 72 (8th Cir. 1986); Price supra.

CERCLA's chief liability provision, §107(a)--which is no unlike the chief liability provision of the MPRSA §1437(b)(1)--states in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--(1) the owner and operator of a

> vessel or a facility ... shall be liable for--(A) all costs of removal or remedial action taken by the United States Government or a state not inconsistent with the national contingency plan ....

42 U.S.C. 9607(a) (emphasis added). The statutory language in the case at bar is similar to that found in CERCLA. The MPRSA provides in pertinent part:

> Any person subject to the jurisdiction of the United States who violates any regulation issued under this chapter shall be liable ....

16 U.S.C. §1437(b)(1) (emphasis added). Given the similarity in the construction of the two statutes, and that both statutes are legislative responses to protect an increasingly endangered environment, we find that the cases construing liability under CERCLA to be strict, joint, and several lend additional support for the view that the MPRSA should be similarly construed as imposing strict liability.

Another environmental statute worthy of examination here for the sake of comparison is the Clean Water Act. The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). To facilitate these objectives, Congress expressly prohibited the discharge of oil or other hazardous substances into the navigable waters of the United States and created statutory provisions to enforce such prohibitions. See Ward v. Coleman, 598 F.2d 1187, 1191 (10th Cir. 1979), rev'd on other grounds, 448 U.S. 242 (1980). One such provision assesses a civil penalty of not more than $5,000, regardless of fault, on any owner, operator, or person in charge of any onshore or

offshore facility from which oil or hazardous substances are released., See 33 U.S.C. §1321(b)(6).

The language contained in Section 1321(b)(6), which has been held not to require fault to support the imposition of penalties thereunder, see Texas Pipe Line Co., supra at 347, closely mirrors the language of §1437(b)(1) of the MPRSA. Section 1321(b)(6) of the Pollution Control Act states in pertinent part:

> Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense ....

33 U.S.C. §1321(b)(6)(A) (emphasis added). Courts have construed the language of §1321(b)(6) of the Clean Water Act as imposing strict liability. See, e.g., Ward v. Coleman, 598 F.2d 1187, 1191 (10th Cir. 1979)("The assessment of this penalty [33 U.S.C. §1321(b)(6)] is without regard to fault and subject to no defenses."). In Coleman, the Court found that once section 1321(b)(6) had been violated, the "penalty is assessed automatically in every case without regard to fault." See id. Again, because the plain language of section 1321(b)(6) is strikingly similar to the language used in 16 U.S.C. §1437(b)(1) of the MPRSA, we find that cases construing §1321(b)(6) as imposing strict liability persuasive authority that §1437(b)(1) of the MPRSA should be construed the same way.

Still another judicially construed environmental statute, the Resource Conservation and Recovery Act, is also instructive for the sake of comparison. Congress enacted the Resource

Conservation and Recovery Act ("RCRA") to promote the protectic of health and the environment and to conserve valuable materia and energy resources. 42 U.S.C. §6902. In furtherance of thi goal, the Act, among other things, regulates the treatment storage, transportation and disposal of hazardous wastes. 4 U.S.C. §6902(4). Section 6928 of RCRA imposes both criminal ar civil penalties upon persons who violate the Act's requirements Section 6928(g), which authorizes the imposition of civi penalties, has been construed to impose liability even in th absence of any showing of intent. See, e.g., United States v. Charles George Trucking Co., Inc., 642 F.Supp. 329, 333-34 (N.I Ill. 1986)(imposition of a §6928(g) civil penalty does nc require a finding of sienter). Section 6928(g) states:

> Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

Once again, as is the case with similar enforcement language i CERCLA and the Clean Water Act, RCRA's civil penalty provisio section 6929(g), contains practically the exact same language a the civil penalty provision in the MPRSA:

> Any person who violates any regulation under this chapter shall be liable to the United States for a civil penalty of not more than $50,000 for each such violation, to be assessed by the Secretary. Each day of a continuing violation shall constitute a separate violation.

16 U.S.C. Section 1437(b)(1). In view of the similarity i statutory construction between RCRA and the MPRSA, and that bo

statutes are legislative vehicles specifically designed to protect the environment, we find that case law interpreting section 6929(g) of RCRA as imposing liability without regard to intent lends additional support that §1437(b)(1) of the MPRSA should likewise be construed as imposing liability, even in the absence of a showing of intent.

In sum, upon review of the plain language of the MPRSA, the Act's legislative history and purpose, the civil penalty provisions found in similar environmental statutes as well as cases construing those provisions, and the Commerce Department's own interpretation of the Act, we agree with the Department of Commerce's interpretation and hold that the Act makes those who cause damage to the marine sanctuaries strictly liable for the fines they are assessed. The imposition of strict liability is consistent with both the enforcement language of the MPRSA, section 1437(b)(1) and the Act's underlying policy goal: the comprehensive and coordinated conservation of designated marine areas. See 16 U.S.C. §1431(b)(2). Accordingly, because the Department of Commerce's interpretation of the Act and regulations promulgated thereunder is not plainly erroneous or inconsistent with the language of the MPRSA, we find that it is controlling here. See Parker, supra at 1518.

We hasten to add that Petitioner's proposed construction of section 1437(b)(1)--that specific intent is required to assess a civil penalty--would all but render section 1437(b)'s effectiveness nugatory. We can think of few instances indeed in which a person would intentionally run his or her yacht aground

on a coral reef in order to damage it. The adoption o Petitioners' argument that specific intent be grafted onto thi Congressional enactment would surely undermine the deterrenc value of the MPRSA's enforcement provisions.

Finally, we observe that even if §1437(b)1) of the MPRS required a showing of some fault or negligence before a fin could be imposed, on this record, the ALJ's finding tha Respondents Deaton, Sewell, and Fun in the Sun negligently cause substantial damage to the Sanctuary's coral reef is supported b substantial evidence.

IV. EXIGENT CIRCUMSTANCES

Petitioners also contend that even if they violated the Act they should not be held liable for the fine imposed on the because of exigent circumstances. In support, the Petitioner point to the relevant regulation that provides:

> Any person or entity may conduct in the Sanctuary any activity listed under § 929.4 if:
> (a) such activity ... pertains to salvage or recovery operations; and
> (b) ... [N]o permit is required for the conduct of any activity immediately and urgently necessary for the protection of life, liberty, or the environment.

15 C.F.R. § 929.6 (1983). In applying an exception to liability such as the one found in this regulation, the exception must b construed narrowly. See United States v. First City Nationa Bank, 386 U.S. 361, 366 (1967); Marshall v. Eastern Airlines, Inc., 474 F.Supp. 364, 368 (S.D. Fla. 1979), aff'd sub nom E.E.O.C. v. Eastern Airlines, 645 F.2d 69 (5th Cir. 1981), cert denied sub nom., Eastern Airlines, Inc. v. Equal Employment

Opportunity Commission, 454 U.S. 818 (1981). Moreover, the party claiming the benefit of a statutory exception has the burden of proof that its activities fall within that exception. United States v. First City Nat. Bank, 386 U.S. 361, 366 (1967).

The Petitioners argue that they fit within this statutory exception because the weather created an emergency situation. Although an emergency situation may exculpate a defendant from liability, the defendant must have not contributed to or created the emergency. Taylor v. Bair, 414 F.2d 815, 820 (5th Cir. 1969)(sudden emergency doctrine is only applicable when party seeking its application was free of negligence before emergency arose). Here, the ALJ found that the S/V "Chanda" was unseaworthy at the time it ran aground on the coral reef. Specifically, the ALJ found that one day after the S/V "Chanda" was dispatched, its engine starter became inoperative and its radio was discovered to be inadequate. [ALJ's Initial Decision at 10]. The following day, the boat lost one of its two anchors when an anchor line broke. Although the ALJ concluded that the failure of the starter alone rendered the S/V "Chanda" unseaworthy, he found that the problems with the radio and anchor line exacerbated the situation, especially in light of inclement weather. Id. Finally, the ALJ concluded that Respondent Deaton's decision--once he became aware of the problems with the starter, radio and anchor line--to sail on to Key Largo in severe weather rather than seek refuge in nearby Turtle Harbor, as did the S/V "Myra," constituted imprudent navigation. Id. at 11. Likewise, he determined that Respondent Sewell's decision, after

taking the S/V "Chanda" in tow, to go on to Key Largo rather than proceed to seek refuge in the nearest port, as did the S/V "Myra," constituted imprudent judgment. Id. at 12. In sum, the ALJ concluded that the proximate cause of the groundings of the S/V "Chanda" and the S/V "Golly Gee" was the lack of adequate navigation skills and poor judgment of the vessels' operators in deteriorating weather. Id. at 11.

The findings of the Administrative Law Judge below are subject to review upon the substantial evidence standard. Thus, unless we find that the ALJ's findings are not supported by substantial evidence, we will not disturb them. The ALJ's findings are entitled to considerable deference because he had the opportunity to hear the witnesses' testimony and observe their demeanor. First Nat. Monetary Corp. v. Weinberger, 819 F.2d 1334, 1339 (6th Cir. 1987). Additionally, we note that agency credibility resolutions are essentially nonreviewable unless contradicted by "uncontrovertible documentary evidence or physical facts." Olin Const. Co., Inc. v. Occupational S&H Rev. Com'n., 525 F.2d 464, 467 (2d Cir. 1975) citing NLRB v. Dixie Gas, Inc., 323 F.2d 433, 437 (5th Cir. 1963); see also NLRB v. Bausch & Lomb, Inc.,. 526 F.2d 817, 822 (2d Cir. 1975)("Decisions by Administrative fact finders as to demeanor and credibility will be overturned by this Court only when the evidence to the contrary is overwhelmingly compelling.") Here, the ALJ's findings were supported by substantial record evidence. Accordingly, because the ALJ properly found that Petitioners' imprudent operations of the S/V "Chanda" and S/V "Golly Gee" were

substantially responsible for creating the emergency situation at issue, they may not now seek refuge in the emergency exception provisions of 15 C.F.R. §926.6 (1983).

V. VESSEL OWNER LIABILITY

Petitioners also contend that because the Gebeleins and Fun in the Sun were not in control of either vessel at the time of the groundings, neither can be held liable for damage caused to the coral reef. Essentially, Petitioners argue that the applicable regulations refer only to operators of vessels and therefore, because the Gebeleins and Fun in the Sun were not operating the vessels at the time the vessels struck the reef, they are not within the purview of the regulations at issue here. Respondents argue that because the Gebeleins, as owners of the "Golly Gee," and Fun in the Sun, as charterer of both vessels, were responsible for he proper maintenance of the vessels and equipment, and because the faulty starter, broken anchor line, and inadequate radio contributed in substantial part to the vessels' grounding, they are both liable under the MPRSA and applicable regulations.

Respondents cite to three cases as standing for the proposition that a vessel owner may be liable for statutory violations committed by another in charge of the vessel. See Dale Hansey, No. 355-186, 355-187 (Dept. of Commerce Oct. 5, 1984)(Westlaw, FENV, ORW) 3 O.R.W. 749; Anchor Fishing Co., No. 223-132, 223-133 (Dept. of Commerce Aug. 12, 1983) (Westlaw, FENV, ORW) 3 O.R.W. 315; Miller Seafoods, Inc., No. 215-070 (Dept. of Commerce Dec. 3, 1982) (Westlaw, FENV, ORW) 3 O.R.W. 55.

While these cases do stand for this general proposition, all are factually distinguishable. In each of the cases cited, the owner was also the vessel's charterer. In each, the ALJ found the owner/charterer liable for statutory violations committed by the operator of the vessel because the owner/charterer negligently exercised its discretion in permitting the boat operator to charter the vessel. The instant case is distinguishable, insofar as it applies to the Gebeleins, because here the Gebeleins--owners of the "Golly Gee"--were not charterers. Rather, the Gebeleins entered into a contract with Fun in the Sun who, in turn, was to be responsible for chartering the "Golly Gee." Consequently, because the Gebeleins relinquished control of their vessel to Fun in the Sun, (Admin. Rec. 31L at ¶1), they are not in the same position as were the vessel owner/charterers in Hansley, Anchor, and Miller, supra.

Here the statutory provision at issue states:

> Any person who violates any regulation under this chapter shall be liable to the United States for a civil penalty of not more than $50,000 for each such violation....

16 U.S.C. Section 1437(b)(1). (emphasis added). The term "person" is defined broadly in the regulations promulgated pursuant to the MPRSA as "any private individual, partnership, corporation or other entity...." 15 C.F.R. Section 922.2(f) (1983). The regulations purportedly violated by Petitioners provide in pertinent part:

> (a) Removal or destruction of natural features and marine life. (1) No person shall destroy, injure, harmfully disturb or remove ... corals, sea feathers and fans, ...

> or any soil, rock, artifact or other material....
> (2) No person shall cut, carve, injure, mutilate, move or displace or break off any bottom formation of growth.

15 C.F.R. Section 929.4(a)(1) & (2). Regulation 929.4(h) provides in pertinent part:

> (h) Operation of watercraft (1) All watercraft shall be operated in accordance with applicable federal rules and regulations. The following additional constraints will also be imposed within the boundaries of the sanctuary.
> (2) No watercraft should be operated in such a manner as to strike or otherwise cause damage to the natural features of the marine sanctuary.

In assessing whether or not the ALJ properly found Fun in the Sun and the Gebeleins liable under the Act and applicable regulations, we must determine whether the conduct of these actors falls within the scope of activities Congress and the Secretary of Commerce intended to regulate.[3]

The first question is whether the charterer Fun in the Sun and the owner Gebeleins fall within the scope of "persons" Congress intended to regulate when it passed the Act. Section 922.2(f) (1983) of the regulations promulgated under the Act states that the term person includes "any private individual, partnership, corporation or other entity ...." Accordingly, we find that both Fun in the Sun and the Gebeleins fit within the broad and inclusive parameters of persons that may be subject to liability under the Act.

Next, we must determine if Fun in the Sun and/or the Gebeleins have violated any of the Key Largo Sanctuary regulations quoted supra. The ALJ found that the responsible

for the damage to the coral reef laid with "Fun in the Sun for dispatching a vessel which shortly thereafter experienced a malfunction of the engine starter, a defective marine radio, a separation of anchor and line and for having failed to maintain communications with the chartered vessels at sea." (ALJ's Feb. 6, 1986 Initial Decision at 12). The ALJ also found that, to a lesser extent, the Gebeleins bore indirect responsibility for "selecting Fun in the Sun as a chartering agent that failed to maintain commuication with the owners' vessels at sea." Id. Regarding Regulation 929.4(h)--governing operators of watercraft--neither Fun in the Sun nor the Gebeleins could have committed a violation because plainly neither was operating a vessel when the double grounding occurred. Whether either Fun in the Sun or the Gebeleins violated Regulation 929.4(a)(1)--which prohibits all persons from injuring or destroying coral or any other bottom growth formation--is a more difficult question, however.

Regulation 929.4(a)(1) prohibits all persons from causing damage to, among other things, the coral formations at the Key Largo Marine Sanctuary. The ALJ made a factual finding that Fun in the Sun's conduct in chartering out an unseaworthy vessel and then failing to maintain communiation with it while at sea was a substantial cause of the damage inflicted upon the reefs by the double grounding. On this record, we conclude that this finding was supported by substantial evidence.

The ALJ also found that the Gebeleins' conduct in selecting Fun in the Sun as a chartering agent was indirectly responsible

for the damage caused to the reef, and that the Gebeleins were therefore liable under the MPRSA. As to this finding, however, we disagree. Although the language and the policy underpinnings of the MPRSA, as revealed through its legislative history and the Act itself, suggest that Regulation 929.4 be broadly construed to foster the goals sought by the Act, this record does not support a finding that the Gebeleins caused damage to the reefs. Here, the Gebeleins relinquished control of their seaworthy vessel to a chartering agent, Fun in the Sun, who then chartered the vessel out to Petitioner Sewell. The ALJ did not find that the Gebeleins' vessel, the "Golly Gee," was in any way defective, or unseaworthy, either when the owner relinquished control to the charterer, or when the charterer turned the boat over to Sewell. Indeed, the ALJ did not conclude that any defect in the "Golly Gee" led to the damage to the coral reef. Rather, he found only that the Gebeleins were "indirectly responsible" for the reef damage in selecting Fun in the Sun as their chartering agent. We are unable to follow the causal chain drawn by the ALJ. Although the ALJ found that the "Chanda" was unseaworthy, notably he made no such finding regarding th "Golly Gee." Moreover, none of the deficiencies in the "Chanda" that led to the ALJ's finding that Fun in the Sun was liable under the Act can be imputed to the Gebeleins, who owned the "Golly Gee"--which was seaworthy.

In short, the only finding the ALJ made regarding deficiencies in Fun in the Sun's conduct as it related to the "Golly Gee" was that Fun in the Sun failed to maintain radio contact with both vessels. Thus, the sole basis for the AL

finding the Gebeleins liable under Regulation 929.4 is that the Gebeleins, as vessel owners, selected a chartering agent who failed in this instance to maintain radio contact with their chartered vessel. In support of this finding, the ALJ cited James S. Mattson, Esq. Claim for Attorney's Fees Under EAJA Docket No. 405-253, May 29, 1985 4 O.R.W. 202 (1985) ("Thus [under the MPRSA] strict liability is imposed on all persons associated with harming or destroying marine sanctuaries." (emphasis added) Pet. for review denied 4 O.R.W. 385 Nov. 8, 1985 Read liberally, Regulation 929.4 imposes strict liability on all persons who, either intentionally or unintentionally, caus damage to the Key Largo Marine Sanctuary coral reefs. Thi record fails to support the chain of causation purportedly draw between the owner's act of engaging this chartering agent and th charterer's failure to maintain radio contact with the "Goll Gee." Although an absentee vessel owner may be found liable fo reef damage caused by his vessel while operated by another, unde the MPRSA, for such liability to attach to the absent vesse owner there must exist, we believe, some evidence that the vesse owner's conduct was a substantial cause of the reef damage at issue. Liability is not triggered by the loosest associatio with such damage. Rather, liabiity is triggered by conduc that--regardless of intention or negligence--substantially cause the violation at issue. Before a civil fine may be imposed for violation of a regulation prohibiting persons from damagi protected reefs, it must first be shown that the allege violator's conduct constituted a substantial cause of the re

damage at issue. Thus, the controlling question here boils down to this: whether the conduct of the Gebeleins, regardless of intention or negligence, caused the damage to the reefs. On this record, we are unable to find any evidence supporting a finding that the Gebeleins' conduct was a substantial cause of the damage to the coral reefs at issue here. We cannot accept the ALJ's conclusion that the plain language of Regulation 929.4 was violated here by the conduct of the owners, the Gebeleins.

VI. AMOUNT OF FINE

Finally, the Petitioners contend that the $50,000.00 fine was excessive in light of the circumstances leading up to the grounding of the two vessels. According to the Petitioners, because they did not intend to cause damage to the coral reef, they should not be subject to the maximum fine.

Initially we point out that the proper standard to review an administrative decision imposing a fine is whether the penalty was arbitrary and capricious.

> To be "valid" a sanction must not be arbitrary and capricious, and a sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact.

Bruno's, Inc. v. United States, 624 F.2d 592, 594 (5th Cir. 1980)(emphasis added) quoting Goodman v. United States, 518 F.2d 505, 511 (5th Cir. 1975); see also Butz v. Glover Livestock Commission Co., 411 U.S. 182, 1985-86 (1973). Here, the fine imposed was clearly warranted in law. Section 929.5 of the 1976 regulation repeats the language of §303 of the Act, which authorizes fines of up to $50,000 for each violation of any

regulation issued pursuant to the Act. In addition, the ALJ imposition of a $50,000 fine was supported by substantial record evidence. In reaching his conclusion that the Petitioners should be fined $50,000.00, the ALJ took into account a number of factors. First, the ALJ pointed to the fact that the damage caused to the coral reef was extensive and "may be evident for upwards of 25 years hence." (Admin. Rec. 12 at 16). The ALJ relied upon testimony of John Halas, a sanctuary biologist for the State of Florida Department of Natural Resources. Mr. Halas testified that "the destruction caused by the double grounding had resulted in the greatest amount of damage ever observed by the witness in any one area." (Admin. Rec. 12 at 8). Second, the ALJ determined that Petitioners were substantially at fault. Petitioner Deaton, operator of the "Chanda," not only should have returned the "Chanda" to Fun in the Sun after determining that he could not repair the engine starter motor himself, he should have attempted to contact Fun in the Sun on August 1, 1983. Deaton's failure to do so and his decision to continue to Key Largo without engine power was not prudent navigation. (Admin. Rec. 12 at 11). Petitioner Sewell, operator of the "Golly Gee," should have proceeded to the nearest port, as did the "Myra." According to the ALJ, Sewell was responsible as operator of the towing vessel. (Id. at 12). The ALJ also found Petitioner Fun in the Sun at fault for failing to maintain communications with vessels it had chartered out. Finally, the ALJ determined that Fun in the Sun chartered out a vessel that had a faulty engine starter and anchor line and hence was unseaworthy. (Id. at 10).

On this record, the ALJ's imposition of a $50,000.00 total fine was not arbitrary and capricious in light of the extent of the damage to the Key Largo Marine Sanctuary, the blameworthiness of Petitioners Deaton, Sewell, and Fun in the Sun, and the statutory and regulatory authority under which the fine was assessed. To the contrary, the fine was warranted in law and justified in fact. Having made such a finding, our review of the alleged excessiveness of the fine is at an end.

> The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere. ... [A]ppellate courts [may not] enter the more spacious domain of public policy which Congress has entrusted in the various regulatory agencies. 454 F.2d 109, 114.

Glover Livestock Commission Co. v. Hardin, 454 F.2d 109, 114 (8th Cir. 1972), rev'd sub nom. on other grounds Butz v. Glover Livestock Commission Co., 411 U.S. 182 (1973). Accordingly, where the fine imposed below was warranted in law and justified in fact, it is not the proper province of this Court to replace the ALJ's exercise of discretion with its own. Moreover, we find that the ALJ exercised sound discretion when he determined that the double grounding constituted a single violation of the Act and reduced the fine from a total of $75,000.00 to $50,000.00 Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. The ALJ's fine of $17,500.00 assessed against Deaton; $12,500.00 assessed against Sewell; and $10,000.00 assessed against Fun in the Sun is AFFIRMED.

2. The ALJ's fine of $5,000.00 assessed against the Gebeleins is REVERSED.

3. Gebeleins' $5,000.00 fine is reapportioned among the remaining Respondents in accordance with their respective percentages of culpability as found by the ALJ: Deaton 35%, Sewell 25%, and Fun in the Sun 20%. Accordingly, Deaton's fine is increased from $17,500 to $19,250.00; Sewell's fine is increased from $12,500.00 to $13,750.00, and Fun in the Sun's fine is increased from $10,000.00 to $11,000.00.

DONE AND ORDERED in Miami, Florida this 31 day of January, 1989.

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

Footnotes

[1]Judge Dolan apportioned the penalty as follows:

Deaton (operator of "Chanda")	$17,500.00	(35%)
Sewell (operator of "Golly Gee")	12,500.00	(25%)
Fun in the Sun (charterer)	10,000.00	(20%)
Gebeleins (owners of "Golly Gee")	5,000.00	(10%)
Trainor (owner of "Chanda")	5,000.00	(10%)
	$50,000.00	

[2]A review of the legislative history of the Act reveals tha there is no direct congressional guidance on this issue. See e.g., S.Rep. No. 280, 98th Cong., 2d Sess. reprinted in 1983 U.S Code Cong. & Admin. News 3909.

[3]Petitioners argue that Fun in the Sun and the Gebeleins cannc be properly found to have committed a violation of th regulations protecting the Key Largo Sanctuary because they ha relinquished responsibility for the operation of the vessels With respect to the Gebeleins, Petitioners raise what i essentially a demise charter defense, citing Pichirilo v. Guzman 369 U.S. 698 (1962)--that is to say, a vessel owner's transfer c complete control of his vessel to a bareboat or demise charterer terminates the owner's liability for conditions that aris thereafter. The argument follows that because there was n finding that the Gebeleins' vessel was defective at the time i was turned over to Fun in the Sun, the Gebeleins cannot properl be found liable here. We note first that there was no findi: that a demise charter existed. Under Pichirilo, supra, a vesse owner seeking to escape liability on the grounds that he ha relinquished complete control of his vessel has the burden c establishing facts which give rise to such relief. Id. at 70(More importantly, however, we find that the line of admiral: cases espousing this demise charter principle is not controlli: here. The instant case is not before the Court under i: admiralty jurisdiction. Rather, the case sub judice arose fr: an alleged violation of a federal environmenal statute, the MPRS: To ascertain how broad Congress intended the scope of liabili under the Act to be, we look not to admiralty law, but to the A itself, its legislative history, and any applicable regulation We add, however, that even if the demise charter defense w applicable here, it would lead us to the same result, reach infra, as our review of the MPRSA, its legislative history, a applicable regulations.

Prepared by Ole Varmer
GCOS

Craft v. National Parks Service, et al. (NOAA)
(Wreck Diver Appeal)

This case involves a NOAA and Park Service undercover enforcement action against several wreck divers and a charter operator for the unlawful removal and destruction of historic sanctuary resources in the Channel Islands National Marine Sanctuary-Channel Islands National Park in violation of sanctuary regulations. A Department of Commerce Administrative Law Judge (ALJ), Hugh Dolan raised the fines requested by NOAA from $32,000 to $132,000 because the ALJ found that the boat operator had told the wreck divers of the sanctuary regulations and then told them that he would sound an alarm if the enforcement authorities came into view.

Judge Steven V. Wilson, U.S. District Court Central District of California, ruled for the United States (NOAA) in the wreck diver case and upheld the ALJ's decision to assess civil penalties of $132,000 for removal of historic resources and alteration of the seabed in the Channel Islands NMS. The Judge held that: 1) the regulation prohibiting alteration of the seabed was not unconstitutionally vague, 2) the regulation prohibiting the removal of historic resources was within NOAA's scope of authority and did not violate section 304(c) of the MPRSA governing rights of access which are in existence prior to sanctuary designation (admiralty rights to dive and salvage), and 3) the penalties were proportionate to the harm caused to historic resources and the seabed.

The court's decision on the regulation prohibiting alteration of the seabed makes it clear that the regulatory exceptions from the prohibition (alteration from bottom trawling from a commercial fishing vessel or vessel anchoring) do not define what "alteration of the seabed" is prohibited. Unless the alteration clearly comes within the exceptions, the regulation has been violated and penalties are appropriate. The wreck divers conducted unauthorized excavations with picks and shovels. However, they argued that the regulation was unreasonable because they could be penalized for merely hand-fanning the seabed. The court ignored their arguments and held that the fines were reasonable.

The decision upholding the regulation prohibiting the removal or destruction of historic sanctuary resources has important implications for the scope of NOAA's authority under the MPRSA to protect resources against maritime laws governing navigation and the recovery of cargo. The Craft decision is further support for the U.S. position articulated in U.S. v. Mel Fisher that under

the MPRSA NOAA has the authority to prevent the unpermitted removal or injury of the public's historic sanctuary resources and the authority to regulate the removal of shipwrecks privately owned pursuant to pre-existing legal rights under maritime law in a manner which protects sanctuary resources (natural and historic).

Maritime law is the set of rules, concepts and processes that relate to navigation and commerce by water. Maritime and admiralty law are used synonymously in American English today, however, admiralty more precisely refers to the jurisdiction in Federal court which is based on English court handling of maritime commercial matters. The law of marine salvage has ancient origins and was developed to save property from destruction and discourage embezzlement by salvors. Under the law of salvage, salvors are entitled to compensation by the owner for the recovery of the property that is in peril of being destroyed as a result of a marine casualty. The cargo or a portion thereof may be awarded to the salvor as compensation. Under the law of finds, the salvor claims rights to a shipwreck and cargo which he must prove has been lost or expressly abandoned. For shipwrecks in sanctuaries which are of historic significance, the shipwrecks will be protected and managed primarily consistent with the goals and objectives of the MPRSA rather than maritime law. The rights of salvors to claim historic wrecks under maritime law will not be applied without NOAA's permission and consistent with the MPRSA.

The Craft court cites a Florida National Park Service case (Klien) in finding that designation of a sanctuary gives NOAA "constructive possession" over historic resources in the sanctuary. Thus, the court found that NOAA has the authority to protect historic shipwrecks in sanctuaries from being removed or injured under the maritime law of salvage or finds without NOAA's permission. Under a maritime law analysis, NOAA can prevent unwanted salvage claims of historic sanctuary resources because NOAA has in constructive possession of the shipwreck. Similarly, the shipwrecks can not be "found" since they are no longer lost or abandoned. Instead they are being protected and managed consistent with the MPRSA.

Entry - No JS-6

		Init.
U.S. Attorney		
Chief Assistant		
Chief-Civil Div.		
Chief-Crim. Div.		
Chief-Tax Div.		
Chief-Ast. Fort.		
Civil Frauds		
Admin. Officer		
Docket Coll. Unit		
Docket-Civil		
Docket-Criminal		
File		

FILED
OCT 26 1992
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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AS REQUIRED BY FRCP, RULE 77(d)

OCT 1992
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ENTERED
CLERK, U.S. DISTRICT COURT
OCT 28 1992
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFTON B. CRAFT, et al.,

Plaintiffs,

v.

THE NATIONAL PARK SERVICE et al.,

Defendants.

CV 92 1769 SVW (Sx)

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Plaintiffs, a group of recreational salvage divers, seek review of civil penalties assessed against them by defendants for violations of Title III of the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. § 1431 et seq. (MPRSA), for their alteration of the seabed and their unlawful removal of historical artifacts from the shipwrecks located within the Channel Islands Marine Sanctuary (CINMS). Plaintiffs argue that the Court should overturn the agency decision because the regulation prohibiting alteration of the CINMS seabed is unconstitutionally vague and overbroad, the prohibition against the removal of historical

resources is ultra vires and conflicts with the MPRSA because it rescinds the plaintiffs' pre-existing rights to dive and salvage, and the penalties assessed by the agency are disproportionate to the harm caused. Defendants respond that plaintiffs' arguments are not supported by the law.

II. DISCUSSION

Plaintiffs Craft, Ferguson and Wilson were convicted of violating 15 CFR § 935.7(a)(2)(iii). The regulation at issue states:

> [2] Alteration of, or construction on, the seabed. Except in connection with the laying of any pipeline . . . . No person shall:
> (i) Construct any structure other than a navigation aid, or
> (ii) Dredge or otherwise alter the seabed in any way, other than
> [A] to anchor vessels, or
> [B] to bottom trawl from a commercial fishing vessel.

Plaintiffs' actions which gave rise to their convictions consisted of hand fanning of the bottom sediments and/or the striking of rocks with a hand-held geologist's hammer. Plaintiffs claim that the regulation is void for vagueness because the language does not give sufficient notice that it applies to their conduct. More specifically, plaintiffs explain that dredging, anchoring a vessel and bottom trawling have a much larger impact on the seabed than hand fanning or hammering by a diver.

The Court finds that the language is sufficiently clear. The regulation says "alter . . . in any way." It makes two exceptions and two exceptions only to this general

prohibition. Plaintiffs cite the rule of statutory construction that when a general term follows specific terms the general words embrace only objects similar to the specific words. However, the regulation at issue lists two specific exceptions to the prohibition on "alter[ing] the seabed in any way." Because the regulation lists two exceptions, it seems clear to the Court that if a party's actions do not fall within those explicit exceptions, then the general prohibition on "alter[ing] the seabed in any way" would apply. The language prohibiting plaintiffs' conduct is clear as applied to any alteration, including the alteration committed by plaintiffs. Therefore, the Court finds that the regulation is not unconstitutionally vague.

Plaintiffs' second argument is that the prohibition on removal of historical artifacts violates § 304(c) of the MPRSA and interferes with their salvage rights provided by admiralty law. Section 304(c) of the MPRSA provides:

> (1) Nothing in this chapter shall be construed as terminating or granting to the Secretary the right to terminate any valid lease, permit, license, or right of subsistence use or of access if the lease, permit, license, or right -- [existed on the date of the designation of any national marine sanctuary]. . . .
>
> (2) The exercise of a lease, permit, license, or right is subject to regulation by the Secretary consistent with the purposes for which the sanctuary is designated.

16 U.S.C. § 1434(c). Plaintiffs claim that because their prior salvage activities on the CINMS shipwrecks created a pre-existing right as defined by § 304(c), the regulation prohibiting artifact recovery violates the statute.

The Court does not have to reach defendants' argument that plaintiffs' prior use does not create a right as defined in §304(c)(1), because it finds that even if defendants have a right under the statute, the Secretary acted within its authority to regulate that right in the instant case. Prohibiting removal of historical resources implements the statute's purpose to protect and preserve sanctuary resources as well as research, eduction, recreation and aesthetic value of the area. 15 C.F.R. § 935.2; 935.7; 935.9. The Secretary has implemented a permit system to ensure that anyone holding a pre-existing right apply for a permit to ensure that recovery of the shipwreck is done in an environmentally and archaeologically sound manner. 15 C.F.R. § 935.9.

If the Court were to accept plaintiffs' position that they should be able to continue taking historical resources from the CINMS because they did so in the past, the MPRSA would become meaningless. The Secretary would be prohibited from preventing any activity no matter how destructive, as long as the person engaging in the conduct had done so before the designation of the sanctuary. Such a prohibition violates the policies underlying the MPRSA. Therefore, the Court finds that the regulation prohibiting recovery of historical resources does not violate the MPRSA.

The Court also rejects plaintiffs' argument that admiralty law gives them the right to remove the artifacts from the shipwrecks. Plaintiffs argue that they have a "fundamental

10-29-92 04:08PM P05

right" as salvors arising out of federal admiralty law. Plaintiffs' Brief at 17. The maritime law of salvage requires the salvor to demonstrate three elements to support a successful salvage claim: maritime peril from which the ship or other property could not have been rescued without the salvor's assistance; the salvor's act must be voluntary; the salvor's act must be successful in saving at least a part of the property at risk. U.S. Dominator v. Factory Ship Robert E. Rosoff, 768 F.2d 1099, 1104 (9th Cir. 1985). When the property in question has been "lost or abandoned for a very long period," the maritime law of finds supplements the law of salvage. Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (9th Cir. 1981). The common law of finds assigns ownership of the property to the person who reduces the property in his possession without regard to where the property is found. Exceptions to the law exist where the abandoned property is embedded in the soil, or when the owner of the land where the property is found has "constructive possession" of the property such that the property is not lost. Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985).

In Klein, the Eleventh Circuit found that when the federal government creates a national park in navigable waters, possession of resources beneath those waters vests in the United States. Klein, 758 F.2d at 1514. Although that case involved a designation as a national park, the analysis is the same. In

10-29-92 04:03PM P06

passing the MPRSA Congress asserted its possession of the CINMS. As the Ninth Circuit has explained, under admiralty law principles, someone in possession may refuse services of would-be salvors like the plaintiffs. Tidewater Salvage, Inc. v. Weyerhauser Co., 633 F.2d 1304, 1306-7 (9th Cir. 1980). Through the comprehensive preservation and conservation scheme set out in the MPRSA and its regulations, the owner of the CINMS has refused these services. Any contrary result would "encourage persons to enter [the CINMS] and to continue the unauthorized removal of articles form the various shipwrecks there located which were sought to be protected by the creation of that [sanctuary]." Klein, 758 F.2d at 1515. Therefore, the Court finds that the regulations prohibiting recovery of historical artifacts do not violate the MPRSA nor plaintiffs' admiralty rights.

The plaintiffs' final argument is that the penalties imposed by the Administrative Law Judge ("ALJ") were disproportionate to the violations. Although the plaintiffs' contention relates to the fines imposed on each of the plaintiffs, the focus is on the $100,000 penalty imposed on Plaintiff Jack Ferguson.

This Court's review of administrative sanctions is limited to determining whether the imposition of such sanctions constitutes an abuse of discretion. Butz v. Glover Livestock Commission Co., Inc., 411 U.S. 185, 93 S. Ct. 1455 (1973). The ALJ's determination cannot be overturned unless it is unwarranted in law or without justification in fact. Id at 185-6 (cite

omitted). The Court finds that each penalty set by the ALJ was warranted in law and justified in fact. 16 U.S.C. § 1437(c)(1) provides that any person who violates the regulations promulgated to implement the MPRSA "shall be liable to the United States for a civil penalty of not more than $50,000 for each violation, to be assessed by the Secretary." The ALJ found that each of the plaintiffs violated those regulations and fined each of them in an amount within the penalties allowed by § 1437(c)(1). Hence, each fine is warranted by law and fact.

As for the penalties imposed on plaintiff Jack Ferguson, the Court also finds sufficient evidence to support the ALJ's decision. The ALJ found that Ferguson's announcements to the rest of the divers that they were not to take anything from the wrecks were made in "mocking derision" of the law. See ALJ's Initial Decision, Exhibit 1 to Defendant's Brief at 48. In addition, Ferguson told the divers that he would sound an alarm if any park rangers were spotted, signalling to the divers that they should stop their activities in order to avoid getting caught breaking the law. Id. The ALJ found that Ferguson flagrantly disregarded the CINMS regulations and that through his announcements he encouraged other divers to break the law. Id. at 56. Although plaintiffs argue that the ALJ was wrong in finding that Ferguson was responsible for the group's actions, this Court finds that the ALJ based his decision on Ferguson's actions rather than on his status as divemaster. Given these findings, the Court cannot find that the ALJ abused his

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discretion in imposing the maximum penalty. Therefore, the Court finds that the penalties imposed on all plaintiffs were warranted.

III. CONCLUSION

For all of the foregoing reasons, the Court hereby DENIES Plaintiffs' Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: 10/22/92

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

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CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Clifton B. Craft, et al.,

Plaintiffs,

v.

The National Park Service, National Oceanic & Atmospheric Administration, National Marine Fisheries Service, and the United States of America,

Defendants.

C.A. No. CV 92-1769-SVW(Sx)

~~[PROPOSED]~~ JUDGMENT

RECD NOV 27 1992

* U.S. GPO: 1988-203-641/64033

Pursuant to the court's order of October 28, 1991 denying plaintiffs' motion for summary judgment and the parties' Stipulation for Entry of Judgment in Favor of Defendants Pursuant to Fed. R. Civ. Proc. 58,

IT IS HEREBY ORDERED that:

(1) Plaintiffs' action is dismissed with prejudice in its entirety; and judgment be entered for Defendants.

(2) Each party shall bear their own costs of suit.

DATED: This 18th day of Nov., 1992.

STEPHEN V. WILSON

HON. STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

Presented by:

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FORM OBD-183
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☆ U.S. GPO: 1988-202-041/64833

31.
Selected GCOS Legal Opinions/Memoranda

1. Sale/Disposal of Historic Sanctuary Resources and the Federal Archaeological Program

2. Acceptance of Donations for National Marine Sanctuaries

3. Inward Extent of Jurisdiction under Title III of Marine Protection, Research, and Sanctuaries Act

4. Regulation of Fishing in National Marine Sanctuaries

ATTORNEY-CLIENT PRIVILEGE -- DO NOT RELEASE

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

OCT 14 1992

MEMORANDUM FOR: Stan Wilson
Assistant Administrator
National Ocean Services

THROUGH: Margo Jackson M.J.
Assistant General Counsel
for Ocean Services

FROM: Ole Varmer
Attorney Advisor/GCOS

SUBJECT: Sale/Disposal of Historic Sanctuary Resources and the Federal Archaeological Program

BACKGROUND

With the designation of the Florida Keys National Marine Sanctuary (FKNMS), a number of issues have been raised about the National Oceanic Atmospheric Administrations's (NOAA) historic resource management program and to what extent the program is restricted by historic preservation laws in developing the management plan for the FKNMS. The program's marine archaeologist indicated that historic preservation laws precluded the program from allowing the sale or disposal of historic resources which would result in the preclusion of treasure hunting. Treasure hunters have voiced concerns that they will be precluded from carrying out their livelihood in the sanctuary and have organized opposition to the sanctuary.

Bill Harrigan, the former Acting Chief of the Sanctuaries and Reserves Division (SRD), requested legal advice regarding the Federal archaeological program (FAP) so that the Sanctuary program would understand the legal and policy constraints in developing the management plan and addressing concerns of traditional users of the sanctuary. In response, this memorandum briefly answers three primary issues. Attached is another more lengthy discussion of the FAP for use in understanding these responses as well as other issues regarding the national historic preservation policies for use by the program in developing management plans.

Under National Marine Sanctuary program regulations, 15 CFR Part 922, NOAA states that it will manage its historic resources

consistent with the national policy for the protection and preservation of these resources as stated in the FAP. As indicated in the legal discussion memorandum attached, all sanctuaries with historic resources have been managed in accordance with the FAP. It is our advice that this be continued in the Florida Keys National Marine Sanctuary.

The FAP is the program developed by the Department of the Interior (DOI) to implement the various Federal preservation statutes. The FAP includes the Antiquities Act of 1906 (AA), 16 U.S.C. §§ 431 et seq., the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa et seq., the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 et seq., and most recently the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. §§ 2101 et seq.

ISSUE

Is NOAA legally obligated to manage its historic sanctuary resources consistent with the FAP?

SHORT ANSWER

Yes, because of NOAA regulations. Of the FAP statutes, only the National Historic Preservation Act is legally binding upon NOAA under its own terms, and it does not preclude the sale or disposal of historic resources. However, NOAA regulations state that NOAA will protect and preserve historic sanctuary resources consistent with regulations, policies, guidelines and procedures in the FAP. Thus, all the FAP statutes and the FAP national policies they embody apply in national marine sanctuaries. The FAP was developed by DOI for the management of archaeological resources on lands under its jurisdiction, as well as for other Federal land managers. NOAA regulations recognize that the requirements of the FAP for historic resource management on land may be impracticable in the marine environment and prudently provide that NOAA management will be consistent with the FAP to the extent practicable. NOAA management of historic sanctuary resources which is not consistent with the FAP must be determined by NOAA to be necessary to accomplish MPRSA objectives and must explain why consistency with the FAP is not practicable in the marine environment.

ISSUE

Whether the laws underlying the FAP which includes NHPA, ARPA, AA and the ASA prevents or otherwise limits the Sanctuary program from selling historic resources recovered from national marine sanctuaries.[1]

SHORT ANSWER

Yes. ARPA prevents the sale of historic sanctuary resources which come within the definition of "archaeological resources" and this has been incorporated into the ASA guidelines. Archaeological resource is defined broadly under ARPA, but does exclude shipwrecks and cargo less than 100 years old. In addition, coins are deemed to be archaeological resources only when they have a direct physical relationship with other archaeological resources. The sale of shipwrecks and cargo less than 100 years old is not precluded by ARPA but NOAA, as trustee for all Sanctuary resources must make certain that any such sale of a Sanctuary resource is in the public's interest, e.g., accomplishing an objective under the Marine Protection, Research, and Sanctuaries Act (MPRSA) (16 U.S.C. §§ 1431 et seq.). The NHPA does not prevent the sale of "historic" sanctuary resources. Objects less than 50 years old are not generally considered to be a "historic resource" under the NHPA, but may be still considered to be an important sanctuary resource for recreation or other MPRSA purposes. The determinations of whether objects are archaeological resources or historic resources are made on a case-by-case basis by a marine archaeologist based upon the objects, the site, and their significance to history and culture. Circumstances where coins and treasure are not archaeological resources will be limited and will not likely include the 16th and 17th century Discovery Era galleons of primary interest to treasure hunters.

ISSUE

Whether the FAP allows treasure hunting in national marine sanctuaries?

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[1] This memorandum addresses the application of the FAP to historic sanctuary resources in Federal submerged lands portions of national marine sanctuaries which are in the possession and control of NOAA pursuant to sanctuary designation. Constructive possession allows NOAA to protect these resources against unwanted claims of salvage or the law of finds under admiralty law. This memorandum does not address the application of the FAP to historic sanctuary resources which are not owned by the U.S. Government which includes claims of persons with adjudicated title to shipwrecks from Admiralty Courts prior to designation of the sanctuary, and abandoned shipwrecks in which the States have title under the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101 et seq. or otherwise. This memorandum also does not address whether NOAA has the requisite express authority to sell or dispose of historic resources which are U.S. property. The authority issue will be addressed in a separate memorandum.

SHORT ANSWER

No. DOI's ASA Guidelines, although not binding, suggest that State and Federal agencies consider the interests of users such as commercial salvers, however, DOI also suggests that States set aside protected areas where treasure hunting, commercial salvage, souvenir collecting, and other activities damaging to historic shipwrecks is prohibited. DOI specifically prohibits treasure hunting in the national park system, and the national wildlife refuge system and has suggested that DOC/NOAA similarly prohibit treasure hunting in national marine sanctuaries.

The attached memorandum provides an in-depth discussion of NOAA's historic sanctuary resource management program and the FAP.

Attachment

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DO NOT RELEASE

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

OCT 16 1992

MEMORANDUM FOR: Francesca Cava
Chief of SRD

FROM: Angelica Fleites, GCOS
Ole Varmer, GCOS

SUBJECT: The Federal Archaeological Program and NOAA Historic Sanctuary Resource Management

As Acting Chief of SRD, Bill Harrigan had asked for a legal memo on the Federal archaeological program (FAP) legal and policy requirements for use in developing the historic resource management program in the Florida Keys National Marine Sanctuary (FKNMS). His questions are briefly addressed in the attached memorandum to Stan Wilson. This memorandum provides the legal discussion of NOAA's historic resource management program and the FAP which supports the memo to Stan Wilson and provides SRD information for use in developing the Florida Keys NMS management plan and regulations.

DISCUSSION

I. NOAA's Historic Sanctuary Resource Management Program

Under the Marine, Protection, Research, and Sanctuaries Act of 1972, (MPRSA), 16 U.S.C. §§ 1431 et seq., Congress gave the Secretary of Commerce the authority to designate and manage "certain areas of the marine environment possess[ing] conservation, recreational, ecological, historical, research, education, or esthetic qualities which give them special national significance." 16 U.S.C. § 1431(a)(2)[emphasis added]. Sanctuary resources are defined as "any living or non-living resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

Under NOAA regulations, "historical" means possessing historical, cultural, archaeological, or paleontological significance, including sites, structures, districts, and objects significantly associated with or representative of earlier people, cultures,

and human activities and events." 15 C.F.R. § 922.2(c). The MPRSA's implementing regulations state that:

> Program regulations, policies, standards, guidelines, and procedures under the Act [MPRSA] concerning the identification, evaluation, registration, and treatment of historical resources **shall be consistent, to the extent practicable, with the declared national policy for the protection and preservation of these resources** as stated in the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 et seq., the Archeological and Historical Preservation Act of 1974, 16 U.S.C. 469 et seq., and the Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. 470aa et seq.

15 C.F.R. § 922.1(c)(4) (emphasis added).

Historic resource management in the sanctuary program was established with the designation of the USS MONITOR as the first National Marine Sanctuary in 1975. This wreck may be the most nationally significant historic shipwreck presently known and it is the only sanctuary designated to solely protect a historic resource. The restrictions at the MONITOR NMS are the most stringent for any sanctuary, including prohibiting diving, fishing or even stopping. Any physical access to the site creates a risk of harm to the wreck and the archaeological information contained at the site. Access is only permitted if the potential benefits from the proposed scientific research of the MONITOR justifies the proposed and potential harm to the site arising from the research activities. While this management policy is broadly supported by the historic and archaeological community, it has been criticized by some members of the recreational diving community and others. As a result, permitting non-intrusive recreational access to the MONITOR is a management option being considered in revising the MONITOR NMS management plan.

The MONITOR is the only sanctuary where diving is prohibited. All other sanctuaries allow non-harmful diving. Sanctuary permits are only required if the diving expedition will involve other prohibited activities. In order to protect and preserve historic sanctuary resources, sanctuary regulations uniformly prohibit the removal or injury of historic resources, but allow NOAA to consider on a case-by-case basis whether a permit may be issued for further research or education activities and thus justify the injury or removal. See e.g., 15 C.F.R. Parts 929 (Key Largo), 935 (Channel Islands), 936 (Farallon Is,), 937 (Looe Key), 938 (Gray's Reef).

The current regulations and policies underlying the Sanctuary Program's management of historic resources is consistent with the FAP. Any changes in the management of historic resources must be done in compliance with the procedures and requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., the Administrative Procedure Act (APA) 5 U.S.C. §§ 551 et seq., and the National Historic Preservation Act (NHPA) 16 U.S.C. §§ 470 et seq. The APA requires that the changes in the regulations be accomplished through a rulemaking process involving notice and comment periods before final agency action is implemented. NEPA, at a minimum, requires an environmental assessment of the impacts of the changes and may require an environmental impact statement since the change may have significant adverse impacts on historic resources.

II. The Federal Archaeological Program (FAP)

The FAP is the Department of the Interior's (DOI) implementation of Federal preservation statutes for DOI and other Federal agencies. The FAP includes the Antiquities Act of 1906 (AA), 16 U.S.C. §§ 431 et seq., the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa et seq., the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 et seq., and the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. §§ 2101 et seq., as well as implementing regulations, guidelines, policies and procedures. Other federal preservation statues, the Archaeological and Historical Preservation Act of 1974, 16 U.S.C. §§ 469 et seq., and the Historic Sites Act of 1935, 16 U.S.C. §§ 461 et seq., do not address the issues presented and therefore are not considered in this memorandum.[1]

A. Abandoned Shipwreck Act of 1987 (ASA)

Under the ASA, Congress asserted title to three categories of shipwrecks within States' submerged lands and transferred title to the States, except for those on public lands and Indian lands. 43 U.S.C. §§ 2101, 2105. As directed by the ASA, the National Park Service developed guidelines to assist the States and Federal agencies in developing legislation and regulations for effective management of shipwrecks in waters under their ownership or control. 43 U.S.C. § 2104. "The Abandoned Shipwreck Act Guidelines and the philosophy upon which they are

[1] The Archaeological and Historical Preservation Act of 1974 refers to the preservation of historical and archaeological data which might be lost or destroyed from any federally licensed activity or program such as the construction of a dam. The Historic Sites Act of 1935 authorizes the Secretary of the Interior to secure, survey, investigate, search, acquire, restore, erect, maintain, operate, and preserve archaeological and historical sites throughout the country.

based are the result of three decades of shipwreck management experience within units of the national park system." 55 Fed. Reg. 50116, 50120 (1990). While the guidelines state they are advisory and therefore non-binding upon the States and Federal agencies, NOAA regulations incorporate FAP guidelines. Thus, NOAA is required to comply with the ASA guidelines and should not diverge without ample justification under the MPRSA. Since the ASA Guidelines were drafted specifically for the marine environment, I assume that their practical application in national marine sanctuaries is not in question.

State Guidelines

The ASA Guidelines suggest that the States assign the authority over State owned shipwrecks to an appropriate adequately staffed agency which involves interest groups and advisory boards in its long-term management. Cooperation with other States and Federal agencies is encouraged, with the specific suggestion that States integrate shipwreck management into State Coastal Zone Management Act (CZMA) plans. This would also allow the use of consistency to protect wrecks and CZMA grant money to fund research and management. Other methods of protecting shipwrecks are also suggested. While provision is made for the recovery of shipwrecks for the public by the private sector, the guidelines specifically state that recovery using explosives, dredging or "propeller wash deflectors" is unscientific and would destroy the environment surrounding the site as well as the historic information it contains. 55 Fed. Reg. 50132 (1990). Of particular import is the suggestion that States create and manage underwater parks or preserves to provide additional protection to historic shipwrecks. While these protected areas are to accommodate multiple use values, the guidelines specifically state that "souvenir collecting, commercial salvage, and treasure hunting at shipwrecks (whether historic or non-historic) should be prohibited in underwater parks and preserves." 55 Fed. Reg. 50138 (1990).

Federal Guidelines

The ASA Guidelines for Federal shipwreck management programs are not as stringent as the AA, ARPA and other historic preservation acts. Because of these differences, the Committee on Merchant Marine and Fisheries said that "Federal agencies . . . should manage their historic shipwrecks consistent with the (Abandoned Shipwreck Act) guidelines to the extent consistent with other applicable federal law." U.S. House Report No. 100-514, Pt. 2, p.7. See also 55 Fed. Reg. 50125. The guidelines set forth the

important components of sections 106 and 110 of the NHPA, the permit requirements of ARPA for recovery of historic shipwrecks, the applicability of section 307 of the CZMA, the use of the Abandoned Property Act, the applicability of certain National Park Service guidelines, and the special protection that shipwrecks are to be given in National Parks and National Marine Sanctuaries and other federally managed areas. NOAA and the States are directed to prohibit souvenir collecting, commercial salvage, treasure hunting, and other activities which damage historic shipwrecks in national marine sanctuaries.

Abandoned Property Act

The ASA Guidelines indicate that Federal land managers may, under certain conditions, contract for the search, recovery and sale of shipwrecks in accordance with the Abandoned Property Act administered by the General Services Administration (GSA). See 40 U.S.C. § 310; 55 Fed. Reg. 50126 (1990). At the request of agencies with jurisdiction over the land holding the wreck and treasure, GSA is authorized to enter into contracts for the removal, preservation, or sale of wrecked, abandoned, or derelict property within the jurisdiction of the United States. Such contracts may provide for reasonable compensation to any person discovering, recovering, or preserving the wreck. 40 U.S.C. § 310. The Abandoned Property Act appears to allow the proceeds from the sale of the shipwreck to be used for reasonable compensation of those assisting in the search, preservation and recovery of the wreck. However, consistent with ARPA, the property being sold could not be an "archaeological resource."

Communications with DOI and GSA indicate that pursuant to instructions from agencies with jurisdiction and control over the land, GSA has entered into contracts with private parties for the recovery of treasure trove and that authority exists to divide the treasure in a contract on a 50/50 basis for their discovery, preservation and recovery. Thus, to the extent there are historic sanctuary resources which are not archaeological resources, NOAA may, under certain conditions, be able to contract for the sale of the shipwreck and its cargo pursuant to GSA's authority without conflicting with the FAP.

B. Archaeological Resources Protection Act (ARPA)

Although the Antiquities Act has not been repealed, it has been superseded by the Archaeological Resources Protection Act (ARPA) which was enacted to strengthen historic resource protection and

management as well as address deficiencies of the AA.[2] The House of Representatives Report (House Report), H.R. Rep. No. 311, 96th Cong., 1 Sess. 1 (1979) for ARPA notes that the Antiquities Act is not enforceable in the Ninth Circuit because of the 1974 Diaz decision that the AA is unconstitutionally vague. See discussion on Diaz, infra, p. 15. In addition, the report states that the increase in the commercial value of archaeological resources, the dramatic rise of illegal excavations on public lands and Indian lands for private gain, and the ineffectiveness of $500 penalties under the AA prompted Members of the House and Senate to introduce legislation to protect archaeological resources. House Report at 7.

Scope of ARPA

ARPA was enacted to improve the protection of archaeological resources on "public lands" and Indian lands. By definition, the scope of ARPA does not include national marine sanctuaries. ARPA defines "public lands" to mean:

> (A) lands which are owned and administered by the United States as part of--
>
> (i) the national park system,
>
> (ii) the national wildlife refuge system, or
>
> (iii) the national forest system; and
>
> (B) all other lands the fee title to which is held by the United States, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.

16 U.S.C. § 470bb(3) (emphasis added).

However, NOAA's sanctuary program's regulations require compliance with ARPA to the extent practicable. 15 C.F.R. § 922.1(c)(4).

NOAA does not have title to States' submerged lands which might be within a particular sanctuary. Title to submerged lands from zero to three miles was transferred to the States by the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 et seq., at the same time Federal jurisdiction and control over natural resources on the Outer Continental Shelf was clarified under the OCSLA.

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[2] See ARPA, 16 U.S.C. § 470cc(h)(1) and (2) which recognizes the validity of existing Antiquities Act permits but prohibits issuance of Antiquity Act permits for any activity authorized under ARPA. Lars Hanslin, Senior Attorney for the National Park Service, confirmed that the Antiquities Act is basically "dead" law and that any new permits for the collection of antiquities on "public lands" would be issued under ARPA.

Subsequent clarification concerning historic resources was made by Congress in the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 et seq., whereby title to abandoned shipwrecks found in State submerged lands and waters was claimed by Congress and transferred to the State. Thus, the scope of ARPA does not include historic sanctuary resources in the State portions of national marine sanctuaries. In the State portions of a national marine sanctuary the ASA and the MPRSA establish the historic resource management requirements.

While the MPRSA provides NOAA with jurisdiction and control over sanctuary areas, the MPRSA does not expressly provide NOAA with a fee title to the Federal submerged lands in sanctuaries. Under the MPRSA, the Secretary of Commerce is authorized to designate and manage national marine sanctuaries. See 16 U.S.C. §§ 1431, 1433 and 1434. The Secretary acts as trustee for sanctuary resources. See 16 U.S.C. § 1443(c). There is some implication of ownership of sanctuary resources in providing NOAA with the authority to dispose of sanctuary resources seized in forfeiture actions. See 16 U.S.C. (d)(3). However, this would involve sanctuary resources that are in physical possession of Program officials and appears insufficient for a finding of a fee title in submerged land within a sanctuary.

Under OSCLA, the Outer Continental Shelf is defined as "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;" 43 U.S.C. § 1331(a). Section 1301 defines "lands beneath navigable waters" to include: 1) the State's submerged lands under non-tidal navigable waters, and 2) all submerged lands seaward of a line three geographical miles distant from the coast line of each such State. 43 U.S.C. § 1301 (a). Thus, the Outer Continental Shelf lies seaward of the State's submerged lands and waters. Since ARPA does not apply to the Outer Continental Shelf and does not apply on State submerged lands, its scope does not include national marine sanctuaries unless the title to the submerged land was retained by the Federal Government under the SLA or title was transferred by the State.

Archaeological Resources May Be Loaned But Not Sold

ARPA precludes the sale of archaeological resources but does allow NOAA to loan such resources to museums or other institutions with public access to resources. ARPA does not

preclude such institutions from making a reasonable profit from displaying sanctuary resources.

Section 470cc of ARPA states in part that:

> (3) the archaeological resources which are excavated or removed from public lands will **remain the property of the United States**, and such resources and copies of associated archaeological records and data **will be preserved by a suitable university, museum, or other specific or educational institution, ..**

16 U.S.C. § 470cc(b)(3) (emphasis added).

The above section authorizes the removal under certain conditions, but prevents the sale of archeological resources because the United States would no longer own the recovered property. This analysis is further supported by provisions which prohibit and penalize the unauthorized removal or sale of archaeological resources. 16 U.S.C. § 470ee.

While APRA prevents the sale of archaeological resources, it does not prevent the sale of objects of commercial value which are outside of the ARPA definition of archaeological resource. See supra, ASA Guidelines/Abandoned Property Act. Archaeological resource is defined to mean "any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest." 43 C.F.R. § 7.3(a). There are lengthy definitions for "material remains" and "of archaeological interest" that follow. Coins which have no direct physical relationship with archaeological resources are expressly excluded, however, this is a site specific finding for a marine archaeologist to make. 43 C.F.R. § 7.3(a)(4)(ii).

As mentioned above, NOAA could loan recovered archaeological resources without violating ARPA's requirement that the resources remain U.S. property. In fact, the recovery and loan of historic resources comports with and fulfills MPRSA and ARPA objectives, provided it is done in an environmentally and archaeologically sound manner. An important ARPA improvement upon the public display policy of the AA is the inclusion of private entities to fulfill its public access policy. The House Report states that:

> The subsequent storage or display of these artifacts should not, however, be narrowly construed and may include private as well as public museums or institutions which have adequate resources to protect

> the artifacts and to provide a public, educational, or interpretive service. House Report at 9 (emphasis added).

Since the House Report states that private museums or institutions may store or display the artifacts, one may assume that the private museums would, as a part of their normal operating procedure, charge admission to view the artifacts. Thus, it appears that private profit from display is not precluded by ARPA and is implicitly acknowledged. It seems that Congress' main objective was to assure that the public would benefit from the permitted activity and would have access to the archaeological resources. Consistent with the FAP, NOAA could permit recovery, preservation and the loan of historic sanctuary resources to public or private museums for research, education and viewing enjoyment of the public, provided that fees do not unreasonably limit public access.

ARPA Requirements For Recovery of Archaeological Resources

In order to remove archaeological resources, ARPA requires that the permit applicant be "qualified to perform the activity." 16 U.S.C. § 470cc(b)(1). The regulations, 43 C.F.R. § 7.8(a)(1), provide that:

> (1) The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:
> (i) A graduate degree in anthropology or archaeology, or equivalent training and experience;
> (ii) The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;
> (iii) The demonstrated ability to carry research to completion, as evidenced by timely completion of theses, research reports, or similar documents;
> (iv) Completion of at least 16 months of professional experience and/or specialized training in archaeological field, laboratory, or library research, administration, or management, including at least 4 months experience and/or specialized training in the kind of activity the individual proposes to conduct under authority of a permit; and
> (v) Applicants proposing to engage in historical archaeology

should have had at least one year of experience in research concerning archaeological resources of the historic period. Applicants proposing to engage in prehistoric archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

The preservation of artifacts and associated information is in the public's interest and since there may be just one opportunity to collect all of the information properly the qualifications of personnel and the methodology to be used are critical. As indicated in Klein v. Unidentified Wrecked and Abandoned Sailing Vessel (Klein), 564 F.Supp. 1562 (11th Cir. 1983) "[i]t is in the public interest that if artifacts are to be removed from the wreck the removal be conducted with scrupulous care."[3] Id. at 1564. "The historic value of each artifact is enhanced by careful monitoring of archeological provenance..." Id.

In conclusion, ARPA does not preclude private profit from the display of artifacts collected pursuant to the Act. Thus, the sanctuary program clearly may loan private museums historic resources and those museums may make a reasonable profit from display provided it does not undermine the public's access to public resources. The sale of archaeological resources is inconsistent with ARPA's requirement that resources recovered under an ARPA permit remain the property of the U.S. Government. Thus, under NOAA's current regulations, NOAA would have to determine its sale of any sanctuary archeological resource to be necessary to accomplish MPRSA objectives and explain why consistency with the ARPA requirement that archaeological resources remain U.S. property is impracticable when applied to the sale of a particular archeological sanctuary resource. Regardless of NOAA regulations, NOAA management of historic resources should be consistent with the national policy of historic preservation as set forth in the historic preservation laws and the FAP.

C. The National Historic Preservation Act of 1966 (NHPA)

The NHPA was enacted in order to preserve, restore, and maintain for "the inspiration and benefit of the people"[4] the federally owned sites, structures, and objects of historical, architectural

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[3] Klein involved artifacts from a shipwreck in an underwater national park in which the U.S. had fee title to the submerged lands.

[4] See Executive Order No. 11593, May 13, 1971, 3 C.F.R. 559.

or archaeological significance. Unlike the rest of the FAP, the NHPA applies to historic sanctuary resources by its own terms, regardless of NOAA's regulations.

Section 106 of the NHPA, codified as 16 U.S.C. § 470f, requires that Federal agencies take into account the effect of any proposed Federal, federally assisted, or federally licensed "undertaking" on any historic resource that is included in or eligible for inclusion in the National Register of Historic Places.[5] In addition, agencies must afford the Advisory Council on Historic Preservation and the State Historic Preservation Office reasonable opportunity to comment on the proposed undertaking. 36 C.F.R. 800.1(a).

The section 106 process is not limited to shipwrecks. Artifacts found in abandoned shipwrecks are also subject to the section 106 process, as would the artifacts from Indian cultures or pre-historic cultures. The section 106 process regulations define "Historic property" to mean:

> ...any prehistoric or historic district, site building, structure, or object included in, or eligible for inclusion in, the National Register. This term includes, for the purposes of these regulations, artifacts, records, and **remains that are related to and located within such properties.** The term 'eligible for inclusion in the National Register' includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria."

36 C.F.R. § 800.2 (e) (emphasis added).

Under Subpart B of the regulations, section 800.3 (c) requires that "...the Agency Official complete the Section 106 process ... prior to the issuance of any license or permit." NOAA, however, may enter into a Programmatic Agreement with the Advisory Council in lieu of the section 106 process. A Programmatic Agreement

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[5] The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f [emphasis added].

fulfills the section 106 requirements for a class of undertakings that would require numerous individual requests for comments under section 106. 36 C.F.R. § 800.13(a). Thus, NOAA should enter into a programmatic agreement for permits in its sanctuaries, particularly the MONITOR and the FKNMS.

Sections 106 of the NHPA requires that this process be undertaken prior to the issuance of any agreements, contracts or permits to persons for the collection of archaeological resources in national marine sanctuaries. This process would also apply even to Federal authorizations to salvors with title to historic shipwrecks. Thus, section 106 should be complied with before any permits are issued.

Section 110

Section 110(a)(2) of the NHPA requires Federal agencies to survey, inventory, determine eligibility and nominate historic resources which are eligible for nomination to the Register.[6] When a Federal undertaking will destroy or substantially alter a historic resource, at a minimum the controlling agency should ensure that appropriate records are made.

Section 110(a)(2) also requires that each agency exercise caution to assure that property that may be eligible for inclusion is not "inadvertently" transferred or sold which has been interpreted to mean to follow the section 106 process before the property is transferred or sold[7]. The purposes of the section 106 process is to identify potential conflicts between historic preservation concerns and the needs of Federal undertakings in the public interest. 36 C.F.R. § 800.1(b).

The NHPA also has a strong public policy to preserve, restore, and maintain for the benefit of the public any federally owned objects of historical or archaeological significance. The NHPA does not preclude an agency from transferring or selling historic artifacts which are listed or may be eligible for listing in the

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[6] With the advice of the Secretary and in cooperation with the State historic preservation officer for the State involved, each Federal agency shall establish a program to locate, inventory, and nominate to the Secretary all properties under the agency's ownership or control by the agency, that appear to qualify for inclusion on the National Register in accordance with the regulations promulgated under section 470a(a)(2)(A) of this title. Each Federal agency shall exercise caution to assure that any such property that might qualify for inclusion is not inadvertently transferred, sold, demolished, substantially altered, or allowed to deteriorate significantly.

16 U.S.C. § 470h-2(a)(2)

[7] Telephone conversation on May 5, 1992 with Lars Hanslin, Senior Attorney for the National Park Service.

National Register as long as the agency follows the section 106 process or in the alternative, enters into a Programmatic Agreement with the Advisory Council on Historic Preservation. As a historic resource manager, NOAA's trustee responsibilities for protection and conservation of historic resources under the MPRSA may be greater than those for other Federal agencies with non-conservation missions.

D. Antiquities Act of 1906 (AA)

Section 433 of the Antiquities Act (Permit & Penalty)

As mentioned above, the Antiquities Act has been largely superseded by the ARPA. However, the Departments of Interior and Justice note that it is still a tool which is legally available for enforcement and there are still valid AA permits in existence. In addition, the AA provides the foundation for current national historic preservation policy. I therefore include this discussion for a full view of all the archaeological laws and to answer some informal questions raised by the program.

Section 433 of the Antiquities Act states that:

> Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on **lands owned or controlled by the Government of the United States**, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court."

16 U.S.C. § 433 (emphasis added).

The Antiquities Act does not define "lands" nor state whether "lands" includes submerged lands owned or controlled by the Government of the United States. The legislative history of the Antiquities Act is silent on this issue.[8] However, the submerged lands surrounding the Channel Islands National Monument

[8] See H.R. 11016, 59th Cong., 1st Sess., 40 Cong. Rec. 883 (1906) and H.R. 2224, 59th Cong., 1st Sess., 40 Cong. Rec. 3709 (1906).

was included under section 431[9] of the Antiquities Act.[10] A U.S. Supreme Court case, United States v. California (U.S. v. California) 98 S.Ct. 1662 (1978), confirms that submerged lands in territorial waters owned or controlled by the Federal government are included within the scope of section 431 of the Antiquities Act.

It is our opinion that national marine sanctuaries would be considered "owned or controlled" by the federal government for purposes of the Antiquities Act and otherwise.[11] One of the purposes and policies of the MPRSA is: "(2) to provide authority for comprehensive and coordinated conservation and management of these marine areas that will complement existing regulatory authorities;" 16 U.S.C. § 1431(b)(2). Since this section of the MPRSA gives NOAA the authority to conserve and manage sanctuaries this may be interpreted to give NOAA "control" over the sanctuary.

The sanctuary program should anticipate that Mel Fisher and Treasure Salvers, Inc. would dispute the application of the Antiquities Act citing Treasure Salvers v. The Unidentified Wrecked and Abandoned Sailing Vessel (Treasure Salvers), 569 F.2d 330 (5th Cir. 1978). However, the case is readily distinguished and its dicta supports NOAA's position that the MPRSA gives the U.S. Government ownership and control over historic shipwrecks in sanctuaries outside State submerged lands and waters. In Treasure Salvers, the United States Court of Appeals for the Fifth Circuit held that the Outer Continental Shelf Lands Act (OCSLA) did not give the U.S. Government ownership or control over shipwrecks lying on the Outer Continental Shelf, and thus the Antiquities Act did not apply to the wreck claimed by Mel Fisher and his company. The court found that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 et seq.,

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[9] 16 U.S.C. § 431 states that:

> The President... is authorized...to declare by public proclamation historic landmarks, historic and prehistoric structures, and other object of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, ...

[10] See President Truman's Proclamation No. 2825, 63 Stat. 1258 (1949).

[11] Under Admiralty law constructive possession of abandoned shipwrecks provides one in possession with the authority to refuse claims of salvage. It is NOAA's position that it has constructive possession of historic resources within sanctuaries. Thus, NOAA has the authority under the MPRSA to protect historic shipwrecks from unwanted claims by salvors. See Schoenbaum, ADMIRALTY LAW AND MARITIME LAW § 15-7, p. 517 n.44 (West 1987).

was passed along with the Submerged Lands Act (SLA)[12] in order to clarify ownership and control of the United States over natural resources of the subsoil and seabed of the continental shelf. The court cited to United States v. Maine, 95 S.Ct. 1155 (1975) which stated that in the OCSLA Congress implemented its view that the U.S. has paramount rights to the seabed beyond the three-mile limit. The court specifically noted the comments of the International Law Commission in the Convention on the Continental Shelf which stated that "[i]t is clearly understood that the **rights in question do not cover objects such as wrecked ships and their cargoes (including bullion)** lying on the seabed or covered by the sand of the subsoil." Id. citing to 11 U.S. GAOR, Supp. 9 at 42, U.N. Doc. A/3159 (1956) (emphasis added). However, the Court in dicta acknowledged that "[w]hile it may be within the constitutional power of Congress to take control of wrecked and abandoned property brought to shore by American citizens (or the proceeds derived from its sale) **legislation** [emphasis added] has never been enacted." Id. at 341. Thus, as DOJ and NOAA have argued in USA v. Fisher and Craft v. USA, the MPRSA would be the "legislation" enacted by Congress expressly giving the Secretary the power to control and manage historic resources including historic abandoned shipwrecks within national marine sanctuaries.

Although section 433 of the AA probably applies to national marine sanctuaries, its application and deterrent factors are weak. Section 433 states that any person who violates that section "...shall, upon conviction be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment..." This section would not be a deterrent to treasure salvers since a fine of $500 is minuscule compared to their potential profits. Further, this fine is not needed in national marine sanctuaries because of the $50,000 fine imposed for each violation of the MPRSA, 16 U.S.C. § 1437(b)(1).[13] Also, one of the reasons ARPA was enacted was because the United States Court of Appeals for the Ninth Circuit held in United States v. Diaz (Diaz), 499 F.2d 113 (9th Cir. 1974), that the Antiquities Act is unconstitutional since definitions under the Act were unconstitutionally vague and therefore a violation of due process. In Diaz, the court noted that because the

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[12] Under the SLA, States have ownership and control over submerged lands and their resources from 0-3 miles.

[13] The amount for civil penalties was increased to $100,000 in the 1992 reauthorization of the MPRSA.

Antiquities Act did not define "ruin," "monument," or "object of antiquity" and antiquity could include an object made recently by existing cultures, there was insufficient notice to the public of the applicability of the penalty provisions. Id. Thus, section 433 is unenforceable in the Ninth Circuit. Although the Diaz case significantly weakened the Antiquities Act, United States v. Smyer (Smyer), 596 F.2d 939 (10th Cir. 1979), a case in another circuit, subsequently upheld the constitutionality of the Antiquities Act.

In Smyer the issue was whether the Antiquities Act is unconstitutional. Like Diaz, the defendants claimed that the Antiquities Act is unconstitutional because it is vague and uncertain as to the use of the words "ruin" and "object of antiquity." The court distinguished Smyer from Diaz stating that in Diaz the charge was appropriation of objects of antiquity which were face masks made in 1969 or 1970. In contrast, the objects appropriated in the Smyer case were 800-900 years old and were taken from ancient sites for commercial motives. Id. The court stated that in determining whether a statute is vague, it must be considered "in the light of the conduct with which the defendant is charged." Id. The court found that as it applied to this particular case, there was "no constitutional infirmity" in section 433 of the Antiquities Act. Id.

Section 432 of the Antiquities Act (Permits & Public Access)

A question was raised as to whether section 432 of the AA precluded the sale or disposal of historic resources. Section 432 provides authority for the recovery of objects on Federal lands, but requires their placement in public museums. Section 432's constraints on the disposition of objects of antiquity recovered under Federal permits does not apply on its own terms to national marine sanctuaries. There is no indication of Congress' intent to apply this provision in the marine environment or to land under the ownership or control of DOC/NOAA. Section 432 of the Antiquities Act states that:

> Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the **Secretaries of the Interior, Agriculture, and Army** to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: Provided, That the examinations, excavations, and gatherings are

> undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

16 U.S.C. § 432 (Emphasis added).

This permitting section of the Antiquities Act has been interpreted by the Department of Interior to be limited to the Departments of the Interior, Agriculture, and Army and thus not applicable to DOC/NOAA controlled areas.[14] However, while NOAA is not required to comply with this provision on its terms, NOAA regulations require compliance to the extent practicable.

Section 432 states that permits may be granted to institutions which are properly qualified to conduct such examination, excavation, or gathering, and that such examinations, excavations, and gatherings are "undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions..." 16 U.S.C. § 432. The regulations promulgated under 43 C.F.R. Part 3, set out the procedures for permitting. Section 3.17 of the regulations states that:

> Every collection made under the authority of the act and of this part **shall** be preserved in the **public museum** designated in the permit and **shall be accessible to the public.** No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution, and then only to another public museum, where it shall be accessible to the public; and when any public museum, which is a depository of any collection made under the provisions of the act and this part, shall cease to exist, every such collection in such public museum shall thereupon revert to the national collections and be placed in the proper national depository.

43 C.F.R. § 3.17 (emphasis added).

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[14] Telephone conversation on May 5, 1992 with Lars Hanslin, Senior Attorney, National Park Service, Department of the Interior. Further, Section 3.1 of 43 C.F.R. Part 3, Preservation of American Antiquities, also states that jurisdiction over ruins, archaeological sites, historic and prehistoric monuments and structures, etc. shall be exercised under the Antiquities Act by the Secretaries of Agriculture, Army, and the Interior.

Section 432 of the AA and its implementing regulation both state that the antiquities collected **shall** be preserved in a **public** museum and **shall** be accessible to the general public. Neither the Antiquities Act nor its legislative history state that the antiquities may be preserved in private museums. However, the public's accessibility to the objects appears to be the central purpose of the provision and DOI has indicated that permits for private museums providing public access have been granted.[15] While the Antiquities Act does not expressly prohibit the sale or disposal of collections made pursuant to a permit under section 432, the sale or disposal would conflict with the requirement that collections revert to the "**national** collections and be placed in the proper **national** depository" if the depository ceases to exist. Id. Although the provisions of section 432 are limited to the Departments of the Interior, Agriculture, and Army, under NOAA regulations, the agency should comply to the extent practicable. Thus, the sale by NOAA of historic sanctuary resources would have to be determined to be necessary to fulfill MPRSA objectives and provide a reasonable explanation why compliance with this provision is not practicable in the marine sanctuary environment.

In conclusion, the Antiquities Act has been found to apply to submerged lands owned or controlled by the United States. Section 433's prohibitions and penalty applies to national marine sanctuaries because NOAA has "control" of historic sanctuary resources. The AA has been significantly weakened by the Diaz case. Moreover, the $500 penalty has not been updated since 1906 and is therefore not a deterrent for treasure salvers. Most importantly, since the MPRSA currently provides for civil penalties of $50,000 per violation, the penalty provisions of the AA are not needed. Section 432 of the AA requires that resources recovered from Federal land be maintained in museums for public access. The sale or disposal of collections made under this section would conflict with this provision. While section 432 does not apply to DOC/NOAA on its own terms, NOAA regulations require compliance to the extent practicable. Therefore, prior to any sale or divestiture of historic public resources, NOAA should create a record for the decision which explains how the sale or disposal is in the public's interest under the MPRSA and the FAP, and how application of this land based FAP restriction is not practicable in the marine environment.

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[15] In a June 8, 1992 conversation, Lars Hanslin, Senior Attorney for the National Park Service, stated his understanding that antiquities that have been collected under the AA have been displayed in private museums accessible to the public. Whether such display is considered by DOI to be authorized or in conflict with the AA is unclear.

ATTORNEY-CLIENT PRIVILEGE -- DO NOT RELEASE

Office of the General Counsel
Washington, D.C. 20230

JUL 1 1992

Stan Wilson

MEMORANDUM FOR: Dr. William W. Fox, Jr.
Assistant Administrator for the
National Marine Fisheries Service
National Oceanic and Atmospheric
Administration

FROM: Barbara S. Fredericks
Assistant General Counsel
for Administration

SUBJECT: Acceptance of Donations for
National Marine Sanctuaries

This responds to a memorandum dated May 12, 1992 from James Brennan, Deputy General Counsel of the National Oceanic and Atmospheric Administration (NOAA), seeking our advice on accepting donations for national marine sanctuaries from individuals or entities whose use of sanctuaries is regulated by NOAA. As discussed below, NOAA may accept such donations so long as the timing and nature of the gift would not cause a reasonable person to question the agency's impartiality in matters affecting the donors.

In 1988, Congress passed H.R. 4210, which amended the Marine Protection, Research, and Sanctuaries Act of 1972. Section 311 of H.R. 4210 authorized the Secretary of Commerce to accept donations of funds, property, and services for use in designating and administering national marine sanctuaries. 16 U.S.C. § 1442(b). Section 311 also authorized the Secretary to enter into cooperative agreements with any nonprofit organization for the solicitation of private donations to support interpretive, historical, scientific, and educational activities relating to national marine sanctuaries. 16 U.S.C. § 1442(a).

In many marine sanctuaries, NOAA regulates oil, gas and mineral development, fishing, and the operation of vessels. Mr. Brennan has asked whether NOAA can properly accept donations under Section 1442(b) from individuals or entities directly affected by these regulations. If NOAA cannot accept such donations itself, Mr. Brennan has asked whether an intermediary nonprofit organization under Section 1442(a) may accept such donations on NOAA's behalf.

More specifically, Mr. Brennan has asked whether oil companies can contribute resources to help build an exhibit on sanctuaries for the national aquarium, and to transport NOAA officials to the Flower Garden Banks to view the upcoming mass spawning of the coral. With respect to the offer of transport, Mr. Brennan has advised us that the oil company proposes to use one of its own

vessels, providing meals and sleeping accommodations for approximately 24 to 36 hours.

We have examined the major provisions of H.R. 4210. A primary purpose of this legislation was to provide new enforcement authority to deal with pollution and to study the effects of pollution, overfishing and ocean dumping on marine sanctuaries.

To this end, the bill authorized the Secretary to issue special use permits for conducting specific activities in marine sanctuaries, to assess fees for conducting activities under the permits, and to assess civil penalties for violations of the terms or conditions of a permit.

The Secretary was also authorized to ask the Attorney General to initiate a civil action against any person or vessel who might be liable for the destruction, loss, or injury to a sanctuary resource.

The legislative history of H.R. 4210 contains only passing references to Section 311. In bringing the bill to the House floor for a vote, one of the sponsors, Congressman Lowry of Washington, explained:

> Under Section 311, the Secretary of Commerce is explicitly authorized to enter into cooperative agreements with any nonprofit organizations and to authorize those organizations to solicit private donations for the support of sanctuary activities. This section also allows the Secretary to accept any donations and to expend those donations for sanctuary purposes.

134 Cong. Rec. H 9390-91 (October 3, 1988).

In bringing the measure to the Senate floor for a vote, Senator Hollings stated: "[T]he bill includes minor changes to provisions governing . . . . cooperative agreements and donations." 134 Cong. Rec. S 15608 (October 12, 1988).

In enacting Section 311, Congress made no attempt to limit the class of donors to individuals and entities whose financial interests were unaffected by NOAA's regulatory authority.

Nonetheless, agency policy set forth in Department Administrative Order 203-9, Gifts and Bequests, requires that certain guidelines be met before NOAA can accept donations from these sources. Section 6 states:

> .01 A gift or bequest may be accepted by an authorized official only if the donation would:

a. Aid or facilitate some part or aspect of the work of the Department;

b. Not involve in substance, or have the appearance of involving, a personal benefit to an employee for or in contemplation of services to the donor;

c. Not result in public misunderstanding concerning the ability of any Department employee to carry out his or her official duties in a fair, independent, impartial or objective manner;

d. Not compromise or appear to compromise the honesty or integrity of the Department's programs or employees and their official actions or decisions; and

e. Not reasonably be expected to result in impeding or otherwise impairing Government efficiency or economy.

.02 An authorized official, in accepting and using gifts and bequests to the Department, must be careful not to take any action which creates a conflict of interest or the appearance of impropriety. Conflict of interest regulations and statutes may place additional limitations on employee conduct and may bar acceptance or use of a gift or bequest in particular circumstances.

Applying these standards to donations for the marine sanctuaries, we have concluded that NOAA should not directly accept gifts from individuals or entities that: (i) have permit applications pending; (ii) are being investigated for or in the process of being fined for violations of the terms or conditions of their permits; or (iii) are being investigated for or in the process of being sued for the destruction, loss, or injury to a sanctuary resource. Donations should also be declined in any similar situation where the timing and nature of the gift would cause a reasonable person to question the agency's impartiality in matters affecting the donors.

This same policy should be applied to donations passed to NOAA through an intermediary nonprofit organization whenever the identity of donors is made known to NOAA officials. Because the appearance of undue influence occurs only when donors are identified, it may be possible to develop procedures for use by the intermediary organizations that would cloak the identity of particular donors from NOAA staff. This would enable NOAA to use these donations for the national marine sanctuaries.

NOAA should apply these policy guidelines in deciding whether to accept the proposed contributions from oil companies to help build an exhibit on sanctuaries for the national aquarium, and to

transport NOAA officials to the Flower Garden Banks to view the unpcoming mass spawning of coral.

If you or your staff have any questions concerning this matter, please feel free to call me or Francine Kerner, an attorney on my staff, at 377-5384.

cc: James Brennan
Ray Kammer

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington D.C. 20230

OFFICE OF THE GENERAL COUNSEL

ATTORNEY WORK PRODUCT -- DO NOT RELEASE

December 5, 1991

MEMORANDUM FOR: Margo E. Jackson
Assistant General Counsel
for Ocean Services

FROM: Stephanie S. Campbell
Attorney-Adviser

SUBJECT: Inward Extent of Jurisdiction under Title III of Marine Protection, Research, and Sanctuaries Act

You asked me to do a brief memorandum addressing Joan Bondareff's informal inquiry at the recent Hill hearing about the inward geographical extent of jurisdiction under title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA). Jurisdiction to designate national marine sanctuaries extends inward to coastal waters where the tide ebbs and flows and includes the Great Lakes and their connecting waters. I arrive at this conclusion via the following analytical steps.

1) Title III provides that the Secretary of Commerce may "designate any discrete area of the marine environment as a national marine sanctuary" if certain determinations and findings are made. 16 U.S.C. § 1433(a).

2) Title III defines "marine environment" as "those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, consistent with international law." 16 U.S.C. § 1432(3).

3) The statutory definitions pertaining to all titles of the MPRSA define "ocean waters" as "those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639)." 33 U.S.C. § 1402(b). (The normal baseline of the territorial sea is the low-water line along a coast, as marked on large-scale charts of the coastal nation. A. Shalowitz, Shore and Sea Boundaries 212 (1962).)

4) The statute does not include a definition of "coastal waters," although it seems clear that the seaward boundary of those waters for purposes of title III is intended to be coterminous with the inward boundary of "ocean waters."

See, e.g., H.R. Rep. No. 92-361, 92d Cong., 1st Sess. 27 (1971). The question therefore becomes, what is the inward boundary of "coastal waters"?

5) The term "marine environment" was introduced into title III during its 1984 reauthorization, although the term "coastal waters" has been in the act, albeit undefined, since its passage in 1972. The House of Representatives report for that reauthorization (there is no conference report and the Senate report does not address definitions) explains that the term "coastal waters" refers to "those areas of coastal waters where the tide ebbs and flows, and is derived from section 302 of the [then] current MPRSA without change." H.R. Rep. No. 98-187, Part I, 98th Cong., 1st Sess. 19, 20 (1983). This explanation, although somewhat tautological in that it attempts to define "coastal waters" by repeating the term, satisfies me that the best conclusion as to the question of inward reach of jurisdiction under title III is that sanctuaries may be designated inward to the extent of tidal influence.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

ATTORNEY WORK PRODUCT --
DO NOT RELEASE

May 2, 1991

MEMORANDUM FOR: Margo

FROM: Stephanie Stephanie

SUBJECT: Regulation of Fishing in National Marine Sanctuaries

You asked for a paragraph or so for your information on what I know of the past practice regarding regulation of fishing in national marine sanctuaries. I will start off with a summary of what title III of the MPRSA and its program-wide regulations provide on the subject.

I. Statute and Program-Wide Regulations

Title III requires that the Secretary of Commerce provide the appropriate Regional Fishery Management Council with the opportunity to prepare draft regulations for fishing within the U.S. Fishery Conservation Zone (now the Exclusive Economic Zone (EEZ)). (Interesting point: Susan Auer informs me that the Magnuson Act allows Fishery Management Councils to regulate within state waters -- they just have to jump through more hoops.) The Secretary is to prepare the fishing regulations if the Council: 1) fails to make a determination with respect to the need for regulations; 2) makes a determination that is rejected by the Secretary as failing to fulfill the purposes and policies of title III or the goals and objectives of the proposed designation; or 3) fails to prepare the draft regulations in a timely manner. Any amendments to the fishing regulations are to be "drafted, approved, and issued in the same manner as the original regulations." 16 U.S.C. § 1434(a)(5).

The program-wide regulations, in turn, implement the statutory provisions by specifying that the Fishery Management Councils have 120 days from the date of the Secretary's request to prepare the draft fishing regulations and submit them to the Secretary. 15 C.F.R. § 922.31(f)(1). Interestingly, the program-wide regulations also give the Fishery Management Councils the first crack at drafting the fishing regulations for the entire proposed sanctuary -- not just for within the EEZ -- if the proposed sanctuary includes any waters within the EEZ. 15 C.F.R. § 922.31(f).

II. My Knowledge of Past Practice

A) Cordell Bank National Marine Sanctuary

Fishing is neither regulated in this sanctuary nor listed in the sanctuary constitution ("Designation Document") as subject to possible regulation in the future. I have a call in to Mark Murray-Brown of the Sanctuaries and Reserves Division (SRD), who is out of the office today, to find out if SRD whole-heartedly concurred with the relevant Fishery Management Council that no regulation was necessary in this particular sanctuary, or if it merely acquiesced. I suspect it whole-heartedly concurred in the case of this sanctuary.

B) Proposed Flower Garden Banks National Marine Sanctuary

This sanctuary is about to be designated: the regulations are about to go to OMB for review. Before issuing the draft regulations, SRD duly solicited views of the relevant Fishery Management Council, enclosing in its letter a copy of all the "preliminary" draft regulations as an aid to the Council in preparing its recommendations. The draft regulations included a prohibition on the use of any fishing gear other than conventional hook and line gear and spearfishing gear. This regulation is basically the same as one of the regulations implementing the Fishery Management Plan for Coral and Coral Reefs in the area, except that it expands the geographic scope somewhat. The sanctuary, although small (41.7 square nautical miles), is larger that the coral Habitat Area of Particular Concern (HAPC) in question, which is limited to the portions of each bank shallower than the 300-foot isobath.

The Council responded to SRD's letter with a short letter endorsing the designation and particularly applauding the proposed regulations restricting anchoring -- regulations it had wanted to promulgate but had been unable to. The Council did not comment in writing on the official draft regulations and Draft Environmental Impact Statement/Management Plan (DEIS/MP). Annie Hillary of SRD reports that the Council indicated orally that it had no problem with them.

The proposed interim final regulations add, among other prohibitions not relevant here, prohibitions on spearfishing, feeding fish, possession of fishing gear other than conventional hook and line gear (except while passing without interruption through the sanctuary) and possession of fish not caught with conventional hook and line gear. The last two regulations were added as enforcement tools. As interim final regulations, these four regulations will be effective immediately (after the Congressional review period) but subject to a 60-day comment period.

C) Proposed Monterey Bay National Marine Sanctuary

Draft regulations have been issued for this sanctuary; SRD is currently analyzing the comments received. Mark Murray-Brown reports that, before the draft regulations were issued, the relevant Fishery Management Council stated that no fishing regulations were needed. The draft regulations indeed contain no fishing regulations, and the draft sanctuary constitution dose not list fishing as subject to possible regulation in the future. The preamble in the draft regulations, however, specifically solicited comments on the need for fishing regulations. This was done at the behest of the Minerals Management Service, who felt that SRD was being inconsistent in what it was choosing to regulate versus not regulate given the goal of resource protection.

The Council did not comment on the draft regulations and DEIS/MP. Vickie Nichols of SRD reports that a significant number of commenters were in favor of sanctuary regulations prohibiting fishing with gill nets and trommel nets because of the by-catch of marine mammals and seabirds. Some commenters also favored prohibitions on bottom fishing, trawling and dragnetting, because of the effect on the benthic community.

D) Older Sanctuaries

I was not at NOAA when the seven older sanctuaries were designated. Attached is a memorandum done by Amor Lane of SRD regarding fishing regulations in those sanctuaries. I have corrected it as necessary (handwriting). In the sanctuaries where fishing is regulated, it is unclear to what extent, if at all, the sanctuary regulations merely reiterate existing regulations implementing fishery management plans.

Also U Note that A. Lane's captions often inaccurate.

A. Lane
6/11/90

Comparison of Prohibited Actions
for Eight Designated Sanctuaries
for Fishing (Commercial/Recreational

1. Monitor

Activities Prohibited
- Trawling

2. Key Largo

a) Removal or damage of natural ~~resources~~ features, marine life and archaeological and historical resources

(i) No person shall destroy, injure, harmfully disturb, break, cut or similarly damage or remove any coral or other marine invertebrate, or any plant, soil, rock or other material, except that commercial taking of spiny lobster and stone crab by trap and recreational taking of spiny lobster by hand which is consistent with both the applicable regulations under the appropriate Fishery Management Plan and these regulations is allowed. Divers are prohibited from handling coral formations, standing on coral formations, or otherwise disturbing the corals.

(ii) No person shall catch or collect any tropical fish. a defined term

(iii) ∃ rebuttal presumption re possession.

b) Use of harmful fishing methods

No person shall use within the Sanctuary, or shall carry or possess, except while passing without interruption through the Sanctuary or for law enforcement purposes, the following firearms or weapons: Pole spears, air rifles, bows and arrows, slings, Hawaiian slings, rubber powered arbaletes, pneumatic and spring loaded guns, explosive powered guns or similar devices known as spearguns. No person shall use within the Sanctuary:

(i) Wire fish traps:

(ii) Bottom trawls, dredges, fish sleds, or similar vessel-towed or anchored bottom fishing gear or net or

(iii) Poisons, electric charges, explosives or similar devices.

3. Channel Islands

a) Bottom trawling from a commercial fishing vessel is allowed. See excerpt below:

Alteration of, or construction on, the seabed. Except in connection with the laying of any pipeline as allowed by Section 935.6, within 2 nautical miles of any Island, no person shall:

(i) Construct any structure other than a navigation aid, or
(ii) Drill through the seabed, or
(iii) Dredge or otherwise alter the seabed in any way, other than
  (A) to anchor vessels, or
  (B) to bottom trawl from a commercial fishing vessel.

b) Access for fishing a recreational vessels is not to be limited. See excerpt below:

Commercial vessels operations. Except to transport persons or supplies to or from an island, no person shall operate within one nautical mile of an Island any vessel engaged in the trade of carrying cargo, including but not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be construed to limit access for fishing (including kelp harvesting), recreational, or research vessels.

4. Gray's Reef

a) Removal or damage of natural features, marine life

(i) No person shall break, cut, or similarly damage, take, or remove any bottom formation, any marine invertebrate, or any marine plant without a permit.
(ii) No person shall take without a permit any tropical fish, which is a fish of minimal sport and food value, usually brightly colored, often used for aquaria purposes, and which lives in a direct relationship with the live bottom community.

(iii) ∃ rebuttable presumption re possession re (i) and (ii).
(iv) No person shall use poisons, electric charges, explosives, or similar methods to take any marine mammal or plant.

b) Use of harmful fishing methods

(i) Wire fishing.
No person shall use, place, or possess wire fish traps within the Sanctuary without a permit.

(ii) Bottom trawling and specimen dredging.
No person shall use a bottom trawl, specimen dredge, or similar vessel-towed bottom sampling device within the Sanctuary without a permit.

5. Looe Key

a) Removal or damage of natural features, marine life

(i) No person shall break, cut or similarly damage or take any coral or marine invertebrate except as an incidental result of anchoring outside the Fore Reef where sand anchoring is encouraged but not required. Divers are prohibited from handling coral or standing on coral formations.

(ii) No person shall take, except incidentally to allowed fishing activities, any tropical fish or marine invertebrate. a defined term

(iii) ∃ rebuttable presumption re possession.

b) Use of harmful fishing methods

(i) No person shall use or place wire fish traps within the Sanctuary.

(ii) No person shall place lobster traps within the Fore Reef area of the Sanctuary.

(iii) No person shall use pole spears, Hawaiian slings, rubber-powered arbalets, pneumatic and spring loaded guns or similar devices known as spearguns within the Sanctuary.

(iv) No person shall use poisons, electric charges, explosives or similar methods within the Sanctuary.

6. Gulf of the Farallones

a) Bottom trawling from a commercial fishing vessel is allowed. See excerpt below:

Alteration of, or construction on the seabed. Except in connection with the laying of pipelines or construction of an outfall if certified in accordance with Section 936.9, no person shall:

(~~i~~) - Construct any structure other than a navigation aid,
(ii) Drill through the seabed, and
(iii) Dredge or otherwise alter the seabed in any way other than by anchoring vessels or bottom trawling from a commercial fishing vessel, except for routine maintenance and navigation, ecological maintenance, maricul and the construction of docks and piers in Tomales Bay.

b) Access for fishing or recreational vessels is not to be limited. See excerpt below:

Operations of vessels.
Except to transport persons or supplies to or islands or mainland areas adjacent to sanctuary waters, within an area extending 2 nautical miles from Farallon Islands, Bolinas Lagoon, or any Area of Special Biological Significance, no person shall operate vessel engaged in trade of carrying cargo, including not limited to tankers and other bulk carriers barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be construed to limit access for fishing, recreational or research vessels.

7. Fagatele Bay

a) Removal or damage of natural features, marine life

(i) No person shall gather, break, cut, damage, destroy or possess in the Sanctuary any invertebrate, coral, bottom formation, or marine plant ~~including any species listed a threatened or endangered under federal or territorial law.~~
(ii) No person shall gather, cut, damage, destroy or possess in the Sanctuary any crown-of-thorns starfish (Acanthaster planci).

b) Use of harmful fishing methods

(i) No person shall possess or use ~~toxic chemical~~ poisons, electrical charges, explosives, or similar environmentally destructive methods.

(ii) No person shall possess or use spearguns, including such devices known as Hawaiian slings, poles spears, arbalettes, pneumatic and spring-loaded spearguns, bows and arrows, ~~and~~ bang sticks. ← or any similar taking devices

(iii) No person shall possess or use seines, trammel ~~or~~ ~~trawl~~ nets, ~~throwets,~~ or ~~any standing net of the type commonly referred to as gill nets~~. ← any fixed net

c) ∃ rebuttable presumption re possession. ⊛

c) In addition, the following activities are prohibited or controlled in Subzone A:

(i) No person shall possess or use fishing poles ~~or~~ handlines. ← or trawls

(ii) Commercial fishing shall be prohibited.

8. Cordell Bank

a) Removal or damage of natural features, marine life

(i) Attempting to ~~damage~~ injure or ~~damaging~~ injuring, ~~or~~ attempting to remove or removing, benthic ~~organisms on the ridges and peaks of~~ Cordell Bank within the 50 fathom isobath surrounding the Bank. ← or

invertebrates or algae located on

or attempting to take or taking

This prohibition does not apply to accidental removal, injury, or takings during normal fishing operations

(ii) ∃ rebuttable presumption re possession.

⊛ That rebuttable presumption is silly -- because possession itself is already a violation in the Fagatele Bay regs! SSC

f) Disturbance of the Benthic Community
Disturbance of the benthic community by dredging, felling, dynamiting, bottom trawling, or any alteration of the seabed shall be prohibited.

g) Taking of Sea Turtles - prohibited if threatened or endangered (see reg).

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

ATTORNEY-CLIENT PRIVILEGE -- DO NOT RELEASE

July 21, 1989

MEMORANDUM FOR: Richard Legatski

THROUGH: Stephanie Campbell Stephanie Campbell

FROM: Kirsten Erickson Kirsten Erickson

SUBJECT: Eligibility of the Heritage Task Force for the Hudson River Valley, Inc. to Receive NERR Financial Assistance

Question Presented: May the Heritage Task Force for the Hudson River Valley, Inc. (Task Force) receive, as a direct grantee, financial assistance awards pursuant to the National Estuarine Reserve Research System (NERR) statutory provision for financial assistance, 16 U.S.C. § 1461(e)(ii), for the purpose of operating and managing the Hudson River National Estuarine Research Reserve (Reserve)?

Brief Answer: Current NERR regulations provide that "[o]nly a state Governor, or his/her designated state agency" (emphasis added), may apply for NERR financial assistance awards for operation and management purposes. 15 C.F.R. § 921.50(b). For the reasons discussed below, the Task Force does not qualify as the "designated state agency". Accordingly the Task Force may not receive, as a direct grantee, such NERR financial assistance awards. The Task Force may, however, qualify, under a proposed NERR regulation, 15 C.F.R. § 921.70(a)(1988), as a "coastal state" and as such be eligible to receive, as a direct grantee, financial assistance awards if and when that regulation takes effect.

A. Analysis Pursuant to Current Regulations: 16 U.S.C. § 1461, entitled "National Estuarine Research Reserve System," and part of the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451 et seq., provides the basic authority for the designation and subsequent federal funding of national estuarine research reserves. 16 U.S.C. § 1461(e) provides that the Secretary of Commerce may make financial assistance awards to a "coastal state". "Coastal state" is defined as "a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes...." 16 U.S.C. § 1453(4). Financial assistance awards are available for the acquisition and management and

operation of national estuarine research reserves, as well as for educational and research purposes. 16 U.S.C. § 1461(e). NERR regulations provide, however, that, "[o]nly a state governor, or his/her designated state agency" (emphasis added), may apply for financial assistance awards for operation and management of national estuarine research reserves. 15 C.F.R. § 921.50(b).

The term "designated state agency" is not defined in the NERR regulations. General rules of statutory construction provide that in construing the meaning of statutory terms, statutes are to be interpreted as a whole and legal terms employed in a statute are to be presumed used in their legal sense. 2A Sands, Statutes and Statutory Construction §§ 46.05 and 47.30 (1972). These rules are relevant to construing the meaning of regulations.

"Designated state agency" is a legal term of art and is generally employed in federal grant statutes to indicate that a specific state agency will be solely responsible for receiving and administering federal financial assistance awards. See generally Cappalli, Fed Grants & Coop Agreements §§ 9.05 and 9.06. The designated state agency is generally the agency with management authority for a program. Although the term is not employed in the NERR portion of the CZMA, it is employed in another section. That section provides that in order for a coastal zone management program to quality for administrative grants, the state must have "designated a single agency to receive and administer grants...." (emphasis added). 16 U.S.C. § 1455(c)(5). The regulations for the section indicate that this requirement is "designed to establish a single point of accountability for the prudent use of administrative funds in the furtherance of the management and for monitoring of management activities." 15 C.F.R. § 923.47(c)(1). The purpose of the term "designated state agency" as it is employed in the CZMA is therefore to place responsibility for federal financial assistance in the agency which has final management control over the activities which are funded. 15 C.F.R. § 923.47(b)(3).

The Task Force was established in 1980 by an order of the Commissioner of the New York Department of Environmental Conservation (DEC). In 1987, the legislature reestablished the Task Force in the DEC as an advisory body to the DEC regarding a wide variety of cultural and environmental issues involving the entire Hudson River Valley. N.Y. Environmental Conservation §§ 44-0101 et seq. (Mckinney 1989). The enabling act for the Task Force authorizes it to, among other things:

> provide local governments and the private sector with improved liaison, interpretation and focus relative to a variety of state and federal programs which bear on the Hudson River Valley and its shorelines, including

... estuarine sanctuaries. N.Y. Environmental Conservation § 44-0107(19) (McKinney 1989) (Emphasis added.)

Nothing in the enabling act, however, specifically authorizes the Task Force to assume direct management authority for the Reserve. Rather, pursuant to the draft management plan for the Reserve, the DEC's enabling act, and the state statute establishing the Hudson River estuary management program, ultimate authority to administer grants and manage the Reserve rests with the DEC. N.Y. Environmental Conservation § 11-0306 (McKinney 1989); N.Y. Environmental Conservation § 11-0301 (McKinney 1989). Although the Task Force is presently under contract (copy attached) to the DEC to operate the research and preservation programs at the four sites (Pierport Marsh, Long Island Marsh, Tivoli Bay and Stockports Flats) currently designated in the Reserve, nothing in the contract abrogates DEC's final management authority for the Reserve. Nor does the contract abrogate DEC's responsibility to receive and administer federal financial assistance. Rather, under the contract the Task Force provides services to the DEC which include coordination of scientific research and monitoring programs as set forth in the draft management plan and assistance in the management and administration of federal grants. Additionally, under the contract, the Task Force employs a staff that reports directly to an employee of the DEC.

As the state entity with ultimate authority to manage the Reserve and in light of the use of the term "designated state agency" elsewhere in the CZMA, the DEC is the "designated state agency" which pursuant to 15 C.F.R. § 921.50(b) may apply for and receive, as a direct grantee, financial assistance awards for management and operation purposes for the Reserve. Permitting the Task Force to receive funds as a direct grantee would disregard the purpose behind the "designated state agency" requirement, which is to place final responsibility for federal financial assistance in the agency which has ultimate management control over the activities which are funded.

31 U.S.C. § 6504 provides that notwithstanding the existence of a law which requires that a single state agency administer federal financial assistance awards, that requirement may be waived by the federal agency granting the award upon adequate showing by the state that directing the award to only one agency is not the most effective and efficient organizational arrangement. However, the state government must be the entity which requests the waiver. The state government has not done so here. Additionally, even if NOAA were to grant a waiver, the financial assistance must still go to the Governor or a state agency and it is not clear that the Task Force is a state agency. Although the act which created the Task Force defines it as an entity

"reestablished" in the DEC, the Task Force ("Inc.") appears to operate as a non-profit corporation whose employees are outside of the state system. In order to resolve this issue, a legal opinion on the legal status of the Task Force under New York law should be provided to NOAA by a New York attorney.[1]

B. Analysis Pursuant to Proposed Regulations:

Proposed NERR regulation 15 C.F.R. § 921.70 (1988) provides that

> only a coastal state may apply for Federal financial assistance awards for preacquistion, acquisition and development, operation and management, and education and interpretation. (Emphasis added.)

As stated earlier, "coastal state" is defined in the CZMA as "a state of the United States in or bordering on the Atlantic, Pacific or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes...." As indicated above, the Task Force may qualify as a state agency and therefore a "coastal state" and as such be eligible to receive, as a direct grantee, financial assistance awards. Before this determination may be made, however, the legal status of the Task Force must be clarified by the state, as explained above. Additionally, the management plan for the Reserve would have to be amended to designate the Task Force as the entity with ultimate authority to manage the Reserve.

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1. This issue also needs to be addressed as part of the § 1458 (§ 312) evaluation process. Because the legal status of the Task Force is unclear, it is unclear that the state is fulfilling its responsibility under 16 U.S.C. § 1461 to provide long-term protection and financial commitment for the Reserve. See attached letter from NOAA regarding the Wells National Estuarine Research Reserve.

32.
Selected Legal Opinion re: NERRS

1. Eligibility of the Heritage Task Force for the Hudson River Valley, Inc. to Receive NERR Financial Assistance

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

November 24, 1992

MEMORANDUM FOR: Capt. Francesca Cava, Chief
Sanctuaries and Reserves Division

THROUGH: Margo Jackson M.J.
Assistant General Counsel
for Ocean Services

FROM: Roger Eckert RE
Attorney-Adviser

SUBJECT: Authority to Use Dispersants in Treating an Oil Spill Affecting Marine Sanctuary Resources

Issue Presented: In responding to an oil spill affecting a national marine sanctuary, who has the final authority to authorize the use of chemical dispersants?

Short Answer: The National Contingency Plan (NCP) provides the Federal On-Scene Coordinator (OSC) with final authority in an emergency to authorize the use of chemical dispersants. Approval by the OSC is based upon concurrence by the affected State and the Environmental Protection Agency (EPA), and if time permits, upon consultation with appropriate natural resource trustees. When human life is threatened, however, the OSC may make this decision unilaterally. Because dispersants must usually be applied within the first 24-48 hours of an oil spill, rapid decision-making is required and an expedited decision-making process must be included in all Area Contingency Plans (ACPs). Natural resource trustees will probably have veto authority during this planning process on the use of dispersants. Therefore, sanctuary managers should work with other NOAA regional elements, specifically the appropriate NOAA Scientific Support Coordinator and the DOC Regional Response Team member, to ensure that SRD's concerns regarding the use of dispersants are reflected in area and regional contingency plans, and to ensure that appropriate response personnel are familiar with NOAA's marine sanctuary responsibilities.

Discussion: In the event of an oil spill affecting sanctuary resources, the Clean Water Act, as amended (CWA), 33 U.S.C. § 1251 et seq, provides that the President shall, in accordance with the NCP and any appropriate ACP, ensure effective removal

of an oil spill.[1] CWA § 311(c). In carrying out section 311(c), the President may direct or monitor all Federal, State, and private actions to remove a discharge. Furthermore, each Federal agency, State, owner or operator, or other person participating in efforts under section 311(c) shall act in accordance with the NCP for the removal of oil and hazardous substances in coastal and ocean areas, or as directed by the President. The Clean Water Act also provides that the NCP shall provide for the assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies and port authorities. Thus, the program's interests in protecting sanctuary resources from injury caused by the use of dispersants should be reflected in the NCP and any appropriate ACP.

The Clean Water Act provides that the NCP and appropriate ACPs shall include procedures and techniques for dispersing oil spills. See CWA § 311(d), (j)(4). In particular, the NCP must contain a schedule identifying appropriate dispersants, the waters in which such dispersants may be used, and the quantities of dispersants that may be used. In addition, Area Committees under the direction of an OSC shall prepare an ACP and shall "work with State and local officials to expedite decisions for the use of dispersants." CWA § 311(j)(4)(B)(iii). These ACPs are implemented in conjunction with the NCP and "describe the procedures to be followed for obtaining an expedited decision regarding the use of dispersants." CWA § 311(j)(4)(C)(v). Finally, each ACP shall describe how the plan is integrated into other ACPs, other response plans, and into operating procedures of the National Response Unit. CWA § 311(j)(4)(C)(vi). This pre-approval process for the use of dispersants under the Clean Water Act is necessary because dispersants are usually most effective within 24-48 hours of an oil spill.

The NCP further regulates the use of dispersants. In coastal areas, the NCP generally assigns responsibility to U.S. Coast Guard directed Regional Response Teams (RRTs) acting through an OSC and a Regional Response Center.[2] RRTs set up dispersant planning committees. The NCP provides that the OSC, with the concurrence of the EPA representative to the RRT and the RRT representatives from the affected states, and in consultation with the DOC/DOI natural resource trustees, may authorize the use

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[1] Section 311 of the Clean Water Act (attached) addresses oil and hazardous substance liability.

[2] See 40 C.F.R. § 300.5 (definition of lead agency); § 300.120(a)(1). The NCP addresses the use of dispersants at 40 C.F.R. Part 300, Subpart J (attached).

of certain dispersants.[3] 40 C.F.R. § 300.910(a). However, when human life is threatened, the OSC may authorize the use of any dispersant without obtaining the concurrence of EPA or the affected states. 40 C.F.R. § 300.910(c). Once the threat to human life has subsided, the OSC is to inform the EPA RRT representative, the RRT representatives from the affected states, and the DOC/DOI natural resource trustees of the use of a product not on an NCP schedule as soon as possible, and obtain their concurrence or their comments on its continued use. 40 C.F.R. § 300.910(c).

Given that the Clean Water Act provides that the NCP shall provide for the assignment of duties and responsibilities among Federal departments and agencies, appropriate ACPs should be modified, where necessary, to account for the Secretary's authority for protection of sanctuary resources. Specifically, under the MPRSA "[t]he Secretary may undertake or authorize all necessary actions to prevent or minimize the destruction or loss of, or injury to, sanctuary resources, or to minimize the imminent risk of such destruction, loss, or injury." MPRSA § 312(b)(1)(as reauthorized, emphasis added). In addition, individual sanctuary regulations may prohibit discharges.[4] One important exception to a sanctuary discharge prohibition, however, would be where the prohibition does not apply to activities necessary to respond to emergencies threatening life, property or the environment. When an oil spill becomes such an emergency, the discharge prohibition would not apply to the necessary use of dispersants. In the unusual situation, however, where an oil spill requiring the use of dispersants is not an emergency threatening life, property or the environment, the OSC should first obtain a sanctuary permit. As a matter of policy, the OSC may defer to the Department of Commerce as the relevant resource management agency even in an emergency situation. As stated above, however, appropriate ACPs may need to be modified to account for the Secretary's authority for protecting sanctuary resources.

Finally, to further expedite decision-making on the use of dispersants affecting sanctuary resources, appropriate sanctuary staff must be involved in the contingency planning process and knowledgeable in the use of dispersants. Program staff should consult with their Scientific Support Coordinators and Coastal

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[3] The Secretary's trusteeship responsibilities under the NCP are discussed at 40 C.F.R. § 300.615. Where there are multiple trustees for sanctuary resources, the co-trustees must coordinate and cooperate in carrying out their responsibilities.

[4] See, e.g., Monterey Bay Sanctuary discharge prohibitions, 57 Fed. Reg. 43324 (September 18, 1992) (to be codified at 15 C.F.R. § 944.5(a)(2),(3)).

Resource Coordinators (CRCs) on the use of dispersants. Dr. Jean Snyder, 202-267-0418, a HAZMAT liaison to the Coast Guard and the Environmental Protection Agency, is available to further discuss the use of dispersants in marine sanctuaries. Ms. Alyce Fritz, (206) 526-6305, is in charge of the CRC program and can also be of assistance.

Attachments

cc: Mike Webber
Todd Baxter
Kathe Pease

Clean Water Act § 311

(d) Report by alleged polluter

In connection with any hearing called under this subsection, the board is authorized to require any person whose alleged activities result in discharges causing or contributing to pollution to file with it in such forms as it may prescribe, a report based on existing data, furnishing such information as may reasonably be required as to the character, kind, and quantity of such discharges and the use of facilities or other means to prevent or reduce such discharges by the person filing such a report. Such report shall be made under oath or otherwise, as the board may prescribe, and shall be filed with the board within such reasonable period as it may prescribe, unless additional time is granted by it. Upon a showing satisfactory to the board by the person filing such report that such report or portion thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge trade secrets or secret processes of such person, the board shall consider such report or portion thereof confidential for the purposes of section 1905 of title 18. If any person required to file any report under this paragraph shall fail to do so within the time fixed by the board for filing the same, and such failure shall continue for thirty days after notice of such default, such person shall forfeit to the United States the sum of $1,000 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States in the district court of the United States where such person has his principal office or in any district in which he does business. The Administrator may upon application therefor remit or mitigate any forfeiture provided for under this subsection.

(e) Compensation of board members

Board members, other than officers or employees of Federal, State, or local governments, shall be for each day (including travel-time) during which they are performing board business, entitled to receive compensation at a rate fixed by the Administrator but not in excess of the maximum rate of pay for grade GS–18, as provided in the General Schedule under section 5332 of title 5, and shall, notwithstanding the limitations of sections 5703 and 5704 of title 5, be fully reimbursed for travel, subsistence and related expenses.

(f) Enforcement proceedings

When any such recommendation adopted by the Administrator involves the institution of enforcement proceedings against any person to obtain the abatement of pollution subject to such recommendation, the Administrator shall institute such proceedings if he believes that the evidence warrants such proceedings. The district court of the United States shall consider and determine de novo all relevant issues, but shall receive in evidence the record of the proceedings before the conference or hearing board. The court shall have jurisdiction to enter such judgment and orders enforcing such judgment as it deems appropriate or to remand such proceedings to the Administrator for such further action as it may direct.

(June 30, 1948, c. 758, Title III, § 310, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 860.)

Library References

International Law ⇐10.
C.J.S. International Law § 12.

§ 1321. Oil and hazardous substance liability [FWPCA § 311]

(a) Definitions

For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 1342 of this title, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 1342 of this title, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of this title, which are caused by events occurring within the scope of relevant operating or treatment systems;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana

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Islands, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership.

(8) "remove" or "removal" refers to containment and removal of the oil or hazardous substances 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, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section;

(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway;

(17) "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided for by international agreement to which the United States is a party;

(18) "Area Committee" means an Area Committee established under subsection (j) of this section;

(19) "Area Contingency Plan" means an Area Contingency Plan prepared under subsection (j) of this section;

(20) "Coast Guard District Response Group" means a Coast Guard District Response Group established under subsection (j) of this section;

(21) "Federal On-Scene Coordinator" means a Federal On-Scene Coordinator designated in the National Contingency Plan;

(22) "National Contingency Plan" means the National Contingency Plan prepared and published under subsection (d) of this section;

(23) "National Response Unit" means the National Response Unit established under subsection (j) of this section; and

(24) "worst case discharge" means—

(A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and

(B) in the case of an offshore facility or onshore facility, the largest foreseeable discharge in adverse weather conditions.

(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions: penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs and alternative remedies

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the

Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]).

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B) The Administrator shall within 18 months after November 2, 1978, conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances on the part of owners, operators, or persons in charge of onshore facilities, offshore facilities, or vessels. The Administrator shall include in such study (1) limits of liability, (2) liability for third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (iii) of subparagraph (B) of subsection (b)(2) of section 311 of Public Law 92-500 should be enacted.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C.A. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. The Federal agency shall immediately notify the appropriate State agency of any State which is, or may reasonably be expected to be, affected by the discharge of oil or a hazardous substance. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined in accordance with Title 18, or imprisoned for not more than 5 years, or both. Notification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Administrative penalties

(A) Violations

Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility—

(i) from which oil or a hazardous substance is discharged in violation of paragraph (3), or

(ii) who fails or refuses to comply with any regulation issued under subsection (j) of this section to which that owner, operator, or person in charge is subject,

may be assessed a class I or class II civil penalty by the Secretary of the department in which the Coast Guard is operating or the Administrator.

(B) Classes of penalties

(i) Class I

The amount of a class I civil penalty under subparagraph (A) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before assessing a civil penalty under this clause, the Administrator or Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to assess the penalty and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed penalty. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(ii) Class II

The amount of a class II civil penalty under subparagraph (A) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and Secretary may issue rules for discovery procedures for hearings under this paragraph.

(C) Rights of interested persons

(i) Public notice

Before issuing an order assessing a class II civil penalty under this paragraph the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(ii) Presentation of evidence

Any person who comments on a proposed assessment of a class II civil penalty under this paragraph shall be given notice of any hearing held under this paragraph and of the order assessing such penalty. In any hearing held under this paragraph, such person shall have a reasonable opportunity to be heard and to present evidence.

(iii) Rights of interested persons to a hearing

If no hearing is held under subparagraph (B) before issuance of an order assessing a class II civil penalty under this paragraph, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with subparagraph (B)(ii). If the Administrator or Secretary denies a hearing under this clause, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(D) Finality of order

An order assessing a class II civil penalty under this paragraph shall become final 30 days after its issuance unless a petition for judicial review is filed under subparagraph (G) or a hearing is requested under subparagraph (C)(iii). If such a hearing is denied, such order shall become final 30 days after such denial.

(E) Effect of order

Action taken by the Administrator or Secretary, as the case may be, under this paragraph shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or Secretary has commenced and is diligently prosecuting an action to assess a class II civil penalty under this paragraph, or

(ii) for which the Administrator or Secretary has issued a final order assessing a class II civil penalty not subject to further judicial review and the violator has paid a penalty assessed under this paragraph,

shall not be the subject of a civil penalty action under section 1319(d), 1319(g), or 1365 of this title or under paragraph (7).

(F) Effect of action on compliance

No action by the Administrator or Secretary under this paragraph shall affect any person's obligation to comply with any section of this chapter.

(G) Judicial review

Any person against whom a civil penalty is assessed under this paragraph or who commented on the proposed assessment of such penalty in accordance with subparagraph (C) may obtain review of such assessment—

(i) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(ii) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or Secretary, as the case may be, and the Attorney General. The Administrator or Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(H) Collection

If any person fails to pay an assessment of a civil penalty—

(i) after the assessment has become final, or

(ii) after a court in an action brought under subparagraph (G) has entered a final judgment in favor of the Administrator or Secretary, as the case may be,

the Administrator or Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this subparagraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(I) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this paragraph. In case of contumacy or refusal to obey a subpoena issued pursuant to this subparagraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(7) Civil penalty action

(A) Discharge, generally

Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3), shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil or unit

of reportable quantity of hazardous substances discharged.

(B) Failure to remove or comply

Any person described in subparagraph (A) who, without sufficient cause—

(i) fails to properly carry out removal of the discharge under an order of the President pursuant to subsection (c) of this section; or

(ii) fails to comply with an order pursuant to subsection (e)(1)(B) of this section;

shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure.

(C) Failure to comply with regulation

Any person who fails or refuses to comply with any regulation issued under subsection (j) of this section shall be subject to a civil penalty in an amount up to $25,000 per day of violation.

(D) Gross negligence

In any case in which a violation of paragraph (3) was the result of gross negligence or willful misconduct of a person described in subparagraph (A), the person shall be subject to a civil penalty of not less than $100,000, and not more than $3,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged.

(E) Jurisdiction

An action to impose a civil penalty under this paragraph may be brought in the district court of the United States for the district in which the defendant is located, resides, or is doing business, and such court shall have jurisdiction to assess such penalty.

(F) Limitation

A person is not liable for a civil penalty under this paragraph for a discharge if the person has been assessed a civil penalty under paragraph (6) for the discharge.

(8) Determination of amount

In determining the amount of a civil penalty under paragraphs (6) and (7), the Administrator, Secretary, or the court, as the case may be, shall consider the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

(9) Mitigation of damage

In addition to establishing a penalty for the discharge of oil or a hazardous substance, the Administrator or the Secretary of the department in which the Coast Guard is operating may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(10) Recovery of removal costs

Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319(b) of this title.

(11) Limitation

Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

(c) Federal removal authority

(1) General removal requirement

(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance—

(i) into or on the navigable waters;

(ii) on the adjoining shorelines to the navigable waters;

(iii) into or on the waters of the exclusive economic zone; or

(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

(B) In carrying out this paragraph, the President may—

(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

(2) Discharge posing substantial threat to public health or welfare

(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government—

(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

(3) Actions in accordance with National Contingency Plan

(A) Each Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j) of this section, or as directed by the President.

(4) Exemption from liability

(A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.

(B) Subparagraph (A) does not apply—

(i) to a responsible party;

(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(iii) with respect to personal injury or wrongful death; or

(iv) if the person is grossly negligent or engages in willful misconduct.

(C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A).

(5) Obligation and liability of owner or operator not affected

Nothing in this subsection affects—

(A) the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil; or

(B) the liability of a responsible party under the Oil Pollution Act of 1990 [33 U.S.C.A. § 2701 et seq.].

(6) Responsible party defined

For purposes of this subsection, the term "responsible party" has the meaning given that term under section 1001 of the Oil Pollution Act of 1990 [33 U.S.C.A. § 2701].

(d) National Contingency Plan

(1) Preparation by President

The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.

(2) Contents

The National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to, the following:

(A) Assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies and port authorities including, but not limited to, water pollution control and conservation and trusteeship of natural resources (including conservation of fish and wildlife).

(B) Identification, procurement, maintenance, and storage of equipment and supplies.

(C) Establishment or designation of Coast Guard strike teams, consisting of—

(i) personnel who shall be trained, prepared, and available to provide necessary services to carry out the National Contingency Plan;

(ii) adequate oil and hazardous substance pollution control equipment and material; and

(iii) a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fisheries and wildlife.

(D) A system of surveillance and notice designed to safeguard against as well as ensure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies.

(E) Establishment of a national center to provide coordination and direction for operations in carrying out the Plan.

(F) Procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances.

(G) A schedule, prepared in cooperation with the States, identifying—

(i) dispersants, other chemicals, and other spill mitigating devices and substances, if any, that may be used in carrying out the Plan,

(ii) the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used, and

(iii) the quantities of such dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in such waters,

which schedule shall provide in the case of any dispersant, chemical, spill mitigating device or substance, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants, other chemicals, and other spill mitigating devices and substances which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.

(H) A system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed in accordance with the Oil Pollution Act of 1990 [33 U.S.C.A. § 2701 et seq.], in the case of any discharge of oil from a vessel or facility, for the reasonable costs incurred for that removal, from the Oil Spill Liability Trust Fund.

(I) Establishment of criteria and procedures to ensure immediate and effective Federal identification of, and response to, a discharge, or the threat of a discharge, that results in a substantial threat to the public health or welfare of the United States, as required under subsection (c)(2) of this section.

(J) Establishment of procedures and standards for removing a worst case discharge of oil, and for mitigating or preventing a substantial threat of such a discharge.

(K) Designation of the Federal official who shall be the Federal On-Scene Coordinator for each area for which an Area Contingency Plan is required to be prepared under subsection (j) of this section;

(L) Establishment of procedures for the coordination of activities of—

(i) Coast Guard strike teams established under subparagraph (C);

(ii) Federal On-Scene Coordinators designated under subparagraph (K);

(iii) District Response Groups established under subsection (j) of this section; and

(iv) Area Committees established under subsection (j) of this section.

(M) A fish and wildlife response plan, developed in consultation with the United States Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and other interested parties (including State fish and wildlife conservation officials), for the immediate and effective protection, rescue, and rehabilitation of, and the minimization of risk of damage to, fish and wildlife resources and their habitat that are harmed or that may be jeopardized by a discharge.

(3) Revisions and amendments

The President may, from time to time, as the President deems advisable, revise or otherwise amend the National Contingency Plan.

(4) Actions in accordance with National Contingency Plan

After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

(e) Civil enforcement

(1) Orders protecting public health

In addition to any action taken by a State or local government, when the President determines that there may be an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States, because of an actual or threatened discharge of oil or a hazardous sub-

stance from a vessel or facility in violation of subsection (b) of this section, the President may—

(A) require the Attorney General to secure any relief from any person, including the owner or operator of the vessel or facility, as may be necessary to abate such endangerment; or

(B) after notice to the affected State, take any other action under this section, including issuing administrative orders, that may be necessary to protect the public health and welfare.

(2) Jurisdiction of district courts

The district courts of the United States shall have jurisdiction to grant any relief under this subsection that the public interest and the equities of the case may require.

(f) Liability for actual costs of removal

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an

action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

(g) Third party liability

Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

(h) Rights against third parties who caused or contributed to discharge

The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) The[2] United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

(i) Recovery of removal costs

In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Claims Court, that such discharge was caused solely by (A) an act of God, (B) an act of

war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(j) National response system

(1) In general.—Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) National response unit

The Secretary of the department in which the Coast Guard is operating shall establish a National Response Unit at Elizabeth City, North Carolina. The Secretary, acting through the National Response Unit—

(A) shall compile and maintain a comprehensive computer list of spill removal resources, personnel, and equipment that is available worldwide and within the areas designated by the President pursuant to paragraph (4), which shall be available to Federal and State agencies and the public;

(B) shall provide technical assistance, equipment, and other resources requested by a Federal On-Scene Coordinator;

(C) shall coordinate use of private and public personnel and equipment to remove a worst case discharge, and to mitigate or prevent a substantial threat of such a discharge, from a vessel, offshore facility, or onshore facility operating in or near an area designated by the President pursuant to paragraph (4);

(D) may provide technical assistance in the preparation of Area Contingency Plans required under paragraph (4);

(E) shall administer Coast Guard strike teams established under the National Contingency Plan;

(F) shall maintain on file all Area Contingency Plans approved by the President under this subsection; and

(G) shall review each of those plans that affects its responsibilities under this subsection.

(3) Coast guard district response groups

(A) The Secretary of the department in which the Coast Guard is operating shall establish in each Coast Guard district a Coast Guard District Response Group.

(B) Each Coast Guard District Response Group shall consist of—

(i) the Coast Guard personnel and equipment, including firefighting equipment, of each port within the district;

(ii) additional prepositioned equipment; and

(iii) a district response advisory staff.

(C) Coast Guard district response groups—

(i) shall provide technical assistance, equipment, and other resources when required by a Federal On-Scene Coordinator;

(ii) shall maintain all Coast Guard response equipment within its district;

(iii) may provide technical assistance in the preparation of Area Contingency Plans required under paragraph (4); and

(iv) shall review each of those plans that affect its area of geographic responsibility.

(4) Area committees and area contingency plans

(A) There is established for each area designated by the President an Area Committee comprised of members appointed by the President from qualified personnel of Federal, State, and local agencies.

(B) Each Area Committee, under the direction of the Federal On-Scene Coordinator for its area, shall—

(i) prepare for its area the Area Contingency Plan required under subparagraph (C);

(ii) work with State and local officials to enhance the contingency planning of those officials and to assure preplanning of joint response efforts, including appropriate procedures for mechanical recovery, dispersal, shoreline cleanup, protection of sensitive environmental areas, and protection, rescue, and rehabilitation of fisheries and wildlife; and

(iii) work with State and local officials to expedite decisions for the use of dispersants and other mitigating substances and devices.

(C) Each Area Committee shall prepare and submit to the President for approval an Area Contingency Plan for its area. The Area Contingency Plan shall—

(i) when implemented in conjunction with the National Contingency Plan, be adequate to remove a worst case discharge, and to mitigate or prevent a substantial threat of such a discharge, from a vessel, offshore facility, or onshore facility operating in or near the area;

(ii) describe the area covered by the plan, including the areas of special economic or environmental importance that might be damaged by a discharge;

(iii) describe in detail the responsibilities of an owner or operator and of Federal, State, and local agencies in removing a discharge, and in mitigating or preventing a substantial threat of a discharge;

(iv) list the equipment (including firefighting equipment), dispersants or other mitigating substances and devices, and personnel available to an owner or operator and Federal, State, and local agencies, to ensure an effective and immediate removal of a discharge, and to ensure mitigation or prevention of a substantial threat of a discharge;

(v) describe the procedures to be followed for obtaining an expedited decision regarding the use of dispersants;

(vi) describe in detail how the plan is integrated into other Area Contingency Plans and vessel, offshore facility, and onshore facility response plans approved under this subsection, and into operating procedures of the National Response Unit;

(vii) include any other information the President requires; and

(viii) be updated periodically by the Area Committee.

(D) The President shall—

(i) review and approve Area Contingency Plans under this paragraph; and

(ii) periodically review Area Contingency Plans so approved.

(5) Tank vessel and facility response plans

(A) The President shall issue regulations which require an owner or operator of a tank vessel or facility described in subparagraph (B) to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.

(B) The tank vessels and facilities referred to in subparagraph (A) are the following:

(i) A tank vessel, as defined under section 2101 of Title 46.

(ii) An offshore facility.

(iii) An onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.

(C) A response plan required under this paragraph shall—

(i) be consistent with the requirements of the National Contingency Plan and Area Contingency Plans;

(ii) identify the qualified individual having full authority to implement removal actions, and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment pursuant to clause (iii);

(iii) identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;

(iv) describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or at the facility, to be carried out under the plan to ensure the safety of the vessel or facility and to mitigate or prevent the discharge, or the substantial threat of a discharge;

(v) be updated periodically; and

(vi) be resubmitted for approval of each significant change.

(D) With respect to any response plan submitted under this paragraph for an onshore facility that, because of its location, could reasonably be expected to cause significant and substantial harm to the environment by discharging into or on the navigable waters or adjoining shorelines or the exclusive economic zone, and with respect to each response plan submitted under this paragraph for a tank vessel or offshore facility, the President shall—

(i) promptly review such response plan;

(ii) require amendments to any plan that does not meet the requirements of this paragraph;

(iii) approve any plan that meets the requirements of this paragraph; and

(iv) review each plan periodically thereafter.

(E) A tank vessel, offshore facility, or onshore facility required to prepare a response plan under this subsection may not handle, store, or transport oil unless—

(i) in the case of a tank vessel, offshore facility, or onshore facility for which a response plan is reviewed by the President under subparagraph (D), the plan has been approved by the President; and

(ii) the vessel or facility is operating in compliance with the plan.

(F) Notwithstanding subparagraph (E), the President may authorize a tank vessel, offshore facility, or onshore facility to operate without a response plan approved under this paragraph, until not later than 2 years after the date of the submission to the President of a plan for the tank vessel or facility, if the owner or operator certifies that the owner or operator has ensured by contract or other means approved by the President the availability of private personnel and equipment necessary to respond, to the maximum extent practicable, to a worst case discharge or a substantial threat of such a discharge.

(G) The owner or operator of a tank vessel, offshore facility, or onshore facility may not claim as a defense to liability under title I of the Oil Pollution Act of 1990 [section 2701 et seq. of this title] that the owner or operator was acting in accordance with an approved response plan.

(H) The Secretary shall maintain, in the Vessel Identification System established under chapter 125 of Title 46, the dates of approval and review of a response plan under this paragraph for each tank vessel that is a vessel of the United States.

(6) Equipment requirements and inspection

Not later than 2 years after August 18, 1990, the President shall require—

(A) periodic inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges; and

(B) vessels operating on navigable waters and carrying oil or a hazardous substance in bulk as cargo to carry appropriate removal equipment that employs the best technology economically feasible and that is compatible with the safe operation of the vessel.

(7) Area drills

The President shall periodically conduct drills of removal capability, without prior notice, in areas for which Area Contingency Plans are required under this subsection and under relevant tank vessel and facility response plans. The drills may include participation by Federal, State, and local agencies, the owners and operators of vessels and facilities in the area, and private industry. The President may publish annual reports on these drills, including assessments of the effectiveness of the plans and a list of amendments made to improve plans.

(8) United States Government not liable

The United States Government is not liable for any damages arising from its actions or omissions relating to any response plan required by this section.

(k) Repealed. Pub.L. 101–380, Title I, § 2002(b)(2), Aug. 18, 1990, 104 Stat. 507

(l) Administration

The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

(m) Administrative provisions

(1) For vessels

Anyone authorized by the President to enforce the provisions of this section with respect to any vessel may, except as to public vessels—

(A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone,

(B) with or without a warrant, arrest any person who in the presence or view of the authorized person violates the provisions of this section or any regulation issued thereunder, and

(C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

(2) For facilities

(A) Recordkeeping

Whenever required to carry out the purposes of this section, the Administrator or the Secretary of the Department in which the Coast Guard is operating shall require the owner or operator of a facility to which this section applies to establish and maintain such records, make such reports, install, use, and maintain

such monitoring equipment and methods, and provide such other information as the Administrator or Secretary, as the case may be, may require to carry out the objectives of this section.

(B) Entry and inspection

Whenever required to carry out the purposes of this section, the Administrator or the Secretary of the Department in which the Coast Guard is operating or an authorized representative of the Administrator or Secretary, upon presentation of appropriate credentials, may—

(i) enter and inspect any facility to which this section applies, including any facility at which any records are required to be maintained under subparagraph (A); and

(ii) at reasonable times, have access to and copy any records, take samples, and inspect any monitoring equipment or methods required under subparagraph (A).

(C) Arrests and execution of warrants

Anyone authorized by the Administrator or the Secretary of the department in which the Coast Guard is operating to enforce the provisions of this section with respect to any facility may—

(i) with or without a warrant, arrest any person who violates the provisions of this section or any regulation issued thereunder in the presence or view of the person so authorized; and

(ii) execute any warrant or process issued by an officer or court of competent jurisdiction.

(D) Public access

Any records, reports, or information obtained under this paragraph shall be subject to the same public access and disclosure requirements which are applicable to records, reports, and information obtained pursuant to section 1318 of this title.

(n) Jurisdiction

The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

(p) Repealed. Pub.L. 101–380, Title II, § 2002(b)(4), Aug. 18, 1990, 104 Stat. 507

(q) Establishment of maximum limit of liability with respect to onshore or offshore facilities

The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than $50,000,000, but not less than $8,000,000.

(r) Liability limitations not to limit liability under other legislation

Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C. 1501 et seq.].

(June 30, 1948, c. 758, Title III, § 311, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 862, and amended Dec. 28, 1973, Pub.L. 93–207, § 1(4), 87 Stat. 906; Dec. 27, 1977, Pub.L. 95–217, §§ 57, 58(a)–(g), (i), (k)–(m), 91 Stat. 1593–1596; Nov. 2, 1978, Pub.L. 95–576, § 1(b), 92 Stat. 2467; Oct. 21, 1980, Pub.L. 96–478, § 13(b), 94 Stat. 2303; Oct. 21, 1980, Pub.L. 96–483, § 8, 94 Stat. 2362; Dec. 22, 1980, Pub.L. 96–561, Title II, § 238(b), 94 Stat. 3300; April 2, 1982, Pub.L. 97–164, Title I, § 161(5), 96 Stat. 49; Feb. 4, 1987, Pub.L. 100–4, Title V, § 502(b), 101 Stat. 75; Aug. 18, 1990, Pub.L. 101–380, Title II, § 2002(b), Title IV, §§ 4201(a), (b), (b)[(c)], 4202(a), (c), 4204, 4301(a), (b), 4305, 4306, 104 Stat. 507, 523, 525, 527, 532, 533, 540, 541.)

(s) Oil Spill Liability Trust Fund

The Oil Spill Liability Trust Fund established under section 9509 of Title 26 shall be available to carry out subsections (b), (c), (d), (j), and (*l*) of this section as those subsections apply to discharges, and substantial threats of discharges, of oil. Any amounts received by the United States under this section shall be deposited in the Oil Spill Liability Trust Fund.

References in Text

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to in subsec. (c)(4)(B)(ii), is Pub.L. 96–510, Dec. 11, 1980, 94 Stat. 2767, as amended, which is principally classified to chapter 103 (section 9601 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 9601 of Title 42 and Tables.

The Oil Pollution Act of 1990, referred to in subsecs. (c)(5)(B), (c)(6), (d)(2)(H) and (j)(5)(H), is Pub.L. 101–380, Aug. 18, 1990, 104 Stat. 484, which is principally classified to chapter 40 (section 2701 et seq.) of this title. Section 1001 of the Act is classified to section 2701 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

Codification

"Not later than 2 years after August 18, 1990", appearing in subsec. (j)(6), was, in the original, "not later than 2 years after the date of enactment of this section", and was editorially translated according to the probable intent of Congress in enacting subsec. (j)(6) by Pub.L. 101–380, 104 Stat. 484, which was approved Aug. 18, 1990.

Oil Spill Liability Under Oil Pollution Act of 1990

Section 2002(a) of Pub.L. 101–380 provided that: "Subsections (f), (g), (h), and (i) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) [subsecs. (f), (g), (h), and (i) of this section] shall not apply with respect to any incident for which liability is established under section 1002 of this Act [section 2702 of this title]."

Transfer to Oil Spill Liability Trust Fund of Moneys Remaining in Revolving Fund Upon Its Repeal

Section 2002(b)(2) of Pub.L. 101–380 provided that: "Subsection (k) [of this section] is repealed. Any amounts remaining in the revolving fund established under that subsection shall be deposited in the [Oil Spill Liability Trust] Fund. The [Oil Spill Liability Trust] Fund shall assume all liability incurred by the revolving fund established under that subsection."

Revision of National Contingency Plan

Section 4201(c) of Pub.L. 101–380 provided that: "Not later than one year after the date of the enactment of this Act [Aug. 18, 1990], the President shall revise and republish the National Contingency Plan prepared under section 311(c)(2) of the Federal Water Pollution Control Act [subsec. (c)(2) of this section] (as in effect immediately before the date of the enactment of this Act [Aug. 18, 1990]) to implement the amendments made by this section [amending subsecs. (a), (c), and (d) of this section] and section 4202 [amending subsecs. (j) and (o) of this section]."

Implementation of National Planning and Response System

Section 4202(b) of Pub.L. 101–380 provided that:

"(1) **Area committees and contingency plans.**—(A) Not later than 6 months after the date of the enactment of this Act [Aug. 18, 1990], the President shall designate the areas for which Area Committees are established under section 311(j)(4) of the Federal Water Pollution Control Act [subsec. (j)(4) of this section], as amended by this Act. In designating such areas, the President shall ensure that all navigable waters, adjoining shorelines, and waters of the exclusive economic zone are subject to an Area Contingency Plan under that section.

"(B) Not later than 18 months after the date of the enactment of this Act [Aug. 18, 1990], each Area Committee established under that section [subsec. (j)(4) of this section] shall submit to the President the Area Contingency Plan required under that section.

"(C) Not later than 24 months after the date of the enactment of this Act [Aug. 18, 1990], the President shall—

"(i) promptly review each plan;

"(ii) require amendments to any plan that does not meet the requirements of section 311(j)(4) of the Federal Water Pollution Control Act [subsec. (j)(4) of this section]; and

"(iii) approve each plan that meets the requirements of that section.

"(2) **National response unit.**—Not later than one year after the date of the enactment of this Act [Aug. 18, 1990], the Secretary of the department in which the Coast Guard is operating shall establish a National Response Unit in accordance with section 311(j)(2) of the Federal Water Pollution Control Act, as amended by this Act [subsec. (j)(2) of this section].

"(3) **Coast guard district response groups.**—Not later than 1 year after the date of the enactment of this Act [Aug. 18, 1990], the Secretary of the department in which the Coast Guard is operating shall establish Coast Guard District Response Groups in accordance with section 311(j)(3) of the Federal Water Pollution Control Act, as amended by this Act [subsec. (j)(3) of this section].

"(4) **Tank vessel and facility response plans; transition provision; effective date of prohibition.**—(A) Not later than 24 months after the date of the enactment of this Act [Aug. 18, 1990], the President shall issue regulations for tank vessel and facility response plans under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act [subsec. (j)(5) of this section].

"(B) During the period beginning 30 months after the date of the enactment of this paragraph [Aug. 18, 1990], and ending 36 months after that date of enactment, a tank vessel or facility for which a response plan is required to be prepared under section 311(j)(5) of the Federal Water Pollution Control Act [subsec. (j)(5) of this section], as amended by this Act, may not handle, store, or transport oil unless the owner or operator thereof has submitted such a plan to the President.

"(C) Subparagraph (E) of section 311(j)(5) of the Federal Water Pollution Control Act [subsec. (j)(5) of this section], as amended by this Act, shall take effect 36 months after the date of the enactment of this Act [Aug. 18, 1990]."

Deposit of Certain Penalties Into Oil Spill Liability Trust Fund

Penalties paid pursuant to this section and sections 1319(c) and 1501 et seq., respectively, of this title, deposited in the Oil Spill Liability Trust Fund created under section 9509 of Title 26, Internal Revenue Code, see section 4304 of Pub.L. 101–380, set out as a note under section 9509 of Title 26.

Cross References

Authorization of appropriations to carry out this chapter with certain exceptions, see section 1376 of this title.

Coordination of guidelines for use of imminent hazard, enforcement, and emergency response authorities with powers under this section, see section 9606 of Title 42, The Public Health and Welfare.

Definition of "hazardous substance" for purposes of comprehensive environmental response, compensation, and liability provisions, see section 9601 of Title 42.

Definition of "removal costs" for purposes of offshore oil spill pollution fund, see section 1811 of Title 43, Public Lands.

Demonstration of financial responsibility in accordance with this section, see section 1653 of Title 43.

Designation of hazardous substance under this section as constituting hazardous material in relation to vessels and seamen, see section 2101 of Title 46, Shipping.
Effective date of regulations issued pursuant to this section, see section 9652 of Title 42, The Public Health and Welfare.
Establishment and maintenance of records to carry out this section, see section 1318 of this title.
Establishment of reportable released quantities of hazardous substances, see section 9602 of Title 42, The Public Health and Welfare.
Federal oil pollution preventive measures on the high seas, availability of revolving fund monies, see section 1486 of this title.
Hazardous Substance Superfund, payment of claims incurred as result of carrying out national contingency plan established under this section, see section 9611 of Title 42, The Public Health and Welfare.
Hudson River reclamation demonstration project, see section 1266 of this title.
Oil within meaning of this section as included in definition of "material", see section 1402 of this title.
Prohibition of discharge of oil from any offshore facility or vessel, see section 1821 of Title 43, Public Lands.
Regulations respecting assessment of damages to natural resources, see section 9651 of Title 42, The Public Health and Welfare.
Regulations supplemental to effluent limitations for specific hazardous pollutants, see section 1314 of this title.
Removal of oil in accordance with National Contingency Plan established pursuant to this section, see section 1517 of this title.
Revision of National Contingency Plan, see section 9605 of Title 42, The Public Health and Welfare.
Transfer of unobligated funds under this section, see section 9654 of Title 42.

Federal Practice and Procedure

Exceptions to sovereign immunity, see Wright, Miller & Cooper: Jurisdiction 2d § 3656 et seq.

Federal Jury Practice and Instructions

Liability of corporation, see Devitt and Blackmar § 64.08.

West's Federal Forms

Complaint for cleanup expense, see § 11098.5 and Comment thereunder.
Complaints in admiralty charging oil pollution, see §§ 11097, 11098.
Judgment for oil spill cleanup costs, penalty, see § 11755 and Comment thereunder.

West's Federal Practice Manual

Concurrent Claims Court jurisdiction, see § 1834.

Code of Federal Regulations

Civil penalties for violation of oil pollution prevention regulations, see 40 CFR 114.1 et seq.
Designation of substances, reportable quantities, and notification requirements for release of substances, see 40 CFR 302.1 et seq.
Financial responsibility for oil pollution—Alaska pipeline, see 33 CFR 131.1 et seq.
Financial responsibility for water pollution, see 33 CFR 130.1 et seq.
Hazardous substances—
Designation, see 40 CFR 116.1 et seq.
Determination of reportable quantities, see 40 CFR 117.1 et seq.
Inspection and certification, see 46 CFR 71.01 et seq., 91.01 et seq., 189.01 et seq.
Liability limits for small onshore storage facilities, see 40 CFR 113.1 et seq.
Limitations on discharge of oil, see 40 CFR 110.1 et seq., 112.1 et seq.
Oil pollution regulations, see 33 CFR Chap. I, Subchap. O.
Pollution contingency plan, see 40 CFR 300.1 et seq.
Pollution of coastal and navigable waters, reports by United States Customs Service officers, see 19 CFR 4.0 et seq.
Pollution removal damage claims, see 33 CFR 25.101 et seq.
Trans-Alaska pipeline liability fund, see 43 CFR 29.1 et seq.

United States Supreme Court

Hearing in which civil penalty imposed not "quasi-criminal" so as to implicate constitutional protection against compulsory self-incrimination as regards use of statutory reporting requirements, see U.S. v. Ward, 1980, 100 S.Ct. 2636, 448 U.S. 242, 65 L.Ed.2d 742, rehearing denied 101 S.Ct. 37, 448 U.S. 916, 65 L.Ed.2d 1179.

State regulation or control, oil spills, waiver of preemption, Askew v. American Waterways Operators Inc., 1973, 93 S.Ct. 1590, 411 U.S. 325, 36 L.Ed.2d 280.

Law Review Commentaries

Encouraging safety through insurance-based incentives: financial responsibility for hazardous wastes. Jeffrey Kehne, 96 Yale L.J. 403 (1986).
Groundwater contamination claims in Connecticut. Dean M. Cordiano and Lynn Anne Glover, 60 Conn.B.J. 167 (1986).
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Regulation of batture pollution and ecology. Stan Millan, 33 Loyola (La.) L.Rev. 921 (1988).

§ 1322. Marine sanitation devices [FWPCA § 312]

(a) Definitions

For the purpose of this section, the term—

(1) "new vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters, the construction of which is initiated after promulgation of standards and regulations under this section;

(2) "existing vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters, the construction of which is initiated before promulgation of standards and regulations under this section;

(3) "public vessel" means a vessel owned or bareboat chartered and operated by the United States, by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(4) "United States" includes the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Canal Zone, and the Trust Territory of the Pacific Islands;

(5) "marine sanitation device" includes any equipment for installation on board a vessel which

public. The lead agency is encouraged to consider and respond, as appropriate, to significant comments that were submitted prior to the public comment period. A written response to significant comments submitted during the public comment period shall be included in the administrative record file.

(3) Documents generated or received after the decision document is signed shall be added to the administrative record file only as provided in § 300.825.

§ 300.825 Record requirements after the decision document is signed.

(a) The lead agency may add documents to the administrative record file after the decision document selecting the response action has been signed if:

(1) The documents concern a portion of a response action decision that the decision document does not address or reserves to be decided at a later date; or

(2) An explanation of significant differences required by § 300.435(c), or an amended decision document is issued, in which case, the explanation of significant differences or amended decision document and all documents that form the basis for the decision to modify the response action shall be added to the administrative record file.

(b) The lead agency may hold additional public comment periods or extend the time for the submission of public comment after a decision document has been signed on any issues concerning selection of the response action. Such comment shall be limited to the issues for which the lead agency has requested additional comment. All additional comments submitted during such comment periods that are responsive to the request, and any response to these comments, along with documents supporting the request and any final decision with respect to the issue, shall be placed in the administrative record file.

(c) The lead agency is required to consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action. All such comments and any responses thereto shall be placed in the administrative record file.

Subpart J—Use of Dispersants and Other Chemicals

SOURCE: 55 FR 8861, Mar. 8, 1990, unless otherwise noted.

§ 300.900 General.

(a) Section 311(c)(2)(G) of the Clean Water Act requires that EPA prepare a schedule of dispersants and other chemicals, if any, that may be used in carrying out the NCP. This subpart makes provisions for such a schedule.

(b) This subpart applies to the navigable waters of the United States and adjoining shorelines, the waters of the contiguous zone, and the high seas beyond the contiguous zone in connection with activities under the Outer Continental Shelf Lands Act, activities under the Deepwater Port Act of 1974, or activities that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States, including resources under the Magnuson Fishery Conservation and Management Act of 1976.

(c) This subpart applies to the use of any chemical agents or other additives as defined in subpart A of this part that may be used to remove or control oil discharges.

§ 300.905 NCP Product Schedule.

(a) *Oil Discharges.* (1) EPA shall maintain a schedule of dispersants and other chemical or biological products that may be authorized for use on oil discharges in accordance with the procedures set forth in § 300.910. This schedule, called the NCP Product Schedule, may be obtained from the Emergency Response Division (OS-210), U.S. Environmental Protection Agency, Washington, DC 20460. The telephone number is 1-202-382-2190.

(2) Products may be added to the NCP Product Schedule by the process specified in § 300.920.

(b) *Hazardous Substance Releases* [Reserved].

§ 300.910 Authorization of use.

(a) The OSC, with the concurrence of the EPA representative to the RRT and, as appropriate, the concurrence of the RRT representatives from the states with jurisdiction over the navigable waters threatened by the release or discharge, and in consultation with the DOC and DOI natural resource trustees, when practicable, may authorize the use of dispersants, surface collecting agents, biological additives, or miscellaneous oil spill control agents on the oil discharge, provided that the dispersants, surface collecting agents, biological additives, or miscellaneous oil spill control agents are listed on the NCP Product Schedule.

(b) The OSC, with the concurrence of the EPA representative to the RRT and, as appropriate, the concurrence of the RRT representatives from the states with jurisdiction over the navigable waters threatened by the release or discharge, and in consultation with the DOC and DOI natural resource trustees, when practicable, may authorize the use of burning agents on a case-by-case basis.

(c) The OSC may authorize the use of any dispersant, surface collecting agent, other chemical agent, burning agent, biological additive, or miscellaneous oil spill control agent, including products not listed on the NCP Product Schedule, without obtaining the concurrence of the EPA representative to the RRT, the RRT representatives from the states with jurisdiction over the navigable waters threatened by the release or discharge, when, in the judgment of the OSC, the use of the product is necessary to prevent or substantially reduce a hazard to human life. The OSC is to inform the EPA RRT representative and, as appropriate, the RRT representatives from the affected states and, when practicable, the DOC/DOI natural resource trustees of the use of a product not on the Schedule as soon as possible and, pursuant to the provisions in paragraph (a) of this section, obtain their concurrence or their comments on its continued use once the threat to human life has subsided.

(d) Sinking agents shall not be authorized for application to oil discharges.

(e) RRTs shall, as appropriate, consider, as part of their planning activities, the appropriateness of using the dispersants, surface collecting agents, biological additives, or miscellaneous oil spill control agents listed on the NCP Product Schedule, and the appropriateness of using burning agents. Regional Contingency Plans (RCPs) shall, as appropriate, address the use of such products in specific contexts. If the RRT representatives from the states with jurisdiction over the waters of the area to which an RCP applies and the DOC and DOI natural resource trustees approve in advance the use of certain products under specified circumstances as described in the RCP, the OSC may authorize the use of the products without obtaining the specific concurrences described in paragraphs (a) and (b) of this section.

§ 300.915 Data requirements.

(a) *Dispersants.* (1) Name, brand, or trademark, if any, under which the dispersant is sold.

(2) Name, address, and telephone number of the manufacturer, importer, or vendor.

(3) Name, address, and telephone number of primary distributors or sales outlets.

(4) Special handling and worker precautions for storage and field application. Maximum and minimum storage temperatures, to include optimum ranges as well as temperatures that will cause phase separations, chemical changes, or other alterations to the effectiveness of the product.

(5) Shelf life.

(6) Recommended application procedures, concentrations, and conditions for use depending upon water salinity, water temperature, types and ages of the pollutants, and any other application restrictions.

(7) Dispersant Toxicity. Use standard toxicity test methods described in Appendix C to part 300.

(8) Effectiveness. Use standard effectiveness test methods described in Appendix C to part 300. Manufacturers are also encouraged to provide data on

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