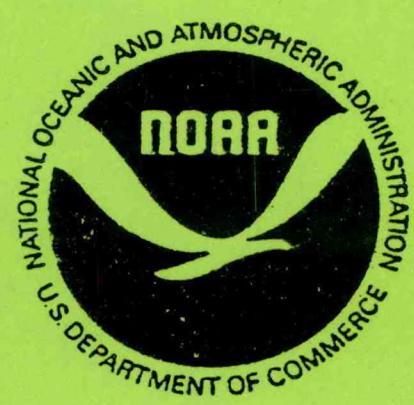


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Permits and Regulations  
Applicable to  
United States Ocean Thermal Energy Conversion  
Projects



U.S. DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration

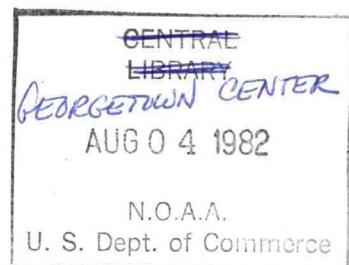
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# Permits and Regulations Applicable to United States Ocean Thermal Energy Conversion Projects

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April 1982



U. S. DEPARTMENT OF COMMERCE  
Malcolm Baldrige, Secretary

National Oceanic and Atmospheric Administration  
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Office of Ocean Minerals and Energy  
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## INTRODUCTION

Ocean Thermal Energy Conversion (OTEC) technology has the potential to be of substantial benefit to the Nation, both as a means of reducing dependence on expensive and unreliable foreign supplies of fossil fuel and as a new, high-technology industry for American private enterprise to develop and export. The technology's application in domestic markets will entail major construction, deployment, and operational activities in waters subject to federal and state jurisdiction. Thus, a number of federal, state, and local authorizations, licenses, and permits will be required for any significant OTEC project, whether it be for pilot plant, demonstration, or commercial purposes.

The National Oceanic and Atmospheric Administration (NOAA) is assigned a lead role in federal licensing of U.S. OTEC facilities and plantships under the Ocean Thermal Energy Conversion Act of 1980, Public Law 96-320 (the OTEC Act). NOAA views this role seriously and has taken a number of actions to assist OTEC project sponsors in obtaining necessary federal, state and local permits and authorizations. The NOAA licensing regulations (Appendix E) were developed with a view toward clarity and ease of use. A Technical Guidance Document was prepared to assist applicants in responding to environmental assessment requirements. Copies of it are available from NOAA's Office of Ocean Minerals and Energy. Provision was made in NOAA's licensing regulations, 15 CFR 981.70, for pre-application consultations with project sponsors. A more coordinated and efficient license application review process than that specified in the OTEC Act has been made available for use upon request by an applicant. This process, known as Consolidated Application Review, or CAR, is described in Part II - Application Review, of this Guide. The regulations governing CAR are set out in 15 CFR 981.380 through 981.450.

This Guide, covering permits and regulations applicable to U.S. OTEC projects, is another step in NOAA's process of providing the tools needed for OTEC project sponsors to design, develop, and implement commercial OTEC operations in the most efficient and cost-effective way. Its purpose is to provide OTEC project sponsors with an overview of potentially required licenses, permits, and authorizations, at both the Federal and State level, to give guidance on information about the proposed project needed to determine what permits are required, and to list, in a single reference, the agencies potentially involved in project review.

Project sponsors are encouraged to use the Guide in conjunction with early consultations with NOAA's Office of Ocean Minerals and Energy. Office staff are available to discuss project plans early in the conceptual design phase so that siting, design, and operational features can be developed with licensing and permitting requirements in mind. Staff have a working knowledge of all of the requirements noted in the Guide and are ready to assist in interpreting them in the context of a particular OTEC proposal and in arranging any necessary consultations with other involved agencies. NOAA strongly believes that this sort of early involvement with

project sponsors in the pre-application phase of project development will go far in assuring coordinated, efficient processing once actual applications for any necessary permits and licenses are made.

The Guide also describes the steps involved in review of an OTEC license application submitted to the National Oceanic and Atmospheric Administration under the OTEC Act. The normal process of license application review defined in the Act is described, as well as the voluntary, more integrated Consolidated Application Review, or CAR process.

The Guide is thus a tool for OTEC project sponsors throughout the project planning process. In the pre-application phase, Part I provides a framework for developing, with NOAA's assistance, the minimum amount of information on the project needed to determine which Federal, state, and local permits, licenses and authorizations will be required. Once this information has been developed, NOAA will aid project sponsors in conducting any necessary pre-application discussions with other involved agencies. The Office of Ocean Minerals and Energy stands ready to assist project sponsors in the preapplication effort, whether the particular project is subject to NOAA licensing, or is expected to be designated by the Secretary of Energy as a demonstration project not required to obtain a commercial license. The Office of Ocean Minerals and Energy also has available additional reference materials on permits and controls, and copies of required application forms.

This Guide is then used in conjunction with applicable rules and regulations to define the information which must be submitted to the appropriate agency when application for each required permit, license, or authorization is made. By providing an overall summary of these requirements, the Guide should be of assistance in avoiding the development of duplicative or redundant information. The Guide will enable OTEC project sponsors to work with NOAA in developing one overall set of descriptive information on the project to serve the needs of all agencies participating in project review.

Part II of the Guide generally describes the steps and timing of OTEC license application reviews, both under the conventional review process and CAR. The information contained in this Part, while not in great detail, defines the timing of the review process and identifies key decision points in it. By factoring this into the project planning cycle, delays in project implementation and the need for any major changes in the intended design or operation of the project brought about by regulatory requirements should be avoided.

Appendix A describes each potentially required Federal permit or control and gives cites to applicable statutes, rules, and regulations, along with an agency contact for more detailed information. Appendix B does the same for state and local permits and controls. Each state section also gives local federal agency contacts and information regarding federally designated historic sites, endangered species, etc. Appendix C provides additional references on permitting requirements and Appendix D indexes

permitting requirements by responsible agency. NOAA's licensing regulations are included as Appendix E.

This Guide has been issued to potential project sponsors in looseleaf format. This will enable NOAA's Office of Ocean Minerals and Energy to update it periodically to take account of changed requirements and new information on OTEC-related permits, licenses, and authorizations. Note, however, that the Guide does not replace the formal regulations of any agency. While every attempt has been made to present accurate information, formal agency regulations and procedures should be followed in any case where the Guide conflicts with them.

It is urged that persons using the Guide consult early with the Office of Ocean Minerals and Energy for direct assistance to assure that the latest information is being used in project planning. Also, users who become aware of new or altered requirements are strongly encouraged to pass that information on to the Office of Ocean Minerals and Energy. By working together in this way from the early stages of project planning, NOAA and the industry can streamline the OTEC permitting process and move forward together toward the national goal of a viable domestic and export OTEC industry.

## PART I - Preapplication Consultations

This phase of OTEC project development begins with the decision to plan an OTEC facility or plantship. Project sponsors are encouraged to avail themselves of the opportunity to consult with NOAA's Office of Ocean Minerals and Energy as soon as possible after the decision to proceed is made. Assistance is available in using this Part of the Guide to determine which federal, state and local permits, licenses and controls are applicable to a particular U.S. OTEC project.

In making that determination, a certain minimum amount of descriptive information on the proposed project is required. Table I-1 lists that information, and NOAA will help project sponsors in using it as a check-list in preparing the project "prospectus". Once that is done, Table I-2 will be used as a tool for determining applicable federal, state and local requirements. Note that Table I-2 is subdivided into a federal section and a number of state, commonwealth, territory, and possession sections. The federal section will be used for any project, along with the appropriate state, commonwealth, territory, or possession section for the intended location of the project.

Once Table I-2 has been used to determine which regulations are applicable to the proposed OTEC project, Appendices A and B are used to provide specific information on responsible agency contacts, application information requirements, and processing procedures for all applicable permits, licenses, and other controls. NOAA will counsel users of the Guide to assure that the latest regulatory requirements are being used.

Subpart B of NOAA's OTEC licensing regulations (Appendix E) sets out the information requirements for a NOAA license application. NOAA will work with potential license applicants as they use Subpart B as a tool for organizing the detailed project description to avoid excessive or duplicative preparation of plans, analyses, etc. The information requirements listed for each required federal, state, and local permit or control will also be considered at that time. Then, as sections of the NOAA license application are developed, they can be expanded as necessary to satisfy the needs of other review agencies as well. Working together this way, NOAA and the OTEC project sponsor should be able to develop a single set of detailed descriptive materials on the proposed project and its projected impacts which will satisfy the requirements of all review agencies. To aid in this effort, NOAA will schedule early consultations as necessary with other appropriate agencies to assure that project information which will meet their needs is being included.

This early and ongoing consultation process between NOAA, the potential applicant, and other agencies as necessary should also serve to identify any major permitting issues before an application is submitted. NOAA will then assist project sponsors in resolving them during the informal, pre-application phase of project development, if possible, so that actual permit and license processing can proceed smoothly.

Table I-1

Information Required to Determine Applicable  
Permits and Regulations

	<u>YES</u>	<u>NO</u>
<b>I. Project Location</b>		
a. on land in U.S.		
b. in U.S. navigable waters (generally, rivers, estuaries, bays, and coastal waters out to 3 miles from shore)		
c. in U.S. territorial sea (generally coastal waters out to 3 miles at sea)		
d. on U.S. outer continental shelf (generally from 3 miles at sea to outer boundary of submerged lands appertaining to U.S. jurisdiction and control)		
e. on land within 100 yards of shoreline		
f. on land within 40 feet of shoreline		
<b>II. Project Site</b>		
a. sites listed or eligible for listing on state or National Register of Historic Places in vicinity (See appropriate state section of Appendix B.)		
b. marine mammals in vicinity (See Marine Mammal Protection Act Permit, p. A-57)		
c. threatened or endangered species or critical habitat in vicinity (See appropriate state section of Appendix B)		
d. Marine Sanctuary in vicinity (See appropriate state section of Appendix B)		
e. airport, heliport, or seaplane facility in vicinity		
<b>III. Project Design</b>		
a. vessel		
b. building		
c. fixed or moored marine structure		
d. connected to U.S. by pipeline or cable		
e. includes airport or heliport		

Table I-1 (cont.)  
Information Required to Determine Applicable  
Permits and Regulations

<u>III. Project Design (cont.)</u>	<u>YES</u>	<u>NO</u>
f. effluent discharge to navigable waters or territorial sea		
g. effluent discharge to ocean waters beyond territorial sea		
h. sunken obstruction in navigable waters		
i. sunken obstruction on outer continental shelf		
j. capacity for 250 or more barrels of oil		
k. includes radio transmission facilities		
l. involves routine atmospheric emissions		
m. project will be documented under U.S. law		
n. project will involve use of groundwater for non-domestic purposes		
o. effluent discharges will violate local ambient water quality standards		
p. includes electrical transmission lines or other utility installations within state highway rights-of-way		
q. design is not covered by national plumbing or electrical codes, or involves use of nonstandard construction methods or materials		
r. design is not in accordance with zoned uses at proposed site location		
s. project will involve digging a well		
<u>IV. Project Sponsor and Financing Organization</u>		
a. owned in whole or in part by U.S. citizens		
b. financed in whole or in part with foreign funds		
c. sponsors involved in other related business activities		
d. project is commercial		
e. project is designated demonstration project (designated by Secretary of Energy)		

Table I-1 (cont.)  
Information Required to Determine Applicable  
Permits and Regulations

<u>V. Project Construction Activities</u>	<u>YES</u>	<u>NO</u>
a. discharge of dredged or fill material into waters of the United States (generally all internal waters and the territorial sea)		
b. transportation of dredged material for dumping into ocean waters (waters seaward of the base line of the territorial sea)		
c. excavating, grading, or stockpiling of soil, gravel, etc.		

Table I-2a  
Required Federal Permits/Controls

If YES (from Table I-1)	THEN (Check if required)	REQUIRED PERMIT/ CONTROL
I.a, OR		NOAA OTEC License, p. A-3
I.c AND III.c, OR	unless	
III.a AND IV.a, OR	IV.e YES	
III.c AND III.d, OR		
III.c AND III.m		
I.b AND III.c		Permit for Structures or work in or Affecting Navigable Waters of the United States, p. A-5
I.d AND III.c		Permit for Artificial Islands, Installations, and Other Devices Installed on the Outer Continental Shelf which May Obstruct Navigation, p. A-7
V.a		Permit for Discharges of Dredged or Fill Material into Waters of the United States p. A-9
V.b		Permit for Ocean Dumping of Dredged Material, p. A-11
I.b, OR		Coast Guard Navigation Safety Requirements, p. A-13
III.a, OR		
III.h, OR		
III.i		
III.a OR		U.S Coast Guard Vessel Inspection Requirements, p. A-17
I.b AND III.c, OR		
I.c AND III.c, OR		
I.d AND III.c		
I.c AND III.c, OR		Documentation and Financing of OTEC Facility or Plantship, p. A-19
III.a AND IV.a, OR		
III.c AND III.d, OR		
IV.b		

Table I-2a (cont.)  
Required Federal Permits/Controls

IF YES (from Table I-1)	THEN (check if required)	REQUIRED PERMIT/ CONTROL
III.m		U.S. Coast Guard Manning Requirements, p. A-23
I.a AND III.j, OR		U.S. Coast Guard Pollution Prevention Requirements, p. A-25
I.b AND III.j, OR		
I.c AND III.j, OR		
I.d AND III.j, OR		
III.a		
II. e, OR		Notices required by the Federal Aviation Administration, A-27
III.e		
III.k		Federal Communications Commission Licenses, A-29
I.a, OR		Occupational Safety and Health Standards, p. A-31
I.b, OR		
I.c		
IV.c		Antitrust Business Review, p. A-33 (Recommended. Note formal antitrust review is part of NOAA licensing process in any case)
III.f, OR		NPDES Permit, p. A-37
III.g		
III.e		Clean Air Act Compliance, p. A-39
I.a, OR		Coastal Zone Management Consistency Certification, p. A-43
I.b, OR		
I.c, OR		
I.d, OR		
III.d		

Table I-2a (cont.)  
Required Federal Permits/Controls

IF YES (From Table I-1)	THEN (check if required)	REQUIRED PERMIT/ CONTROL
II.d		National Marine Sanctuaries Review, p. A-45
II.a		Historic Preservation Act Review, p. A-47
II.c		Endangered Species Review, p. A-51
I.a, OR		Fish and Wildlife Coordination Act Consultations, p. A-55
I.b, OR		
I.c, OR		
I.d		
II.b		Marine Mammal Protection Act Permit, p. A-57
I.a, OR		Federal Environmental Impact Statement, p. A-59
I.b, OR		
I.c, OR		
I.d, OR		
III.a		

Table I-2b  
Required Hawaii State/County  
Permits/Controls

IF YES (from Table I-1)	THEN (Check if required)	REQUIRED PERMIT/ CONTROL
I.a and III.d OR		Permit for Shoreline Waters Work, p. HI-3
I.b and III.c OR		
I.c and III.c OR		
<u>III.d</u>		
I.a and III.d OR		Conservation District Use Permit, p. HI-5
I.b and III.c OR		
I.c and III.c OR		
<u>III.d</u>		
I.a and III.n		Designated Groundwater Area Use Permit, p. HI-7
I.e, OR		Special Management Area Permit, p. HI-27
<u>III.d</u>		
I.e and IV.c OR		Shoreline Setback Variance, p. HI-31
<u>III.d and IV.c</u>		
<u>III.f</u>		National Pollutant Discharge Elimina- tion System (NPDES) Permit, p. HI-19
I.a, OR		Environmental Impact Statement, p. HI-9 (If required by a state permitting agency)
I.b, OR		
I.c, OR		
<u>III.d</u>		

NOTE: State of Hawaii claims jurisdiction over channel waters between major islands, so some activities to be conducted more than three miles from shore may still be subject to state requirements.

Table I-2b (cont.)  
Required Hawaii State/County  
Permits/Controls

If YES (From Table I-1)	Then (Check if required)	Required Permit/ Control
III.1		Authority to Construct Permit and Permit to Operate (air quality), p. HI-17
I.a, OR		Coastal Zone Management Consistency Review, p. HI-15 (See also p. A-43)
I.b, OR		
I.c, OR		
<u>III.d</u>		
I.a		Building Permit for Building, Electrical and Plumbing Work, p. HI-33, HI-37
I.a and III.q		Variance from Building, Electrical, and Plumbing Codes, p. HI-39
III.p		Permit to Install Utilities within State Highway Rights-of-Way, p. HI-25
II.a		Historic Site Review, p. HI-13
I.a and II.a		Certificate of Appropriateness, (possible, if located in Honolulu County) p. HI-49
III.o		Zone of Mixing Approval, p. HI-23
I.a and III.r		Conditional Use Permit or zoning waiver (If project located in Honolulu County), p. HI-41, HI-45
I.a and V.c		Grubbing, Grading, and Stockpiling Permit, (If project located in Honolulu or Hawaii Counties), p. HI-43
I.a and III.s		Well Permit (If project located in Honolulu County), p. HI-47

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When the application is determined to be complete, NOAA has 5 days within which to publish a notice of its receipt in the Federal Register. That notice will include a summary of the project plans. If the application is for an OTEC facility(i.e., not a grazing plantship), the notice will also designate an "application area." The application area so designated encompasses the geographic area within which the operation of the proposed OTEC facility would significantly impact the operation of another OTEC facility as well as the area within which the operation of another OTEC facility would significantly impact the operation of the proposed OTEC facility. The notice will invite submission of other applications for facilities within the designated application area. Any such additional applications received by NOAA within prescribed deadlines will be considered in conjunction with the original one. NOAA will weigh the national interest and determine which one or combination of license applications received for the designated application area would best serve it. A license or licenses will then be awarded on the basis of that analysis, assuming all other legal requirements are met.

To assure timely processing of OTEC facility applications, the Act requires that any entity intending to file an application within a designated application area give notice of that intent to NOAA within 60 days after publication of the initial Federal Register notice. The application itself must be filed within 90 days after publication of the initial notice.

To assist NOAA in balancing competing applications for a designated application area, certain additional information must be provided by the initial and subsequent applicants, where additional applications are actually received. That information relates to projected costs to the end-users of electricity or products to be produced at the proposed OTEC project, and to potential fuel and raw material savings which might be realized through project operation.

Once the initial notice of receipt of an application has been published, NOAA will forward copies of the application to other involved federal agencies. Applicants are required to provide 45 copies of the application to assist in making this distribution.

The Act defines the role that state governments will play in review of the license application. If the proposed OTEC project will be located in state waters, or will be connected to a state by pipeline or cable, that state is automatically designated an "adjacent coastal state." Such designations are noted in the Federal Register notice of receipt of the application. The notice also calls for applications for additional adjacent coastal state designations and provides 14 days in which to apply, as mandated by the Act. Additional adjacent coastal state designations will be made by NOAA, upon application within the 14 day deadline, provided NOAA determines that the risk of environmental harm to each such state is at least as great as the risk to a state receiving automatic designation, or that the proposed OTEC project could reasonably be expected to significantly degrade possible OTEC operations in such state. Upon designation, NOAA provides each adjacent coastal state with a copy of the license application.

The next step in the license application review process is preparation of a draft environmental impact statement (EIS). The Act requires that NOAA prepare a single EIS covering all federal actions related to the proposed OTEC project. NOAA must complete the draft within 180 days after publication of the Federal Register notice of receipt of the application.

One of the federal agencies which will receive a copy of any OTEC license application is the Department of Justice. The Act requires the Attorney General to conduct an antitrust review of it within 90 days after its receipt by the Department. If the Justice Department does not file written views with NOAA on the antitrust implications of the proposed project within the 90 day deadline, license processing will proceed as if a favorable review had been received. If the Attorney General decides that the proposed project would create a situation inconsistent with the antitrust laws, NOAA may still proceed to issue a license. However, the Act prohibits issuance of a NOAA license if the Attorney General determines, within the 90 day deadline, that issuance would create a situation in violation of the antitrust laws.

Another agency action which must be taken early in the license application review process involves possible designation of a navigation safety zone around the OTEC facility or plantship site. Under the terms of the Act, the Coast Guard has 30 days after publication of the initial Federal Register notice to determine the need, if any, for a safety zone and to make the designation, if required.

After all applications have been received and a draft EIS has been prepared, public hearings on the application(s) must be held. Each license applicant must submit an additional license fee payment to NOAA of \$100,000 not later than the date of the first such public hearing on the application. At least one hearing will be held in the District of Columbia and in each designated adjacent coastal state. The Act requires NOAA to consolidate these hearings with those required by other federal agencies involved in permitting the proposed OTEC project, to the maximum extent practicable. Public notice of all hearings will be given in advance, all interested persons may attend and submit oral and written statements, and a report on each hearing will be prepared by the presiding officer within 21 days after its completion. If, on the basis of a public hearing report, NOAA determines that a specific and material factual issue related to the application remains to be resolved, a formal evidentiary hearing will be held before an administrative law judge. The results of any such hearing will be a part of the basis for the ultimate decision on the license application.

NOAA must complete all hearings on an OTEC license application not later than 240 days after publication of the initial Federal Register notice. The Act requires that all involved federal agencies and adjacent coastal states with approved Coastal Zone Management plans make their views on the application known to NOAA within 45 days after completion of public hearings. NOAA then has 45 days in which to make a final decision on issuance of the OTEC license and to issue the final EIS on the application. Each applicant must submit a final license fee payment to NOAA of \$50,000 before the

license will be issued. A license, when issued, becomes effective 30 days after issuance. Detailed criteria by which NOAA will make the decision on license issuance are set out in Section 981.470 of the OTEC regulations contained in Appendix E to this Guide.

This license application review process is required by the OTEC Act itself. It will result in each license review being accomplished by NOAA in not more than 356 days after receipt of the initial application, provided it is complete when initially received. The process provides for a significant amount of interagency coordination through the mechanisms of a single federal application, a consolidated federal EIS, and combined hearings, where possible. These and the other steps in the license review process are depicted in figure II-1. The notes to the figure give cites to the relevant sections of the OTEC Act and NOAA's licensing regulations.

**Figure II-1**  
**OTEC License Application Review Process**  
 (as required by P. L. 96-320)

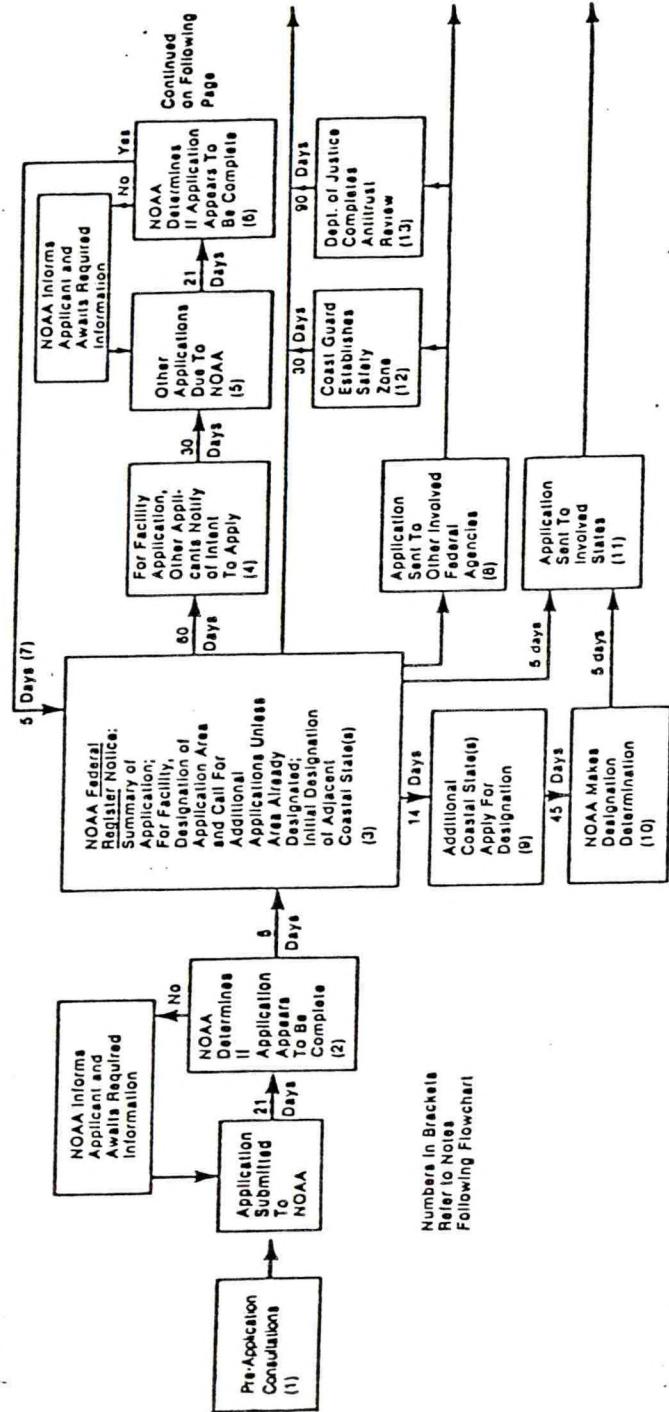
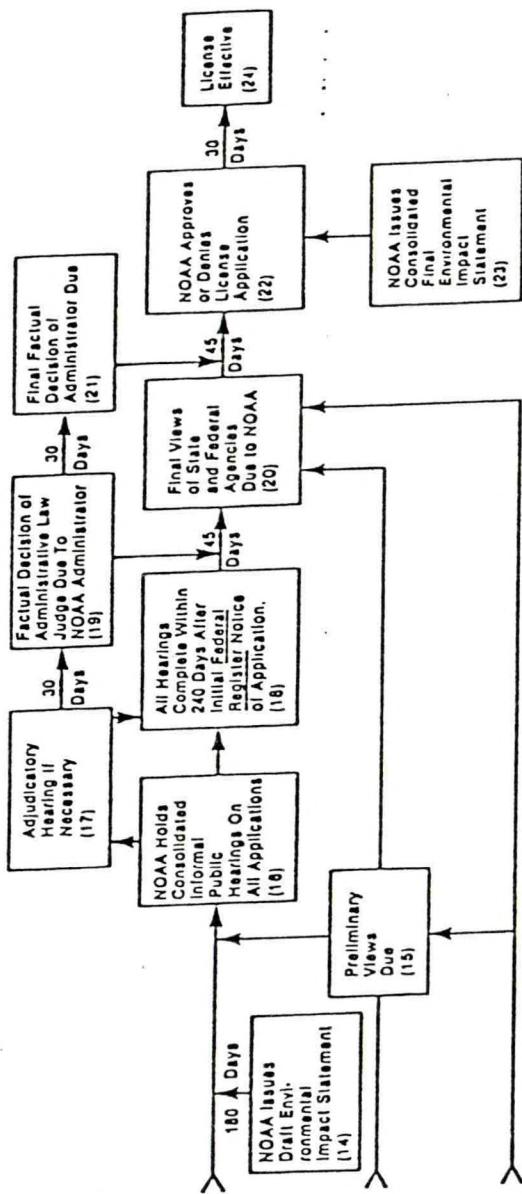


Figure 11-1 (Cont.)  
**OTEC License Application Review Process**  
(as required by P. L. 96-320)



Notes on OTEC Licensing Process Flowchart, Figure II-1

- [1] Upon request, NOAA will consult with any prospective license applicant to assist in preparing the application and in contacting other Federal and State agencies involved in the application review process, 15 CFR 981.70.
- [2] NOAA must make the determination within 21 days after receipt of the application, 42 U.S.C. 9112(d)(1); 15 CFR 981.280.
- [3] NOAA must publish the Federal Register notice within 5 days after determining that the application appears to be complete, 42 U.S.C. 9112(d)(1); 15 CFR 981.290. If the application is for an OTEC facility, the notice designates the application area and calls for additional applications, 42 U.S.C. 9112(e)(1); 42 U.S.C. 9112 (e)(2); 15 CFR 981.290. The notice also announces mandatory adjacent coastal state designations, 42 U.S.C. 9115(a)(1); 15 CFR 981.330.
- [4] Other prospective applicants must file notice of intent to apply not later than 60 days after publication of the Federal Register notice on the initial application, 42 U.S.C. 9112(e)(2); 15 CFR 981.290.
- [5] Other prospective applicants must file applications not later than 90 days after publication of the Federal Register notice on the initial application, 42 U.S.C. 9112(e)(2); 15 CFR 981.290.
- [6] NOAA must make the determination within 21 days after receipt of the application, 42 U.S.C. 9112(d)(1); 15 CFR 981.280.
- [7] NOAA must publish the Federal Register notice within 5 days after determining that the application(s) appear(s) to be complete, 42 U.S.C. 9112(d)(1); CFR 981.290. Note that for these additional applications in a previously designated application area, no additional application area will be designated. Note also that the requirement that all public hearings must be completed within 240 days of notice of the initial application is not affected by receipt of subsequent applications for the initial designated application area, 42 U.S.C. 9112(g), 15 CFR 981.360. Receipt of additional applications may require additional mandatory designation of adjacent coastal state(s), 42 U.S.C. 9115(a)(1); 15 CFR 981.330.
- [8] At the time the Federal Register notice is published, NOAA must forward copies of the application to other involved Federal agencies, 42 U.S.C. 9112(f); 15 CFR 981.300.
- [9] Coastal states not designated under the procedure described in note 3 wishing to be designated must make a request to NOAA not later than 14 days after publication of the Federal Register notice, 42 U.S.C. 9115(a) (2); 15 CFR 981.330

- [10] NOAA must act on the designation request within 45 days after receipt, 42 U.S.C. 9115(a)(2); 15 C.F.R. 981.330.
- [11] NOAA must transmit a copy of the application to the Governor of each adjacent coastal state no later than 5 days after designation, 42 U.S.C. 9115(b)(1); 15 CFR 981.330.
- [12] The U.S. Coast Guard must designate, if necessary, a safety zone around the OTEC facility or plantship site within 30 days after publication of the Federal Register notice, 42 U.S.C. 9118 (d)(1).
- [13] The Attorney General must complete antitrust review of the application within 90 days after its receipt by the Justice Department, 42 U.S.C. 9114(a); 15 CFR 981.320.
- [14] NOAA must issue a consolidated draft environmental impact statement (EIS) within 180 days after the initial Federal Register notice, 42 U.S.C. 9117(e), 15 CFR §§ 981.310 and 981.370.
- [15] NOAA, as well as other Federal and State agencies, will attempt to make their preliminary views on the license application available prior to the first public hearing on the application, 15 CFR §§ 981.300 and 981.330.
- [16] Insofar as practicable, NOAA hearings on the license application will be consolidated with those of other agencies, 42 U.S.C. 9112(g); 15 CFR 981.340.
- [17] If NOAA determines, after public hearings, that an adjudicatory hearing is needed to resolve a specific and material factual issue, NOAA will conduct such a hearing, 42 U.S.C. 9112(g); 15 CFR §§ 981.350, 981.560, and 981.570.
- [18] NOAA will publish a Federal Register notice announcing completion of all public hearings and specifying the date by which final views of other Federal and State agencies are due, 15 CFR 981.360.
- [19] If an adjudicatory hearing has been held, the recommended decision of the administrative law judge should be transmitted to the NOAA Administrator not later than 30 days after completion of the adjudicatory hearing, 15 CFR 981.560(1)(2).
- [20] Final views of other involved Federal and State agencies must be transmitted to NOAA within 45 days after public hearings are concluded, 42 U.S.C. 9112(f); 42 U.S.C. 9115(b)(1); 15 CFR 981.300; 15 CFR 981.330.
- [21] The NOAA Administrator should make his decision on the factual issue within 30 days after receipt of the recommended decision of the administrative law judge, 15 CFR 981.560(1)(3).

- [22] The NOAA Administrator must make a final decision on each license application not later than 90 days after completion of public hearings, 42 U.S.C. 9112(i)(1); 15 CFR 981.460.
- [23] NOAA will issue the final EIS on the license application not later than issuance of the final licensing decision, 42 U.S.C. 9117(e); 15 CFR 981.370.
- [24] A 30-day "cooling off" period, after issuance of the final EIS and before agency action becomes effective, is required by Council on Environmental Quality regulations, 40 CFR 1506.10.

Although this process, as mandated by the OTEC Act, is more integrated and efficient than the norm in federal permitting, NOAA early recognized a need for a more consolidated process for OTEC license application review to ease the regulatory burden on the embryonic OTEC industry. This process, known as Consolidated Application Review (CAR), is described in the next section of the Guide.

#### Consolidated Application Review (CAR)

The CAR process is an addition to the mandatory license review steps covered in the preceding section. CAR is voluntary on the part of an OTEC license applicant. Its use may be requested when the application is initially made to NOAA. The process is also voluntary on the part of federal and state agencies other than NOAA. However, all potentially involved federal agencies have indicated agreement in principle to participate should an applicant request use of CAR.

The CAR process starts with requests by NOAA for involved federal and state agencies to designate CAR team members. These requests are made at the time copies of the application are provided to those agencies. It is requested that designations be made within 14 days of receipt of the application. A request to a state government includes a request for designation of appropriate local government representatives to the CAR team.

Within 45 days after all members of the CAR team are designated, the team will develop and sign a Joint Agreement. The Joint Agreement describes the responsibilities of the applicant and each involved agency in the review process; sets the schedule for all meetings, hearings, and decisions necessary in the review process and sets out a brief description of the proposed OTEC project or projects which are the subject of the review. In signing the Joint Agreement, each CAR team member commits to a good faith effort to work in a cooperative and coordinated fashion to assure that the schedule in it is adhered to.

After the Joint Agreement is signed, an interagency CAR team meeting is held. The meeting is open to the public and is held in a designated adjacent coastal state, if practicable. At the meeting the applicant describes the details of the proposed OTEC project. Each agency CAR team member describes the procedures to be followed by his or her agency in processing necessary permits, authorizations, and approvals for the project. Public participation is invited, in the form of oral and written presentations. The interagency CAR team meeting may be combined with a scoping meeting on the EIS for the proposed project.

After the initial interagency CAR team meeting, the team meets periodically as necessary to assure that the terms of the Joint Agreement are being adhered to and that the overall review is proceeding efficiently in accordance with the agreed-upon schedule.

The relationship of the CAR process to the mandatory review process required by the OTEC Act is shown in figure II-2. The increased coordi-

nation and accountability provided by CAR should go far in assuring timely processing of all necessary project permits and authorizations. Applicants for NOAA OTEC licenses are strongly encouraged to make use of it as they commence the project approval phase.

Figure 11-2 OTEC Consolidated Application Review (CAR) Process

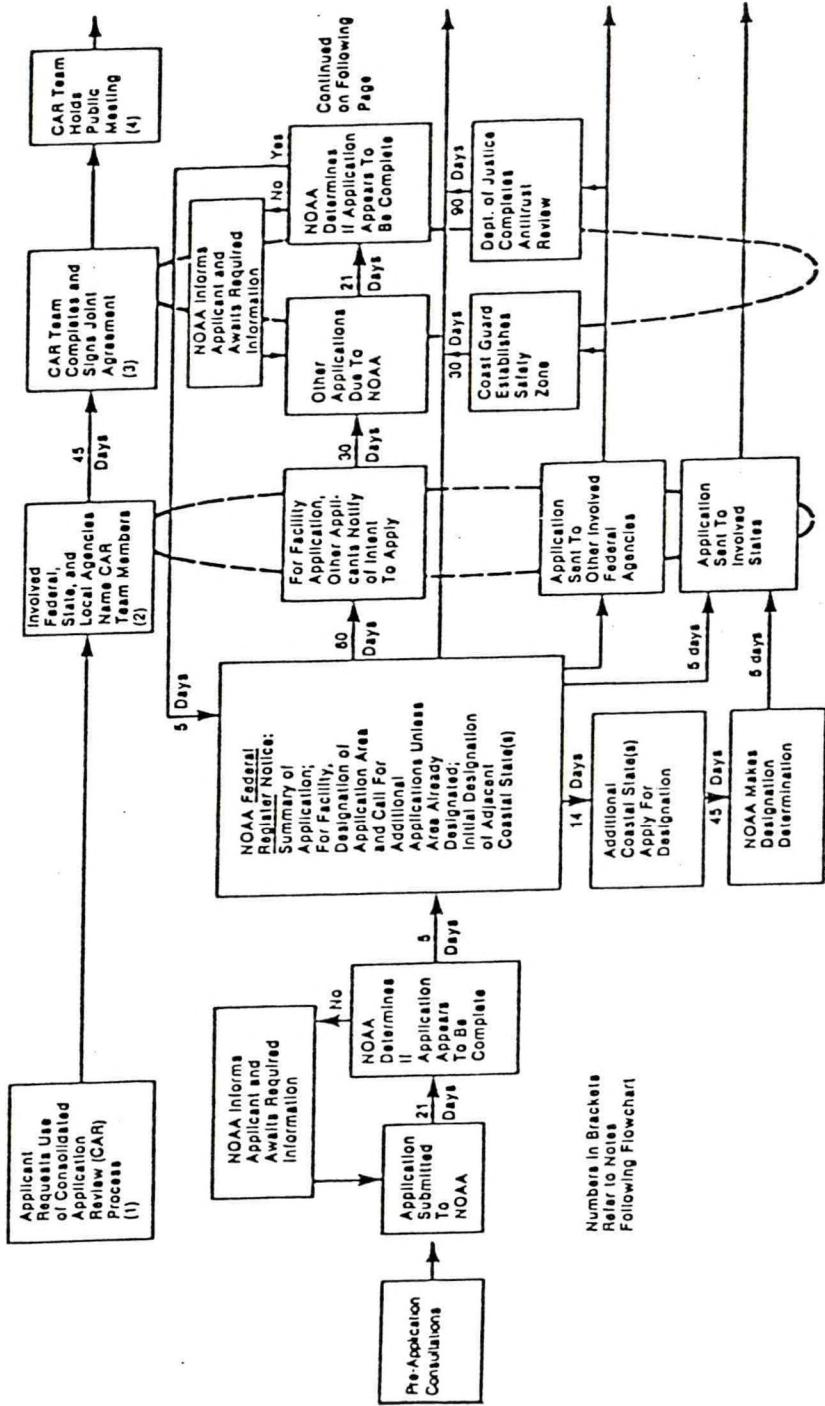
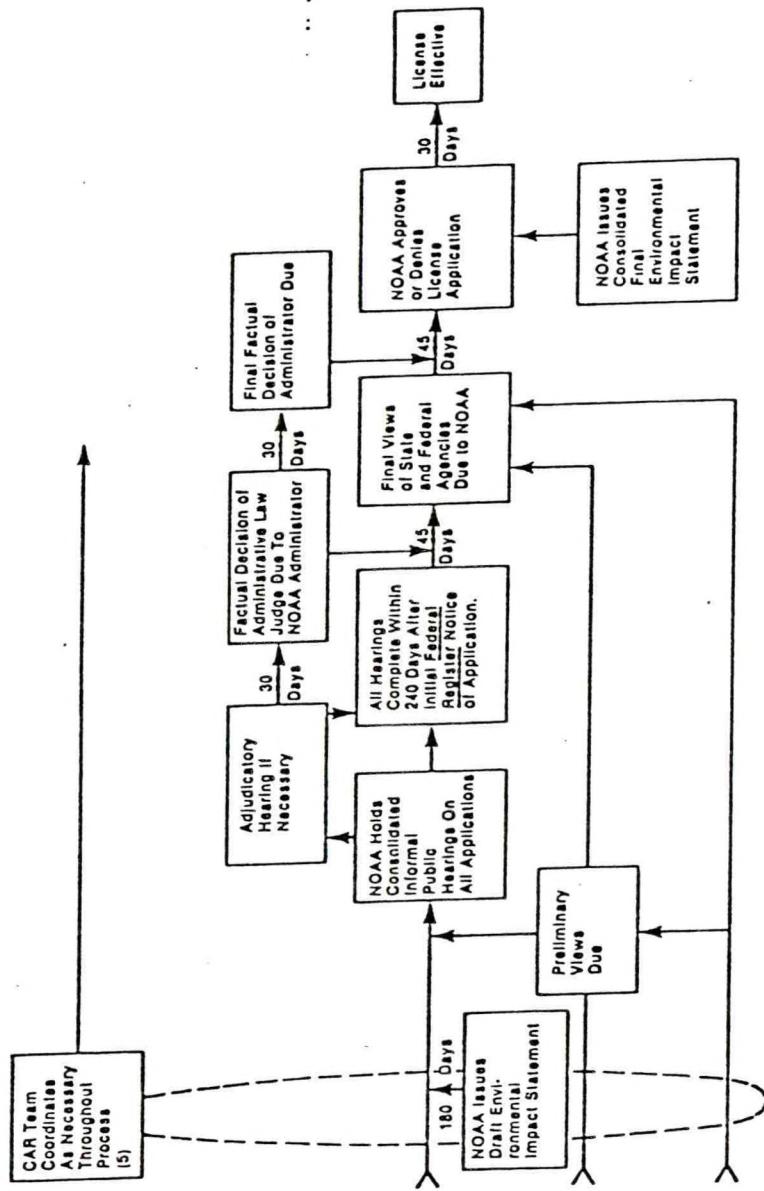


Figure 11-2 (Cont.)  
OTEC Consolidated Application Review (CAR) Process



Notes on OTEC Consolidated Application Review (CAR)  
Process Flowchart, Figure II-2

- [1] The Voluntary Consolidated Application Review (CAR) process may be requested by applicant
- [2] Federal, state, and local agencies participating in the voluntary Consolidated Application Review (CAR) process should designate CAR team members within 14 days after receipt of the application, 15 CFR §§ 981.410 and 981.420.
- [3] CAR team members will complete and sign the Joint Agreement within 45 days after all team members are designated, 15 CFR 981.430.
- [4] The CAR team holds a public meeting on the application prior to any required public hearings, 15 CFR 981.440.
- [5] The CAR team continues to coordinate as necessary throughout the license review process, 15 CFR 981.450.

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**Federal Permits/Controls**

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Note: Date shown by each entry is date of current revision of that entry. When using Guide, check NOAA's Office of Ocean Minerals and Energy (202) 254-3483 to ensure that current revisions are being used.

NOAA OTEC License1. When required

An OTEC project may take the form of a facility or a plantship. An OTEC facility is a project located on land or on a fixed or moored platform at sea. An OTEC plantship is a vessel which uses the OTEC process while floating unmoored or moving through the water. If the proposed OTEC project will be a facility or plantship documented under the laws of the United States, a facility located on land or in the territorial sea of the United States, or a facility connected to the United States by pipeline or cable, the project sponsors must obtain an OTEC license from the National Oceanic and Atmospheric Administration (NOAA) prior to commencing construction or operation of the project. If the proposed OTEC project will be a plantship owned by United States citizens, a NOAA OTEC license must be obtained prior to construction and operation, unless the plantship is the subject of a license issued by a foreign nation whose licenses have been found by NOAA to be compatible with NOAA-issued licenses. The one exception to these requirements for NOAA licenses is in the case of OTEC demonstration projects so designated in writing by the Secretary of Energy. Such projects are not required to obtain NOAA licenses for so long as the demonstration designation remains in force.

NOAA's Office of Ocean Minerals and Energy is prepared to assist OTEC project sponsors in complying with these and other federal, state, and local requirements applicable to the project. Early consultations with the Office are encouraged.

2. Synopsis of information required in application

When application is made for a NOAA license, information must be provided on: the structure and ownership of the business entity sponsoring the OTEC project; the operating characteristics of the proposed project including type of power cycle, cold and warm water flow rates, and annual product or electricity production estimates; the proposed site for the project, including a site plan showing the location and type of each major onshore and offshore component of the project; the proposed operating procedures for the project in normal and severe weather conditions; the proposed construction and deployment schedule and procedures for the project; the navigation safety and communications features of the proposed project; and the projected environmental impacts of the proposed project. To assist applicants in preparing environmental analyses, NOAA has prepared a Technical Guidance Document which is available from the Office of Ocean Minerals and Energy.

An initial, non-refundable payment of \$100,000 must be submitted to NOAA with the application.

### 3. Processing procedure

Under the terms of the OTEC Act, the application to NOAA constitutes application for all Federal authorizations for the OTEC project other than those administered by the United States Coast Guard. Upon receipt of an application, NOAA provides copies to all other involved federal agencies and states. From that point on, the mechanics of the application review process depend on whether or not the applicant has requested use of the Consolidated Application Review (CAR) process provided for in NOAA's licensing regulations. Detailed descriptions of the steps and timing of the license review process, both with and without CAR, are given in Part II of this Guide. In general, however, NOAA first reviews the application for completeness. If it appears to contain all of the required information, a notice to that effect is published in the Federal Register. The notice includes a description of the proposed project, designation of an application area in which competing applications for other OTEC projects may be received, and designations of adjacent coastal states which will be involved in the application review process. If the applicant has requested use of the CAR process, a CAR team consisting of appropriate federal, state, and local representatives is formed and develops a coordinated review schedule for the application. In any case, a draft environmental impact statement covering all federal actions associated with the proposed OTEC project is prepared by NOAA. Public hearings are held on the proposal in Washington, D.C., and the potentially affected states. Prior to the date of the first of these hearings, the applicant must make an additional \$100,000 payment on the application fee. NOAA receives opinions on the advisability of issuing the license from other involved federal agencies and states, and a final decision to issue or deny the license is made by NOAA. The final \$50,000 payment on the licensing fee must be submitted to NOAA before this license will be issued. The OTEC Act sets tight deadlines on the steps in the application review process, and it must be completed in slightly less than one year after receipt of a license application, provided the application is complete as initially submitted.

### 4. Applicable laws

Federal: Ocean Thermal Energy Conversion Act of 1980, (Pub. L. 96-320; 42 U.S.C. 9101, et seq.)

### 5. Rules and regulations

Federal: 15 CFR Part 981

### 6. Responsible agency

Federal: Office of Ocean Minerals & Energy  
National Oceanic & Atmospheric Administration  
Page I Building, Room 410  
2001 Wisconsin Ave., N.W.  
Washington, D.C. 20235  
(202)254-3483

Permit for Structures or Work in or Affecting Navigable Waters of the United States

1. When required

If the proposed OTEC project will involve structures or work in or affecting navigable waters of the United States, other than bridges or causeways, this permit must be obtained from the U.S. Army Corps of Engineers. Structures include, but are not limited to, piers, wharves, dolphins, weirs, booms, breakwaters, bulkheads, jetties, permanent mooring structures, power transmission lines, permanently moored floating vessels, pilings, aids to navigation, and any other permanent or semi-permanent obstacles or obstructions. Work includes, but is not limited to, dredging, filling, excavation, disposal of dredged material, or other modification of a navigable water of the United States. Navigable waters of the United States are those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. 33 CFR Part 329 contains a more complete definition of the term "navigable waters of the United States." Note also that structures or work outside navigable waters of the United States will require this permit if they affect the course, location or condition of the waterbody so as to impact on the navigable capacity of the waterbody.

2. Synopsis of information required in application

Information required to be submitted with this permit application is similar to that described under Permit for Discharge of Dredged or Fill Material into Waters of the United States.

3. Processing procedure

Application for this permit must be made to the U.S. Army Corps of Engineers District Engineer in charge of the District in which the OTEC project will be located. Processing procedures are similar to those for the Permit for Discharge of Dredged or Fill Material into Waters of the United States. Special attention will be given to coordination with the U.S. Coast Guard in cases involving placement of fixed or floating aids to navigation. If the proposed project involves dredging of a channel, slip, or other project for navigation, any permit issued will also authorize periodic maintenance dredging. If the proposed project would involve construction, maintenance, or operation of facilities at the borders of the United States, close coordination will be maintained with the Department of State during processing. If any of the proposed structures will be associated with seaplane operations, the Federal Aviation Administration within the Department of Transportation will be involved in reviewing the permit application. Note that a single permit will be issued by the Corps of Engineers covering all applicable Corps authorities. See also pp. A-7, A-9 and A-11.

4. Applicable laws

Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403)

5. Rules and regulations

Federal: 33 CFR Parts 320, 322, 325 to 330

6. Responsible agency

Federal: U.S. Army Corps of Engineers District Engineer. See appropriate state section of Appendix B.

Permit for Artificial Islands, Installations, and Other Devices Installed on the Outer Continental Shelf, which May Obstruct Navigation

1. When required

If the proposed OTEC project will involve placement of artificial islands, installations, or other devices on the outer continental shelf, this permit must be obtained from the U.S. Army Corps of Engineers. The outer continental shelf is all submerged lands seaward of the boundaries of the states, the subsoil and seabed of which appertain to the United States and are subject to its jurisdiction and control.

2. Synopsis of information required in application

Information required to be submitted with this permit application is similar to that described under Permit for Discharge of Dredged or Fill Material into Waters of the United States.

3. Processing procedure

Application for this permit must be made to the U.S. Army Corps of Engineers District Engineer in charge of the District in which the OTEC project will be located. Processing procedure is the same as for a Permit for Structures or Work in or affecting Navigable Waters of the United States. However, in cases where the location is on submerged lands under mineral lease from the Bureau of Land Management, U.S. Department of the Interior, that agency will also fully evaluate the proposal. The review by the Corps of Engineers will be limited to an evaluation of the impact of the proposed structures or work on navigation and national security. The U.S. Coast Guard will be involved in determining any markings necessary on the artificial island, installation, or other device, necessary for the protection of navigation. Note that a single permit will be issued by the Corps of Engineers covering all applicable Corps authorities. See also pp. A-5, A-9, and A-11.

4. Applicable Laws

\* Federal: Section 4(e) of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1333)

5. Rules and regulations

Federal: 33 CFR Parts 320, 322 and 325 to 330

6. Responsible agency

Federal: U.S. Army Corps of Engineers District Engineer.

See appropriate state section of Appendix B.

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Permit for Discharges of Dredged or Fill Material into Waters of the United States

1. When required

If any discharge of dredged or fill material into waters of the United States will occur during construction or operation of the proposed OTEC project, a permit must be obtained from the Department of the Army. Waters of the United States include coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, tributaries of navigable waters, interstate waters and their tributaries, and all other waters of the United States, the degradation of which could affect interstate commerce. Fill material is material to be placed for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. Dredged material is material dredged or excavated from waters of the United States. With respect to discharge of fill material, the territorial seas of the United States are also included as waters of the United States. Adjacent wetlands are also included in the definition of waters of the United States for permitting purposes.

2. Synopsis of information required in application

The application for this permit must include a complete description of the proposed OTEC activity, including drawings, sketches, or plans; the location, purpose, and intended use of the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjoining structures; and the approvals required by other State, or local agencies for the work, including all approvals received or denials already made. If the proposed activity involves dredging, the application must include a description of the type, composition, and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material. If the activity will involve discharge of dredged or fill material into waters of the United States, or transportation of dredged material for dumping in ocean waters, the application must include the source of the material; a description of its type, composition, and quantity, the methods of transportation and disposal to be used; and the location of the disposal site. If the activity involves construction of a fill supported platform the application must include a description of the platform and its intended use.

3. Processing procedure

Application for this permit is made to the U.S. Army Corps of Engineers District Engineer in charge of the District where the proposed OTEC activity would take place. See the appropriate state section of Appendix B for the cognizant District Engineer. Application is made on ENG Form 4345, or on a joint federal/state

application form in some cases. The application is reviewed for completeness and any necessary additional information is obtained from the applicant. At that point, public notice is made of receipt of the application. That notice will include the District Engineer's preliminary determination as to whether or not the proposed activity requires preparation of an Environmental Impact Statement (EIS). The Corps decision on issuance of the permit will be coordinated with EPA in accordance with guidelines promulgated by the EPA Administrator under the Clean Water Act. Public hearings may be held on the application. Coordination with other involved Federal and State agencies will be maintained throughout the permit application review process. An EIS will be prepared, if required. A thorough weighing of the public interest and a balancing of national concern for both protection and utilization of important resources will be done during the review. In routine cases, the permit will be issued by the District Engineer. However, in controversial cases, particularly where disagreements exist among involved Federal agencies, the initial decision of the District Engineer may be forwarded up the chain of command for further review prior to final issuance or denial of the permit. Note that a single permit will be issued by the Corps of Engineers covering all applicable Corps authorities. See also pp. A-5, A-7, and A-11.

4. Applicable laws

Federal: Section 404 of the Clean Water Act (Pub. L. 92-500, as amended by Pub. L. 95-217 and Pub. L. 95-578; 33 U.S.C. 1251 et seq.)

5. Rules and regulations

Federal: 33 CFR Parts 320, 323, and 325 to 330

6. Responsible agency

Federal: U.S. Army Corps of Engineers

District Engineer in charge of the District where the proposed OTEC activity would take place. See Appendix B.

Permit for Ocean Dumping of Dredged Material1. When Required

If the proposed OTEC activity will involve transportation of dredged material by vessel for the purpose of dumping it in ocean waters, this permit must be obtained from the U.S. Army Corps of Engineers. Ocean waters are those waters of the open seas lying seaward of the baseline from which the territorial sea is measured. Dredged material is any material dredged or excavated from navigable waters of the United States or from ocean waters.

2. Synopsis of Information Required in Application

In addition to the information described under Permit for Discharges of Dredged or Fill Material into Waters of the United States, the application must include a description of the location of the proposed disposal site, including its physical boundaries; a statement as to whether or not the disposal site has been designated for use by the EPA Administrator under §102(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1412 *et seq.*); a brief description of known prior disposals at the proposed site and their effects; an estimate of the length of time disposal would occur at the proposed site; and the characteristics and composition of the material to be disposed. If the proposed disposal site has not been designated by the EPA Administrator, the application must also contain an explanation of why no previously designated disposal site is feasible.

3. Processing procedure

Application for this permit is made to the U.S. Army Corps of Engineers District Engineer in charge of the District where the proposed OTEC activity will take place. Processing procedures are similar to those described under Permit for Discharges of Dredged or Fill Material into Waters of the United States. Note that a single permit will be issued by the Corps of Engineers covering all applicable Corps authorities. See also pp. A-5, A-7, and A-9.

4. Applicable laws

Federal: Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413).

5. Rules and regulations

Federal: 33 CFR Parts 320, 324, and 325 to 330.

6. Responsible agency

Federal: U.S. Army Corps of Engineers District Engineer.  
See Appendix B.

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Coast Guard Navigation Safety Requirements1. When required

Section 108 of the OTEC Act of 1980 charges the Coast Guard with promoting safety of life and property at sea as it relates to OTEC operations. With respect to navigational safety, the Coast Guard has responded to this mandate by noting that a number of existing regulations will relate to certain specific aspects of proposed OTEC operations. In particular, if the proposed OTEC operation involves a sunken obstruction in the navigable waters of the United States, the owner is required to report its existence to the nearest Coast Guard Marine Inspection Office, along with a complete description of any buoys, daymarks, or lights established to mark the obstruction. Such aids to navigation, as well as any others to be established as part of the OTEC project must conform to the U.S. system of aids to navigation described in 33 CFR 62.25, and must be approved by the appropriate Coast Guard District Commander prior to their emplacement. It should be noted also that any aid to navigation consisting of a fixed structure in the navigable waters of the United States or on the Outer Continental Shelf is subject to U.S. Army Corps of Engineers approval.

OTEC plantships are required to comply with the International Regulations for Preventing Collisions at Sea, 1972, which are set out as Appendix A to 33 CFR Part 87. Particular attention should be paid to Rule 27 of those Regulations, related to vessels restricted in their ability to maneuver.

OTEC facilities and plantships operating in the navigable waters of the United States must have a radiotelephone capable of operation from the bridge or main control station for the exchange of navigational information with vessels, 33 CFR Part 26. Persons maintaining a listening watch on the required radiotelephone must be capable of speaking English.

OTEC plantships operating in the navigable waters of the United States must comply with the U.S. Coast Guard Navigation Safety Regulations set out at 33 CFR Part 164. Those regulations prescribe requirements for operating procedures, both underway and at anchor; require carriage of specified charts and publications; and establish requirements for navigation equipment including radar, magnetic and gyrocompasses, rudder angle indicators, and Loran-C receivers, as well as for the posting of vessel maneuvering information.

2. Synopsis of information required in application

If the OTEC project will involve establishment of private aids to navigation, application must be made to the appropriate U.S. Coast Guard District Commander on Coast Guard form CG-2554. The required information includes the proposed location of the aid;

the names and addresses of the persons who will maintain it and pay for its maintenance; the times and dates during which it is proposed to operate the aid; the necessity for the aid; and the proposed type and characteristics of the aid. If the aid is to be a fixed structure, evidence of approval by the U.S. Army Corps of Engineers must also be provided.

### 3. Processing procedure

Upon receipt of a complete application, the District Commander will review it and assign it one of the following classifications: Class I for aids on marine structures or other works which the owners are legally required to establish, maintain and operate; Class II for all aids other than Class I located in waters used by general navigation; or Class III for aids exclusive of Class I located in waters not ordinarily used by general navigation. Upon approval, a signed copy of the application will be returned to the applicant. If the aid is to mark a sunken obstruction, the location and details of the aid should be reported to the nearest U.S. Coast Guard Marine Inspection Office.

### 4. Applicable laws

Federal: Marking of Sunken Obstructions, 14 U.S.C. 81, 86, 92, 633; 33 U.S.C. 403, 409

Private Aids to Navigation, 14 U.S.C. 81, 83, 85, 86, 92, 633; 43 U.S.C. 1333; 49 U.S.C. 1655(b)

Convention on the International Regulations for Preventing Collisions at Sea, 1972 (as rectified); Executive Order 11964.

Bridge-to-Bridge Radiotelephone Requirements; 33 U.S.C. 1201-1208

Navigation Safety Requirements; Sec. 2. Port and Tanker Safety Act of 1978 (Pub. L. 95-474).

### 5. Rules and regulations

Federal: Marking of Sunken Obstructions, 33 CFR Part 64

Private Aids to Navigation, 33 CFR Part 66

Convention on the International Regulations for Preventing Collisions at Sea, 1972, 33 CFR Part 87

Bridge-to-Bridge Radiotelephone Requirements, 33 CFR Part 26

Navigation Safety Regulations, 33 CFR Part 164

6. Responsible agencies

Federal: Appropriate U.S. Coast Guard District Commander.  
See Appendix B.

Appropriate U.S. Coast Guard Marine Inspection Office.  
See Appendix B.

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U.S. Coast Guard Vessel Inspection Requirements1. When required

Any proposed OTEC project which is a vessel, or a facility standing or moored in or beyond the territorial sea of the United States is subject to U.S. Coast Guard inspection requirements. Application must be made to the Coast Guard for an original Certificate of Inspection before construction of the facility or plantship is started.

2. Synopsis of information required in application

Application for an original Certificate of Inspection is made by submitting a completed Application for Inspection of a U.S. Vessel, Form CG-3752, to the U.S. Coast Guard Officer in Charge, Marine Inspection, of the marine inspection zone in which the OTEC facility or plantship is to be constructed. Plans and information indicating the proposed arrangement and construction of the project must be submitted with the application. The information which must be submitted includes general specifications and arrangement plans; hull structure plans, stability curves, calculations and plans; fire control arrangement plans; marine and electrical engineering plans; life saving equipment arrangement and location plans; personnel accommodation arrangement plans; and a construction portfolio. In addition, an outboard profile showing mooring and cold water pipe schemes; plans and details of hot and cold water intake and discharge arrangements; plans and calculations for special structural features; plans and calculations for bottom attachment details of fixed structures; details and calculations for support structures of fixed structures; and a hazardous materials plan are required.

3. Processing procedure

When a complete application for Inspection of a U.S. Vessel is received, the Officer in Charge, Marine Inspection (OCMI) will review the submitted information for compliance with all applicable Coast Guard requirements. As plans are approved for construction, they will be so stamped by the OCMI. During the process of construction, the Coast Guard will inspect periodically to assure that the facility or plantship is being built in accordance with the approved plans. When the project is completed, a final inspection is conducted to assure that all requirements are met and that all required safety, firefighting, and lifesaving systems are complete and operable. A Certificate of Inspection is then issued and the facility or plantship may be placed in operation. Certificates of Inspection are valid for a period of two years from date of issuance. As part of the renewal process the facility or plantship must be reinspected to assure that it still meets applicable requirements.

4. Applicable laws

Federal: Vessel Inspection and Certification; 46 U.S.C. 86, 367, 375, 400, 407, 408, 411, 412, 416, 481; 43 U.S.C. 1333(d); 49 U.S.C. 1655(b)(1)

5. Rules and regulations

Federal: Ocean Thermal Energy Conversion Facilities and Plantships, 46 CFR Part 106 (proposed), 46 FR 49081, October 5, 1981

Inspection and Certification, 46 CFR Part 107

Electrical Engineering, Subchapter J, Chapter I, Title 46, Code of Federal Regulations

Marine Engineering, Subchapter F, Chapter I, Title 46, Code of Federal Regulations

Load Lines, Subchapter E, Chapter I, Title 46, Code of Federal Regulations

Oil Pollution Prevention Regulations, 33 CFR Part 155, Subpart B.

6. Responsible agency

Federal: Appropriate Coast Guard Officer in Charge, Marine Inspection. See appropriate state listing in Appendix B.

Documentation and Financing of OTEC Facility or Plantship1. When required

The Ocean Thermal Energy Conversion Act of 1980, Public Law 96-320, requires that any OTEC plantship and any OTEC facility which is standing or moored in or beyond the territorial sea of the United States be documented under the laws of the United States as a prerequisite to obtaining an OTEC license from the National Oceanic and Atmospheric Administration (NOAA). Presently conceived OTEC plantship and facility configurations are unlikely to be considered to be in the U.S. coastwise trade. Thus, the most appropriate form of documentation available to qualifying OTEC facilities and plantships would be "registry."

Federal documentation is a type of national registration which serves to establish a vessel's national character, eligibility to engage in a particular employment or trade, and eligibility for the privileges of a U.S. documented vessel, such as becoming the object of a preferred ship mortgage. The United States Coast Guard administers the U.S. flag vessel documentation program. Applicable regulations are currently set out in 46 CFR Parts 66 and 67. However, the Coast Guard has proposed significant changes to those regulations in response to the Vessel Documentation Act, Pub L. 96-594 (46 U.S.C. a-w). The proposed changes are set out in the Federal Register of November 16, 1981 (46 FR 56318-56358). This paper describes the requirements of the Documentation Act, as amended, which becomes effective July 1, 1982. OTEC project sponsors should check with NOAA's Office of Ocean Minerals and Energy to determine the status of the proposed amendments to the regulations when making decisions related to documentation and financing of OTEC facilities and plantships.

Landbased OTEC facilities are not eligible for documentation under U.S. law and are thus not subject to this requirement.

Documentation is available only to those OTEC facilities and plantships not registered under the laws of a foreign country which are wholly owned by United States citizens. An individual is a U.S. citizen if he or she is a native-born, naturalized or derivative citizen of the U.S. An association or joint venture is a United States citizen for documentation purposes if each of its members is a citizen. A partnership is a U.S. citizen for documentation purposes if each of its general partners is a U.S. citizen and the controlling interest in the partnership is owned by U.S. citizens. A corporation is a United States citizen for documentation purposes if it is incorporated under the laws of the United States or of a state, territory, district or possession of the U.S.; its chief executive officer, by whatever title, is a U.S. citizen; its chairman of the board of directors is a U.S. citizen; and no more of its directors are non-citizens than a minority of the number necessary to constitute a quorum.

For a corporation, the citizenship requirements for a NOAA OTEC license and for documentation are the same. However, for a joint venture or association to be eligible for documentation, each of its members must be a U.S. citizen. For a partnership to be eligible for documentation, each of its general partners must be a U.S. citizen. These citizenship requirements are more rigorous than those prerequisite to a joint venture, partnership, or association obtaining a NOAA OTEC license.

Additional citizenship requirements apply to eligibility of a mortgagee to hold a preferred ship mortgage under the Ship Mortgage Act of 1920, 46 U.S.C. 911, *et seq.*. A preferred ship mortgage is one which meets the requirements of 46 U.S.C. 922, which include being recorded at the vessel's port of documentation and being endorsed on the vessel's document. Under the Ship Mortgage Act of 1920, a mortgagee holding a preferred ship mortgage has a maritime lien which permits foreclosure in admiralty in federal District Court in the event of a default. These claims generally have preferential status in bankruptcy proceedings.

The citizenship requirements on a corporate, partnership, or association mortgagee prerequisite to perfecting a preferred ship mortgage are set out in 46 U.S.C. 802. In brief, they are as follows for a registered vessel. The controlling interest in the entity must be owned by U.S. citizens. In the case of a corporation, its chief executive officer, by whatever title, and its chairman of the board of directors must be citizens, no more of its directors than a minority of the number necessary to constitute a quorum may be non-citizens, and it must be organized under the laws of the United States or of a state, territory, district, or possession of the U.S. For the controlling interest in a corporation to be owned by U.S. citizens, title to a majority of its stock must be vested in U.S. citizens free of any trust or fiduciary obligation in favor of any person not a U.S. citizen; and the majority of the voting power in the corporation must be vested in U.S. citizens; and it may not be arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person not a U.S. citizen; and no other means whatsoever may exist which confers on or permits a non-U.S. citizen to exercise control of the corporation.

To be eligible for a financing guarantee under Title XI of the Merchant Marine Act of 1936, 46 U.S.C. 1271-1279b, a mortgage must be a first preferred ship mortgage. Thus the citizenship requirements of 46 U.S.C. 802 also are applicable to mortgagees where financing guarantees are being sought from the U.S. Maritime Administration under the regular Title XI program or the special OTEC Demonstration Fund.

## 2. Synopsis of information required in application

Application for documentation must be made by submitting Coast Guard form CG-1258 to the documentation officer at the Coast Guard Documen-

tation Office at the desired home port of the OTEC facility or plantship or at the port of documentation nearest where the facility or plantship is located. The application must include evidence of the citizenship of the owners of the facility or plantship; evidence that the owners possess valid title to the facility or plantship; evidence of the gross and net tonnage of the facility or plantship; a designation by the owners of a home port for the facility or plantship; a designation of a hailing port for the facility or plantship; a designation of a name for the facility or plantship; and evidence that the name and hailing port for the facility or plantship are properly marked on it.

Evidence of title to a newly constructed OTEC facility or plantship being documented by the owner for whom the facility or plantship was built must be provided on a Coast Guard certificate of builder, CG-1261. Evidence of the gross and net tonnage of a facility or plantship must be provided in the form of a Certificate of Admeasurement issued by an official authorized by the U.S. Coast Guard.

### 3. Processing procedure

Application for documentation must be made by filing an original form CG-1258 with the documentation officer at the U.S. Coast Guard documentation office at the desired home port for the facility or plantship or at the port of documentation nearest where the facility or plantship is located. The Certificate of Admeasurement, and Certification of Builder, CG-1261, must also be filed. Upon review of the submitted information for accuracy and completeness, the documentation officer will issue a Certificate of Documentation, CG-1270. A Certificate of Documentation is valid for one year. The owner of the facility or plantship must apply for annual renewal of the Certificate by submission of Coast Guard form CG-1280 before the last day of the month in which the Certificate is to expire.

### 4. Applicable laws

Federal: Shipping Act of 1916, 46 U.S.C. 801 et seq.

Merchant Marine Act of 1920, 46 U.S.C. 861 et seq.

Ship Mortgage Act of 1920, 46 U.S.C. 911 et seq.

Merchant Marine Act of 1936, 46 U.S.C. 1271-1279b

Vessel Documentation Act, 46 U.S.C. 65 a-w.

### 5. Rules and regulations

Federal: Documentation and Measurement of Vessels, Subchapter G, Chapter I, Title 46, Code of Federal Regulations.

6. Responsible agency

Federal: Appropriate U.S. Coast Guard vessel documentation Office.  
See appropriate state listing in Appendix B.

Note: General information on documentation requirements may be obtained from:

U.S. Coast Guard Headquarters (G-MVD)  
Room 1312  
2100 Second St., S.W.  
Washington, D.C. 20593  
(202)426-1492

General information on requirements related to Title XI guarantees may be obtained from:

Office of Maritime Aids  
U.S. Maritime Administration  
Room 8126  
400 7th St., S.W.  
Washington, D.C. 20590  
(202) 382-0364

U.S. Coast Guard Manning Requirements1. When required

Section 108 of the OTEC Act requires that any licensed and documented OTEC facility or plantship be manned or crewed by United States citizens or permanent resident aliens unless sufficient persons satisfying those requirements are not qualified and available for the work or the President finds that imposition of the requirement would not be in the national interest. In addition, other U.S. laws establish numerous requirements on the number and qualifications of crew members on inspected vessels flying the United States Flag. The United States Coast Guard is responsible for carrying out these laws. The sponsors of an OTEC project should meet early-on with the appropriate U.S. Coast Guard Officer in Charge, Marine Inspection (OCMI) to develop manning requirements for the proposed project. The complement of officers and crew for the facility or plantship determined to be necessary for the safe navigation of the facility or plantship is specified in, and becomes a requirement of, the Certificate of Inspection.

2. Synopsis of information required in application

An applicant for a Coast Guard Certificate of Inspection should be prepared to furnish information on the size; type; proposed routes of operation; cargo to be carried, if any; and type of operations to be conducted, for use by the OCMI in developing manning requirements for the proposed OTEC facility or plantship.

3. Processing procedure

After receipt of appropriate information from the OTEC project sponsors, the OCMI reviews the proposed project in the context of applicable U.S. laws and regulations governing manning of U.S. inspected vessels. Manning requirements are developed on the basis of that review and are incorporated as requirements in the original Certificate of Inspection issued by the Coast Guard for the OTEC facility or plantship. If the project sponsors are not satisfied with the manning requirements established by the OCMI, appeal may be made to the Coast Guard District Commander having jurisdiction. If dissatisfied with the decision on the appeal by the District Commander, the project sponsors may take an additional appeal to the Commandant of the Coast Guard. Each of these appeals must be made in writing within 30 days after the decision being appealed is made. Pending decision on any appeal, the complement originally specified must be carried by the OTEC facility or plantship, if it is operating. The decision of the Commandant on any appeal is final.

4. Applicable laws

Federal: Statutory requirements on manning of U.S. inspected vessels are set forth in various statutes with many qualifications as to their application. See 46 CFR 157.01-10(b) for an inclusive list of applicable statutes.

Section 108(e)(2)(c) of the OTEC Act of 1980 sets out additional manning requirements specific to OTEC facilities and plantships, 42 U.S.C. 9118(e)(2)(c).

5. Rules and regulations

Federal: Manning provisions specific to OTEC facilities and plantships are set out in 46 CFR 106.1101, (proposed), 46 FR 49084, October 5, 1981.

General requirements for manning of U.S. inspected vessels are set out in Subchapter P, Chapter I, Title 46, Code of Federal Regulations.

6. Responsible agency

Federal: Manning requirements are established by the appropriate U.S. Coast Guard Officer in Charge, Marine Inspection. See Appendix B.

U.S. Coast Guard Pollution Prevention Requirements1. When required

Any OTEC facility or plantship must comply with U.S. Coast Guard regulations designed to prevent oil pollution from vessels and facilities which transfer oil to or from vessels. If the proposed OTEC project includes an onshore or offshore facility with a capacity of 250 or more barrels of oil that is capable of transferring oil in bulk to or from a vessel, the facility must comply with the operations, equipment, and operations manual requirements of 33 CFR Part 154. If the proposed OTEC project is a vessel, it must comply with the equipment, personnel, operations, and record keeping requirements of 33 CFR Part 155. If the OTEC project is a vessel with a capacity of 250 or more barrels of oil, it must also comply with the equipment, personnel, and operations requirements of 33 CFR Part 156.

2. Synopsis of information required in application

If the OTEC project includes a facility subject to 33 CFR, Part 154, the operator must submit a letter of intent to operate to the appropriate U.S. Coast Guard Captain of the Port (COTP) not less than 60 days before operations are to begin. The letter of intent must give the location of the facility and the name, address and phone number of the facility and facility operator. The applicant must submit an operations manual with the letter of intent. The operations manual must describe the location, type, and intended operations of the facility and the safety, fire-protection, communications and other procedures to be followed in routine oil transfer and emergency situations. Specific requirements on the information which must be contained in the operations manual and the order of its presentation are set out in 33 CFR Part 154.

3. Processing procedure

If the proposed OTEC project includes an oil transfer facility subject to 33 CFR Part 154, the person who will operate the facility must submit a letter of intent to operate and an operations manual to the appropriate U.S. Coast Guard Captain of the Port not less than 60 days before oil transfer operations will begin. The COTP reviews the letter of intent and the operations manual. When the operations manual is determined to meet the requirements of 33 CFR Part 154, the COTP issues a letter of adequacy certifying that the manual meets the requirements. Oil transfer operations may then begin at the facility, provided they are conducted in accordance with the approved operations manual. The approved operations manual may only be amended through use of the procedures set out in 33 CFR 154.320.

While there are no general requirements for Coast Guard approval

under 33 CFR Parts 155 and 156 prior to commencement of operations, compliance with the equipment, operations, and record keeping requirements of those Parts will form part of the review conducted pursuant to issuance of the original Certificate of Inspection for the OTEC project if it is a vessel, or is a facility standing or moored in or beyond the territorial sea of the United States. In any case, required procedures, manuals, and records must be available for Coast Guard inspection at any time the facility or vessel is in operation.

In addition to the requirements of 33 CFR Parts 154, 155, and 156, any applicant for a NOAA OTEC license must submit an emergency pollutant discharge contingency plan with the application for the NOAA license. The plan must describe the equipment, training, procedures, and maintenance required to respond to or conduct cleanup of any unpermitted pollutant discharge from the proposed OTEC facility or plantship. The plan will be reviewed jointly by NOAA and the Coast Guard. Compliance with the approved version of the plan will be a condition on any OTEC license granted.

4. Applicable Laws

Federal: 33 U.S.C. 1321(j)(1)(C) and (D)

5. Rules and Regulations

Federal: Oil Pollution Prevention Regulations for Marine Oil Transfer Facilities, 33 CFR Part 154.

Oil Pollution Prevention Regulations for Vessels, 33 CFR Part 155.

Oil Pollution Prevention Regulations for Oil Transfer Operations Involving Vessels, 33 CFR Part 156.

6. Responsible agencies

Federal: Appropriate U.S. Coast Guard Officer in Charge, Marine Inspection and U.S. Coast Guard Captain of the Port.  
See Appendix B.

Notices Required by the Federal Aviation Administration (FAA)1. When required

Federal Regulations require that the FAA be notified prior to the construction, alteration, or deactivation of an airport, heliport, or seaplane facility. Regulations also require the FAA to be notified prior to the start of construction of a building, antenna, or other structure that is in close proximity to an airport, heliport, or seaplane facility. Airport notices should be submitted at least 90 days prior to the start of construction. Building notices should be submitted at least 30 days prior to the start of construction. Thus if the proposed OTEC project includes an airport, heliport, or seaplane facility, or if it will be located close to an existing airport, heliport, or seaplane facility, FAA notification requirements must be complied with.

2. Synopsis of information required

Forms for submitting notice are available from FAA Regional and Airports District Offices. The forms (FAA Form 7480-1 for airport development and FAA Form 7460-1 for building and structures) require information on the proposed development, geographic coordinates, owner, distance to other airports, etc. A map showing the airport/building location and a sketch of the proposed airport facility is also required.

3. Processing procedure

Airport proposals should be submitted to the appropriate FAA Airports District Office or to the Airports Division of the appropriate FAA Regional Office. Building proposals should be submitted to the appropriate FAA Regional Office. The proposals are studied to determine the effect on the navigable airspace. Applicants will be informed whether the FAA finds the proposal to be nonobjectionable, nonobjectionable provided certain conditions are met, or objectionable and the reason(s) therefore.

4. Applicable laws

Federal: 49 U.S.C. 1304, 1348, 1350, 1354, 1355, 1481, 1501, 1510, and 1655

State: See appropriate state section of Appendix B.

5. Rules and regulations

Federal: 14 CFR Parts 77 and 157

State: See appropriate state section of Appendix B.

6. Responsible agencies

Federal: Appropriate FAA Airports District Office for airports and appropriate FAA Regional Office for buildings and structures

State: See appropriate state section of Appendix B.

Federal Communications Commission Licenses1. When required

If the proposed OTEC project will include radio transmission facilities, appropriate station licenses must be obtained from the Federal Communications Commission (FCC). Note that some types of OTEC projects will be required by Coast Guard regulations to have radio transmission facilities (See Coast Guard Navigation Safety Requirements, p. A-13.) Radio stations subject to licensing include fixed and mobile land stations as well as stations located on vessels and in aircraft. Depending upon the type of transmitter and transmissions, operators of the equipment may be required to hold FCC operators' licenses. In addition any antenna structure which would be more than 200 feet high, or which would be located in close proximity to an airport must be approved by the Federal Aviation Administration prior to construction. See p. A-27.

2. Synopsis of information required in application

Any application for an FCC license must be made on the forms provided for that purpose by the FCC. In general, an applicant must provide information on citizenship, the type of equipment for which the license is being requested, and the type and duration of operations to be conducted at the licensed transmitting facility.

3. Processing procedure

Application for a station license is made to the FCC on the particular form prescribed for that purpose. Application forms may be obtained at no cost from the FCC, Washington, D.C. 20554. Application must be made at least sixty days before the authorization to operate the station is required. Application for a land station in the maritime service is made on FCC Form 503. Application for a ship radio station license is made on FCC Form 506. Application for an aviation ground station is made on FCC Form 406. Application for an aircraft radio station license is made on FCC Form 404. Application for a license for a mobile or fixed land radio station to be used for short distance business radio-communications service is made on FCC form 400.

Licenses are generally granted for a term of five years, and may be renewed. Licenses may not be transferred without prior approval by the FCC, which in some cases will take the form of cancellation of the old license and issuance of a new one to the "transferee."

4. Applicable laws

Federal: Communications Act of 1934, as amended 47 U.S.C., 151-155, 301-609.

5. Rules and regulations

Federal: 47 CFR Part 80-95

6. Responsible agency

Federal: Federal Communications Commission  
Washington, D.C. 20554  
(202) 632-6940

Occupational Safety and Health Standards1. When required

An OTEC project which will be located on land or in state waters is subject to workplace safety standards and employee medical record keeping requirements issued by the Department of Labor under authority of the Occupational Safety and Health Act of 1970, 84 stat. 1593, or equivalent state standards in the 23 states operating approved state plans (See Appendix B). These standards regulate the design of walking-working surfaces, escape routes, elevators, ventilation systems, noise sources, the design and use of personal protective equipment, medical and first aid equipment, fire protection equipment, hand and portable powered tools, machinery, and welding, cutting and brazing equipment, among other things. In addition, standards have been established on an industry-specific basis in some cases, for instance, for construction, shipbuilding, and commercial diving operations. Use of some hazardous materials is also the subject of specific standards. Such standards have been set for oxygen, hydrogen, acetylene, anhydrous ammonia, and asbestos, among others. Compliance with these standards, as applicable to the specific OTEC project, must be considered in developing the design and operating procedures to be followed.

For landbased OTEC activities, programs to assure compliance are administered by either the federal Occupational Safety and Health Administration (OSHA) within the U.S. Department of Labor, or by the appropriate state agency, where state plan approval has been obtained. For OTEC projects which will be conducted on fixed or moored structures offshore, the federal OSHA will be responsible for ensuring compliance in most cases. However, maritime activities within state territorial waters may be subject to state OSHA plan jurisdiction dependent on the particular type of OTEC activity to be conducted and other factors such that OTEC project sponsors should consult with appropriate federal and state officials as noted in Appendix B early in the design phase of the project. This is particularly important as some states with approved programs apply standards different from, and in some cases more rigorous than, federal standards.

OTEC activities which will be conducted on fixed or moored facilities located beyond state waters are subject to federal regulation by OSHA and the United States Coast Guard. Vessel-type OTEC projects will have occupational health and safety concerns addressed via regulation by the Coast Guard. Again, early consultation with appropriate agencies is strongly encouraged.

2. Synopsis of information required in application

No specific prior approval of project design or operating procedures is required under the terms of the Occupational Safety and Health Act of 1970 and implementing regulations. Rather, compliance with

applicable standards is assessed through analysis of employee injury and illness frequency data and through random, unannounced inspections as well as response to workplace complaints and investigations of accidents and fatalities by either federal Occupational Safety and Health Administration (OSHA) or state personnel, as applicable.

3. Processing procedure

As noted previously, there is no requirement for pre-construction review for compliance with OSHA standards. However, OTEC project sponsors are encouraged to consult with appropriate state and/or federal officials early in the project design phase to minimize the possibility of incurring later, costly design changes to comply with established standards. If a state has an occupational safety and health program approved by OSHA, and the program covers the OTEC activity, such discussions should be held with the state official identified in Appendix B. If the relevant state does not have an approved program, or the approved program does not cover the proposed OTEC activity, the appropriate OSHA regional office as identified in Appendix B should be consulted.

In all states free on-site consultation services are available to employers upon request. Consultations provide on-site assistance in compliance with OSHA and state standards without threat of citation or penalty. OTEC project sponsors should consider requesting such assistance during both the construction and implementation phases of their projects.

4. Applicable laws

Federal: Williams-Steiger Occupational Safety and Health Act of 1970, 84 Stat. 1590.

State: See appropriate state section of Appendix B.

5. Rules and regulations

Federal: 29 CFR Parts 1901-1910

State: See appropriate state listing in Appendix B.

6. Responsible agencies

Federal: Occupational Safety and Health Administration  
Department of Labor  
Washington, D.C. 20210  
(202) 523-8081

State: See appropriate state listing in Appendix B.

Antitrust Business Review1. When required

Section 104 of the Ocean Thermal Energy Conversion Act of 1980 requires that the Attorney General review any application for a NOAA OTEC license and submit to NOAA any advice or recommendations he deems advisable to avoid any actions on the application by the NOAA Administrator which would create a situation inconsistent with the antitrust laws. In addition to that required review, a potential applicant for a NOAA license may avail himself of the business review procedure of the Antitrust Division within the Department of Justice, if the Division agrees. The business review procedure provides an informal means for an OTEC license applicant to receive the current views of the Antitrust Division on the acceptability of the proposed business conduct of the OTEC project sponsors in advance of submitting the license application to NOAA.

2. Synopsis of information required in submission

If a potential OTEC license applicant desires to avail himself of the business review procedure, the request for review must be made in writing to the Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D.C. 20530.

The request for review must include all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, which will govern the proposed business conduct of the sponsors of the proposed OTEC project with respect to it. There is an affirmative obligation on the parties requesting the review to make full and true disclosure in this area.

The information which must be provided to NOAA with the license application to enable the Justice Department to conduct the formal antitrust review required by the OTEC Act includes the names, addresses and citizenship of the parties having controlling interests in the applicant or its affiliates, or having ownership interests in the applicant or its affiliates of greater than 5 percent; a copy of the charter or other legal instrument under which the applicant is organized; the most recent financial statements of the applicant and its affiliates, including income statements and balance sheets accompanied by the opinions of a certified public accountant; a copy of every agreement or proposal of the applicant and its affiliates relating to the ownership, lease, charter, or operation of the proposed OTEC project; and detailed information on the prior production of electricity, or other products to be produced by the OTEC project, by the applicant and its affiliates over the three years preceding submission of the license application.

3. Processing procedure

When a written request for business review is received by the Antitrust

Division, along with the accompanying data, the Division may, in its discretion, refuse to conduct a review. The general policy of the Division is to defer the review until after other Federal agencies have taken action on required permits and authorizations. However, if deferring the review would impose exceptional and unnecessary burdens on the party requesting review, or if the other federal agency involved requests that the review be done before it completes its own action, the Division will usually proceed to conduct it.

If the Division proceeds to conduct the review, it may state its present enforcement intentions with respect to the proposed conduct, decline to pass on the request, or take any other appropriate action or position. If the Division decides to state its present enforcement intentions with respect to the proposed conduct, it will issue a written business review letter signed by the Assistant Attorney General in charge of the Antitrust Division, or his delegate. It should be emphasized that a business review letter states only the enforcement intentions of the Division as of the date of the letter. It in no way binds the Division to any future action or inaction. However, the Division has never exercised its right to bring a criminal action after stating a present intention not to bring one where full and true disclosure was made at the time of presenting the business review request. It should be noted that the Antitrust Division will make available for public inspection the business review request, supporting data, and the Division's letter within 30 days after issuing the letter unless the applicant requests nondisclosure and the Department decides, in its discretion, that it is warranted. Of course, any information subject to other limits on public disclosure arising from statutory restrictions, Executive Order, or the national interest will not be publicly disclosed.

The formal antitrust review procedure required by the OTEC Act begins when the OTEC license application is submitted to NOAA. NOAA provides a complete copy of the application to the Attorney General. The Justice Department then has 90 days to review it and make its views known to the NOAA Administrator. An OTEC license may not be issued during that 90 day period unless the Attorney General states in writing that he does not intend to submit any further advice or recommendation on the application. If the 90 day period has expired without comment by the Attorney General, his acceptance of the business aspects of the OTEC proposal as submitted is assumed. Unless the Attorney General informs the NOAA Administrator within the 90 day period that the project as proposed will create a situation in violation of the antitrust laws, the NOAA Administrator may proceed to issue the license. Although not required by statute, the NOAA Administrator has agreed to provide a written explanation of his reasons, should a decision to issue the license be made in the face of an opinion by the Attorney General that such action would create a situation inconsistent with the antitrust laws.

4. Applicable laws

Federal: Business review procedures, (28 U.S.C. 509 and 510;  
5 U.S.C. 301)

Formal antitrust review of application, (42 U.S.C. 9114)

5. Rules and regulations

Federal: Business review letter, 28 CFR 50.6

Formal antitrust review of application, 15 CFR 981.180,  
15 CFR 981.320.

6. Responsible agency

Federal: Assistant Attorney General, Antitrust Division, Department  
of Justice, Washington, D.C. 20530. (202) 633-3543

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National Pollutant Discharge Elimination System (NPDES) Permit1. When required

An NPDES permit is required for the discharge of any pollutant from a point source into the waters of the United States, its contiguous zone or the oceans. Such discharges include, but are not limited to, evaporator and condenser waters, deck drainage, sanitary wastes, domestic wastes, ballast and bilge water, machinery cooling water, and distilling plant brine.

2. Synopsis of information required in application

The application must contain the name and address of the owner, a description of the facility or plantship, a listing of all relevant Federal and State environmental permits required for the project, a topographic map of the site of the proposed facility, a line drawing of water flows through the facility or plantship including a water balance and description of flowrates and any treatment which wastewater flows will receive prior to discharge, and, most importantly, a detailed description of the physical and chemical characteristics of each pollutant to be discharged, along with the results of any bioassays on those pollutants. If the effluents will be discharged into the territorial sea, the waters of the contiguous zone, or the oceans, the application must also contain information on the potential ecological impacts of the discharges sufficient to enable a determination to be made that the discharges will not cause irreparable harm to the marine environment.

3. Processing procedure

If the discharges from the proposed OTEC project will occur in waters under state jurisdiction, and the state has an NPDES permitting program approved by the U.S. Environmental Protection Agency (EPA), the application for the NPDES permit is made to the appropriate state agency. Note that processing of NPDES and Clean Air Act permits has been consolidated in most cases. See also Clean Air Act Compliance, p. A-39. If the discharges will occur seaward of the territorial sea, or if the state into whose waters the discharges will be made does not have an EPA approved permitting program, application for the NPDES permit is made to the Regional EPA Administrator (See Appendix B for a listing of those states with EPA-approved permitting programs). The application is reviewed for completeness, and when it is complete, processing is begun. Processing includes preparing a draft permit; giving public notice of this proposed permit and the various steps in the processing procedure; providing for public comment on the draft permit, including public hearings in some cases; and issuance of the final permit.

If the discharges will occur seaward of the inner boundary of the territorial sea, a determination must be made as to whether or not

they will cause unreasonable degradation of the marine environment. If it can be determined that unreasonable degradation will not occur, the NPDES permit will be issued. If that determination cannot be made, but it can be determined that the discharges will not cause irreparable harm, a permit may be issued which will incorporate monitoring requirements sufficient to assess the impact of the discharges on water, sediment, and biological quality. The results of that monitoring program, along with any other relevant new data may be used as a basis for modifying the permit conditions to prevent unreasonable degradation.

4. Applicable laws

Federal: Clean Water Act (Pub. L. 92-500, as amended by Pub. L. 95-217 and Pub. L. 95-576; 33 U.S.C. 1251 et seq.).

State: See Appendix B for listing under appropriate state.

5. Rules and regulations

Federal: EPA Consolidated Permit Regulations, 40 CFR Parts 122 and 124

Ocean Discharge Criteria, 40 CFR Subpart M

State: See Appendix B for listing under appropriate state.

6. Responsible agencies

Federal: Appropriate Regional EPA Administrator. See Appendix B.

State: See Appendix B.

Clean Air Act Compliance1. When required

Under sections 111 and 112 of the Clean Air Act, the U.S. Environmental Protection Agency has set out emissions standards for new stationary sources of air pollution and emissions standards for hazardous air pollutants. These standards, which currently cover primary aluminum reduction plants, coal preparation plants, electric arc furnaces, stationary gas turbines, diammonium phosphate fertilizer plants, asbestos, beryllium, mercury, and vinyl chloride, among others, may be applicable to an OTEC project which would discharge pollutants into the air from an on-site refining or manufacturing process.

Under Part C of the Clean Air Act, the U.S. Environmental Protection Agency has issued regulations requiring states to adopt plans for the prevention of significant deterioration (PSD) of air quality. If the state where the OTEC project would be located does not have a PSD plan approved by the Environmental Protection Agency (EPA), EPA is responsible for ensuring that any new source will meet the PSD requirements. Thus an OTEC project which would operate on land or within state waters (generally within the three mile limit) and would discharge pollutants into the atmosphere may require a state or EPA PSD permit. If a project would be located in an area which has not attained one of the National Ambient Air Quality Standards under the Clean Air Act, it must comply with state-adopted regulations for new source review in non-attainment areas.

If air emissions from an OTEC project located in one state may have an adverse impact on air quality in an adjacent state, section 126 of the Clean Air Act requires that the project sponsors provide written notice to each such adjacent state which might be so affected at least sixty days prior to beginning construction of the OTEC project. Under § 126, states or political subdivisions may petition EPA to find that a proposed OTEC project will prevent attainment of any National Ambient Air Quality Standard in an adjacent state. If such a finding is made, the proposed project would have to be modified.

Finally, section 176(c) of the Clean Air Act requires that a Federal agency must determine that a proposed project conforms with each applicable state air pollution control plan before issuing the requisite federal permit or license to the applicant. Thus, when OTEC project sponsors apply for any federal license or permit, they should be prepared to provide evidence that the proposed project conforms with applicable state air pollution control requirements.

2. Synopsis of information required in application

As most states have EPA approved air pollution control plans, application for applicable air pollution control permits will most likely

be made to the responsible state agency. Note that processing of Clean Air Act requirements has been consolidated with NPDES permitting in most cases. See National Pollutant Discharge Elimination System (NPDES) Permit, p. A-37. See the state sections of Appendix B for the correct agency in the state where the proposed OTEC project will be located.

In general, an applicant for an air pollution control permit should be prepared to provide information on the nature and amount of air emissions to be expected from the proposed OTEC project; a description of the location, design, construction and operation of the proposed project; an assessment of the impact of air emissions from the project on attainment and maintenance of national ambient air quality standards; a description of the control technologies which will be used to control emissions of air pollutants subject to regulation; and an analysis demonstrating that allowable air emissions increases from the proposed project, in conjunction with all other applicable air emissions increases or reductions, would not cause or contribute to air pollution in violation of national ambient air quality standards or in excess of maximum allowable air pollution increases provided for in the applicable state PSD plan.

### 3. Processing procedure

As noted above, application for required PSD permits is made to the state in cases where the state has air pollution control plans approved by the Environmental Protection Agency. Otherwise, application is made to the appropriate EPA regional administrator. See the state section of Appendix B for the proper authority to which to make application.

When application is made, the permitting authority reviews the submittal and performs an analysis of the potential effect of the proposed project on ambient air quality. The application, that analysis, and the proposed approval or disapproval decision are then made available for public comment for a minimum of 30 days. An Environmental Impact Statement on the proposed project may be prepared and public hearings held, if the project would have a major impact on air quality. After the close of the public comment period and completion of any necessary public hearings, a final permit decision will be issued. That decision will include responses to all comments received and statements of actions taken in response to comments, if any.

### 4. Applicable laws

Federal: Clean Air Act, 42 U.S.C. 7401 et seq.

State: See appropriate state section of Appendix B

5. Rules and regulations

Federal: 40 CFR Part 50-87

State: See appropriate state section of Appendix B

6. Responsible agencies

Federal: Appropriate regional EPA administrator. See state section of Appendix B

State: See state section of Guide (Appendix B)

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Coastal Zone Management Consistency Certification1. When required

If the proposed OTEC activity will affect the coastal zone of a state with a Coastal Zone Management Plan approved under the Coastal Zone Management Act, an applicant for any Federal license or permit must certify that the proposed OTEC activity is consistent with the approved State Plan. Any likely OTEC activity other than deployment of a grazing plantship will affect the coastal zone, so an OTEC project sponsor should be prepared to make the requisite certification, if the state where the OTEC activity will be located has an approved Coastal Zone Management Plan. See Appendix B to determine if the relevant state has an approved plan.

2. Synopsis of Information Required in Certification

The specific data requirements for determining consistency are set out in the relevant state plan. An applicant for a Federal permit or license covered by the State plan must therefore obtain a copy of it. It is the applicant's responsibility to evaluate the proposed OTEC activities against the requirements of the Plan and prepare a certification of consistency. The applicant must also provide the state with the data necessary to evaluate the consistency certification. In general, this data includes a detailed description of the proposed OTEC project and its operation, an assessment of the probable effects on the coastal zone of the proposed project in relation to the state's management plan, and a brief set of findings demonstrating that all relevant aspects of the proposed project are consistent with the plan. In most cases, the Federal agency involved will be prepared to assist the applicant in the consistency certification process.

3. Processing procedure

As noted above, the applicant for the Federal permit or license must prepare the coastal zone consistency certification. When the applicant is satisfied that the proposed OTEC activity is consistent with the relevant state plan, the certification is prepared and submitted, along with the required supporting information, to the affected state and the involved Federal agency. In general, the affected state has six months to either concur in or object to the consistency certification. However, the state must inform the applicant within 90 days of the status of the consistency review to prevent a conclusive presumption arising that the state concurs with the applicant's certification. A Federal agency may not issue a permit during the six month period and may not issue a permit if the state objects on the grounds the proposed activity is not consistent with the Coastal Zone Management Plan.

If a serious dispute arises between the federal permitting agency and the state coastal zone agency as to whether a particular pro-

ject is subject to consistency requirements, either party may request mediation by the Secretary of Commerce. The Secretary also has authority to hear appeals from state objections and may override those objections if he or she finds that the proposed OTEC project is consistent with the purposes of the Coastal Zone Management Act, or is necessary in the interest of national security.

The Ocean Thermal Energy Conversion Act of 1980, Public Law 96-320, provides an additional review mechanism for governors of states with approved Coastal Zone Management plans. For the NOAA OTEC license, the Governor of such a state has 45 days after conclusion of public hearings on the license application to transmit to the NOAA Administrator his approval or disapproval of the license application with respect to programs within his jurisdiction. If neither approval or disapproval has been transmitted by that time, approval is conclusively presumed. If disapproval is transmitted, the transmittal must indicate what must be done to make the proposed project consistent with the State plan. A license may then be issued only if conditioned to make the project consistent.

#### 4. Applicable laws

Federal: Section 307(c) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1456(c)).

State: See Appendix B.

#### 5. Rules and regulations

Federal: 15 CFR Part 930

State: See Appendix B.

#### 6. Responsible agencies

Federal: Agency administering Federal license or permit applied for.

NOTE: Review and Approval of State Coastal Zone Management Programs is done by:

Office of Coastal Zone Management  
National Oceanic and Atmospheric Administration  
Page 1, Room 324A  
2001 Wisconsin Avenue, N.W.  
Washington, D.C. 20235  
(202) 634-4232

State: See Appendix B.

National Marine Sanctuaries Review1. When required

Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended in 1980, authorizes the Secretary of Commerce with Presidential approval to designate ocean waters as far seaward as the outer edge of the Continental Shelf as national marine sanctuaries for the purpose of preserving or restoring their conservation, recreational, ecological, or esthetic values. The Act is a broad-based mandate that allows for comprehensive management of special marine resources. Once a sanctuary is designated, certain activities inconsistent with the purpose of the sanctuary are prohibited and other activities are subject to regulation within it. For example, in the Channel Islands National Marine Sanctuary, removing or damaging historical or cultural resources is prohibited, and a special permit is required to conduct any drilling, dredging, or construction operations. Thus a potential OTEC license applicant must ascertain whether or not the proposed site for the OTEC project is within or close to a designated or proposed national marine sanctuary and then determine what activities are prohibited or subject to special permitting requirements.

2. Synopsis of information required in application

In applying for a permit to conduct regulated activities within a designated marine sanctuary, the applicant must provide a description of all activities proposed, the equipment, methods and personnel involved, the extent to which the activity may diminish the value of the sanctuary, a timetable for completion of the proposed activities, copies of all other required licenses or permits, and such other information as NOAA's Assistant Administrator for Coastal Zone Management deems appropriate.

3. Processing procedure

If a permit is required, application is made to the Assistant Administrator, Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, D.C. 20235. The Assistant Administrator will review the proposed activity for its impact on the sanctuary resources and its potential benefits to the Nation. The responsibility and competence of the party proposing to conduct the activity will be assessed. The views of persons other than the applicant may be sought, and a public hearing on the proposed activity may be held. A permit, which is nontransferable, may then be granted, in whole or in part, subject to those conditions the Assistant Administrator deems appropriate. If dissatisfied with the Assistant Administrator's decision on the permit, the applicant may appeal it to the Administrator of NOAA. Such an appeal must be made in writing within 30 days after the Assistant Administrator's decision. The

Administrator may request, and if he does, the applicant shall provide such additional information and in such form as the Administrator may request in order to enable him to act upon the appeal. The decision of the Administrator shall be final action. The appeal process will generally take three to four months.

4. Applicable laws

Federal: Title III of the Marine Protection, Research and Sanctuaries Act of 1972, Public Law 95-532, as amended in 1980; 86 Stat. 1061 (16 U.S.C. 1431-1434).

5. Rules and regulations

Federal: General Regulations governing designation and management of national marine sanctuaries, 15 CFR Part 922.

Specific regulations delineating national marine sanctuaries and prescribing regulations for activities within them, 15 CFR Part 935 et seq.

Note: See Appendix B for current national marine sanctuary designations and proposed designations.

6. Responsible agency

Federal: Sanctuary Programs Office, Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, N.W., Washington, D.C. 20235 (202) 634-4236

Historic Preservation Act Review1. When required

Section 106 of the National Historic Preservation Act, 16 U.S.C. 470, as amended, requires that any Federal agency which is making a licensing or permitting decision consider the potential effect of the activity to be licensed or permitted on properties listed or eligible to be listed on the National Register of Historic Places. The Federal agency making the licensing or permitting decision is primarily responsible for performing this analysis. However, the applicant for a Federal license or permit necessary for a proposed OTEC project should be prepared to provide information on potential impacts of the OTEC project on the historical, architectural, archeological, or cultural characteristics of any listed or eligible properties in the vicinity of the proposed project. If it is determined that the proposed OTEC project will have an effect on listed or eligible properties, the Federal Advisory Council on Historic Preservation must be afforded a reasonable opportunity to comment on the proposal. Criteria for determining eligibility for listing on the National Register are established by the Secretary of the Interior and are published at 36 CFR 60.6.

2. Synopsis of information required in application

To assist the Federal permitting agency in complying with the Historic Preservation Act, the license or permit applicant should be prepared to provide a description of the proposed OTEC activity, including maps, drawings, photographs, and specifications, as appropriate; a list of National Register and eligible properties which might be affected by the proposed OTEC project; and an assessment of any impacts that the proposed OTEC project might have on any listed or eligible property, including destruction, alteration, isolation from or alteration of the property's surrounding environment, neglect of the property, transfer or sale of the property without adequate protection of its historical, cultural, archeological, or architectural significance, or introduction of visible, audible, or atmospheric elements out of character with the property or its setting.

3. Processing procedure

When a Federal agency receives a license or permit application, the first step in the historic preservation review process is to determine which, if any, listed or eligible properties are located within the area of the project's potential environmental impacts and may be affected by the proposed OTEC project. That determination is made by the permitting or licensing agency in consultation with the appropriate State Historic Preservation Officer and other individuals and groups with knowledge and expertise related to historic and cultural resources in the area of the proposed project. This identification and evaluation of historic and cultural proper-

ties may involve field surveys or other studies. If either the Federal permitting official or State Historic Preservation Officer believes that a property is eligible for listing on the National Register of Historic Places, a determination of eligibility is requested of the Secretary of the Interior. If no properties listed or appearing to meet the criteria for listing are found, the Federal permitting official documents this finding and the processing of the Federal permit or license proceeds.

If listed or eligible properties are found in the vicinity of the proposed OTEC project, the Federal permitting official, in consultation with the State Historic Preservation Officer, must make a determination of effect. If those officials determine that the proposed project will have no effect on listed or eligible resources, the determination is documented for public inspection and Federal permit or license processing proceeds. If it is determined that the proposed OTEC project will have an effect, the federal permitting agency, in consultation with the State Historic Preservation Officer, must determine whether or not the effect will be adverse. That determination must be documented and forwarded to the Federal Advisory Council on Historic Preservation. If the Executive Director of the Council does not object to a determination of no adverse effect within 30 days after receipt of a properly documented determination, Federal permitting proceeds.

If a determination of adverse effect is made, the report to the Council takes the form of a Preliminary Case Report, draft environmental impact statement, or similar information, which includes the documentation required for a finding of adverse effect and a description of alternatives which would avoid or mitigate the adverse effects of the proposed OTEC projects. Consultations are held between the Federal permitting agency, the involved State Historic Preservation Officer, and the Executive Director of the Federal Advisory Council on Historic Preservation in an attempt to agree on a reasonable mix of alternatives and mitigating measures to minimize adverse effects on listed or eligible properties. On-site inspection and public meetings may form part of this process. If agreement is reached, it is documented in the form of a Memorandum of Agreement, which is then reviewed by the Council. If agreement cannot be reached among the parties, the matter is referred to the Council for resolution. The comments of the Council must then be considered by the Federal permitting agency in reaching its decision on the proposed OTEC project. During all of this review, consultation, and decision-making process, the Federal permitting agency is prohibited from taking any action on the application which would amount to an irreversible or irretrievable commitment which could result in an adverse effect on listed or eligible properties. It is intended that the overall historic preservation review process be coordinated with and done concurrently with the permitting agency's environmental review process under the National Environmental Policy Act.

NOTE: The Advisory Council on Historic Preservation is preparing revisions to this review process. OTEC project sponsors should contact the Office of Ocean Minerals and Energy to obtain the latest procedures.

4. Applicable laws

Federal: National Historic Preservation Act, 16 U.S.C. 470, as amended.

State: See Appendix B.

5. Rules and regulations

Federal: Review process contained in "Protection of Historic and Cultural Properties," 36 CFR Part 800.

Criteria and procedures for listing properties on the National Register of Historic Places, 36 CFR Part 60.

Determinations of eligibility, 36 CFR Part 63

National Register of Historic Places, published periodically in the Federal Register. Contact National Park Service, U.S. Department of the Interior for latest complete listing.

State: See Appendix B.

6. Responsible agencies

Federal: Advisory Council on Historic Preservation, 1522 K St., N.W., Suite 510, Washington, D.C., 20005 (202)254-3974.

National Register Division, National Park Service, U.S. Department of the Interior, 440 G St., N.W. Washington, D.C. 20243 (202) 272-3504.

Federal agency to which application for license or permit has been made.

State: Appropriate State Historic Preservation Officer. See Appendix B.

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Endangered Species Review1. When required

Section 7 of the Endangered Species Act (ESA), 16 USC 1536, requires that each Federal agency insure that any activity authorized, funded, or carried out by it is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of any critical habitat for such species. Construction and operation of an OTEC project will involve modification of the physical environment as well as potential impacts on living organisms. Accordingly, review of the proposed OTEC project for endangered species impacts will form a part of the process of granting any Federal permit or authorization for the project.

2. Synopsis of information required in application

The Endangered Species Act review is conducted by the Federal agency which will issue the relevant license or permit, in close consultation with the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration and the Fish and Wildlife Service within the Department of the Interior. Although information required of the permit applicant varies from Federal agency to Federal agency, an OTEC project sponsor should generally be prepared to submit information on endangered or threatened species and critical habitat for those species believed to be found in the vicinity of the site of the proposed project.

3. Review procedure

Upon receipt of the application, the Federal permitting agency submits requests to the Regional Directors of the Fish and Wildlife Service (FWS) and NOAA's Assistant Administrator for Fisheries (NMFS) for determinations as to whether or not there are species listed or proposed to be listed as threatened or critical or which have critical habitats within the general vicinity of the proposed OTEC project. FWS and/or NMFS must respond to these requests within 30 days. If the FWS and or NMFS respond that there is critical habitat or species listed or proposed to be listed as endangered or threatened believed to be present in the area, the Federal permitting agency must prepare a Biological Assessment. This assessment seeks to identify any such species which is likely to be affected by the proposed project. The assessment must be prepared within 180 days after notification by FWS and/or NMFS.

Once the FWS and/or NMFS Biological Assessment is completed, a determination will be made as to whether or not listed or proposed species and/or their critical habitat may be affected by the proposed activities. If it is concluded that the proposed activities may affect listed species or critical habitat, the permitting

agency will consult with FWS or NMFS as required by § 7(a)(2) of the ESA. At the conclusion of that consultation, FWS and/or NMFS will issue a Biological Opinion with a determination as to whether or not the proposed project is likely to jeopardize a species or its habitat. If the permitting agency then concludes that the proposed action is likely to jeopardize, it may not issue the relevant permit, license, or authorization at that time.

If the conclusion reached is that the proposed OTEC project would jeopardize, the applicant, the Federal permitting agency, or the Governor of the State where the project's impacts would occur may apply for an exemption to an endangered species review board convened by the Secretary of the Interior. Such application must be made within 90 days of the permitting agency decision to deny the license or permit on the basis of the endangered species conflict. Any application for an exemption should include information on available reasonable and prudent alternatives to the original OTEC project proposal; evidence as to the public interest, national and regional significance of the proposed project; and appropriate reasonable mitigation and enhancement measures which would reduce the impacts of the project. The endangered species review board has 60 days in which to determine whether an irresolvable conflict exists and whether or not the prior consultation process between the Federal permitting agency and FWS/NMFS has been properly carried out. If the board determines that an irresolvable conflict exists and that the prior consultation process has been conducted properly, it has an additional 180 days to prepare a report on the conflict for consideration by the Endangered Species Committee, chaired by the Secretary of the Interior and comprising in addition the Secretaries of Agriculture and the Army, the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, the Chairman of the Council of Economic Advisors, and one individual appointed by the President, to represent each affected State.

The Committee has 90 days after receipt of the report of the review board in which to grant or deny the exemption request. However, the Committee may not grant an exemption if the Secretary of State informs it that an exemption would violate a treaty or other international obligation of the United States. Conversely, if the Secretary of Defense determines that the exemption is necessary for national security reasons, the Committee must grant it.

#### 4. Applicable laws

Federal: Section 7 of the Endangered Species Act, as amended  
(16 U.S.C. 1536)

State: See Appendix B.

5. Rules and Regulations

Federal: Endangered Species Lists, 50 CFR Parts 17 and 222; Designated Critical Habitat Lists, 50 CFR Parts 17 and 226; Threatened Species Lists, 50 CFR Parts 17 and 227.

State: See Appendix B.

6. Responsible agencies

Federal:

- 1) Agency Administering Federal license or permit applied for.
- 2) Appropriate regional Fish and Wildlife Service Director, see Appendix B.
- 3) Assistant Administrator for Fisheries  
National Oceanic and Atmospheric Administration  
Room 400  
Page Building 2  
3300 Whitehaven St., N.W.  
Washington, D.C. 20235

State: See Appendix B.

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Fish and Wildlife Coordination Act Consultations1. When required

The Fish and Wildlife Coordination Act, as amended, 16 U.S.C. 661-666c, requires that Federal permitting agencies give full consideration to conservation of wildlife resource values in the permitting process. This is accomplished through consultations between the permitting agency and the affected state wildlife agency, the U.S. Fish and Wildlife Service Regional Director, and National Marine Fisheries Service Regional Director, as appropriate for the particular OTEC project proposal. The purpose of these consultations is, to the maximum practical extent, to avoid project-caused losses of wildlife resources, to compensate for unavoidable wildlife resource losses, and to enhance wildlife resource values.

2. Synopsis of information required in application

Conducting these consultations is primarily the responsibility of the Federal agency to which application for a permit or authorization has been made. However, permit or license applicants should be prepared to provide the Federal permitting agency with information on wildlife and wildlife habitat in the vicinity of the proposed OTEC project; projected impacts on wildlife and habitat of the proposed project; and possible conservation and mitigation measures which could be implemented to minimize losses of wildlife and habitat associated with construction and operation of the proposed project.

3. Processing procedure

OTEC project sponsors are encouraged to consult with federal and affected state wildlife agencies as early as possible in the project planning process, preferably before formal application is made for any required Federal authorization, permit, or license. This will assist project sponsors in designing an environmentally sound project and in minimizing the potential for later delay in processing applications. In any case, the following steps will be taken by the Federal permitting agency after an application has been received, to assure compliance with the Fish and Wildlife Coordination Act.

- o Consultation between the Federal permitting agency and state and Federal wildlife agencies on measures necessary to conserve wildlife during OTEC project planning, construction, and operation.
- o Reporting to the Federal permitting agency by wildlife agencies on potential effects of the OTEC project on wildlife resources and on recommended measures to be taken in connection with the proposed project to conserve wildlife resources.

- o Full consideration by the Federal action agency of measures recommended to conserve wildlife resources in connection with the proposed OTEC project.
- o Implementation as permit or license conditions of justifiable conservation measures.

#### 4. Applicable laws

Federal: Fish and Wildlife Coordination Act, 16 U.S.C. 661-666c.

#### 5. Rules and regulations

Federal: Fish and Wildlife Coordination Procedures, 15 CFR Part 410 (proposed), 45 FR 83412, December 18, 1980

Mitigation Policy of the U.S. Fish and Wildlife Service, Final, 46 FR 7644, January 23, 1981.

#### 6. Responsible agencies

Federal: U.S. Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240 (202) 343-7151.

National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Washington, D.C. 20235 (202) 634-7283

Appropriate Fish and Wildlife Service Regional Director. See Appendix B.

Appropriate National Marine Fisheries Service Regional Director. See Appendix B.

State: Appropriate state wildlife management agency. See Appendix B.

Marine Mammal Protection Act Permit1. When required

The Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407, as amended (MMPA), established a moratorium with some exceptions on the taking or importation of marine mammals, including polar bears, sea otters, walrus, dugong, manatees, whales, porpoises, seals, and sea lions. Taking is broadly defined to include harassing, hunting, capturing, collecting, killing, disturbing, or molesting, as well as attempts to do any of these. If marine mammals are found in the vicinity of the proposed OTEC project and steps adequate to assure that "takings" as defined above will not occur cannot be implemented, authorizations for such taking must be obtained. These authorizations are obtained from either the Fish and Wildlife Service for the first five marine mammal species or the National Marine Fisheries Service for the others. If the marine mammal is listed as endangered or threatened, the requirements of the Endangered Species Act must be satisfied (see p. A-51).

2. Synopsis of information required in application

An authorization to take marine mammals may be granted only if the take is covered by one of the exceptions to the moratorium provisions of the MMPA. Of the principal exceptions, which cover native Alaskan subsistence take, permits for scientific research or public display, incidental take in a commercial fishery, waiver of the moratorium, and the incidental but not intentional take of a small number of non-depleted marine mammals, only the latter two are likely to apply to OTEC projects. There are wide variations in information requirements and in the strictness of legal and administrative requirements to be satisfied for each of these exceptions. Early discussions with NOAA's Office of Marine Mammals and Endangered Species are recommended for OTEC projects that may impact marine mammals, so that the appropriate information can be developed. These discussions are even more important when the project may impact an endangered or threatened marine mammal or other marine species of fauna and flora where additional requirements must be satisfied.

3. Processing procedure

Varies with type of exception sought

4. Applicable laws

Federal: Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407.

5. Rules and regulations

Federal: 50 CFR.

6. Responsible agencies

Federal: For whales, porpoises, seals and sea lions:

Assistant Administrator for Fisheries  
National Marine Fisheries Service  
National Oceanic and Atmospheric Administration  
3300 Whitehaven Street, N.W.  
Washington, D.C. 20235  
(202) 634-7529

For polar bears, sea otters, walrus, dugong, manatee,  
and marine otters:

Director  
Fish and Wildlife Service  
U.S. Department of the Interior  
Washington, D.C. 20240  
(703) 235-1903

Federal Environmental Impact Statement1. When required

When a federal agency takes an action which is a "major federal action significantly affecting the quality of the human environment," the agency must prepare an environmental impact statement (EIS) as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). The issuance of a federal permit, license, or authorization for an OTEC project generally will be deemed to be such an action triggering the EIS preparation requirement. The OTEC Act itself specifically requires NOAA to prepare an EIS as part of the process of issuing a NOAA OTEC license. See pp. A-4 and II-3. However, it is likely that many of the federal permits and licenses required for an OTEC project not subject to the NOAA licensing requirement would also trigger the EIS requirement of NEPA. Thus, in any case, OTEC project sponsors should be prepared to provide information and work with the federal permitting agency in developing an EIS on the project. Note also, that many states have their own EIS requirements, above and beyond the federal one.

2. Synopsis of information required in application

As noted above, it is the responsibility of the federal permitting agency to prepare the EIS. However, the permit applicant will be expected to provide detailed information on the projected environmental impacts of the project as part of the permit application. This information must include a description of the proposed project and the atmospheric, terrestrial, marine, and coastal environments in which it will be located; an assessment of the atmospheric, terrestrial, marine and coastal effects of construction, deployment, and operation of the project; an assessment of indirect and cumulative effects of the project, including secondary environmental effects and socioeconomic effects; an assessment of unavoidable adverse effects and mitigating measures; and assessment of the relationship between the effects of the proposed project and the maintenance and enhancement of long term productivity of the environment.

3. Processing procedure

The first step in the federal EIS preparation process is generally the development of an environmental issues discussion paper and the conduct of a public "scoping" meeting. The purpose of that process is to define the environmental issues of significance associated with development of the OTEC project. After the scoping meeting is completed and any written comments on the discussion paper have been received, the permitting agency proceeds to develop a draft EIS. In addition to descriptive material, the draft will contain a discussion of alternatives to issuance of the relevant permit,

license, or authorization, including taking no action, or a modified one. The environmental consequences of the alternatives will be presented along with the permitting agency's tentative opinion as to its preferred alternative and the environmentally preferable alternative. If the project involves more than one federal license, permit, or authorization, the agency responsible for the most significant permit will generally act as lead agency for draft EIS preparation. Other involved federal agencies will participate and, if practicable, a single draft EIS covering all major federal actions will be prepared. This lead agency process of draft EIS preparation is required by statute if a NOAA OTEC license is being applied for and NOAA is specified as the lead agency.

A Federal Register notice of availability of the draft EIS is published, which includes notice of public hearings which will be held on it. After the close of public comment, generally at least 45 days after publication of the notice of availability, the lead federal agency proceeds to prepare the final EIS on the proposed project. The final EIS must specifically respond to all public comments received on the draft. It will reflect the agency's final selection of its preferred alternative and the environmentally preferable alternative, based on the record developed during preparation of the draft EIS and the public comment period. The lead agency files the final EIS with the Environmental Protection Agency and a Federal Register notice of its availability is published. The involved federal agencies must then allow 30 days before their actions on the various permits, licenses, and authorizations covered by the EIS became final. This "cooling off" period is provided to allow affected parties to challenge the validity of the conclusions reached in the final EIS before any irreversible or irretrievable commitment of resources is made in connection with the proposed project.

#### 4. Applicable law

Federal: National Environmental Policy Act of 1969, Pub. L. 91-190, as amended (42 U.S.C. 4321-4347)

#### 5. Rules and regulations

Federal: 40 CFR Parts 1500-1508

#### 6. Responsible agencies

Federal: Involved permitting, licensing, and authorizing agencies

Office of Federal Activities  
Environmental Protection Agency  
401 M St., S.W.  
Washington, D.C. 20460  
(202) 755-0770

Responsible agencies (Cont.)

President's Council on Environmental Quality  
722 Jackson Place, N.W.  
Washington, D.C.  
(202) 395-5750

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STATE AND LOCAL PERMITS, AND CONTROLS

An OTEC project located on land or in state waters, or connected to a state by cable or pipeline will be the subject of a number of state and local permits, licenses, and controls, in addition to the federal requirements previously described. This Appendix covers those requirements on a state-by-state basis in a format similar to that used for the federal authorizations potentially applicable to OTEC projects. Note that only those permits which will have significant impact on project design, siting, and operation are treated here. Routine state controls related to doing business, such as minimum wage and workmen's compensation statutes and state requirements on corporate registration are not covered. Each state section also includes a listing of local federal agency contacts and a list of federally designated historic sites, marine sanctuaries, endangered species, etc. relevant to the particular state.

It can readily be seen that many of the information requirements relevant to state and local permits duplicate those necessary for obtaining federal authorizations. Careful development and organization of project information should therefore enable project sponsors to satisfy all requirements with a minimum of wasted effort. OTEC project sponsors are encouraged to do this by working with NOAA in structuring project documentation so that all involved governmental entities can make use of it with a minimum need for restructuring available project information for different license, permit, and authorization applications.

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Hawaii Permits/Controls

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HAWAII (STATE)

Permit for shoreline waters work

1. When required

This permit is required for OTEC projects involving permanent or temporary construction in shorewaters of the state of Hawaii including navigable portions of streams and certain shores.

2. Synopsis of information required in application

The application for this permit has been combined with the application for the Conservation District Use Permit, which requires a description of the shoreline, nature and extent of proposed work (dredging, disposition of dredged material, etc.), reference to public access, effects on adjacent property owners, and other information pertinent to the proposed work.

3. Processing procedure

The Department of Transportation acts in the capacity of a review agency for this Permit during processing of the Conservation District Use Permit. The overall proposal is processed as a Conservation District Use Application and is approved or denied by the Board of Land and Natural Resources. This relieves the applicant of the necessity of obtaining two separate permit approvals for the same work. The rare exception to this procedure would occur when the Board approves a proposal over the objections of the Department of Transportation. In these cases, the applicant will be required to obtain a shorewaters construction permit from the Department of Transportation. A public hearing, while not mandatory, may be required if sufficient public interest is expressed.

4. Applicable law

Chapter 266, Hawaii Revised Statutes (HRS)

5. Rules and regulations

Department of Transportation's Rules and Regulations and Tariff No. 4

6. Responsible agency

Department of Transportation  
State of Hawaii  
79 S. Nimitz Highway  
Honolulu, Hawaii 96813  
(808) 548-3205

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## HAWAII (STATE)

Conservation District Use Permit1. When required

Anyone proposing to make any use of lands within the Conservation District, as established by the State Land Use Commission, must apply for this Permit. The Conservation District includes large areas of shoreline lands and all submerged lands lying beneath state territorial waters. Thus, laying OTEC piping or cables, constructing a facility in state waters, or installing a permanent mooring clump or device below state waters would all require this permit. Note that the state of Hawaii claims jurisdiction over channel waters between the major islands. Thus activities proposed to be conducted more than three miles from shore may still be subject to this state requirement.

2. Synopsis of information required in application

A complete application form, which can be obtained from the state Department of Land and Natural Resources, must be submitted, identifying the site of the proposed action, and describing the action in sufficient detail to permit a thorough evaluation by the Department. Site and construction plans are required. Eighteen copies of the application form and all attachments must be submitted to the Department.

There is a \$50.00 filing fee and a \$50.00 public hearing fee which is required if the proposed activity will be commercial.

3. Processing procedure

Upon receipt of an application, the Department reviews and makes recommendations on the proposed uses to the Board of Land and Natural Resources. Applications which have been reviewed are considered during Board meetings which are open to the public. However, all federal and state environmental requirements must be satisfied before Board action can begin. This may include preparation an EIS under Chapter 343, HRS. (See Environmental Impact Statement.) For shoreline conservation areas, a number of other permit requirements may apply. See Special Management Area Permit, Shoreline Setback Variance, and Permit for Shoreline Waters Work. Note that if a county Special Management Area permit is required for the proposed OTEC project, it must be obtained before processing of the Conservation District Use Permit can begin. If the Board fails to act within one hundred and eighty (180) days after receipt of an application, the applicant may automatically put the land to the use or uses requested, unless a temporary variance is required for some or all of the proposed activity. The Board may grant such a temporary variance from zoned uses for "good cause" where the Board determines the use to be in accordance with good conservation practices.

4. Applicable laws

Chapter 183-41, Hawaii Revised Statutes, as amended.

5. Rules and regulations

State Department of Land and Natural Resources Regulation No. 4

6. Responsible agencies

Approved by: Board of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street  
Honolulu, Hawaii 96813  
(808) 548-6550

Reviewed by: Department of Land and Natural Resources  
Planning Office  
State of Hawaii  
1151 Punchbowl Street, Room 131  
Honolulu, Hawaii 96813  
(808) 548-7837

## HAWAII (STATE)

Designated Groundwater Area Use Permit1. When required

Anyone wishing to initiate the use of groundwater for non-domestic purposes from "designated groundwater areas" established by the state Board of Land and Natural Resources must apply to the Board for this permit.

2. Synopsis of information required in application

The application must be in writing and must state specifically:

- (a) the merits of the water use;
- (b) the hazards to public health, safety or welfare;
- (c) the desirability of the permit; and
- (d) any appropriate qualifications of the applicant.

Fees are established by the Board on the basis of the class of the permit, duration, the capital investment to be made, and other relevant factors.

3. Processing procedure

Permits may be granted if:

- (a) There is water available for use.
- (b) The proposed use will be beneficial.
- (c) The most beneficial use and development of the water resources of the State will not be impaired by granting the permit.
- (d) Granting the permit will not substantially and materially interfere with other existing permitted uses.

The Board gives notice of the application by publication in a newspaper of general circulation at least ten (10) days before granting the permit. The applicant will also be required to mail notices to any State or City agency or person who may have an interest in the application.

Each permit is issued for a specified period, not exceeding fifty (50) years and may be conditioned as the Board deems appropriate. A hearing can be held upon the request of any person who is or may be adversely affected by the granting or denial of the permit. If municipal water is already available, permission may be denied and the applicant required to use municipal supplies.

4. Applicable law

Chapter 177, Hawaii Revised Statutes

5. Rules and regulations

As adopted for specified "groundwater areas" by the Board.

6. Responsible agencies

Issued by: Board of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street  
Honolulu, Hawaii 96813  
(808) 548-6550

Reviewed by: Department of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street  
Honolulu, Hawaii 96813  
(808) 548-6550

## HAWAII (STATE)

Environmental Impact Statement (EIS)1. When required

A state EIS may be required for an OTEC project involving:

(1) the use of state or county lands or funds; (2) the use of lands within the State Conservation District; (3) the use of lands within the shoreline area, including 20 to 40 feet inland and 300 feet seaward from the shoreline as defined by Chapter 205.31, HRS; (4) and the use of lands within any historic site as designated in either the State or National Register of Historic Places. An EIS is required for OTEC projects which take place within the above-described categories only when agencies determine that the project may have a significant effect on the environment. If an EIS is required, a single one will be prepared to cover all state and local permits and controls applicable to the OTEC project. If impacts are judged to be insignificant, a Negative Declaration is filed with the state Office of Environmental Quality Control (OEQC) by the agency making such a determination.

2. Synopsis of information required in application

The Environmental Quality Commission (EQC) has devised rules and regulations to guide EIS preparation. These rules lay out a general EIS format through which the applicant must respond to a number of specific topic areas in sufficient detail to permit decisionmakers to fully anticipate the environmental consequences of the proposed action. The major categories of information called for by the regulations are as follows:

Summary sheet which outlines and concisely discusses the contents.

Project description.

The relationship of the proposed action to land use plans, policies, and controls for the affected area.

Any probable adverse environmental effects which cannot be avoided.

Alternatives to the proposed action.

The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

Mitigation measures proposed to minimize impact.

Any irreversible and irretrievable commitments of resources.

An indication of what other interests and considerations of governmental policies are thought to offset the adverse environmental effects of the proposed action.

Organizations and persons consulted.

There is no filing fee and no public hearing requirement. A single EIS is prepared covering all state and local actions associated with the OTEC project.

3. Processing procedure

After it is determined that an EIS is required, a notice is published in the OEQC Bulletin advising the public that an EIS will be prepared. The Environmental Impact Statement Preparation Notice — prepared by the agency requiring the EIS — summarizes the proposed action, points out areas of potential impact and generally documents the steps and criteria used in making the decision. The Notice includes the name and address of a person who may be contacted for further information about the project.

Following the publication of the Notice, the public has thirty (30) days in which to request to be a consulted party during EIS preparation. After the EIS is prepared and circulated, the public has an additional thirty (30) days during which to comment in writing. The applicant must respond in writing to any public comments. Both the comments and the applicant's responses must be included in the final EIS submitted to the approving agency.

An EIS is accepted or not accepted by the agency requiring it. Acceptance of an EIS must be done within sixty (60) days of the filing of it with the approving agency. Agency acceptance of an EIS means that all identifiable impacts have been adequately described, and that questions raised during review of the EIS have been satisfactorily answered by the applicant. Acceptance does not mean that a project is approved. It is merely a condition precedent to requests for permit approval.

The mechanics of filing the statement, public notification of agency decisions, distribution of the statement for review, and appeals from agency decisions are handled through the State Office of Environmental Quality Control, 550 Halekauwila Street, Room 301, Honolulu, Hawaii 96813.

When actions using State or County resources are subject to both State and Federal EIS requirements, the State's requirements must be satisfied first and an EIS written to satisfy federal requirements is not automatically acceptable. However, Chapter 343-5(f) of Hawaii Revised Statutes encourages concurrent review and processing of federal and state permits and controls. Thus if early and close coordination is maintained by OTEC project sponsors with

involved federal and state officials, a single EIS should satisfy both requirements. See p. A-59.

"Public projects" e.g., those involving the use of State or County lands or funds are assessed by the agency proposing the project. If it is determined that there would be significant environmental effects, the agency prepares the required EIS. Acceptance of the document is by either the Governor or Mayor — depending upon whether State or County funds/lands are involved. (See Chapter 343, HRS, for further elaboration.) Review of a public agency EIS is handled in essentially the same manner as the procedure for "private projects" described above.

Note that OTEC projects involving wetlands, streams, and coastal waters are subject to both State and Federal EIS requirements.

4. Applicable laws

Chapter 343, HRS

5. Rules and regulations

Environmental Quality Commission's Environmental Impact Statement, Regulations and Rules of Practice and Procedure

6. Responsible agencies

The determination as to whether an EIS is required or not is made by the State or County agency to which the applicant first applies for any permit connected with the OTEC project.

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## HAWAII (STATE)

Historic Site Review1. When required

This review is required if the proposed OTEC project would entail any construction, alteration, or improvement of any nature at or near a designated historic site, or a site eligible to be designated, within the state of Hawaii.

2. Synopsis of information required in application

The application must describe the nature of the proposed construction and the precise location of any designated historic sites in the vicinity of the proposed project. No separate fee is required for this review.

3. Processing procedure

The Historic Site Review is done as part of the internal review conducted by the state Department of Land and Natural Resources during processing of the Conservation District Use Permit application. After the historic site review is completed, the Department must respond in one of three ways:

- a. Allow the proposed action to proceed unimpeded.
- b. Undertake or permit the investigation, recording, preservation, and salvage of any historical information deemed necessary to preserve Hawaiian history.
- c. Initiate condemnation proceedings to take the property upon just compensation of the owner.

Proposed work within sites on the state or federal Register of Historic Places also may require preparation of an EIS. If the work will be conducted within the City and County of Honolulu, it may require City review under Article 12, Revised Ordinances 1969, Chapter 21 (Historic, Cultural, Scenic Districts). See Certificate of Appropriateness in the Hawaii section of this Appendix.

4. Applicable law

Chapter 91, Hawaii Revised Statutes

5. Rules and regulations

Title 13, Department of Land and Natural Resources, Sub-Title 8, Hawaii Historic Places Review Board, Chapter 197, Rules of Practice and Procedure, June 12, 1981.

6. Responsible agency

Reviewed by: Department of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street  
Honolulu, Hawaii 96813  
(808) 548-6550

## Hawaii (State)

Coastal Zone Management Consistency Review1. When required

Because the state of Hawaii has a federally approved Coastal Zone Management (CZM) program, any project affecting Hawaii's coastal zone must be reviewed and accepted by the state as consistent with the Plan before required permits and authorizations for the project may be issued by federal agencies. Since any OTEC project other than a plantship would both impact the coastal zone and require some federal permits and authorizations, this review is required.

2. Synopsis of information required in application

The project sponsors must submit an assessment of the proposed OTEC project's consistency with the enforceable provisions of the state CZM plan to the state Department of Planning and Economic Development (DPED). A signed statement to the effect that the proposed project is consistent with the CZM plan and a detailed project description must also be provided. Copies of each required federal permit and license application must be included in the submittal. Application for consistency review should be made at the time applications are submitted to federal agencies. No fee is required when making application for this review.

3. Processing procedure

The DPED reviews the submitted information and may request clarification or additional information concerning the proposed activity's effects on the coastal zone. Conferences may be arranged to resolve potential issues or to discuss possible alternatives which would assure consistency with the CZM program. State and County agencies may participate in these conferences and may also provide formal review comments, as appropriate.

The DPED formally agrees or disagrees with the applicant's consistency statement. If there is disagreement, the DPED recommends alternative measures which, if implemented, would assure consistency with the CZM Program. Federal permitting agencies may not issue a permit for an activity which the DPED has found to be inconsistent with Hawaii's program.

See the description of Coastal Zone Management consistency certification in the Federal section of this Guide, p. A-43, for additional information on the review procedures. See also the description of NOAA OTEC licensing, p. A-3, for time deadlines imposed on state CZM review during OTEC license application processing.

4. Applicable laws

Federal: Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 et seq.

State: Sec. 205A -3(3) Hawaii Revised Statutes.

5. Rules and regulations

Federal: 15 CFR Part 930.

6. Responsible agency

Department of Planning and Economic Development  
State of Hawaii  
P.O. Box 2359  
Honolulu, Hawaii 96804  
Attn: Coastal Zone Management Program  
(808) 548-8467

## HAWAII (STATE)

Authority to Construct Permit and Permit to Operate (Air Quality)1. When required

Any proposed OTEC project which may result in air pollution is required to secure these permits before construction or operation. "Air pollution" is defined in Section 342-21(1), HRS. Chapter 42 of the state Public Health Regulations further defines substances which are air pollutants and states that "any industrial, public or private project development which could constitute a new source of air pollution or an increased source of air pollution will be required to have a permit to construct and operate and, as part of the initial project design, to provide the highest and best practicable degree of air pollution control." Chapter 43 of the state Public Health Regulations establishes a specific requirement for permits for all new sources of air pollution.

While a closed-cycle OTEC operation itself would probably not require these permits, its standby or startup generators might. Generally, the threshold which would trigger permitting requirements would be boiler or engine capacity of 500,000 BTU's per day, or more.

2. Synopsis of information required in application

Application is made to the state Director of Health. Forms are available for this purpose at the State Department of Health. The form must be accompanied by two copies of complete data, citing information, plan descriptions, specifications, drawings, and other detailed information necessary to determine in what manner the new source will be operated and controlled. There is a filing fee of \$20.00. In addition, an applicant will be required to pay additional fees as specified in Chapter 43, § 2(a)(15) of state Public Health Regulations, when and if a Permit to Operate is granted.

3. Processing procedure

An applicant for an Authority to Construct Permit or a Permit to Operate must show to the satisfaction of the Director of Health that:

- (a) The new source is designed, built, and equipped in accordance with the best practicable control technology so as to reduce emissions to a minimum.
- (b) The new source is designed and will be constructed or modified to operate without causing a violation of applicable rules and regulations.
- (c) The new source will not endanger the maintenance of applicable ambient air quality standards.

The Director must act on an application within one hundred and eighty (180) days after its receipt, and must notify the applicant in writing of approval, conditional approval, or denial. The Director may deny an application if the information submitted shows that the new source cannot conditionally or otherwise meet (a) through (c), above. The Director may grant conditional approval, and in such cases, may:

- (a) require an applicant to provide sampling and testing facilities such as sampling ports of size, number, and location as specified by the Director; safe access to each port; and instrumentation for monitoring and recording emission data.
- (a) specify conditions which will bring the operation of any new source described in the application up to the standards of (a) through (c) above.

In acting upon an application for a Permit to Operate, the Director can deny if it is found that the facility has not been constructed in accordance with the Authority to Construct Permit. Performance testing may also be required by the Director.

It should be noted that the U.S. Environmental Protection Agency retains power to formulate a state plan/or enforce applicable air quality standards in the event a state fails to do so. See p. A-39.

#### 4. Applicable laws

Clean Air Act Amendments of 1977, Public Law No. 95-95 Chapter 342, Hawaii Revised Statutes

#### 5. Rules and regulations

Public Health Regulations, Chapter 42 and 43

#### 6. Responsible agencies

Issued by: Pollution Technical Review Branch  
Environmental Protection and Health Services Division  
Department of Health  
State of Hawaii  
645 Halekauwila Street  
Honolulu, Hawaii 96813  
(808) 548-6455

Other: U.S. Environmental Protection Agency  
Enforcement Division  
215 Fremont Street  
San Francisco, California 94105  
(415) 974-8153

## HAWAII (STATE)

National Pollutant Discharge Elimination System (NPDES) Permit1. When required

An NPDES permit is required before any effluent discharge can be made from ponds, tanks, or other facilities to surface streams or to coastal waters of the state of Hawaii. The state of Hawaii claims jurisdiction over channel waters between the major islands, including those waters beyond three miles from shore. Because the state has an NPDES program approved by the U.S. Environmental Protection Agency, this permit program is administered by the state Department of Health. Refer to Chapter 37 of Public Health Regulations for exemptions from the basic permitting requirements.

2. Synopsis of information required in application

Federal forms used to apply for this permit are available at the state Department of Health. Required data include physio-chemical characterization of the proposed effluent, specifically nitrogen and phosphorous, pH, temperature, and any other factors and parameters by which the effluent differs from the quality of the receiving waters. There is a \$100.00 filing fee.

3. Processing procedure

There is no mandatory public hearing. However, there is a requirement for public notification of the Department's intent to issue a permit and a hearing will be required if requested by a member of the public.

This permit is issued for a limited period of time, usually five years with no guarantee of renewal. A monitoring program involving quarterly (or more frequent) sampling of the effluent and its constituents could be required. In certain cases, an EIS could be required as a condition preceding issuance of this permit (See Environmental Impact Statement).

4. Applicable laws

Federal Clean Water Act (Pub.L. 92-500, as amended by Pub.L. 95-217 and Pub.L. 95-576; 33 U.S.C. 1251 et seq.)

Chapter 342, Part III, Hawaii Revised Statutes

5. Rules and regulations

state Public Health Regulations, Chapter 37

6. Responsible agencies

Issued by: Pollution Technical Review Branch  
Environmental Protection and Health Service Division  
State Department of Health  
645 Halekauwila Street  
Honolulu, Hawaii 96813  
(808) 548-6455

Reviewed by: U.S. Environmental Protection Agency  
Enforcement Division  
215 Fremont Street  
San Francisco, California 94105  
(415) 974-8153

## HAWAII (STATE)

Variance from Pollution Controls1. When required

A variance must be obtained for any emission or discharge from an OTEC project of a pollutant or noise which exceeds applicable standards. Refer to Chapter 37-A, 42, and 44-A of the state Public Health Regulations for water quality, air quality, and noise standards, respectively. Generally, normal operating conditions will be covered by routine permits, and this variance would only be required if unforeseen conditions arising after project startup make it impossible to comply with pre-existing permit conditions.

2. Synopsis of information required in application

An application form is available from the state Department of Health. The application must be accompanied by a complete and detailed description of present conditions and how present conditions do not conform to standards.

3. Processing procedure

No variance can be granted unless the application and the supporting information clearly show that:

- (a) The continuation of the function or operation is in the public interest;
- (b) The emission or discharge occurring or proposed to occur does not substantially endanger human health or safety; and
- (c) Compliance with the rules, regulations, or standards from which a variance is sought would produce serious hardship without equal or greater benefits to the public.

No renewal can be allowed without a thorough review of known and available means of preventing, controlling, or abating the pollution or excessive noise involved. The Department may issue a variance for a period not exceeding ten years.

Every variance granted must include conditions requiring the applicant to perform air, discharge, effluent, or noise sampling and report the results of such sampling to the department.

Any application for renewal must be made at least sixty (60) days before expiration of the variance. No variance can be issued or renewed for any discharge of pollutants or wastes which is in violation of the requirements of the Federal Clean Water Act.

4. Applicable laws

Chapter 342, Hawaii Revised Statutes

5. Rules and regulations

Public Health Regulations, Chapters 37-A, 42 and 44-A

6. Responsible agencies

Department of Health  
State of Hawaii  
1250 Punchbowl Street  
Honolulu, Hawaii 96813  
(808) 548-6410

## HAWAII (STATE)

Zone of Mixing Approval1. When required

A zone of mixing application must be filed if the proposed OTEC project effluent discharge would violate water quality standards for that area. See also National Pollutant Discharge Elimination System (NPDES) Permit. Water quality standards are established for the state of Hawaii, by geographical area, in Chapter 37-A of state Public Health Regulations.

2. Synopsis of information required in application

Application is made to the State Department of Health. Forms are available at the Department. The application form must be accompanied by a complete and detailed description of present conditions, an explanation of how those conditions do not conform to standards, and other pertinent information.

3. Processing procedure

Applications are reviewed for the effect or probable effect on water quality standards as specified in Chapter 37-A. Approval can be granted only after a public hearing is held by the Director of Health in the county where the source of effluent is situated.

No zone of mixing can be granted unless the application and supporting information clearly show that:

- (a) The continuation of the function or operation involved in the discharge is in the public interest;
- (b) The discharge occurring or proposed to occur does not substantially endanger human health or safety;
- (c) Compliance with existing water quality standards would produce serious hardships without equal or greater benefits to the public; and
- (d) The discharge occurring or proposed to occur does not violate basic standards applicable to all waters, will not unreasonably interfere with any actual or probable use of the water areas for which it is applied, and has received the best degree of treatment or control practicable under existing technology or, in the case of the proposed discharge, will receive the best available demonstrated pollution control technology, processes, and operating methods.

The Director may issue a zone of mixing approval for a period not exceeding five years. The grantee may be required to perform effluent and receiving water sampling and report the results of such

sampling to the Director. A program of research to develop practicable alternatives to the methods of treatment or control in use by the grantee may also be required. The establishment of any zone of mixing is subject to concurrence by the U.S. Environmental Protection Agency.

4. Applicable laws

Federal Clean Water Act, Pub.L. 92-500, as amended.

Chapter 342, Hawaii Revised Statutes

5. Rules and regulations

Public Health Regulations, Chapter 37-A

6. Responsible agencies

Approved by: Pollution Technical Review Branch  
Environmental Protection and Health Services Division  
Department of Health  
State of Hawaii  
645 Halekauwila Street  
Honolulu, Hawaii 96813  
(808) 548-6410

Reviewed by: U.S. Environmental Protection Agency  
Enforcement Division  
215 Fremont Street  
San Francisco, California 94105  
(415) 974-8153

## HAWAII (STATE)

Permit to Install Utilities Within State Highway Rights-of-Way1. When required

A permit is required for new utility installations which are to cross or otherwise occupy the rights-of-way of State Highways. A permit is also required for existing utility facilities which are to be retained, relocated or adjusted within these rights-of-way. Permit requirements apply to utility facilities which are privately-, publicly-, or cooperatively-owned, including private lines which are devoted exclusively to private use. However, installation of private lines within the rights-of-way is limited to crossing only.

2. Synopsis of information required in application

Plans describing the location and nature of the proposed utility installation must be submitted to the state Department of Transportation along with an application for Permit to Perform Work Upon State Highway. There is a minimum \$10.00 fee for the permit which increases with the physical size of the project within the right-of-way.

3. Processing procedure

The location, design, and methods for the accommodation and installation of utility facilities are reviewed to ensure that they (a) do not interfere with the free and safe flow of traffic; (b) do not otherwise impair the highway or its visual quality; and (c) do not conflict with other laws, rules or regulations. Use and occupancy agreements between the Department and the utility company (in writing) are required for crossings or other occupancy of the right-of-way of an active or completed State Highway. There are specific restrictions applicable to scenic strips, over-looks, rest areas, recreation areas, the adjacent highway right-of-way, and the rights-of-way of highways which pass through public parks and historic sites.

During installation and maintenance of the utility facilities, adequate provisions must be made for traffic control. Any deviation from the Rules and Regulations is subject to the Department's approval.

4. Applicable laws

Title 23, Code of Federal Regulations

Title 23, United States Code

Chapter 264, Hawaii Revised Statutes

5. Rules and regulations

Rules and Regulations Relating to the Accommodation and Installation  
of Utilities and State Highways and Federal-Aid Secondary County  
Highways, Title 19, Subtitle 4, Chapter 105, May 18, 1981.

6. Responsible agency

Department of Transportation  
State of Hawaii  
869 Punchbowl Street  
Honolulu, Hawaii 96813  
(808) 548-3205

## HAWAII (HONOLULU, HAWAII, KAUAI, MAUI COUNTIES)

Special Management Area (SMA) Permit1. When required

An SMA permit issued by the appropriate county is required for any OTEC project located within designated SMA boundaries, which include all land in Hawaii from the coastline to at least 100 yards inland, and in some cases, to a point further inland. Issuance of an SMA permit must, by statute, precede any other necessary land use approval. If, however, a shoreline setback variance is required in addition to an SMA permit, it will be processed concurrently (See Shoreline Setback Variance.)

2. Synopsis of information required in application

Application for an SMA Permit is a two step process involving a request for assessment which must include sufficiently detailed data on the project and its environmental setting to allow the environmental effects of the proposal to be assessed accurately. The applicant must also disclose the estimated cost of the project. There is no fee for filing a request for assessment. After the assessment is complete, the applicant files an application for a Special Management Area Permit. Fees for the permit application are as follows:

City and County of Honolulu: \$100.00

County of Hawaii: \$100.00

County of Kauai: \$150.00

County of Maui: \$150.00

3. Processing procedure

In reviewing the request for assessment, the responsible county agency is guided by the policies and objectives of Chapter 205, HRS. The object of the assessment is to determine if the proposal will have significant environmental effects on the SMA. This review must be accomplished within thirty (30) days of the request for assessment.

If the cost of the proposed land development is more than \$25,000 and it has no significant environmental effects on the SMA, the county agency will file a Negative Declaration and proceed to process the Special Management Area Permit application. If, regardless of its cost, the proposed land development project is found to have a significant environmental effect on the SMA, a state EIS will be required. The EIS will be processed in accordance with chapter 343, HRS Environmental Impact Statements. The EIS is prepared by the applicant and must be accepted by the county

ency before the application for the Special Management Area Permit can be accepted.

A public hearing must be held by the responsible county agency within sixty (60) days after acceptance of the application for Special Management Area Permit. Advance notice is given to adjacent property owners and published in newspapers of general circulation. A decision must be made on the application within thirty (30) days after this hearing, unless an extension is agreed to by the applicant.

#### 4. Applicable laws

Chapter 205A, Hawaii Revised Statutes

City Ordinance No. 4529(76), City and County of Honolulu

Rule 9, Planning Commission, County of Hawaii

#### 5. Rules and regulations

City Ordinance No. 4529 (Honolulu)

Rule 9, Planning Commission (Hawaii)

Special Management Area Rules and Regulations of the County of Kauai, 12 December 1979.

Special Management Area Rules and Regulations of the County of Maui,

#### 6. Responsible agencies

Issued by: (Honolulu) Department of Land Utilization  
City and County of Honolulu  
650 South King Street (7th floor)  
Honolulu, Hawaii 96813  
(808) 523-4254

(Hawaii) Planning Department  
County of Hawaii  
25 Aupuni Street  
Hilo, Hawaii 96720  
(808) 961-8321

(Kauai) Planning Commission of the County of Kauai  
4280 Rice Street  
Lihue, Hawaii 96766  
(808) 245-3919

Responsible agencies (Cont.)

(Maui) County of Maui Planning Commission  
200 S. High St.  
Wailuku, Maui, Hawaii 96793  
(808) 244-7735

Reviewed by: (Honolulu) Honolulu City Council  
City Hall  
Honolulu, Hawaii 96813  
(808) 523-4708  
(808) 523-4000

(Hawaii) Planning Department  
County of Hawaii  
25 Aupuni Street  
Hilo, Hawaii 96720  
(808) 961-8321

(Kauai) Planning Department of the County of Kauai  
4280 Rice Street  
Lihue, Hawaii 96766  
(808) 245-3919

(Maui) County of Maui Planning Department  
200 S. High St.  
Wailuku, Maui, Hawaii 96793  
(808) 244-7735

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## HAWAII (HONOLULU, HAWAII, MAUI, KAUAI COUNTIES)

Shoreline Setback Variance1. When required

A variance is required for all proposed commercial activities in the area of the shoreline from the water's edge to 40 feet inland. These variances are handled by the same county bodies which process special management area permits.

2. Synopsis of information required in application

In addition to the county application form, an applicant must submit a map prepared by a registered land surveyor which shows the actual field location of the shoreline and the position of the proposed OTEC project relative to it. The purpose of the survey is to show whether the project is subject to the provisions of the shoreline setback law. The shoreline survey must have been certified by the State Surveyor within twelve (12) months prior to filing. In addition, an applicant must prepare a written statement showing that: 1) the proposed structure, activity, or facility is in the public interest, or 2) hardship will be caused to the applicant if the request is denied. The filing fee for the variance is \$100.00 in Honolulu, Hawaii, and Kauai counties, and \$35.00 in Maui County.

3. Processing procedure

A public hearing is required. The county agency must approve or disapprove the request in writing within forty-five (45) days after the hearing, unless this period is extended by written agreement of the applicant.

The variance procedure is often combined with the Special Management Area (SMA) permit process since the SMA overlaps the shoreline setback area and both sets of regulations apply.

4. Applicable laws

Chapter 205, Hawaii Revised Statutes (HRS)

5. Rules and regulations

Ordinance No. 4631(76), City and County of Honolulu

Rule No. 8, Planning Commission, County of Hawaii

Shoreline Setback Rules and Regulations, Planning Department, County of Kauai, June 22, 1971.

Shoreline Setback Rules and Regulations of the County of Maui, Article III.

6. Responsible agencies

(Honolulu) Department of Land Utilization  
City and County of Honolulu  
650 S. King Street (7th Floor)  
Honolulu, Hawaii 96813  
(808) 523-4254

(Hawaii) Planning Department  
County of Hawaii  
25 Aupuni Street  
Hilo, Hawaii 96720  
(808) 961-8321

(Kauai) Planning Department of the County of Kauai  
4280 Rice Street  
Lihue, Hawaii 96766  
(808) 245 3919

(Maui) County of Maui Planning Department  
200 S. High St.  
Wailuku, Maui, Hawaii 96793  
(808) 244-7735

## HAWAII (HONOLULU, HAWAII, MAUI, KAUAI COUNTIES)

Building Permit for Building, Electrical, and Plumbing Work1. When required

For portions of the OTEC project to be located on land, these permits are required:

- a. to erect, construct, alter, remove, or demolish any building or structure including fences, retaining walls, walls, and swimming pools;
- b. for any electrical or plumbing work; and
- c. to construct or alter any sidewalk, curb or driveway in public rights-of-way.

County jurisdiction ends at the waters' edge and no county building permit is required for such activities conducted in state waters.

2. Synopsis of information required in application

An application must be submitted to the appropriate County Department. Forms for this purpose are available at each Department. In addition to the application form, three sets of plans are required. They should be drawn to scale with sufficient information and details to clearly show the nature and extent of the work. The plans must be properly stamped and signed by an architect or structural engineer if the principal structural members are of reinforced concrete or structural steel, regardless of value. Certain information must be shown on the plans:

- a. On plot plan, show lot dimensions, location of driveway, location of proposed work, distance from property lines and other buildings, easements and other pertinent information.
- b. On floor plan, indicate the use of rooms, room dimensions, location and sizes of windows, exits, etc.
- c. On framing plans or typical section views, show sizes and spacing of beams, floor joists, rafters, etc., and ceiling heights.
- d. On outside or exterior elevation views, show height of building.
- e. Give address and/or tax map key of where the work is to be done, and the name and address of owner.
- f. Give name and address of person who prepared the plans (if other than owner).

Fees for these permits vary depending on the value and scope of the proposed work.

### 3. Processing procedure

The responsible county department reviews the application and plans for compliance with the Building, Electrical, and Plumbing Codes. The application and plans are referred to a number of other county and state agencies with jurisdiction over specific aspects of the proposed work to be done. Each of these agencies must sign the application form, indicating compliance with applicable laws. The county department then issues the permit on the basis of this compliance. See also Supplemental Information On Building Permits, p. HI-37.

### 4. Applicable laws

Revised City Charter, Chapter 15, City and County of Honolulu

Revised Ordinances, Chapter 16, 17, 18 and 19, City and County of Honolulu

Hawaii County Code, Chapters 11, 13, 15

### 5. Rules and regulations

Building Code, R.O. 1969, Chapter 16, City and County of Honolulu

Electrical Code, R.O. 1969, Chapter 17, City and County of Honolulu

Plumbing Code, R.O. 1969, Chapter 19, City and County of Honolulu

Fee Schedules and Permit Procedures, R.O. 1969, Chapter 18, City and County of Honolulu

Hawaii County Code, Chapters, 11, 13, 15

Uniform Building Code

National Electrical Code

Uniform Plumbing Code

### 6. Responsible agencies

Issued by: (Honolulu) Building Department  
City and County of Honolulu  
650 S. King Street (1st Floor)  
Honolulu, Hawaii 96813  
(808) 523-4391

(Hawaii) Department of Public Works  
County of Hawaii  
25 Aupuni Street  
Hilo, Hawaii 96720  
(808) 961-8321

Responsible agencies (Cont.)

(Kauai) County of Kauai Department of Public Works  
4396 Rice Street  
Lihue, Hawaii 96766  
(808) 245-6705

(Maui) County of Maui Department of Public Works  
200 So. High St.  
Wailuku, Hawaii 96793  
(808) 244-7845

Reviewed by: Various other agencies

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## HAWAII (HONOLULU, HAWAII, KAUAI, MAUI COUNTIES)

Supplemental Information on Building Permits

As part of the Building Permit approval process, applications must be reviewed and approved in writing by a number of "referral agencies". Some of these agencies review all Building Permit applications, for example, boards of water supply, fire departments, etc., while others are involved only when the project would affect a specialized area of their jurisdiction over development such as airports, food establishments, etc.

These supplemental notes are intended to call attention to some of the referral agencies' requirements. They are not meant to be a comprehensive description of Building Permit referrals. The appropriate agencies should be contacted directly for more detailed information on their requirements.

1. Water Supply

Approval by the appropriate county Water Supply agency usually is required for Building Permit applications. Concurrence by the water supply agency also is usually required for final approval of areawide clearinghouse reviews, solid waste disposal permits, private sewage disposal system approvals, conservation district use applications, zoning changes, conditional use permits and subdivision permits.

2. Fire Safety

Any building permit application will be referred to the appropriate county fire officials for review and concurrence before a permit is issued. This involves a plans check.

3. Urban Renewal

The county department responsible for housing and community development usually must approve any project proposed for land within an area covered by an urban renewal plan.

4. Sidewalks, curbs, gutters, pavement, etc.

If the planned OTEC project includes sidewalks, curbs, gutters, pavement, adjustments at the property line, or adjustment or relocation of drainage, water, street lighting, sewer and other public utilities lines, review and concurrence by the county public works department will generally be required.

5. Refuse Collection and Disposal

The county agency responsible for refuse collection will generally review and approve plans for refuse collection from private roads and nonstandard private driveways.

## 6. Air Conditioning and Ventilation, Food Service, and Noise Permits

An applicant for a Building Permit which involves the installation of air conditioning or a ventilation system, the establishment of a food service operation, or a request to exceed minimum noise standards during construction will be referred to the State Department of Health for a plans check and the issuance of a permit or certificate as appropriate. Referral is made as a part of the Building Permit approval process. Questions on specific standards and requirements should be referred to the state Department of Health.

## 7. Airports

State Airport Zoning Regulations affect heights of structures and are administered by the Airports Division of the State's Department of Transportation. The purpose of the regulations is to prevent the creation, maintenance, establishment or continuation of airport hazards. Referral would be made for any Building Permit application on lands adjacent to or in the vicinity of airports. The regulations apply to all public, quasi-public and military airports in the State, but do not apply to private airports. They would specifically affect:

- (a) any object of natural growth, terrain, or permanent or temporary construction or alteration, including equipment or materials used therein, and apparatus of a permanent or temporary character; and
- (b) alteration of any permanent or temporary existing structure by a change in its height (including appurtenances) or lateral dimensions, including equipment or materials used therein.

In addition, there is a requirement by the Federal Aviation Administration for a "Notice of Proposed Construction or Alteration in the Vicinity of Airports" as authorized by Title 14 of the Code of Federal Regulations. See p. A-27 of this Guide.

## HAWAII (HONOLULU, HAWAII, KAUAI, MAUI, COUNTY)

Variance from Building, Electrical and Plumbing Codes1. When required

A variance is required when the proposed OTEC project will vary from the requirements of the Building, Electrical, or Plumbing Codes, e.g., requests for variances would be required prior to the use of new or alternative materials.

2. Synopsis of information required in application

An application must be submitted in duplicate to the appropriate county building department. Forms for this purpose are available at each Department. In addition to the application form, two copies of a plot plan, drawings, computations, and other pertinent data are required.

Supporting data should include:

- a. An explanation as to why strict application, operation or enforcement would result in practical difficulty or unnecessary hardship;
- b. Assurance that safety to life, limb, and property will not be jeopardized; and
- c. Assurance that granting the variance would not be injurious to adjoining uses, would not create fire hazards, and would not be contrary to the purpose of the Codes and the public interest.

Fees for variances are dependent upon the scope of the proposed OTEC project and the variances requested.

3. Processing procedure

The appropriate county building department will review the variance request and prepare a report for the relevant Board of Appeals.

The decision to approve or deny the request generally is made after a hearing is held on it. The character, use, and type of occupancy and construction of adjoining buildings or buildings on adjoining lots and the building involved in the appeal are considered in reaching the decision. A decision and order and separate findings of fact and conclusions of law are prepared and sent to each party or appointed representative after action has been taken. Appeals from the decision of a Board of Appeals generally would be directed to the appropriate Circuit Court.

4. Applicable laws

Revised City Charter, 1973, Chapter 15, City and County of Honolulu

Revised Ordinances, 1969, Chapter 16, 17, and 19, City and County of Honolulu

5. Rules and regulations

Refer to R.O. 1969, City and County of Honolulu:

Chapter 16, Building Code

Chapter 17, Electrical Code

Chapter 19, Plumbing Code

6. Responsible agencies

Approved by: (Honolulu) Building Board of Appeals  
City and County of Honolulu  
650 S. King Street (1st Floor)  
Honolulu, Hawaii 96813  
(808) 523-4653

(Hawaii) Building Board of Appeals  
25 Apuni Street  
Hilo, Hawaii 96720  
(808) 961-8331

(Kauai) Building Board of Appeals  
4396 Rice St.  
Lihue, Hawaii 96766  
(808) 245-6705

(Maui) Building Board of Appeals  
200 So. High St.  
Wailuku, Hawaii 96793  
(808) 244-7760

Reviewed by: (Honolulu) Building Department  
City and County of Honolulu  
650 S. King Street (1st Floor)  
Honolulu, Hawaii 96813  
(808) 523-4564

(Hawaii) Department of Public Works  
County of Hawaii  
25 Aupuni St.  
Hilo, Hawaii 96720  
(808) 961-8321

(Kauai) County of Kauai  
Department of Public Works  
4396 Rice Street  
Lihue, Hawaii 96766  
(808) 245-6705

(Maui) County of Maui  
Department of Public Works  
200 S. High St.  
Wailuku, Hawaii 96793  
(808) 244-7845

## HAWAII (HONOLULU COUNTY)

Conditional Use Permit1. When required

Conditional uses are those uses not usually permitted within certain zoning districts, but which can be permitted under certain conditions. Other conditional uses within the various zoning districts are listed in R.O. 1969, Chapter 21 (Honolulu County).

2. Synopsis of information required in application

A Conditional Use Permit application is submitted to the Department of Land Utilization, City and County of Honolulu. A form is available for this purpose at the Department. The application must be accompanied by a plan showing:

- a. Actual dimensions and shape of the lot.
- b. Exact sizes and location of existing and proposed structures.
- c. Existing and proposed uses of structures and open areas.
- d. Topography, access, surrounding land uses and other matters which may be required.

There is a \$100.00 filing fee.

3. Processing procedure

The application is reviewed by the Department. It is also reviewed by various government agencies to ensure the adequacy of water, sewer, and other public facilities to support the proposed use. Compatibility of the proposed use with the surrounding neighborhood is important. Agency and citizen comments are incorporated in a report and recommendation to the Planning Commission and City Council. A recommendation for approval usually contains certain conditions which are contained in a draft resolution. Adjacent property owners are notified and the public hearing notice is published in a newspaper of general circulation. The Planning Commission holds a public hearing and recommends approval, approval with modifications, or denial. The Department's report and recommendation, with a draft resolution if needed, and the Planning Commission's recommendation must be forwarded to the City Council for action within thirty (30) days of the close of the public hearing. A second public hearing is held by the City Council. The Council's Planning and Zoning Committee reviews the request and recommends approval, approval with modifications or denial. Approval of a Conditional Use Permit is by adoption of a Resolution by the Council as a Whole.

The Mayor has no jurisdiction over a Conditional Use Permit. Final action is taken by the Council and a permit is issued via a committee report and adopted Resolution.

An evening informational meeting may be held by the Department in the community.

4. Applicable laws

Chapter 46, Hawaii Revised Statutes

Revised City Charter, 1973, Chapter 10 (City and County of Honolulu)

Revised Ordinances, 1969, Chapter 21 (Comprehensive Zoning Code)

5. Rules and regulations

Refer to R.O. 1969, Chapter 21 (City and County of Honolulu)

6. Responsible agencies

Approved by: Honolulu City Council  
City Hall  
Honolulu, Hawaii 96813  
(808) 523-4000

Reviewed by: Planning Commission  
City and County of Honolulu  
650 S. King Street (8th Floor)  
Honolulu, Hawaii 96813  
(808) 523-4711

Department of Land Utilization  
City and County of Honolulu  
650 S. King Street (7th Floor)  
Honolulu, Hawaii 96813  
(808) 523-4290

Various other government agencies

## HAWAII (HONOLULU, HAWAII COUNTIES)

Grubbing, Grading, and Stockpiling Permit1. When required

A permit is required if the proposed OTEC project will involve grubbing, grading, or stockpiling operations. Operations under certain conditions are excluded.

2. Synopsis of information required in application

The applicant for this permit must submit a plan showing:

- a. All pertinent terrain features.
- b. Layout and arrangement of the proposed work on a plan view.
- c. Representation to scale of typical cross-sections of cut and fill areas.
- d. Details of topography both before and after the proposed work.
- e. Indication of means to be employed to assure erosion control.
- f. Estimates (in cubic yards) of the amounts of excavation and embankment.
- g. If material is to be imported to or exported from the site, an indication of where the material comes from or where it will be deposited. A grading permit is also required for any such offsite locations as well.

The above information is normally presented in the form of a scale drawing, with explanatory and/or supplementary data presented in the margins.

Where the graded area is 15,000 square feet or more, the plan should be prepared by a civil engineer licensed in the State of Hawaii. The original copy is to be submitted for review and approval. If the project involves more than one acre, the applicant must also submit a Temporary Erosion Control Plan for review and approval by the Division Chief and the Director. A soils report prepared by a soils engineer is required in some cases.

The amount of the permit fee depends on the volume of the earth moved or square feet of area denuded.

3. Processing procedure

After approval of the plan, three copies must be submitted to the Permit Section. At this point, a performance bond may be required in an amount dependent on the volume of earth to be moved. This

bond is required for all projects involving movement of more than 500 cubic yards of earth or for excavations or fills of over 15 feet in vertical height. The bond must be obtained from a surety firm operating in Hawaii. There is no public hearing requirement. The permit will not be granted until all other environmental and regulatory requirements have been met.

4. Applicable laws

Chapter 180C, Hawaii Revised Statutes

Revised Ordinances, 1969, Chapter 23, City and County of Honolulu

Ordinance No. 168, County of Hawaii

5. Rules and regulations

Soil Erosion Standards and Guidelines

6. Responsible agencies

Issued by: (Honolulu) Department of Public Works  
(Division of Engineering)  
City and County of Honolulu  
650 S. King Street (1st Floor)  
Honolulu, Hawaii 96813  
(808) 523-4341

(Hawaii) Department of Public Works  
County of Hawaii  
25 Aupuni Street  
Hilo, Hawaii 96720  
(808) 961-8321

## HAWAII (HONOLULU COUNTY)

Zoning Waiver1. When required

Certain minimum requirements of the zoning code (R.O. 1969, Chapter 21) can be waived by the Director of Land Utilization for public uses or utility installations. This applies to public utilities and uses only.

2. Synopsis of information required in application

There is no formal application form. Plans must be submitted with a letter requesting a waiver from the specific zoning requirement. Data required include:

- a. the exact dimensions of the lot;
- b. exact location of the proposed structure;
- c. existing and proposed uses of the structure; and
- d. height elevations of the structures.

There is no filing fee or public hearing requirement.

3. Processing procedure

The plans are reviewed by the Department of Land Utilization. The Director may set aside zoning requirements for these uses if he finds that the proposal is in the best interest of the public, that it would not have an adverse impact on the surrounding neighborhood, and that it meets all other applicable Code requirements.

4. Applicable laws

Chapter 46, Hawaii Revised Statutes

Revised City Charter, 1973, Chapter 10

Revised Ordinances, 1969, Chapter 21 (Comprehensive Zoning Code)

5. Rules and regulations

Refer to R.O. 1969, Chapter 21

6. Responsible Agency

Approved by: Department of Land Utilization  
City and County of Honolulu  
650 S. King Street  
Honolulu, Hawaii 96813  
(808) 523-4414

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## HAWAII (HONOLULU COUNTY)

Well Permit1. When required

If the proposed OTEC project will involve a well dug in the City and County of Honolulu, either for fresh or brackish salt water, a well permit will be required.

2. Synopsis of information required in application

Basic data required with the application include:

- (a) Location, size, proposed depth of well.
- (b) Purpose to which water will be put.
- (c) Capacity of pumps and distribution system.
- (d) Specifics of construction, including a cross-sectional drawing of the well throughout its depth.

There is a \$100.00 filing fee.

3. Processing procedure

Application is made to the Honolulu Board of Water Supply. The permit may not be issued if the Board of Water Supply has adequate service to the area. In that case, the applicant will be required to use water from the public system.

4. Applicable laws

Chapter 54, Hawaii Revised Statutes

Revised City Charter 1973, Article VII

5. Rules and regulations

Rules and Regulations Providing for the Protection, Development and Conservation of Water Resources in the City and County of Honolulu

6. Responsible Agency

Issued by: Board of Water Supply  
City and County of Honolulu  
630 S. Beretania Street  
Honolulu, Hawaii 96813  
(808) 548-7081

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Certificate of Appropriateness (Historic, Cultural, and Scenic Districts)1. When required

A Certificate of Appropriateness is required to construct, alter, repair, relocate, or demolish a structure within any Historic, Cultural and Scenic District within the City and County of Honolulu. A developer, owner, or lessee having at least five (5) years left on a recorded lease may file for a Certificate of Appropriateness. Maps showing the boundaries of these districts, such as the Hawaii Capitol District and Chinatown, are available at the County Department of Land Utilization. Note that there are certain exemptions in each district. Information on these is also available at the Department.

Certificates of Appropriateness must be obtained for both "non-significant projects" and "significant projects." Non-significant projects are generally interior alterations, repairs and renovation, and exterior repairs which do not change the character or visual appearance of a building. All other proposals (unless exempt) are considered to be significant. The underlying zoning regulations of the zoning districts remain in effect. In case of a conflict, the more restrictive provision applies.

2. Synopsis of information required in application

Separate application forms are available at the Department for each district. Materials to be submitted with the application generally include:

- a. Architectural plans.
- b. Site plans.
- c. Landscaping plans.
- d. Proposed location, size, number, and details of signs.
- e. Exterior lighting arrangements.
- f. Elevations of structures.
- g. Design of door and windows, ornamentation, and colors.
- h. Photos or perspective drawings showing visual relationships to adjoining structures and spaces.

There is a filing fee and a public hearing required for "significant projects"; none for "non-significant projects."

A minimum \$3.00 fee increases as the total estimated cost of work increases. Fees are computed in accordance with Table No. 3-A,

Section 303 of the Uniform Building Code. The applicant is notified by letter if the project is classified as significant.

3. Processing Procedure

a. Non-Significant Project

A Certificate of Appropriateness for a non-significant project must be issued by the Department within fifteen (15) days after receipt of the request. The Director of Land Utilization is authorized to issue this certificate on all non-significant projects without prior approval of the City Council, except for non-significant projects proposed by the City or State. City and State non-significant projects are subject to Council review and approval. No public hearing is required.

b. Significant Project

The Department has fifteen (15) days to decide if a project is significant. Within forty-five (45) days, the Department must prepare a report and recommendation to the Planning Commission which must schedule the public hearing. Within thirty (30) days after the public hearing, the Planning Commission must submit its recommendation to the City Council through the Mayor.

For specific Hawaii Capitol and Special Design (HC & SD) districts, ordinances may add other non-significant projects to the significant project review process or grant exemptions from it.

There are four HC & SDs: the Hawaii Capitol District, the Diamond Head District, the Punchbowl District, and the Chinatown District. Informational hand-outs on the requirements of each district are available at the Department of Land Utilization.

4. Applicable laws

Chapter 46, Hawaii Revised Statutes

Revised City Charter, 1973, Chapter 10

Revised Ordinances, 1969, Chapter 21 (Comprehensive Zoning Code)

5. Rules and regulations

Refer to R. O. 1969, Chapter 21

6. Responsible agencies

Issued by: Honolulu City Council  
City Hall  
Honolulu, Hawaii 96813  
(808) 523-4000

Responsible agencies (Cont.)

Reviewed by: Planning Commission  
City and County of Honolulu  
650 S. King Street  
Honolulu, Hawaii 96813  
(808) 523-4711

Department of Land Utilization  
City and County of Honolulu  
650 S. King Street  
Honolulu, Hawaii 96813  
(808) 523-4414

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HAWAII  
FEDERAL CONTACTS AND DESIGNATIONS

1. U.S. Army Corps of Engineers

District Engineer  
U.S. Army Engineer District  
Bldg 230, Ft. Shafter  
Honolulu, HI  
Attn: PODCO-0  
(808) 438-9258

2. U.S. Coast Guard

Commander  
Fourteenth Coast Guard District  
300 Ala Moana Blvd.  
Honolulu, HI 96850  
(808) 546-5531

Commanding Officer  
U.S. Coast Guard Marine Safety Office  
433 Ala Moana Blvd, Room 1  
Honolulu, HI 96813  
(808) 546-7146

3. Federal Aviation Administration

Regional Office:

Airports Division AWP-600  
Federal Aviation Administration  
P.O. Box 92007, Worldway Postal Center  
Los Angeles, CA 90009  
(213) 536-6240

Airports District Office:

Airports District Office  
HNL-600  
Federal Aviation Administration  
P.O. Box 50109  
Honolulu, HI 96850  
(808) 546-7129

4. Occupational Safety and Health Administration

(Federal)

Honolulu Area Office  
U.S. Department of Labor - OSHA  
300 Ala Moana Blvd., Suite 5122  
P.O. Box 50072  
Honolulu, HI 96850  
(808) 546-3157

(State)

Director  
Hawaii Department of Labor and Industrial Relations  
825 Mililani St.  
Honolulu, HI 96813  
(808) 548-3150

5. U.S. Environmental Protection Agency

Pacific Islands Contact Office  
U.S. Environmental Protection Agency  
300 Ala Moana Blvd., Rm. 1302  
Honolulu, HI 96850  
(808) 546-8910

6. U.S. Fish and Wildlife Service

U.S. Fish and Wildlife Service  
Hawaii Administrator  
300 Ala Moana Blvd, Room 5302  
P.O. Box 50167  
Honolulu, HI 96850  
(808) 546-5608

7. National Marine Fisheries Service

National Marine Fisheries Service,  
NOAA  
2570 Dole St.  
P.O. Box 3830  
Honolulu, HI 96812  
(808) 946-2181

8. Marine Sanctuary Designations - NONE

Proposals - Hawaii Humpback Whale  
National Marine Sanctuary  
(inter-island waters of Maui County)

HAWAII - PROPERTIES LISTED ON THE NATIONAL REGISTER OF HISTORIC PLACES

7418

[4310-03-M]

DEPARTMENT OF THE INTERIOR

Heritage Conservation and Recreation Service  
NATIONAL REGISTER OF HISTORIC PLACES

Annual Listing of Historic Properties

Pursuant to the National Historic Preservation Act of 1966 (80 Stat. 915, 16 USC 470 et seq.), the Heritage Conservation and Recreation Service, Department of the Interior, has undertaken steps to implement the purposes of that act through: (1) Expansion of the National Register of Historic Places, (2) Initiating a program of grants-in-aid for historic preservation, and (3) Adoption of procedures and criteria for furthering the Nation's historic preservation program.

It is the purpose of this notice, through publication of the information included herein, to apprise the public, as well as governmental agencies, associations, and all other organizations and individuals interested in historic preservation of the properties added to the National Register before December 31, 1978, and the properties determined eligible for inclusion in the National Register through December 1978.

WILLIAM J. MURTAGH,  
Keeper of the National Register.

The following properties were listed on the National Register of Historic Places as of December 31, 1978. National Historic Landmarks are designated by NHL; properties recorded by Historic American Buildings Survey are designated by HABS; properties recorded by Historic American Engineering Record are designated by HAER.

[PR Doc. 78-2110 Filed 2-8-79, 245 am]

HAWAII

Honolulu. HAWAII THEATRE, 1130 Bethel St., (11-14-78)

hawaii county

Captain Cook vicinity. KEALAKEKUA BAY HISTORICAL DISTRICT, SW of Captain Cook off HI 11, (12-12-73) PH0055841

Halewa. TONG WO SOCIETY BUILDING, HI 27, (6-9-78)

Hawaii Volcanoes National Park. 1790 FOOT-PRINTS, (8-7-74) PH0055140

Hawi vicinity. HEIAU IN KUKUIPAHU, SW of Hawi, (4-24-73) PH0055921

Hawi vicinity. MOOKINI HEIAU, Northern tip of Hawaii, 1 mi. W of Upolu Point Airport, (10-15-66) PH0097861 NHL

Hilo. LYMAN, REV. D. B. HOUSE, 276 Haili St., (3-24-78)

Hilo. SHIPMAN, W. H. HOUSE, 141 Kalulani St., (6-23-78)

Hilo. U.S. POST OFFICE AND OFFICE BUILDING, Kinole and Waianuenue Sts., (10-1-74) PH0055166

Hilo vicinity. KILAUEA CRATER, SW of Hilo in Hawaii Volcanoes National Park, (7-24-74) PH0055859

NOTICES

Hilo vicinity. MAUNA KEA ADZ QUARRY, 24 mi. NW of Hilo; (10-15-66) PH0055107 NHL

Hilo vicinity. OLD VOLCANO HOUSE NO. 42, SW of Hilo on HI 11 in Hawaii Volcanoes National Park, (7-24-74) PH0055115

Hilo vicinity. WHITNEY SEISMOGRAPH VAULT NO. 29, SW of Hilo on HI 11 in Hawaii Volcanoes National Park, (7-24-74) PH0055174

Hilo vicinity. WILKES CAMP SITE, W of Hilo at Mauna Loa Volcano in Hawaii Volcanoes National Park, (7-24-74) PH0055182

Holualoa vicinity. KAHALUU HISTORIC DISTRICT, (12-27-74) PH0055948

Honokaa. CHEE YING SOCIETY, HI 24, (7-20-78)

Kailua. MOKUAIAKAU CHURCH, off HI 11, (10-3-78)

Kailua-Kona. HULIHEE PALACE, Alii Dr., (5-25-73) PH0055930 NHL

Kailua-Kona. KAMAKAHONU, RESIDENCE OF KING KAMEHAMEHA I, On NW edge of Kailu Bay, N and W of Kailua Wharf, (10-15-66) PH0097845 NHL

Kailua-Kona vicinity. HONOKOHAU SETTLEMENT, Honokohau Bay, N of Kailua-Kona, (10-15-66) PH0055263 NHL

Kailua-Kona vicinity. KUAMO'O BURIALS, W of HA 11, (8-13-74) PH0055867

Kailua-Kona vicinity, Island of Hawaii. CITY OF REFUGE NATIONAL HISTORICAL PARK, 20 mi. S of Kailua-Kona, (10-15-66) PH0055913

Kapaa vicinity. BOND DISTRICT, SE of Kapaa off HI 27, (3-30-78)

Kawaihae vicinity, Island of Hawaii. PUU-KOHOHEI'A NATIONAL HISTORIC SITE, N end of Hawaii off HI 26, about 1 mi. SE of Kawaihae, (10-15-66) PH0055131

Keauhou. KAMEHAMEHA III'S BIRTHPLACE, off Alii Dr., (7-24-78)

Keauhou. KEAUHOU HOLUA SLIDE, E of HI 18, (10-15-66) PH0097853 NHL

Mahukona. LAPAKAHI COMPLEX, 0.5 mi. S of Mahukona, Hawaii Island, (7-2-73) PH0055875

Mauna Loa vicinity. AINAPO TRAIL (MENZIES TRAIL), Hawaii Volcanoes National Park, (8-30-74) PH0055905

Milolii vicinity. AHOLE HOLUA COMPLEX, S of Milolii on Ahole Bay, (11-26-73) PH0055883

Naalehu vicinity. SOUTH POINT COMPLEX, South Cape, southern tip of Hawaii, Ka'u District, (10-15-66) PH0055158 NHL

North Kona. AHUA A UMI HEIAU, Between Hualalai and Mauna Loa, (8-13-74) PH0055891

Pahala vicinity. PUNA-KA'U HISTORIC DISTRICT, Hawaii Volcanoes National Park, (7-1-74) PH0055123

Waimea. IMIOLA CHURCH, NE of Waimea on HI 19, (8-28-75)

Waiohinu vicinity. MANUKA BAY PETROGLYPHS, SW of Waiohinu at Manuka Bay, (9-19-73) PH0055093

honolulu

Honolulu. LISHMAN BUILDING, Makiki Park, Keeaumoku St., (9-13-78)

honolulu county

Aiea. KEAIWA HEIAU, Aiea Heights Dr., (11-9-72) PH0055352

Hakaiwa vicinity. KUPOPOLO HEIAU, 3 mi. N of Hakaiwa on Kamchamcha Hwy. At Waimea Bay, (6-4-73) PH0055379

Hakaiwa vicinity. PUU O MAHUKA HEIAU, 4 mi. NE of Hakaiwa on HI 83, overlooking Waimea Bay, (10-15-66) PH0097837 NHL

Honolulu. ALI'IOLANI HALE (JUDICIARY BUILDING), King St., (2-2-72) PH0055191 NHL

Honolulu. ALOHA TOWER, Pier 9, Honolulu Harbor, (5-13-76)

Honolulu. CHINATOWN HISTORIC DISTRICT, Bounded roughly by Beretania St. on NE, Nuuanu Stream on N, Nuuanu Ave. on SE, and Honolulu Harbor, (1-17-73) PH0055221 G.

Honolulu. FALLS OF CLYDE, Pier 5, Honolulu Harbor, (7-2-73) PH0055239 G.

Honolulu. HAWAII CAPITAL HISTORIC DISTRICT, Beretania, Richards, King, Queen, Punchbowl, and Kawaiahao Sts., (12-1-78)

Honolulu. HONOLULU ACADEMY OF ARTS, 900 S. Beretania St., (3-25-72) PH0055271

Honolulu. IOLANI PALACE, 364 S. King St., (10-15-66) PH0097802 NHL

Honolulu. KAKAAKO PUMPING STATION, 653 Ala Moana Blvd., (10-4-78)

Honolulu. KAMEHAMEHA V POST OFFICE, Corner of Merchant and Bethel Sts., (5-5-72) PH0055336 NHL

Honolulu. KAPUAIWA BUILDING, 426 Queen St., (7-2-73) PH0055328

Honolulu. KAHAAHAO CHURCH AND MISSION HOUSES, 957 Punchbowl St., 553 S. King St., (10-15-66) PH0097811 NHL

Honolulu. MERCHANT STREET HISTORIC DISTRICT, (6-19-73) PH0055395

Honolulu. MOANA HOTEL, 2365 Kalakaua Ave., (8-7-72) PH0055409

Honolulu. OUR LADY OF PEACE CATHEDRAL, 1183 Fort St., (8-7-72) PH0055450 NHL

Honolulu. PALAMA FIRE STATION, 879 N. King St., (4-21-76)

Honolulu. PUNAHOU SCHOOL CAMPUS, 1601 Punahoa St., (8-7-72) PH0055484 NHL

Honolulu. QUEEN EMMA'S SUMMER HOME, 2913 Pali Hwy., (8-7-72) PH0055492 NHL

Honolulu. ROYAL BREWERY, 553 S. Queen St., (11-29-72) PH0055506

Honolulu. ROYAL MAUSOLEUM, 2261 Nuuanu Ave., (8-7-72) PH0055514 NHL

Honolulu. ST. ANDREW'S CATHEDRAL, Beretania St. (Queen Emma Sq.), (7-2-73) PH0055522

Honolulu. THOMAS SQUARE, Bounded by King, S. Beretania, and Victoria Sts. and Ward Ave., (4-25-72) PH0055549

Honolulu. U.S. IMMIGRATION OFFICE, 595 Ala Moana Blvd., (8-14-73) PH0055565

Honolulu. U.S. POST OFFICE, CUSTOM-HOUSE, AND COURTHOUSE, 335 Merchant St., (1-27-75) PH0055581

Honolulu. WALKER, H. ALEXANDER, RESIDENCE, 2616 Pali Hwy., (4-24-73) PH0055620

Honolulu. WASHINGTON PLACE, Beretania and Miller Sts., (6-18-73) PH0055638 NHL

Honolulu vicinity. NUUANU PETROGLYPH COMPLEX, S of Nuuanu Ave. and Pali Hwy. jct., (3-14-73) PH0055433

Kaaawa vicinity. SMALL HEIAU, 1 mi. S of Kaaawa off Kaaawa Valley Rd., (3-14-73) PH0055531

Kahaluu. KAHALUU (KAHOUNA) FISH-POND, NW of Laeana St. off Kamchamcha Hwy., (3-14-73) PH0055301

Kahaluu. KAHALUU TARO LO'I, W of western end of Hui Kulu St., (3-14-73) PH0055280

Kahuku vicinity. BURIAL PLATFORM, NW of Kahuku off Kamchamcha Hwy., (8-14-73) PH0055212

HAWAII - PROPERTIES LISTED ON THE NATIONAL REGISTER OF HISTORIC PLACES (CONT.)

NOTICES

Kahuku vicinity. **KAHUKU HABITATION AREA**, 0.3 mi. NE of Kahuku Airport Rd., (9-11-72) PH0055298

Kailua. **ULA PO HEIAU**, Off Kailua Rd., (11-9-72) PH0055557

Kailua vicinity. **PAHUKINI HEIAU**, SW of Kapea Quarry, (9-11-72) PH0055468

Kaneohe. **HEIAU FISHPOND**, Off Kamchamcha Hwy., adjacent to Heia Point, (1-17-73) PH0055247

Kaneohe. **KAWAEWAHE HEIAU**, At the rear of 45-162 Namoku St., (8-21-72) PH0055344

Kaneohe. **LELEAHINA HEIAU**, S of Haiku Plantation Dr., (3-20-73) PH0055387

Kaneohe. **MOKAPU BURIAL AREA**, Off Mofet Rd. in the NE section of Kaneohe Marine Corps Air Station, (11-15-72) PH0055417

Kaneohe vicinity. **HUILUA FISHPOND**, On Kahana Bay, 13 mi. N of Kaneohe on HI 83 adjacent to Kahana Bay State Park, (10-15-66) PH0097829 NHL

Kaneohe vicinity. **KUALOA AHUPU'A HISTORICAL DISTRICT**, Kamchamcha Hwy., (10-16-74) PH0055361

Kaneohe vicinity. **MOLII FISHPOND**, SE of Kamchamcha Hwy. between Kualoa and Johnson Rds., (12-5-72) PH0055425

Kaneohe vicinity. **POHAKU KA LUAHINE**, Near the center of Moanalua Valley, (7-23-73) PH0055476

Kapapa Island. **KAPAPA ISLAND COMPLEX**, In Kaneohe Bay, (8-21-72) PH0055310

Luwulalei. **WAIALUA AGRICULTURAL COMPANY** **ENGINE NO. 6**, Off HI 78, (8-19-74) PH0055590

Nanakuli vicinity. **OAHU RAILWAY AND LAND COMPANY** **RIGHT-OF-WAY**, Barber's Point, (12-1-75)

Pearl City vicinity. **ISLAND OF OAHU U.S. NAVAL BASE, PEARL HARBOR**, 3 mi. S of Pearl City on HI 73, (10-15-66) PH0055573 NHL

Pearl Harbor. **OKIOKILEPE POND**, 0.3 mi. NW of Iroquois Point at Pearl Harbor entrance, (3-14-73) PH0055448

Wahiawa. **DOLE, JAMES D. HOMESTEAD**, 148 Dole Rd., (6-23-78)

Wahiawa vicinity. **KUKANILOKO BIRTHSTONES**, NW of Wahiawa, off HI 80, (4-11-73) PH0055701

Waianae vicinity. **WAIANAE DISTRICT**, N of Waianae off Farrington Hwy., (1-21-74) PH0055603

Waikane vicinity. **WAIKANE TARO FLATS**, 1 mi. NW of Waikane in Upper Waikane Valley, (4-11-73) PH0055611

Waimanalo vicinity. **BELLOWS FIELD ARCHEOLOGICAL AREA**, SE of Waimanalo, (8-14-74) PH0055204

Waimanalo vicinity. **U.S. COAST GUARD MAKAPUU POINT LIGHT**, SE of Waimanalo off Kalanianaole Hwy., (12-7-77)

Kalaau county

Kalaupapa. **KALAUPAPA LEPROSY SETTLEMENT**, Molokai Island, (1-7-76) NHL

Lanai county

Hanalei. **WAIOLI MISSION DISTRICT**, Off HI 56, (10-3-73) PH0055671

Kolua. **OLD SUGAR MILL OF KOLUA**, (10-15-66) PH0097748 NHL

Lihue. **GROVE FARM**, On HI 501, about 1 mi. SE of Lihue, (6-25-74) PH0055654

Lihue vicinity. **LIHUE HONGWANJI MISSION**, N of Lihue at HI 56, (3-21-78)

Lihue vicinity. **MENEHUNE FISHPOND (ALEKOKO FISHPOND)**, S of Lihue on Hulcua River, (3-14-73) PH0055662

Wailua vicinity. **WAILUA COMPLEX OF HEIAUS**, E coast of Kauai at mouth of Wailua River, Lihue District, (10-15-66) PH0097756 NHL

Waimea. **BISHOP NATIONAL BANK OF HAWAII**, HI 50, (11-29-78)

Waimea. **COOK LANDING SITE**, 2 mi SW of HI 50, (10-15-66) PH0055646 NHL

Waimea. **GULICK-ROWELL HOUSE**, Missionary Row, (4-15-78)

Waimea vicinity. **RUSSIAN FORT**, On HI 50 200 yds. SW of the bridge over the Waimea River, (10-15-66) PH0169951 NHL

Kealakekua. **GREENWELL STORE**, HI 11, (5-22-78)

maui county

Hana vicinity. **PIILANIHALE HEIAU**, 4 mi. N of Hana, at the mouth of Honomae Gulch near Kalahu Point, (10-15-66) PH0097795 NHL

Kahului vicinity. **CRATER HISTORIC DISTRICT**, Haleakala National Park, (11-1-74)

Kahului vicinity. **CRATER HISTORIC DISTRICT**, Haleakala National Park, E of Kahului, (11-1-74)

Kaupo vicinity. **LOALOA HEIAU**, SE coast of Maui, on HI 31, about 0.25 mi. N of Kaupo, (10-15-66) PH0097781 NHL

Lahaina. **LAHAINA HISTORIC DISTRICT**, W side of Maui on HI 30, (10-15-66) PH0097772 NHL; HAER

Lahaina. **LALE PA'I**, Lahaina High School, (5-13-76) HAER

Lanai City vicinity. **KAUNOLU VILLAGE SITE**, On Kaunolu Bay on the SW cape of the Island of Lanai, (10-15-66) PH0097764 NHL

Ualapue vicinity. **HOKUKANO-UALAPUE COMPLEX**, On HI 45, (10-15-66) PH0055235 NHL

Wailuku. **AAHUMANU CHURCH**, S. High St., (5-12-75)

Wailuku. **MAUI JINSHA MISSION**, 472 Lipo St., (11-21-78)

Wailuku. **OLD BAILEY HOUSE (HALE HOIKEIKE)**, Iao Valley Rd., (3-20-73) PH0055697 oahu county

Haleiwa vicinity. **KAWAILOA RYUSENJI TEMPLE**, N of Haleiwa at 179-A Kawaiola Dr., (11-21-78)

DEPARTMENT OF THE INTERIOR

Heritage Conservation and Recreation Service

National Register of Historic Places; Annual Listing of Historic Properties

Pursuant to the National Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 470 et seq.), the Heritage Conservation and Recreation Service, Department of the Interior, has undertaken steps to implement the purposes of that act through: (1) expansion of the National Register of Historic Places, (2) initiating a program of grants-in-aid for historic preservation, and (3) adoption of procedures and criteria for furthering the Nation's historic preservation program.

It is the purpose of this notice, through publication of the information included herein, to apprise the public, as well as governmental agencies, associations, and all other organizations and individuals interested in historic preservation of the properties added to the National Register during 1979, and of the properties determined eligible for inclusion in the National Register through December 1979.

Ronald M. Greenberg,  
Acting Chief, National Register of Historic Places

The following properties were placed on the National Register of Historic Places between January and December 1979. Properties recorded by the Historic American Buildings Survey are designated by HABS and properties recorded by the Historic American Engineering Record are designated by HAER.

HAWAII

hawaii county

Hilo. **DISTRICT COURTHOUSE AND POLICE STATION**, 141 Kalabau St. (8-4-79); 79-11-18 079 0004800

Honaunau. **ST. BENEDICT'S CATHOLIC CHURCH**, Off HI 11, (5-31-79); 79/10/24 079 0002043

Kapaa. **KOHALA DISTRICT COURTHOUSE**, Government Rd., (8-31-79); 79-11-18 079 0004801

bonolulu county

Honolulu. **ALEXANDER AND BALDWIN BUILDING**, 822 Bishop St. (9-7-79); 79-11-18 079 0004802

Honolulu. **DILLINGHAM TRANSPORTATION BUILDING**, 735 Bishop St. (9-7-79); 79-11-18 079 0004803

kauai county

Hanalei. **HANAELI PIER**, Hanalei Bay, (9-13-79); 79-11-18 079 0004804

Kapaa. **SETO BUILDING**, Kuhio Hwy. (9-4-79); 79-11-18 079 0004805

Lihue. **WILCOX, ALBERT SPENCER BUILDING (KAUA'I MUSEUM)**, 4420 Rice St. (5-31-79); 79/10/24 079 0002044

maui county

Kalae. **MEYER, R. W. SUGAR MILL**, HI 47, (9-4-79); 79-11-18 079 0004806

HAWAII - PROPERTIES LISTED ON THE NATIONAL REGISTER OF HISTORIC PLACES (CONT.)

DEPARTMENT OF THE INTERIOR

Heritage Conservation and Recreation Service

National Register of Historic Places; Annual Listing of Historic Properties

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This listing differs from previous annual listings published by the Heritage Conservation and Recreation Service in that properties are listed that were entered on the National Register only for calendar year 1979. For a cumulative listing comprising all properties on the National Register, we recommend that users retain the Federal Register listing from February 6, 1979 (Vol. 44 No. 26, Part II) and March 18, 1980 (Vol. 45, No. 54, Part II). Together these listings provide accumulative information for all National Register properties and for properties determined eligible for inclusion on the National Register through 1980. The 1979 Federal Register Part II is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 (GPO Stock No.

022-003-00971-0) price 75¢. A limited number of copies of the 1980 Federal Register Part II is available from the Division of the National Register of Historic Places, Heritage Conservation and Recreation Service, 440 G Street, NW Washington, D.C. 20242.

HAWAII

*Honolulu County*

Haleiwa, *Waialua School*, 65-505 Haleiwa Rd. (8-11-80)

Honolulu, *Brewer, C. Building*, 827 Fort St. (4-2-80)

Honolulu, *Canavarro, Georges-de S. House*, 2756 Cooke Ave. (5-28-80)

Honolulu, *Cuild, John House*, 2001 Vancouver Dr. (8-1-80)

Honolulu, *Linekona School*, Victoria and Beretania Sts. (5-28-80)

Honolulu, *McKinley High School*, 1039 S. King St. (8-11-80)

Honolulu, *U.S. Coast Guard Diamond Head Lighthouse*, 3399 Diamond Head Rd. (10-31-80)

Honolulu, *War Memorial Natatorium*, Kalakaua Ave. (8-11-80)

Honolulu, *Young, Alexander, Building*, Bishop St. (8-5-80)

Waipahu vicinity, *Wakamiya Inari Shrine*, Waipahu Cultural Garden (1-8-80)

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HAWAII - PROPERTIES ELIGIBLE FOR LISTING ON THE NATIONAL REGISTER OF HISTORIC PLACES

The following properties have been determined to be eligible for inclusion in the National Register. All determinations of eligibility are made at the request of the concerned Federal Agency under the authorities in section 2(b) and 1(3) of Executive Order 11593 as implemented by the Advisory Council on Historic Preservation, 36 CFR Part 800. This listing is not complete. Pursuant to the authorities discussed herein, an Agency Official shall refer any questionable actions to the Director, Office of Archeology and Historic Preservation, Heritage Conservation and Recreation Service, Department of the Interior, for an opinion respecting a property's eligibility for inclusion in the National Register.

Historical properties which are determined to be eligible for inclusion in the National Register of Historic Places are entitled to protection pursuant to section 106 of the National Historic Preservation Act of 1966, as amended, and the procedures of the Advisory Council on Historic Preservation, 36 CFR Part 800. Agencies are advised that in accord with the procedures of the Advisory Council on Historic Preservation, before an agency of the Federal Government may undertake any project which may have an effect on such a property, the Advisory Council on Historic Preservation shall be given an opportunity to comment on the proposal.

HAWAII

hawaii county

Hana vicinity. **KIPAHULU HISTORIC DISTRICT**, SW of Hana on Rts. 31, Hawaii Volcanoes National Park. **MAUNA LOA TRAIL**, Kealakekua Bay. **KONA FIELD SYSTEM**, South Kona vicinity. **GREAT WALL OF KUAKINI**, (63.3).

honolulu county

Honolulu. **U.S. COAST GUARD DIAMOND HEAD LIGHT**, 3399 Diamond Head Rd.,

kauai county

**HANALEI BRIDGE**, Kuhio Hwy., **WAIIOLI BRIDGE**, Kuhio Hwy., **WAIPA BRIDGE**, Kuhio Hwy..

maui county

Kalaupapa. **U.S. COAST GUARD MOLOKAI LIGHT**.

oahu county

Honolulu. **MOANALUA VALLEY**, Oahu. **BARBER'S POINT HARBOR**,

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HAWAII

hawaii county

Hana vicinity. **KIPAHULU HISTORIC DISTRICT**, SW of Hana on Rts. 31; 78/11/13 078 0050279

Hawaii Volcanoes National Park. **MAUNA LOA TRAIL**; 78/11/13 078 0050278

Kapsan. **OLD KAHAKA COURTHOUSE**, Government Rd.; 79/11/08 078 0001693

Kealakekua Bay. **KONA FIELD SYSTEM**; 78/11/13 078 0050277

South Kona vicinity. **GREAT WALL OF KUAKINI**, (63.3); 78/11/13 078 0050278

honolulu county

Honolulu. **ADVERTISER BUILDING**, 805 Kapiolani Blvd. (63.3); 79/10/19 078 0000020

Honolulu. **BRASS FOUNDRY**, 556B Kamani St. (63.3); 79/10/19 078 0000022

Honolulu. **CHURCH OF THE CROSSROADS**, 1212 University Ave. (63.3); 79/10/19 078 0000023

Honolulu. **OAHU ICE AND COLD STORAGE COMPANY**, 721 Kapiolani Blvd. (63.3); 79/10/19 078 0000024

Honolulu. **OR&L OFFICE AND DOCUMENT STORAGE BUILDING AND OR&L STATION**, 333, 355, 357 N. King St. (63.3); 79/10/19 078 0000025

Honolulu. **OTANI BLOCK**, N. King St. between Iwilei Rd. and Awa St. (63.3); 79/10/19 078 0000026

Honolulu. **PORTLAND BUILDING**, Union Mall and Hotel St. (63.3); 79/10/19 078 0000027

Honolulu. **S. H. KRESS COMPANY**, 917 Fort St. (63.3); 79/10/19 078 0000028

Oahu. **ARCHEOLOGICAL SITE** 7, Kawainui Marsh (63.3); 9-1171-078 0000249

kauai county

**HANALEI BRIDGE**, Kuhio Hwy.; 78/11/15 078 0055303

**WAIIOLI BRIDGE**, Kuhio Hwy.; 78/11/15 078 0055304

**WAIPA BRIDGE**, Kuhio Hwy.; 78/11/15 078 0055305

oahu county

Honolulu. **MOANALUA VALLEY**; 78/11/13 078 0050281

Oahu. **BARBER'S POINT HARBOR**; 78/11/13 078 0050280

HAWAII

Archeological Site 97-20-305. Island of Kahoolawe

Hilo County

Hilo Bay. **Hilo Breakwater**

Honolulu County

Ewa. **Barbers Point Archeological District** (extension) (1204.3)

Honolulu. **Ala Wai Park Clubhouse**

Honolulu. **Campbell, J. Building**

Honolulu. **Hawaii Building**

Honolulu. **Hotel Street Sidewalk Elements**

Honolulu. **McCorriston Building**

Honolulu. **Oahu State Prison Administration Building**

Honolulu. **Robinson Building**

Honolulu. **Tong Fat Company, Ltd.**

Oahu. **Kanohuluiwi Fishpond**, Kaneohe Bay (1204.3)

Kauai County

Hanalei vicinity. **Hanalei National Wildlife Refuge Historic and Archeological District**

Maui County

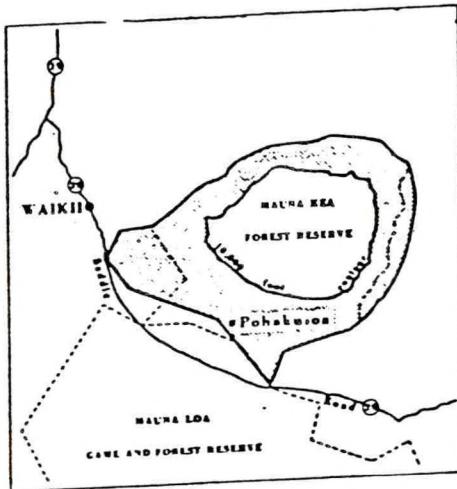
Island of Kahoolawe. **35 Archeological Sites of Kahoolawe**

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HAWAII- DESIGNATED CRITICAL HABITAT

Palila (*psittirostra bailloui*)

sion). (d) that portion (Parcel 10, Kaohe IV, State of Hawaii Tax Map Key 4-4-16, Third Division) lying north of the Saddle Road (State Highway 20) and south of the Power Line Road; (2) that portion of the State of Hawaii Kaohe Game Management Area (Parcel 4, State of Hawaii Tax Map Key 4-4-15, Third Division) to the north and east of the Saddle Road (State Highway 20); (3) that portion of the Upper Waikii Paddock (Parcel 2, State of Hawaii Tax Map Key 4-4-15, Third Division) northeast of the Saddle Road (State Highway 20); (4) that portion of the lands of Humuula between Puu Kahinina and Kole lying southeast of the Mauna Kea Forest Reserve fence (portions of Parcels 2, 3, and 7, State of Hawaii Tax Map Key 3-8-1, Third Division) which are included in the State conservation district.



CRITICAL HABITAT FOR THE PALILA

PALILA (*Psittirostra bailloui*)

Hawaii. An area of land, water, and air-space on the Island of Hawaii, Hawaii County, with the following components: (1) The State of Hawaii Mauna Kea Forest Reserve, except (a) that portion above the 10,000 foot contour line, (b) that portion south of the Saddle Road (State Highway 20), (c) lands owned by the United States in the Pohakuloa Training Area north of the Saddle Road (State Highway 20) established by Executive Order 1719 (Parcel 6, State of Hawaii Tax Map Key 4-4-16, Third Division).

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HAWAII

THREATENED AND ENDANGERED SPECIES: MARINE  
(Source: 50 CFR 17.11 and 17.12)

Scientific Name	Common Name	Status
MARINE MAMMALS		
<u>Balaena glacialis*</u>	Right Whale	E <sup>1</sup>
<u>Balaenoptera borealis</u>	Sei Whale	E
<u>Balaenoptera musculus</u>	Blue Whale	E
<u>Balaenoptera physalus</u>	Finback Whale	E
<u>Megaptera novaeangliae</u>	Humpback Whale	E
<u>Monachus schauinslandi</u>	Hawaiian Monk Seal	E
<u>Physeter catodon</u>	Sperm Whale	E
SEA TURTLES		
<u>Caretta caretta</u>	Loggerhead Sea Turtle	T <sup>2</sup>
<u>Chelonia mydas</u>	Green Sea Turtle	E
<u>Dermochelys coriacea</u>	Leatherback Sea Turtle	E
<u>Eretmochelys imbricata</u>	Hawksbill Sea Turtle	E
<u>Lepidochelys kempii</u>	Kemp's Ridley Sea Turtle	E
<u>Lepidochelys olivacea</u>	Olive Ridley Sea Turtle	T
BIRDS		
<u>Puffinus puffinus newelli</u>	Newel's Manx Shearwater	T
<u>Pterodroma phaeopygia sandwichensis</u>	Hawaiian Dark-rumped Petrel	E

1) E - Endangered

2) T - Threatened

\* Not considered part of the normal cetacean fauna in Hawaiian waters.

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## HAWAII

THREATENED AND ENDANGERED SPECIES: TERRESTRIAL  
(Source: 50 CFR 17.11 and 17.12)

Scientific Name	Common Name	Status
<b>MAMMALS</b>		
<u>Lasiurus cinereus</u>	Hoary Bat	E <sup>1</sup>
<b>REPTILES</b>		
<u>Crocodylus porosus</u>	Salt Water (estuarine) Crocodile	E
<b>BIRDS</b>		
<u>Acrocephalus familiaris</u> kingi	Nihoa Millerbird	E
<u>Anas laysanensis</u>	Laysan Duck	E
<u>Anas wyvilliana</u>	Hawaiian Duck	E
<u>Branta sandvicensis</u>	Hawaiian Goose	E
<u>Buteo solitarius</u>	Hawaiian Hawk	E
<u>Corvus troicus</u>	Hawaiian Crow	E
<u>Diomedea albatrus</u>	Short-tailed Albatross	E
<u>Fulica americana alai</u>	Hawaiian Coot	E
<u>Gallinula chloropus</u> sandvicensis	Hawaiian Gullinule	E
<u>Hemignathus procerus</u>	Kauai Akialoa	E
<u>Hemignathus wilsoni</u>	Akipolau (honeycreeper)	E
<u>Hemignathus lucidus</u>	Nukupuu (honeycreeper)	E

1) E - Endangered

## HAWAII

THREATENED AND ENDANGERED SPECIES: TERRESTRIAL (Cont.)  
(Source: 50 CFR 17.11 and 17.12)BIRDS (Cont.)

Scientific Name	Common Name	Status
<u>Himantopus himantopus knudseni</u>	Hawaiian Stilt	E
<u>Loxops coccinea coccinea</u>	Hawaii Akepa	E
<u>Loxops coccinea ochrana</u>	Maui Akepa	E
<u>Loxops maculata flammea</u>	Molokai Creeper	E
<u>Loxops maculata maculata</u>	Oahu Creeper	E
<u>Loxops maculata mana</u>	Hawaiian Creeper	E
<u>Melamprosops phaeosoma</u>	Poo-uli	E
<u>Moho braccatus</u>	Kauai Oo (honeycreeper)	E
<u>Palmeria dolei</u>	Crested Honeycreeper	E
<u>Phaeornis obscurus myadestina</u>	Large Kauai Thrush	E
<u>Phaeornis obscurus rutha</u>	Molokai Thrush	E
<u>Phaeornis palmeri</u>	Small Kauai Thrush	E
<u>Pseudonestor xanthophrys</u>	Maui Parrotbill (honeycreeper)	E
<u>Psittirostra bailleui</u>	Palila (honeycreeper)	E
<u>Psittirostra psittacea</u>	Ou (honeycreeper)	E
<u>Telespyza ultima</u>	Nihoa Finch	E
<u>Telespyza cantans</u>	Laysan Finch (honeycreeper)	E

## MOLLUSCS

<u>Achatinella spp.</u>	Oahu Tree Snails	E
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## HAWAII

THREATENED AND ENDANGERED SPECIES: TERRESTRIAL (Cont.)  
(Source: 50 CFR 17.11 and 17.12)

Scientific Name	Common Name	Status
PLANTS		
<u>Haplostachys haplostachya</u> <u>var. angustifolia</u>	None	E
<u>Kokia cookei</u>	Cooke's Kokio	E
<u>Lipochaeta venosa</u>	None	E
<u>Stenogyne angustifolia</u> var. <u>angustifolia</u>	None	E
<u>Vicia menziesii</u>	Hawaiian vetch	E

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## APPENDIX C

## REFERENCES

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City and County of Honolulu, Procedures on Processing of Building Permits, Honolulu, Hawaii, April 1981.

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## APPENDIX E

### DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 981 AS AMENDED BY 46

FR 61643, 12/18/81  
Licensing of Ocean Thermal Energy Conversion Facilities and Plantships

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

ACTION: Final rule.

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

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

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

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

### SUPPLEMENTARY INFORMATION:

#### I. Principal Author

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

#### II. Prior Actions in the Rulemaking

##### A. Environmental Scoping Process

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

1981, 46 FR 20283. (See Section VI, E of this preamble for information on the final environmental impact statement developed as part of the rulemaking.)

##### B. Rulemaking

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

#### III. Availability of Comments

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

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

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

##### A. General Comments

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

##### B. Land-based OTEC Facilities

NOAA took the position in the NPR that the legislative history of the Act demonstrated Congressional intent that OTEC facilities located in part on land be subject to the licensing requirements of these regulations. However, the difficulty in documenting such "land-based" facilities under existing U.S. vessel documentation laws was

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

##### C. Specific Comments

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

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

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

displeasure over the fact that the Department of Energy would exercise control over the operation of OTEC demonstration projects so designated by the Secretary of Energy under the proposed wording of this section. That situation is a requirement of section 116 of the Act and no change has been made in these final regulations.

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

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

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

**§ 981.100 Confidentiality of information.** Several commentors requested that this section be changed to allow for provision of the justification for confidential treatment of information at the time that its release was requested, rather than at the time the information was submitted to NOAA. Other commentors requested that copies of license applications available for public review be clearly marked to indicate where material had been deleted due to requests for confidential treatment. One commentator requested that a process for appeal be provided in the event the Administrator initially determined to release information for which confidential treatment had been requested and one commentator proposed that a more vigorous effort be made to

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

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

submitted, but submitted voluntarily, be afforded confidential treatment.

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

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

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

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

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

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

The commentor who proposed the phased approach to provision of information based it in part on the concept of establishing a "priority of right" to a particular geographic site for an OTEC facility through provision of

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

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

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

the Act. DOJ also felt strongly that the required 3 years of such information was necessary for assessing trends. Accordingly, the requirement appears in § 981.180(e)(5) of these final regulations.

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

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

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

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

**§ 981.260 Environmental information.** Several changes have been made in this section of the NPR on the basis of comments received. Section 981.260(a)(1) has been reworded to make it clear that the applicant must describe the boundaries of the geographic area in which the proposed OTEC operation would impact or be impacted by another OTEC operation. Section 981.260(a)(4) has been revised to make it clear that potential impacts of entrainment and impingement on biological communities

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

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

**§ 981.320 Antitrust review.** As noted earlier in the discussion of changes made to § 1001.180(e) of the NPR, NOAA has had additional discussions with the Department of Justice concerning the information necessary for the antitrust review required by the Act and has modified that section of the final rules accordingly. Section 981.320 has been modified to provide notice to the Attorney General if the NOAA Administrator does not accept the Attorney General's recommendation on an application that may create a situation inconsistent with the antitrust laws. In response to one question received on the NPR, NOAA has asked the Antitrust Division at the Department of Justice whether a mechanism exists for obtaining an opinion on the antitrust implications of an OTEC proposal prior to making formal application to NOAA for a license. The Antitrust Division has indicated that such a procedure does exist and that a non-binding opinion in the form of a "business review letter" describing the Department's preliminary views on antitrust issues may be obtained by consulting with the Division. The procedures for obtaining such a review are contained in 28 CFR 50.8. NOAA will assist potential applicants in obtaining these views under the pre-application consultation provisions contained in § 981.70 of these final regulations.

The Department of Justice noted that it might require information beyond that initially required by these regulations to

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

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

One commentator expressed concern that designation as an adjacent coastal State could somehow extend that State's taxing power to include an OTEC plantship which did not operate in that State's waters. Such a situation is impossible because such extraterritorial taxing authority is not granted the States by section 403(b)(2) of the Act. Although a State might achieve adjacent

coastal State status under § 981.330(b) o these rules relative to plantship operations conducted on the high seas, that designation does not confer any taxing power under the terms of section 403(b)(2) of the Act.

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

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

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

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

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

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

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

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

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

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

**§ 981.550** *Suspension, revocation, termination, relinquishment or surrender of a license.* One commentor requested that NOAA not seek Federal

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

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

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

**§ 981.630** *Observers.* One commentor interpreted this section of the NPR as requiring that accommodations dedicated to observers be included in the initial design of the OTEC facility or plantship. This was not intended, and the final regulations have been amended to make clear that the requirement is to provide temporary accommodations for observers if

necessary due to the remote location of the licensed OTEC facility or plantship. The language of this section in the final regulations has been changed to clarify that it relates to one or more observers at a given time.

The provision of § 1001.630(e) of the NPR under which the Administrator would have reimbursed the licensee for reasonable costs directly related to the quartering and maintaining of observers on OTEC facilities or plantships has been deleted from the final regulations. Current Administration policy is to place the financial costs of necessary regulation on the regulated industry itself, wherever feasible and appropriate. As we receive further guidance from the Administration on government cost recovery policy NOAA will clarify who will bear the cost of observers.

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

## V. Organization of the Rules

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

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

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

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

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

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

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

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

## VI. Other Actions Associated With These Regulations

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

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

### B. Regulatory Impact Analysis

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

### C. Summary of Final Regulatory Flexibility Analysis

Because of the large size and cost of commercial OTEC projects, the primary involvement of small business concerns in the OTEC industry is expected to be as contractors or subcontractors, rather than sole owners or operators of OTEC facilities or plantships. Only one license, obtained by the owner, is required. The general regulatory approach selected by NOAA for these regulations was designed to provide the greatest flexibility for, and to minimize any

adverse economic impact on, any entity—large or small—which may be involved in OTEC development. The regulations do not impose any reporting, record keeping, or other compliance requirements on small governmental jurisdictions or small organizations. Copies of the combined final Regulatory Flexibility Analysis and final Regulatory Impact Analysis may be obtained by writing to the Director, NOAA Office of Ocean Minerals and Energy, at the address specified in the Address section of this preamble.

### D. Paperwork Reduction Act Pub. L. 96-511

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

### E. Environmental Impact Statement

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

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

Dated: July 24, 1981.

John V. Byrne,  
Administrator, National Oceanic and  
Atmospheric Administration.

## PART 981—OCEAN THERMAL ENERGY CONVERSION LICENSING PROGRAM

### Subpart A—General Program Requirements

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981.30 Scope of the OTEC licensing regulations.

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Sec.

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

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Subpart E—Formal Hearing Procedures

981.560 Formal hearing procedures.

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Subpart F—Enforcement Procedures

981.580 General.

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

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

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

Authority: Ocean Thermal Energy Conversion Act of 1980, Pub. L. 96-220, 94 Stat. 974 (42 U.S.C. 9101, et seq.).

### Subpart A—General Program Requirements

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

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

§ 981.20 Purpose of the OTEC licensing regulations.

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

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

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

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

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

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

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

operation of OTEC facilities and plantships; and

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

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

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

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

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

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

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

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

**§ 981.40 Definitions.**

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

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

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

Administrator in accordance with § 981.330(b) of this part.

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

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

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

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

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

"Cleanup" means removal of pollutants from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, public and private property, shorelines, and beaches.

"Coastal State" means a State in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes.

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

"Controlling interest" means a direct or indirect legal or beneficial interest in or influence over another person arising through ownership of capital stock, interlocking directorates or officers, contractual relations, or other similar means, which substantially affect the independent business behavior of such person.

"Designated application area" means the projected area or areas in which the OTEC activities of the applicant might

impact so as to significantly degrade the operation of another OTEC facility or plantship, and in which the operation of another OTEC facility or plantship might impact so as to significantly degrade the OTEC operation proposed by the applicant.

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

"Facility" means an OTEC facility.

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

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

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

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

"NOAA" means the National Oceanic and Atmospheric Administration.

"OTEC" means ocean thermal energy conversion.

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

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

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

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

"Plantship" means an OTEC plantship;

"Pollutant" means (A) oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes; (B) dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, temperature change, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water; and (C) hazardous substances as that term is defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 98-510);

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

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

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

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

"United States citizen" means (A) any individual who is a citizen of the United States by law, birth, or naturalization; (B) any Federal, State, or local government in the United States, or any entity of any such government; or (C) any corporation, partnership, association, or other entity, organized or existing under the laws of the United States, or of any State, which has as its

president or other executive officer and as its chairman of the board of directors, or holder of similar office, an individual who is a United States citizen and which has no more of its directors who are not United States citizens than constitute a minority of the number required for a quorum necessary to conduct the business of the board.

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

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

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

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

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

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

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

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

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

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

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

(4) Manufacture or supplying of components for construction of an

OTEC facility or plantship unless such activity takes place seaward of the high-water mark.

**§ 981.60 Federal applications.**

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

**§ 981.70 Pre-application consultation.**

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

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

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

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

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

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

(d) **Signature.**

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

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

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

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

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

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

#### § 981.90 Provision of additional information.

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

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

(c) *Time limits.* In exercising the authority to require supplemental information under this section, the Administrator may fix a reasonable time by which an applicant must meet the requirement. If an application states that required information is not yet available but will be furnished at a later date, the Administrator may specify a reasonable time by which the information must be provided. If any requirement is not met by a time fixed in accordance with this paragraph, the Administrator shall determine whether compliance with the requirement is material to processing of the application within the time

deadlines prescribed in Subpart C of this part. If the Administrator determines that an unmet requirement for supplemental information is material, the Administrator may disapprove the application or suspend the application pending a determination that processing can be resumed. The period of any suspension shall not be counted in determining the dates of the deadlines prescribed in Subpart C of this part.

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

#### § 981.100 Confidentiality of information.

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

(b) *Written requests for confidential treatment.*

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

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

(A) Should be submitted at the time of submission of the information;

(B) Should state the period of time for which confidential treatment is desired (e.g., until a certain date, or until the occurrence of a certain event, or permanently);

(C) Must be submitted in writing and

(D) Must include the name, mailing address, and telephone number of an agent of the submitter who is authorized to receive notice of requests for disclosure of such information pursuant to paragraph (d) of this section.

(ii) If information is submitted to NOAA without an accompanying request for confidential treatment, the notice referred to in paragraph (d)(2) of this section need not be given. If a request for confidential treatment is received after the information itself is received, NOAA will make such efforts as are administratively practicable to associate the request with copies of the previously submitted information in the files of NOAA and the Federal and State agencies to which NOAA distributed the information. However, NOAA cannot assure that such efforts will be effective, in light of the prior distribution to Federal and State agencies and the possibility of prior disclosure of the information.

(3)(i) Information subject to a request for confidential treatment must be segregated from information for which confidential treatment is not being requested, and each page (or segregable portion of each page) subject to the request must be clearly marked with the name of the person requesting confidential treatment, the name of the applicant or licensee, and an identifying legend such as "Proprietary Information" or "Confidential Treatment Requested." Where this marking proves impracticable, a cover sheet containing the identifying names and legend must be securely attached to the compilation of information for which confidential treatment is requested. Each copy of the information for which confidential treatment has been requested must be cross-referenced to the appropriate section of the application or other document. All information for which confidential treatment is requested pertaining to the same application or other document must be submitted to NOAA in a package separate from that information for which confidential treatment is not being requested.

(ii) Each copy of any application or other document with respect to which confidential treatment of information has been requested must indicate, at each place in the application or document where confidential information has been deleted, that confidential treatment of information has been requested.

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

(iv) Normally, NOAA will not make a determination as to whether confidential treatment is warranted until a request for disclosure of the information is received. However on a case-by-case basis the Administrator may decide to make a determination in advance of a request for disclosure where it would facilitate NOAA's obtaining voluntarily-submitted information (rather than information required to be submitted under this part).

(c) *Substantiation of request for confidential treatment.*

(1) Any request for confidential treatment may include a statement of the basis for believing that the information is deserving of confidential treatment which addresses the issues relevant to a determination whether the information is a trade secret, or commercial or financial information which is privileged or confidential. To the extent permitted by applicable law, part or all of any such statement

submitted will be treated as confidential if so requested by the person requesting confidential treatment. Any such statement for which confidential treatment is requested must be segregated, marked, and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

(2) Issues addressed in the statement should include:

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

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

(iii) The nature and extent of the competitive harm which would result from public disclosure of the information;

(iv) The extent to which the information has been disseminated to employees and contractors of the person submitting the information;

(v) The extent to which persons other than the person submitting the information possess, or have access to, the same information; and

(vi) The nature of the measures which have been and are being taken to protect the information from disclosure.

(d) *Requests for disclosure.*

(1) Any request for disclosure of information submitted, reported or collected pursuant to this Part shall be made in accordance with 15 CFR 903.7.

(2) Upon receipt of a request for disclosure of information for which confidential treatment has been requested, the Administrator immediately will issue notice by an expeditious means (such as by telephone, confirmed by certified or registered mail, return receipt requested), of the request for disclosure to the person who requested confidential treatment of the information or to the designated agent. The notice also will:

(i) Inquire whether such person continues to maintain the request for confidential treatment;

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

(A) Waives or withdraws the request for confidential treatment in full or in part; or

(B) Confirms that the request for confidential treatment is maintained;

(iii) Inform such person that by such date as the Administrator specifies (generally, not later than the close of business on the fourth working day after issuance of the notice), the person:

(A) Is strongly encouraged to deliver to NOAA a written statement addressing the issues listed in paragraph (c)(2) of this section, describing the basis for believing that the information is deserving of confidential treatment, if such a statement was not previously submitted;

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

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

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

(3) To the extent permitted by applicable law, part or all of any statement submitted in response to any notice issued under paragraph (d)(2) will be treated as confidential if so requested by the person submitting the response.

Any such response for which confidential treatment is requested must be segregated, marked and submitted in accordance with the procedures

described in paragraphs (b)(3)(i) and (b)(3)(ii) of this section.

(4) Upon the expiration of the time allowed for response under paragraph (d)(2) of this section, or sooner if authorized under paragraph (e) of this section, the Administrator will determine, in consultation with the NOAA Office of General Counsel, whether confidential treatment is warranted based on the information then available to NOAA.

(5) If the person who requested confidential treatment waives or withdraws that request, the Administrator will proceed with appropriate disclosure of the information;

(6) If the Administrator determines that confidential treatment is warranted, he will so notify the person requesting confidential treatment and will issue an initial denial of the request for disclosure of records in accordance with 15 CFR 903.8.

(7)(i) If the Administrator determines that confidential treatment is not warranted for part or all of the information, the Administrator immediately will issue notice by an expeditious means (such as by telephone, confirmed by certified or registered mail, return receipt requested), to the person who requested confidential treatment. The notice will state:

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

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

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

(D) That, except as otherwise provided by paragraph (d)(7)(ii) of this section, on the fourth working day after issuance of the notice described in this paragraph (d)(7)(i) the Administrator will make the information available to the person who requested disclosure unless NOAA has first been notified of the filing of an action in a Federal court to obtain judicial review of the determination, and the court has issued an appropriate order preventing or limiting disclosure.

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

(8) NOAA will keep a record of the date any notice is issued, and of the date any response is received, by NOAA under this paragraph (d).

(9) In all other respects, procedures for handling requests for records containing information submitted to, reported to, or collected by the Administrator pursuant to this Part will be in accordance with 15 CFR Part 903. For example, if 10 working days have passed after the receipt of a request for disclosure and, despite the exercise of due diligence by the agency, the Administrator cannot make a determination as to whether confidential treatment is warranted, the Administrator will issue appropriate notice in accordance with 15 CFR 903.8(b)(5).

(e) *Special limitations on disclosure of certain information.* Any information submitted to, reported to, or collected by the Administrator under this Part which is exempt from disclosure pursuant to section 552(b)(4) of Title 5, United States Code (the section of the Freedom of Information Act relating to trade secrets and commercial or financial information

which is privileged or confidential), will not:

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

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

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

(2) Be otherwise disclosed except:

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

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

(C) Pursuant to court order, and

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

(f) *Direct Submissions of Confidential Information.* If any person (for example, an affiliate) has reason to believe that it would be prejudiced by furnishing information required from it to the applicant or licensee, such person may file the required information directly with NOAA. Information for which the person requests confidential treatment must be segregated, marked, and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

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

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

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

(3) A notification that information which is exempt from disclosure under 5 U.S.C. 552(b)(4) (the section of the Freedom of Information Act relating to trade secrets and commercial or financial information which is privileged

or confidential) shall not be disclosed except in the limited circumstances provided by section 112 of the Act, and § 981.100(d) and (e) of this part; and

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

#### § 981.110 Amendment of an application.

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

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

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

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

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

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

(b) The Administrator will terminate a proceeding if:

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

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

#### § 981.130 Application fees.

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

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

(2) An additional payment of one hundred thousand dollars (\$100,000.00) must be submitted not later than the

date of the first public hearing held by NOAA on the license application in accordance with § 981.340 of this part.

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

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

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

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

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

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

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

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

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

**§ 981.150 Public inspection and copying.**

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

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

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

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

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

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

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

(a) Submission of specified information with applications; and

(b) Compliance with specified recordkeeping and reporting requirements.

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

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

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

**Subpart B—Information To Be Submitted With Application**

**§ 981.160 Why Is this Information required?**

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

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

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

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

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

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

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

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

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

(b) *Proof of citizenship and authority.*

(1) If the applicant is a partnership or sole proprietorship, an affidavit from

each partner or the proprietor, respectively, stating that the individual is a citizen of the United States of America.

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Locations; and  
(ii) Total U.S. and total worldwide:

(A) Gross and net production of electricity; and

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

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

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

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

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

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

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

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

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

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

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

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

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

#### § 981.200 Requested duration of license.

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

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

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

(b) *Clean Water Act.* The information required to be submitted to the Environmental Protection Agency to obtain a *National Pollutant Discharge Elimination System* (NPDES) permit under section 402 of the *Clean Water Act* (Pub. L. 92-500, as amended by Pub. L. 95-217 and Pub. L. 95-576; 33 U.S.C. 1251 *et seq.*). The procedures and information required for such submittals

are set out in 33 CFR Part 122, 33 CFR Part 124, and 40 CFR 125.120 *et seq.* In addition, NPDES permits for discharges into marine waters are issued in compliance with guidelines developed by EPA under section 403(c) of the *Clean Water Act*. For the Ocean Discharge Criteria see 40 CFR Part 125, Subpart M (45 FR 65952; October 3, 1980).

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

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

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

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

(g) *Coastal Zone Management Act of 1972.* The certification or certification required to be submitted to NOAA under section 307(c) of the *Coastal Zone Management Act of 1972* (CZMA) (18

U.S.C. 1456(c)]. The procedures and information required for such submittals are set out in 15 CFR Part 830.

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

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

(j) *Fish and Wildlife Coordination Act (FWCA)*. Information to assist NOAA in complying with the consultation requirements of the FWCA [16 U.S.C. 861 *et seq.*; in particular, section 862], with a view to the conservation of fish and wildlife resources by planning and incorporating measures to prevent loss of and damage to such resources. NOAA strongly encourages each applicant to contact NOAA at the pre-application stage of the project, to facilitate early consultation with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and State agencies administering affected wildlife resources.

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

#### § 981.220 OTEC site information.

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

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

(c) *Existing human uses*. Single-line drawings of the marine area within five miles of the proposed site showing the nature and location of any cables, pipelines, offshore drilling or production platforms, aids to navigation, sewage outfalls, or other man-made structures and equipment. These drawings must also show the boundary lines and identification of each Outer Continental Shelf lease block, shipping lane, submarine transit lane, fishing ground, national defense restricted area, or other special area noted on navigation charts for the area covered by the drawings, or otherwise known to the applicant. The information required in §§ 981.260(a)(7) and (a)(8) of the part must also be included on these drawings.

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

(1) The proposed size and location of: (i) All fixed and floating structures associated with the OTEC facility or plantship;

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

(iii) Maneuvering areas;

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

(v) Recommended anchorage areas, if any;

(vi) Recommended mooring area for support vessels;

(vii) Pipelines and cables within the marine site;

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

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

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

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

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

(2) The stability of the seabed when exposed to the environmental forces

resulting from severe storms, or to lesser forces that continue for an extended period, including any history of accretion or erosion of the coast line in proximity to the marine site.

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

- (1) Onshore electrical transmission cables or pipelines;
- (2) Electrical substations;
- (3) Switching stations;
- (4) Electrical transmission lines;
- (5) Storage facilities;
- (6) Industrial plants; and
- (7) Vessel on/off loading facilities.

#### § 981.230 Operational information.

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

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

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

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

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

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

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

#### § 981.240 Design Information.

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

##### (b) *Major floating components data*.

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

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

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

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

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

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

(c) *Major fixed marine components.*

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

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

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

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

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

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

(d) *Major onshore components.*

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

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

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

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

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

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

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

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

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

(f) *Miscellaneous components data.*

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

(2) A description of aids to navigation to be established on the OTEC facility in

accordance with 33 CFR Part 64 and 33 CFR Part 86.

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

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

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

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

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

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

**§ 981.250 Construction and deployment procedures.**

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

**§ 981.260 Environmental Information.**

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

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

(2) An assessment of the quantities, composition and potential for bioaccumulation or persistence of any pollutants which may be discharged into

the water or atmosphere from the facility or plantship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Subpart C—License Application Review Procedures

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

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

##### § 981.280 NOAA review for completeness

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

Administrator will consult with other involved Federal agencies and departments.

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

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

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

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

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

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

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

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

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

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

(c) Any person intending to file an application referred to in paragraph (b)(2) of this section shall submit a notice of intent to file an application to the Administrator not later than 60 days after the publication of notice pursuant to paragraph (a) of this section, and shall submit the completed application no later than 90 days after publication of such notice. No application for a license for the ownership, construction, and operation of an OTEC facility within the designated application area for which a

notice of intent to file was received after such 60-day period, or which is received after such 90-day period has elapsed, shall be considered until action has been completed on all timely filed applications pending with respect to such application area.

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

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

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

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

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

##### § 981.300 Other Federal agencies and departments

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

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

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

#### § 981.310 EIS for each application.

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

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

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

responsibilities pursuant to the Act to prepare an EIS.

#### § 981.320 Antitrust review.

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

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

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

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

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

#### § 981.330 Adjacent coastal States.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

application is inadequate or inconsistent:

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

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

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

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

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

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

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

#### § 981.340 Informal public hearings on license application

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

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

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

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

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

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

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

#### § 981.350 Formal hearings on material factual issues

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

(b) If the Administrator determines under paragraph (a) of this section that a formal hearing is necessary, at least one adjudicatory hearing will be held in the District of Columbia in accordance

with 5 U.S.C. 554 and the procedures set forth in Subpart E of this Part. The record developed in any such adjudicatory hearing will be part of the basis for the Administrator's decision to approve or deny a license.

#### § 981.360 Timely conclusion of public hearings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) *Other application review agreements*. Agreements other than the Joint Agreement may, at the option of the affected parties, be negotiated between any applicant and individual regulatory agencies, or between regulatory agencies, regarding any aspect of the regulatory reviews necessary pursuant to any government permit, license, or authorization required for construction or operation of the OTEC facility or plantship which is the subject of the application. Such agreements may be negotiated before or

after an application for an OTEC license is submitted to NOAA. Such agreements will not be affected by an applicant's later decision to use the CAR process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

schedule in the Joint Agreement is adhered to.

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

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

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

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

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

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

##### § 981.470 Criteria for approval or denial.

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

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

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

(3) The Administrator determines, after consultation with the Secretary of the department in which the Coast Guard is operating, that the OTEC facility or plantship will not be operated with reasonable regard to the freedom

of navigation or other reasonable uses of the high seas and authorized uses of the Continental Shelf, as defined by United States law, treaty, convention, or customary international law;

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

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

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

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

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

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

(10) The Governor of any adjacent coastal State with an approved coastal zone management program in good standing pursuant to the Coastal Zone Management Act of 1972 (18 U.S.C. 1451 *et seq.*) notifies the Administrator under § 981.330(d) of this part that the application is inadequate or inconsistent with respect to programs within his jurisdiction and the license cannot be conditioned as described in § 981.330(d)(4) of this part;

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

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

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

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

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

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

##### § 981.480 Multiple applications.

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

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

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

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

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

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

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

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

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

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

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

(2) There will be no change in the:

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

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

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

seek oral approval from the Administrator before making a substantial change. The licensee must immediately notify the Administrator, orally or in writing, of each substantial change made.

#### § 981.500 Contents of license.

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

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

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

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

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

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

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

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

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

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

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

(1) In the case of components another applicant or licensee requests to use, the Administrator has not yet reached a

decision on the request for continued use of the components; or

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

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

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

#### (e) Discharge impacts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(k) *Foreign-flag vessels.* Each license will contain a condition that, except in a situation involving force majeure, the licensee will not permit a vessel registered in or flying the flag of a

foreign state, to call at, load or unload cargo at, or otherwise utilize the facility or plantship which is the subject of the license unless:

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

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

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

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

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

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

#### (c) *Revision.*

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

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

(3) A change which would require a request to and approval by the

Administrator as a revision is any change:

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

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

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

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

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

(i) The licensee;

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

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

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

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

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

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

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

(f) *Initial decision.*

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

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

(g) *Acceptance or objection by licensee.*

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

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

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

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

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

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

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

(h) *Final action by the Administrator.*

(1) After the close of the 30-day period described in paragraph (g)(1) of this section, or after taking action on a

licensee's objection under paragraph (g)(2), the Administrator will take final action on the license modification or revision.

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

§ 981.530 *Renewal of a license.*

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

§ 981.540 *Transfer of license.*

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

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

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

(1) To suspend the license; or

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

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

(c) *Emergency orders.* The Administrator may order the licensee to cease or alter construction or operation activities pending the completion of a judicial proceeding pursuant to

paragraph (a) of this section if the Administrator determines that immediate suspension of such activities is necessary to protect public health and safety or to eliminate any imminent and substantial danger to the environment as recognized in any treaty or convention to which the United States is a party.

(d) *Relinquishment or surrender.*

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

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

**Subpart E—Formal Hearing Procedures**

§ 981.560 *Formal hearing procedures.*

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

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

(b) *Decision to hold a hearing.*

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

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

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

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

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

(d) *Notice.*

(1) The Administrator will publish public notice of the formal hearing in the Federal Register at least 15 days before the beginning of the hearing, and will send written notice by registered or certified mail or by personal delivery to:

(i) Each applicant

(ii) The Governor of each adjacent coastal State;

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

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

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

(i) Time and place of the hearing;

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

(iii) The due date for filing a written request to participate in the hearing in accordance with paragraphs (f)(2) and (f)(3) of this section; and

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

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

(1) Regulate the course of the hearing and the conduct of the parties, interested persons and others submitting evidence, including but not limited to the power to require the submission of part or all of the evidence in written form if the judge determines a party will not be prejudiced thereby and if otherwise in accordance with law;

(2) Rule upon requests submitted in accordance with paragraph (f)(2) of this section to participate as a party, or requests submitted in accordance with paragraph (f)(3) of this section to

participate as an interested person in a proceeding, by allowing, denying, or limiting such participation;

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

(4) Administer oaths and affirmations;

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

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

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

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

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

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

(11) Examine and cross-examine witnesses;

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

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

(14) Schedule the time and place of the hearing (in accordance with the Act), or the hearing conference, continue the hearing from day to day, adjourn the hearing to a later date, or a different place, and reopen the hearing at any time before issuance of the recommended or initial decision, having due regard for the convenience and necessity of the parties;

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

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

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

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

(f) *Hearings: Participation.*

(1) Parties to the formal hearing will include:

(i) The NOAA General Counsel;

(ii) The applicant and

(iii) Any other person determined by the judge, in accordance with paragraph (f)(2) below, to be eligible to participate as a full party.

(2)(i) Any person desiring to participate as a party in a formal hearing must submit a request to the judge to be admitted as a party. Such person will be allowed to participate as a party if the judge finds that the interests of justice and a fair determination of the issues would be served by granting the request. The judge will give special consideration to each request from a designated adjacent coastal State to participate as a party.

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

(A) Special circumstances justify granting the request;

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

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

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

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

(ii) The judge may permit any interested person to submit evidence at any formal hearing if the judge determines that such evidence is relevant to facts in dispute concerning an issue being adjudicated. The fact that an interested person may submit evidence under this paragraph at a hearing does not entitle the interested person to participate in other ways in

the hearing unless allowed by the judge under paragraph (f)(3)(iii) of this section.

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

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

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

(i) *Conferences.*

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

(i) Simplification of the issues;  
(ii) Settlements in appropriate cases;  
(iii) Stipulations and admissions of fact, and contents and authenticity of documents;

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

(v) Limitation of the number of witnesses; and

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

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

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

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

(2) *Failure to appear.*

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

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

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

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

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

(3) *Evidence.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(k) *Interlocutory appeals.*

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

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

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

(i) *Decision.*

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

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

(3) *Final decision.*

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

(ii) The Administrator will base the final decision upon the record already made, except that the Administrator may issue orders:

(A) Specifying the filing of supplemental briefs; or

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

(iii) With respect to hearings to resolve material issues of fact pursuant to § 981.350 of this part, the

Administrator may defer announcement of his final decision on the findings of fact until the time he takes final action on the issuance, transfer or renewal of a license.

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

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

(o) *Depositions.*

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

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

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

(4) Each witness testifying upon deposition will be sworn and any party will have the right to cross-examine.

The questions propounded and the answers thereto, together with all objections made, will be reduced to writing, read to the witness, signed by the witness unless waived, and certified by the person presiding. Thereafter, the person presiding will deliver or mail a copy of the document to each party.

Subject to such objection to the questions and answers as were noted at the time of taking the deposition which would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by any party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof.

(p) *Subpoenas.* A party may request the judge to issue or the judge on the judge's own motion may issue a subpoena for the attendance and

testimony of witnesses and for the production of documentary or other evidence. Applications for subpoenas must be in writing, and must specify the general relevance and reasonable scope of the evidence sought to be produced.

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

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

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

(r) *Filing, submission and service of documents.*

(1) Whenever the regulations in this subpart or an order issued hereunder require a document to be filed within a certain period of time, such document will be considered filed as of the date of the postmark, if mailed, or (if not mailed) as of the date actually delivered to the office where filing is required. Time periods will begin to run on the day following the date of the document or event which begins the time period.

(2) All submissions must be signed by the person making the submission, or by the person's attorney or other authorized agent or representative.

(3) Service of a document must be made by delivering or mailing a copy of the document to the known address of the person being served.

(4) Whenever the regulations in this Subpart require service of a document, such service may effectively be made on the agent for the service of process or on the attorney for the person to be served.

(5) Refusal of service of a document by the person to be served, his agent, or attorney, will be deemed effective service of the document as of the date of such refusal.

(6) A certificate of the person serving the document by personal delivery or by mailing, setting forth the manner of the service, will be proof of the service.

§ 981.570 *Ex parte communications.*

(a) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports.

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

shall be made, or knowingly caused to be made:

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

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

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

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

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

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

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

(ii) From employees of the United States Government involving inter-governmental negotiations; are permitted if the communicator's position with respect to those matters cannot otherwise be fairly presented for reasons of foreign policy or national defense.

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

#### Subpart F—Enforcement Procedures

##### § 981.580 General

###### (a) Purpose and scope.

(1) Section 302 of the Act authorizes the Administrator to assess a civil penalty, in an amount not to exceed twenty-five thousand dollars (\$25,000)

for each violation, against any person found to have committed an act prohibited by section 301 of the Act. Each day of a continuing violation is a separate offense.

(2) Section 111 of the Act describes the circumstances under which the Administrator may suspend or terminate a license, or seek revocation of a license, for violation of the Act or of any regulation, restriction or condition issued under the Act.

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

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

(5) Section 114 of the Act describes the circumstances under which a person may bring a civil action against an alleged violator or against the Administrator for failure to perform a nondiscretionary duty, and directs the Administrator to issue regulations governing procedures prerequisite to such a civil action.

(6) The regulations in this Subpart provide uniform rules and procedures for the assessment of civil penalties (§§ 981.590 and 981.600 of this part); establishment of license sanctions (§ 981.610 of this part); issuance of compliance orders (§ 981.620 of this part); placement of observers on or in OTEC facilities and plantships (§ 981.630 of this part); and the giving of advance notice of private civil actions (§ 981.640 of this part).

###### (b) Filing and service of documents.

(1) Filing and service of documents required by this Subpart shall be in accordance with §§ 981.580(r) and 981.158 of this part. The method for computing time periods set forth in §§ 981.580(r) and 981.158 of this part also applies to any action or event, such as payment of a civil penalty, required by this Subpart to take place within a specified period of time.

(2) If an oral or written request is made to the Administrator within 10 days after the expiration of a time period established in this Subpart for the required filing of documents, the Administrator may permit a late filing if the Administrator finds reasonable

grounds for an inability or failure to file within the time period. All extensions will be in writing. Except as provided by this paragraph, by § 981.590(b) of this

15 CFR § 904.102(c)

or by order of an administrative law judge, no requests for an extension of time may be granted.

##### § 981.590 Assessment procedure.

Subpart B of 15 CFR Part 904 governs the procedures for assessing a civil penalty under the Act, and the rights of any person against whom a civil penalty is assessed.

##### § 981.600 Hearing and appeal procedures.

Subpart C of 15 CFR Part 904 governs the hearing and appeal procedures for civil penalties assessed under the Act.

##### § 981.610 License sanctions.

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

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

(b) Basis for sanctions.

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

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

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

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

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

(c) Nature of sanctions. In the Administrator's discretion and subject to the requirements of this section, the Administrator may take any of the following actions or combinations thereof with respect to a license issued under the Act:

(1) Revoke the license.

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

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

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

(d) Notice of license sanction.

(1) If the Administrator determines, on the basis of available information, that the licensee is not in compliance with any applicable provision of the Act, or any regulation, order or any license condition or restriction issued under the

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

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

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

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

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

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

(A) Protect public health and safety; or

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

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

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

writing when granting the review of the emergency order.

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

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

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

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

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

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

(3) If no hearing is required by or requested under paragraph (e)(1) of this section, the Administrator may nonetheless order a hearing if the Administrator determines that there are material issues of fact, law or equity to be further explored.

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

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

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

(g) *Appeals.*

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

(2)(i) The Administrator will decide the appeal upon the record already made, except that the Administrator may issue orders: (A) Specifying the filing of supplemental briefs; or

(B) Remanding the matter to a hearing officer for the receipt of further evidence, or other assistance in the determination of the matter.

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

(h) *Final decision.*

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

calendar day after the date it is rendered.

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

**§ 981.620 Compliance orders.**

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

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

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

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

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

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

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

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

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

(e) Evidence of compliance with an order issued under this section shall be presented to the Administrator in writing within the time period specified

in the order. The Administrator will, as soon as practicable, determine whether or not there is timely compliance with the order, and advise the person concerned of the determination.

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

**§ 981.630 Observers.**

(a) *Purpose of Observers.* Each licensee shall allow, at such times and to such extent as the Administrator deems reasonable and necessary, an observer (as used in this section, the term "observer" means "one or more observers") duly authorized by the Administrator to board, enter or accompany any OTEC facility or plantship to which a license applies, for the purposes of observing and reporting on:

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

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

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

(b) *Notice to Licensee.*

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

(2) The Administrator normally will issue any such notice as far in advance of placement of the observer as is practicable.

(3) *Contents of Notice.* The notice given by the Administrator may include, among other things:

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

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

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

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

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

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

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

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

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

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

(e) *Reasonableness of Observer activities.*

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

(2) The Administrator will assure that equipment brought into or aboard an OTEC facility or plantship by the observer is reasonable as to size, weight, and electric power and storage requirements, taking into consideration the necessity of the equipment for carrying out the observer's functions.

(3) The observer will have no authority over the operation of the OTEC facility or plantship or its activities, or the officers, crew, or personnel of the OTEC facility or plantship. The observer will comply

with all orders of the master or senior operations official which are necessary to ensure the safe operation of the OTEC facility or plantship and the safety of its personnel.

(f) *Non-interference with Observer.*

Licensees and other persons are reminded that the Act (see, for example, sections 301(2) and 301(3)) makes it unlawful for any person subject to section 301 of the Act to interfere with any observer in the performance of the observer's duties.

(g) *Confidentiality of Information.*

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

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

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

#### § 981.640 Advance notice of civil actions.

(a) *Actions against alleged violators.*

(1) No civil action may be filed in a United States district court under section 114 of the Act against any person for alleged violation of the Act, or any regulation, or license term or condition issued under the Act, until 60 days after the Administrator and any alleged violator receive written and dated notice of the alleged violation.

(2) The notice shall contain:

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

(ii) A specific reference to the provisions of the Act, regulation or license allegedly violated; and

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

(b) *Actions against the Administrator.*

(1) No civil action may be filed in a United States district court under section 114 of the Act against the Administrator for an alleged failure to perform any act or duty under the Act which is not discretionary until 60 days after the Administrator receives a written and dated notice of intent to file the action.

(2) The notice shall contain:

(i) A specific reference to the provisions of the Act, regulations or license believed to require the Administrator to perform a nondiscretionary act or duty;

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

(iii) A concise statement of the facts believed to show a failure to perform the act or duty; and

(iv) Any documentary or other evidence of the alleged failure to perform the act or duty.

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

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

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

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