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SUBCHAPTER G—MISCELLANEOUS RULES

PART 765—RULES APPLICABLE TO THE PUBLIC

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AUTHORITY: Secs. 5031, 6011, 70A Stat. 278, 375, as amended; sec. 133, 76 Stat. 517; sec. 301, 80 Stat. 379; 5 U.S.C. 301, 10 U.S.C. 133, 956, 5031, 6011, 7881; DOD 7000.14–R, Financial Management Regulation, Vol. 10.

§§ 765.1–765.5 [Reserved]

§ 765.6 Regulations for Pearl Harbor, Hawaii.

The Commander, U.S. Naval Base, Pearl Harbor, Hawaii, is responsible for prescribing and enforcing such rules and regulations as may be necessary for insuring security and for governing the navigation, movements, and anchorage of vessels in the waters of Pearl Harbor and in the entrance channel thereto.

(Sec. 1, 37 Stat. 341, 62 Stat. 799; 18 U.S.C. 2152, 33 U.S.C. 475; E.O. 8143, 4 FR 2179, 3 CFR 1943 Cum. Supp. 504)

[31 FR 16620, Dec. 29, 1966]

§§ 765.9–765.11 [Reserved]

§ 765.12 Navy and Marine Corps absentees; rewards.

The following is set forth as it applies to Navy and Marine Corps absentees. The term ''absentee,'' as used in this section, refers to a service member who commits the offense of absence without leave. Cf. article 86 of the Uniform Code of Military Justice (10 U.S.C. 886).

(a) *Payment of rewards*—(1) *Authority*. When authorized by military officials of the Armed Forces, any civil officer having authority to arrest offenders may apprehend an individual absent without leave from the military service of the United States and deliver him into custody of the military authorities. The receipt of Absentee Wanted by the Armed Forces (DD Form 553) or oral or written notification from military officials or Federal law enforcement officials that the person is absent and that his return to military control is desired is authority for apprehension and will be considered as an offer of a reward. When such a reward has been offered, persons or agency representatives (except salaried officers or employees of the Federal Government, or service members) apprehending or delivering absentees or deserters to military control will be entitled to a payment of

(i) $50 for the apprehension and detention until military authorities assume control, or

(ii) $75 for the apprehension and delivery to military control.

Payment of reward will be made to the person or agency representative actually making the arrest and the turnover or delivery to military control. If two or more persons or agencies join in performing these services, payment may be made jointly or severally but the total payment or payments will not exceed $50 or $75 as applicable. Payment of a reward is authorized whether the absentee or deserter voluntarily surrenders to civil authorities or is apprehended. Payment is not authorized for information merely leading to the apprehension of an absentee or deserter.

(2) *Payment procedure*. The disbursing officer, special disbursing agent or agent officer of the military activity to which an absentee or deserter is first delivered will be responsible for payment of the reward. Payment of rewards will be made on SF 1034 or NAVCOMPT Form 2277 supported by a copy of DD Form 553 or other form or notification that an individual is absent and that his return to military control is desired, and a statement signed by the claimant specifying that he apprehended (or accepted voluntary surrender) and detained the absentee or deserter until military authorities assumed control, or that he apprehended (or accepted voluntary surrender) and delivered the absentee or deserter to

military control. If oral notification was made in lieu of written notification, the claimant will so certify and provide the date of notification and the name, rank or rate, title, and organization of the person who made the authorized notice of reward for apprehension of the absentee or deserter.

(b) *Reimbursement for actual expenses*—(1) *Authority*. When a reward has not been offered or when conditions for payment of a reward otherwise cannot be met, reimbursement, not to exceed $75, may be made to any person or agency for actual expenses incurred in the apprehension and detention or delivery to military control of an absentee or deserter. If two or more persons or agencies join in performing these services, payment may be made jointly or severally, but the total payment or payments may not exceed $25. Reimbursement may not be made for the same apprehension and detention or delivery for which a reward has been paid. Actual expenses for which reimbursement may be made include:

(i) Transportation costs, including mileage at the rate established by the Joint Travel Regulation for travel by privately owned vehicle, for a round trip from either the place of apprehension or civil police headquarters to place of return to military control;

(ii) Meals furnished the service member for which the cost was assumed by the apprehending person or agency representative;

(iii) Telephone or telegraph communication costs;

(iv) Damages to property of the apprehending person or agency if caused directly by the service member during the apprehension, detention, or delivery;

(v) Such other reasonable and necessary expenses incurred in the actual apprehension, detention, or delivery as may be considered justifiable and reimbursable by the commanding officer. Reimbursement will not be made for:

(*a*) Lodging at nonmilitary confinement facilities;

(*b*) Transportation performed by the use of official Federal, State, county, or municipal vehicles;

(*c*) Personal services of the apprehending, detaining, or delivering person or agency.

(2) *Payment procedure*. The disbursing officer or special disbursing agent of the military activity to which an absentee or deserter is first delivered will be responsible for making reimbursement for actual expenses. Reimbursement will be effected on SF 1034 or NAVCOMPT Form 2277 supported by an itemized statement in triplicate signed by the claimant and approved by the commanding officer.

(c) *Reimbursement for subsistence furnished*—(1) *Authority*. Civil authorities may be reimbursed for the cost of subsistence furnished absentees or deserters placed in their custody for safekeeping at the request of military authorities. Such reimbursement will be in addition to rewards and reimbursement for actual expenses authorized in paragraphs (a) and (b) of this section.

(2) *Payment procedure*. The disbursing officer or special disbursing agent of the military activity requesting the safekeeping confinement will be responsible for making reimbursement for subsistence furnished by civil authorities. Reimbursement will be effected on SF 1034 or NAVCOMPT Form 2277 supported by an itemized statement signed by the claimant and approved by the officer who requested the confinement.

(d) Nothing said in this section shall be construed to restrict or exclude authority to apprehend an offender in accordance with law.

(Sec. 807, 70A Stat. 39; 10 U.S.C. 807. Interpret or apply secs. 808, 7214, 70A Stat. 40, 445; 10 U.S.C. 808, 7214)

[25 FR 1075, Feb. 6, 1960, as amended at 51 FR 22283, June 19, 1986; 65 FR 53172, Sept. 1, 2000]

§ 765.13 Insignia to be worn on uniform by persons not in the service.

(a) Under title 10 U.S.C., section 773, members of military societies composed of persons discharged honorably or under honorable conditions from the United States Army, Navy, Air Force or Marine Corps, regular or reserve, may, when authorized by regulations prescribed by the President, wear the uniform duly prescribed by such societies to be worn by the members thereof.

(b) The law cited in paragraph (a) of this section further provides that instructors and members of duly organized cadet corps at certain institutions of learning may wear the uniform duly prescribed by the authorities of such institutions.

(c) The law cited in paragraph (a) of this section further provides that the uniform worn by members of the military societies or by members and instructors of the cadet corps referred to in paragraph (a) of this section shall include some distinctive mark or insignia prescribed by the Secretary of the military department concerned to distinguish such uniforms from the uniforms of the Army, Navy, Air Force, or Marine Corps.

(d) Accordingly, except as otherwise provided in this paragraph, the following mark is hereby designated to be worn by all persons wearing the Navy or Marine Corps uniform as provided in paragraphs (a), (b), and (c) of this section: A diamond, 3½ inches long in the vertical axis, and 2 inches wide in the horizontal axis, of any cloth material, white on blue clothing, forestry green on khaki clothing, and blue on white clothing. The figure shall be worn on all outer clothing on the right sleeve, at the point of the shoulder, the upper tip of the diamond to be one-fourth inch below the shoulder seam. For persons who are participating in United States Marine Corps Junior ROTC programs, the following mark is designated to be worn: A round patch, three inches in diameter, which contains a gold Marine Corps emblem centered on a scarlet field. The scarlet field is surrounded with a blue border containing the words ''United States Marine Corps Junior ROTC'' in white lettering. Surrounding the blue field will be a gold border. Unless otherwise directed, the patch will be worn in the manner described above in connection with the ''diamond'' insignia.

(e) Within the meaning of paragraph (a) of this section, the occasions when members of the military societies may wear the uniform of their respective society are official functions which such a member attends in his capacity as a war veteran or as a member of such military society.

(f) Marine Corps Uniform Regulations may be examined and individual copies of pertinent provisions thereof may be purchased in accordance with § 701.1 of this chapter.

(Sec. 773, 70A Stat. 35; 10 U.S.C. 773)

[13 FR 8971, Dec. 28, 1948, as amended at 26 FR 11794, Dec. 12, 1961; 37 FR 6472, Mar. 30, 1972; 44 FR 37610, June 28, 1979]

§ 765.14 Unofficial use of the seal, emblem, names, or initials of the Marine Corps.

(a) *Purpose.* To establish procedures to determine whether to grant permission to use or imitate the seal, emblem, names, or initials of the Marine Corps in connection with commercial and certain noncommercial activities pursuant to 10 U.S.C. 7881. The Secretary of the Navy, in Secretary of the Navy Instruction 5030.7, has provided the policy and delegated to the Commandant of the Marine Corps (CMC), power to subdelegate to certain subordinate officers in writing, the authority to grant permission required by section 7881(b) of 10 U.S.C. for such use or imitation.

(b) *Scope.* The provisions of this Order requiring prior approval of the Secretary of the Navy, CMC, or the designee apply only to the use or imitation of the seal, emblem, names, or initials of the Marine Corps that suggest official approval, endorsement, or authorization is in connection with a promotion, goods, services, or commercial activity.

(c) *Standards*—(1) *No unofficial use or imitation of the Marine Corps seal.* Reproduction and use of the Marine Corps seal, as designated in Executive Order No. 10538 of June 22, 1954, is restricted to materials emanating from Headquarters Marine Corps. Except for manufacture of official letterhead stationery and related items of official Marine Corps use, reproduction and use of the Marine Corps seal is prohibited.

(2) *Unofficial use or imitation of the Marine Corps emblem, names, or initials.* Requests from civilian enterprises to use or imitate the Marine Corps emblem, names, or initials will ordinarily be approved where use or imitation merely provides a Marine Corps accent or flavor to otherwise fungible goods. Disapproval, however, usually may be

expected where such use or imitation reasonably would:

(i) Imply any official or unofficial connection between the Marine Corps and the user;

(ii) Tend to create the impression that the Marine Corps or the United States is in any way responsible for any financial or legal obligation of the user;

(iii) Give the impression that the Marine Corps selectively benefits the particular manufacturer, commercial entity, or other user, as in displaying the Marine Corps emblem, names, or initials on musical instruments, weapons, or the like, and in using the emblem, names, or initials in connection with advertising, naming, or describing products and services such as insurance, real estate, or financial services; or

(iv) Tend to subject the Marine Corps to discredit or would be inimical to the health, safety, welfare, or morale of the members of the Marine Corps.

(3) *Acceptable use of imitation of the Marine Corps insignia.* No request for permission is required when a use or imitation of the Marine Corps emblem, names, or initials includes prominent display of the disclaimer, ''Neither the United States Marine Corps nor any other component of the Department of Defense has approved, endorsed, or authorized this product (or promotion, or service, or activity)'' as an integral part of the use of imitation. A ''prominent display'' is one located on the same page as the first use of the insignia, prominent in that use, and printed in letters at least one half the size and density of the insignia.

(d) *Action*—(1) *When permission required.* Commercial or noncommercial use or imitation of the Marine Corps emblem, names, or initials is prohibited unless permission is first obtained in writing from the CMC, except when such use does not suggest that the use or imitation is approved, endorsed, or authorized by the Marine Corps or any other component of the Department of Defense.

(2) *Redelegation of authority.* The CMC hereby redelegates, pursuant to the authorization in paragraph 4 of the Secretary of the Navy 5030.7, authority to grant written permission to use the Marine Corps emblem, names, or initials to the Director, Administration Resource Management (ARDE). Prior to granting approval for commercial usage of the Marine Corps insignia, the CMC (ARDE) shall forward such requests to the Head, Marine Corps Exchange Service Branch, Facilities and Services Division, Installations and Logistics Department (CMC) (LFE)) and to the Counsel for the Commandant (CMC (CL)) for comment and concurrence. All other requests shall be routed to the Director, Judge Advocate Division (CMC (JAR)) for comment and concurrence.

(3) *Procedures for obtaining written permission.* Requests for written permission to use or imitate the Marine Corps emblem, names, or initials shall be in writing and shall be directed to the CMC (ARDE). The request should, at a minimum, contain the following information:

(i) Name and address of the requester.

(ii) A description of the type of activity in which the requester is engaged or proposes to engage.

(iii) A statement of whether the requester considers the proposed use or imitation to be commercial or noncommercial, and why.

(iv) A brief description and illustration or sample of the proposed use or imitation, as well as a description of the product or service in connection with which it will be used. This description will provide sufficient detail to enable the Marine Corps to determine whether there is a reasonable tendency to suggest such use or imitation is approved, endorsed, or authorized by the Marine Corps or any other component of the Department of Defense.

(v) In the case of a noncommercial use of imitation, a copy of the charter, constitution, bylaws, and similar organizational documents of the requester, together with a detailed description of its function or purpose. Insufficiently specific requests will be returned for additional information.

(e) *Reserve applicability.* This Order is applicable to the Marine Corps Reserve.

[51 FR 45467, Dec. 19, 1986, as amended at 65 FR 62619, Oct. 19, 2000]

PART 766—USE OF DEPARTMENT OF THE NAVY AVIATION FACILITIES BY CIVIL AIRCRAFT

Sec.

766.1 Purpose.
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766.9 Insurance requirements.
766.10 Cancellation or suspension of the aviation facility license (OPNAV Form 3770/1).
766.11 Fees for landing, parking and storage.
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766.13 Sale of aviation fuel, oil, services and supplies.

AUTHORITY: 49 U.S.C. 1507.

SOURCE: 35 FR 14451, Sept. 15, 1970, unless otherwise noted.

NOTE: The provisions of this part 766 are SECNAV Instruction 3770.1B of 30 June 1970.

§ 766.1 Purpose.

This part establishes the policy and procedures for the use of Navy and Marine Corps aviation facilities by aircraft other than U.S. Department of Defense aircraft.

§ 766.2 Definition of terms.

For the purpose of this part certain terms are defined as follows:

(a) *Alternate use.* Use of the aviation facility, specified in the flight plan, to which an aircraft may divert when a landing at the point of first intended landing becomes impractical because of weather. (Aircraft may not be dispatched, prior to takeoff from the airport of origin, to a facility licensed for alternate use.)

(b) *Civil aircraft.* Domestic or foreign aircraft operated by private individuals or corporations, or foreign government-owned aircraft operated for commercial purposes. This includes:

(1) *Contract aircraft.* Civil aircraft operated under charter or other contract to any U.S. Government department or agency.

(2) *Leased aircraft.* U.S. Government-owned aircraft delivered by the Government to a lessee subject to terms prescribed in an agreement which does not limit the lessee's use of the aircraft to Government business.

(c) *Civil aviation.* All flying activity by civil aircraft including:

(1) *Commercial aviation.* Transportation by aircraft of passengers or cargo for hire and the ferrying of aircraft as a commercial venture.

(2) *General aviation.* All types of civil aviation other than commercial aviation as defined above.

(d) *Facility.* A separately located and officially defined area of real property in which the Navy exercises a real property interest and which has been designated as a Navy or Marine Corps aviation facility by cognizant authority; or where the Department of the Navy has jurisdiction over real property agreements, expressed or implied, with foreign governments, or by rights of occupation. (This definition does not include aircraft carriers nor any other type of naval vessel with a landing area for aircraft.)

(e) *Government aircraft.* Aircraft owned or operated by any department or agency of either the United States or a foreign government (except a foreign government-owned aircraft operated for commercial purposes). Also aircraft owned by any department, agency, or political subdivision of a State, territory, or possession of the United States when such local government has sole responsibility for operating the aircraft. Government aircraft includes:

(1) *Military aircraft.* Aircraft used in the military services of any government.

(2) *Bailed aircraft.* U.S. Government-owned aircraft delivered by the Government to a Government contractor for a specific purpose directly related to a Government contract.

(3) *Loaned aircraft.* U.S. Government-owned aircraft delivered gratuitously by any Department of Defense agency to another Government agency, to a U.S. Navy or Marine Corps Flying Club, or to a U.S. Army or Air Force Aero Club.

(f) *Joint-use facility.* A Navy or Marine Corps facility where a specific agreement between the Department of the Navy and a civilian community, or between the U.S. Government and a foreign government, provides for civil aircraft use of the runways and taxiways. Civil aircraft terminal, parking, and servicing facilities are established and controlled by civil authorities in an area separate from those of the Navy or Marine Corps.

(g) *Official business.* Business, in the interest of the U.S. Government, which personnel aboard an aircraft must transact with U.S. Government organizations or personnel at or near the naval aviation facility concerned. Use of a facility to solicit U.S. Government business is not ''official business.''

(h) *Provisional use.* Use of a naval aviation facility for the purpose of providing adequate service to a community where, because of repair, construction or the performance of other work, the regular civil airport servicing the community is not available for an extended period. (An aircraft may be dispatched prior to takeoff from the airport of origin to a naval aviation facility authorized for provisional use.)

(i) *Scheduled use.* Use of a facility on a scheduled or regularly recurring basis by an air carrier certified by the Civil Aeronautics Board to provide passenger and cargo service to a community or area.

(j) *Services in connection with Government contracts.* This type of operation, cited on the Aviation Facility License, indicates the use of a facility for transporting the contractor's supplies and personnel for the performance of work at the facility under the terms of a specific U.S. Government contract.

(k) *Technical stop.* An en route landing for the purpose of obtaining fuel, oil, minor repairs, or crew rest. This does not include passenger accommodations nor passenger/cargo enplaning or deplaning privileges unless specifically authorized by the Chief of Naval Operations.

(l) *User.* An individual, corporation, or company named in the Aviation Facility License and the Certificate of Insurance.

§ 766.3 Authority.

Section 1107(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1507, 1508) states that ''Air navigation facilities owned or operated by the United States may be made available for public use under such conditions and to such extent as the head of the department or other agency having jurisdiction thereof deems advisable and may by regulation prescribe.'' (See § 766.13 for restrictions imposed by the Federal Aviation Act of 1958.)

§ 766.4 Policy.

Navy and Marine Corps aviation facilities are established to support the operation of Navy and Marine Corps aircraft. Equipment, personnel and material are maintained only at a level necessitated by these requirements and shall not be used to support the operation or maintenance of civil aircraft or non U.S. Government aircraft, except as noted below. (Nothing in this part, however, should be interpreted to prohibit any aircraft from landing at any suitable Navy or Marine Corps aviation facility in case of a bona fide emergency.) (See § 766.5(i).)

(a) *General.* Subject to the procedures established elsewhere in this part, civil aircraft and government aircraft, other than those belonging to the U.S. Government may use Navy or Marine Corps facilities, if necessary, *Provided,* That:

(1) They do not interfere with military requirements, and the security of military operations, facilities, or equipment is not compromised.

(2) No adequate civil airport is available. (Exception to this provision may be made when the aircraft is operated in connection with official business as defined in this part.)

(3) Pilots comply with regulations promulgated by the cognizant military agency and the commanding officer of the facility.

(4) Civil aircraft users assume the risk in accordance with the provisions of the Aviation Facility License.

(5) Each aircraft is equipped with two-way radio which provides a capability for voice communications with the control tower on standard Navy/Marine Corps frequencies.

(6) The user, or requesting government, has obtained permission through diplomatic channels from the host country wherein the facility of intended landing is located, if applicable.

(b) *Civil Aircraft owned and operated by*—(1) *Military personnel.* Private aircraft owned and operated by active duty U.S. military personnel or by Navy/Marine Corps Reservists on inactive duty may be authorized to land at a facility, provided such aircraft is not engaging in air commerce, and such landing is for official business required by written orders. Under no conditions shall such aircraft be allowed to base or operate from a facility for personal convenience nor base at a facility under the guise of official business.

(2) *Civil employees of the U.S. Government.* Private aircraft owned and operated by civil employees of the U.S. Government may be authorized to land at a facility, provided such aircraft is not engaging in air commerce, and such landing is for official business required by written orders. Such aircraft shall not be allowed to base or operate from a facility for personal convenience. (Employees of U.S. Government contractors are not considered civil employees of the U.S. Government.)

(3) *Non-U.S. Government personnel.* An individual or corporation owned and/or operated aircraft may be authorized to land at a facility for:

(i) Sales or service representation to authorized military agents (e.g. the exchange, commissary, or contracting officer).

(ii) Services in connection with U.S. Government contracts. Contracting agency and contract number(s) must be cited in the application for an Aviation Facility License.

(c) *Department of defense charter or contract.* Aircraft operating under a Military Traffic Management and Terminal Service (MTMTS), Military Airlift Command (MAC), or Navy charter or contract for the movement of DOD passengers or cargo may be authorized to use Navy or Marine Corps aviation facilities when required for loading, en route or terminal stops.

(d) *Test and experimental use.* Aircraft being produced for a military agency under contract may use Navy/Marine Corps facilities for testing and experimental purposes, if the contract so provides, or if it is determined to be in the best interests of the U.S. Government to do so. Unless otherwise provided in the contract, an Aviation Facility License is required, and the user shall furnish a Certificate of Insurance as provided in this part.

(e) *Aircraft demonstrations.* Manufacturers of aircraft or installed equipment may be authorized to use Navy/Marine Corps facilities in demonstrating and/or showing aircraft or installed equipment to officials of the U.S. Government when:

(1) It is determined to be in the best interest of the U.S. Government.

(2) The aircraft was produced in accordance with U.S. Government specifications either with or without the aid of Federal funds.

(3) There is an expressed interest on the part of the U.S. Government officials responsible for procurement, approval, or certification of the aircraft.

(f) *Joint use.* When a specific agreement is entered into by the Department of the Navy pertaining to joint civil/military use of a Navy or Marine Corps facility, the terms of that agreement shall take precedence over the provisions of this part.

(g) *Diplomatic agreements.* For diplomatic agreements and clearances to use U.S. Navy and Marine Corps aviation facilities in foreign countries, the provisions of this part are subject to the provisions of status of forces agreements, treaties of mutual cooperation or other international agreements. This part shall be used as a guide in negotiating agreements at the local level with representatives of a foreign military service, the U.S. Embassy, and the host government concerning the use of naval facilities by other than U.S. military aircraft. Approval shall be obtained from the Chief of Naval Operations for proposed terms which are in conflict with this part.

§ 766.5 Conditions governing use of aviation facilities by civil aircraft.

(a) *Risk.* The use of Navy or Marine Corps aviation facilities by civil aircraft shall be at the risk of the operator. Except as hereinafter provided for U.S. Government contractors, the Department of the Navy shall assume no

liability or responsibility by reason of the condition of the landing area, taxiways, radio and navigational aids, or other equipment or for notification of such condition; or by the acts of its agents in connection with the granting of the right to use such naval facility. No responsibility is assumed for the security of or damage to aircraft while on property owned or controlled by the U.S. Government.

(b) *Military rules.* Operators of civil aircraft utilizing a Navy or Marine Corps aviation facility shall be required to comply with the air and ground rules promulgated by the Department of the Navy and the commanding officer of the aviation facility. Such compliance shall pertain specifically to clearance authorization for the entry, departure, or movement of aircraft within the confines of the terminal area normally controlled by the commanding officer of the aviation facility.

(c) *Federal aviation regulations.* Operators of civil aircraft shall be required to comply with all Federal Aviation Administration (FAA) rules and regulations including filing of flight plans. When such flight plans are required, they shall be filed with the commanding officer or his authorized representative prior to the departure of the aircraft. When such a flight plan is not required, a list of passengers and crew members, the airport of first intended landing, the alternate airport, and fuel supply in hours shall be placed on file prior to takeoff, with the commanding officer or with the local company representative as appropriate.

(d) *Hours of operation.* The use of a Navy/Marine Corps aviation facility by civil aircraft shall be limited to the hours when the facility is normally in operation.

(e) *Weather minimums.* Civil aircraft shall comply with weather minimums as follows:

(1) Visual Flight Operations shall be conducted in accordance with Federal Aviation Regulations (FAR), §91.105 of this title. If more stringent visual flight rules minimums have been established for the point of departure or destination, as noted in the aerodrome remarks section of the Department of Defense Flight Information Publication (en Route) Instrument Flight Rules—Supplement, then the ceiling and visibility must be at or above these minimums in the applicable control zone.

(2) Instrument flight operations shall be conducted in accordance with FAR, §91.116 of this title.

(f) *Inspection.* The commanding officer may conduct such inspection of a transiting civil aircraft and its crew, passengers and cargo as he may consider appropriate or necessary to the carrying out of his duties and responsibilities.

(g) *Customs, immigration, agriculture, and public health inspection.* (1) The civil aircraft commander shall be responsible for compliance with all applicable customs, immigration, agriculture, and public health laws and regulations. He shall also be responsible for paying fees, charges for overtime services, and for all other costs connected with the administration of such laws and regulations.

(2) The commanding officer of the Navy/Marine Corps aviation facility will inform the appropriate public officials of the arrival of civil aircraft subject to such laws and regulations. He will not issue clearances for a civil aircraft to takeoff until such laws and regulations have been complied with. Procedures for insuring compliance with such laws and regulations shall be as mutually agreed to by the commanding officer of the aviation facility and the local public officials.

(h) *Weather alternate.* If a Navy/Marine Corps aviation facility has been approved for use as an alternate airport, radio clearance must be obtained from such facility as soon as the decision is made en route for such use.

(i) *Emergency landings.* Any aircraft may land at a Navy/Marine Corps aviation facility when necessary as a result of a bona fide emergency. However, whenever the nature of the emergency permits the pilot to select the time and place of landing, it is preferred that the pilot land his aircraft at a civil field.

(1) The commanding officer of the aviation facility will require that the pilot of the aircraft pay all fees and charges and execute the Aviation Facility License. A statement explaining the circumstances of the emergency

landing must be noted in § 766.5 of the license application. If a narrative report from the pilot is available, it may be attached to the application.

(2) *Clearance of runway.* The Department of the Navy reserves the right to use any method to clear a runway of aircraft or wreckage consistent with operational requirements. Care will be exercised to preclude unnecessary damage in removing wrecked aircraft; however, the Navy assumes no liability as a result of such removal.

(3) *Repairs.* (i) Aircraft requiring major repairs may be stored temporarily in damaged condition. If repairs cannot be completed within a reasonable time, the aircraft must be removed from the facility by the owner or operator of the aircraft without delay.

(ii) No aircraft will be given a major or minor overhaul.

(iii) Engine or air frame minor components may be furnished, when not available through commercial sources, provided such supplies can be spared and are not known to be in short supply. The issuance of such supplies must be approved by the commanding officer.

(iv) Minor components in short supply or major components for which there is a repeated demand can be furnished only on message authority obtained from the Aviation Supply Office, Philadelphia, PA (for continental facilities) or local fleet air command or major aviation supply depot (for extracontinental facilities). Complete engines, airplane wings, or other major items of equipment shall not be furnished under this authority.

(v) If the commanding officer believes it is desirable to furnish requested material or services in excess of the restrictions stated herein, he shall request instructions from the Chief of Naval Operations, giving a brief description of the material or services requested together with his recommendations.

(4) *Reimbursement for costs.* (i) The civil user making an emergency landing will be billed in accordance with paragraphs 032500–032503 of the NAVCOMPT Manual and paragraphs 25345–25363 of the NAVSUP Manual for payment of all costs incurred by the Government as a direct result of the emergency landing. Such costs will include those associated with labor, material, rental of equipment, vehicles or tools, etc., for:

(*a*) Spreading foam on runway before the aircraft attempts emergency landing.

(*b*) Fire and crash control and rescue.

(*c*) Movement and storage of aircraft or wreckage.

(*d*) Damage to runway, lights, navigation aids, etc.

(ii) There will be no charge for naval meteorological services and naval communications facilities for the handling of arrival and departure reports, air traffic control messages, position reports and safety messages.

(iii) The determination as to whether landing fees shall be charged pursuant to an emergency landing for maintenance or repair shall be the prerogative of the commanding officer of the facility.

[35 FR 14451, Sept. 15, 1970, as amended at 51 FR 22804, June 23, 1986]

§ 766.6 Approving authority for landings at Navy/Marine Corps aviation facilities.

(a) Except as indicated in paragraphs (b) and (c) of this section, the commanding officer of an active Navy/Marine Corps aviation facility may approve or disapprove landings of civil aircraft at his facility when such landing is:

(1) Directly connected with or in support of U.S. Government business (except those listed in paragraph (c) of this section).

(2) In connection with U.S. Government or community interests on an infrequent basis when no adequate civil airport is reasonably available.

(3) By aircraft owned and operated by Navy/Marine Corps Flying Clubs or U.S. Army or Air Force Aero Clubs which are operated as instrumentalities of the U.S. Government.

(4) By aircraft owned and operated by U.S. Government personnel when such use is in accordance with § 766.4(b) (1) and (2).

(5) By civil aircraft either owned or personally chartered by:

(i) The President or Vice President of the United States or a past President of the United States.

(ii) The head of any Federal department or agency.

(iii) A Member of Congress.

(6) By a bailed, leased, or loaned aircraft (as defined in §766.2) when operated in connection with official business only.

(7) By aircraft owned and operated by States, counties, or municipalities of the United States when used for official business of the owner.

(b) Except as limited by paragraph (c) of this section, the Commander in Chief, U.S. Naval Forces, Europe; Chief of Naval Material; Commander in Chief, U.S. Atlantic Fleet; Commander in Chief, U.S. Pacific Fleet; Chief of Naval Air Training; Commander, Pacific Missile Range; Commander, Marine Corps Air Bases, Eastern Area; Commander, Marine Corps Air Bases, Western Area; and Commanding General, Fleet Marine Force, Pacific may approve civil aircraft use of any active aviation facility under their control. (At overseas locations, aircraft landing authorizations must be in consonance with the provisions of applicable international agreements.)

(c) The Chief of Naval Operations may approve any of the above requests, and is the only agency empowered to approve all other requests for use of naval facilities by civil and government aircraft, for example:

(1) Applications for use of more than one facility when the facilities are not under the control of one major command.

(2) Application for use of naval aviation facilities when participating in U.S. Government or Department of Defense single-manager contract and charter airlift operations; *i.e.*, Military Airlift Command (MAC) or Military Traffic Management and Terminal Service (MTMTS).

(3) Application for a facility to be used as a regular civil airfield for a community, by either commercial or general aviation.

(4) Requests for use of a facility by foreign civil or government aircraft when:

(i) Such use is not covered by an agreement between the U.S. Government and the government of the aircraft's registry, or

(ii) The facility is located in a country other than that in which the foreign aircraft is registered.

§ 766.7 How to request use of naval aviation facilities.

(a) *Forms required.* Each applicant desiring use of a Navy/Marine Corps aviation facility will be required to:

(1) Execute an application for an Aviation Facility License (OPNAV Form 3770/1 (Rev. 7–70)).

(2) Submit a Certificate of Insurance (NAVFAC 7–11011/36) showing coverage as provided by §766.9 of this part.

(b) *Exceptions.* Exceptions to the foregoing requirements are:

(1) Aircraft owned and operated by departments or agencies of the U.S. Government for official business.

(2) Aircraft owned and operated or noncommercial purposes by agencies of a foreign government, except in cases where the foreign government charges fees for U.S. Government aircraft.

(3) Aircraft owned and operated by States, possessions, and territories of the United States and political subdivisions, thereof, when used for official business of the owner.

(4) Aircraft owned and operated by either Navy/Marine Corps Flying Clubs or Aero Clubs of other military services which are operated as instrumentalities of the U.S. Government.

(5) Bailed aircraft, provided the bailment contract specifies that the U.S. Government is the insurer for liability.

(c) *Obtaining forms.* The applicant may obtain the required forms listed in paragraph (a) of this section, from the commanding officer of any Navy or Marine Corps aviation facility or from the Chief of Naval Operations (OP–53C). Navy units may obtain the forms through regular supply channels as a Cog ''I'' item.

(d) *Preparation of forms.* (1) The license application will be completed in quadruplicate by the applicant in accordance with detailed instructions set forth in Aviation Facility License (OPNAV Form 3770/1 (REV. 7–70)).

(2) The Certificate of Insurance will be completed by the insurer. Only the signed original certificate and one copy are required to be submitted.

(e) *Submission of forms.* (1) The forms executed by the applicant shall be submitted to the commanding officer of the aviation facility concerned, except that applications requiring approval by higher authority shall be submitted to the appropriate approving authority, as indicated in paragraph (b) or (c) of this section at least 30 days prior to the first intended landing.

(2) Once the NAVFAC 7–11011/36, Certificate of Insurance, is on file with an executing authority, it is valid until insurance expiration date and may be used by that executing authority as a basis for his action on any subsequent OPNAV Forms 3770/1 submitted for approval.

(f) *Security deposit.* All applications, other than those listed in §766.11(a) contemplating more than one landing per month, will be accompanied by a security deposit in the form of a certified check payable to the ''Treasurer of the United States'' in payment of the estimated costs of landing, hangar and outside parking fees, for 3 months in advance, calculated as provided in §766.11 (c) and (d). Security deposits will be handled as set forth in paragraph 032102 of the NAVCOMPT Manual.

(g) *Nonexclusive use airports.* When either the Chief of Naval Operations or Commandant of the U.S. Marine Corps does not have exclusive operational control over a landing area, the aircraft operator will obtain permission to land from the appropriate civil or military authority.

§ 766.8 Procedure for review, approval, execution and distribution of aviation facility licenses.

(a) *Review of application by the commanding officer.* The commanding officer will review each application for Aviation Facility License and Certificate of Insurance received and determine whether such forms have been completed by the applicant in accordance with the instructions for their preparation as indicated in the Aviation Facility License (OPNAV Form 3770/1 (REV. 7–70)) and the Certificate of Insurance (NAVFAC 7–11011/36(7–70)). As appropriate, the commanding officer will require each applicant to furnish a security deposit as stipulated in §766.7(f).

(b) *Processing application.* The commanding officer will approve/disapprove the application or forward it to higher authority for approval as required by §766.6(b) or (c). If the application is approved, the approving authority will then forward all copies of the license and Certificate of Insurance to the Commander, Naval Facilities Engineering Command or his designated representative for review and execution of the license.

(c) *Action by the Commander, Naval Facilities Engineering Command or his designated representative.* (1) Upon receipt, the Commander, Naval Facilities Engineering Command, or his designated representative, will review the license and Certificate of Insurance. He shall determine whether the insurance coverage conforms to the requirements prescribed by §766.9 of this part or to such requirements as may be promulgated from time to time by the Chief of Naval Material.

(2) Upon approval, he will then execute the license in triplicate, conform all additional copies, and make distribution as provided in paragraph (d) of this section. Applications which are not approved will be returned to the applicant with an explanation of deficiencies which must be corrected prior to execution.

(d) *Distribution.* (1) After execution of a license, distribution will be made as follows:

Original—To the licensee.
Executed copy—To the commanding officer.
Executed copy—To the Commander, Naval Facilities Engineering Command or his designated representative.
Conformed copy—To the Chief of Naval Operations (OP–53).
Conformed copy—To the cognizant commander under §766.6(b).
Conformed copy—To the disbursing officer serving the performing activity in the case of local deposits, and to the Office of the Navy Comptroller (NAFC3) in the case of central deposits held at the Washington, DC level.
Conformed copy—To the Military Airlift Command (MAC) for DOD contract or charter airlift operations.
Conformed copy—To the Military Traffic Management and Terminal Service (MTMTS) for DOD contract or charter airlift operations.

(2) Licenses issued under this authority are to be disposed of under provisions of paragraph 4280 of SECNAVINST 5212.5B, Disposal of Navy and Marine Corps Records. In accordance therewith, official executed copies of licenses are to be retained for a period of 6 years after completion or termination of the agreement. They may be transferred to the nearest Federal records center when superseded, revoked, canceled, or expired for retention by the center until expiration of the 6-year retention period.

§ 766.9 Insurance requirements.

(a) *Control of insurance.* The Commander, Naval Facilities Engineering Command, or his designee, shall be responsible for requiring aircraft owners or operators to procure and maintain liability insurance conforming to the standards prescribed by the Chief of Naval Material. The insurance policy must be obtained at the expense of the civil aircraft owner or operator and with a company acceptable to the U.S. Navy.

(b) *Insurance coverage.* Except for those aircraft exempted by paragraph (c) below, each civil aircraft is required to be covered by insurance of the types and minimum limits established by the Chief of Naval Material. The Certificate of Insurance, must state all coverages in U.S. dollars. Current minimums are:

(1) Privately owned commercially-operated aircraft used for cargo carrying only and aircraft being flight-tested or ferried without passengers will be insured for:

(i) *Bodily injury liability.* At least $100,000 for each person in any one accident with at least $1 million for each accident.

(ii) *Property damage liability.* At least $1 million for each accident.

(2) Privately owned commercially-operated aircraft used for passenger carrying and privately owned noncommercially-operated aircraft of 12,500 pounds or more certified maximum gross takeoff weight will be insured for:

(i) *Bodily injury liability* (*excluding passengers*). At least $100,000 for each person in any one accident with at least $1 million for each accident.

(ii) *Property damage liability.* At least $1 million for each accident.

(iii) *Passenger liability.* At least $100,000 for each passenger, with a minimum for each accident determined as follows: multiply the minimum for each passenger, $100,000 by the next highest whole number resulting from taking 75 percent of the total number of passenger seats (exclusive of crew seats). For example: The minimum passenger coverage for each accident for an aircraft with 94 passenger seats is computed: $94 \times 0.75 = 70.5$—next highest whole number resulting in 71. Therefore, $71 \times \$100{,}000 = \$7{,}100{,}000$.

(3) Privately owned noncommercially-operated aircraft of less than 12,500 pounds will be insured for:

(i) *Bodily injury liability* (*excluding passengers*). At least $100,000 for each person in any one accident with at least $500,000 for each accident.

(ii) *Property damage liability.* At least $500,000 for each accident.

(iii) *Passenger liability.* At least $100,000 for each passenger, with a minimum for each accident determined by multiplying the minimum for each passenger, $100,000 by the total number of passenger seats (exclusive of crew seats).

(4) Aircraft insured for a single limit of liability must have coverage equal to or greater than the combined required minimums for bodily injury, property damage, and passenger liability for the type of use requested and for the passenger capacity and gross takeoff weight of the aircraft being operated. For example: the minimum single limit of liability acceptable for an aircraft operating as described in paragraph (b)(2) of this section is $1,000,000 + $1,000,000 + $7,100,000 = $9,100,000.

(5) Aircraft insured by a combination of primary and excess policies must have combined coverage equal to or greater than the required minimums for bodily injury, property damage, and passenger liability, for the type of use, and for the passenger capacity and gross takeoff weight of the aircraft.

(6) Each policy must specifically provide that:

(i) The insurer waives any right to subrogation the insurer may have against the United States by reason of

any payment under the policy for damage or injury which might arise out of or in connection with the insured's use of any Navy installation or facility.

(ii) The insurance afforded by the policy applies to the liability assumed by the insured under OPNAV Form 3770/1, Aviation Facility License.

(iii) If the insurer cancels or reduces the amount of insurance afforded under the listed policy, the insurer shall send written notice of the cancellation or reduction to Commander, Naval Facilities Engineering Command, Department of the Navy, Washington, DC 20390 by registered mail at least 30 days in advance of the effective date of the cancellation; the policy must state that any cancellation or reduction will not be effective until at least 30 days after such notice is sent, regardless of the effective date specified therein.

(iv) If the insured requests cancellation or reduction, the insurer shall notify the Commander, Naval Facilities Engineering Command, Department of the Navy, Washington, DC 20390 immediately upon receipt of such request.

(c) *Exemption.* Government aircraft, as defined in §766.2(e) are exempt from the insurance requirements specified above. However, this exemption applies to bailed aircraft only if the contract under which the aircraft is bailed specifies that insurance is not required.

§ 766.10 Cancellation or suspension of the aviation facility license (OPNAV Form 3770/1).

(a) *Cancellation.* (1) If the user fails to comply with the terms of the Aviation Facility License (OPNAV Form 3770/1) or of any applicable regulations, all current Aviation Facility Licenses for that user will be canceled. A canceled Aviation Facility License cannot be reinstated; a new application must be submitted for approval as explained in §766.7.

(2) If the commanding officer of a naval aviation facility has reason to believe that the use of an Aviation Facility License is not in accordance with the terms of the license he should immediately notify the Chief of Naval Operations, giving the name of the user, the Aviation Facility License number, and citing the circumstances of the misuse.

(b) *Suspension.* The approving authority, or the commanding officer of the facility, may suspend an approved Aviation Facility License when such licensed use would be inconsistent with Navy/Marine Corps or national defense interests. Whenever possible, the Department of the Navy will avoid suspension of licenses which have been issued for official business or scheduled air carrier use. In all cases, suspensions will be lifted as quickly as possible. A suspension will not have the effect of extending the expiration date of an approved Aviation Facility License.

§ 766.11 Fees for landing, parking and storage.

(a) The commanding officer of a facility will collect landing, parking, and storage fees, as applicable, from all users required to have an Aviation Facility License by §766.7 except for the following:

(1) Government aircraft (see definition §766.2(g)) except that foreign government aircraft will be charged fees if their government charges similar fees for U.S. Government aircraft.

(2) Aircraft being produced under a contract of the U.S. Government.

(3) Any contract aircraft (see definition §766.2(b)(1)) or other civil aircraft which is authorized to use the facility on official business.

(4) Aircraft employed to train operators in the use of precision approach systems (GCA, ILS, et al.) provided full-stop or touch-and-go landings are not performed.

(5) Aircraft owned and operated by either Navy/Marine Corps Flying Clubs or Aero Clubs or other military services which are operated as instrumentalities of the U.S. Government.

(6) Aircraft owned and operated by military personnel on active duty (Regular and Reserve) or retired, provided the aircraft is not used for commercial purposes.

(7) Landing fees incident to emergency landings for which the landing fee has been waived by the commanding officer in accordance with §766.5(i)(5)(i).

(b) *Fee for unauthorized landing.* If an aircraft lands at a Navy/Marine Corps aviation facility without obtaining prior permission (except for a bona fide

emergency landing), a landing fee in excess of the normal landing fee will be charged to cover the additional expenses incurred due to special handling and processing. The fee for an unauthorized landing will be as follows:

(1) For aircraft weighing less than 12,500 pounds: $100.

(2) For aircraft weighing 12,500 pounds but less than 40,000 pounds: $250.

(3) For aircraft weighing 40,000 pounds but less than 100,000 pounds: $500.

(4) For aircraft weighing above 100,000 pounds: $600.

(c) *Normal landing fee.* The normal landing fee is based on the aircraft maximum authorized gross takeoff weight, to the nearest 1,000 pounds. The maximum gross takeoff weight may be determined either from item 7F of OPNAV Form 3770/1 or from the ''Airplane Flight Manual'' carried aboard each aircraft. If the weight cannot be determined, it should be estimated.

CHARGE PER LANDING

Inside CONUS—0.20/1,000 pounds or any portion thereof with a minimum of $5.

Outside CONUS—0.30/1,000 pounds or any portion thereof with a minimum of $7.50.

(d) *Parking and storage fees.* Fixed and rotary wing aircraft parking and storage fees are based upon the gross takeoff weight of the aircraft as follows:

(1) *Outside a hangar.* Charges begin 6 hours after the aircraft lands. The rate is 10 cents per thousand pounds for each 24-hour period or fraction thereof, with a minimum charge of $1.50 per aircraft.

(2) *Inside a hangar.* Charges begin as soon as the aircraft is placed inside the hangar. The rate is 20 cents per 1,000 pounds for each 24-hour period or fraction thereof, with a minimum charge of $5 per aircraft.

(e) *Reimbursement.* Collections incident to direct (out of pocket) costs will be credited to local operating and maintenance funds. All other collections, such as for landing, parking, and storage fees will be credited to Navy General Fund Receipt Account 172426. Accumulation of costs and preparation of billing documents are prescribed in paragraphs 032500–032503 of the NAVCOMPT Manual.

§ 766.12 Unauthorized landings.

An aircraft that lands at a Navy/Marine Corps aviation facility without obtaining prior permission from an approving authority, except in a bona fide emergency, is in violation of this part. Civil aircraft landing in violation of this regulation will have to pay the fee prescribed in § 766.11(b). In those cases where an unauthorized landing is made at a facility within a Naval Defense Area, proclaimed as such by Executive order of the President, civil aircraft may be impounded and the operator prosecuted as indicated in OPNAVINST 5500.11C of November 12, 1963. In any event, before the aircraft is authorized to depart, the commanding officer of the facility will:

(a) Inform the aircraft operator of the provisions of this part and the OP NAVINST 5500.11C of November 12, 1963, if applicable.

(b) Require the aircraft operator (or owner), before takeoff, to pay all fees and charges and to comply with the following procedure:

(1) Execute OPNAV Form 3770/1, explaining in item 6 of that form the reason for the landing.

(2) In lieu of submitting a Certificate of Insurance (NAVFAC 7–11011/36), the insurer must furnish evidence of sufficient insurance to include waiver of any right of subrogation against the United States, and that such insurance applies to the liability assumed by the insured under OPNAV Form 3770/1.

(3) When it appears that the violation may have been deliberate, or is a repeated violation, departure authorization must be obtained from the Chief of Naval Operations.

(4) Waiver of the requirements in paragraphs (b)(1) and (2) of this section may be obtained from the Chief of Naval Operations to expedite removal of these aircraft when such waiver is considered appropriate.

[35 FR 14451, Sept. 15, 1970, as amended at 51 FR 22804, June 23, 1986]

§ 766.13 Sale of aviation fuel, oil, services and supplies.

(a) *General policy.* In accordance with sections 1107 and 1108 of the Federal Aviation Act of 1958 (72 Stat. 798 as amended, 49 U.S.C. 1507, 1508), Navy/

Marine Corps Aviation fuel, oil, services, and supplies are not sold to civil aircraft in competition with private enterprise. Sections 1107 and 1108 of Federal Aviation Act of 1958 (72 Stat. 798 as amended, 49 U.S.C. 1507, 1508), however, does authorize the sales of fuel, oil, equipment, supplies, mechanical service, and other assistance by reason of an emergency. Such sales will be made only where there is no commercial source and only in the amount necessary for the aircraft to continue on its course to the nearest airport operated by private enterprise.

(b) *Contract aircraft.* The sale of aviation fuel, oil, supplies, etc. to aircraft under U.S. Government contract or charter is permitted at, and limited to, points where passengers or cargo are loaded into or discharged from the aircraft under terms of the contract or charter. Sales are not authorized at naval aviation facilities where commercial supplies and service are available.

PART 767—GUIDELINES FOR PERMITTING ARCHAEOLOGICAL INVESTIGATIONS AND OTHER ACTIVITIES DIRECTED AT SUNKEN MILITARY CRAFT AND TERRESTRIAL MILITARY CRAFT UNDER THE JURISDICTION OF THE DEPARTMENT OF THE NAVY

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767.27 References.

AUTHORITY: 10 U.S.C. 113 note; Pub. L. 108–375, Title XIV, sections 1401 to 1408, Oct. 28, 2004, 118 Stat. 2094; 5 U.S.C. 301; 16 U.S.C. 470.

SOURCE: 80 FR 52594, Aug. 31, 2015, unless otherwise noted.

Subpart A—Regulations and Obligations

§ 767.1 Purpose.

The purpose of this part is:

(a) To assist the Secretary in managing sunken military craft under the jurisdiction of the Department of the Navy (DON) pursuant to the Sunken Military Craft Act (SMCA), 10 U.S.C. 113 note; Public Law 108–375, Title XIV, sections 1401 to 1408, Oct. 28, 2004, 118 Stat. 2094.

(b) To establish the procedural rules for the issuance of permits authorizing persons to engage in activities directed at sunken military craft and terrestrial military craft under the jurisdiction of the DON for archaeological, historical, or educational purposes, when the proposed activities may disturb, remove, or injure the sunken military craft or terrestrial military craft.

(c) To set forth the procedures governing administrative proceedings for assessment of civil penalties or liability damages in the case of a sunken military craft permit violation or violation of section 1402 of the SMCA.

§ 767.2 [Reserved]

§ 767.3 Definitions.

Agency means the Department of the Navy.

Artifact means any portion of a sunken military craft or terrestrial military craft that by itself or through its relationship to another object or assemblage of objects, regardless of age, whether in situ or not, may carry archaeological or historical data that yields or is likely to yield information that contributes to the understanding of culture or human history.

Associated Contents means:

(1) The equipment, cargo, and contents of a sunken military craft or terrestrial military craft that are within its debris field; and

(2) The remains and personal effects of the crew and passengers of a sunken military craft or terrestrial military craft that are within its debris field.

Debris field means an area, whether contiguous or non-contiguous, that consists of portions of one or more sunken military craft or terrestrial military craft and associated artifacts distributed due to, or as a consequence of, a wrecking event and post-depositional site formation processes.

Directed at means an intentional or negligent act that disturbs, removes, or injures a craft that the person knew or should have known to be a sunken military craft.

Disturb or *disturbance* means to affect the physical condition of any portion of a sunken military craft or terrestrial military craft, alter the position or arrangement of any portion of a sunken military craft or terrestrial military craft, or influence the wrecksite or its immediate environment in such a way that any portion of a craft's physical condition is affected or its position or arrangement is altered.

Historic in the case of a sunken military craft or a terrestrial military craft means fifty (50) years have elapsed since the date of its loss and/or the craft is listed on, eligible for, or potentially eligible for listing on the National Register of Historic Places.

Injure or *injury* means to inflict physical damage on or impair the soundness of any portion of a sunken military craft or terrestrial military craft.

Permit holder means any person authorized and given the right by the Naval History and Heritage Command (NHHC) to conduct activities authorized under these regulations.

Permitted activity means any activity that is authorized by the NHHC under the regulations in this part.

Person means an individual, corporation, partnership, trust, institution, association; or any other private entity, or any officer, employee, agent, instrumentality, or political subdivision of the United States.

Possession or *in possession of* means having physical custody or control over any portion of a sunken military craft or terrestrial military craft.

Remove or *removal* means to move or relocate any portion of a sunken military craft or terrestrial military craft by lifting, pulling, pushing, detaching, extracting, or taking away or off.

Respondent means a vessel or person subject to a civil penalty, enforcement costs and/or liability for damages based on an alleged violation of this part or a permit issued under this part.

Secretary means the Secretary of the Navy or his or her designee. The Director of the NHHC is the Secretary's designee for DON sunken military craft and terrestrial military craft management and policy; the permitting of activities that disturb, remove, or injure DON sunken military craft and terrestrial military craft; the permitting of activities that disturb, remove, or injure sunken military craft of other departments, agencies or sovereigns incorporated into the DON permitting program; the initiation of enforcement actions; and, assessment of civil penalties or liability for damages. The Secretary's designee for appeals of Notices of Violations is the Defense Office of Hearings and Appeals (DOHA).

Secretary concerned means:

(1) The Secretary of a military department;

(2) In the case of a Coast Guard sunken military craft, the Secretary of the Department in which the Coast Guard is operating.

Sunken military craft means all or any portion of:

(1) Any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank;

(2) Any sunken military aircraft or military spacecraft that was owned or operated by a government when it sank;

(3) The associated contents of a craft referred to in paragraph (1) or (2) of this definition;

(4) Any craft referred to in paragraph (1) or (2) of this definition which may now be on land or in water, if title thereto has not been abandoned or transferred by the government concerned.

Sunken Military Craft Act refers to the provisions of 10 U.S.C. 113 note; Public Law 108–375, Title XIV, sections 1401 to 1408, Oct. 28, 2004, 118 Stat. 2094.

Terrestrial military craft means the physical remains of all or any portion of a historic ship, aircraft, spacecraft, or other craft, intact or otherwise, manned or unmanned, along with all associated contents, located on land and under the jurisdiction of the DON. Terrestrial military craft sites are distinguished from sunken military craft by never having sunk in a body of water.

United States Contiguous Zone means the contiguous zone of the United States declared by Presidential Proclamation 7219, dated September 2, 1999. Accordingly, the contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation.

United States internal waters means all waters of the United States on the landward side of the baseline from which the breadth of the United States territorial sea is measured.

United States sunken military craft means all or any portion of a sunken military craft owned or operated by the United States.

United States territorial sea means the waters of the United States territorial sea claimed by and described in Presidential Proclamation 5928, dated December 27, 1988. Accordingly, the territorial sea of the United States extends to 12 nautical miles from the baselines of the United States determined in accordance with international law.

United States waters means United States internal waters, the United States territorial sea, and the United States contiguous zone.

Wrecksite means the location of a sunken military craft or terrestrial military craft. The craft may be intact, scattered or completely deteriorated, and may presently be on land or in water. The wrecksite includes any physical remains of the craft and all associated contents.

§ 767.4 Prohibited acts.

(a) *Unauthorized activities directed at sunken military craft or terrestrial military craft.* No person shall engage in or attempt to engage in any activity directed at a sunken military craft or terrestrial military craft that disturbs, removes, or injures any sunken military craft or terrestrial military craft, except:

(1) As authorized by a permit issued pursuant to these regulations;

(2) As otherwise authorized by these regulations; or

(3) As otherwise authorized by law.

(b) *Possession of sunken military craft or terrestrial military craft.* No person may possess, disturb, remove, or injure any sunken military craft or terrestrial military craft in violation, where applicable, of:

(1) Section 1402 of the SMCA; or

(2) Any regulation set forth in this part or any permit issued under it; or

(3) Any prohibition, rule, regulation, ordinance, or permit that applies under any other applicable law.

(c) *Limitations on application.* Prohibitions in section 1402 of the SMCA shall not apply to:

(1) Actions taken by, or at the direction of, the United States.

(2) Any action by a person who is not a citizen, national, or resident alien of the United States, except in accordance with:

(i) Generally recognized principles of international law;

(ii) An agreement between the United States and the foreign country of which the person is a citizen;

(iii) In the case of an individual who is a crew member or other individual on a foreign vessel or foreign aircraft,

an agreement between the United States and the flag State of the foreign vessel or aircraft that applies to the individual.

§ 767.5 Policy.

(a) As stewards of the DON's sunken military craft and terrestrial military craft, the NHHC is responsible for managing these irreplaceable resources for the continued education and appreciation of present and future generations. To ensure consistent and effective stewardship, the NHHC has developed a comprehensive program that encompasses the following aspects: Preservation planning; wrecksite management; archaeological research; conservation and curation; and public information, interpretation, and education. The NHHC strongly encourages cooperation with other Department of Defense commands, Federal and State agencies, educational institutions, and individuals interested in preserving DON's maritime and aviation heritage.

(b) Subject to operational requirements, sunken military craft and terrestrial military craft will generally be managed in place unless wrecksite disturbance, recovery, or injury is justified and necessary to protect the craft or the environment, to address matters pertaining to human remains or public safety, to mitigate adverse effects, to conduct research, or to provide for public education. While the NHHC prefers non-intrusive in situ research on sunken military craft and terrestrial military craft, it recognizes that wrecksite disturbance, removal, or injury may become necessary or appropriate. At such times, wrecksite disturbance, removal, or injury may be permitted by the NHHC with respect to DON sunken military craft for archaeological, historical, or educational purposes, subject to conditions set forth in accordance with these regulations. Historic shipwrecks under the jurisdiction of the DON that do not qualify as sunken military craft are to be provided the same consideration and treatment as terrestrial military craft.

(c) In addition to managing historic sunken military craft and terrestrial military craft, the NHHC will serve as the permitting authority for the disturbance of non-historic DON sunken military craft. Permit applications will only be issued in instances where there is a clear demonstrable benefit to the DON, and only special use permits can be issued in the case of non-historic sunken military craft. In such instances, prior to issuing a special use permit, the NHHC will consult with appropriate DON offices within affected commands or offices, including, but not limited to, the Naval Sea Systems Command, Naval Air Systems Command, Space and Naval Warfare Systems Command, Naval Supply Systems Command, Naval Facilities Engineering Command, Navy Personnel Command, Military Sealift Command, Supervisor of Salvage and Diving, Office of the Judge Advocate General of the Navy, the Office of the Chief of Naval Operations, or other interested offices.

(d) The NHHC will serve as the permitting authority for disturbance of those foreign state sunken military craft located in U.S. waters addressed in § 767.15. The NHHC, in consultation with the Department of State as appropriate, will make a reasonable effort to inform the applicable agency of a foreign state of the discovery or significant changes to the condition of its sunken military craft upon becoming aware of such information. The NHHC will also serve as the permitting authority for disturbance of those sunken military craft of another military department, or the Department in which the Coast Guard is operating, that have been incorporated into the DON permitting program in accordance with § 767.15(e).

(e) The DON recognizes that, in accordance with section 1402(a)(3) of the Act and other statutes, certain federal agencies have statutory authority to conduct and permit specific activities directed at DON sunken military craft and terrestrial military craft. The NHHC will coordinate, consult, and enter into interagency agreements with those federal agencies to ensure effective management of DON sunken military craft and terrestrial military craft and compliance with applicable law.

(f) Where appropriate, the NHHC will coordinate, consult, and enter into agreements with the appropriate State Historic Preservation Office (SHPO), or

state land or resource manager, to ensure effective management of DON sunken military craft and terrestrial military craft and compliance with applicable law.

(g) Notwithstanding any other section of this part, no act by the owner of a vessel, or authorized agent of the owner of a vessel, under a time charter, voyage charter, or demise charter to the DON and operated on military service at the time of its sinking, provided that the sunken military craft is not considered historic as determined by the NHHC, shall be prohibited by, nor require a permit under, the SMCA or these regulations. This paragraph (g) shall not be construed to otherwise affect any right or remedy of the United States existing at law, in equity, or otherwise, in regard to any such sunken military craft, in regard to cargo owned by the United States on board or associated with any such craft, or in regard to other property or contents owned by the United States on board or associated with any such sunken military craft.

(h) The NHHC reserves the right to deny an applicant a permit if the proposed activity does not meet the permit application requirements; is inconsistent with DON policy or interests; does not serve the best interests of the sunken military craft or terrestrial military craft in question; in the case of foreign sunken military craft, is inconsistent with the desires of a foreign sovereign; is inconsistent with an existing resource management plan; is directed towards a sunken military craft or terrestrial military craft upon which other activities are being considered or have been authorized; will be undertaken in such a manner as will not permit the applicant to meet final report requirements; raises professional ethical conduct concerns or concerns over commercial exploitation; raises concerns over national security, foreign policy, environmental or ordnance issues; or out of respect for any human remains that may be associated with a wrecksite. The NHHC also reserves the right to deny an applicant a permit if the applicant has not fulfilled requirements of permits previously issued by the NHHC to the applicant.

Subpart B—Permit Requirements

§ 767.6 Historic sunken military craft and terrestrial military craft permit application.

(a) Any person seeking to engage in an activity otherwise prohibited by section 1402 of the SMCA with respect to a historic sunken military craft or any activity that might affect a terrestrial military craft under the jurisdiction of the DON shall apply for a permit for the proposed activity and shall not begin the proposed activity until a permit has been issued. The Secretary or his designee may issue a permit to any qualified person, in accordance with these regulations, subject to appropriate terms and conditions.

(b) To request a permit application form, please write to: Department of the Navy, U.S. Naval History and Heritage Command, Underwater Archaeology Branch, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060. Application forms and guidelines can also be found on the NHHC's Web site at: *www.history.navy.mil.*

(c) Each applicant must submit a digital (electronic) and two printed copies of their complete application at least 120 days in advance of the requested effective date to allow sufficient time for evaluation and processing. Completed applications should be sent to the Department of the Navy, U.S. Naval History and Heritage Command, Underwater Archaeology Branch, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060.

(d) Each permit application shall include:

(1) A statement of research objectives, scientific methods, and significance of the proposed work to the U.S. Navy or the nation's maritime cultural heritage. This should include discussion articulating clearly the archaeological, historical, or educational purposes of the proposed activity;

(2) A summary of significant previous work in the area of interest;

(3) A discussion of how the proposed activity could disturb, remove, or injure the sunken military craft or the terrestrial military craft and the related physical environment;

(4) A discussion of the methodology planned to accomplish the project's objectives. This should include a map showing the study location(s) and a description of the wrecksite(s) of particular interest;

(5) An analysis of the extent and nature of potential environmental impacts from permitted activities and feasible mitigation measures that could reduce, avoid, or reverse environmental impacts, as well as any associated permits or authorizations required by foreign, federal, state, or local law;

(6) A detailed plan for wrecksite restoration and remediation with recommendations on wrecksite preservation and protection of the wrecksite location;

(7) In addition to identification and qualifications of the principal investigator, required by § 767.8, identification of all other members of the research team and their qualifications. Changes to the primary research team subsequent to the issuance of a permit must be authorized via a permit amendment request in accordance with § 767.10(a);

(8) A proposed budget, identification of funding source, and sufficient data to substantiate, to the satisfaction of the NHHC, the applicant's financial capability to complete the proposed research and, if applicable, any conservation and curation costs associated with or resulting from that activity;

(9) A proposed plan for the public interpretation and professional dissemination of the proposed activity's results;

(10) Where the application is for the excavation and/or removal of artifacts from a sunken military craft or terrestrial military craft, or for the excavation and/or removal of a sunken military craft or terrestrial military craft in its entirety, the following must be included:

(i) A conservation plan, estimated cost, and the name of the university, museum, laboratory, or other scientific or educational institution in which the material will be conserved, including written certification, signed by an authorized official of the institution, of willingness to assume conservation responsibilities.

(ii) A plan for applicable post-fieldwork artifact analysis, including an associated timetable.

(iii) The name of the facility in which the recovered materials and copies of associated records derived from the work will be curated. This will include written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibilities for the collection. The named repository must, at a minimum, meet the standards set forth in 36 CFR part 79, Curation of Federally-Owned and Administered Archaeological Collections, in accordance with § 767.9(h).

(iv) Acknowledgement that the applicant is responsible for all conservation-related and long-term curation costs, unless otherwise agreed upon by NHHC.

(11) A proposed project timetable to incorporate all phases of the project through to the final report and/or any other project-related activities.

(e) If the applicant believes that compliance with one or more of the factors, criteria, or procedures in the regulations contained in this part is not practicable, the applicant should set forth why and explain how the purposes of the SMCA (if applicable), these regulations, and the policies of the DON are better served without compliance with the specified requirements. If the NHHC believes that the policies of the DON are better served without compliance with one or more of the factors, criteria, or procedures in the regulations, or determines that there is merit in an applicant's request and that full compliance is not required to meet these priorities, the NHHC will provide a written waiver to the applicant stipulating which factors, criteria, or procedures may be foregone or amended. In exceptional circumstances, verbal permission may be obtained in cases of unexpected or emergent finds that may require immediate unanticipated disturbance, removal, or injury of a sunken or terrestrial military craft or its associated contents. However, the NHHC will not waive statutory procedures or requirements.

(f) Persons carrying out official NHHC duties under the direction of the NHHC Director, or his/her designee, or conducting activities at the direction

of or in coordination with the NHHC as recognized through express written permission by the NHHC Director, or his/her designee, need not follow the permit application procedures set forth in this section and §§ 767.7 and 767.9 to 767.12 if those duties or activities are associated with the management of sunken military craft or terrestrial military craft. Where appropriate, such persons will coordinate with Federal Land Managers, the Bureau of Ocean Energy Management, State Historic Preservation Offices, or state land or resource managers, as applicable, prior to engaging in the aforementioned activities. The NHHC Director, or his/her designee, shall ensure that the provisions of paragraph (d) of this section and §§ 767.8 and 767.11 have been met by other documented means and that such documents and all resulting data will be archived within the NHHC.

(g) Federal agencies carrying out activities that disturb, remove, or injure sunken military craft or terrestrial military craft need not follow the permit application procedures set forth in this section and §§ 767.7 and 767.9 to 767.12 if those activities are associated with the management of sunken military craft or terrestrial military craft within their areas of responsibility. Where appropriate, Federal agencies will coordinate with the NHHC prior to engaging in the aforementioned activities.

§ 767.7 Evaluation of permit application.

(a) Permit applications are reviewed for completeness, compliance with program policies, and adherence to the regulations of this subpart. Incomplete applications will be returned to the applicant for clarification. Complete applications are reviewed by NHHC personnel who, when appropriate, may seek outside guidance or peer reviews. In addition to the criteria set forth in §§ 767.6(d) and 767.8, applications are also judged on the basis of: Project objectives being consistent with DON policy and the near- and long-term interests of the DON; relevance or importance of the proposed project; archaeological, historical, or educational purposes achieved; appropriateness and environmental consequences of technical approach; conservation and long-term management plan; qualifications of the applicants relative to the type and scope of the work proposed; and funding to carry out proposed activities. The NHHC will also take into consideration the historic, cultural, or other concerns of a foreign state when considering an application to disturb a foreign sunken military craft of that state located within U.S. waters, subsequent to an understanding or agreement with the foreign state in accordance with § 767.15. The same consideration may be applied to U.S. sunken military craft that are brought under the jurisdiction of the DON for permitting purposes following an agreement with the Secretary of any military department, or in the case of the Coast Guard, the Secretary of the Department in which the Coast Guard is operating, as set forth in § 767.15(e).

(b) Prior to issuing a permit, the NHHC will consult with the appropriate federal resource manager when it receives applications for research at wrecksites located in areas that include units of the National Park System, National Wildlife Refuge System, National Marine Sanctuary System, Marine National Monuments, within lease blocks managed by the Bureau of Ocean Energy Management, or within areas of responsibility of other Federal Land Managers.

(c) Prior to issuing a permit, the NHHC will consult with the appropriate SHPO, state land or resource manager or Tribal Historic Preservation Office (THPO) when it receives applications for research at wrecksites located on state lands, including lands beneath navigable waters as defined in the Submerged Lands Act, 43 U.S.C. 1301–1315, or tribal lands.

(d) The applicant is responsible for obtaining any and all additional permits or authorizations, such as but not limited to those issued by another federal or state agency, or foreign government. In the case of U.S. sunken military craft or terrestrial military craft located within foreign jurisdictions, the NHHC may review and issue a conditional permit authorizing activities upon receipt of the appropriate permits and authorizations of the applicable foreign government by the applicant.

The applicant must file a copy of the foreign government authorization with the NHHC when submitting the preliminary report stipulated in § 767.9(d) and final report stipulated in § 767.9(f). Failure to do so will be considered a permit violation.

(e) Based on the findings of the NHHC evaluation, NHHC personnel will recommend an appropriate action to the NHHC Deputy Director. If approved, the NHHC Deputy Director, or his or her designee, will issue the permit; if denied, applicants are notified of the reason for denial and may request reconsideration within 30 days of receipt of the denial. Requests for reconsideration must be submitted in writing to: Director of Naval History, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060.

§ 767.8 Credentials of principal investigator.

The principal investigator shall be suitably qualified as evidenced by training, education, and/or experience, and possess demonstrable competence in archaeological theory and method, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed. A resume or curriculum vitae detailing the professional qualifications of the principal investigator must be submitted with the permit application. Additionally, the principal investigator will be required to attest that all persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the proposed activity. The principal investigator must, at a minimum, meet the following requirements:

(a) The minimum professional qualification standards for archaeology as determined by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

(b) At least one year of full-time professional supervisory experience in the archaeological study of historic maritime resources or historic aviation resources. This experience requirement may concurrently account for certain stipulations of paragraph (a) of this section.

(c) The demonstrated ability to plan, equip, fund, staff, organize, and supervise the type and scope of activity proposed.

(d) If applicable, the demonstrated ability to submit post-operational archaeological or other technical reports in a timely manner.

§ 767.9 Conditions of permits.

(a) Permits are valid for one year from the date of issue.

(b) Upon receipt of a permit, permit holders shall counter-sign the permit and return copies to the NHHC and the appropriate SHPO, state land or resource manager, THPO, or foreign government official, if applicable, prior to conducting permitted activities on the wrecksite. When the sunken military craft or terrestrial military craft is located within federal areas such as a unit of the National Park System, the National Wildlife Refuge System, the National Marine Sanctuary System, or Marine National Monuments, the permit holder shall provide copies of countersigned permits to the applicable federal resource manager. Upon the NHHC confirming receipt of the counter-signed permit, the permitted activities may commence, provided that any other federal or state regulatory and permitting requirements that apply are met.

(c) Permits shall be carried on-site and made available upon request for inspection by federal or state law enforcement officials. Permits are non-transferable. The permit holder, or the activity's authorized principal investigator in the case where a permit holder is not concurrently the authorized principal investigator, is expected to remain on-site for the duration of operations prescribed in the permit. In the event a permit holder or the authorized principal investigator is unable to directly oversee operations, the permit holder must nominate a suitable qualified representative who may only serve in that function upon written approval by the NHHC.

(d) Permit holders must abide by all provisions set forth in the permit as well as applicable state or federal regulations. Permit holders must abide by applicable regulations of a foreign government for activities directed at a

sunken military craft when the sunken military craft is located in the internal waters, territorial sea, contiguous zone, or continental shelf of a foreign State, as defined by customary international law reflected in the United Nations Convention on the Law of the Sea. If the physical environment is to be impacted by the permitted activity, the permit holder will be expected to meet any associated permit or authorization stipulations required by foreign, federal, state, or local law, as well as apply mitigation measures to limit such impacts and where feasible return the physical environment to the condition that existed before the activity occurred.

(e) At least 30 days prior to the expiration of the original permit, the permit holder shall submit to the NHHC a preliminary report that includes a working log and, where applicable, a diving log, listing days spent conducting field research, activities pursued, working area locations including precise coordinates, an inventory of artifacts observed or recovered, and preliminary results and conclusions. The NHHC shall review preliminary reports for thoroughness, accuracy, and quality and shall inform the permit holder of their formal acceptance in writing.

(f) In the case of one or more permit extensions received through the process identified in §767.10(b), a preliminary report that includes all the information stated in paragraph (e) of this section is to be submitted by the permit holder annually at least 30 days prior to the renewed permit's expiration date.

(g) The permit holder shall prepare and submit a final report as detailed in §767.11, summarizing the results of the permitted activity to the NHHC, and any applicable SHPO, THPO, federal or state land or resource manager, or foreign government official within an appropriate time frame as specified in the permit. Failure to submit a final report within the specified time-frame will be considered a permit violation. If the final report is not due to be submitted within two years of commencement of a permitted activity, interim reports must be filed biennially, with the first interim report submitted within two years of commencement of the activity. The interim report must include information required by §767.11 to the maximum extent possible, and an account of both the progress that has been achieved and the objectives remaining to be accomplished. The NHHC shall review interim and final reports for thoroughness, accuracy, and quality and shall inform the permit holder of their formal acceptance in writing.

(h) The permit holder shall agree to protect all sensitive information regarding the location and character of a wrecksite that could potentially expose it to non-professional recovery techniques, looters, or unauthorized salvage. Sensitive information includes specific location data and information about the cargo of a sunken military craft or terrestrial military craft, the existence of armaments, munitions and other hazardous materials, or the presence of, or potential presence of, human remains.

(i) All recovered DON sunken military craft, terrestrial military craft, and their associated contents, remain the property of the United States. These resources and copies of associated archaeological records and data must be preserved by a suitable university, museum, or other scientific or educational institution that, at a minimum, meets the standards set forth in 36 CFR part 79, Curation of Federally-Owned and Administered Archaeological Collections, at the expense of the applicant or facility, unless otherwise agreed upon in writing by the NHHC. The curatorial facility must establish a loan of resources agreement with the NHHC and maintain it in good standing. If a loan of resources agreement is not established, or at the discretion of the NHHC, resources are to be managed, conserved and curated directly by the NHHC at the expense of the applicant, unless otherwise agreed upon in writing by the NHHC. Copies of associated archaeological and conservation records and data will be made available to the NHHC, and to the applicable SHPO, THPO, the federal or state land or resource manager, or foreign government official upon request.

(j) The disposition of foreign sunken military craft or associated contents shall be determined on a case-by-case

basis in coordination with the respective foreign state prior to the issuance of a NHHC permit.

(k) In the event that credible evidence for or actual human remains, unexploded ordnance, hazardous materials or environmental pollutants such as oil are discovered during the course of research, the permit holder shall cease all work and immediately notify the NHHC. Permitted work may not resume until authorized by the NHHC.

(l) The permittee shall purchase and maintain sufficient comprehensive general liability, and such other types of insurance, in an amount consistent with generally accepted industry standards throughout the period covered by the permit, or post an equivalent bond. Such insurance shall cover against any third party claims arising out of activities conducted under the permit. The permittee must further agree to hold the United States harmless against such claims.

§ 767.10 Requests for amendments or extensions of active permits.

(a) Requests for amendments to active permits (e.g., a change in study design or research personnel) must conform to the regulations in this part. All information deemed necessary by the NHHC to make an objective evaluation of the amendment must be included as well as reference to the original application. Requests for amendments must be sent to the Deputy Director, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington DC 20374–5060. A pending amendment request does not guarantee approval and proposed activities cannot commence until approval is granted. All requests for permit amendments must be submitted during the period within which an existing permit is active and at least 30 days prior to the desired effect date of the amendment. Time-sensitive or non-substantive amendments must be submitted in writing to the point of contact included in the permit and will be considered and expedited on a case-by-case basis.

(b) Permit holders desiring to continue research activities beyond the original permit expiration date must apply for an extension of a valid permit prior to its expiration. A pending extension request does not guarantee an extension of the original permit. All requests for a permit extension must be sent to the Deputy Director, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060, at least 30 days prior to the original permit's expiration date. Reference to the original application may be given in lieu of a new application, provided the scope of work does not change significantly. Applicants may apply for one-year extensions subject to annual review.

(c) Permit holders may appeal denied requests for amendments or extensions to the appeal authority listed in § 767.7(e).

§ 767.11 Content of permit holder's final report.

The permit holder's final report shall at minimum include the following:

(a) A wrecksite history and a contextual history relating the wrecksite to the general history of the region;

(b) A master wrecksite map;

(c) Feature map(s) of any recovered artifacts showing their positions within the wrecksite;

(d) Where environmental conditions allow, photographs of significant wrecksite features and significant artifacts both in situ and after removal;

(e) If applicable, a section that includes an inventory of recovered artifacts, description of conserved artifacts, laboratory conservation records, documentation of analyses undertaken, photographs of recovered artifacts before and after conservation treatment, and recommended curation conditions;

(f) A written report describing the wrecksite's discovery, environment, past and current archaeological fieldwork, results, and analysis;

(g) A summary of the survey and/or excavation process including methods and techniques employed, an account of operational phases, copies of applicable logs, as well as thorough analysis of the recovered data;

(h) An evaluation of the completed permitted activity that includes an assessment of the project's degree of success compared to the goals specified in the permit application;

(i) Recommendations for future activities, if applicable;

(j) An account of how the public interpretation or dissemination plan described in the permit application has been or is being carried out. Additionally, identification of any sensitive information as detailed in § 767.9(g).

§ 767.12 Special use permit application.

(a) Any person proposing to engage in an activity to document a sunken military craft utilizing diving methods or remotely-operated or autonomously-operated equipment, or collect data or samples from a wrecksite, whether a sunken military craft or terrestrial military craft, that would result in the wrecksite's disturbance but otherwise be minimally intrusive, may apply for a special use permit. Any person proposing to engage in an activity that would disturb, remove, or injure a non-historic sunken military craft must apply for a special use permit.

(b) To request a special use permit application form, please refer to § 767.6(b) and (c). Special use permit applications must be sent to the Department of the Navy, U.S. Naval History and Heritage Command, Underwater Archaeology Branch, 805 Kidder Breese St. SE., Washington Navy Yard, Washington, DC 20374–5060.

(c) Each special use permit application shall include:

(1) A statement of the project's objectives and an explanation on how they would serve the NHHC's objectives stated in § 767.5;

(2) A discussion of the methodology planned to accomplish the project's objectives. This should include a map showing the study location(s) and a description of the wrecksite(s) of particular interest;

(3) An analysis of the extent and nature of potential direct or indirect impacts on the resources and their surrounding environment from permitted activities, as well as any proposed mitigation measures;

(4) Where appropriate, a plan for wrecksite restoration and remediation with recommendations on wrecksite preservation and protection of the wrecksite location;

(d) The NHHC Deputy Director, or his or her designee, may authorize a special use permit under the following conditions:

(1) The proposed activity is compatible with the NHHC policies and in the case of non-historic sunken military craft is not opposed by consulted DON parties;

(2) The activities carried out under the permit are conducted in a manner that is minimally intrusive and does not purposefully significantly disturb, remove or injure the sunken military craft or wrecksite;

(3) When applicable, the pilot(s) of remotely-operated equipment holds a certificate of operation from a nationally-recognized organization;

(4) The principal investigator must hold a graduate degree in archaeology, anthropology, maritime history, oceanography, marine biology, marine geology, other marine science, closely related field, or possess equivalent training and experience. This requirement may be waived by the NHHC on a case by case basis depending on the activity stipulated in the application.

(e) The permittee shall submit the following information subsequent to the conclusion of the permitted activity within an appropriate time frame as specified in the special use permit:

(1) A summary of the activities undertaken that includes an assessment of the goals specified in the permit application;

(2) Identification of any sensitive information as detailed in § 767.9(h);

(3) Complete and unedited copies of any and all documentation and data collected (photographs, video, remote sensing data, etc.) during the permitted activity and results of any subsequent analyses.

(f) The following additional sections of this subpart shall apply to special use permits: §§ 767.7(e); 767.9(a), (b), (c), (e), (f), (g), (h), (k), and (l); 767.10; 767.13; 767.14; and 767.15(c).

(g) All sections of subpart A of this part shall apply to all special use permits, and all sections of subpart C of this part shall apply to special use permits pertaining to sunken military craft.

(h) Unless stipulated in the special use permit, the recovery of artifacts

associated with any wrecksite is prohibited.

§ 767.13 Monitoring of performance.

Permitted activities will be monitored to ensure compliance with the conditions of the permit. In addition to remotely monitoring operations, NHHC personnel, or other designated authorities, may periodically assess work in progress through on-site monitoring at the location of the permitted activity. The discovery of any potential irregularities in performance under the permit by NHHC on-site personnel, other designated authorities, or the permit holder, must be promptly reported to the NHHC for appropriate action. Adverse action may ensue in accordance with § 767.14. Findings of unauthorized activities will be taken into consideration when evaluating future permit applications.

§ 767.14 Amendment, suspension, or revocation of permits.

The NHHC Deputy Director, or his/her designee may amend, suspend, or revoke a permit in whole or in part, temporarily or indefinitely, if in his/her view the permit holder has acted in violation of the terms of the permit or of other applicable regulations, or for other good cause shown. Any such action will be communicated in writing to the permit holder or the permit holder's representative and will set forth the reason for the action taken. The permit holder may request the Director of the NHHC reconsider the action in accordance with § 767.7(e).

§ 767.15 Application to foreign sunken military craft and U.S. sunken military craft not under the jurisdiction of the Navy.

(a) Sunken military craft are generally entitled to sovereign immunity regardless of where they are located or when they sank. Foreign governments may request, via the Department of State, that the Secretary of the Navy administer a permitting program for a specific or a group of its sunken military craft in U.S. waters. The request must include the following:

(1) The foreign government must assert the sovereign immunity of or ownership over a specified sunken military craft or group of sunken military craft;

(2) The foreign government must request assistance from the United States government;

(3) The foreign government must acknowledge that subparts B and C of this part will apply to the specified sunken military craft or group of sunken military craft for which the request is submitted.

(b) Upon receipt and favorable review of a request from a foreign government, the Secretary of the Navy, or his or her designee, in consultation with the Department of State, will proceed to accept the specified sunken military craft or group of sunken military craft into the present permitting program. The Secretary of the Navy, or his or her designee, in consultation with the Department of State, reserves the right to decline a request by the foreign government. Should there be a need to formalize an understanding with the foreign government in response to a submitted request stipulating conditions such as responsibilities, requirements, procedures, and length of effect, the Secretary of State, or his or her designee, in consultation with the Secretary of Defense, or his or her designee, will proceed to formalize an understanding with the foreign government. Any views on such a foreign government request or understanding expressed by applicable federal, tribal, and state agencies will be taken into account.

(c) Persons may seek a permit to disturb foreign sunken military craft located in U.S. waters that have been accepted into the present permitting program or are covered under a formalized understanding as per paragraph (b) of this section, by submitting a permit application or special use permit application, as appropriate, for consideration by the NHHC in accordance with subparts B and C of this part.

(d) In the case where there is reasonable dispute over the sovereign immunity or ownership status of a foreign sunken military craft, the Secretary of the Navy, or his or her designee, maintains the right to postpone action on §§ 767.6 and 767.12, as well as requests under paragraph (a) of this section, until the dispute over the sovereign

immunity or ownership status is resolved.

(e) The Secretary of any military department, or in the case of the Coast Guard the Secretary of the Department in which the Coast Guard is operating, may request that the Secretary of the Navy administer the DON permitting program with regard to sunken military craft under the cognizance of the Secretary concerned. Upon the agreement of the Secretary of the Navy, or his or her designee, subparts A, B, and C of this part shall apply to those agreed upon craft.

Subpart C—Enforcement Provisions for Violations of the Sunken Military Craft Act and Associated Permit Conditions

§ 767.16 Civil penalties for violations of Act or permit conditions.

(a) *In general.* Any person who violates the SMCA, or any regulation or permit issued thereunder, shall be liable to the United States for a civil penalty.

(b) *Assessment and amount.* The Secretary may assess a civil penalty under this section of not more than $100,000 for each violation.

(c) *Continuing violations.* Each day of a continuing violation of the SMCA or these regulations or any permit issued hereunder constitutes a separate violation.

(d) *In rem liability.* A vessel used to violate the SMCA shall be liable in rem for a penalty for such violation.

§ 767.17 Liability for damages.

(a) Any person who engages in an activity in violation of section 1402 or any regulation or permit issued under the Act that disturbs, removes, or injures any U.S. sunken military craft shall pay the United States enforcement costs and damages resulting from such disturbance, removal, or injury.

(b) Damages referred to in paragraph (a) of this section may include:

(1) The reasonable costs incurred in storage, restoration, care, maintenance, conservation, and curation of any sunken military craft that is disturbed, removed, or injured in violation of section 1402 or any regulation or permit issued under the Act; and

(2) The cost of retrieving, from the site where the sunken military craft was disturbed, removed, or injured, any information of an archaeological, historical, or cultural nature.

§ 767.18 Notice of Violation and Assessment (NOVA).

(a) A NOVA will be issued by the Director of the NHHC and served in person or by registered, certified, return receipt requested, or express mail, or by commercial express package service, upon the respondent, or in the case of a vessel respondent, the owner of the vessel. A copy of the NOVA will be similarly served upon the permit holder, if the holder is not the respondent. The NOVA will contain:

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

(2) A specific reference to the provision(s) of the SMCA, regulation, or permit violated;

(3) The findings and conclusions upon which the Director of the NHHC bases the assessment;

(4) The amount of civil penalty, enforcement costs and/or liability for damages assessed; and

(5) An advisement of the respondent's rights upon receipt of the NOVA, including a citation to the regulations governing the proceedings.

(b) The NOVA may also contain a proposal for compromise or settlement of the case.

(c) Prior to assessing a civil penalty or liability for damages, the Director of the NHHC will take into account information available to the Agency concerning any factor to be considered under the SMCA and any other information required by law or in the interests of justice. The respondent will have the opportunity to review information considered and present information, in writing, to the Director of the NHHC. At the discretion of the Director of the NHHC, a respondent will be allowed to present information in person.

§ 767.19 Procedures regarding service.

(a) Whenever this part requires service of a document, such service may effectively be made either in person or

by registered or certified mail (with return receipt requested) on the respondent, the respondent's agent for service of process or on a representative designated by that agent for receipt of service. Refusal by the respondent, the respondent's agent, or other designated representative to be served, or refusal by his or her designated representative of service of a document will be considered effective service of the document as of the date of such refusal. Service will be considered effective on the date the document is mailed to an addressee's last known address.

(b) A document will be considered served and/or filed as of the date of the postmark; or (if not mailed) as of the date actually delivered in person; or as shown by electronic mail transmission.

(c) Time periods begin to run on the day following service of the document or date of the event. Saturdays, Sundays, and Federal holidays will be included in computing such time, except that when such time expires on a Saturday, Sunday, or Federal holiday, such period will be extended to include the next business day. This method of computing time periods also applies to any act, such as paying a civil penalty or liability for damages, required by this part to take place within a specified period of time.

§ 767.20 Requirements of respondent or permit holder upon service of a NOVA.

(a) The respondent or permit holder has 45 days from service receipt of the NOVA in which to reply. During this time the respondent or permit holder may:

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

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

(3) Request a hearing before a DOHA Administrative Judge under paragraph (f) of this section;

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

(5) Take no action, in which case the NOVA becomes final in accordance with § 767.22(a).

(b) The respondent or permit holder may seek amendment, modification, or rescindment of the NOVA to conform to the facts or law as that person sees them by notifying the Director of the NHHC in writing at the address specified in the NOVA. If amendment or modification is sought, the Director of the NHHC will either amend the NOVA or decline to amend it, and so notify the respondent, permit holder, or vessel owner, as appropriate.

(c) The respondent or permit holder may, within the 45-day period specified in paragraph (a) of this section, request in writing an extension of time to respond. The Director of the NHHC may grant an extension in writing of up to 30 days unless he or she determines that the requester could, exercising reasonable diligence, respond within the 45-day period.

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

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

(f) If the respondent or permit holder desires a hearing, the request must be in writing, dated and signed, and must be sent by mail to the Director, Defense Office of Hearings and Appeals, 875 North Randolph St., Suite 8000, Arlington, VA 22203. The Director, Defense Office of Hearings and Appeals may, at his or her discretion, treat any communication from a respondent or a permit holder as a proper request for a hearing. The requester must attach a copy of the NOVA. A single hearing will be held for all parties named in a NOVA and who timely request a hearing.

§ 767.21 Hearings.

(a) Hearings before a DOHA Administrative Judge are *de novo* reviews of the circumstances alleged in the NOVA and penalties assessed. Hearings are governed by procedures established by the Defense Office of Hearings and Appeals. Hearing procedures will be provided in writing to the parties and may be accessed on-line at *http://www.dod.mil/dodgc/doha/*. Hearings shall be held at

the Defense Office of Hearings and Appeals, Arlington VA, either in person or by video teleconference. Each party shall bear their own costs.

(b) In any DOHA hearing held in response to a request under §767.20(f), the Administrative Judge will render a final written Decision which is binding on all parties.

§ 767.22 Final administrative decision.

If no request for a hearing is timely filed as provided in §767.20(f), the NOVA becomes effective as the final administrative decision and order of the Agency on the 45th day after service of the NOVA or on the last day of any delay period granted.

§ 767.23 Payment of final assessment.

(a) Respondent must make full payment of the civil penalty, enforcement costs and/or liability for damages assessed within 30 days of the date upon which the assessment becomes effective as the final administrative decision and order of the Agency. Payment must be made by mailing or delivering to the Agency at the address specified in the NOVA a check or money order made payable in U.S. currency in the amount of the assessment to the ''Treasurer of the United States'', or as otherwise directed.

(b) Upon any failure to pay the civil penalty, enforcement costs and/or liability for damages assessed, the Agency may request the Department of Justice to recover the amount assessed in any appropriate district court of the United States, or may act under any law or statute that permits any type of recovery, including but not limited to arrest, attachment, seizure, or garnishment, of property and/or funds to satisfy a debt owed to the United States.

§ 767.24 Compromise of civil penalty, enforcement costs and/or liability for damages.

(a) The Director of the NHHC, in his/her sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty or liability for damages imposed, or which is subject to imposition, except as provided in this subpart.

(b) The compromise authority of the Director of the NHHC under this section is in addition to any similar authority provided in any applicable statute or regulation, and may be exercised either upon the initiative of the Director of the NHHC or in response to a request by the respondent or other interested person. Any such request should be sent to the Director of the NHHC at the address specified in the NOVA.

(c) Neither the existence of the compromise authority of the Director of the NHHC under this section nor the Director's exercise thereof at any time changes the date upon which an assessment is final or payable.

§ 767.25 Factors considered in assessing penalties.

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

(b) The Director of the NHHC may, in consideration of a respondent's ability to pay, increase or decrease a penalty from an amount that would otherwise be warranted by other relevant factors. A penalty may be increased if a respondent's ability to pay is such that a higher penalty is necessary to deter future violations, or for commercial violators, to make a penalty more than the profits received from acting in violation of the SMCA, or any regulation or permit issued thereunder. A penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate penalty amount.

(c) If a respondent asserts that a penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to the Director of the NHHC. The Director of the NHHC will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as the Director of the NHHC determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, the Director of the NHHC may require the respondent

to complete a financial information request form, answer written interrogatories, or submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the penalty.

(1) Financial information relevant to a respondent's ability to pay includes, but is not limited to, the value of respondent's cash and liquid assets and non-liquid assets, ability to borrow, net worth, liabilities, income, prior and anticipated profits, expected cash flow, and the respondent's ability to pay in installments over time. A respondent will be considered able to pay a penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. The Director of the NHHC's consideration of a respondent's ability to pay does not preclude an assessment of a penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

(2) Financial information regarding respondent's ability to pay should be submitted to the Director of the NHHC as soon after receipt of the NOVA as possible. In deciding whether to submit such information, the respondent should keep in mind that the Director of the NHHC may assess de novo a civil penalty, enforcement costs and/or liability for damages either greater or smaller than that assessed in the NOVA.

§ 767.26 Criminal law.

Nothing in these regulations is intended to prevent the United States from pursuing criminal sanctions for plundering of wrecks, larceny of Government property, or violation of applicable criminal law, whether the infringement pertains to a sunken military craft, a terrestrial military craft or other craft under the jurisdiction of the DON.

§ 767.27 References.

References for submission of permit application, including but not limited to, and as may be further amended:

(a) National Historic Preservation Act (NHPA) of 1966, as amended, 54 U.S.C. 300101 *et seq.* (2014), and Protection of Historic Properties, 36 CFR part 800. This statute and its implementing regulations govern the section 106 review process established by the NHPA.

(b) National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq.*, and Protection of the Environment, 40 CFR parts 1500 through 1508. This statute and its implementing regulations require agencies to consider the effects of their actions on the human environment.

(c) Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation available at *http://www.cr.nps.gov/local-law/arch_stnds_0.htm*. These guidelines establish standards for the preservation planning process with guidelines on implementation.

(d) Archaeological Resources Protection Act of 1979, as amended, 16 U.S.C. 470aa–mm, and the Uniform Regulations, 43 CFR part 7, subpart A. This statute and its implementing regulations establish basic government-wide standards for the issuance of permits for archaeological research, including the authorized excavation and/or removal of archaeological resources on public lands or Indian lands.

(e) Secretary of the Interior's regulations, Curation of Federally-Owned and Administered Archaeological Collections, 36 CFR part 79. These regulations establish standards for the curation and display of federally-owned artifact collections.

(f) Antiquities Act of 1906, Public Law 59–209, 34 Stat. 225 (codified at 16 U.S.C. 431 *et seq.* (1999)).

(g) Executive Order 11593, 36 FR 8291, 3 CFR, 1971–1975 Comp., p. 559 (Protection and Enhancement of the Cultural Environment).

(h) Department of Defense Instruction 4140.21M (DoDI 4140.21M, August 1998). Subject: Defense Disposal Manual.

(i) Secretary of the Navy Instruction 4000.35A (SECNAVINST 4000.35A, 9 April 2001). Subject: Department of the Navy Cultural Resources Program.

PARTS 768–769 [RESERVED]

PART 770—RULES LIMITING PUBLIC ACCESS TO PARTICULAR INSTALLATIONS

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AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 6011; 32 CFR 700.702; 32 CFR 700.714, unless otherwise noted.

Subpart A—Hunting and Fishing at Marine Corps Base, Quantico, Virginia

SOURCE: 41 FR 22345, June 3, 1976, unless otherwise noted.

§ 770.1 Purpose.

This subpart provides regulations and related information governing hunting and fishing on the Marine Corps Base Reservation, Quantico, VA.

§ 770.2 Licenses.

(a) Every person who hunts or fishes on Marine Corps Base, Quantico, VA, must possess appropriate valid licenses in compliance with the Laws of the United States and the State of Virginia.

(b) In addition, hunting and fishing privilege cards, issued by the authorities at Marine Corps Base, Quantico, VA, are required for all persons between the ages sixteen and sixty-four, inclusive.

(1) The privilege card may be purchased from the Natural Resources and Environmental Affairs Branch, Building 5–9, Marine Corps Base, Quantico, VA.

(2) The privilege cards are effective for the same period as the Virginia hunting and fishing licenses.

(c) All hunters must obtain a Base hunting permit, and a parking permit, if applicable, from the Game Check Station, Building 5–9 Station (located at the intersection of Russell Road and MCB–1) for each day of hunting. The hunting permit must be carried by the hunter and the parking permit must be displayed on the left dashboard of parked vehicles. The hunting and parking permits must be returned within one hour after either sunset or the hour hunting is secured on holidays or during special season.

(d) Eligibility for a Base hunting permit is predicated on:

(1) Possession of required Federal and State licenses for the game to be hunted including Marine Corps Base hunting privilege card;

(2) Attendance at a safety lecture given daily except Sunday during the hunting season given at the Game Check Station. The lectures commence at the times posted in the Annual Hunting Bulletin and are posted on all base bulletin boards;

(3) Understanding of Federal, State and Base hunting regulations;

(4) And, if civilian, an executed release of U.S. Government responsibility in case of accident or injury.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23205, May 24, 1983; 65 FR 53591, Sept. 5, 2000]

§ 770.3 Fishing regulations.

(a) All persons possessing the proper state license and Base permit are permitted to fish in the areas designated by the Annual Fishing Regulations on Marine Corps Base, Quantico, VA, on any authorized fishing day. A Base Fishing Privilege Card is required for all persons aged 16 to 65.

(b) Fishing is permitted on all waters within the boundaries of Marine Corps Base, Quantico, VA, unless otherwise posted, under the conditions and restrictions and during the periods provided by Marine Corps Base, Quantico, VA. Information regarding specific regulations for each fishing area must be obtained from the Natural Resources and Environmental Affairs Branch, Building 5–9 prior to use of Base fishing facilities.

(c) In addition to the requirements of the Laws of Virginia, the following additional prohibitions and requirements are in effect at Marine Corps Base, Quantico, VA.

(1) No trout lines are permitted in Marine Corps Base waters;

(2) No Large Mouth Bass will be taken, creeled or possessed in a slot limit of 12–15 inches in length. All Large Mouth Bass within this slot will be immediately returned to the water;

(3) No Striped Bass will be taken, creeled or possessed under the size of twenty (20) inches in length. All Striped Bass under this size will be immediately returned to the water.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23205, May 24, 1983; 65 FR 53591, Sept. 5, 2000]

§ 770.4 Hunting regulations.

All persons possessing the proper State, Federal and Base licenses and permits are permitted to hunt in the areas designated daily by the Annual Hunting Bulletin on Marine Corps Base, Quantico, VA, on any authorized hunting day. In addition, a minimum of fifteen percent of the daily hunting spaces will be reserved to civilians on a first come, first served basis until 0600 on each hunting day, at which time, the Game Check Station may fill vacancies from any authorized persons waiting to hunt.

[65 FR 53591, Sept. 5, 2000]

§ 770.5 Safety regulations.

(a) Hunting is not permitted within 200 yards of the following: Ammunition dumps, built-up areas, rifle or pistol ranges, dwelling or other occupied structures, and areas designated by the Annual Hunting Bulletin as recreation areas.

(b) From the end of the special archery season until the end of the regular firearms winter hunting season, except for duck hunters in approved blinds, hunters will wear an outer garment with at least two square foot of blaze orange visible both front and back above the waist and a blaze orange cap while hunting, or while in the woods for any reason, during the hours that hunting is authorized. Any person traveling on foot in or adjacent to an area open for hunting will comply with this requirement.

(c) Weapons will be unloaded while being transported in vehicles, and will be left in vehicles by personnel checking in or out at the Game Check Station. Weapons will not be discharged from vehicles, or within 200 yards of hard surfaced roads.

(d) Certain hunting areas contain numerous unexploded munitions (duds) which are dangerous and must not be removed or disturbed. Hunters should mark such duds with stakes or other means and report their location to the Game Warden.

(e) Hunters must stay in their assigned areas when hunting.

[41 FR 22345, June 3, 1976, as amended at 65 FR 53592, Sept. 5, 2000]

§ 770.6 Restrictions.

(a) There will be no hunting on Christmas Eve, Christmas Day, New Years Day, or after 1200 on Thanksgiving Day.

(b) Hunters under 18 years of age must be accompanied by an adult (21 years of age or older) while hunting or in a hunting area. The adult is limited to a maximum of two underage hunters, and must stay within sight and voice contact and no more than 100 yards away from the underage hunters.

(c) The following practices or actions are expressly forbidden: Use of rifles, except muzzleloaders of .40 caliber or larger as specified below, revolvers or pistols; use of shotguns larger than 10 gauge or crossbows (this prohibition extends to carrying such weapons on the person or in a vehicle while hunting), use of buckshot to hunt any game; use of a light, attached to a vehicle or otherwise, for the purpose of spotting game; use of dogs for hunting or tracking deer; training deer dogs on the Reservation; training or running dogs in hunting areas between 1 March and 1 September; driving deer; baiting or salting traps or blinds; hunting on Sunday; molesting wildlife. Those personnel who are authorized to hunt on Base, desiring to train or exercise dogs other than deer dogs between 2 September and 28 February, may do so by obtaining Walking Pass to enter training areas at the Range Control Office. This Walking Pass is not permission to hunt, and carrying weapons under these conditions is prohibited.

(d) Hunting will not commence before one half hour before sunrise, and will end not later than sunset. The hours of sunrise and sunset are posted daily at the Game Checking Station.

(e) Weapons will not be loaded outside of hunting hours.

(f) There will be no use of a muzzleloader or slug shotgun after obtaining the daily or yearly game bag limits.

(g) There will be no possession or use of drugs or alcohol while checked out to hunt.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23205, May 24, 1983; 65 FR 53592, Sept. 5, 2000]

§ 770.7 Violations and environmental regulations.

Violations of hunting regulations, fishing regulations, safety regulations, or principles of good sportsmanship are subject to administrative restriction of hunting or fishing privileges and possible judicial proceedings in State or Federal courts.

(a) The Marine Corps Base Game Wardens are Federal Game Wardens. They have authority to issue summons to appear in Federal court for game violations.

(b) Offenders in violation of a Federal or State hunting or fishing laws will be referred to a Federal court.

(c) Offenders in violation of a Federal, State or Base hunting or fishing law or regulation will receive the following administrative actions.

(1) The Base Game Warden shall have the authority to temporarily suspend hunting and fishing privileges.

(2) Suspensions of hunting and fishing privileges will be outlined in the Annual Fish and Wildlife Procedures Manual.

(d) Civilians found in violation of a hunting or fishing regulation or law may be permanently restricted from entering the base.

(e) Serious hunting and fishing offenses include, but are not limited to: spotlighting, false statement on a license, hunting under the influence, employment of a light in an area that deer frequent, and taking game or fish during closed seasons.

[41 FR 22345, June 3, 1976, as amended at 65 FR 53592, Sept. 5, 2000]

§ 770.8 Reports.

Upon killing a deer or turkey, a hunter must attach the appropriate tab from his big game license to the carcass before moving the game from the place of kill. The game will then be taken to the Game Checking Station where the tab will be exchanged for an official game tag. All other game, not requiring a tag, killed on the Reservation will be immediately reported to the Game Warden when checking out at the end of a hunt.

[41 FR 22345, June 3, 1976, as amended at 48 FR 23206, May 24, 1983; 65 FR 53592, Sept. 5, 2000]

§ 770.9 Miscellaneous.

Refer to the Annual Fishing and Hunting Bulletins that will cover any annual miscellaneous changes.

[65 FR 53592, Sept. 5, 2000]

Subpart B—Base Entry Regulations for Naval Submarine Base, Bangor, Silverdale, Washington

AUTHORITY: 50 U.S.C. 797; DoDDir. 5200.8 of April 25, 1991; 5 U.S.C. 301; 10 U.S.C. 6011; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 44 FR 32368, June 6, 1979, unless otherwise noted.

§ 770.15 Purpose.

The purpose of this subpart is to promulgate regulations governing entry upon Naval Submarine Base (SUBASE), Bangor.

§ 770.16 Definition.

For the purpose of this subpart, SUBASE Bangor shall include that area of land in Kitsap and Jefferson Counties, State of Washington which has been set aside for use of the Federal Government by an Act of the legislature of the State of Washington, approved March 15, 1939 (Session laws of 1939, chapter 126).

§ 770.17 Background.

(a) SUBASE Bangor has been designated as the West Coast home port of the Trident Submarine. Facilities for the repair or overhaul of naval vessels are located at SUBASE Bangor. It is vital to national defense that the operation and use of SUBASE Bangor be continued without undue and unnecessary interruption. Many areas of SUBASE Bangor are of an industrial nature, including construction sites, where inherently dangerous conditions exist.

(b) For prevention of the interruption of the stated use of the base by the presence of any unauthorized person within the boundaries of SUBASE Bangor, and prevention of injury to any such person as a consequence of the dangerous conditions which exist, as well as for other reasons, it is essential to restrict entry upon SUBASE Bangor to authorized persons only.

§ 770.18 Entry restrictions.

Except for military personnel and civilian employees of the United States in the performance of their official duties, entry upon Naval Submarine Base, Bangor, or remaining thereon by any person whatsoever for any purpose without the advance consent of the Commanding Officer, SUBASE Bangor or his authorized representative is prohibited. *See*, 18 U.S.C. 1382; the Internal Security Act of 1950, Section 21 (50 U.S.C. 797); Department of Defense Directive 5200.8 of 25 April 1991; Secretary of the Navy Instruction 5511.36A of 21 July 1992.

[44 FR 32368, June 6, 1979, as amended at 65 FR 53592, Sept. 5, 2000]

§ 770.19 Entry procedures.

(a) Any person or group of persons desiring the advance consent of the Commanding Officer, SUBASE Bangor or his authorized representative shall, in writing, submit a request to the Commanding Officer, Naval Submarine Base, Bangor, 1100 Hunley Road, Silverdale, WA 98315.

(b) Each request for entry will be considered on an individual basis weighing the operational, security, and safety requirements of SUBASE Bangor with the purpose, size of party, duration of visit, destination, and military resources which would be required by the granting of the request.

[44 FR 32368, June 6, 1979, as amended at 65 FR 53592, Sept. 5, 2000]

§ 770.20 Violations.

(a) Any person entering or remaining on SUBASE Bangor, without the consent of the Commanding Officer, SUBASE Bangor or his authorized representative, shall be subject to the penalties prescribed by 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval * * * reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $5,000 or imprisoned not more than six months or both.

(b) Moreover, any person who willfully violates this subpart is subject to a fine not to exceed $5,000 or imprisonment for not more than one (1) year or both as provided in 50 U.S.C. 797.

[44 FR 32368, June 6, 1979, as amended at 65 FR 53592, Sept. 5, 2000]

Subpart C—Base Entry Regulations for Naval Installations in the State of Hawaii

AUTHORITY: 50 U.S.C. 797; DoD Dir. 5200.8 of Aug. 20, 1954; 5 U.S.C 301; 10 U.S.C. 6011; 32 CFR 700.702, 770.714.

SOURCE: 44 FR 76279, Dec. 26, 1979, unless otherwise noted.

§ 770.25 Purpose.

The purpose of this subpart is to promulgate regulations governing entry to naval installations in the State of Hawaii.

§ 770.26 Definitions.

For the purpose of this subpart the following definitions apply:

(a) *Naval installations.* A naval installation is a shore activity and is any area of land, whether or not fenced or covered by water, that is administered by the Department of the Navy or by any subordinate naval command. The term ''naval installation'' applies to all such areas regardless of whether the areas are being used for purely military purposes, for housing, for support purposes, or for any other purpose by a naval command. Section 770.31 contains a list of the major naval installations in Hawaii. This list is not considered to be all inclusive and is included only as a representative guide. For the purposes of this subpart the area of water within Pearl Harbor is considered to be within a naval installation.

(b) *Outleased areas.* Certain portions of naval installations in Hawaii which are not for the time needed for public use or for which a dual use is feasible have been outleased to private interests. Examples of such outleased areas are the Moanalua Shopping Center and lands such as Waipio Peninsula, which has been outleased for agricultural purposes. For the purpose of this Subpart, outleased areas which are not within fenced portions of naval installations are not considered to be a part of naval installations. Rules for entry onto the outleased areas are made by the lessees, except in the case of Waipio Peninsula where the lessee (Oahu Sugar Company) is not authorized to allow anyone to enter Waipio Peninsula for any purpose not connected with sugar cane production.

§ 770.27 Background.

(a) Naval installations in Hawaii constitute a significant element of the national defense establishment. It is vital to the national defense that the use of such areas be at all times under the positive control of the Department of the Navy. Strict control must be exercised over access to naval installations in order to preclude damage accidental and intentional to Government property, injury to military personnel, and interference in the orderly accomplishment of the mission of command.

(b) There are several industrial areas within naval installations in Hawaii wherein construction activities and the use of heavy machinery pose grave risk of danger to visitors.

(c) Various types of flammable or incendiary materials and ordnance are stored at a number of locations within naval installations in Hawaii.

(d) Classified documents and equipment requiring protection from unauthorized disclosure by Executive order 12065 for reasons of national security are located at various locations within naval installations in Hawaii.

(e) In order to effect the positive control of the Navy over its installations in Hawaii, it is essential that entry

onto those installations be restricted to authorized persons only.

(f) These entry regulations are being promulgated under the authority of Commander, Naval Base, Pearl Harbor, who has been assigned as immediate area coordinator for all naval installations in the State of Hawaii by Commander-in-Chief, U.S. Pacific Fleet.

§ 770.28 Entry restrictions.

Each commander is responsible for the security of his/her command. Therefore, entry onto a command or into part of a command may be controlled by the commander through the imposition of such restrictions as may be required by attendant circumstances. Within the State of Hawaii, entry into a naval installation is not permitted without the permission of the responsible commander.

§ 770.29 Entry procedures.

(a) Operational, security, and safety considerations take priority over requests by individuals to visit a naval installation. Consistent with such considerations, visits by members of the general public may be authorized at the discretion of the commander. The commitment of resources which would be required to safeguard the persons and property of visitors as well as military property and personnel must of necessity preclude or severely restrict such visiting. The purpose and duration of the visit and the size of the party and areas to be visited are other considerations which may affect the commander's decision whether to permit visiting by members of the public.

(b) Any person or group desiring to enter a particular naval installation or portion thereof, shall submit a written request to the commander of the installation well enough in advance to allow a reasonable time for reply by mail. Mailing addresses for commanders of major installations covered by this subpart are listed in § 770.31. Full compliance with a naval installation's local visitor registration and entry control procedures shall be deemed the equivalent of obtaining the advance consent of the commander for entrance upon the installation for the purpose of this subpart. Authorization to enter one naval installation or a portion of one installation does not necessarily include the authorization to enter any other naval installation or all portions of an installation.

§ 770.30 Violations.

(a) Any person entering or remaining on a naval installation in the State of Hawaii, without consent of the commander or his authorized representative, shall be subject to the penalties of a fine of not more than $500 or imprisonment for not more than six months, or both. See 18 U.S.C. 1382.

(b) Moreover, any person who willfully violates this regulation is subject to a fine not to exceed $5,000 or imprisonment for one year, or both. See 50 U.S.C. 797.

§ 770.31 List of major naval installations in the State of Hawaii and cognizant commanders authorized to grant access under these regulations.

(a) *On Oahu.* (1) Naval Base, Pearl Harbor (including the Naval Station, Naval Submarine Base, Naval Shipyard, Naval Supply Center, Naval Public Works Center, Marine Barracks, Ford Island, Bishop Point Dock Area, Commander-in-Chief Pacific Fleet and Commander Naval Logistics Command Headquarters Areas, Johnson Circle Navy Exchange/Commissary Store Area, Navy-Marine Golf Course, miscellaneous other commands, and areas within the Naval Base, Pearl Harbor complex, and the waters of Pearl Harbor). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(2) Naval Western Oceanography Center, Pearl Harbor. Contact:

Commanding Officer, Naval Western Oceanography Center, Box 113, Pearl Harbor, HI 96860.

(3) Naval Air Station, Barbers Point. Contact:

Commanding Officer, Naval Air Station, Barbers Point, HI 96862.

(4) Naval Communication Area Master Station, Eastern Pacific, Wahiawa. Contact:

Commanding Officer, Naval Communication Area Master Station, Eastern Pacific, Wahiawa, HI 96786.

(5) Naval Magazine (Lualualei, Waikele, and West Loch). Contact:

Commanding Officer, Naval Magazine, Lualualei, HI 96792.

(6) Naval Radio Transmitting Facility, Lualualei. Contact:

Commanding Officer, Naval Base, Pearl Harbor, HI 96860.

(7) Naval and Marine Corps Reserve Training Center, Honolulu. Contact:

Commanding Officer, Naval and Marine Corps Reserve Training Center, Honolulu, 530 Peltier Avenue, Honolulu, HI 96818.

(8) Military Sealift Command Office. Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(9) Mauna Kapu (Pacific Missile Range Facility). Contact:

Commanding Officer, Pacific Missile Range Facility, Hawaiian Area, Barking Sands, Kekaha, Kauai, HI 96752.

(10) Kunia Facility; FORACS III Sites; Degaussing Station, Waipio Peninsula; Damon Tract (Remanant) Opana Communciations Site. Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(11) Outlying areas of the Naval Supply Center, Pearl Harbor (including the Ewa Junction Storage Area, Ewa Drum Storage Area, Manana Supply Area, Pearl City Supply Area, and the Red Hill Fuel Storage Area). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(12) Pump Stations (Halawa, Waiawa, Red Hill, and Barbers Point). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(13) Halawa Water Storage Area; Barbers Point, Independent Water Supply Reservoir Site; Sewage Treatment Plant; Fort Kam (tri-service); Utility Corridors, Lynch Park (Ohana Nui). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(14) Navy housing areas (including Moanalua Terrace, Radford Terrace, Makalapa, Maloelap, Halsey Terrace, Catlin Park, Hale Moku, Pearl Harbor, Naval Shipyard, McGrew Point, Halawa, Hokulani, Manana, Pearl City Peninsula, Red Hill, Iroquois Point, Puuloa, and Camp Stover). Contact:

Commander, Naval Base, Pearl Harbor, HI 96860.

(b) *On Kauai.* (1) Pacific Missile Range Facility, Barking Sands, Kekaha.

Contact: Commanding Officer, Pacific Missile Range Facility, Hawaiian Area, Barking Sands, Kekaha, HI 96752.

(c) *Other areas.* (1) Kaho'olawe Island. Contact:

Commander Naval Base, Pearl Harbor, HI 96860. Also see 32 CFR part 763.

(2) Kaula. Contact:

Commander Naval Base, Pearl Harbor, HI 96860.

[44 FR 76279, Dec. 26, 1979, as amended at 52 FR 20074, May 29, 1987]

Subpart D—Entry Regulations for Naval Installations and Property in Puerto Rico

SOURCE: 46 FR 22756, Apr. 21, 1981, unless otherwise noted.

§ 770.35 Purpose.

The purpose of this subpart is to promulgate standard regulations and procedures governing entry upon U.S. Naval installations and properties in Puerto Rico.

§ 770.36 Definitions.

For purposes of these regulations, U.S. Naval installations and properties in Puerto Rico include, but are not limited to, the U.S. Naval Station, Roosevelt Roads (including the Vieques Island Eastern Annexes, consisting of Camp Garcia, the Eastern Maneuver Area, and the Inner Range); the Naval Ammunition Facility, Vieques Island; and the Naval Security Group Activity, Sabana Seca.

§ 770.37 Background.

In accordance with 32 CFR 765.4, Naval installations and properties in Puerto Rico are not open to the general public, *i.e.*, they are ''closed'' military bases. Therefore admission to the

general public is only by the permission of the respective Commanding Officers in accordance with their respective installation instructions.

§ 770.38 Entry restrictions.

Except for duly authorized military personnel and civilian employees, including contract employees, of the United States in the performance of their official duties, entry upon any U.S. Navy installation or property in Puerto Rico at anytime, by any person for any purpose whatsoever without the advance consent of the Commanding Officer of the installation or property concerned, or an authorized representative of that Commanding Officer, is prohibited.

§ 770.39 Entry procedures.

(a) Any person or group of persons desiring to obtain advance consent for entry upon any U.S. Naval installation or property in Puerto Rico from the Commanding Officer of the Naval installation or property, or an authorized representative of that Commanding Officer, shall present themselves at an authorized entry gate at the installation or property concerned or, in the alternative, submit a request in writing to the following respective addresses:

(1) Commanding Officer, U.S. Naval Station, Roosevelt Roads, Box 3001, Ceiba, PR 00635.

(2) Officer in Charge, Naval Ammunition Facility, Box 3027, Ceiba, PR 00635.

(3) Commanding Officer, U.S. Naval Security Group Activity, Sabana Seca, PR 00749.

(b) The above Commanding Officers are authorized to provide advance consent only for installations and properties under their command. Requests for entry authorization to any other facility or property shall be addressed to the following:

Commander, U.S. Naval Forces, Caribbean, Box 3037, Ceiba, PR 00635.

(c) Each request for entry will be considered on an individual basis and consent will be determined by applicable installation entry instructions. Factors that will be considered include the purpose of visit, the size of party, duration of visit, destination, security safeguards, safety aspects, and the military resources necessary if the request is granted.

§ 770.40 Violations.

Any person entering or remaining on U.S. Naval installations and properties in Puerto Rico, without the advance consent of those officials hereinabove enumerated, or their authorized representatives, shall be considered to be in violation of these regulations and therefore subject to the penalties prescribed by 18 U.S.C. 1382, which provides in pertinent part: ''Whoever, within the jurisdiction of the United States, goes upon any military, naval * * * reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $500.00 or imprisoned not more than six months, or both,'' or any other applicable laws or regulations.

Subpart E—Base Entry Regulations for Naval Submarine Base New London, Groton, Connecticut

AUTHORITY: 50 U.S.C. 797; DoD Directive 5200.8 of July 29, 1980; SECNAVINST 5511.36 of December 20, 1980; OPNAVINST 5510.45 of April 19, 1971; 5 U.S.C. 301; 10 U.S.C. 6011; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 48 FR 5555, Feb. 7, 1983, unless otherwise noted.

§ 770.41 Purpose.

The purpose of this subpart is to promulgate regulations and procedures governing entry upon Naval Submarine Base New London, and to prevent the interruption of the stated functions and operations of Naval Submarine Base New London, by the presence of any unauthorized person within the boundaries of Naval Submarine Base New London.

§ 770.42 Background.

Naval Submarine Base New London maintains and operates facilities to support training and experimental operations of the submarine force including providing support to submarines, submarine rescue vessels, and assigned

service and small craft; within capabilities, to provide support to other activities of the Navy and other governmental activities in the area; and to perform such other functions as may be directed by competent authority.

§ 770.43 Responsibility.

The responsibility for proper identification and control of personnel and vehicle movement on the Naval Submarine Base New London is vested with the Security Officer.

§ 770.44 Entry restrictions.

Except for military personnel, their authorized dependents, or guests, and employees of the United States in the performance of their official duties, entry upon Naval Submarine Base New London, or remaining thereon by any person for any purpose without the advance consent of the Commanding Officer, Naval Submarine Base New London, or his authorized representative is prohibited. *See* 18 U.S.C. 1382j, the Internal Security Act of 1950 (50 U.S.C. 797); Chief of Naval Operations Instruction 5510.45B of April 19, 1971; and Secretary of the Navy Instruction 5511.36 of December 20, 1980.

§ 770.45 Entry procedures.

(a) Any individual person or group of persons desiring the advance consent of the Commanding Officer, Naval Submarine Base New London, or his authorized representative shall, in writing, submit a request to the Commanding Officer, Naval Submarine Base New London, at the following address: Commanding Officer (Attn: Security Officer), Box 38, Naval Submarine Base New London, Groton, CT 06349.

(b) Each request for entry will be considered on an individual basis weighing the operational, security, and safety requirements of Naval Submarine Base New London with the purpose, size of party, duration of visit, destination, and military resources which would be required by the granting of the request.

§ 770.46 Violations.

(a) Any person entering or remaining on Naval Submarine Base New London, without the consent of the Commanding Officer, Naval Submarine Base New London or his authorized representative, shall be subject to the penalties prescribed in 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval . . . reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . shall be fined not more than $500 or imprisoned not more than six months or both.

(b) Moreover, any person who willfully violates this subpart is subject to a fine not to exceed $5000 or imprisonment for not more than one (1) year or both as provided in 50 U.S.C. 797.

Subpart F—Base Entry Regulations for Puget Sound Naval Shipyard, Bremerton, Washington

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 6011; 50 U.S.C. 797; DoD Directive 5200.8 of April 25, 1991; SECNAVINST 5511.36A of July 21, 1992; OPNAVINST 5530.14C of December 10, 1998; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 65 FR 53592, Sept. 5, 2000, unless otherwise noted.

§ 770.47 Purpose.

To promulgate regulations and procedures governing entry upon Puget Sound Naval Shipyard, and to prevent the interruption of the functions and operations of Puget Sound Naval Shipyard by the presence of any unauthorized person within the boundaries of the Puget Sound Naval Shipyard.

§ 770.48 Definition.

For the purpose of this subpart, Puget Sound Shipyard shall include that area of land, whether or not fenced or covered by water, in Kitsap County in the State of Washington under the operational control of the Commander, Puget Sound Naval Shipyard or any tenant command. This includes all such areas regardless of whether the areas are being used for purely military purposes, for housing, for support purposes, or for any other purpose by a naval command or other Federal agency.

§ 770.49 Background.

(a) Puget Sound Naval Shipyard is a major naval ship repair facility, with operational requirements to complete repairs and overhaul of conventionally powered and nuclear powered naval vessels. It is vital to national defense that the operation and use of the shipyard be continued without interruption. Additionally, most of Puget Sound Naval Shipyard is dedicated to heavy industrial activity where potentially hazardous conditions exist.

(b) For prevention of the interruption of the stated use of Puget Sound Naval Shipyard and prevention of injury to any unsupervised or unauthorized person as a consequence of the hazardous conditions that exist, as well as for other reasons, it is essential to restrict entry upon Puget Sound Naval Shipyard to authorized persons only.

§ 770.50 Entry restrictions.

Except for military personnel and civilian employees of the United States in the performance of their official duties, entry upon Puget Sound Naval Shipyard, or remaining thereon by any person for any purpose without advance consent of the Commander, Puget Sound Naval Shipyard or his/her authorized representative, is prohibited.

§ 770.51 Entry procedures.

(a) Any person or group of persons desiring the advance consent of the Commander, Puget Sound Naval Shipyard, or his authorized representative, shall, in writing, submit a request to the Commander, Puget Sound Naval Shipyard, at the following address: Commander, Puget Sound Naval Shipyard, 1400 Farragut Avenue, Bremerton, WA 98314–5001.

§ 770.52 Violations.

(a) Any person entering or remaining on Puget Sound Naval Shipyard, without the consent of the Commander, Puget Sound Naval Shipyard, or an authorized representative, shall be subject to the penalties prescribed by 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval * * * reservation, post, fort, arsenal, yard, station or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $500.00 or imprisoned not more than six months or both.

(b) Moreover, any person who willfully violates this subpart is subject to a fine not to exceed $5000.00 or imprisonment for not more than one year or both as provided in 50 U.S.C. 797.

Subpart G—Entry Regulations for Portsmouth Naval Shipyard, Portsmouth, New Hampshire

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 6011; 50 U.S.C. 797; DoD Directive 5200.8 of April 25, 1991; SECNAVINST 5511.36A of July 21, 1992; NAVCOMSYSCOMINST 5510.2B of April 18, 1990; 32 CFR 700.702; 32 CFR 700.714.

SOURCE: 49 FR 34003, Aug. 28, 1984, unless otherwise noted.

§ 770.53 Purpose.

To promulgate regulations and procedures governing entry upon Portsmouth Naval Shipyard, and to prevent the interruption of the functions and operations of Portsmouth Naval Shipyard by the presence of any unauthorized person within the boundaries of Portsmouth Naval Shipyard.

§ 770.54 Background.

(a) Portsmouth Naval Shipyard maintains and operates facilities ''to provide logistic support for assigned ships and service craft; to perform authorized work in connection with construction, conversion, overhaul, repair, alteration, drydocking, and outfitting of ships and craft, as assigned; to perform manufacturing, research, development, and test work, as assigned; and to provide services and material to other activities and units, as directed by competent authority.''

(b) Portsmouth Naval Shipyard is a major naval ship repair facility, with operational requirements to complete repairs and overhaul of conventionally powered and nuclear-powered naval vessels. It is vital to national defense that the operation and use of the shipyard be continued without undue or unnecessary interruptions. Additionally, most of Portsmouth Naval Shipyard is dedicated to heavy industrial

activity where potentially hazardous conditions exist.

(c) For prevention of interruption of the stated use of the base by the presence of any unauthorized person within the boundaries of Portsmouth Naval Shipyard, and prevention of injury to any such unsupervised person as a consequence of the dangerous conditions which exist, as well as for other reasons, it is essential to restrict entry upon Portsmouth Naval Shipyard to authorized persons only.

§ 770.55 Responsibility.

The responsibility for proper identification and control of personnel and vehicle movement on the Portsmouth Naval Shipyard is vested with the Shipyard Security Manager (Code 1700).

[49 FR 34003, Aug. 28, 1984, as amended at 65 FR 53593, Sept. 5, 2000]

§ 770.56 Entry restrictions.

Except for military personnel, their authorized dependents, or guests, and civilian employees of the United States in the performance of their official duties, entry upon Portsmouth Naval Shipyard, or remaining thereon by any person for any purpose without the advance consent of the Commander, Portsmouth Naval Shipyard, or his authorized representative, is prohibited. In many instances, Commander, Naval Sea Systems Command, approval is required.

§ 770.57 Entry procedures.

(a) Any person or group desiring the advance consent of the Commander, Portsmouth Naval Shipyard, or his authorized representative, shall, in writing, submit a request to the Commander, Portsmouth Naval Shipyard, at the following address: Commander, Portsmouth Naval Shipyard, Portsmouth, NH 03801, Attention: Security Manager (Code 1700). For groups, foreign citizens, and news media, the request must be forwarded to the Commander, Naval Sea Systems Command, for approval.

(b) Each request for entry will be considered on an individual basis, weighing the operational, security, and safety requirements of Portsmouth Naval Shipyard, with the purpose, size of party, duration of visit, destination, and military resources which would be required by the granting of the request.

[49 FR 34003, Aug. 28, 1984, as amended at 65 FR 53593, Sept. 5, 2000]

§ 770.58 Violations.

(a) Any person entering or remaining on Portsmouth Naval Shipyard without the consent of the Commander, Portsmouth Naval Shipyard, or his authorized representative, shall be subject to the penalties prescribed in 18 U.S.C. 1382, which provides in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval . . . reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation . . . Shall be fined not more than $500 or imprisoned not more than six months, or both.

(b) Moreover, any person who willfully violates this instruction is subject to a fine not to exceed $5000 or imprisonment for not more than one (1) year, or both, as provided by 50 U.S.C. 797.

PARTS 771–774 [RESERVED]

PART 775—POLICIES AND RESPONSIBILITIES FOR IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT WITHIN THE DEPARTMENT OF THE NAVY

Sec.

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AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 4321–4361; 40 CFR parts 1500–1508.

SOURCE: 55 FR 33899, Aug. 20, 1990, unless otherwise noted.

§ 775.1 Purpose and scope.

(a) To implement the provisions of the National Environmental Policy Act

(NEPA), 42 U.S.C. 4321 *et seq.*, the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA, 40 CFR 1500–1508, and the Department of Defense Instruction on Environmental Planning and Analysis, DODINST 4715.9, and to assign responsibilities within the Department of the Navy (DON) for preparation, review, and approval of environmental documents prepared under NEPA.

(b) The policies and responsibilities set out in this part apply to the DON, including the Office of the Secretary of the Navy, and Navy and Marine Corps commands, operating forces, shore establishments, and reserve components. This part is limited to the actions of these elements with environmental effects in the United States, its territories, and possessions.

[69 FR 8109, Feb. 23, 2004]

§ 775.2 Definitions.

(a) *Action proponent.* The commander, commanding officer, or civilian director of a unit, activity, or organization who initiates a proposal for action, as defined in 40 CFR 1508.23, and who has command and control authority over the action once it is authorized. For some actions, the action proponent will also serve as the decision-making authority for that action. In specific circumstances, the action proponent and decision maker may be identified in Navy Regulations, other SECNAV Instructions, operational instructions and orders, acquisition instructions, and other sources which set out authority and responsibility within the DON.

(b) *Environmental Impact Statement (EIS).* An environmental document prepared according to the requirements of Council on Environmental Quality (CEQ) regulations (40 CFR parts 1500–1508) for a major action that will have a significant effect on the quality of the human environment.

(c) *Environmental Assessment (EA).* A concise document prepared according to the requirements of 40 CFR parts 1500–1508 that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS. An EA aids compliance with NEPA when no EIS is necessary and facilitates preparation of an EIS when one is necessary.

(d) *Categorical Exclusion (CATEX).* A published category of actions that do not individually or cumulatively have a significant impact on the human environment under normal circumstances, and, therefore, do not require either an environmental assessment or an environmental impact statement.

(e) *Record of Decision (ROD).* An environmental document signed by an appropriate official of the DON. A ROD sets out a concise summary of the final decision and selected measures for mitigation (if any) of adverse environmental impacts of the alternative chosen from those considered in an EIS.

(f) *Finding of No Significant Impact (FONSI).* A document that sets out the reasons why an action not otherwise categorically excluded will not have a significant impact on the human environment, and for which an EIS will not therefore be prepared. A FONSI will include the EA or a summary of it and shall note any other environmental documents related to it. A FONSI may be one result of review of an EA.

[69 FR 8109, Feb. 23, 2004]

§ 775.3 Policy.

(a) It is the DON policy regarding NEPA, consistent with its mission and regulations and the environmental laws and regulations of the United States, to:

(1) Initiate the NEPA processes at the earliest possible time to be an effective decision making tool in the course of identifying a proposed action.

(2) Develop and carefully consider a reasonable range of alternatives for achieving the purpose(s) of proposed actions.

(3) Assign responsibility for preparation of action specific environmental analysis under NEPA to the action proponent. The action proponent should understand the plans, analyses, and environmental documents related to that action.

(b) NEPA is intended to ensure that environmental issues are fully considered and incorporated into the Federal decision making process. Consequently, actions for which the DON has no decision-making authority and

no discretion in implementing the action, such as those carried out under a non discretionary mandate from Congress (e.g., congressional direction to transfer Federal property to a particular entity for a particular purpose that leaves DON no discretion in how the transfer will be implemented) or as an operation of law (e.g., reversionary interests in land recorded at the time the property was obtained and that provide no discretion in whether to trigger the reversion or how the reversion will be implemented), require no analysis or documentation under NEPA or its implementing regulations.

[69 FR 8109, Feb. 23, 2004]

§ 775.4 Responsibilities.

(a) The Assistant Secretary of the Navy (Installations and Environment) (ASN (I&E)) shall:

(1) Act as principal liaison with the Office of the Secretary of Defense, the Council on Environmental Quality, the Environmental Protection Agency, other Federal agencies, Congress, state governments, and the public with respect to significant NEPA matters.

(2) Direct the preparation of appropriate environmental analysis and documentation and, with respect to those matters governed by SECNAV Instruction 5000.2 series, advise the Assistant Secretary of the Navy (Research Development and Acquisition) (ASN (RD&A)) concerning environmental issues and the appropriate level of environmental analysis and NEPA documentation needed in any particular circumstance.

(3) Except for proposed acquisition-related actions addressed in paragraph (b)(2) of this section, review, sign, and approve for publication, as appropriate, documents prepared under NEPA.

(4) Establish and publish a list of categorical exclusions for the DON.

(b) The Assistant Secretary of the Navy (Research, Development and Acquisition (ASN (RD&A)) shall, in accordance with SECNAV Instruction 5000.2 series:

(1) Ensure that DON acquisition programs, research programs, and procurements comply with NEPA.

(2) Review, sign, and approve for publication, as appropriate, environmental documents prepared under NEPA for proposed acquisition or research and development related actions.

(c) The General Counsel of the Navy and the Judge Advocate General of the Navy shall:

(1) Ensure that legal advice for compliance with environmental planning requirements is available to all decision-makers.

(2) Advise the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps as to the legal requirements that must be met, and the conduct and disposition of all legal matters arising in the context of environmental planning.

(d) The Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) shall:

(1) Implement effective environmental planning throughout their respective services.

(2) Prepare and issue instructions or orders to implement environmental planning policies of the DON. Forward proposed CNO/CMC environmental planning instructions or orders to ASN (I&E) and, when appropriate, ASN (RD&A) for review and comment prior to issuance.

(3) Make decisions on environmental assessments as to whether a Finding of No Significant Impact is appropriate or preparation of an environmental impact statement is required.

(4) Ensure that subordinate commands establish procedures for implementing mitigation measures described in NEPA documents.

(5) Provide coordination as required for the preparation of NEPA documents for actions initiated by non-DON/DOD entities, state or local agencies and/or private individuals for which service involvement may be reasonably foreseen.

(6) Bring environmental planning matters that involve controversial issues or which may affect environmental planning policies or their implementation to the attention of ASN (I&E) and, where appropriate, ASN (RD&A) for coordination and determination.

(7) Notify ASN (I&E), and when appropriate, ASN (RD&A) of any proposed EIS, and of any EA that may involve potentially sensitive public interest issues. EIS notification shall

occur prior to commencing NEPA document preparation or receiving any public or regulatory agency involvement. EA notification shall be made as soon as it becomes apparent that potentially sensitive public issues are involved.

[69 FR 8109, Feb. 23, 2004]

§ 775.5 Classified actions.

(a) The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with NEPA and the CEQ regulations. Therefore, environmental documents shall be prepared, safeguarded and disseminated in accordance with the requirements applicable to classified information. When feasible, these documents shall be organized in such a manner that classified portions are included as appendices so that unclassified portions can be made available to the public. Review of classified NEPA documentation will be coordinated with the Environmental Protection Agency (EPA) to fulfill requirements of section 309 of the Clean Air Act (42 U.S.C. 7609 *et seq.*).

(b) It should be noted that a classified EA/EIS serves the same ''informed decisionmaking'' purpose as does a published unclassified EA/EIS. Even though the classified EA/EIS does not undergo general public review and comment, it must still be part of the information package to be considered by the decisionmaker for the proposed action. The content of a classified EA/EIS (or the classified portion of a public EA/EIS) will therefore meet the same content requirements applicable to a published unclassified EA/EIS.

§ 775.6 Planning considerations.

(a) An EIS must be prepared for proposed major Federal actions that will have significant impacts on the human environment. The agency decision in the case of an EIS is reflected in a ROD.

(b) Where a proposed major Federal action has the potential for significantly affecting the human environment, but it is not clear whether the impacts of that particular action will in fact be significant, or where the nature of an action precludes use of a categorical exclusion, an EA may be used to assist the agency in determining whether to prepare an EIS. If the agency determination in the case of an EA is that there is no significant impact on the environment, the findings will be reflected in a FONSI. If the EA determines that the proposed action is likely to significantly affect the environment (even after mitigation), then an EIS will be prepared. An EA also may be used where it otherwise will aid compliance with NEPA.

(c) CEQ regulations (40 CFR 1508.18(a)) define major federal actions subject to evaluation under NEPA to include, among other things, ''new and continuing activities''. The term *new activities* is intended to encompass future actions, *i.e.*, those which are not ongoing at the time of the proposal. The term *continuing activities* which may necessitate the preparation of a NEPA document will be applied by the Department of Navy to include activities which are presently being carried out in fulfillment of the Navy mission and function, including existing training functions, where:

(1) The currently occurring environmental effects of which have not been previously evaluated in a NEPA document, and there is a discovery that substantial environmental degradation is occurring, or is likely to occur, as a result of ongoing operations (e.g., a discovery that significant beach erosion is occurring as a result of continuing amphibious exercises, new designation of wetland habitat, or discovery of an endangered species residing in the area of the activity), or

(2) There is a discovery that the environmental effects of an ongoing activity are significantly and qualitatively different or more severe than predicted in a NEPA document prepared in connection with the commencement of the activity.

A substantial change in a continuing activity (such as a substantial change in operational tempo, area of use, or in methodology/equipment) which has the potential for significant environmental impacts should be considered a proposal for a new action and be documented accordingly. Preparation of a NEPA document is not a necessary prerequisite, nor a substitute, for compliance with other environmental laws.

(d) Where emergency circumstances require immediate action, for the protection of lives and for public health and safety, which could result in significant harm to the environment, the activity Commanding Officer or his designee shall report the emergency action to CNO (OP–44E)/CMC (LFL) who will facilitate the appropriate consultation with CEQ as soon as practicable.

(e) A categorical exclusion (CATEX), as defined and listed in this part and 40 CFR 1508.4, may be used to satisfy NEPA, eliminating the need for an EA or an EIS. Extraordinary circumstances are those circumstances for which the DON has determined that further environmental analysis may be required because an action normally eligible for a CATEX may have significant environmental effects. The presence of one or more of the extraordinary circumstances listed in paragraph (e)(1) of this section does not automatically preclude the application of a CATEX. A determination of whether a CATEX is appropriate for an action, even if one or more extraordinary circumstances are present, should focus on the action's potential effects and consider the environmental significance of those effects in terms of both context (consideration of the affected region, interests, and resources) and intensity (severity of impacts).

(1) Before applying a CATEX, the decision maker must consider whether the proposed action would individually or cumulatively:

(i) Adversely affect public health or safety;

(ii) Involve effects on the human environment that are highly uncertain, involve unique or unknown risks, or which are scientifically controversial;

(iii) Establish precedents or make decisions in principle for future actions that have the potential for significant impacts;

(iv) Threaten a violation of Federal, State, or local environmental laws applicable to the DON; or

(v) Involve an action that may:

(A) Have more than an insignificant or discountable effect on federally protected species under the Endangered Species Act or have impacts that would rise to the level of requiring an Incidental Take Authorization under the Marine Mammal Protection Act irrespective of whether one is procured;

(B) Have an adverse effect on coral reefs or on federally designated wilderness areas, wildlife refuges, marine sanctuaries and monuments, or parklands;

(C) Adversely affect the size, function, or biological value of wetlands and is not covered by a general (nationwide, regional, or state) permit;

(D) Have an adverse effect on archaeological resources or resources listed or determined to be eligible for listing on the National Register of Historic Places (including, but not limited to, ships, aircraft, vessels, and equipment) where compliance with Section 106 of the National Historic Preservation Act has not been resolved through an agreement executed between the DON and the appropriate historic preservation office and other appropriate consulting parties; or

(E) Result in an uncontrolled or unpermitted release of hazardous substances or require a conformity determination under standards in 40 CFR part 93, subpart B (the Clean Air Act General Conformity Rule).

(2) If a decision is made to apply a CATEX to a proposed action that is more than administrative in nature, the decision must be formally documented per existing Navy and Marine Corps policy. For actions with a documented CATEX where one or more extraordinary circumstances are present, a copy of the executed CATEX decision document (e.g., Record of CATEX or Decision Memorandum) must be forwarded for review to Navy Headquarters or Marine Corps Headquarters, as appropriate, before the action is implemented. With the exception of actions that fall under paragraph (e)(1)(v)(A) of this section, the requirement to send the documented CATEX to headquarters for review will end on January 6, 2022.

(f) Subject to the criteria in paragraph (e) of this section, the following categories of actions are excluded from further analysis under NEPA. The CNO and CMC shall determine whether a decision to forego preparation of an EA

or EIS on the basis of one or more categorical exclusions must be documented in an administrative record and the format for such record.

(1) Routine fiscal and administrative activities, including administration of contracts;

(2) Routine law and order activities performed by military personnel, military police, or other security personnel, including physical plant protection and security;

(3) Routine use and operation of existing facilities, laboratories, and equipment;

(4) Administrative studies, surveys, and data collection;

(5) Issuance or modification of administrative procedures, regulations, directives, manuals, or policy;

(6) Military ceremonies;

(7) Routine procurement of goods and services conducted in accordance with applicable procurement regulations, executive orders, and policies;

(8) Routine repair and maintenance of buildings, facilities, vessels, aircraft, ranges, and equipment associated with existing operations and activities (e.g., localized pest management activities, minor erosion control measures, painting, refitting, general building/structural repair, landscaping, or grounds maintenance);

(9) Training of an administrative or classroom nature;

(10) Routine personnel actions;

(11) Routine movement of mobile assets (such as ships, submarines, aircraft, and ground assets for repair, overhaul, dismantling, disposal, homeporting, home basing, temporary reassignments; and training, testing, or scientific research) where no new support facilities are required;

(12) Routine procurement, management, storage, handling, installation, and disposal of commercial items, where the items are used and handled in accordance with applicable regulations (e.g., consumables, electronic components, computer equipment, pumps);

(13) Routine recreational and welfare activities;

(14) Alterations of and additions to existing buildings, facilities, and systems (e.g., structures, roads, runways, vessels, aircraft, or equipment) when the environmental effects will remain substantially the same and the use is consistent with applicable regulations;

(15) Routine movement, handling, and distribution of materials, including hazardous materials and wastes that are moved, handled, or distributed in accordance with applicable regulations;

(16) New activities conducted at established laboratories and plants (including contractor-operated laboratories and plants) where all airborne emissions, waterborne effluent, external ionizing and non-ionizing radiation levels, outdoor noise, and solid and bulk waste disposal practices are in compliance with existing applicable Federal, state, and local laws and regulations;

(17) Studies, data, and information gathering that involve no permanent physical change to the environment (e.g., topographic surveys, wetlands mapping, surveys for evaluating environmental damage, and engineering efforts to support environmental analyses);

(18) Temporary placement and use of simulated target fields (e.g., inert mines, simulated mines, or passive hydrophones) in fresh, estuarine, and marine waters for the purpose of non-explosive military training exercises or research, development, test, and evaluation;

(19) Installation and operation of passive scientific measurement devices (e.g., antennae, tide gauges, weighted hydrophones, salinity measurement devices, and water quality measurement devices) where use will not result in changes in operations tempo and is consistent with applicable regulations;

(20) Short-term increases in air operations up to 50 percent of the typical operation rate, or increases of 50 operations per day, whichever is greater. Frequent use of this CATEX at an installation requires further analysis to determine there are no cumulative impacts;

(21) Decommissioning, disposal, or transfer of naval vessels, aircraft, vehicles, and equipment when conducted in accordance with applicable regulations, including those regulations applying to removal of hazardous materials;

(22) Non-routine repair and renovation, and donation or other transfer of structures, vessels, aircraft, vehicles, landscapes, or other contributing elements of facilities listed or eligible for listing on the National Register of Historic Places;

(23) Hosting or participating in public events (e.g., air shows, open houses, Earth Day events, and athletic events) where no permanent changes to existing infrastructure (e.g., road systems, parking, and sanitation systems) are required to accommodate all aspects of the event;

(24) Military training conducted on or over nonmilitary land or water areas, where such training is consistent with the type and tempo of existing non-military airspace, land, and water use (e.g., night compass training, forced marches along trails, roads, and highways, use of permanently established ranges, use of public waterways, or use of civilian airfields);

(25) Transfer of real property from the DON to another military department or to another Federal agency;

(26) Receipt of property from another Federal agency when there is no anticipated or proposed substantial change in land use;

(27) Minor land acquisitions or disposals where anticipated or proposed land use is similar to existing land use and zoning, both in type and intensity;

(28) Disposal of excess easement interests to the underlying fee owner;

(29) Initial real estate in grants and out grants involving existing facilities or land with no significant change in use (e.g., leasing of federally owned or privately owned housing or office space, and agricultural out leases);

(30) Renewals and minor amendments of existing real estate grants for use of Government-owned real property where no significant change in land use is anticipated;

(31) Land withdrawal continuances or extensions that establish time periods with no significant change in land use;

(32) Grants of license, easement, or similar arrangements for the use of existing rights-of-way or incidental easements complementing the use of existing rights-of-way for use by vehicles (not to include significant increases in vehicle loading); electrical, telephone, and other transmission and communication lines; water, wastewater, storm water, and irrigation pipelines, pumping stations, and facilities; and for similar utility and transportation uses;

(33) New construction that is similar to or compatible with existing land use (*i.e.*, site and scale of construction are consistent with those of existing adjacent or nearby facilities) and, when completed, the use or operation of which complies with existing regulatory requirements (e.g., a building within a cantonment area with associated discharges and runoff within existing handling capacities). The test for whether this CATEX can be applied should focus on whether the proposed action generally fits within the designated land use of the proposed site;

(34) Demolition, disposal, or improvements involving buildings or structures when done in accordance with applicable regulations including those regulations applying to removal of asbestos, PCBs, and other hazardous materials;

(35) Acquisition, installation, modernization, repair, or operation of utility (including, but not limited to, water, sewer, and electrical) and communication systems (including, but not limited to, data processing cable and similar electronic equipment) that use existing rights of way, easements, distribution systems, and facilities;

(36) Decisions to close facilities, decommission equipment, or temporarily discontinue use of facilities or equipment, where the facility or equipment is not used to prevent or control environmental impacts;

(37) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site;

(38) Relocation of personnel into existing federally owned or commercially leased space that does not involve a substantial change affecting the supporting infrastructure (e.g., no increase in vehicular traffic beyond the capacity of the supporting road network to accommodate such an increase);

(39) Pre-lease upland exploration activities for oil, gas, or geothermal reserves, (e.g., geophysical surveys);

(40) Installation of devices to protect human or animal life (e.g., raptor electrocution prevention devices, fencing to restrict wildlife movement onto airfields, and fencing and grating to prevent accidental entry to hazardous areas);

(41) Reintroduction of endemic or native species (other than endangered or threatened species) into their historic habitat when no substantial site preparation is involved;

(42) Temporary closure of public access to DON property to protect human or animal life;

(43) Routine testing and evaluation of military equipment on a military reservation or an established range, restricted area, or operating area; similar in type, intensity, and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the DON was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment;

(44) Routine military training associated with transits, maneuvering, safety and engineering drills, replenishments, flight operations, and weapons systems conducted at the unit or minor exercise level; similar in type, intensity, and setting, including physical location and time of year, to other actions for which it has been determined, through NEPA analysis where the DON was a lead or cooperating agency, that there are no significant impacts; and conducted in accordance with all applicable standard operating procedures protective of the environment;

(45) Natural resources management actions undertaken or permitted pursuant to agreement with or subject to regulation by Federal, state, or local organizations having management responsibility and authority over the natural resources in question, including, but not limited to, prescribed burning, invasive species actions, timber harvesting, and hunting and fishing during seasons established by state authorities pursuant to their state fish and game management laws. The natural resources management actions must be consistent with the overall management approach of the property as documented in an Integrated Natural Resources Management Plan (INRMP) or other applicable natural resources management plan;

(46) Minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events that threaten public health or safety, security, property, or natural and cultural resources, and that are necessary to repair or improve lands unlikely to recover to a management-approved condition (*i.e.,* the previous state) without intervention. Covered activities must be completed within one year following the event and cannot include the construction of new permanent roads or other new permanent infrastructure. Such activities include, but are not limited to: Repair of existing essential erosion control structures or installation of temporary erosion controls; repair of electric power transmission infrastructure; replacement or repair of storm water conveyance structures, roads, trails, fences, and minor facilities; revegetation; construction of protection fences; and removal of hazard trees, rocks, soil, and other mobile debris from, on, or along roads, trails, or streams;

(47) Modernization (upgrade) of range and training areas, systems, and associated components (including, but not limited to, targets, lifters, and range control systems) that support current testing and training levels and requirements. Covered actions do not include those involving a substantial change in the type or tempo of operation, or the nature of the range (*i.e.,* creating an impact area in an area where munitions had not been previously used);

(48) Revisions or updates to INRMPs that do not involve substantially new or different land use or natural resources management activities and for which an EA or EIS was previously prepared that does not require supplementation pursuant to 40 CFR 1502.9(c)(1); and

(49) DON actions that occur on another Military Service's property where the action qualifies for a CATEX of that Service, or for actions on property designated as a Joint Base or Joint Region that would qualify for a CATEX of any of the Services included

as part of the Joint Base or Joint Region. If the DON action proponent chooses to use another Service's CATEX to cover a proposed action, the DON must obtain written confirmation the other Service does not object to using its CATEX to cover the DON action. The DON official making the CATEX determination must ensure the application of the CATEX is appropriate and that the DON's proposed action was of a type contemplated when the CATEX was established by the other Service. Use of this CATEX requires preparation of a Record of CATEX or Decision Memorandum.

[55 FR 33899, Aug. 20, 1990, as amended at 55 FR 39960, Oct. 1, 1990; 69 FR 8110, Feb. 23, 2004; 84 FR 66589, Dec. 5, 2019]

§ 775.7 Time limits for environmental documents.

(a) The timing of the preparation, circulation, submission and public availability of environmental documents is important in achieving the purposes of NEPA. Therefore, the NEPA process shall begin as early as possible in the decisionmaking process.

(b) The EPA publishes a weekly notice in the FEDERAL REGISTER of environmental impact statements filed during the preceding week. The minimum time periods set forth below shall be calculated from the date of publication of notices in the FEDERAL REGISTER. No decision on the proposed action may take place until the later of the following dates:

(1) Ninety days after publication of the notice of availability for a draft environmental impact statement (DEIS). Draft statements shall be available to the public for 15 days prior to any public hearing on the DEIS (40 CFR 1506.6(c)(2)).

(2) Thirty days after publication of the notice of availability for a final environmental impact statement (FEIS). If the FEIS is available to the public within ninety days from the availability of the DEIS, the minimum thirty day period and the minimum nintey day period may run concurrently. However, not less than 45 days from publication of notice of filing shall be allowed for public comment on draft statements prior to filing of the FEIS (40 CFR 1506.10(c)).

§ 775.8 Scoping.

As soon as practicable after the decision to prepare an EIS is made, an early and open process called ''scoping'' shall be used to determine the scope of issues to be addressed and to identify the significant issues to be analyzed in depth related to the proposed action (40 CFR 1501.7). This process also serves to deemphasize insignificant issues, narrowing the scope of the EIS process accordingly (40 CFR 1500.4(g)). Scoping results in the identification by the proponent of the range of actions, alternatives, and impacts to be considered in the EIS (40 CFR 1508.25). For any action, this scope may depend on the relationship of the proposed action to other existing environmental documentation.

§ 775.9 Documentation and analysis.

(a) Environmental documentation and analyses required by this rule should be integrated as much as practicable with any environmental studies, surveys and impact analyses required by other environmental review laws and executive orders (40 CFR 1502.25). When a cost-benefit analysis has been prepared in conjunction with an action which also requires a NEPA analysis, the cost-benefit analysis shall be integrated into the environmental documentation.

(b) CEQ regulations encourage the use of tiering whenever appropriate to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for discussion at each level of environmental review (40 CFR 1502.20). Tiering is accomplished through the preparation of a broad programmatic environmental impact statement discussing the impacts of a wide ranging or long term stepped program followed by narrower statements or environmental assessments concentrating solely on issues specific to the analysis subsequently prepared (40 CFR 1508.28).

(1) *Appropriate use of tiering:* Tiering is appropriate when it helps the lead agency to focus on issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe. (40 CFR 1508.28(b).) The sequence of statements or analyses is:

(i) From a broad program, plan, or policy environmental impact statement (not necessarily site specific) to a subordinate/smaller scope program, plan, or policy statement or analysis (usually site specific) (40 CFR 1508.28 (a)).

(ii) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation) (40 CFR 1508.28(b)).

(iii) In addition to the discussion required by these regulations for inclusion in environmental impact statements, the programmatic environmental impact statement shall also discuss:

(A) A description of the subsequent stages or sites that may ultimately be proposed in as much detail as presently possible;

(B) All of the implementing factors of the program that can be ascertained at the time of impact statement preparation;

(C) All of the environmental impacts that will result from establishment of the overall program itself that will be similar for subsequent stages or sites as further implementation plans are proposed; and

(D) All of the appropriate mitigation measures that will be similarly proposed for subsequent stages or sites.

(iv) The analytical document used for stage or site specific analysis subsequent to the programmatic environmental impact statement shall also be an environmental impact statement when the subsequent tier itself may have a significant impact on the quality of the human environment or when an impact statement is otherwise required. Otherwise, it is appropriate to document the tiered analysis with an environmental assessment to fully assess the need for further documentation or whether a FONSI would be appropriate.

(2) [Reserved]

§ 775.10 Relations with state, local and regional agencies.

Close and harmonious planning relations with local and regional agencies and planning commissions of adjacent cities, counties, and states, for cooperation and resolution of mutual land use and environment-related problems should be established. Additional coordination may be obtained from state and area-wide planning and development ''clearinghouses''. These are agencies which have been established pursuant to Executive Order 12372 of July 14, 1982 (3 CFR, 1982 Comp., p. 197). The clearinghouses serve a review and coordination function for Federal activities and the proponent may gain insights on other agencies' approaches to environmental assessments, surveys, and studies in relation to any current proposal. The clearinghouses would also be able to assist in identifying possible participants in scoping procedures for projects requiring an EIS.

§ 775.11 Public participation.

The importance of public participation (40 CFR 1501.4(b)) in preparing environmental assessments is clearly recognized and it is recommended that commands proposing an action develop a plan to ensure appropriate communication with affected and interested parties. The command Public Affairs Office can provide assistance with developing and implementing this plan. In determining the extent to which public participation is practicable, the following are among the factors to be weighed by the command:

(a) The magnitude of the environmental considerations associated with the proposed action;

(b) The extent of anticipated public interest; and

(c) Any relevant questions of national security and classification.

§ 775.12 Delegation of authority.

(a) The ASN (I&E) may delegate his/her responsibilities under this instruction for review, approval and/or signature of EISs and RODs to appropriate Executive Schedule/Senior Executive Service civilians or flag/general officers. ASN (I&E), CNO, and CMC may delegate all other responsibilities assigned in this instruction as deemed appropriate.

(b) The ASN (RD&A) delegation of authority for approval and signature of documents under NEPA is contained in

SECNAV Instruction 5000.2 series, which sets out policies and procedures for acquisition programs.

(c) Previously authorized delegations of authority are continued until revised or withdrawn.

[69 FR 8112, Feb. 23, 2004]

PART 776—PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL

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AUTHORITY: 10 U.S.C. 806, 806a, 826, 827, 1044; Manual for Courts-Martial, United States, 2012; U.S. Navy Regulations, 1990; Department of Defense Instruction 1442.02 (series); Secretary of the Navy Instruction 5430.27 (series), Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services.

SOURCE: 80 FR 68389, Nov. 4, 2015; 80 FR 73991, Nov. 27, 2015, unless otherwise noted.

Subpart A—General

§ 776.1 Purpose.

In furtherance of the authority citations (which, if not found in local libraries, are available from the Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard DC 20374–5066), which require the Judge Advocate General of the Navy (JAG) to supervise the performance of legal services under JAG cognizance throughout the Department of the Navy (DoN), this part is promulgated:

(a) To establish Rules of Professional Conduct (subpart B of this part) for attorneys subject to this part;

(b) To establish procedures for receiving, processing, and taking action on complaints of professional misconduct made against attorneys practicing under the supervision of the JAG, whether arising from professional legal activities in DoN proceedings and matters, or arising from other, non-U.S. Government related professional legal activities or personal misconduct that suggests the attorney is ethically, professionally, or morally unqualified to perform legal services within the DoN;

(c) To prescribe limitations on and procedures for processing requests to engage in the outside practice of law by those DoN attorneys practicing under the supervision of the JAG; and

(d) To ensure quality legal services at all proceedings under the cognizance and supervision of the JAG.

§ 776.2 Applicability.

(a) This part applies to all ''covered attorneys'' as defined herein.''

(b) ''Covered attorneys'' include:

(1) The following U.S. Government (USG) attorneys, referred to collectively as ''covered USG attorneys'' throughout this part:

(i) All active-duty Navy judge advocates (designator 2500 or 2505) or Marine Corps judge advocates (Military Occupational Specialty (MOS) 4402 or 9914).

(ii) All active-duty judge advocates of other U.S. armed forces who practice law or provide legal services under the cognizance and supervision of the JAG.

(iii) All civil service and contracted civilian attorneys who practice law or perform legal services under the cognizance and supervision of the JAG. This includes civilian attorneys employed by the DoN as Executive Agent for Combatant Commands, and for whom the JAG serves as the ''qualifying authority'' under the authority citations.

(iv) All Reserve or Retired judge advocates of the Navy or Marine Corps (and any other U.S. armed force), who, while performing official DoN duties, practice law, provide legal services under the cognizance and supervision of the JAG or are serving in non-legal MOS billets.

(v) All other attorneys appointed by the JAG (or the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) in Marine Corps matters) to serve in billets or to provide legal services normally provided by Navy or Marine Corps judge advocates. This policy applies to officer and enlisted Reservists, active-duty personnel, and any other personnel who are licensed to practice law by any Federal or state authority but who are not members of the Judge Advocate General's Corps or who do not hold the 4402 or 9914 MOS designation in the Marine Corps.

(vi) All qualified volunteer attorneys that have been certified as legal assistance attorneys by the JAG, or his designee, pursuant to the authority citations.

(2) The following non-U.S. Government attorneys, referred to collectively as ''covered non-USG attorneys'' throughout this part:

(i) All civilian attorneys representing individuals in any matter for which the JAG is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings.

(3) The term ''covered attorney'' does not include those civil service or civilian attorneys who practice law or perform legal services under the cognizance and supervision of the General Counsel of the Navy.

(c) Professional or personal misconduct unrelated to a covered attorney's DoN activities, while normally outside the ambit of Subpart B of this part, may be reviewed under procedures established herein and may provide the basis for decisions by the JAG regarding the covered attorney's continued qualification to provide legal services in DoN matters.

(d) Although subpart B of this part do not apply to non-attorneys, they do define the type of ethical conduct that the public and the military community have a right to expect from DoN legal personnel. Accordingly, Subpart B of this part shall serve as the model of ethical conduct for the following personnel when involved with the delivery of legal services under the supervision of the JAG:

(1) Navy Legalmen and Marine Corps legal administrative officers, legal service specialists, and legal services reporters;

(2) Limited duty officers (LAW);

(3) Legal interns; and

(4) civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court reporters, and other personnel holding similar positions. Covered USG attorneys who supervise non-attorney DON employees are responsible for their ethical conduct to the extent provided for in §776.55 of this part.

§ 776.3 Policy.

(a) Covered attorneys shall maintain the highest standards of professional ethical conduct. Loyalty and fidelity to the United States, the law, clients, both institutional and individual, and the rules and principles of professional ethical conduct set forth in subpart B of this part must come before private gain or personal interest.

(b) Subpart B of this part and related procedures set forth herein concern matters solely under the purview of the JAG. Whether conduct or failure to act constitutes a violation of the professional duties imposed by this part is a matter within the sole discretion of the JAG or officials authorized to act for the JAG. Subpart B of this part are not substitutes for, and do not take the place of, other rules and standards governing DoN personnel, such as the Department of Defense Joint Ethics Regulation, the Code of Conduct for members of the Armed Forces, the Uniform Code of Military Justice (UCMJ), and the general precepts of ethical conduct to which all DoN service members and employees are expected to adhere. Similarly, action taken per this part is not supplanted or barred by, and does not, even if the underlying misconduct is the same, supplant or bar the following action from being taken by authorized officials:

(1) Punitive or disciplinary action under the UCMJ; or

(2) Administrative action under the Manual for Courts-Martial (MCM), U.S. Navy Regulations, or under other applicable authority.

(c) Inquiries into allegations of professional misconduct will normally be held in abeyance until any related criminal investigation or proceeding is complete. However, a pending criminal investigation or proceeding does not bar the initiation or completion of a professional misconduct investigation stemming from the same or related conduct or prevent the JAG from imposing professional disciplinary sanctions as provided for in this part.

§ 776.4 Attorney-client relationships.

(a) The executive agency to which the covered USG attorney is assigned (DoN in most cases) is the client served by the covered USG attorney unless detailed to represent another client by

competent authority. Specific guidelines are contained in § 776.32 of this part.

(b) Covered USG attorneys will not establish attorney-client relationships with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority. Wrongfully establishing an attorney-client relationship may subject the attorney to discipline administered per this part. See § 776.21 of this part.

(c) Employment of a non-USG attorney by an individual client does not alter the professional responsibilities of a covered USG attorney detailed or otherwise assigned by competent authority to represent that client. Specific guidance is set forth in subpart E.

§ 776.5 Judicial conduct.

To the extent that it does not conflict with statutes, regulations, or this part, the current version of the American Bar Association Model Code of Judicial Conduct (as amended), hereafter referred to as the 'Code of Judicial Conduct,' applies to all military and appellate judges and to all other covered USG attorneys performing judicial functions under the JAG's supervision within the DoN.

§ 776.6 Conflict.

(a) To the extent that a conflict exists between this part and the rules of other jurisdictions that regulate the professional conduct of attorneys, this part will govern the conduct of covered attorneys engaged in legal functions under JAG cognizance and supervision. Specific and significant instances of conflict between the rules contained in subpart B of this part and the rules of other jurisdictions shall be reported promptly to the Rules Counsel (see § 776.9 of this part), via the supervisory attorney. See § 776.53 of this part.

(b) In the case of Navy and Marine Corps personnel engaged in legal functions under Department of Defense (DoD) vice JAG cognizance and supervision (e.g., DoD Office of Military Commissions), this part and the applicable DoD professional responsibility rules apply. In such a case, to the extent that a conflict exists between Subpart B of this part and applicable DoD professional responsibility rules, the DoD rules shall take precedence.

§ 776.7 Reporting requirements.

Covered USG attorneys shall report promptly to the Rules Counsel (see § 776.9 of this part) any disciplinary or administrative action, including initiation of investigation, by any licensing authority or Federal, State, or local bar, possessing the power to revoke, suspend, or in any way limit the authority to practice law in that jurisdiction, upon himself, herself, or another covered attorney. Failure to report such discipline or administrative action may subject the covered USG attorney to discipline administered per this part. See § 776.71 of this part.

§ 776.8 Professional Responsibility Committee.

(a) *Composition.* This standing committee will consist of the Assistant Judge Advocate General (AJAG) for Military Justice; the Deputy Chiefs of Staff for Naval Legal Service Offices (or Defense Services Offices, effective 1 October 2012), and Region Legal Service Offices; the Chief Judge, Navy-Marine Corps Trial Judiciary; and in cases involving Marine Corps judge advocates, the Deputy Staff Judge Advocate to the Commandant of the Marine Corps (DSJA to CMC); and such other personnel as the JAG from time-to-time may appoint. A majority of the members constitutes a quorum. The Chairman of the Committee shall be the AJAG for Military Justice. The Chairman may excuse members disqualified for cause, illness, or exigencies of military service, and may appoint additional or alternate members on a permanent basis.

(b) *Purpose.* (1) When requested by the JAG, the SJA to CMC, or the Rules Counsel, the Committee will provide formal advisory opinions to the JAG regarding application of subpart B of this part to individual or hypothetical cases.

(2) On its own motion, the Committee may also issue formal advisory opinions on ethical issues of importance to the DoN legal community.

(3) Upon written request, the Committee may also provide formal advisory opinions to covered attorneys

about the propriety of proposed courses of action under subpart B of this part. If such requests are predicated upon full disclosure of all relevant facts, and if the Committee advises that the proposed course of conduct does not violate subpart B of this part, then no adverse action under this rule may be taken against a covered attorney who acts consistently with the Committee's advice. Such requests must be made via the Rules Counsel.

(4) The Chairman will forward copies of all opinions issued by the Committee to the Rules Counsel.

(c) *Limitation.* The Committee will not normally provide ethics advice or opinions concerning professional responsibility matters that are then the subject of litigation.

§ 776.9 Rules Counsel.

Appointed by JAG to act as special assistants for the administration of subpart B of this part, the Rules Counsel derive authority from JAG and, as detailed in this part, have ''by direction'' authority. The Rules Counsel shall cause opinions issued by the Professional Responsibility Committee of general interest to the DoN legal community to be published in summarized, non-personal form in suitable publications. Unless another officer is appointed by JAG to act in individual cases, the following officers shall act as Rules Counsel:

(a) The SJA to CMC, for cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under his cognizance;

(b) Assistant Judge Advocate General, Chief Judge, DoN (AJAG–CJ) for cases involving Navy and Marine Corps trial and appellate judges; and

(c) AJAG (Civil Law), in all other cases.

§ 776.10 Informal ethics advice.

(a) *Advisors.* Covered attorneys may seek informal ethics advice either from the officers named below or from supervisory attorneys in the field. Within the Office of the Judge Advocate General (OJAG) and the Office of the SJA to CMC, the following officials are designated to respond, either orally or in writing, to informal inquiries concerning this rule in the areas of practice indicated:

(1) Director, Criminal Law Division (OJAG Code 20): Military justice matters;

(2) Director, Trial Counsel Assistance Program (TCAP): Trial counsel matters;

(3) Director, Defense Counsel Assistance Program (DCAP): Defense counsel matters;

(4) Director, Legal Assistance Division (OJAG Code 16): Legal assistance matters;

(5) The DSJA to CMC and Head, Research and Civil Law Branch (JAR), Judge Advocate (JA) Division, Headquarters United States Marine Corps (HQMC): Cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of SJA to CMC;

(6) Deputy Chief Judge, Navy-Marine Corps Trial Judiciary: Judicial matters; and

(7) Professional Responsibility Coordinator, Administrative Law Division (OJAG Code 13): All other matters.

(b) *Limitation.* Informal ethics advice will not normally be provided by JAG/HQMC advisors concerning professional responsibility matters that are then the subject of litigation.

(c) *Written advice.* A request for informal advice does not relieve the requester of the obligation to comply with subpart B of this part. Although covered attorneys are encouraged to seek advice when in doubt as to their responsibilities, they remain personally accountable for their professional conduct. If, however, an attorney receives written advice on an ethical matter after full disclosure of all relevant facts and reasonably relies on such advice, no adverse action under this part will be taken against the attorney. Written advice may be sought from either a supervisory attorney or the appropriate advisor in paragraph (a) of this section. The JAG is not bound by unwritten advice or by advice provided by personnel who are not supervisory attorneys or advisors. See §§ 776.8(b)(3) and 776.54(c) of this part.

§ 776.11 Outside practice of law.

A covered USG attorney's primary professional responsibility is to the client, as defined by §776.4 of this part, and he or she is expected to ensure that representation of such client is free from conflicts of interest and otherwise conforms to the requirements of Subpart B of this part and other regulations concerning the provision of legal services within the DoN. The outside practice of law, therefore, must be carefully monitored. Covered USG attorneys who wish to engage in the outside practice of law, including while on terminal leave, must first obtain permission from the JAG. Failure to obtain permission before engaging in the outside practice of law may subject the covered USG attorney to administrative or disciplinary action, including professional sanctions administered per subpart C of this part. Further details are contained in §776.57 and subpart D of this part.

§ 776.12 Maintenance of files.

Pursuant to SECNAVINST 5211.5 (series) and SECNAVINST 5212.5 (series) ethics complaint records and outside practice of law request files shall be maintained by the Office of the Chief Judge, DoN (Code 05) for judicial conduct matters; the Research and Civil Law Branch, JA Division, HQMC (JAR) for Marine matters; and the Office of the JAG, Administrative Law Division (Code 13) for all other matters.

(a) Requests for access to such records should be referred to the Office of the Chief Judge, Washington Navy Yard, 1254 Charles Morris Street SE., Suite 320 Washington, DC, 20374–5124; Deputy Assistant Judge Advocate General (Administrative Law), Office of the Judge Advocate General (Code 13), 1322 Patterson Avenue SE Suite 3000, Washington Navy Yard, DC, 20374–5066; or to Head, Research and Civil Law Branch, Office of the Staff Judge Advocate to the Commandant of the Marine Corps, Headquarters United States Marine Corps, 3000 Marine Corps Pentagon (Room 4D556), Washington DC, 20350–3000, as appropriate.

(b) Local command files regarding professional responsibility complaints will not be maintained. Commanding officers and other supervisory attorneys may, however, maintain personal files but must not share their contents with others.

(c) All records maintained under this part shall be maintained in accordance with the following procedures established by JAGINST 5801.2 (series) and DON Privacy Act Notice N05813–1:

(1) Records shall be maintained for a minimum of two years;

(2) Records shall be maintained for as long as an attorney remains subject to JAG-imposed limitations on practice; and

(3) Records pertaining to unsubstantiated complaints, or to attorneys who are no longer subject to limitation on practice, shall be destroyed after 10 years.

§§ 776.13–776.17 [Reserved]

Subpart B—Rules of Professional Conduct

§ 776.18 Preamble.

(a) A covered attorney is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen who has a special responsibility for the quality of justice and legal services provided to the DoN and to individual clients. These Rules of Professional Conduct (Subpart B of this part) govern the ethical conduct of covered attorneys practicing under the Uniform Code of Military Justice, the MCM, 10 U.S.C. 1044 (Legal Assistance), other laws of the United States, and regulations of the DoN.

(b) Subpart B of this part not only address the professional conduct of judge advocates, but also apply to all other covered attorneys who practice under the cognizance and supervision of the Navy JAG.

(c) All covered attorneys are subject to professional disciplinary action, as outlined in this part, for violation of subpart B of this part. Action on allegations of professional or personal misconduct undertaken per subpart B of this part does not prevent other Federal, state, or local bar associations, or other licensing authorities, from taking professional disciplinary or other administrative action for the same or similar conduct.

§ 776.19 Principles.

Subpart B of this part is based on the following principles. Interpretation of subpart B of this part should flow from their common meaning. To the extent that any ambiguity or conflict exists, subpart B of this part should be interpreted consistent with these general principles.

(a) Covered attorneys shall:

(1) Obey the law and applicable military regulations, and counsel clients to do so.

(2) Follow all applicable ethics rules.

(3) Protect the legal rights and interests of clients, organizational and individual.

(4) Be honest and truthful in all dealings.

(5) Not derive personal gain, except as authorized, for the performance of legal services.

(6) Maintain the integrity of the legal profession.

(b) Ethical rules should be consistent with law. If law and ethics conflict, the law prevails unless an ethical rule is constitutionally based.

(c) The military criminal justice system is a truth-finding process consistent with constitutional law.

§ 776.20 Competence.

(a) A covered attorney shall provide competent, diligent, and prompt representation to a client. Competent representation requires the legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation reasonably necessary for representation. Initial determinations as to competence of a covered USG attorney for a particular assignment shall be made by a supervising attorney before case or issue assignments; however, assigned attorneys may consult with supervisors concerning competence in a particular case.

(b) [Reserved]

§ 776.21 Establishment and scope of representation.

(a) Formation of attorney-client relationships by covered USG attorneys with, and representation of, clients is permissible only when the attorney is authorized to do so by competent authority. For purposes of this part, Military Rules of Evidence 502, the Manual of the Judge Advocate General (JAGINST 5800.7 series), and the Naval Legal Service Command Manual (COMNAVLEGSVCCOMINST 5800.1 series), generally define when an attorney-client relationship is formed between a covered USG attorney and a client servicemember, dependent, or employee.

(b) Generally, the subject matter scope of a covered attorney's representation will be consistent with the terms of the assignment to perform specific representational or advisory duties. A covered attorney shall inform clients at the earliest opportunity of any limitations on representation and professional responsibilities of the attorney towards the client.

(c) A covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements.

(d) A covered attorney's representation of a client does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(e) A covered attorney shall not counsel or assist a client to engage in conduct that the attorney knows is criminal or fraudulent, but a covered attorney may discuss the legal and moral consequences of any proposed course of conduct with a client, and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(f) [Reserved]

§ 776.22 Diligence.

(a) A covered attorney shall act with reasonable diligence and promptness in representing a client, and shall consult with a client as soon as practicable and as often as necessary upon being assigned to the case or issue.

(b) [Reserved]

§ 776.23 Communication.

(a) A covered attorney shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A covered attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) [Reserved]

§ 776.24 Fees.

(a) A covered USG attorney shall not accept any salary, fee, compensation, or other payments or benefits, directly or indirectly, other than Government compensation, for services provided in the course of the covered USG attorney's official duties or employment.

(b) A covered USG attorney shall not accept any salary or other payments as compensation for legal services rendered, by that covered USG attorney in a private capacity, to a client who is eligible for assistance under the DoN Legal Assistance Program, unless so authorized by the JAG. This rule does not apply to Reserve or Retired judge advocates not then serving on extended active-duty.

(c) A Reserve or Retired judge advocate, whether or not serving on extended active-duty, who has initially represented or interviewed a client or prospective client concerning a matter as part of the attorney's official Navy or Marine Corps duties, shall not accept any salary or other payments as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity, unless so authorized by the JAG.

(d) Covered non-USG attorneys may charge fees. Fees shall be reasonable. Factors considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the attorney or attorneys performing the services; and

(8) Whether the fee is fixed or contingent.

(e) When the covered non-USG attorney has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(f) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (a)(7) of this section or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the covered non-USG attorney in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the covered non-USG attorney shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(g) A covered non-USG attorney shall not enter into an arrangement for, charge, or collect a contingent fee for representing an accused in a criminal case.

(h) A division of fees between covered non-USG attorneys who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each attorney or, by written agreement with the client, each attorney assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all the attorneys involved; and

(3) The total fee is reasonable.

(i) Covered Non-USG Attorneys. Paragraphs (d) through (h) of this section apply only to private civilian attorneys practicing in proceedings conducted under the cognizance and supervision of the JAG. The primary purposes of paragraphs (d) through (h) of this section are not to permit the JAG to regulate fee arrangements between civilian attorneys and their clients but to provide guidance to covered USG attorneys practicing with non-USG attorneys and to supervisory attorneys who may be asked to inquire into alleged fee irregularities. Absent paragraphs (d) through (h) of this section, such supervisory attorneys have no readily available standard against which to compare allegedly questionable conduct of a civilian attorney.

§ 776.25 Confidentiality of information.

(a) A covered attorney shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) of this section.

(b) A covered attorney shall reveal information relating to the representation of a client to the extent the covered attorney reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm; or

(2) To prevent the client from committing a criminal act that the covered attorney reasonably believes is likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(c) A covered attorney may reveal such information to the extent the covered attorney reasonably believes necessary:

(1) To secure legal advice about the covered attorney's compliance with subpart B of this part;

(2) To establish a claim or defense on behalf of the covered attorney in a controversy between the covered attorney and the client, to establish a defense to a criminal charge or civil claim against the covered attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the attorney's representation of the client; and/or

(3) To comply with other law or a court order.

(d) Examples of conduct likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system include: Divulging the classified location of a special operations unit such that the lives of members of the unit are placed in immediate danger; sabotaging a vessel or aircraft to the extent that the vessel or aircraft could not conduct an assigned mission, or that the vessel or aircraft and crew could be lost; and compromising the security of a weapons site such that the weapons are likely to be stolen or detonated. Paragraph (b) of this section is not intended to and does not mandate the disclosure of conduct that may have a slight impact on the readiness or capability of a unit, vessel, aircraft, or weapon system. Examples of such conduct are: Absence without authority from a peacetime training exercise; intentional damage to an individually assigned weapon; and intentional minor damage to military property.

§ 776.26 Conflict of interest: General rule.

(a) Except as provided by paragraph (b) of this section, a covered attorney shall not represent a client if the representation of that client involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the covered attorney's responsibilities to another client, a former client or a third person or by a personal interest of the covered attorney.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) of this section, a covered attorney may represent a client if:

(1) The covered attorney reasonably believes that the covered attorney will

be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law or regulation;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the covered attorney in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

(c) These conflict-of-interest rules apply to Reservists only while they are actually drilling or on active-duty-for-training, or, as is the case with Retirees, on extended active-duty or when performing other duties subject to JAG supervision. Therefore, unless otherwise prohibited by criminal conflict-of-interest statutes, Reserve or Retired attorneys providing legal services in their civilian capacity may represent clients, or work in firms whose attorneys represent clients, with interests adverse to the United States. Reserve judge advocates who, in their civilian capacities, represent persons whose interests are adverse to the DoN will provide written notification to their supervisory attorney and commanding officer, detailing their involvement in the matter. Reserve judge advocates shall refrain from undertaking any official action or representation of the DoN with respect to any particular matter in which they are providing representation or services to other clients.

§ 776.27 Conflict of interests: Prohibited transactions.

(a) Covered USG attorneys shall strictly adhere to current DoD Ethics Regulations and shall not:

(1) Knowingly enter into any business transactions on behalf of, or adverse to, a client's interest that directly or indirectly relate to or result from the attorney-client relationship; or

(2) Provide any financial assistance to a client or otherwise serve in a financial or proprietorial fiduciary or bailment relationship, unless otherwise specifically authorized by competent authority.

(b) No covered attorney shall:

(1) Use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by subpart B of this part;

(2) Prepare an instrument giving the covered attorney or a person related to the covered attorney as parent, child, sibling, or spouse any gift from a client, including a testamentary gift, except where the client is related to the donee;

(3) In the case of covered non-USG attorneys, accept compensation for representing a client from one other than the client unless the client consents after consultation, there is no interference with the covered attorney's independence of professional judgment or with the attorney-client relationship, and information relating to representation of a client is protected as required by § 776.25 of this part;

(4) Negotiate any settlement on behalf of multiple clients in a single matter unless each client provides fully informed consent;

(5) Prior to the conclusion of representation of the client, make or negotiate an agreement giving a covered attorney literary or media rights for a portrayal or account based in substantial part on information relating to representation of a client;

(6) Represent a client in a matter directly adverse to a person whom the covered attorney knows is represented by another attorney who is related as parent, child, sibling, or spouse to the covered attorney, except upon consent by the client after consultation regarding the relationship; or

(7) Acquire a proprietary interest in the cause of action or subject matter of litigation the covered attorney is conducting for a client.

(c) [Reserved]

§ 776.28 Conflict of interest: Former client.

(a) A covered attorney who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless

the former client gives informed consent, confirmed in writing.

(b) A covered attorney who has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client or to the covered attorney's own advantage, except as Subpart B of this part would permit or require with respect to a client, or when the information has become generally known; or

(2) Reveal information relating to the representation except as subpart B of this part would permit or require with respect to a client.

(c) [Reserved]

§ 776.29 Imputed disqualification: General rule.

(a) *Imputed disqualification: General rule.* Covered USG attorneys working in the same military law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by § 776.26, § 776.27, § 776.28, or § 776.38 of this part. Covered non-USG attorneys must consult their federal, state, and local bar rules governing the representation of multiple or adverse clients within the same office before such representation is initiated, as such representation may expose them to disciplinary action under the rules established by their licensing authorities.

(b) *Comment.* (1) The circumstances of military (or Government) service may require representation of opposing sides by covered USG attorneys working in the same law office. Such representation is permissible so long as conflicts of interests are avoided and independent judgment, zealous representation, and protection of confidences are not compromised. Thus, the principle of imputed disqualification is not automatically controlling for covered USG attorneys. The knowledge, actions, and conflicts of interests of one covered USG attorney are not imputed to another simply because they operate from the same office. For example, the fact that a number of defense attorneys operate from one office and normally share clerical assistance would not prohibit them from representing co-accused at trial by court-martial. Imputed disqualification rules for non-USG attorneys are established by their individual licensing authorities and may well proscribe all attorneys from one law office from representing a co-accused, or a party with an adverse interest to an existing client, if any attorney in the same office were so prohibited.

(2) Whether a covered USG attorney is disqualified requires a functional analysis of the facts in a specific situation. The analysis should include consideration of whether the following will be compromised: Preserving attorney-client confidentiality; maintaining independence of judgment; and avoiding positions adverse to a client. See, e.g., U.S. v. Stubbs, 23 M.J. 188 (CMA 1987).

(3) Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in a particular circumstance, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which covered USG attorneys work together. A covered USG attorney may have general access to files of all clients of a military law office (e.g., legal assistance attorney) and may regularly participate in discussions of their affairs; it may be inferred that such a covered USG attorney in fact is privy to all information about all the office's clients. In contrast, another covered USG attorney (e.g., military defense counsel) may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a covered USG attorney in fact is privy to information about the clients actually served but not to information of other clients. Additionally, a covered USG attorney changing duty stations or changing assignments within a military office has a continuing duty to preserve confidentiality of information about a client formerly represented. See § 776.25 and § 776.28 of this part.

(4) In military practice, where covered USG attorneys representing adverse interests are sometimes required to share common spaces, equipment,

and clerical assistance, inadvertent disclosure of confidential or privileged material may occur. A covered attorney who mistakenly receives any such confidential or privileged materials should refrain from reviewing them (except for the limited purpose of ascertaining ownership or proper routing), notify the attorney to whom the material belongs that he or she has such material, and either follow instructions of the attorney with respect to the disposition of the materials or refrain from further reviewing or using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court. A covered attorney's duty to provide his or her client zealous representation does not justify a rule allowing the receiving attorney to take advantage of inadvertent disclosures of privileged and/or confidential materials. This policy recognizes and reinforces the principles of: Confidentiality and the attorney-client privilege; analogous principles governing the inadvertent waiver of the attorney-client privilege; the law governing bailments and missent property; and considerations of common sense, reciprocity, and professional courtesy.

(5) Maintaining independent judgment allows a covered USG attorney to consider, recommend, and carry out any appropriate course of action for a client without regard to the covered USG attorney's personal interests or the interests of another. When such independence is lacking or unlikely, representation cannot be zealous.

(6) Another aspect of loyalty to a client is the general obligation of any attorney to decline subsequent representations involving positions adverse to a former client in substantially related matters. This obligation normally requires abstention from adverse representation by the individual covered attorney involved, but, in the military legal office, abstention is not required by other covered USG attorneys through imputed disqualification.

§ 776.30 Successive Government and private employment.

(a) Except as the law or regulations may otherwise expressly permit, a former covered USG attorney, who has information known to be confidential Government information about a person that was acquired while a covered USG attorney, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. The former covered USG attorney may continue association with a firm, partnership, or association representing any such client only if the disqualified covered USG attorney is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom.

(1) The disqualified former covered USG attorney must ensure that he or she is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom; and,

(2) Must provide written notice promptly to the appropriate Government agency to enable it to ascertain compliance with the provisions of applicable law and regulations.

(b) Except as the law or regulations may otherwise expressly permit, a former covered USG attorney, who has information known to be confidential Government information about a person which was acquired while a covered USG attorney, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. The former covered USG attorney may continue association with a firm, partnership, or association representing any such client only if the disqualified covered USG attorney is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom.

(c) Except as the law or regulations may otherwise expressly permit, a covered USG attorney shall not:

(1) Participate in a matter in which the covered USG attorney participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the covered USG attorney's stead in the matter; or,

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the covered USG attorney is participating personally and substantially.

(d) As used in this paragraph (d), the term ''matter'' includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and

(2) Any other matter covered by the conflict-of-interest rules of the DoD, DoN, or other appropriate Government agency.

(e) As used in the rule, the term ''confidential Governmental information'' means information that has been obtained under Governmental authority and that, at the time this Rule is applied, the Government is prohibited by law or regulations from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

(f) [Reserved]

§ 776.31 Former judge or arbitrator.

(a) Except as stated in paragraph (c) of this section, a covered USG attorney shall not represent anyone in connection with a matter in which the covered USG attorney participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A covered USG attorney shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the covered USG attorney is participating personally and substantially as a judge or other adjudicative officer. A covered USG attorney serving as law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the covered USG attorney has notified the judge, other adjudicative officer, or arbitrator, and been disqualified from further involvement in the matter.

(c) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

(d) [Reserved]

§ 776.32 Department of the Navy as client.

(a) Except when representing an individual client pursuant to paragraph (f) of this section, a covered USG attorney represents the DoN (or the Executive agency to which assigned) acting through its authorized officials. These officials include the heads of organizational elements within the naval service, such as the commanders of fleets, divisions, ships and other heads of activities. When a covered USG attorney is assigned to such an organizational element and designated to provide legal services to the head of the organization, an attorney-client relationship exists between the covered attorney and the DoN as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the attorney-client privilege or the rule of confidentiality for the head of the organization's own benefit but may invoke either for the benefit of the DoN. In invoking either the attorney-client privilege or attorney-client confidentiality on behalf of the DoN, the head of the organization is subject to being overruled by higher authority.

(b) If a covered USG attorney knows that an officer, employee, or other member associated with the organizational client is engaged in action, intends to act or refuses to act in a matter related to the representation that is either adverse to the legal interests or obligations of the DoN or a violation of law that reasonably might be imputed to the DoN, the covered USG attorney shall proceed as is reasonably necessary in the best interest of the naval service. In determining how to proceed, the covered USG attorney shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the covered USG attorney's representation, the responsibility in the naval service

and the apparent motivation of the person involved, the policies of the naval service concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize prejudice to the interests of the naval service and the risk of revealing information relating to the representation to persons outside the service. Such measures shall include:

(1) Asking for reconsideration of the matter by the acting official;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the naval service;

(3) Referring the matter to, or seeking guidance from, higher authority in the chain of command including, if warranted by the seriousness of the matter, referral to the supervisory attorney assigned to the staff of the acting official's next superior in the chain of command; or

(4) Advising the acting official that his or her personal legal interests are at risk and that he or she should consult counsel as there may exist a conflict of interest for the covered USG attorney, and the covered USG attorney's responsibility is to the organization.

(c) If, despite the covered USG attorney's efforts per paragraph (b) of this section, the highest authority that can act concerning the matter insists upon action or refuses to act, in clear violation of law, the covered USG attorney shall terminate representation with respect to the matter in question. In no event shall the attorney participate or assist in the illegal activity. In this case, a covered USG attorney shall report such termination of representation to the attorney's supervisory attorney or attorney representing the next superior in the chain of command.

(d) In dealing with the officers, employees, or members of the naval service a covered USG attorney shall explain the identity of the client when it is apparent that the naval service's interests are adverse to those of the officer, employee, or member.

(e) A covered USG attorney representing the naval service may also represent any of its officers, employees, or members, subject to the provisions of § 776.26 of this part and other applicable authority. If the DoN's consent to dual representation is required by § 776.26 of this part, the consent shall be given by an appropriate official of the DoN other than the individual who is to be represented.

(f) A covered USG attorney who has been duly assigned to represent an individual who is subject to criminal or disciplinary action or administrative proceedings, or to provide legal assistance to an individual, has, for those purposes, an attorney-client relationship with that individual.

(g) [Reserved]

§ 776.33 Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the covered attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) When the covered attorney reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the covered attorney may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.

(c) Information relating to the representation of a client with diminished capacity is protected by § 776.25 of this part. When taking protective action pursuant to paragraph (b) of this section, the covered attorney is impliedly authorized under § 776.25(a) of this part to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) [Reserved]

§ 776.34 Safekeeping property.

(a) Covered USG attorneys shall not normally hold or safeguard property of a client or third persons in connection with representational duties. See § 776.27 of this part.

(b) [Reserved]

§ 776.35 Declining or terminating representation.

(a) Except as stated in paragraph (c) of this section, a covered attorney shall not represent a client or, when representation has commenced, shall seek to withdraw from the representation of a client if:

(1) The representation will result in violation of subpart B of this part or other law or regulation;

(2) The covered attorney's physical or mental condition materially impairs his or her ability to represent the client; or

(3) The covered attorney is dismissed by the client.

(b) Except as stated in paragraph (c) of this section, a covered attorney may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the covered attorney's services that the covered attorney reasonably believes is criminal or fraudulent;

(2) The client has used the covered attorney's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the covered attorney considers repugnant or imprudent;

(4) In the case of covered non-USG attorneys, the representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client; or

(5) Other good cause for withdrawal exists.

(c) A covered attorney must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a covered attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for assignment or employment of other counsel, and surrendering papers and property to which the client is entitled and, where a non-USG attorney provided representation, refunding any advance payment of fee that has not been earned. The covered attorney may retain papers relating to the client to the extent permitted by law.

(e) [Reserved]

§ 776.36 Prohibited sexual relations.

(a) A covered attorney shall not have sexual relations with a current client. A covered attorney shall not require, demand, or solicit sexual relations with a client incident to any professional representation.

(b) A covered attorney shall not engage in sexual relations with another attorney currently representing a party whose interests are adverse to those of a client currently represented by the covered attorney.

(c) A covered attorney shall not engage in sexual relations with a judge who is presiding or who is likely to preside over any proceeding in which the covered attorney will appear in a representative capacity.

(d) A covered attorney shall not engage in sexual relations with other persons involved in the particular case, judicial or administrative proceeding, or other matter for which representation has been established, including but not limited to witnesses, victims, co-accused, and court-martial or board members.

(e) For purposes of this paragraph (e), ''sexual relations'' means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the covered attorney for the purpose of arousing or gratifying the sexual desire of either party.

(f) [Reserved]

§ 776.37 Advisor.

(a) In representing a client, a covered attorney shall exercise independent professional judgment and render candid advice. In rendering advice, a covered attorney may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

(b) [Reserved]

§ 776.38 Mediation.

(a) A covered attorney may act as a mediator between individuals if:

(1) The covered attorney consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the attorney-client confidentiality, and obtains each individual's consent to the mediation;

(2) The covered attorney reasonably believes that the matter can be resolved on terms compatible with each individual's best interests, that each individual will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the individuals if the contemplated resolution is unsuccessful; and,

(3) The covered attorney reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the covered attorney has to any of the individuals.

(b) While acting as a mediator, the covered attorney shall consult with each individual concerning the decisions to be made and the considerations relevant in making them, so that each individual can make adequately informed decisions.

(c) A covered attorney shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a)(1) of this section is no longer satisfied. Upon withdrawal, the covered attorney shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

(d) [Reserved]

§ 776.39 Evaluation for use by third persons.

(a) A covered attorney may provide an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The covered attorney reasonably believes that making the evaluation is compatible with other aspects of the covered attorney's relationship with the client; and

(2) The client provides informed consent, confirmed in writing.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by § 776.25 of this part.

(c) [Reserved]

§ 776.40 Meritorious claims and contentions.

(a) A covered attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A covered attorney representing an accused in a criminal proceeding or the respondent in an administrative proceeding, that could result in incarceration, discharge from the Naval service, or other adverse personnel action, may nevertheless defend the client at the proceeding as to require that every element of the case is established.

(b) [Reserved]

§ 776.41 Expediting litigation.

(a) A covered attorney shall make reasonable efforts to expedite litigation or other proceedings consistent with the interests of the client.

(b) [Reserved]

§ 776.42 Candor and obligations toward the tribunal.

(a) A covered attorney shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the covered attorney;

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the covered attorney to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) Offer evidence that the covered attorney knows to be false. If a covered attorney, the attorney's client, or a witness called by the covered attorney, has offered material evidence and the covered attorney comes to know of its falsity, the covered attorney shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A covered attorney may refuse

to offer evidence, other than the testimony of an accused in a criminal matter, that the covered attorney reasonably believes is false; or

(4) Disobey an order imposed by a tribunal unless done openly before the tribunal in a good faith assertion that no valid order should exist.

(b) A covered attorney who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) of this section continue to the conclusion of the proceedings, and apply even if compliance requires disclosure of information otherwise protected by §776.25 of this part.

(d) In an ex parte proceeding, a covered attorney shall inform the tribunal of all material facts known to the covered attorney that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) [Reserved]

§776.43 Fairness to opposing party and counsel.

(a) A covered attorney shall not:

(1) Unlawfully obstruct a party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A covered attorney shall not counsel or assist another person to do any such act;

(2) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(3) Knowingly disobey an order of the tribunal except for an open refusal based on an assertion that no valid obligation exists;

(4) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by a party;

(5) In trial, allude to any matter that the covered attorney does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(6) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(i) The person is a relative, an employee, or other agent of a client; and

(ii) The covered attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(b) [Reserved]

§776.44 Impartiality and decorum of the tribunal.

(a) A covered attorney shall not:

(1) Seek to influence a judge, court member, member of a tribunal, prospective court member or member of a tribunal, or other official by means prohibited by law or regulation;

(2) Communicate ex parte with such a person except as permitted by law or regulation; or

(3) Engage in conduct intended to disrupt a tribunal.

(b) [Reserved]

§776.45 Extra-tribunal statements.

(a) A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

(b) A statement referred to in paragraph (a) of this section ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, and the statement relates to:

(1) The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, victim, or witness, or the identity of a victim or witness, or the expected testimony of a party, suspect, victim, or witness;

(2) The possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any forensic examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of an accused or suspect in a criminal case or other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action;

(5) Information the covered attorney knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of materially prejudicing an impartial proceeding;

(6) The fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(7) The credibility, reputation, motives, or character of civilian or military officials of the DoD.

(c) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim, offense, or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law or regulation, the identity of the persons involved;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) In a criminal case, in addition to paragraphs (c)(1) through (6) of this section:

(i) The identity, duty station, occupation, and family status of the accused;

(ii) If the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) The fact, time, and place of apprehension; and

(iv) The identity of investigating and apprehending officers or agencies and the length of the investigation.

(d) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) The protection and release of information in matters pertaining to the DoN is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

(f) [Reserved]

§ 776.46 Attorney as witness.

(a) A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and quality of legal services rendered in the case; or

(3) Disqualification of the covered attorney would work substantial hardship on the client.

(b) A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely to be called as a witness, unless precluded from doing so by § 776.26 or § 776.28 of this part.

(c) [Reserved]

§ 776.47 Special responsibilities of a trial counsel and other government counsel.

(a) A trial counsel in a criminal case shall:

(1) Recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn;

(2) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(4) Make timely disclosure to the defense of all evidence or information known to the trial counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order or regulation;

(5) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel from making an extrajudicial statement that the trial counsel would be prohibited from making under § 776.45 of this part; and

(6) Except for statements that are necessary to inform the public of the nature and extent of the trial counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

(b) Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. Such communications expressly include, but are not limited to, land-line telephone conversations, facsimile transmissions, U.S. mail, and Email. Trial counsel and other government counsel must not infringe upon the confidential nature of attorney-client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing, or listening to such privileged communications.

(c)(1) The trial counsel represents the United States in the prosecution of special and general courts-martial. See Article 38(a), UCMJ; see also R.C.M. 103(16), 405(d)(3)(A), and 502(d)(5). Accordingly, a trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Paragraph (a)(1) of this section recognizes that the trial counsel does not have all the authority vested in modern civilian prosecutors. The authority to convene courts-martial, and to refer and withdraw specific charges, is vested in convening authorities. Trial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. See United States v. Howe, 37 M.J. 1062 (NMCMR 1993). Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. See also § 776.42(d) of this part (governing ex parte proceedings). Applicable law may require other measures by the trial counsel.

Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of § 776.69 of this part.

(2) Paragraph (a)(3) of this section does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

(3) The exception in paragraph (a)(4) of this section recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable statutes and regulations may proscribe the disclosure of certain information without proper authorization.

(4) A trial counsel may comply with paragraph (a)(5) of this section in a number of ways. These include personally informing others of the trial counsel's obligations under § 776.46 of this part, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

(5) Paragraph (a)(6) of this section supplements § 776.45 of this part, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. A trial counsel can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a trial counsel may make that comply with § 776.45 of this part.

(6) The ''ABA Standards for Criminal Justice: The Prosecution Function,'' (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases. See United States v. Howe, 37 M.J. 1062 (NMCRS 1993); United States v. Dancy, 38 M.J. 1 (CMA 1993); United States v. Hamilton, 41 M.J. 22 (CMA 1994); United States v. Meek, 44 M.J. 1 (CMA 1996).

(d) [Reserved]

§ 776.48 Advocate in nonadjudicative proceedings.

(a) A covered attorney representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of §§ 776.42 (a) through (d), 776.43, and 776.44 of this part.

(b) [Reserved]

§ 776.49 Truthfulness in statements to others.

(a) In the course of representing a client a covered attorney shall not knowingly;

(1) Make a false statement of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by § 776.25 of this part.

(b) [Reserved]

§ 776.50 Communication with person represented by counsel.

(a) In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law to do so.

(b) [Reserved]

§ 776.51 Dealing with an unrepresented person.

(a) When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested. When the covered attorney knows or reasonably should know that the unrepresented person misunderstands the covered attorney's role in the matter, the covered attorney shall make reasonable efforts to correct the misunderstanding.

(b) [Reserved]

§ 776.52 Respect for rights of third persons.

(a) In representing a client, a covered attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) [Reserved]

§ 776.53 Responsibilities of the Judge Advocate General and supervisory attorneys.

(a) The JAG and supervisory attorneys shall make reasonable efforts to ensure that all covered attorneys conform to subpart B of this part.

(b) A covered attorney having direct supervisory authority over another covered attorney shall make reasonable efforts to ensure that the other attorney conforms to subpart B of this part.

(c) A supervisory attorney shall be responsible for another subordinate covered attorney's violation of subpart B of this part if:

(1) The supervisory attorney orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The supervisory attorney has direct supervisory authority over the other attorney and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) A supervisory attorney is responsible for ensuring that the subordinate covered attorney is properly trained and is competent to perform the duties to which the subordinate covered attorney is assigned.

(e) [Reserved]

§ 776.54 Responsibilities of a subordinate attorney.

(a) A covered attorney is bound by this part notwithstanding that the covered attorney acted at the direction of another person.

(b) In recognition of the judge advocate's unique dual role as a commissioned officer and attorney, subordinate judge advocates shall obey lawful directives and regulations of supervisory attorneys when not inconsistent with this part or the duty of a judge advocate to exercise independent professional judgment as to the best interest of an individual client.

(c) A subordinate covered attorney does not violate this part if that covered attorney acts in accordance with a supervisory attorney's written and reasonable resolution of an arguable question of professional duty.

(d) [Reserved]

§ 776.55 Responsibilities regarding non-attorney assistants.

(a) With respect to a non-attorney acting under the authority, supervision, or direction of a covered attorney:

(1) The senior supervisory attorney in an office shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney;

(2) A covered attorney having direct supervisory authority over the non-attorney shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney; and

(3) A covered attorney shall be responsible for conduct of such a person that would be a violation of this part if engaged in by a covered attorney if:

(i) The covered attorney orders or, with the knowledge of the specific conduct, explicitly or impliedly ratifies the conduct involved; or

(ii) The covered attorney has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(b) [Reserved]

§ 776.56 Professional independence of a covered USG attorney.

(a) Notwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with subpart B of this part and remains ultimately responsible for acting in the best interest of the individual client.

(b) Notwithstanding a civilian USG attorney's status as a Federal employee subject, generally, to the authority of superiors, a civilian USG attorney detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with this part and remains ultimately responsible for acting in the best interest of the individual client.

(c) The exercise of professional judgment in accordance with paragraph (a) or (b) of this section shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

(1) Subpart B of this part recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes the similar status of a civilian USG attorney. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties. Thus, when a covered USG attorney is assigned to represent an individual client, neither the attorney's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

(2) Not all direction given to a subordinate covered attorney is an attempt to influence improperly the covered attorney's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A covered attorney subjected to outside pressures should make full disclosure of them to the client. If the covered attorney or the client believes the effectiveness of the representation has been or will be impaired thereby, the covered attorney should take proper steps to withdraw from representation of the client.

(3) Additionally, a judge advocate has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1998.

§ 776.57 Unauthorized practice of law.

(a) A covered USG attorney shall not:

(1) Except as authorized by an appropriate military department, practice law in a jurisdiction where doing so is prohibited by the regulations of the legal profession in that jurisdiction; or

(2) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(3) Engage in the outside practice of law without receiving proper authorization from the JAG.

(b) Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. A covered USG attorney's performance of legal duties pursuant to a military department's authorization, however, is considered a Federal function and not subject to regulation by the states. Thus, a covered USG attorney may perform legal assistance duties even though the covered attorney is not licensed to practice in the jurisdiction within which the covered attorney's duty station is located. Paragraph (a)(2) of this section does not prohibit a covered USG attorney from using the services of non-attorneys and delegating functions to them, so long as the covered attorney supervises the delegated work and retains responsibility for it. See § 776.55 of this part. Likewise, it does not prohibit covered USG attorneys from providing professional advice and instruction to non-attorneys whose employment requires knowledge of law; for example, claims adjusters, social workers, accountants and persons employed in Government agencies. In addition, a covered USG attorney may counsel individuals who wish to proceed pro se or non-attorneys authorized by law or regulation to appear and represent themselves or others before military proceedings.

§§ 776.58–776.65 [Reserved]

§ 776.66 Bar admission and disciplinary matters.

(a) A covered attorney, in connection with any application for bar admission, appointment as a judge advocate, employment as a civilian USG attorney, certification by the JAG or his designee, or in connection with any disciplinary matter, shall not:

(1) Knowingly make a false statement of fact; or

(2) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this part does not require disclosure of information otherwise protected by § 776.25 of this part.

(b) The duty imposed by subpart B of this part extends to covered attorneys and other attorneys seeking admission to a bar, application for appointment as a covered USG attorney (military or civilian) or certification by the JAG or his designee. Hence, if a person makes a false statement in connection with an application for admission or certification (e.g., misstatement by a civilian attorney before a military judge regarding qualifications under R.C.M. 502), it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by subpart B of this part applies to a covered attorney's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a covered attorney to make a knowing misrepresentation or omission in connection with a disciplinary investigation of the covered attorney's own conduct. Subpart B of this part also requires affirmative clarification of any misunderstanding on the part of the admissions, certification, or disciplinary authority of which the person involved becomes aware.

§ 776.67 Judicial and legal officers.

(a) A covered attorney shall not make a statement that the covered attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, investigating officer, hearing officer, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) [Reserved]

§ 776.68 Reporting professional misconduct.

(a) A covered attorney having knowledge that another covered attorney has committed a violation of subpart B of this part that raises a substantial question as to that covered attorney's honesty, trustworthiness, or fitness as a covered attorney in other respects, shall report such violation in accordance with the procedures set forth in this part.

(b) A covered attorney having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation in accordance with the procedures set forth in this part.

(c) This part does not require disclosure of information otherwise protected by § 776.25 of this part.

(d) [Reserved]

§ 776.69 Misconduct.

(a) It is professional misconduct for a covered attorney to:

(1) Violate or attempt to violate subpart B of this part, knowingly assist or induce another to do so, or do so through the acts of another;

(2) Commit a criminal act that reflects adversely on the covered attorney's honesty, trustworthiness, or fitness as an attorney in other respects;

(3) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(4) Engage in conduct that is prejudicial to the administration of justice;

(5) State or imply an ability to influence improperly a government agency or official; or

(6) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(b)(1) Judge advocates hold a commission as an officer in the Navy or Marine Corps and assume legal responsibilities going beyond those of other citizens. A judge advocate's abuse of such commission can suggest an inability to fulfill the professional role of judge advocate and attorney. This concept has similar application to civilian USG attorneys.

(2) Covered non-USG attorneys, Reservists, and Retirees (acting in their civilian capacity), like their active-duty counterparts, are expected to demonstrate model behavior and exemplary integrity at all times. The JAG

may consider any and all derogatory or beneficial information about a covered attorney, for purposes of determining the attorney's qualification, professional competence, or fitness to practice law in DoN matters, or to administer discipline under this rule. Such consideration shall be made, except in emergency situations necessitating immediate action, according to the procedures established in this rule.

§ 776.70 Jurisdiction.

(a) All covered attorneys shall be governed by this part.

(b)(1) Many covered USG attorneys practice outside the territorial limits of the jurisdiction in which they are licensed. While covered attorneys remain subject to the governing authority of the jurisdiction in which they are licensed to practice, they are also subject to subpart B of this part.

(2) When covered USG attorneys are engaged in the conduct of Navy or Marine Corps legal functions, whether serving the Navy or Marine Corps as a client or serving an individual client as authorized by the Navy or Marine Corps, the provisions contained in subpart B of this part supersede any conflicting rules applicable in jurisdictions in which the covered attorney may be licensed. However, covered attorneys practicing in State or Federal civilian court proceedings will abide by the rules adopted by that State or Federal civilian court during the proceedings. As for covered non-USG attorneys practicing under the supervision of the JAG, violation of the provisions contained in subpart B of this part may result in suspension from practice in DoN proceedings.

(3) Covered non-USG attorneys, Reservists, or Retirees (acting in their civilian capacity) who seek to provide legal services in any DoN matter under JAG cognizance and supervision, may be precluded from such practice of law if, in the opinion of the JAG (as exercised through this rule) the attorney's conduct in any venue renders that attorney unable or unqualified to practice in DoN programs or proceedings.

§ 776.71 Requirement to remain in good standing with licensing authorities.

(a) Each officer of the Navy appointed as a member of the JAG Corps, each officer of the Marine Corps designated a judge advocate, and each civil service and contracted civilian attorney who practices law under the cognizance and supervision of the JAG shall maintain a status considered ''in good standing'' at all times with the licensing authority admitting the individual to the practice of law before the highest court of at least one State, Territory, Commonwealth, or the District of Columbia.

(b) The JAG, the Staff Judge Advocate to the Commandant of the Marine Corps, or any other supervisory attorney may require any covered USG attorney over whom they exercise authority to establish that the attorney continues to be in good standing with his or her licensing authority. Representatives of the JAG or of the Staff Judge Advocate to the Commandant of the Marine Corps may also inquire directly of any such covered USG attorney's licensing authority to establish whether he or she continues to be in good standing and has no disciplinary action pending.

(c) Each covered USG attorney shall immediately report to the JAG if any jurisdiction in which the covered USG attorney is or has been a member in good standing commences disciplinary investigation or action against him or her or if the covered USG attorney is disciplined, suspended, or disbarred from the practice of law in any jurisdiction.

(d) Each covered non-USG attorney representing an accused in any court-martial or administrative separation proceeding shall be a member in good standing with, and authorized to practice law by, the bar of a Federal court or of the bar of the highest court of a State, or a lawyer otherwise authorized by a recognized licensing authority to practice law and found by the military judge to be qualified to represent the accused.

(e)(1) Generally, the JAG relies on the licensing authority granting the certification or privilege to practice

law to define the phrase ''good standing.'' However, as circumstances require, the JAG may, instead, use separate criteria to determine compliance. At a minimum, ''good standing'' means the individual:

(i) Is subject to the jurisdiction's disciplinary review process;

(ii) Has not been suspended or disbarred from the practice of law within the jurisdiction;

(iii) Is current in the payment of all required fees;

(iv) Has met applicable continuing legal education requirements that the jurisdiction has imposed (or the cognizant authority has waived); and

(v) Has met such other requirements as the cognizant authority has set for eligibility to practice law. So long as these conditions are met, a covered USG attorney may be ''inactive'' as to the practice of law within a particular jurisdiction and still be ''in good standing'' for purposes of subpart B of this part.

(2) Rule for Court-Martial 502(d)(3)(A) requires that any civilian defense counsel representing an accused in a court-martial be a member of the bar of a Federal court or of the bar of the highest court of a State. This civilian defense counsel qualification only has meaning if the attorney is a member ''in good standing,'' and is then authorized to practice law within that jurisdiction. See United States v. Waggoner, 22 M.J. 692 (AFCMR 1986). It is appropriate for the military judge, in each and every case, to ensure that a civilian defense counsel is qualified to represent the accused.

(3) Failure of a judge advocate to comply with the requirements of subpart B of this part may result in professional disciplinary action as provided for in this rule, loss of certification under Articles 26 and/or 27(b), UCMJ, adverse entries in military service records, and administrative separation under SECNAVINST 1920.6 (series) based on the officer's failure to maintain professional qualifications. In the case of civil service and contracted civilian attorneys practicing under the JAG's cognizance and supervision, failure to maintain good standing or otherwise to comply with the requirements of subpart B of this part may result in adverse administrative action under applicable personnel regulations, including termination of employment.

(4) A covered USG attorney need only remain in good standing in one jurisdiction. If admitted to the practice of law in more than one jurisdiction, however, and any jurisdiction commences disciplinary action against or disciplines, suspends or disbars the covered USG attorney from the practice of law, the covered USG attorney must so advise the JAG.

(5) An essential time to verify that a judge advocate is currently in good standing is upon accession. Other appropriate times for verification are before a judge advocate is promoted to a higher grade, detailed to a new command, or assigned to duties where there is a statutory requirement to be a member of the bar, such as a military judge per 10 U.S.C. 826(b). The JAG, the SJA to CMC, or any other supervisory attorney may need to verify the professional qualifications of a judge advocate, either periodically or on an occasional basis. JAGINST 5803.2 (series) establishes a biennial requirement for all covered attorneys to provide proof of good standing.

(6) Certification by the United States Court of Appeals for the Armed Forces that a judge advocate is in good standing with that court will not satisfy the requirement of this section, since such status is normally dependent on Article 27, UCMJ, certification.

§§ 776.72–776.75 [Reserved]

Subpart C—Complaint Processing Procedures

§ 776.76 Policy.

(a) It is JAG's policy to investigate and resolve, expeditiously and fairly, all allegations of professional impropriety lodged against covered attorneys under JAG supervision.

(b) Rules Counsel approval will be obtained before conducting any preliminary inquiry or formal investigation into an alleged violation of the Rules of Professional Conduct (subpart B of this part) or the ABA Model Code of Judicial Conduct (Code of Judicial Conduct). The Rules Counsel will notify the JAG prior to the commencement of

any preliminary inquiry or investigation. The preliminary inquiry and any subsequent investigation will be conducted according to the procedures set forth in this subpart.

§ 776.77 Related investigations and actions.

Acts or omissions by covered attorneys may constitute professional misconduct, criminal misconduct, poor performance of duty, or a combination of all three. Care must be taken to characterize appropriately the nature of a covered attorney's conduct to determine who may and properly should take official action.

(a) Questions of legal ethics and professional misconduct by covered attorneys are within the exclusive province of the JAG. Ethical or professional misconduct will not be attributed to any covered attorney in any official record without a final JAG determination, made in accordance with this part that such misconduct has occurred.

(b) Criminal misconduct is properly addressed by the covered USG attorney's commander through the disciplinary process provided under the UCMJ and implementing regulations, or through referral to appropriate civil authority.

(c) Poor performance of duty is properly addressed by the covered USG attorney's reporting senior through a variety of administrative actions, including documentation in fitness reports or employee appraisals.

(d) Prior JAG approval is not required to investigate allegations of criminal conduct or poor performance of duty involving covered attorneys. When, however, investigations into criminal conduct or poor performance reveal conduct that constitutes a violation of this part or of the Code of Judicial Conduct in the case of judges, such conduct shall be reported to the Rules Counsel immediately.

(e) Generally, professional responsibility complaints will be processed in accordance with this part upon receipt. Rules Counsel may, however, on a case-by-case basis, delay such processing to await the outcome of pending related criminal, administrative, or investigative proceedings.

(f) Nothing in this part prevents a military judge or other appropriate official from removing a covered attorney from acting in a particular court-martial or prevents the JAG, the SJA to CMC, or the appropriate official from reassigning a covered attorney to different duties prior to, during, or subsequent to proceedings conducted under the provision of this part.

§ 776.78 Informal complaints.

Informal, anonymous, or ''hot line'' type complaints alleging professional misconduct must be referred to the appropriate authority (such as the JAG Inspector General or the concerned supervisory attorney) for inquiry. Such complaints are not, by themselves, cognizable under this subpart but may, if reasonably confirmed, be the basis of a formal complaint described in § 776.79 of this part.

§ 776.79 The formal complaint.

(a) The formal complaint shall:

(1) Be in writing and be signed by the complainant;

(2) State that the complainant has personal knowledge, or has otherwise received reliable information indicating, that:

(i) The covered attorney concerned is, or has been, engaged in misconduct that demonstrates a lack of integrity, that constitutes a violation of this part or the Code of Judicial Conduct or a failure to meet the ethical standards of the profession; or

(ii) The covered attorney concerned is ethically, professionally, or morally unqualified to perform his or her duties; and

(3) Contain a complete, factual statement of the acts or omissions constituting the substance of the complaint, as well as a description of any attempted resolution with the covered attorney concerned. Supporting statements, if any, should be attached to the complaint.

(b) A complaint may be initiated by any person, including the Administrative Law Division of the Office of the Judge Advocate General (OJAG) Administrative Law Division (Code 13) or the Judge Advocate Research and Civil Law Branch, Office of the SJA to CMC, HQMC (JAR).

§ 776.80 Initial screening.

(a) Complaints involving conduct of a Navy or Marine Corps trial or appellate judge shall be forwarded to OJAG (Code 05). All other complaints shall be forwarded to OJAG (Code 13) or, in cases involving Marine Corps judge advocates or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of the SJA to CMC, to JAR. In cases involving Marine judge advocates, including trial and appellate judges, where the SJA to CMC is not the Rules Counsel, the cognizant Rules Counsel will notify the SJA to CMC when a complaint is received.

(b) OJAG (Code 05), OJAG (Code 13), and JAR shall log all formal complaints received and will ensure a copy of the complaint and allied papers is provided to the covered attorney who is the subject of the complaint. Service of the formal complaint and other materials on the covered attorney must be accomplished through personal service or registered/certified mail sent to the covered attorney's last known address reflected in official Navy and Marine Corps records or in the records of the state bar(s) that licensed the attorney to practice law. The covered attorney's supervisory attorney must also be provided notice of the complaint.

(c) The covered attorney concerned may elect to provide an initial statement, normally within ten calendar days from receipt, regarding the complaint for the Rules Counsel's consideration. The covered attorney will promptly inform OJAG (Code 05), OJAG (Code 13), or JAR if he or she intends to submit any such statement. At this screening stage, forwarding of the complaint to the Rules Counsel will not be unduly delayed to await the covered attorney's submission.

(d) The cognizant Rules Counsel shall initially review the complaint, and any statement submitted by the covered attorney complained of, to determine whether it complies with the requirements set forth in paragraph (4) of this section. The Rules Counsel is not required to delay the initial review of the complaint awaiting the covered attorney's submission.

(1) Complaints that do not comply with the requirements may be returned to the complainant for correction or completion, and resubmission to OJAG (Code 05), OJAG (Code 13), or JAR. If the complaint is not corrected or completed and resubmitted within 30 days of the date of its return, the Rules Counsel may close the file without further action. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence relating to the return and resubmission of a complaint, and shall notify the covered attorney concerned, as well as the supervisory attorney, if and when the Rules Counsel takes action to close the file.

(2) Complaints that comply with the requirements shall be further reviewed by the cognizant Rules Counsel to determine whether the complaint establishes probable cause to believe that a violation of subpart B of this part or Code of Judicial Conduct has occurred.

(e) The cognizant Rules Counsel shall close the file without further action if the complaint does not establish probable cause to believe a violation has occurred. The Rules Counsel shall notify the complainant, the covered attorney concerned, and the supervisory attorney, that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file.

(f) The cognizant Rules Counsel may close the file if there is a determination that the complaint establishes probable cause but the violation is of a minor or technical nature appropriately addressed through corrective counseling. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.) The Rules Counsel shall ensure the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and the supervisory attorney that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under

these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting of such action.

§ 776.81 Forwarding the complaint.

(a) If the Rules Counsel determines there is probable cause to believe that a violation of subpart B of this part or of the Code of Judicial Conduct has occurred, and the violation is not of a minor or technical nature, the Rules Counsel shall notify the JAG. (In cases relating to Marine Corps judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, the SJA to CMC shall also be notified.) The Rules Counsel shall forward the complaint and any allied papers, as follows:

(1) In cases involving a military trial judge, if practicable, to a covered attorney with experience as a military trial judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(2) In cases involving a military appellate judge, if practicable, to a covered attorney with experience as a military appellate judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(3) In all other cases, to such covered attorney as the cognizant Rules Counsel may designate (normally senior to the covered attorney complained of and not previously involved in the case), and assign the officer to conduct a preliminary inquiry into the matter.

(b) The Rules Counsel shall provide notice of the complaint (if not previously informed) as well as notice of the preliminary inquiry:

(1) To the covered attorney against whom the complaint is made as well as the supervisory attorney;

(2) In cases involving a covered USG attorney on active duty or in civilian Federal service, to the commanding officer, or equivalent, of the covered USG attorney concerned;

(3) In cases involving Navy or Marine Corps judge advocates serving in Naval Legal Service Command (NLSC) units, to Commander, NLSC;

(4) In cases involving Navy attorneys serving in Marine Corps units, involving Marine Corps attorneys serving in Navy units, or involving Marine Corps trial and appellate judges, to the SJA to CMC (Attn: JAR);

(5) In cases involving trial or appellate court judges, to either the Chief Judge, Navy-Marine Corps Trial Judiciary or Chief Judge, Navy-Marine Corps Court of Criminal Appeals, as appropriate; and

(6) In cases involving covered attorneys certified by the Judge Advocates General/Chief Counsel of the other uniformed services, to the appropriate military service attorney discipline section.

§ 776.82 Interim suspension.

(a) Where the Rules Counsel determines there is probable cause to believe that a covered attorney has committed misconduct and poses a substantial threat of irreparable harm to his or her clients or the orderly administration of military justice, the Rules Counsel shall so advise the JAG. Examples of when a covered attorney may pose a ''substantial threat of irreparable harm'' include, but are not limited to:

(1) When charged with the commission of a crime which involves moral turpitude or reflects adversely upon the covered attorney's fitness to practice law, and where substantial evidence exists to support the charge;

(2) When engaged in the unauthorized practice of law (e.g., failure to maintain good standing in accordance with § 776.71 of this part); or

(3) Where unable to represent client interests competently.

(b) Upon receipt of information from the Rules Counsel, JAG may order the covered attorney to show cause why he or she should not face interim suspension, pending completion of a professional responsibility investigation. The covered attorney shall have 10 calendar days in which to respond. Notice of the show cause order shall be provided as outlined in § 776.81(b) of this part.

(c) If an order to show cause has been issued under paragraph (b) of this section, and the period for response has passed without a response, or after consideration of any response and finding sufficient evidence demonstrating probable cause to believe that the covered attorney is guilty of misconduct and poses a substantial threat of irreparable harm to his or her client or the orderly administration of military justice, the JAG may direct an interim suspension of the covered attorney's certification under Articles 26(b) or 27(b), UCMJ, or R.C.M. 502(d)(3), or the authority to provide legal assistance, pending the results of the investigation and final action under this part. Notice of such action shall be provided as outlined in § 776.81(b) of this part.

(d) Within 10 days of the JAG's decision to impose an interim suspension, the covered attorney may request an opportunity to be heard before an impartial officer designated by the JAG. Where so requested, that opportunity will be scheduled within 10 calendar days of the request. The designated officer shall receive any information that the covered attorney chooses to submit on the limited issue of whether to continue the interim suspension. The designated officer shall submit a recommendation to the JAG within 5 calendar days of conclusion.

(e) A covered attorney may, based upon a claim of changed circumstances or newly discovered evidence, petition for dissolution or amendment of the JAG's imposition of interim suspension.

(f) Any professional responsibility investigation involving a covered attorney who has been suspended pursuant to subpart B of this part shall proceed and be concluded without appreciable delay. However, the JAG may determine it necessary to await completion of a related criminal investigation or proceeding, or completion of a professional responsibility action initiated by other licensing authorities. In such cases, the JAG shall cause the Rules Counsel to so notify the covered attorney under interim suspension as well as those officials outlined in § 776.81(b) of this part. Where necessary, continuation of the interim suspension shall be reviewed by the JAG every 6 months.

§ 776.83 Preliminary inquiry.

(a) The purpose of the preliminary inquiry is to determine whether, in the opinion of the officer appointed to conduct the preliminary inquiry (PIO), the questioned conduct occurred and, if so, whether the preponderance of the evidence demonstrates that such conduct constitutes a violation of subpart B of this part or the Code of Judicial Conduct. The PIO is to recommend appropriate action in cases of substantiated violations.

(b) Upon receipt of the complaint, the PIO shall promptly investigate the allegations, generally following the format and procedures set forth in the Manual of the Judge Advocate General (JAGMAN) for the conduct of command investigations. Reports of relevant investigations by other authorities including, but not limited to, the command, the Inspector General, and State licensing authorities should be used. The PIO should also:

(1) Identify and obtain sworn affidavits or statements from all relevant and material witnesses to the extent practicable;

(2) Identify, gather, and preserve all other relevant and material evidence; and

(3) Provide the covered attorney concerned an opportunity to review all evidence, affidavits, and statements collected and a reasonable period of time (normally not exceeding 10 calendar days) to submit a written statement or any other written material that the covered attorney wishes considered.

(c) The PIO may appoint and use such assistants as may be necessary to conduct the preliminary inquiry.

(d) The PIO shall personally review the results of the preliminary inquiry to determine whether, by a preponderance of the evidence, a violation of subpart B of this part or of the Code of Judicial Conduct has occurred.

(1) If the PIO determines that no violation has occurred or that the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the PIO determines by a preponderance of the evidence that a violation did occur, and that corrective action greater than counseling may be warranted, he or she shall:

(i) Draft a list of substantiated violations of these Rules of Professional Conduct or the Code of Judicial Conduct;

(ii) Recommend appropriate action; and

(iii) Forward the preliminary inquiry to the Rules Counsel, providing copies to the covered attorney concerned and the supervisory attorney.

(e) The Rules Counsel shall review all preliminary inquiries. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the PIO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the PIO recommendation or through the Rules Counsel's own review of the report, that a violation of this part has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously provided notice of the complaint. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that a violation of subpart B of this part has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously provided notice of the complaint that the file has been closed. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that further professional discipline or corrective action may be warranted, the Rules Counsel shall notify the JAG and take the following action:

(i) In cases involving a military trial judge, if practicable, forward the recommendation to a covered attorney with experience as a military trial judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of the Manual for Courts-Martial);

(ii) In cases involving a military appellate judge, forward the recommendation to a covered attorney with experience as a military appellate judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of the Manual for Courts-Martial); or

(iii) In all other cases, assign a covered attorney (normally senior to the covered attorney complained of and not previously involved in the case) to conduct an ethics investigation.

§ 776.84 Ethics investigation.

(a) When an ethics investigation is initiated, the covered attorney concerned shall be so notified, in writing, by the Rules Counsel. Notice of such action shall also be provided as outlined in § 776.81(b) of this part.

(b) The covered attorney concerned will be provided written notice of the following rights in connection with the ethics investigation:

(1) To request a hearing before the investigating officer (IO);

(2) To inspect all evidence gathered;

(3) To present written or oral statements or materials for consideration;

(4) To call witnesses at his or her own expense (local military witnesses should be made available at no cost);

(5) To be assisted by counsel (see paragraph (c) of this section);

(6) To challenge the IO for cause (such challenges must be made in writing and sent to the Rules Counsel via the challenged officer); and

(7) To waive any or all of these rights. Failure to affirmatively elect any of the rights included in this section shall be deemed a waiver by the covered attorney.

(c) If a hearing is requested, the covered attorney may be represented by counsel at the hearing. Such counsel may be:

(1) A civilian attorney retained at no expense to the Government; or,

(2) In the case of a covered USG attorney, another USG attorney:

(i) Detailed by the cognizant Naval Legal Service Office (NLSO), (or Defense Services Office (DSO), effective October 1, 2012), Law Center, or Legal Service Support Section (LSSS); or

(ii) Requested by the covered attorney concerned, if such counsel is deemed reasonably available in accordance with the provisions regarding individual military counsel set forth in Chapter I of the JAGMAN. There is no right to detailed counsel if requested counsel is made available.

(d) If a hearing is requested, the IO will conduct the hearing after reasonable notice to the covered attorney concerned. The hearing will not be unreasonably delayed. The hearing is not adversarial in nature and there is no right to subpoena witnesses. Rules of evidence do not apply. The covered attorney concerned or his or her counsel may question witnesses that appear. The proceedings shall be recorded but no transcript of the hearing need be made. Evidence gathered during, or subsequent to, the preliminary inquiry and such additional evidence as may be offered by the covered attorney shall be considered.

(e) The IO may appoint and use such assistants as may be necessary to conduct the ethics investigation.

(f) The IO shall prepare a report which summarizes the evidence, to include information presented at any hearing.

(1) If the IO believes that no violation has occurred or, by clear and convincing evidence, that the violation has occurred but the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the IO believes by clear and convincing evidence that a violation did occur, and that corrective action greater than counseling is warranted, he or she shall:

(i) Modify, as necessary, the list of substantiated violations of this part or, in the case of a military trial or appellate judge, the Code of Judicial Conduct;

(ii) Recommend appropriate action; and

(iii) Forward the ethics investigation to the Rules Counsel with a copy to the attorney investigated.

(g) The Rules Counsel shall review all ethics investigations. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the IO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of subpart B of this part or Code of Judicial Conduct has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint. OJAG (Code 05), OJAG (Code 13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of this part or Code of Judicial Conduct has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any

such decision, to include a brief summary of the case, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.) The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint that the file has been closed. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel believes, either consistent with the IO recommendation or through the Rules Counsel's own review of the inquiry report, that professional disciplinary action greater than corrective counseling is warranted, the Rules Counsel shall forward the investigation, with recommendations as to appropriate disposition, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.)

§ 776.85 Effect of separate proceeding.

(a) For purposes of this section, the term ''separate proceeding'' includes, but is not limited to, court-martial, non-judicial punishment, administrative board, or similar civilian or military proceeding.

(b) In cases in which a covered attorney is determined, at a separate proceeding determined by the Rules Counsel to afford procedural protection equal to that provided by a preliminary inquiry under this part, to have committed misconduct that forms the basis for ethics charges under this part, the Rules Counsel may dispense with the preliminary inquiry and proceed directly with an ethics investigation.

(c) In those cases in which a covered attorney is determined to have committed misconduct at a separate proceeding which the Rules Counsel determines has afforded procedural protection equal to that provided by an ethics investigation under this part, the previous determination regarding the underlying misconduct is res judicata with respect to that issue during an ethics investigation. A subsequent ethics investigation based on such misconduct shall afford the covered attorney a hearing into whether the underlying misconduct constitutes a violation of subpart B of this part, whether the violation affects his or her fitness to practice law, and what sanctions, if any, are appropriate.

(d) Notwithstanding paragraphs (b) and (c) in this section, the Rules Counsel may dispense with the preliminary inquiry and ethics investigation and, after affording the covered attorney concerned written notice and an opportunity to be heard in writing, recommend to the JAG that the covered attorney concerned be disciplined under this part when the covered attorney has been:

(1) Decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the JAG or Chief Counsel of another Military Department;

(2) Disbarred or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Court of Appeals for the Armed Forces or by any Federal, State, or local bar; or

(3) Convicted of a felony (or any offense punishable by one year or more of imprisonment) in a civilian or military court that, in the opinion of the Rules Counsel, renders the attorney unqualified or incapable of properly or ethically representing the DoN or a client when the Rules Counsel has determined that the attorney was afforded procedural protection equal to that provided by an ethics investigation under this part.

§ 776.86 Action by the Judge Advocate General.

(a) The JAG is not bound by the recommendation rendered by the Rules Counsel, IO, PIO, or any other interested party, but will base any action on the record as a whole. Nothing in this

part limits the JAG's authority to suspend from the practice of law in DoN matters any covered attorney alleged or found to have committed professional misconduct or violated subpart B of this part, either in DoN or civilian proceedings, as detailed in this part.

(b) The JAG may, but is not required to, refer any case to the Professional Responsibility Committee for an advisory opinion on interpretation of subpart B of this part or its application to the facts of a particular case.

(c) Upon receipt of the ethics investigation, and any requested advisory opinion, the JAG will take such action as the JAG considers appropriate in the JAG's sole discretion. The JAG may, for example:

(1) Direct further inquiry into specified areas.

(2) Determine the allegations are unfounded, or that no further action is warranted, and direct the Rules Counsel to make appropriate file entries and notify the complainant, covered attorney concerned, and all officials previously notified of the complaint.

(3) Determine the allegations are supported by clear and convincing evidence, and take appropriate corrective action including, but not limited to:

(i) Limiting the covered attorney to practice under direct supervision of a supervisory attorney;

(ii) Limiting the covered attorney to practice in certain areas or forbidding him or her from practice in certain areas;

(iii) Suspending or revoking, for a specified or indefinite period, the covered attorney's authority to provide legal assistance;

(iv) Finding that the misconduct so adversely affects the covered attorney's ability to practice law in the naval service or so prejudices the reputation of the DoN legal community, the administration of military justice, the practice of law under the cognizance of the JAG, or the armed services as a whole, that certification under Article 27(b), UCMJ, or R.C.M. 502(d)(3), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or permanently revoked;

(v) In the case of a judge, finding that the misconduct so prejudices the reputation of military trial and/or appellate judges that certification under Article 26(b), UCMJ (10 U.S.C. 826(b)), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or to be permanently revoked; and

(vi) Directing the Rules Counsel to contact appropriate authorities such as the Chief of Naval Personnel or the Commandant of the Marine Corps so that pertinent entries in appropriate DoN records may be made; notifying the complainant, covered attorney concerned, and any officials previously provided copies of the complaint; and notifying appropriate tribunals and authorities of any action taken to suspend, decertify, or limit the practice of a covered attorney as counsel before courts-martial or the U.S. Navy-Marine Corps Court of Criminal Appeals, administrative boards, as a legal assistance attorney, or in any other legal proceeding or matter conducted under JAG cognizance and supervision.

§ 776.87 Finality.

Any action taken by the JAG is final.

§ 776.88 Report to licensing authorities.

Upon determination by the JAG that a violation of subpart B of this part or the Code of Judicial Conduct has occurred, the JAG may cause the Rules Counsel to report that fact to the Federal, State, or local bar or other licensing authority of the covered attorney concerned. If so reported, notice to the covered attorney shall be provided by the Rules Counsel. This decision in no way diminishes a covered attorney's responsibility to report adverse professional disciplinary action as required by the attorney's Federal, State, and local bar or other licensing authority.

Subpart D—Outside Practice of Law by Covered USG Attorneys

§ 776.89 Background.

(a) A covered USG attorney's primary professional responsibility is to the DoN, and he or she is expected to devote the required level of time and

effort to satisfactorily accomplish assigned duties. Covered USG attorneys engaged in the outside practice of law, including while on terminal leave, must comply with local bar rules governing professional responsibility and conduct and obtain proper authorization from the JAG as required by §§ 776.57 and 776.88 of this part.

(b) Outside employment of DoN personnel, both military and civilian, is limited by the UCMJ, MCM, and 10 U.S.C. 1044. A covered USG attorney may not provide compensated legal services, while working in a private capacity, to persons who are eligible for legal assistance, unless specifically authorized by the JAG. See § 776.24. Because of the appearance of misuse of public office for private gain, this prohibition is based upon the status of the proposed client and applies whether or not the services provided are actually available in a DoN/DoD legal assistance office.

(c) Additionally, DoN officers and employees are prohibited by 18 U.S.C. 209 from receiving pay or allowances from any source other than the United States for the performance of any official service or duty unless specifically authorized by law. Furthermore, 18 U.S.C. 203 and 205 prohibit Federal officers and employees from personally representing or receiving, directly or indirectly, compensation for representing any other person before any Federal agency or court on matters in which the United States is a party or has an interest.

(d) These limitations are particularly significant when applied to covered USG attorneys who intend to engage concurrently in a civilian law practice. In such a situation, the potential is high for actual or apparent conflict arising from the mere opportunity to obtain clients through contacts in the course of official business. Unique conflicts or adverse appearances may also develop because of a covered USG attorney's special ethical responsibilities and loyalties.

§ 776.90 Definition.

(a) Outside practice of law is defined as any provision of legal advice, counsel, assistance or representation, with or without compensation, that is not performed pursuant or incident to duties as a covered USG attorney (including while on terminal leave). Occasional uncompensated assistance rendered to relatives or friends is excluded from this definition (unless otherwise limited by statute or regulation). Teaching a law course as part of a program of education or training offered by an institution of higher education is not practicing law for purposes of this rule.

(b) The requirement to seek permission prior to engaging in the outside practice of law does not apply to non-USG attorneys, or to Reserve or Retired judge advocates unless serving on active duty for more than 30 consecutive days.

§ 776.91 Policy.

(a) As a general rule, the JAG will not approve requests by covered USG attorneys to practice law in association with attorneys or firms which represent clients with interests adverse to the DoN.

(b) The JAG's approval of a particular request does not constitute DoN certification of the requesting attorney's qualifications to engage in the proposed practice or DoN endorsement of activities undertaken after such practice begins. Moreover, because any outside law practice is necessarily beyond the scope of a covered USG attorney's official duties, the requesting attorney should consider obtaining personal malpractice insurance coverage.

§ 776.92 Action.

(a) Covered USG attorneys, who contemplate engaging in the outside practice of law, including while on terminal leave, must first obtain approval from the JAG. Requests should be forwarded in the form prescribed in appendix to subpart D of part 776 to OJAG (Code 05), JAG (Code 13), or JAR, as appropriate, via the attorney's chain of command.

(b) The requesting attorney's commanding officer may:

(1) Disapprove and return the request if he or she perceives actual or apparent conflicts of interests;

(2) Recommend disapproval of the request and forward it, along with his or

her rationale for such a recommendation; or

(3) Forward the request recommending approval and providing such other information as may be relevant.

(c) The JAG will review the request and advise applicants in writing of the decision, and of any conditions and limitations under which a particular practice may be undertaken. Until permission is granted, applicants will not commence any outside law practice.

§ 776.93 Revalidation.

(a) Covered USG attorneys to whom permission is given to engage in the outside practice of law will notify the JAG in writing, via their chain of command, within 30 days of any material change in:

(1) The nature or scope of the outside practice described in their requests, including termination, or

(2) Their DoN assignment or responsibilities.

(b) Covered USG attorneys to whom permission is given to engage in the outside practice of law will annually resubmit an application to continue the practice, with current information, by October 1 each year.

APPENDIX TO SUBPART D OF PART 776—OUTSIDE LAW PRACTICE QUESTIONNAIRE AND REQUEST.

DATE

From: (Attorney Requesting Outside Practice of Law)

To: Deputy Chief Judge, Navy-Marine Corps Trial Judiciary/Deputy Assistant Judge Advocate General (Administrative Law)/Head, Judge Advocate Research and Civil Law Branch, Judge Advocate Division

Via: (Chain of Command)

Subj: OUTSIDE PRACTICE OF LAW REQUEST ICO (Name of attorney)

1. Background Data

a. Name, rank/pay grade:

b. Current command and position:

c. Description of duties and responsibilities (including collateral duty assignments):

d. Describe any DoN responsibilities that require you to act officially in any way with respect to any matters in which your anticipated outside employer or clients have interests:

e. Normal DoN working hours:

2. Proposed Outside Practice of Law Information

a. Mailing address and phone number:

b. Working hours:

c. Number of hours per month:

d. Description of proposed practice (indicate the type of clientele you anticipate serving, as well as the type of work that you will perform):

e. Describe whether you will be a sole practitioner, or collocated, renting from, or otherwise affiliated or associated in any matter with other attorneys:

f. Describe, in detail, any anticipated representation of any client before the United States or in any matter in which the United States has an interest:

g. Describe the manner in which you will be compensated (hourly, by case, fixed salary, and how much of your fees will be related in any way to any representational services before the Federal Government by yourself or by another):

h. Provide a description of any military-related work to which your proposed practice may be applied including, but not limited to, courts-martial, administrative discharge boards, claims against the Department of the Navy, and so forth:

3. Attorneys With Whom Outside Practice Is/Will Be Affiliated, Collocated, or Otherwise Associated

a. Identify the type of organization with which you will be affiliated (sole practitioner, partnership, and so forth), the number of attorneys in the firm, and the names of the attorneys with whom you will be working:

b. Identify the attorneys in the firm who are associated in any way with the military legal community (e.g., active, Reserve, or retired judge advocate), and specify their relationship to any of the military services:

c. Identify the nature of your affiliation with the organization with which you intend to be associated (staff attorney, partner, associate, space-sharing, rental arrangement, other):

d. Provide a brief description of the type of legal practice engaged in by the organization with which you intend to affiliate, including a general description of the practice, as well as the clientele:

e. Describe the clientele who are military personnel or their dependents, and the number and type of cases handled:

f. Describe whether your affiliates will refer clients to you, and the anticipated frequency of referral:

g. Describe

(1) Whether your associates will assist or represent clients with interests adverse to the United States or in matters in which the United States has an interest:

(2) Those clients, matters, and interests in detail:

(3) What support will you provide in such cases:

(4) What compensation, in any form, you will receive related to such cases:

4. Desired Date of Commencement of Outside Practice

a. Identify if this is your first request or an annual submission for re-approval:

b. If this is an annual submission, indicate when your outside practice began:

c. If this is your first request, indicate when you wish to begin your practice:

5. Conflicts of Interest and Professional Conduct (Include the following statement in your request)

''I certify that I have read and understand my obligations under enclosure (3) to JAGINST 5803.1 (series), DOD 5500.7–R, Joint Ethics Regulation, JAGMAN Chapter VII, the Legal Assistance Manual, and Title 18, U.S.C. 203, 205, and 209. I certify that no apparent or actual conflict of interests or professional improprieties are presented by my proposed initiation/continuation of an outside law practice. I also certify that if an apparent conflict of interest or impropriety arises during such outside practice, I will report the circumstances to my supervisory attorney immediately.''

6. Privacy Act Statement. I understand that the preceding information is gathered per the Privacy Act as follows:

Authority: Information is solicited per Executive Order 12731 and DOD 5500.7–R.

Primary purpose: To determine whether outside employment presents conflicts of interest with official duties.

Routine use: Information will be treated as sensitive and used to determine propriety of outside employment.

Disclosure: Disclosure is voluntary. Failure to provide the requested information will preclude the Judge Advocate General from approving your outside practice of law request.

Signature

Subpart E—Relations With Non-USG Counsel

§ 776.94 Relations with Non-USG Counsel.

(a) This part applies to non-USG attorneys representing individuals in any matter for which the JAG is charged with supervising the provision of legal services, including but not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings. Employment of a non-USG attorney by an individual client does not alter the responsibilities of a covered USG attorney to that client. Although a non-USG attorney is individually responsible for adhering to the contents of this part, the covered USG attorney detailed or otherwise assigned to that client shall take reasonable steps to inform the non-USG attorney:

(1) Of the contents of this part;

(2) That subpart B of this part apply to civilian counsel practicing before military tribunals, courts, boards, or in any legal matter under the supervision of the JAG as a condition of such practice; and

(3) That subpart B of this part take precedence over other rules of professional conduct that might otherwise apply, but that the attorney may still be subject to rules and discipline established by the attorney's Federal, state, or local bar association or other licensing authority.

(b) If an individual client designates a non-USG attorney as chief counsel, the detailed USG attorney must defer to civilian counsel in any conflict over trial tactics. If, however, the attorneys have ''co-counsel'' status, then conflict in proposed trial tactics requires the client to be consulted to resolve the conflict.

(c) If the non-USG attorney has, in the opinion of the involved covered USG attorney, acted or failed to act in a manner which is contrary to subpart B of this part, the matter should be brought to the attention of the civilian attorney. If the matter is not resolved with the civilian counsel, the covered USG attorney should discuss the situation with the supervisory attorney. If not resolved between counsel, the client must be informed of the matter by the covered USG attorney. If, after being apprised of possible misconduct, the client approves of the questioned conduct, the covered USG attorney shall attempt to withdraw from the case in accordance with § 776.35 of this part. The client shall be informed of such intent to withdraw prior to action by the covered USG attorney.

Subpart F [Reserved]

PARTS 777–799 [RESERVED]