

Shelbyville, IN, Shelbyville Muni, VOR or GPS RWY 18, Amdt 9
 Shenandoah, IA, Shenandoah Muni, VOR/DME OR GPS RWY 12, Amdt 3
 Rochester, NH, Sykhaven, GPS RWY 33, Orig
 Hickory, NC, Hickory Regional, VOR/DME or GPS RWY 6, Orig, Cancelled
 Maxton, NC, Laurinburg-Maxton, VOR/DME-A, Orig-A, Cancelled
 Sanford, NC, Sanford-Lee County Brick Field, VOR/DME-A, Orig-A, Cancelled
 Wilmington, NC, New Hanover County, VOR or TACAN-A, Amdt 2A, Cancelled
 Wilmington, NC, New Hanover County, RNAV RWY 24, Amdt 4A, Cancelled
 Harrison, OH, Cincinnati West, VOR or GPS RWY 18, Amdt 2
 Marysville, OH, Union County, NDB or GPS RWY 27, Amdt 5
 Ardmore, OK, Ardmore Muni, ILS RWY 30, Amdt 3
 Chambersburg, PA, Chambersburg Muni, VOR/DME-A, Amdt 2, Cancelled
 Friday Harbor, WA, Friday Harbor, NDB RWY 34, Orig.

* * * Effective March 2, 1995

Holland, MI, Tulip City, ILS/DME RWY 26, Orig
 Amarillo, TX, Amarillo Intl, GPS RWY 22, Orig

* * * Effective 2 February 1995

Jacksonville, FL, Jacksonville Intl, ILS RWY 7, Amdt 12

* * * Effective Upon Publication

Teterboro, NJ, Teterboro, VOR/DME RWY 24, Amdt 8
 Santa Fe, NM, Santa Fe County Muni, VOR OR GPS RWY 33, Amdt 8
 Castroville, TX, Castroville Muni, NDB OR GPS RWY 33, Amdt 2
 Bluefield, WV, Mercer County, VOR/DME or GPS RWY 23, Amdt 4

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DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 15a

[Docket No. 950126028-5028-01]

RIN 0690-AA22

Testimony by Employees and the Production of Documents in Legal Proceedings

AGENCY: Office of the Secretary, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce is revising its regulations which prescribes policies and procedures to be followed with respect to the testimony of Department employees regarding official matters, and the production of Department documents in legal proceedings. These regulations will

serve as a statement of policy and the amendments expand the scope of the existing regulations and provide for more comprehensive standards and guidelines for Department components, employees, former employees, other federal agencies, and the public in general regarding the appropriate procedures concerning testimony and the production of documents.

EFFECTIVE DATE: March 20, 1995.

FOR FURTHER INFORMATION CONTACT: M. Timothy Conner or Donald J. Reed, (202) 482-1067.

SUPPLEMENTARY INFORMATION: Section 301 of Title 5, United States Code, provides that the head of an Executive department may prescribe regulations for the custody, use and preservation of its records. The Supreme Court has upheld the ability of Federal agencies to establish procedures in section 301 regulations governing the production of records and testimony in legal proceedings in which the United States is not a party. *United States ex rel. Touhy v. Ragen*, 340 U. S. 462 (1951).

These rules establish Department of Commerce (DOC) policies and procedures applicable to the production of DOC documents and/or testimony by DOC employees in legal proceedings. Basically, the legal proceedings addressed in the rules are any administrative or judicial activities traditionally conducted within the executive or judicial branches of Federal, state, local or foreign governmental entities in which the United States: (i) Is not a party; (ii) is not represented; (iii) does not have a direct and substantial interest; and (iv) is not providing representation to an individual or entity that is a party.

Similarly, the rules will not cover activities that are not legal proceedings such as Congressional request for records or testimony, or requests for records under the Freedom of Information Act, 5 U.S.C. 552. In addition, the rules will not infringe upon or displace responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States.

Finally, the rules will not remove the need to comply with any applicable confidentiality provisions such as the Privacy Act, The Freedom of Information Act or the Trade Secrets Act. In fact, if the requirements of confidentiality statutes or regulations are not met, records or testimony cannot be provided even where the requirements of these regulations are satisfied.

A notice of proposed rule making was published on September 9, 1994, (59 FR

46598). One comment was received regarding the standing of the individual or business entity, from whom the information was obtained, to contest its production or release. This comment did not require a modification in the final rule. The Department of Commerce's *Touhy* regulations cannot, in and of themselves, provide standing to third parties. *Touhy* regulations only provide a procedure whereby the agency can determine whether any evidentiary privileges or statutory requirements of privacy or confidentiality apply, or if there is any other legal basis for withholding information.

This rule has been determined to be "not significant" for purposes of Executive Order 12866.

The Assistant General Counsel for Legislation and Regulation certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. This is because the rule is established to facilitate the Department's safeguarding, control and preservation of its records, information, papers and property. As a result, a regulatory flexibility analysis was not prepared.

List of Subjects in 15 CFR Part 15a

Administrative practice and procedure, Courts, Government employees.

For the reasons set out in the preamble Part 15a is revised to read as follows:

PART 15a—TESTIMONY BY EMPLOYEES AND THE PRODUCTION OF DOCUMENTS IN LEGAL PROCEEDINGS

Sec.

- 15a.1 Scope.
- 15a.2 Definitions.
- 15a.3 Demands for testimony or production of documents: Department Policy.
- 15a.4 Demand for testimony or production of documents: Department procedures.
- 15a.5 Procedures when a Department employee receives a subpoena.
- 15a.6 Legal Proceedings between private litigants: Expert and/or opinion testimony.
- 15a.7 Demands or requests in legal proceedings for records protected by confidentiality statutes.
- 15a.8 Testimony of Department employees in proceedings involving the United States.

Authority: 5 U. S. C. 301; 15 U. S. C. 1501, 1512, 1513, 1515 and 1518; Reorganization Plan No. 5 of 1950; 3 CFR, 1949-1953 Comp., p. 1004; 44 U.S.C. 3101.

§ 15a.1 Scope.

(a) This part sets forth the policies and procedures of the Department of Commerce regarding the testimony of employees, and former employees, as witnesses in legal proceedings and the production or disclosure of information contained in Department of Commerce documents for use in legal proceedings pursuant to a request, order, or subpoena (collectively referred to in this part as a "demand").

(b) This part does not apply to any legal proceeding in which an employee is to testify while on leave status, regarding facts or events that are unrelated to the official business of the Department.

(c) This part in no way affects the rights and procedures governing public access to records pursuant to the Freedom of Information Act, the Privacy Act or the Trade Secrets Act.

(d) This part is not intended to be relied upon to, and does not, create any right or benefit, substantive or procedural, enforceable at law by any party against the United States.

§ 15a.2 Definitions.

For the purpose of this part:

(a) *Agency counsel* means the chief legal officer (or his/her designee) of an agency within the Department of Commerce.

(b) *Component* means Office of the Secretary or an operating unit of the Department as defined in Department Organization Order 1-1.

(c) *Demand* means a request, order, or subpoena for testimony or documents for use in a legal proceeding.

(d) *Department* means the United States Department of Commerce and its constituent agencies.

(e) *Document* means any record, paper and other property held by the Department, including without limitation, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes and sound or mechanical reproductions.

(f) *Employee* means all current or former employees or officers of the Department, including commissioned officers of the National Oceanic and Atmospheric Administration and any other individual who has been appointed by, or subject to the supervision, jurisdiction or control of the Secretary of the Department of Commerce.

(g) *General Counsel* means the General Counsel of the Department or

other Department employee to whom the General Counsel has delegated authority to act under this part.

(h) *Legal proceeding* means all pretrial, trial and post trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards or other tribunals, foreign or domestic. This phrase includes all phases of discovery as well as responses to formal or informal requests by attorneys or others involved in legal proceedings.

(i) *Official business* means the authorized business of the Department.

(j) *Secretary* means the Secretary of the Department of Commerce.

(k) *Solicitor* means the Solicitor of the Patent and Trademark Office.

(l) *Testimony* means a statement in any form, including personal appearances before a court or other legal tribunal, interviews, depositions, telephonic, televised, or videotaped statements or any responses given during discovery or similar proceedings, which response would involve more than the production of documents.

(m) *United States* means the Federal Government, its departments and agencies, and individuals acting on behalf of the Federal Government.

§ 15a.3. Demand for testimony or production of documents: Department policy.

No employee shall in response to a demand, produce any documents, or provide testimony regarding any information relating to, or based upon Department of Commerce documents, or disclose any information or produce materials acquired as part of the performance of that employee's official duties, or because of that employee's official status without the prior authorization of the General Counsel, or the Solicitor, or the appropriate agency counsel. The reasons for this policy are as follows:

(a) To conserve the time of Department employees for conducting official business;

(b) To minimize the possibility of involving the Department in controversial issues that are not related to the Department's mission;

(c) To prevent the possibility that the public will misconstrue variances between personal opinions of Department employees and Department policy;

(d) To avoid spending the time and money of the United States for private purposes;

(e) To preserve the integrity of the administrative process; and

(f) To protect confidential, sensitive information and the deliberative process of the Department.

§ 15a.4. Demand for testimony or production of documents: Department procedures.

(a) Whenever a demand for testimony or for the production of documents is made upon an employee, the employee shall immediately notify the General Counsel (Room 5890, U. S. Department of Commerce, Washington, D. C. 20230, (202) 482-1067) or appropriate agency counsel. When a demand for testimony or for the production of documents is made upon an employee of the Patent and Trademark Office, the employee should immediately notify the Solicitor, by phone, (703) 305-9035; by mailed addressed Solicitor, Box 8, Patent and Trademark Office, Washington, D. C. 20231; or in person to 2121 Crystal Drive, Crystal Park 2, Suite 918, Arlington, Virginia 22215.

(b) A Department employee may not give testimony, produce documents, or answer inquiries from a person not employed by the Department regarding testimony or documents subject to a demand or a potential demand under the provisions of this part without the approval of the General Counsel, or the Solicitor, or the appropriate agency counsel. A Department employee shall immediately refer all inquiries and Demands to the General Counsel, or the Solicitor, or appropriate agency counsel. Where appropriate, the General Counsel, or the Solicitor, or appropriate agency counsel, may instruct the Department employee, orally or in writing, not to give testimony or produce documents.

(c)(1) *Demand for testimony or documents.* A demand for the testimony of a Department employee shall be addressed to the General Counsel, Room 5890, Department of Commerce, Washington, D. C. 20230 or appropriate agency counsel. A demand for testimony of an employee of the Patent and Trademark Office shall be mail addressed to the Solicitor, Box 8, Patent and Trademark Office, Washington, D. C. 20231; or in person to 2121 Crystal Drive, Crystal Park 2, Suite 918, Arlington, Virginia 22215.

(2) *Subpoenas.* A subpoena for testimony by a Department employee or a document shall be served in accordance with the Federal Rules of Civil or Criminal Procedure or applicable state procedure and a copy of the subpoena shall be sent to the General Counsel, or the Solicitor, or appropriate agency counsel.

(3) *Affidavit.* Except when the United States is a party, every demand shall be

accompanied by an affidavit or declaration under 28 U.S.C. 1746 or, if an affidavit is not feasible, a statement setting forth the title of the legal proceeding, the forum, the requesting party's interest in the legal proceeding, the reason for the demand, a showing that the desired testimony or document is not reasonably available from any other source, and if testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony. The purpose of this requirement is to assist the General Counsel, or the Solicitor, or appropriate agency counsel in making an informed decision regarding whether testimony or the production of a document(s) should be authorized.

(d) A certified copy of a document for use in a legal proceeding may be provided upon written request and payment of applicable fees. Written requests for certification shall be addressed to the agency counsel for the component having possession, custody, or control of the document. Unless governed by another applicable provision of law or component regulation, the applicable fee includes charges for certification and reproduction as set out in 15 CFR part 4.9. Other reproduction costs and postage fees, as appropriate, must also be borne by the requester.

(e) The Secretary retains the authority to authorize and direct testimony in those cases where a statute or Presidential order mandates a personal decision by the Secretary.

(f) The General Counsel, or the Solicitor, or appropriate agency counsel may consult or negotiate with an attorney for a party or the party if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or obtain information necessary to make the determination required by paragraph (b) of this section. Failure of the attorney to cooperate in good faith to enable the General Counsel, or the Solicitor, or the Secretary, or the appropriate agency counsel to make an informed determination under this part may serve, where appropriate, as a basis for a determination not to comply with the demand.

(g) A determination under this part to comply or not to comply with a demand is not an assertion or waiver of privilege, lack of relevance, technical deficiency or any other ground for noncompliance.

(h) The General Counsel, or the Solicitor, or appropriate agency counsel may waive any requirements set forth

under this section when circumstances warrant.

§ 15a.5 Procedures when a Department employee receives a subpoena.

(a) A Department employee who receives a subpoena shall immediately forward the subpoena to the General Counsel, or the appropriate agency counsel. In the case of an employee of the Patent and Trademark Office, the subpoena shall immediately be forwarded to the Solicitor. The General Counsel, or the Solicitor, or appropriate agency counsel will determine the extent to which a Department employee will comply with the subpoena.

(b) If an employee is served with a subpoena that the General Counsel, or the Solicitor, or appropriate agency counsel determines should not be complied with, the General Counsel, Solicitor or appropriate agency counsel will attempt to have the subpoena withdrawn or modified. If this cannot be done, the General Counsel, Solicitor or appropriate agency counsel will attempt to obtain Department of Justice representation for the employee and move to have the subpoena modified or quashed. If, because of time constraints, this is not possible prior to the compliance date specified in the subpoena, the employee should appear at the time and place set forth in the subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of the Department's regulations and inform the legal tribunal that he/she has been advised by counsel not to provide the requested testimony and/or produce documents. If the legal tribunal rules that the demand in the subpoena must be complied with, the employee shall respectfully decline to comply with the demand. *United States ex rel. Touhy v. Ragen*, 340 U. S. 462 (1951).

(c) Where the Department employee is an employee of the Office of the Inspector General, the Inspector General in consultation with the General Counsel, will make a determination under paragraphs (a) and (b) of this section.

§ 15a.6 Legal Proceedings between private litigants: Expert or opinion testimony.

In addition to the policies and procedures as outlined in §§ 15a.1 through 15a.6., the following applies to legal proceedings between private litigants:

(a) If a Department employee is authorized to give testimony in a legal proceeding not involving the United States, the testimony, if otherwise proper, shall be limited to facts within the personal knowledge of the

Department employee. Employees, with or without compensation, shall not provide expert testimony in any legal proceedings regarding Department information, subjects or activities except on behalf of the United States or a party represented by the United States Department of Justice. However, upon a showing by the requester that there are exceptional circumstances and that the anticipated testimony will not be adverse to the interest of the Department or the United States, the General Counsel, or the Solicitor, or appropriate agency counsel may, in writing grant special authorization for the employee to appear and give the expert or opinion testimony.

(b)(1) If, while testifying in any legal proceeding, an employee is asked for expert or opinion testimony regarding official DOC information, subjects or activities, which testimony has not been approved in advance in accordance with the regulations in this part, the witness shall:

(i) Respectfully decline to answer on the grounds that such expert or opinion testimony is forbidden by the regulations in this part;

(ii) Request an opportunity to consult with the General Counsel, or the Solicitor, or appropriate agency counsel before giving such testimony; and

(iii) Explain that upon such consultation, approval for such testimony may be provided.

(2) If the witness is then ordered by the body conducting the proceeding to provide expert or opinion testimony regarding official DOC information, subjects or activities without the opportunity to consult with either the General Counsel, or the Solicitor, or appropriate agency counsel, the witness shall respectfully refuse to provide such testimony. See *United States ex rel. Touhy v. Ragen*, 340 U. S. 462 (1951).

(c) If an employee is unaware of the regulations in this part and provides expert or opinion testimony regarding official DOC information, subjects or activities in a legal proceeding without the aforementioned consultation, the witness shall, as soon after testifying as possible, inform the General Counsel, or the Solicitor, or appropriate agency counsel that such testimony was given and provide a written summary of the expert or opinion testimony provided.

§ 15a.7 Demands or requests in legal proceedings for records protected by confidentiality statutes.

Demands in legal proceedings for the production of records, or for the testimony of Department employees regarding information protected by the Privacy Act, 5 U.S.C. 552a, the Trade

Secrets Act, 18 U.S.C. 1905 or other confidentiality statutes, must satisfy the requirements for disclosure set forth in those statutes before the records may be provided or testimony given. The General Counsel, or the Solicitor, or appropriate agency counsel should first determine if there is a legal basis to provide the testimony or records sought under applicable confidentiality statutes before applying §§ 15a.1 through 15a.8. Where an applicable confidentiality statute mandates disclosure, §§ 15a.1 through 15a.8 will not apply.

§ 15a.8 Testimony of Department employees in proceedings involving the United States.

The following applies in legal proceedings in which the United States is a party:

(a) A Department employee may not testify as an expert or opinion witness for any other party other than the United States.

(b) Whenever, in any legal proceeding involving the United States, a request is made by an attorney representing or acting under the authority of the United States, the General Counsel, or the Solicitor, or appropriate agency counsel will make all necessary arrangements for the Department employee to give testimony on behalf of the United States. Where appropriate, the General Counsel, or the Solicitor, or appropriate agency counsel may require reimbursement to the Department of the expenses associated with a Department employee giving testimony on behalf of the United States.

Alden F. Abbott,

Assistant General Counsel for Finance and Litigation.

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BILLING CODE 3510-BW-P

National Oceanic and Atmospheric Administration

15 CFR Part 925

RIN 0648-AC63

Olympic Coast National Marine Sanctuary Regulations

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

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to Appendix A to the final regulations for the Olympic Coast National Marine Sanctuary which were published on Wednesday, May 11, 1994 (59 FR 24586).

EFFECTIVE DATE: February 17, 1995.

FOR FURTHER INFORMATION CONTACT: Todd Jacobs, Sanctuary Manager, at (206) 457-6622 or Elizabeth Moore at (301) 713-3141.

SUPPLEMENTARY INFORMATION: The National Oceanic and Atmospheric Administration (NOAA), by the designation document published in the 59 FR 24586, May 11, 1994, designated approximately 2,500 square nautical miles of coastal and ocean waters, and the submerged lands thereunder, off the Olympic Peninsula of Washington State, including the waters of the Strait of Juan de Fuca eastward to Koitlah Point, as the Olympic Coast National Marine Sanctuary (Sanctuary). This notice corrects a discrepancy between the Sanctuary boundary as described in 15 CFR 925.2(b) and the coordinates for that boundary listed in Appendix A. Section 925.2(b) describes the Sanctuary boundary as extending from Koitlah

Point due north to the U.S./Canada international boundary seaward to the 100 fathom isobath. The seaward boundary of the Sanctuary approximates the 100 fathom isobath in a southerly direction from the U.S./Canada international boundary to a point due west of the mouth of the Copalis River cutting across the heads of Nitnat, Juan de Fuca and Quinault Canyons. Appendix A has been corrected to more accurately represent the U.S./international boundary, which delineates the northern boundary of the Sanctuary. The remaining coordinates have not been changed.

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program.)

List of Subjects in 15 CFR Part 925

Administrative practice and procedure, Coastal zone, Education, Environmental protection, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Reporting and recordkeeping requirements, Research.

Accordingly, 15 CFR part 925 is corrected by making the following correcting amendment:

PART 925—OLYMPIC COAST NATIONAL MARINE SANCTUARY

1. The authority citation for part 925 continues to read as follows:

Authority: Sections 302, 303, 304, 305, 306, 307, 310, and 312 of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (16 U.S.C. 1431 *et seq.*).

2. Appendix A to part 925 is revised to read as follows:

Appendix A To Part 925—Olympic Coast National Marine Sanctuary Boundary Coordinates

Point	2500 square nautical miles	
	Latitude	Longitude
1	47 07'45"	124 11'02"
2	47 07'45"	124 58'12"
3	47 35'05"	124 00'00"
4	47 40'05"	124 04'44"
5	47 50'01"	124 05'42"
6	47 57'13"	124 29'13"
7	48 07'33"	125 38'20"
8	48 15'00"	125 40'54"
9	48 18'21.2"	125 30'02.9"
10	48 20'15.2"	125 22'52.9"
11	48 26'46.2"	125 09'16.9"
12	48 27'09.2"	125 08'29.9"
13	48 28'08.2"	125 05'51.9"
14	48 29'43.2"	125 00'10.9"
15	48 29'56.2"	124 59'19.9"
16	48 30'13.2"	124 54'56.9"
17	48 30'21.2"	124 50'25.9"

[Based on North American Datum of 1983]