

DEPARTMENT OF DEFENSE**Department of the Navy****32 CFR Part 767**

[Docket ID: USN-2011-0016]

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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**AGENCY:** Department of the Navy, DoD.**ACTION:** Final rule.

SUMMARY: In this final rule, the Department of the Navy (DON) is revising its rules to assist the Secretary in managing sunken military craft under the jurisdiction of the DON pursuant to the Sunken Military Craft Act (SMCA), and to issue updated application procedures for research permits on terrestrial military craft under the jurisdiction of the DON.

DATES: This final rule is effective March 1, 2016.

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SUPPLEMENTARY INFORMATION:**Executive Summary**

This final rule serves as a revision of 32 CFR part 767 and incorporates provisions of the existing regulations together with regulations implementing the expanded authority provided to the Secretary of the Navy by the SMCA (Pub. L. 108-375, 10 U.S.C. 113 Note and 118 Stat. 2094-2098) in regards to permitting activities directed at sunken military craft that are otherwise prohibited by the SMCA. The rule replaces the existing regulations and establishes a single permitting process for persons wishing to engage in activities that disturb, remove, or injure DON sunken military craft and terrestrial military craft for archaeological, historical, or educational purposes. In accordance with the limitations on application expressed in (10 U.S.C. 1402(c)(1)), section 1402 of the SMCA shall not apply to actions taken by, or at the direction of, the United States.

The former rule was based on provisions of the National Historic Preservation Act (NHPA) (54 U.S.C.

300101 *et seq.*), which sets forth the responsibility for each agency to preserve and manage historic properties under its respective jurisdiction and control, and 5 U.S.C. 301, which authorizes the DON to promulgate regulations regarding the custody, use, and preservation of its records, papers and property. The rule instituted a permitting program that authorized controlled access to disturb historic properties, which remain property of the DON, for prescribed purposes. It codified the policy of the DON to preserve sites in situ unless site disturbance, removal, or injury is necessary for their protection or justified for research and educational purposes. Archaeological science and sound management principles support this strategy that afforded the DON the ability to efficiently oversee its more than 17,000 historic wrecks dispersed around the globe.

The former regulations only applied to ships and aircraft that were classified as DON historic structures or archaeological sites, regardless of location, and did not carry the enforcement provisions necessary to serve as a deterrent to their unauthorized disturbance. The SMCA was enacted in 2004 and codified the existing principles of preservation of right, title, and interest of the United States in and to any United States sunken military craft. As defined in the SMCA, the term sunken military craft includes all sunken warships, all naval auxiliaries, and other vessels that were owned or operated by a government on military noncommercial service when they sank. The term also includes all sunken military aircraft or spacecraft owned or operated by a government when they sank. In addition, associated contents such as equipment, cargo, and the remains and personal effects of the crew and passengers are also protected if located within a craft's debris field. It is important to note that the SMCA is not limited to historic sunken military craft of the United States. All U.S. sunken military craft are covered, regardless of location or time of loss, while all foreign sunken military craft in U.S. waters, consisting of U.S. internal waters, the U.S. territorial sea, and the U.S. contiguous zone, are also afforded protection from disturbance by the SMCA. According to the SMCA, a permitting process may be implemented by the Secretary of a military department, or the department in which the Coast Guard is operating, in order to permit activities directed at sunken military craft that are otherwise prohibited. These regulations do not

apply to any sunken military craft under the jurisdiction of the Maritime Administration or its predecessor agencies or organizations at the time of sinking. Predecessor agencies or organizations of the Maritime Administration, include, but are not limited to, the United States Shipping Board, the United States Shipping Board Merchant Fleet Corporation, the War Shipping Board, the War Shipping Administration, the United States Shipping Board of the U.S. Department of Commerce, and the U.S. Maritime Commission.

This final rule is, in part, promulgated based on the authority granted to the Secretary of the Navy by the SMCA to establish a permitting program allowing controlled public access to sunken military craft under the jurisdiction of the DON for the purposes of undertaking activities directed at these craft that are otherwise prohibited by the SMCA. Sunken military craft are not only of historical importance to the Nation, having served in all of its most critical moments, but are also often war graves and memorials to the men and women who served aboard them. Many carry unexploded ordnance that can pose public safety hazards or oil and other materials that, if not properly handled, may cause substantial harm to the environment. Furthermore, many hold state secrets and technologies of significance to national security. Therefore, it is important for these sites to be respected and remain undisturbed and for the U.S. to promote the international law rules pertaining to sunken military craft, sovereign immunity, and the preservation of title. When otherwise prohibited activities are permitted, they must be conducted in a professional manner and with archaeological, historical or educational purposes in mind. Accordingly, the SMCA declares that the "law of finds" does not apply to any U.S. sunken military craft or any foreign sunken military craft in U.S. waters. No salvage rights or awards are to be granted with respect to U.S. sunken military craft without the express permission of the U.S., or with respect to foreign sunken military craft located in U.S. waters without the express permission of the relevant foreign state.

As stewards of the DON's historic ship and aircraft wrecks, the Naval History and Heritage Command (NHHC) continues its role as the authority responsible for administering this revised permitting program. As a result of the need to incorporate provisions of the former regulations with provisions set forth in the SMCA, the rule adopts the definition of sunken military craft as

present in the Act and develops a counterpart—terrestrial military craft—to refer to historic DON wrecked craft located on land.

In addition to serving as the authority for permitting activities directed at historic DON sunken military craft and terrestrial military craft, the NHHHC will also serve as the permitting authority for the disturbance of non-historic DON sunken military craft. Applications pertaining to non-historic DON sunken military craft will be considered when there is a clear demonstrable benefit to the DON, and under the special use permit provisions. Special use permits will only be issued in cases when internal DON coordination does not result in any objection. Finally, the NHHHC will also serve as the permitting authority on behalf of the DON for those foreign sunken military craft located in U.S. waters that through and under the terms of an understanding or agreement with the respective foreign state are included within the NHHHC's management purview. The Secretary of a military department, or in the case of the Coast Guard, the Secretary of the Department in which the Coast Guard is operating, may also request that the Secretary of the Navy administer their respective sunken military craft through the DON permitting program established by this rule.

Non-intrusive activities including diving on or remotely documenting sites do not require a permit or authorization from the NHHHC, though this rule does not preclude the obligation to obtain permits or authorizations otherwise required by law. The regulations stipulate an application process for disturbance, removal, or injury of sunken military craft and terrestrial military craft under the jurisdiction or management of the DON. Applicants must meet certain requirements and qualifications which are set forth in the rule in order to demonstrate careful planning, professional credentials, and a long-term view of the effects of the proposed activities on the craft and any recovered material.

The rule also incorporates provisions for a special use permit to be issued in the case of certain activities directed at sunken military craft that would result in a wrecksite's disturbance, removal, or injury but otherwise be minimally intrusive. The standards that must be met for special use permits are more easily attainable as are the reporting requirements, though data collected shall be shared with the NHHHC.

Additional permits or authorizations may otherwise be required by law and other agencies, even in the case where the NHHHC issues a permit or a special

use permit pertaining to activities directed at DON sunken or terrestrial military craft in accordance with these regulations. The NHHHC remains responsible for complying with all applicable laws while implementing the DON permitting program such as the National Environmental Policy Act (NEPA) and the NHPA.

As more than half of the DON's sunken military craft rest beyond U.S. waters, the U.S. government has an interest in reaching understandings or agreements with foreign nations, and in particular the major maritime powers, seeking assurances that U.S. sunken military craft will be respected and protected and offering foreign nations reciprocal treatment. In order to encourage universal respect, protection, and mutually-beneficial treatment of sunken military craft, the Secretary of the Navy, in consultation with the Secretary of State, may consider requests by foreign states to incorporate their military craft located in U.S. waters within the DON permitting program. The foreign state must assert the sovereign immunity of or ownership over its craft, request assistance by the U.S. government, and acknowledge the provisions that will apply to their sunken military craft if incorporated into the DON permitting program. Following such a request and appropriate consultation, an understanding to this effect may be reached with that foreign state. The Secretary of State, in consultation with the Secretary of Defense, may also negotiate and conclude broader bilateral and multilateral agreements with foreign states pertaining to sunken military craft.

The final major provision of the rule affects violations of the SMCA or of the DON permitting program and outlines penalties and enforcement procedures. Violators may be punished by a fine not to exceed \$100,000 per violation, with each day of a violation counting as a separate incident, may be liable for damages, and may suffer loss of their vessel and other equipment associated with the violation.

This rule codifies existing legislation and stated public policy and does not carry a significant burden of cost to the public. With stricter enforcement provisions acting as a deterrent and a management policy based on the principle of in situ preservation, the proposed rule makes the protection of war-related and other maritime graves, the preservation of historical resources, the proper handling of safety and environmental hazards, and the safeguarding of national security interests more effective, efficient, and

affordable. At the same time, the proposed rule enables persons to have controlled intrusive access to sites otherwise prohibited from disturbance, bringing to light new knowledge about the Nation's maritime heritage, and honoring the service of those Sailors lost at sea.

The revisions to this rule are part of the Department of Defense (DoD) retrospective plan under EO 13563 completed in August 2011. DoD's full plan can be accessed at <http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036>.

Background

The DON is revising 32 CFR part 767 pursuant to the SMCA in order to implement a permitting system regulating activities directed at DON sunken military craft for archaeological, historical, or educational purposes that are otherwise prohibited by the SMCA. This final rule also revises existing regulations by incorporating those permitting provisions stemming from 5 U.S.C. Chapter 301, 16 U.S.C. Chapter 470, and the SMCA into a single comprehensive set of rules for research activities directed at sunken military craft and terrestrial military craft under the jurisdiction of the DON, regardless of location or passage of time. Sunken military craft and terrestrial military craft are non-renewable cultural resources that often serve as war-related and other maritime graves, safeguard state secrets, carry environmental and safety hazards such as oil and ordnance, and hold significant historical and archaeological value. Access to these sites requires DON oversight to ensure site preservation, the sanctity of war and other maritime graves, public safety, and sound environmental stewardship. In addition, DON oversight ensures that research carrying the potential to disturb such sites is conducted to professional standards under existing laws and guidelines. The rule allows for the incorporation of foreign sunken military craft in this permitting system upon request and agreement with the foreign state. It also provides a Secretary of a military department, or in the case of the Coast Guard, the Secretary of the Department in which the Coast Guard is operating, the opportunity to request that their respective sunken military craft are also incorporated, upon agreement by the Secretary of the Navy, in this permitting program. Furthermore, it identifies penalties and enforcement procedures to be followed in the event of violations to the rule affecting sunken military craft. This rule replaces the former 32 CFR part 767 to reflect current agency regulations. It has

been determined upon review that this rule amendment is a significant regulatory action as it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866 and Executive Order 13563.

Public Comment Summary

Between January 6, 2014 and March 7, 2014, the DON held a public comment period inviting members of the public to submit comments, suggestions, concerns or requested modifications to the proposed rule revision to 32 CFR part 767 (79 FR 620). Upon conclusion of that public comment phase, the DON proceeded to afford each submission due consideration and categorize public comments into subject areas. What follows is a response by DON to the public comments addressed thematically by category. The DON response also identifies where public comments led to the proposed rule being amended in the development of the final rule.

The DON received several public comments submitted by citizens, organizations, and state agencies that recognized the value and regulatory clarity added by the adoption of a single consolidated permitting program such as the one proposed by the DON in these regulations. However, the DON also received comments critical of the overall benefit of these regulations that questioned why the DON would not contract with the civilian sector to recover associated contents from sunken military craft. The DON wishes to stress that actions taken by, or at the direction of, the United States are not bound by the prohibitions of § 1402 of the SMCA, and thereby the DON may proceed to contract with the civilian sector for recovery operations when it deems appropriate outside of the permitting program encompassed in these regulations. Furthermore, several comments expressed concern that the DON was prohibiting independent civilian groups from locating, exploring, and studying sunken military craft under its jurisdiction. The DON would like to emphasize that the revision to 32 CFR 767 aims to do precisely the contrary, affording controlled access to external parties that are presently prohibited by the SMCA from disturbing, removing, or injuring sunken military craft or their associated contents. Furthermore, the revised regulations do not affect activities that do not disturb, remove, or injure sunken military craft, such as non-intrusively locating, exploring and documenting

these sites, as these activities are not prohibited by the SMCA.

In terms of application of national and international best practices in the management of submerged cultural resources, the public comments received were divided between those that believed that the consistency exhibited by the revision to 32 CFR part 767 with established management practices was prudent and those that posited an undue influence of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention) on the drafting of these regulations. DON management practices, including that of in situ preservation, predate the UNESCO Convention as exhibited by the issuance in 2000 of the 32 CFR part 767 regulations presently being revised. Since that time, whereas the UNESCO Convention has not been ratified by the U.S., the principles and practices established by its Annex have been recognized as appropriate international guidelines in the management of underwater cultural heritage by several pertinent federal agencies such as the National Park Service, the National Oceanic and Atmospheric Administration, the Bureau of Ocean Energy Management, the U.S. Coast Guard, as well as by the Advisory Council on Historic Preservation. The DON, in agreement with the aforementioned federal agencies, regards the Annex of the UNESCO Convention as representing guidelines that embody sound international practices in the realm of underwater cultural heritage stewardship. However, in developing the revision to 32 CFR part 767, the DON was and remains driven by national legislation such as the Sunken Military Craft Act and the National Historic Preservation Act. The DON views continuation of the in situ preservation management practice as the preferred practice in its stewardship of a vast collection of sunken military craft as it cumulatively best addresses concerns regarding maritime grave sites, public safety, environmental hazards, state secrets, national security, and the preservation of the U.S. Navy's non-renewable submerged cultural resources.

A moderate number of public comments emphasized and encouraged the consistency exhibited by these regulations with federal legislation; other comments questioned the impact of the revised rule on the Abandoned Shipwreck Act, the common law of finds, and the common law of salvage. The DON considers the revision to 32 CFR part 767 to be consistent with the SMCA and federal legislation, including

the National Historic Preservation Act, the Archaeological Resources Protection Act, and the Abandoned Shipwreck Act. Section 1401 of the SMCA clearly states that right, title, and interest of the United States in and to any United States sunken military craft shall not be extinguished except by express divestiture of title, regardless of when the sunken military craft sank. Accordingly, United States sunken military craft are not considered abandoned, unless title has been specifically divested, thereby excluding them from the abandoned shipwrecks addressed in the Abandoned Shipwreck Act and managed by individual states. Elsewhere, section 1406 of the SMCA states that the law of finds shall not apply to any United States sunken military craft, wherever located, or any foreign sunken military craft located in United States waters. Additionally, the same section states that no salvage rights or awards shall be granted with respect to any United States sunken military craft without the express permission of the United States, or any foreign sunken military craft in United States waters without the express permission of the relevant state. The revised rule, remaining consistent with the federal mandate of the SMCA, does not alter or amend any of these provisions.

Several public comments addressed the nature and scope of definitions present in the proposed revision to 32 CFR part 767. In response, the DON has simplified § 767.3 to enhance the clarity of the overall regulations by removing definitions for the terms "Archaeological Site" and "Historic Structure", as well as any mention of those terms elsewhere. The definition of "Sunken Military Craft", commonly referenced in public comments, is derived from the SMCA proper and remains as established by Congress except for a clarification stipulating that divestiture of title results in the loss of status for a sunken military craft. Whereas a number of public comments recommended further revision of the definition of "Sunken Military Craft", the DON believes the established definition appropriately identifies the set of assets Congress intended to afford protection to and requires no alteration. In contrast with interpretations expressed in certain public comments, merchant ships in private ownership may not qualify as sunken military craft unless they served as vessels operated by a government on military noncommercial service when they sank. The DON does not believe that it is in the interest of international reciprocity to specifically delineate a category of

foreign sunken military craft and exclude them from the set of assets afforded protection by the SMCA, as suggested by certain comments. This would run contrary to the stated intent of the Act to promote bilateral and multilateral understandings or agreements with foreign states, ultimately aimed at protecting the thousands of U.S. sunken military craft resting in foreign or international waters.

Several comments concentrated on the definition of the term "Disturbance" noting that it did not provide sufficient clarity to the diving community, thereby raising concerns of inadvertent violations of the SMCA. The SMCA and these regulations clearly do not prohibit diving on sunken military craft; rather they address activities directed at sunken military craft that disturb, remove, or injure such craft. In response to the expressed concerns, the DON has defined the term "Directed at" and limited its application to intentional or negligent acts. Therefore, unintentional or accidental impacts that disturb, injure, or remove sunken military craft or terrestrial military craft, provided they are not the result of negligence, do not constitute prohibited activities directed at sunken military craft.

Four public comments addressed matters pertaining to sunken military craft that do not necessarily fall under the jurisdiction of the DON, but are not considered foreign sunken military craft. The DON would like to emphasize that these regulations address sunken military craft that fall under the cognizance of the Secretary of the Navy. Accordingly, these regulations do not apply to sunken military craft that fall solely under the jurisdiction of other agencies such as the U.S. Department of Transportation or that of state governments, unless an agreement to that effect has been reached with the respective authorities. Certain state agencies requested amendment or elaboration of the definition of the term "Sunken Military Craft" which the DON deems unnecessary given the primary intended applicability of these regulations to DON sunken military craft. In the case of U.S. Coast Guard sunken military craft, the SMCA states that the Secretary of the Department in which the Coast Guard is operating is the Secretary concerned that may issue applicable regulations to implement a permitting program. The Secretary concerned would be the Secretary of the Navy only in times when the U.S. Coast Guard is operating under the DON. Accordingly, it is the position of the DON that these regulations would apply to U.S. Coast Guard sunken military

craft, irrespective of the time of their loss, only when the U.S. Coast Guard is operating under the DON and that during all other times, U.S. Coast Guard sunken military craft would fall under the purview of the appropriate Secretary concerned. The revision to 32 CFR part 767 does incorporate a provision enabling the Secretary of the Department in which the U.S. Coast Guard is operating to request that the Secretary of the Navy administer a permitting program for sunken military craft under his or her cognizance (§ 767.15(e)). To an extent, this provision addresses one public comment suggesting the DON serve as the single permitting authority for all sunken military craft under the jurisdiction of the U.S. While the benefits of such a single permitting process are recognized by the DON, hence the provision affording other Secretaries concerned the opportunity to request that sunken military craft under their cognizance be incorporated into the DON permitting program, the Secretary of the Navy is defined in statute as the Secretary concerned solely in the case of DON sunken military craft. Accordingly, promulgating a single permitting program for all U.S. Government sunken military craft exceeds the authority vested in the Secretary of the Navy. As recommended by one public comment, the DON has modified the provisions of the DON permitting program that apply to those sunken military craft of other Departments that have been incorporated into the DON permitting program to include the application of portions of Subpart A that were previously omitted.

Several public comments addressed the treatment and status of foreign sunken military craft in the revision to 32 CFR part 767. The SMCA recognizes the importance of reciprocal and respectful treatment of sunken military craft among maritime nations and provides the Secretary of the Navy, in consultation with the Secretary of State, the authority to carry out the permitting program implemented in these regulations with regard to foreign sunken military craft, when expressly requested by the applicable foreign state (section 1403 (d)). The SMCA also encourages the Secretary of State, in conjunction with the Secretary of Defense, to negotiate bilateral and multilateral agreements with foreign countries with regard to sunken military craft (section 1407). Furthermore, the prohibitions and restrictions that apply to activities directed at U.S. sunken military craft also apply to those

directed at foreign sunken military craft located in United States waters, in accordance with section 1406 of the SMCA. The Act, therefore, bars disturbance, removal, or injury of foreign sunken military craft in U.S. waters, asserts that the law of finds do not apply to such craft, and asserts that no salvage rights or awards are to be granted without the express permission of the relevant foreign state.

The proposed regulations are consistent with the clear recognition that foreign sunken military craft remain under the sovereign immunity or ownership of foreign governments unless title thereto has been expressly divested. Ownership of sunken military craft does not afford foreign states ownership of the lands upon which they sank, whether they are federal, state, or private in nature. In § 767.15 of these regulations, DON establishes a process whereby foreign states may request that one or more of its sunken military craft be incorporated in the permitting process set forth by these regulations. There are three conditions that a foreign government must acknowledge in submitting a request, without which a request will not be considered. As a result of one public comment, the condition that a foreign government must assert sovereign immunity over a specified sunken military craft or group of sunken military craft has been modified to require a foreign government to assert either sovereign immunity or ownership over such craft.

A small number of public comments pertained to waivers and waiver provisions incorporated within the revision to 32 CFR part 767. The DON believes that § 767.6(e) of the revised regulations provides sufficient latitude for applicants to request relief from certain permit application requirements, including the general liability insurance or equivalent bond provision, as well as special use permit holder qualification requirements. As a result of one public comment, a modification to § 767.6(e) has been made whereby, in exceptional circumstances, written permission may be replaced by verbal permission 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. Elsewhere, § 767.6(f) provides for the execution of activities directed at sunken military craft by individuals operating on behalf of agencies under existing agreements with the NHHHC, thereby, in effect, acting in coordination with the NHHHC through express written permission, as stipulated in the aforementioned section. These

provisions are intended to afford the Director, NHHHC, the authority to offer relief from certain permit application requirements to external applicants when appropriate, as well as afford persons carrying out official NHHHC duties on behalf of the DON improved efficiency in the execution of their tasks. These persons are held to the same standards as external applicants set forth in §§ 767.6(d), 767.8, and 767.11. For the purposes of consistency, § 767.6(f) has been amended to reflect tasks associated with the management of sunken military craft or terrestrial military craft as opposed to solely archeological resources.

A relatively large number of public comments received by the DON pertained to procedural concerns and recommendations that spanned across a number of areas of interest. Foremost, the DON wishes to clarify the misperception evident in certain public comments that amendments are being made to the SMCA itself through the implementation of these regulations. The SMCA, which has remained in effect as it was enacted in 2004, is not being and cannot be modified or amended in any way by these regulations. Rather, in publishing the proposed revision to 32 CFR part 767 for a 60-day public comment period, the DON put forth proposed regulations implementing the SMCA, in coordination with the Department of Defense, in accordance with procedures coordinated with the White House Office of Management and Budget. The DON elected to encompass terrestrial military craft in the same permitting program as that pertaining to sunken military craft, rather than issue separate regulations for the former, as suggested by one public comment. The DON believes that a consistent, uniform, and simplified approach is in the best interest of the regulated public, while at the same time enhancing the efficiency of the DON's management functions. Creating a single permitting program does not extend the application of the SMCA to terrestrial military craft, as was observed by another public comment. These regulations do not solely implement the SMCA but also encompass the former permitting program put in place in 2000 by the former 32 CFR part 767 rule. The process affords each permit application to be considered on its own merits, based on standardized criteria, with the ability for the applicant to request due consideration for waivers or appeals. The DON, therefore, respectfully rejects the small number of public comments which postulated that these regulations

establish an arbitrary process or deny due process.

Per the request of one public comment, the DON has proceeded to amend § 767.12 to emphasize that diving operations may expressly be considered in activities intended to document sunken military craft. Another public comment expressed that the capacities of "Permit Holder" and "Principal Investigator" should be maintained separate, with the option for both capacities to be fulfilled by a single person. The DON agrees with this approach and reviewed the rule to ensure this distinction could be effectively maintained throughout the permitting process. This review led to a minor change in § 767.9(c) which now stipulates that the presence of a permit holder, or their principal investigator, if they are not the same person, is required on site. In response to public comment, the DON conducted a separate review of § 767.11(k) which pertained to National Register of Historic Places nominations that led to the section's removal from these regulations.

One public comment identified the need for improved clarity in § 767.6(f) regarding the responsibilities of persons acting at the direction of the NHHHC. As a result, the DON has inserted language, consistent with its original intent, to emphasize that appropriate provisions regarding documentation of requirements by other means apply to such persons. Another public comment stated that the rule should make provision for the NHHHC to review submitted reports for compliance and issue a formal note of concurrence, thereby ensuring and, if deemed acceptable, asserting that the applicant has fulfilled all permitting requirements. A modification to § 767.9(g) has been made to incorporate such a provision.

A separate public comment questioned the need for a special use permit provision and recommended its removal for the purposes of establishing a simpler system with a single permitting process. Upon consideration, the DON elected to retain the special use permit provision as the requirements for the full permit process would unnecessarily hinder less intrusive operations directed at sunken or terrestrial military craft, whether historic or not, by imposing stricter or less relevant standards. Violations of either permit or special use permit conditions are treated in the same manner under these regulations.

One public comment questioned the DON's assertion that the former rule provided insufficient enforcement provisions necessary to serve as a

deterrent to unauthorized disturbance, removal, or injury. In fact, the former rule's section on violations was restricted to permit violations with the sole course of action for the DON being the amendment, suspension, or revocation of an issued permit. No provisions were made for the unauthorized disturbance of sites by non-permit holding members of the public, an omission addressed by the SMCA and subsequently these regulations. The amount of the civil penalty potentially assessed for each violation incorporated within section 1404 of the SMCA itself was questioned by one comment as being uniquely high among federal legislation. The civil penalty of \$100,000 for each violation is entirely consistent with related laws such as the National Marine Sanctuaries Act and the Archaeological Resources Protection Act, as well as in line with the purpose of the civil penalty serving as a deterrent to illicit activities directed as sunken military craft. Finally, the DON emphasizes that subpart C of these regulations provides a clear due process for the issuance and response to Notices of Violation and Assessments.

A series of public comments addressed or questioned the concept of sunken military craft ownership, as well as the right of the DON to regulate access to sunken military craft under its jurisdiction. Under section 1401 of the SMCA, unless title is expressly divested, the U.S. Government maintains right, title, and interest in and to any United States sunken military craft, a right originally vested in the U.S. Government by the U.S. Constitution. The Act then proceeds to establish prohibitions identifying specific unauthorized activities directed at sunken military craft including engaging, or attempting to engage in any activity that disturbs, removes, or injures any sunken military craft, barring certain exceptions. The Secretary of the Navy is provided authority to permit persons to engage in such otherwise prohibited activities for archaeological, historical, or educational purposes. In order to promote public knowledge, awareness, and understanding of the DON's collection of sunken military craft, the Secretary of the Navy has elected to establish such a permitting process and assigned the NHHHC responsibility for its implementation. Unless title has been expressly divested, DON sunken military craft remain the property of the DON, are not abandoned, and are not subject to the common law of finds irrespective of location. These regulations are consistent with the

statutory mandates asserted in the SMCA and will take effect as of the date stated above. The SMCA, however, has been in effect as of October 28, 2004 and actions to enforce violations of section 1402 of the SMCA may be brought up to 8 years after the date on which all facts material to the right of action were known or should have been known by the Secretary concerned, and the defendant was subject to the jurisdiction of the appropriate district court of the U.S. or administrative forum.

A proportionally large number of public comments addressed assessments of the economic impact, or lack thereof, of these regulations. A series of public comments expressed concern over economic impacts on the salvage sector, the effect on their associated revenue stream, and the misperceived ineligibility of shipwreck recovery companies from pursuing permits. The DON wishes to stress that the prohibitions associated with disturbance, removal, and injury of sunken military craft, along with limitations on the application of the common laws of salvage and finds with respect to sunken military craft were established by enactment of the SMCA in 2004. These regulations are being issued pursuant to section 1403(a) of the SMCA that enables the Secretary of the Navy to implement a permitting program authorizing a person to engage in an activity otherwise prohibited by the SMCA, with respect to DON sunken military craft, expressly for archaeological, historical, or educational purposes. Whereas the DON continues to uphold the prohibitions, limitations, and enforcement provisions expressed in the SMCA through these regulations, along with affording new privileges and controlled access, it establishes no additional limitations that would lead the revision to 32 CFR 767 to constitute a significant regulatory action as a result of its annual effect on the economy. Sunken military craft have not represented potential economic assets at the disposal of salvage sector companies since well before 2004, unless the U.S. expressly granted salvage rights or awards. The permitting program established in these regulations is open to all qualified applicants, but is restricted by the SMCA to serve archaeological, historical, or educational purposes. The recovery of lost commodities for their potential economic value lies outside the prescribed permitting program, and would be addressed by the U.S. either through actions taken by it, or at its direction, as well as through expressly permitting the granting of salvage rights

or awards with respect to its sunken military craft.

Certain public comments expressed concern over the economic impact of these regulations on dive operators and associated businesses. Concern is mostly concentrated on the same limitations established in 2004 by the SMCA, rather than the provisions of these regulations. At the same time, certain concerns that overlapped with concerns expressed regarding the definition of disturbance were expressed in view of the potential indirect economic impact of these regulations. The DON has proceeded to define the term "Directed at" in order to assuage concerns over unintentional disturbance of sunken military craft, thereby addressing concerns over potential indirect economic impacts on dive operators and associated businesses. These regulations do not prohibit or discourage responsible diving on sunken military craft. Finally, certain public comments expressed that these regulations will have a negative impact on the commercial archaeology sector, whether terrestrial or maritime, of the U.S. Leading professional organizations, such as the Society for Historical Archaeology, expressly asserted in their respective public comments the lack of such an impact, an assessment with which the DON concurs. Establishing a permitting program that enables access to sunken and terrestrial military craft for archaeological, historical, and educational purposes increases the number of cultural properties that can be assessed or researched by the commercial archaeology sector.

A few public comments focused on the concept of inadvertent disturbance of sunken military craft and the potential consequences thereof. The SMCA, in section 1406, states that, except to the extent that an activity is undertaken as a subterfuge for activities prohibited by the Act, nothing in the Act is intended to affect any activity that is not directed at a sunken military craft. The same holds true for traditional high seas freedoms of navigation including the laying of submarine cables and pipelines, the operation of vessels, fishing, or other internationally lawful uses of the sea related to such freedoms. Therefore, if a person does not know or have reason to know that the craft at which an activity is directed is a sunken military craft, the prohibitions stated in the Act do not apply. The same holds true for those conducting vessel operations, fishing, and laying of submarine cables and pipelines, who, having satisfied other permitting, licensing, or regulatory requirements,

disturb, remove, or injure a sunken military craft without actual or constructive knowledge of its status.

A modest number of public comments concentrated on the appropriate level of resources required to implement the DON sunken military craft management program outlined in these regulations. One comment recommended that preferential treatment should be given to maritime grave sites, and stated that resources dedicated to sunken military craft that do not serve as grave sites detract from the overall mission. Whereas DON considers the matter of maritime grave sites preeminent among the reasons why DON sunken military craft require controlled access, concerns over unexploded ordnance and public safety, environmental hazards, state secrets and national security, as well as heritage preservation, firmly justify the management of DON sunken military craft that do not serve as maritime grave sites, and afford such craft equal status to that of their counterparts.

Several public comments addressed matters of federal and state agency coordination, requesting clarifying language in certain instances. As a result, DON has modified its executive summary in order to stress that, in addition to a DON permit, an applicant may need to seek additional permits or authorizations prior to conducting activities directed at sunken or terrestrial military craft, such as state antiquities permits. However, as these regulations implement federal statutes on behalf of the DON, including the SMCA, the DON has not introduced the term "Federal" when discussing permitting within the regulations. It is not the case that each permit issued by the DON will require some form of state agency license, which is the impression that may be afforded to the public through the application of the prefix "Federal" when discussing DON permitting. The DON has, however, modified § 767.5(f) to address state agency concerns surrounding the potential applicability of state permits on activities otherwise permitted by DON, and to account for the expressed desire by state agencies to reach agreements with DON on the sound stewardship of DON sunken military craft located in state waters. The DON views such agreements as the appropriate venue within which to discuss sensitive information such as the location or character of sunken or terrestrial military craft. The DON assures state agencies expressing concerns over inadvertently issuing permits for activities to be undertaken on DON sunken military craft, without recognizing their status as sunken

military craft, that the provisions of section 1406 of the SMCA guide these regulations. Elsewhere, recognizing that State Historic Preservation Offices may not be the only state agencies with potential subject-matter interest, oversight, or permitting authority, the DON has accepted a series of recommendations requesting the addition of the term “state land or resource managers” where appropriate.

Finally, a small number of public submissions addressed technical comments which the DON proceeded to consider. As a result, a citation in § 767.12(e)(2) has been corrected to read “§ 767.9(h)” as opposed to “767.9(g)”, and reference to § 767.10(a), (b), and (c) has been shortened to simply read § 767.10. Other technical comments pertaining to the numbering of paragraphs did not appear valid or necessitating modification. The DON also reviewed a reference to “members of the public” in the Executive Summary and replaced the term with “persons” in order to promote consistency within the regulations.

Matters of Regulatory Procedure

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

It has been determined that 32 CFR part 767 is a significant regulatory action. The rule does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of the recipients thereof;

The rule does:

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

Unfunded Mandates Reform Act (Section 202, Pub. L. 104–4)

It has been determined that 32 CFR part 767 does not contain a Federal Mandate that may result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96–354, “Regulatory Flexibility Act” (5 U.S.C. 601)

It has been certified that 32 CFR part 767 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

There will be minimal to no impact on small businesses since the existing permitting program is similar in scope to the requirements of the revised regulations except that the revised regulations further clarify for the applicant the types of information that would need to be required and also put in place an expedited Special Permit process. For example, under the revised regulations, the Navy has clarified what specific information would need to be included within a permit application, whereas under the existing rule, applicants are merely provided guidance regarding where they might procure the relevant form. Under the current rule, those applicants intending to minimally disturb a site are required to complete the same process as those intending full site recoveries. Under the revised regulations, such applicants would be permitted under a much simplified Special Permit process, requiring a streamlined and shorter application. This will lead to a reduced impact on small businesses since the applicants no longer will have to speculate on the types of information that will be needed to receive a permit, nor will they have to provide more information than is necessary for their particular activity. Applicants will be able to tailor their requests and provide specific required items vice providing more of a wider range of information.

Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 767 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). For the past 14 years, only a handful, or less, of applications have been received and processed annually. The Navy will continue to monitor the number of applications received and processed and will submit an information collection package for OMB clearance should the threshold for doing so be reached.

Federalism (Executive Order 13132)

It has been determined that 32 CFR part 767 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or
(3) The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 767

Aircraft, Government property management, Historic preservation, Research, Vessels.

For the reasons set forth in the preamble, 32 CFR part 767 is revised to read as follows:

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

Subpart A—Regulations and Obligations

Sec.

- 767.1 Purpose.
- 767.2 [Reserved]
- 767.3 Definitions.
- 767.4 Prohibited acts.
- 767.5 Policy.

Subpart B—Permit Requirements

- 767.6 Historic sunken military craft and terrestrial military craft permit application.
- 767.7 Evaluation of permit application.
- 767.8 Credentials of principal investigator.
- 767.9 Conditions of permits.
- 767.10 Requests for amendments or extensions of active permits.
- 767.11 Content of permit holder’s final report.
- 767.12 Special use permit application.
- 767.13 Monitoring of performance.
- 767.14 Amendment, suspension, or revocation of permits.
- 767.15 Application to foreign sunken military craft and U.S. sunken military craft not under the jurisdiction of the Navy.

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.
- 767.17 Liability for damages.
- 767.18 Notice of Violation and Assessment (NOVA).
- 767.19 Procedures regarding service.
- 767.20 Requirements of respondent or permit holder upon service of a NOVA.
- 767.21 Hearings.
- 767.22 Final administrative decision.
- 767.23 Payment of final assessment.
- 767.24 Compromise of civil penalty, enforcement costs and/or liability for damages.
- 767.25 Factors considered in assessing penalties.
- 767.26 Criminal law.
- 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.

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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC, 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC, 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 NHHHC 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 NHHHC also reserves the right to deny an applicant a permit if the applicant has not fulfilled requirements of permits previously issued by the NHHHC 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 NHHHC'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 NHHHC, 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 NHHHC.

(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 NHHHC 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 NHHHC 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 NHHHC will not waive statutory procedures or requirements.

(f) Persons carrying out official NHHHC duties under the direction of the NHHHC Director, or his/her designee, or conducting activities at the direction of or in coordination with the NHHHC as recognized through express written permission by the NHHHC 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 NHHHC 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 NHHHC.

(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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC evaluation, NHHHC personnel will recommend an appropriate action to the NHHHC Deputy Director. If approved, the NHHHC 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 NHHHC 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 NHHHC 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 NHHHC.

(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 NHHHC 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 NHHHC 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 NHHHC, 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 NHHHC 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 NHHHC. The curatorial facility must establish a loan of resources agreement with the NHHHC and maintain it in good standing. If a loan of resources agreement is not established, or at the discretion of the NHHHC, resources are to be managed, conserved and curated directly by the NHHHC at the expense of the applicant, unless otherwise agreed upon in writing by the NHHHC. Copies of associated archaeological and conservation records and data will be made available to the NHHHC, 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 NHHHC 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 NHHHC. Permitted work may not resume until authorized by the NHHHC.

(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 NHHHC 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 NHHHC'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 NHHHC 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 NHHHC 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 NHHHC 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, NHHHC 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 NHHHC on-site personnel, other designated authorities, or the permit holder, must be promptly reported to the NHHHC 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 NHHHC 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 NHHHC 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 DON.

(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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC 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 NHHHC. At the discretion of the Director of the NHHHC, 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 online 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 NHHHC. The Director of the NHHHC will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as the Director of the NHHHC determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, the Director of the NHHHC 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 NHHHC'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 NHHHC 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 NHHHC 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.

Dated: August 14, 2015.

N. A. Hagerty-Ford,

Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

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