6 O.R.W. A (N.O.A.A.), 1990 WL 514454

In the Matter of **Gentile**: Administrative Appeal of Denial of
MONITOR National Marine Sanctuary Permit Applications

****1 UNITED STATES DEPARTMENT OF COMMERCE**

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

NATIONAL OCEAN SERVICE

DEPUTY ASSISTANT ADMINISTRATOR

WASHINGTON, D.C. 20230
Docket No. 951–193
January 4, 1990

1. Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431 et seq.
The MPRSA and its implementing regulations expressly prohibit most kinds of activity in the U.S.S. Monitor National Marine Sanctuary. The only activities for which permits may be granted are for research and for air or marine casualty operations. The Agency has broad discretion in deciding whether to grant or deny permits. Permit proposals for research are evaluated on five regulatory criteria provided at 15 C.F.R. § 924.6(b).

2. APPLICANT DECISIONS—15 C.F.R. Part 924
Applicant **GaryGentile** submitted to the Agency a permit application to conduct dives for the purposes of research in the Monitor NMS. Applicant appealed the Agency's denial of his application. An informal administrative hearing was held and the ALJ determined in his Recommended Decision that the Agency's refusal to issue a permit was predicated on personal safety concerns for Applicant and his crew, rather than on the regulatory criteria. The ALJ recommended that the Agency's determination to deny the permit be reversed and that the matter be remanded to appropriate Agency officials for consideration, comments, and a decision on all aspects of the proposal, applying each of the five regulatory criteria. The Secretarial delegate adopted the ALJ's Recommended Decision.

***1** Decision

SUMMARY

This is an appeal from a decision of the Acting Director of the U.S.S. Monitor National Marine Sanctuary to deny three applications to conduct activity in the sanctuary. Mr. **Gentile** has submitted three applications, Nos. 3, 10, and 11, to conduct dives for the purposes of research in the Sanctuary (Administrative Record, hereafter “AR,” 3–1, 2, 3). These applications were denied on June 9, 1989, by Donald E. Critchfield, then Acting Director of the Sanctuary (AR C–1, 2).

Pursuant to the regulations governing the Monitor Marine Sanctuary, “any person may appeal the granting, denial, conditioning, or suspension of any permit ... to the Administrator of **NOAA**, and may request an informal hearing.” (15 § CFR 924.8). A hearing was requested in this case and was held on October 18, 1989, before Administrative Law Judge (ALJ) Hugh Dolan, the Hearing Officer designated by the Secretary for that ***2B** purpose pursuant to § 924.8(c). Judge Dolan issued a recommended

decision on November 20, 1989 and, pursuant to 15 CFR § 924.8(c), that decision has been forwarded to the Secretary for his review. [1]

The regulations provide that the Secretary may adopt the Hearing Officer's recommended decision, in whole or in part, or may reject or modify it (15 CFR § 924.8(d)). Pursuant to the authority delegated to me by the Secretary and based on the record, I have decided as follows.

BACKGROUND

THE ACT AND THE REGULATIONS

**2 The Secretary's authority to regulate activity in the Monitor Sanctuary is derived from the Marine Protection, Research and Sanctuaries Act (hereafter, the MPRSA). That Act, passed in 1972, provided for the creation of marine sanctuaries, and states *3c that it is the policy and purpose of Congress to
"(1) identify areas of the marine environment of special national significance due to their resource or human-use values; (2) to provide authority for comprehensive and coordinated conservation and management of these marine areas that will complement existing regulatory authorities; (3) to support, promote, and coordinate scientific research on, and monitoring of, the resources of these marine areas; (4) to enhance public awareness, understanding, appreciation, and wise use of the marine environment; and (5) to facilitate, to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of these marine areas not prohibited pursuant to other authorities." (16 U.S.C. § 1431)

It is clear that Congress intended both to preserve and promote research on areas of significant national interest, and to encourage public access to and awareness of them. However, Congress has clearly, by the wording of (5), made public access subject to the primary objective of resource protection. Public use of the resources is to be facilitated only to the extent that it is compatible with resource protection.

By regulation, **NOAA** has designated the site of the Monitor as a Marine Sanctuary. Implementing regulations were issued on May 19, 1975 (at 15 CFR § 924 et seq.). The regulations expressly prohibit most kinds of activity on the site; specifically, anchoring, stopping, drifing or diving within the Sanctuary, except as authorized by permit. The only activities for which permits can be granted are for research, and for air or marine casualty operations (§ 924.5).

By their terms, the regulations are restrictive. One of the few changes in the regulations between the time they were *4d proposed and the time they were published in final form was the expansion of the section prohibiting anchoring, which was changed from "bottom anchoring" to "anchoring in any manner, stopping, remaining or drifting without power at any time." (40 Fed.Reg. 21706, May 19, 1975). No additions to the kinds of activities which are permitted or the activities for which permits may be granted have subsequently been proposed or enacted.

The stated purpose for making the site of the Monitor a Marine Sanctuary was to preserve it because of its historical significance (Administrative Record in **Gentile** v. **NOAA**, et al., Civil Action No. 87–2192 (E.D.Pa.), [2] hereafter "1987 AR," at A–3, Appendix F, p. 41). Other sites, according to **NOAA's** 1988 Site Identification and Selection criteria, have been proposed for inclusion in the program for other reasons, ranging from their fishery and recreational value to their suitability as interpretative opportunities (53 Fed.Reg. 43802, October 28, 1988). Given that the historical value of the wreck of the Monitor was the major criteria for its selection as a Marine Sanctuary, it is entirely appropriate that permitted activities on the site are restricted to research and marine and air casualty operations. Entry onto the site for other purposes might lead to damage to the Monitor or the marine environment in which it rests. The area is not especially appropriate for most kinds *5e of recreational diving.

The U.S.S. Monitor lies at a depth of 220 feet (ALJ's Decision, hereafter "Decision," p. 6) in an area off the continental shelf where the currents are strong and the weather and sea conditions unpredictable (Transcript of Proceedings, hereafter "TR," pps. 100, 266, 268).

****3** The regulations give the Agency broad discretion in deciding whether to grant or deny permits (§ 924.6(e)). The Secretary must evaluate five factors in considering whether to grant permits for an activity related to research of the Monitor: (1) the professional and financial responsibility of the applicant, (2) the appropriateness of the research method proposed to the research purpose, (3) whether the activity will diminish the value of the Monitor in any respect, (4) the end value of the research, and (5) "such other matters as the Administrator deems appropriate" (§ 924.6(b)). The Administrator of the Sanctuary, may "seek and consider the views of any person or entity within or outside the Federal Government, as he deems appropriate," but must seek and consider the views of the Advisory Council on Historic Preservation (§ 924.6(d), emphasis added).

AGENCY REVIEW

It has been the practice of the Agency to submit requests for research on the Monitor to a safety review; it is this practice, and the results of this review, that are the objects of contention in this case. The Agency justifies its review of diving safety in terms of its duty to review the "appropriateness ***6f** of the research method envisioned" and "such other matters as the Administrator deems appropriate" (Agency Exceptions to the Recommended Decision, at 10). Its U.S.S. Monitor National Marine Sanctuary Management Plan provides that:

> Diving that is consistent with the Monitor Sanctuary goals may be permissible. However, such activity requires a written permit from **NOAA** for the purpose of protecting the wreck, assurances of optimum safety procedures, and maintaining a record of the sanctuary's public use (1987 AR A–3 at 29, emphasis added).

NOAA's Archaeological Research Guidelines (hereafter "guidelines," appended to the Agency's Exceptions to the Recommended Decision) provide that:

> If proposed archaeological research involves diving or the use of submersibles and if such activities require a permit under the applicable Sanctuary regulations, the application will be reviewed by the **NOAA** Diving Coordinator in accordance with the **NOAA** Diving Regulations, **NOAA** Directive 64–23, Nov. 30, 1983, prior to the issuance of a permit. (p. 6)

Mr. **Gentile** argues (Appellant's Rebuttal to Agency's Exceptions to the Recommended Decision of the Administrative Law Judge, at p. 3) that these guidelines are not properly a part of the administrative record because they are appended to the Agency's Exceptions to the Recommended Decision and references to them in the cited pages of the transcript (TR 53, 65 and 249) are unclear. The guidelines do not appear to have been cited by the Agency in its denial of these applications, have not been referred to at the hearing as the basis for Agency decisions, nor do they seem to have been made available to Mr. **Gentile** when he was preparing his applications. However, I have chosen for the ***7g** purposes of this case to treat them as part of the record, since they provide guidance to the Agency's exercise of discretion in granting or denying permits. They clearly relate to the issue in question and must have been at least indirectly considered by the Agency when it decided to submit Mr. **Gentile's** proposals to the diving coordinator.

****4** The **NOAA** "diving regulations" [3] (hereafter referred to as the "**NOAA** diving safety rules," 1987 AR A–4) specifically apply to "the administration and safety rules for **NOAA** diving." They set forth detailed standards for selection, training, certification, supervision and equipping of **NOAA** divers. They require (at p. 15) that the "The **NOAA** Diving Safety Rules shall be adhered to on all diving operations." The rules state flatly that "dives shall not exceed 130 feet," and that proposals for

dives to greater depths shall require the written approval of the Diving Coordinator (at p. 16). Elsewhere, the rules also state that "proposed diving projects involving diving techniques other than standard SCUSA not covered elsewhere in these regulations must receive the approval of the NOAA Diving Safety Board." The Diving Safety Board can review diver qualifications, certification and physical condition, availability of personnel required to complete the project, specific standard operating procedures regarding safety, ***8h** methodology and emergency procedures and support staffing" (at p. 8). The Diving Safety Board is composed of the NOAA Diving Coordinator, NOAA Line Office Diving Officers and Designated Line Office representatives (p. 3). There are no internal NOAA procedural requirements for handling reviews or requests for approval.

The Agency maintains that the application of NOAA's diving standards to the applicant's proposed diving methodology is a reasonable exercise of discretion under the Act and the regulations (Agency Exceptions to the Recommended Decision, p. 11), and asserts that the NOAA diving safety rules, while not directly binding on those outside the Agency, can be applied as a matter of policy to applications for permits to conduct research in the Monitor Sanctuary (Agency Closing Brief, p. 5).

The applicant argues on appeal that NOAA diving standards are "antiquated" and otherwise inappropriate to recent diving methodology, that Mr. Gentile and others included in his application were "wrongfully and improperly classified and judged against a sport, or novice diver standard," and that the Agency officials who denied the permits "had ulterior and capricious motives" in denying the permit applications, and were personally biased against the applicant (Letter dated August 28, 1989, from Peter E. Hess to John J. Carey, Re; Gentile Monitor Marine Sanctuary Administrative Appeal).

Administrative Law Judge Dolan has gone beyond the applicant's argument to find that the Agency is not entitled to ***9i** apply NOAA diving standards to applications to conduct research in the Monitor (and presumably other) Marine Sanctuaries. He has found that the applicant has presented credible evidence of diving methodology that addresses, but does not completely satisfy, the Agency's safety concerns (Decision, p. 7). He has found that the applicant was treated differently than a previous applicant (the Cousteau Society) which was granted a permit in much less time, using much the same methodology (Decision, p. 5), but that Agency officials were not motivated by bias in denying the applications (Decision, p. 7). He has also found that there was inordinate delay in the processing of these requests (Decision, p. 6).

DISCUSSION

NOAA DIVING STANDARDS

****5** I find that the major issue in dispute is not whether, under the regulatory framework set forth pursuant to the Marine Protection, Research, and Sanctuaries Act, the Agency is entitled to address safety concerns in its review of a permit to conduct research in the Sanctuary, but whether these concerns were correctly addressed.

I accept the ALJ's decision with respect to his finding that Agency officials were not biased, nor did they act arbitrarily and capriciously. However, I find the length of time that these Agency officials took to respond to the requests to be totally unacceptable.

***10j** I find safety to be a reasonable and necessary concern, and well within the scope of Agency discretion, as did the Court in Gentile v. NOAA (Civ. No. 87–2192 (E.D.Pa.), decided March 30, 1988). To the extent that Administrative Law Judge Dolan does not, I find his decision insupportable. Considering the Secretary's broad authority under the MPRSA to manage and regulate Marine Sanctuaries both in terms of resources and human-use factors, it would be exceptionally unusual for it to be unable to concern itself with safety in them. Indeed, safety provisions are absolutely necessary to responsible Agency administration of Marine Sanctuaries, are part of the regulations governing every Sanctuary administered by this Agency, and range from provisions prohibiting the use of weapons to provisions controlling watercraft speed.

The manner in which safety concerns were applied to these applications is the real issue in this case. The guidelines state that applications to dive will be reviewed by the Diving Coordinator "in accordance with the **NOAA** diving regulations." The **NOAA** diving safety rules clearly state that they apply to "all **NOAA** employees and **NOAA**-sponsored personnel" (AR A–2 at 2(c)(1)). But nowhere does it say that these diving safety rules apply to non-**NOAA** activities or divers or that they are binding on applications to dive in the Marine Sanctuaries. Indeed, there is no evidence that the **NOAA** diving safety rules were intended to be applied to non-**NOAA** divers in the context of these guidelines, since they encompass everything from recruitment to certification ***11k** and make frequent references to **NOAA** personnel and internal procedures. It is clear that only parts of the diving safety rules may be applicable to non-**NOAA** divers, but there is no evidence as to which parts these are. Nor are there any procedures set forth in the diving safety rules governing conduct of safety reviews by either the Diving Coordinator or the Diving Safety Board.

The Sanctuary management plan requires the use of "optimum" safety procedures, but is no more specific than that. To the extent that the **NOAA** Diving Manual is the source of the optimum procedures, does it provide standards for diving safety that the Agency could use as the basis for permit denials?

The **NOAA** diving manual is, as the ALJ states in his brief, a well informed compilation of information based on extensive experience. It is also, in the opinion of most of the diving community, an authoritative resource for diving professionals and sport divers alike. The two major recognized sport diving certification organizations apply essentially the same diving standards as those applied by **NOAA** (TR at 198). The present version of the Manual was issued in 1979.

****6** Even so, there exists a body of opinion that maintains that by virtue of training and experience, dives can be safely accomplished in the course of wreck exploration that under the **NOAA** diving standards subject the divers to "exceptional exposure". An experienced cadre of divers is willing to dive in conditions and with diving methodologies that **NOAA** considers ***12L** unsafe in light of the manual and commonly accepted diving safety criteria (ALJ's Findings, No.s 2 and 8, Recommended Decision, p. 4 and 5). And even the **NOAA** Diving Manual itself says "The recommendations and guidelines contained in this Manual are not intended to replace judgement, expert opinion or the application of knowledge and technology that may become available after publication" (**NOAA** Diving Manual, vii, 1987 AR A–7).

What criteria is **NOAA** entitled to use in the permitting process? The Agency argues that it has broad discretion, and that it has applied reasonable standards to Mr. **Gentile's** proposed dives, but are these standards reasonably related to the purpose for which the Agency reviews proposals to do research on the site of the Monitor? The dives proposed do not appear to endanger the Monitor or the site; they seem to pose a danger only to the applicant, and that is only in the opinion of **NOAA**, not Mr. **Gentile**.

I find that the Agency guidelines and its management plan give too little guidance to the Administrator or his designee on how to evaluate the safety of the diving methodology proposed in research applications. The dives are to assure "optimum safety procedures" (by virtue of the Management Plan), and to be reviewed by the Diving Coordinator in accordance with the **NOAA** diving regulations (as stated by the guidelines), but the guidelines do not state that the approval of the Diving Coordinator is a prerequisite for the permit, or that the **NOAA** diving regulations are otherwise binding on the applicants. They ***13m** lack clarity and specificity with respect to how considerations of diving safety are to be applied in practice.

There is certainly a need for specific standards to guide the Agency with respect to applications to dive in the Marine Sanctuaries, but I have not found them here. I recommend that the Agency proceed to develop and adopt them, and make them available to all who wish to conduct research in the Monitor Sanctuary.

THE **GENTILE** PERMIT APPLICATIONS

In this case, since Agency guidelines that might have helped the Administrator decide safety issues according to a workable standard were unworkably vague and imprecise, we must weigh the evidence.

The applicants have presented evidence of considerable expertise and experience which tends to rebut the testimony of Agency experts that any dives on this site done with Mr. **Gentile's** methodology are necessarily unsafe. [4] Mr. **Gentile** and Harold Watts, William Deans, Cecelia Connelly and Stephen ***14n** Bielenda (all of whom testified at the hearing on behalf of Mr. **Gentile**) have shown that they are, by virtue of their experience and fitness, perhaps uniquely qualified to dive at these depths using Mr. **Gentile's** proposed methodology. As the ALJ has concluded, "their training, experience and certifications reflect a substantially greater proficiency" than sport or novice divers (Recommended Decision, p. 7).

****7** The evidence also shows that the applicant's diving safety procedures are unlikely to harm either the Monitor, its immediate environment or other users. Many of the Agency's safety guidelines at this and other Sanctuaries are primarily designed to protect the marine environment, marine life and other humans; departures from these kinds of guidelines could endanger the very interests they were designed to protect. (For example, exceeding a speed limit or violating a divers down regulation would pose a danger to other users of the Sanctuary.) Here, regular public use of the Sanctuary area is not anticipated, and the primary purpose of the MPRSA and the regulations is to protect the wreck of the Monitor. Under these circumstances, Mr. **Gentile** and others who can demonstrate similar levels of fitness and experience should be allowed to employ Mr. **Gentile's** proposed diving methods under permits granted pursuant to these research proposals.

ORDER

I adopt the recommendation of Administrative Law Judge Dolan that "the Agency decision to deny the permits be reversed ***15*o*** and that the matter be remanded for consideration, comments and decision on all five factors set forth in the regulations" (Decision, at p. 7). The Agency must consider the merits of Mr. **Gentile's** research proposal in terms both of the research objectives set forth in the regulations and the Act's directive to, inter alia, "enhance public awareness, understanding, appreciation, and wise use of the marine environment" (16 U.S.C. § 1431).

In accordance with section 924.5(d) of the regulations, I direct the Agency to submit these proposals to review by the Advisory Council on Historic Preservation.

I also direct the Agency to require in permits granted to Mr. **Gentile** pursuant to these proposals;

(1) a waiver and indemnification statement signed by each diver before embarking to the Sanctuary specifying in suitable language that each diver is aware that the dives proposed are characterized by **NOAA** as exceptional exposures and may entail substantial risk of injury or death; that each diver agrees to hold the Federal Government harmless from any accident or injury resulting from the dives; and that each diver agrees to indemnify the Federal Government and hold it harmless from any resulting liability to the divers or third parties;

(2) other conditions and qualifications consistent with this opinion that the Agency finds appropriate upon further review of the proposals, including but not limited to conditions previously agreed to by this applicant concerning the conduct of the dives; ***16P** and

(3) the condition (as mandated by § 924.6(e)) that any information obtained in the research shall be made available to the public.

John J. Carey
Deputy Assistant Administrator

National Ocean Service, NOAA

U.S. Department of Commerce

National Oceanic and Atmospheric Administration

**8 *1q In the Matter of: GaryGentile, Respondent

UNITED STATES DEPARTMENT OF COMMERCE

OFFICE OF ADMINISTRATIVE LAW JUDGE

SUITE 6716

WASHINGTON, D.C. 20230

November 20, 1989

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RECOMMENDED DECISION

PRELIMINARY STATEMENT

This expedited proceeding has been initiated under the Marine Protection, Research and Sanctuaries Act of 1972, 26 U.S.C. § 1431 et seq., and the implementing regulations 15 C.F.R. Part 922 as well as 33 U.S.C. 1401 et seq.

BACKGROUND

This Appeal and Recommended Decision is but a step in a saga that has lasted for almost 5 years. Appellant seeks to scuba dive on the wreck of the Monitor, the civil war “cheese box-on-a-raft” which sunk off Cape Hatteras over a century ago. In 1974, it

was ***2r** designated as part of the Monitor Marine Sanctuary.[1] Appellant has filed some 11 applications for various permits over the last 5 years. This is his second administrative appeal after an unsuccessful attempt to have the earlier Agency denial action reversed in a Federal District Court. The denial of three proposals, Nos. 3, 10 and 11, to perform underwater photography of the USS Monitor are for consideration here.

The grounds for the appeal as set forth in a letter dated August 28, 1989 are as follows:
1) The **NOAA** and/or U.S. Navy diving standards against which Mr. **Gentile's** permit applications were judged are antiquated, in violation of **NOAA's** own diving regulations, and in contravention of the standards accepted and administered by other federal agencies in that they fail to adequately account for recent technological and procedural innovations which have been proven to minimize the safety risks of deep diving on Scuba equipment by the permit applicant.

2) Mr. **Gentile** and the other divers whose Scuba diving vitas were made a part of the applications were wrongfully and improperly classified and judged against a sport, or novice diver standard.

3) The administrative officials who participated in the permit denial process were non-disinterested, bore a personal antipathy toward Mr. **Gentile**, and had ulterior and capricious motives for denying the applicant access to the Monitor Marine Sanctuary.

The 30 day period for holding the hearing was extended because of a delay in transmitting the file to this Office. The informal hearing provided for in the Regulations was conducted on October 18, 1989. This decision is rendered on an expedited basis based on the requirement that it issue within 30 days after the Hearing.

Agency Counsel's suggestion that the due dates prescribed by the regulations not be followed was denied. It is hornbook law that an Agency must follow its own regulations. The fact that inordinate delay has dogged this appellant's requests should move Counsel and the Agency to at least attempt to follow the timetable which the Agency has prescribed.

***3s DISCUSSION**

****9** For almost five years this appellant has been involved in a dispute over his entitlement to scuba dive on the wreck of the USS Monitor. Appellant asserts a right as an American citizen to personally visit and photograph the wreck site some 220# deep off Cape Hatteras, within a Marine Sanctuary. Agency officials have repeatedly refused those requests and have prevailed in prior administrative and judicial review. The sole predicate for such denial has not been directly related to the purposes of the Sanctuary, but has rather been expressed as involving a personal safety concern for the divers. Unfortunately, but also inevitably, some acrimony has developed, principally over the delay. Respondents belligerance has not served to facilitate requests. However, as I have previously observed; antagonism and reprehensible behavior does not warrant official recrimination or sanctions (Dorr 4 O.R.W. 191 (**NOAA** 1985)). The failure to act or issue an opinion on appellant's requests by the diving office of **NOAA** for over a year when there was "... not a hell of a lot of thinking" involved in reaching the adverse determination, demonstrates a very unfortunate attitude and mindset on the part of the **NOAA** officials. Five minute determinations simply should not take over a year. Nor should citizens be led on with suggestions or requests for changes which will not alter the initial decision.

This appellant is not an academician or a scientist, at least in the grant proposal preparation sense. The permit requirement imposed for this most usual Sanctuary, though appropriate, is completely foreign to a wreck diver such as Mr. **Gentile**. The treatment he has received, particularly when contrasted to that shown to the Costeau Society is remarkable. While he was stonewalled, Costeau was encouraged. For example, despite initial reservation about the latter's application, within 30 days conditions were negotiated and a permit issued to scuba dive the Monitor. That permit, a public record, was neither provided as a model nor ever revealed to this appellant. Its existence was extracted from a reluctant Agency witness during my attempt

to ascertain some sense of the history of activity at the site. Review of that testimony demonstrates more than a lack of candor on the part of that Agency representative.

The Costeau permit experience is also significant because it appears to reflect that there is not a well defined process for considering such requests. There the diving office was not consulted, and the permit was granted. Here the diving office appears to have interposed a block, and the committee mandated to be involved in the process does not appear to have been consulted. In neither case, has the requirement that the activity constitute "research" been addressed in any detail. In fact, at the outset ***4t** the Costeau applicant denies that research is involved! Numerous other critical comparisons between these two permit requests may be made based upon materials in this record.

****10** The letter of denial fails to address the five factors or criteria listed in the regulations. It appears to trivialize the appellant's requests by alluding to non-germane matters. The Agency has published standards, it is obliged to rely upon and address them either in granting or denying proposals for permits.

I am not unmindful of the prior administrative and judicial decisions. In the present state of the record, the basis for the Agency action is no longer defensible.

FINDINGS

1. The evidence of record, taken as a whole, is credible and, when examined in the light of each witnesses background and experience, is not inconsistent. Diving presents elements of danger. The risk increases below 130 feet. The Agency witnesses cited standards which the Agency has adopted for the conduct of its diving activities. Staged decompression divers, including appellant, sometimes penetrate to depths below 200 feet. This is well beyond the **NOAA**, Navy and OSHA standards. It appears that a significant number of trained scuba divers frequently penetrate to depths at and in excess of 200 feet. There is certainly an element of increased risk, but not to the extent that restrictions on personal activity can be justified.

The Agency witnesses, most of whom are themselves scuba divers, do not venture to such depths. However, they probably don't: smoke, ride motorcycles, parachute, hang glide, scale mountain peaks, skydive, spelunk, drive speed boats, fish commercially, or engage in other such activities permitted in society. In retrospect, many would say it was foolhardy for the past Secretary of Commerce to be involved in a Rodeo type activity, being over three score years in age. There has been no attempt to impose an OSHA or other federal agency standard for such riding activity, fatal though it was. Similarly, the staged decompression diving of Ms. Connell, who is approaching three score years, is the mother of 11 and grandmother of 10, is not an activity to be proscribed by bureaucratic fiat.
A venturesome minority will always be eager to get off on their own, and no obstacles should be placed in their path; let them take risks, for Godsake, let them get lost, sunburnt, stranded, drowned, eaten by bears, buried alive under avalanches—that is the right and privilege of any free American.

16 Idaho Law Review 407, 420 (1980).

2. In addition to the problem of Nitrogen Narcosis, (Rapture of the deep), which is similar to alcohol intoxication, Decompression Sickness (the bends) is a diving hazard which increases with depth. The use of a decompression chamber is sometimes indicated, though breathing oxygen during staged decompression apparently lessens the ***5u** incidence of that condition. Oxygen toxicity, though alluded to, does not appear to be significantly involved or increased by scuba diving.

3. The **NOAA** and Navy diving program and tables represent well informed compilations of information based on extensive experience. They appear to be consistent with, though they vary somewhat from, the similar publications of other nations such

as Great Britain and France. The conservative approach which they represent reflects the imprecise nature of evaluating the subjective effects of this activity upon various divers at various times. Mathematically precise predictions of the effect of depth and time upon all divers are not possible.

****11** 4. It is understandable and valid that scientific research activity in which the Agency participates or contributes funds may properly be subject to a more stringent safety review process, which would support the use of Agency safety standards. However, the record does not reflect that the Agency "participated" or contributed funds to the Costeau or appellant's proposal. Review of proposals and observation do not constitute participation.

5. Agency's repeated denials of the appellant's requests for permits has been principally based upon the safety concerns issue, particularly Nitrogen Narcosis. That concern is unduly exaggerated and contrary to the experience of the scuba diving community as reflected in the record.

6. Respondent has been treated differently from others by the Agency, namely the Costeau Society. Specifically, if the element of Nitrogen Narcosis, which is relied upon by Agency Counsel, in staged decompression dives was applied equally to the Costeau application, it too would have been denied. The presence of a larger decompression chamber and other safety equipment aboard the Calypso do not appear to significantly impact or address the Nitrogen Narcosis concern.

7. Conditions at the Monitor site do not appear to vary significantly from other diving sites. Depth, currents, turbidity, temperature and the like, all vary significantly from day to day of times contraindicating diving.

8. The Agency asserts that staged decompression dives appear to be unduly hazardous, while the appellant portrays them as almost routine. Both represent honestly held views at near opposite ends of a spectrum to which there is a middle ground. This position is not a compromise, but rather reflects an area where those who take risks venture beyond that which the academic and bureaucratic segments of the scientific community accept, by relying upon additional instrumentation and equipment, as well as experience.

***6v** 9. Appellee is not a sport or recreation diver as the terms are commonly understood. The activity of Mr. **Gentile** and his witnesses such as Messars. Watts, Deans and Bielenda lies in the penumbral area between sport and commercial divers due to the increased depth as well as the profit and business aspects of their activities.

10. The fact that an activity is to be conducted within a federal reservation does not, in the absence of special circumstances, justify the imposition of special conditions or standards. Diving within areas under the jurisdiction of **NOAA's** sister Agency, the National Park Service, is not restricted. This is no different than diving in a Marine Sanctuary. The comment of the **NOAA** Representative to the effect that the National Park Service is not in the business of granting permits is absurd.

11. The record demonstrates that Dr. Morgan Wells and Edward Miller, who spoke for the Agency, had, have and continue to reflect an "unalterable closed mind on matters critical to the disposition of the case" United Steelworders of America v. Marshall, 647 F.2d 1189, 1209 (D.C.Cir.1979). However, there has not been any showing of "fraud or at least a pecuniary interest in the outcome". Howlett v. Walker, 417 F.Supp. 84, 86 (N.D.Ill.1976). The closed minds are tied directly to their sole reliance on the **NOAA** diving regulations and Navy tables and do not appear to be based upon any extraneous or improper motives.

****12** 12. The inordinate delay in the processing of appellant's requests is not explained by Agency Counsel's expression respecting "the stately pace of bureaucratic decision making". The situation here is better described in the presidential phrase about being left twisting gently in the breeze. Agency personnel did not go out of their way to assist appellant to formulate his proposals as it asserted by Agency Counsel. The contrast to the reception and attitude toward the Costeau Society with which the agency representatives worked very quickly and issued a permit within a month is at least remarkable.

13. The evidence of record and the relevant chart information reflect that the depth of the Monitor is approximately 220 feet.

14. The requirement that vessel anchors be placed outside the sanctuary limits is reasonable. Multiple anchors would allow positioning at or close to the Monitor.

15. The evidence and representations respecting the state of the Monitor and the rate of its deterioration do not support any specific finding or conclusion.

*7w CONCLUSION

With respect to the three grounds for the appeal, I conclude that:
1) The standards adopted for Agency use by **NOAA** and/or the United States Navy may not be imposed upon the public sector merely because the proposed activity is to be carried out within a Marine Sanctuary.

2) The appellant and other staged decompression divers are not sport or novice divers. Their training, experience and certifications reflect a substantially greater proficiency.

3) While the record reflects that a disaccord between appellant and the **NOAA** Monitor Marine Sanctuary and Diving Program officials developed over the the almost 5 years during which appellant has sought permits, it does not appear that personal antipathy, or other ulterior and caprious motives generated the denial of the requests on appeal here. The record demonstrates that the **NOAA** officials are strongly committed to the application of the diving standards which they have authored and the Agency has adopted. Under those standards neither appellant nor other scuba equipped divers would be approved.

RECOMMENDED DECISION

I recommend that the Agency determination to deny the permit requested be reversed and that the matter be remanded for consideration, comments and decision on all aspects of the proposal, applying each of the five factors set forth in the regulations (15 C.F.R. § 924.6) by the appropriate agency officials including the Advisory Council on Historic Preservation.

Hugh J. Dolan
Administrative Law Judge

U.S. Department of Commerce

National Oceanic and Atmospheric Administration

Footnotes

1 On November 28, the Assistant Administrator for NOS granted Government Counsel's motion to extend by 30 days the time for the Secretary's review of the ALJ's recommended decision, and provided a timetable for the submission of exceptions to the recommended decision and replies. Exceptions were to be filed by December 12 and replies by December 19. Appellant's reply brief was received on December 22 by facsimile in this office. The mailed copy was postmarked December 21. Under the procedural rules applicable to filings in this proceeding, Appellant's reply brief is late and is therefore not entitled to consideration. Given Appellant's arguments that the agency has been dilatory in this case, his opposition to the agency's request for an extension of time, and his request for an

expedited proceeding, I find Appellant's tardiness and apparent disregard for the rules of procedure highly ironic. I have, nevertheless, considered his arguments to the extent that they are different from those raised in his other filings.

2 This 1988 U.S. District Court Decision and Administrative Record have been made a part of the Administrative Record in this proceeding (AR, E–1.)

3 The "**NOAA** Diving Regulations" are in fact internal agency guidelines on diving safety contained in **NOAA** Directive 64–23. As such, they have not been promulgated according to the provisions of 5 U.S.C. 553 that govern formal agency rule making, including notice and comment.

4 Whether others with less experience would be similarly qualified to dive at these depths, on oxygen and without the use of a decompression chamber cannot be answered at this time. How much experience is enough? Should experience and physical fitness be the standards? Questions of what equipment is necessary, and how to deal with nitrogen narcosis are also of great importance. All of these issues can and should be addressed in the context of agency standards. **NOAA's** diving safety rules may be a good basis for such standards, but they must be tailored to the general diving public, contain procedures for exceptions and decisions, specifically apply to diving in the marine sanctuaries, and be made available to any person who requests an application for any activity connected with such diving.

1 A summary history of the Monitor and Sanctuary is set forth in the 17th annual report of the Council on Environmental Quality (1986 at pp 148–150).

6 O.R.W. A (N.O.A.A.), 1990 WL 514454

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