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## **The Federal Register**

### **The Daily Journal of the United States Government**

Proposed Rule

# **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**

A Proposed Rule by the [Navy Department](#) on [01/06/2014](#)

## **Action**

Proposed Rule.

## **Summary**

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 revised application guidelines for research permits on terrestrial military craft under the jurisdiction of the DoN.

## **Unified Agenda**

# **Permit Application Procedures for Archaeological Research and Enforcement Procedures of the Sunken Military Craft Act on Sunken Military Craft Under the Jurisdiction of the Department of the Navy**

1 action from October 2013

- October 2013
  - NPRM

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- **Subpart A—Regulations and Obligations**
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## DATES:

Interested parties should submit written comments on or before March 7, 2014.

## ADDRESSES:

You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>.

Follow the instructions for submitting comments.

*Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350-3100.

*Instructions:* All submissions received must include the agency name and docket or RIN number for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://regulations.gov> as they are received without change, including any personal identifiers or contact information.

## FOR FURTHER INFORMATION CONTACT:

Dr. Robert Neyland, Head, Underwater Archaeology Branch, Naval History & Heritage Command, Department of the Navy, 805 Kidder Breese Street SE., BL 57, Washington Navy Yard, DC 20374, email: [NHHCUnderwaterArchaeology@navy.mil](mailto:NHHCUnderwaterArchaeology@navy.mil).

## SUPPLEMENTARY INFORMATION:

### Executive Summary

This proposed rule serves as a revision of the current 32 CFR part 767 and incorporates existing regulations together with 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 (10 U.S.C. 1402(a)-1402(b)). The proposed rule replaces the current regulations and establishes a single permitting process for members of the public wishing to engage in activities that disturb, remove, or injure DoN sunken and terrestrial military craft for archaeological, historical, or educational

purposes. As per the limitations on application expressed in (10 U.S.C. 1402(c)(1)), section 1402 shall not apply to actions taken by, or at the direction of, the United States.

The current rule is based on provisions of the National Historic Preservation Act (NHPA) (16 U.S.C. 470) which sets forth the responsibility for each agency to preserve and manage historic properties under their 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 institutes a permitting program that authorizes controlled access to disturb these historic properties, which remain property of the DoN, for prescribed purposes. It is the policy of the DoN to preserve these 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 affords the DoN the ability to efficiently oversee its more than 17,000 historic wrecks dispersed around the globe.

The existing regulations only apply to ships and aircraft that are classified as historic structures or archaeological sites, regardless of location, and do not carry the enforcement provisions necessary to serve as a deterrent to their unauthorized disturbance. The SMCA was enacted in 2004 and codified these existing principles of preservation of title and sovereign immunity in regards to 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. 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.

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 that sunken military craft are entitled to sovereign immunity and 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.

This proposed rule is 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 that is otherwise prohibited. As stewards of the DoN's historic ship and aircraft wrecks, the Naval History & Heritage Command (NHHC) continues its role as the authority responsible for administering this revised permitting program. As a result of the need to incorporate the existing regulations and provisions set forth in the SMCA, the proposed rule adopts the definition of sunken military craft present in the Act and develops a counterpart—terrestrial military craft—to refer to DoN wrecked craft located on land that are either historic structures or archaeological sites.

NHHC will serve as the permitting authority for the disturbance of non-historic DoN sunken and terrestrial military craft and consider such applications in the cases where there is a clear demonstrable benefit to the DoN 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 NHHC will also serve as the permitting authority for those foreign sunken military craft located in U.S. waters that through and under the terms of an agreement with the respective foreign state are included within NHHC's management purview. Non-intrusive activities including diving adjacent to or remotely documenting sites do not require a permit or authorization from the NHHC though this does not preclude the obligation to obtain permits or other authorizations otherwise required by law. The regulations stipulate an application process for disturbance of historic sunken military craft and terrestrial military craft. Applicants must meet certain requirements and qualifications which are set forth in the proposed rules 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 proposed 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 the 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 must be shared with NHHC.

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 agreements with foreign nations, and in particular the major maritime powers, seeking assurances that our sunken military craft will be respected and protected and offering foreign nations reciprocal treatment. In order to encourage universal respect and such 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 its

sovereign immunity 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 final major provision of the proposed rule affects violations of the SMCA or of the 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.

The proposed revision to the 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 national security interests more effective, efficient, and affordable. At the same time, the proposed rule enables the public 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 DoD's retrospective plan under [EO 13563](#) completed in August 2011. DoD's full plan can be accessed at <http://exchange.regulations.gov/exchange/topic/eo-13563>.

## Background

The DoN is revising [32 CFR part 767](#) pursuant to the SMCA in order to implement a permitting system regulating research activities directed at DoN sunken military craft that otherwise are prohibited by the SMCA. The proposed 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 such as those of the Federal Archaeology Program and the NHPA. The proposed rule allows for the incorporation of foreign sunken military

craft in this permitting system upon request and agreement with the foreign state. Furthermore, it identifies penalties and enforcement procedures to be followed in the event of violations to the proposed rule affecting sunken military craft. The proposed rule will replace the existing section to reflect current agency regulations. Interested persons are invited to comment in writing on this amendment. All written comments received will be considered in making the proposed amendments to this part. It has been determined that this proposed rule amendment is not a major rule within the criteria specified in Executive Order 12866, as amended by Executive Order 13258, and does not have substantial impact on the public.

## 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 not 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;
- (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of the recipients thereof; or
- (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 (Sec. 202, Pub. L. 104-4)

It has been certified 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.

## 96, “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.

## 96, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been certified 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).

## Federalism (Executive Order 13132)

It has been certified 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

- Evaluation of permit applications
- Historic sunken military craft and terrestrial military craft site permits
- Special use permits
- Foreign sunken military craft
- Civil penalties
- Liability for damages
- Enforcement actions
- Prohibited acts
- Permit requirements

For the reasons set forth in the preamble, the Department of the Navy proposes to revise 32 CFR part 767 to read as follows:

begin regulatory text

# **PART 767—GUIDELINES FOR ARCHAEOLOGICAL INVESTIGATION PERMITS AND OTHER RESEARCH ON SUNKEN MILITARY CRAFT AND TERRESTRIAL MILITARY CRAFT UNDER THE JURISDICTION OF THE DEPARTMENT OF THE NAVY**

- Sec.
- 767.1 Purpose.
- 767.2 [Reserved].
- 767.3 Definitions.
- 767.4 Prohibited acts.
- 767.5 Policy.
- 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 DoN.
- 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, and to provide application rules for research permits on applicable military craft under the jurisdiction of the DoN.

(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 ensure DoN consistency with other applicable Federal laws. The Secretary is responsible for managing DoN historic military craft, including those that also qualify as sunken military craft, under the guidelines of the Federal Archeology Program. In order for the Secretary's management policy to be consistent to the extent practicable with the Federal Archeology Program, the NHPA (16 U.S.C. 470), Protection of Archaeological Resources: Uniform Regulations (32 CFR part 229), and Curation of Federally-Owned and Administered Archaeological Collections (36 CFR part 79), the DoN has implemented a permitting process applicable to DoN historic military craft consistent with and applying the Archaeological Resources Protection Act (ARPA) of 1979 as amended, 16 U.S.C. 470aa-mm, permitting criteria. The DoN's application of ARPA's permitting criteria promotes consistency among federal agencies. The regulations provide qualified individuals and entities with access to DoN historic military craft for purposes consistent with ARPA and the SMCA.

(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.

*Archaeological site* means the place or places where the remnants of a past culture survive in a physical context that allows for the interpretation of these remains. A historic sunken military craft or a terrestrial military craft is considered an archaeological site when it lacks the structural integrity of an intact craft and when its wrecksite retains archaeological or historical value.

*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.

*Disturb or Disturbance* means directly or indirectly affecting the physical condition of any portion of a sunken military craft or terrestrial military craft, altering the position or arrangement of any portion of a sunken military craft or terrestrial military craft, or influencing 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.

*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 distributed due to, or as a consequence of, a wrecking event and post-depositional site formation processes. An artifact field forms part of a debris field.

*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.

*Historic structure* means a structure made up of interdependent and interrelated parts in a definite pattern or organization that has been deemed historic. Constructed by man, it is often an engineering project large in scale. If a historic structure has lost its historic configuration or pattern of organization through deterioration or demolition, it is considered an archaeological site. A historic sunken military craft or terrestrial military craft is a historic structure when it is relatively intact and when it and its location retain historical, architectural, or associative value.

*Injure or injury* means to inflict material 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 ship and aircraft wreck historical and archaeological policy; the permitting of activities that disturb foreign sunken military craft in U.S. waters and DoN sunken military craft; 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 sunken Coast Guard 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; Pub.L. 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 classified as either historic structures or archaeological sites and 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, may presently be on land or in water, and may be a historic structure or an archaeological site. 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 historic sunken military craft and wrecksites, the NHHC is responsible for managing these irreplaceable resources for the continued education and appreciation of present and future generations. To ensure consistent and effective stewardship, the NHHC has developed a comprehensive program that encompasses the following categories: preservation planning; wrecksite management; curation; and public information, interpretation, and education. The NHHC strongly encourages cooperation with other Department of Defense commands, Federal and State agencies, educational institutions, and individuals interested in preserving DoN's maritime and aviation heritage.

(b) Historic 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 conduct research, or provide for public education. While the NHHC prefers non-destructive, in situ research on sunken military craft and terrestrial military craft, it recognizes that wrecksite disturbance, removal, or injury may become necessary or appropriate. At such times, wrecksite disturbance, removal, or injury may be permitted by the NHHC with respect to DoN

sunken military craft for archaeological, historical, or educational purposes, subject to conditions set forth in accordance with these regulations. Historic shipwrecks under the jurisdiction of the DoN that do not qualify as sunken military craft are to be provided the same consideration and treatment as terrestrial military craft.

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

(d) The NHHC will serve as the permitting authority for disturbance of those foreign state sunken military craft located in U.S. waters addressed in § 767.15 of this part. The NHHC, in consultation with the Department of State as appropriate, will make a reasonable effort to inform the applicable agency of a foreign state of the discovery or significant changes to the condition of its sunken military craft upon becoming aware of such information.

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

(f) Notwithstanding any other section of this part, no act by the owner of a vessel, or authorized agent of the owner of a vessel, under a time charter, voyage charter, or demise charter to the DoN and operated on military service at the time of its sinking, provided that the sunken military craft is not considered historic as determined by the NHHC, shall be prohibited by, nor require a permit under, the SMCA or these regulations. This paragraph (f) 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.

(g) The NHHC reserves the right to deny an applicant a permit if the proposed activity does not meet the permit application requirements; is inconsistent with DoN policy or interests; does not serve the best interests of the sunken military craft or terrestrial military craft in question; in the case of foreign sunken military craft, is inconsistent with the desires of a foreign sovereign; is

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

## **Subpart B—Permit Requirements**

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

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

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

(c) Applicants must submit two printed copies of their completed application, as well as a digital version, 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 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 (PI), required by Sec. 767.8 of this part, 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 as per § 767.10(a) of this part;
- (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:
  - (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 must be included.
  - (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 preserved. 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 as per § 767.9(h) of this part.

(iv) Acknowledgement that the applicant is responsible for all conservation-related and long-term curation costs.

(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 are 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 determines there is merit in the 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. However, 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 of this part if those duties or activities are associated with the management of archaeological resources. Where appropriate, such persons will coordinate with Federal Land Managers, the Bureau of Ocean Energy Management, and/or State Historic Preservation Offices prior to engaging in the aforementioned activities. The NHHHC Director, or his/her designee, shall ensure that the provisions of §§ 767.6(d), 767.8, and 767.11 of this part have been met by other documented means consistent with the Federal Archeology Program and, that such documents and all resulting data will be archived within the NHHHC.

## **§ 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 of this part, 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 agreement

with the foreign state as per § 767.15 of this part. The same consideration may be applied to U.S. sunken military craft that are not under the jurisdiction of the DoN, 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) of this part.

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

(c) The NHHC will consult with the appropriate State Historic Preservation Office (SHPO) or Tribal Historic Preservation Office (THPO) when it receives applications for research at wrecksites located on state lands, including lands beneath navigable waters as defined in the Submerged Lands Act, 43 U.S.C. 1301-1315, or tribal lands.

(d) The applicant is responsible for obtaining any and all additional permits or authorizations, such as but not limited to those issued by another federal or state agency, or foreign government. In the case of U.S. sunken military craft or terrestrial military craft located within foreign jurisdictions, the NHHC may review and issue a conditional permit authorizing activities upon receipt of the appropriate permits and authorizations of the applicable foreign government by the applicant. The applicant must file a copy of the foreign government authorization with the NHHC when submitting the preliminary report stipulated in § 767.9(d) of this part and final report stipulated in § 767.9(f) of this part. Failure to do so will be considered a permit violation.

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

## **§ 767.8 Credentials of principal investigator.**

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

and have demonstrated competence appropriate to their roles in the proposed activity. The principal investigator must, at a minimum, meet the following requirements:

- (a) The minimum professional qualification standards for Archeology as determined by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation ([http://www.cr.nps.gov/local-law/arch\\_stnds\\_0.htm](http://www.cr.nps.gov/local-law/arch_stnds_0.htm)).
- (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 § 767.8(a);
- (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 applicable SHPO, THPO, or foreign government official 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 NHHHC confirming receipt of the counter-signed permit, the permitted activities may commence, provided that any other regulatory and permitting requirements that may be applicable are met.
- (c) Permits shall be carried on-site and made available upon request for inspection to regional preservation personnel or federal or state law enforcement officials. Permits are non-transferable. Permit holders are expected to remain on-site for the duration of operations prescribed in the permit. In the event a permit holder 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 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, or contiguous zone of a foreign State, as defined by customary international law as reflected in the United Nations Convention on the Law of the Sea. If the sunken military

craft is located on the continental shelf of a foreign nation, there may also be laws or regulations pertaining to the foreign nation's sovereign rights and jurisdiction relating to its continental shelf or EEZ that may apply to the proposed activities. To the extent possible, if the physical environment is impacted by the permitted activity, it must be returned to the condition that existed before the activity occurred.

(e) Upon completion of permitted activities and at least 30 days prior to the original permit expiring, the permit holder shall submit to the NHHHC a preliminary report that includes a working and diving log, the latter where appropriate, 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.

(f) In the case of one or more permit extensions received through the process identified in § 767.10 (b) of this part, a preliminary report that includes all the information stated in paragraph (d) 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 Sec. 767.11 of this part, summarizing the results of the permitted activity to the NHHHC, and the applicable SHPO, THPO, federal or state 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 biannually, with the first interim report submitted within two years of commencement of the activity. The interim report must include information required by § 767.11 of this part to the maximum extent possible, a report on the progress that has been achieved to date, as well as the remaining objectives to be accomplished until submission of the final report.

(h) The permit holder shall agree to protect all sensitive information regarding the location and character of the 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 and munitions, or the presence of or potential presence of human remains. Sensitive cargo might also include hazardous materials other than munitions.

(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 NHHC, resources are to be managed, conserved and curated directly by the NHHC at the expense of the applicant and at no cost to the government, unless otherwise agreed upon in writing by the NHHC. Copies of associated archaeological and conservation records and data will be made available to the NHHC, and to the applicable SHPO, THPO, the federal or state 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 foreign state prior to the issuance of a NHHC permit.

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

(l) The permittee shall purchase and maintain comprehensive general liability insurance, or post an equivalent bond, against claims arising out of activities conducted under the permit and agrees to hold the United States harmless against such claims.

## **§ 767.10 Requests for amendments or extensions of active permits.**

(a) Requests for amendments to active permits (e.g., a change in study design or research personnel) must conform to the regulations in this part. All information deemed necessary by the NHHC to make an objective evaluation of the amendment must be included as well as reference to the original application. Requests for amendments must be sent to the Deputy Director, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington DC 20374-5060. A pending amendment request does not guarantee approval. 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 amendments must be submitted in writing to the contact information 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) of this part.

## **§ 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 position 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 the conserved artifacts, laboratory conservation records, documentation of analyses undertaken, photographs of the 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 success of 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 that should be protected and withheld from public disclosure as detailed in § 767.9(g) of this part; and
- (k) If a wrecksite is deemed by the NHHHC to be eligible or potentially eligible for the National Register of Historic Places then a completed draft National Register of Historic Places nomination form must be attached as an appendix to the final report. The eligibility determination will be made by the NHHHC upon review of the preliminary report that is to be submitted by the permit holder.

## § 767.12 Special use permit application.

(a) Any person proposing to engage in an activity to document a sunken military craft utilizing remotely-operated or autonomously-operated equipment or collect data or samples from a wrecksite 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 may apply for a special use permit.

(b) To request a special use permit application form, please refer to § 767.6(b) and (c) of this part. Special use permit applications must be sent to the Deputy Director, Naval History and Heritage Command, 805 Kidder Breese St. SE., Washington Navy Yard, Washington DC 20374-5060.

(c) Each special use permit application shall include:

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

(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 environmental impacts on the resources from permitted activities;

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

(5) Any permits or authorizations required by foreign, federal, state, tribal, or local law.

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

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

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

(3) When applicable, the pilot(s) of remotely-operated equipment holds a commercial 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 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 that should be protected and withheld from public disclosure as detailed in § 767.9(g) of this part;

(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 subpart B shall apply to special use permits: §§ 767.7(e); 767.9(a), (b), (c), (e), (f), (g), (I), (j), and (k); 767.10(a), (b), and (c); 767.13; and 767.14 of this part.

(g) All sections of subpart A shall apply to special use permits and all sections of subpart C 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 strictly 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 as per § 767.14 of this part. 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 NHHC reconsider the action as per § 767.7(e) of this part.

## **§ 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 its sovereign immunity 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 seeking 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 Sec. 767.15(b) of this section, may submit a permit application for consideration by the NHHC as per subparts B and C of this part.

(d) In the case where there is reasonable dispute over the sovereign immunity status of a foreign sunken military craft, the Secretary of the Navy maintains the right to postpone action on §§ 767.6 and 767.12 of this part, as well as requests under § 767.15(a) of this part, until the dispute over the sovereign immunity 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 a permitting program for sunken military craft under his or her cognizance. Upon the agreement of the Secretary of the Navy, subparts 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 violation 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 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 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 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 NHHHC. At the discretion of the Director of 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 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) Any document served upon a respondent must be signed by:

- (1) The person or persons serving the same; or
- (2) Other person having authority to sign.

(c) 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.

(d) 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) of this part.

(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 NHHC in writing at the address specified in the NOVA. If amendment or modification is sought, the Director of 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 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 NHHC may, for good cause, grant an additional extension beyond the 30-day period specified in paragraph (c) of this section.

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

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

## **§ 767.21 Hearings.**

(a) Hearings before a DOHA Administrative Judge are *de novo* reviews of the circumstances alleged in the NOVA and penalties assessed. Hearings are governed by procedures established by the Defense Office of Hearings and Appeals. Hearing procedures will be provided in writing to the parties and may be accessed on-line at <http://www.dod.mil/dodgc/doha/>. Hearings shall be held at the Defense Office of Hearings and Appeals, Arlington VA, either in person or by Video Teleconference. Each party shall bear their own costs.

(b) In any DOHA hearing held in response to a request under § 767.20(f) of this part, 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) of this part, 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 recovery, arrest, attachment, 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 NHHHC, 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 NHHHC 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 NHHHC or in response to a request by the respondent or other interested person. Any such request should be sent to the Director of NHHHC at the address specified in the NOVA.

(c) Neither the existence of the compromise authority of the Director of NHHHC 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 NHHHC 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) Except as provided in paragraph (d) of this section, 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 NHHHC. The Director of NHHHC will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as the Director of NHHHC determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, the Director of 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 NHHC's consideration of a respondent's ability to pay does not preclude an assessment of a penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

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

## **§ 767.26 Criminal law.**

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

## **§ 767.27 References.**

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

(a) NHPA of 1966, as amended, [16 U.S.C. 470](#) et seq. (1999), and Protection of Historic Properties, [36 CFR part 800](#). These 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 1500](#)-1508. These 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](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) ARPA of 1979, as amended, [16 U.S.C. 470aa-mm](#), and the Uniform Regulations, [43 CFR part 7](#), subpart A. These 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, 59, 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.

(j) Naval History and Heritage Command Instruction 5510.4. (NAVHISTCENINST 5510.4, 14 December 1995). Subject: Disclosure of Information from the Naval Shipwreck Database.

N.A. Hagerty-Ford,

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

end regulatory text

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