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Ali Bahrami,

Manager, Transport Airplane Directorate,
Aircraft Certification Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

National Marine Sanctuary Program Policy on Permit Applications for Artificial Reef Development

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Policy statement; response to comments.

SUMMARY: The National Marine Sanctuary Program (NMSP) has developed a final policy and permitting guidelines for applications to establish artificial reefs within National Marine Sanctuaries. The NMSP is releasing its final policy and permitting guidelines, and responding to comments on the interim final policy.

DATES: This notice is effective as a final policy as of September 30, 2005.

ADDRESSES: You can download a copy of the final policy from the NMSP's Web site at <http://sanctuaries.nos.noaa.gov/library/library.html>. You may also request a copy of the NMSP's final policy on artificial reefs and submit written comments on the policy by contacting John Armor, National Marine Sanctuary Program, 1305 East West Highway (N/ORM6), 11th floor, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: John Armor at (301) 713-3125.

SUPPLEMENTARY INFORMATION:

Background

The National Marine Sanctuary Program (NMSP) manages a system of thirteen National Marine Sanctuaries (NMSs or Sanctuaries) and the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve that protect special, nationally significant areas of the marine environment under the authority of the National Marine Sanctuaries Act (NMSA; 16 U.S.C. 1431 *et seq.*). Sanctuaries protect a variety of marine areas including coral reefs, mangrove forests, and seagrass beds in the Florida Keys National Marine

Sanctuary; deep-sea canyons, kelp beds, and hardbottom habitats in the Monterey Bay National Marine Sanctuary; and historic shipwrecks in the Thunder Bay National Marine Sanctuary and Underwater Preserve.

In the last few years the NMSP has experienced an increased number of permit applications to establish artificial reefs inside NMS boundaries, particularly in the Florida Keys National Marine Sanctuary. Because NMSP regulations generally prohibit placing structures on sanctuary submerged lands, any individual who wishes to establish an artificial reef inside a NMS must first get approval from the NMSP through the onsite sanctuary manager.

To ensure that applications to establish artificial reefs in sanctuaries are reviewed consistently and in a manner that adheres to the NMSA and NMSP regulations (15 CFR Part 922), the NMSP developed permitting guidelines specific for such applications. The guidelines build on lessons learned from past experience permitting artificial reefs within sanctuaries and apply knowledge from other sources of information. They are intended to guide decision makers as they review proposals for artificial reefs in sanctuaries. They clarify how decision making criteria contained in NMSP regulations will be applied specifically to permit applications for artificial reef development.

Response to Comments

On July 18, 2003, NOAA published a notice of availability of the NMSP's Artificial Reef Policy and Permitting Guidelines in the **Federal Register** (68 FR 42690, Jul. 18, 2003). The policy and permitting guidelines have been implemented on an interim-final basis since that date. NOAA also requested comments on the policy and permitting guidelines through September 16, 2003. The following are NOAA's responses to the comments received.

Comment 1. Many commenters felt that the policy prohibited or was overly restrictive of artificial reef development within national marine sanctuaries.

Response: NOAA disagrees. The NMSP's regulations prohibit artificial reef development in NMSs by prohibiting the placement of structures on the submerged lands. This policy creates a framework to allow artificial reefs under specific conditions (*i.e.*, when a project is expected to benefit NMS management and would not have a detrimental effect on NMS resources). The policy applies higher standards of resource protection to artificial reef projects within NMSs than would apply to projects outside NMSs or other

protected areas. More protective requirements are appropriate given the nature and purpose of the NMSs.

Comment 2. Several commenters suggested expanding the policy or definition of artificial reefs to address specific issues, such as coral reef restoration and reef balls.

Response: The primary purpose of the policy is to guide decision making related to placement of artificial reefs within the Sanctuary System. The policy is intended to apply to all types of artificial reef projects, and not to direct the policy to a specific type of artificial reef. The policy appropriately and specifically excludes natural reef restoration projects from application of this policy because such projects are addressed by the NMSP in a much different manner.

Comment 3. A few commenters felt that artificial reefs should not be placed in sanctuaries under any circumstances.

Response: See response to comment number 1.

Comment 4. A few commenters stated that all or part of the policy conflicted with the National Fishing Enhancement Act of 1984 (NFEA).

Response: NOAA disagrees. While the NFEA encourages artificial reef development it does not, under any circumstance, require their use. Any regulatory or statutory requirement that prohibits or imposes more restrictive requirements on artificial reef development is not in direct conflict with that statute. The NMSP's artificial reef policy is written pursuant to the NMSA and the regulations promulgated thereunder. Because the primary objective of the NMSA is resource protection, it is entirely appropriate that the NMSP's policy be more protective than the policy applicable to non-sanctuary waters under the NFEA.

Comment 5. Some commenters felt that the NMSP's policy imposes more burdens on an applicant than the requirements of the National Artificial Reef Plan (NARP).

Response: NOAA agrees. The policy does exceed the requirements of the NARP in several respects including the types of monitoring and insurance required. As discussed in the response to comment number 4, these more stringent requirements are consistent with the purposes and policies of the NMSA and are appropriate for NMSs.

Comment 6. One commenter suggested that the section on the definition of an artificial reef should refer to applying the policy to oil rigs and existing structures that may end up being used as artificial reefs in the future.

Response: NOAA does not feel abandoning existing oil rigs would qualify as artificial reef development within a NMS as it is defined in the NMSP policy, because the policy is not meant to address the abandonment of existing structures inside NMSs. If presented with an application to abandon an oil rig inside a NMS, the NMSP would use certain aspects of its artificial reef policy during its review of such a proposal, if appropriate.

Comment 7. Several commenters provided information about artificial reefs they felt should be included or in some manner referenced in the policy.

Response: NOAA appreciates the additional information provided by some commenters. However, none of it necessitated changes in the procedures for reviewing permit applications for artificial reef development in NMSs.

Comment 8. One commenter asked if a complete proposal submitted to the NMSP would have to include a U.S. Army Corps of Engineers (ACOE) or relevant state permits. The commenter also asked if the NMSP would review and approve a proposal before those permits are obtained.

Response: NOAA will begin reviewing permit applications to establish artificial reefs inside NMSs prior to the issuance of an ACOE or required state permit. During this review period, the NMSP will confer with all tribal, local, State, and Federal agencies with jurisdiction. The NMSP will not take final action on any such permit until it understands the positions of all relevant agencies. Nothing in the policy or in the NMSP regulations, however, precludes the NMSP from issuing its permit prior to the permittee receiving other required permits.

Comment 9. One commenter requested that the diagram illustrating the review process indicate that public review of the application would occur before a decision would be made.

Response: The public review process is sufficiently represented in the National Environmental Policy Act process on the diagram. As stated in section 2.4.1 of the policy (page 15), the NMSP will prepare a draft environmental assessment or impact statement and will release the document for public comment prior to making a final decision on the application.

Comment 10. One commenter requested an independent assessment, inspection, or certification of material proposed to be used in artificial reef development to ensure contaminant risk has been adequately researched and minimized.

Response: NOAA agrees that these types of assessments are appropriate,

particularly for artificial reef projects using an obsolete vessel as the material. The Environmental Protection Agency and/or United States Coast Guard inspect and certify vessels proposed to be deployed as artificial reefs. However, such an assessment might not be necessary for artificial reef projects using other types of material. Therefore, NOAA does not feel independent inspection will be necessary in all cases.

Comment 11. One commenter wanted an independent assessment of the deployment and stabilization plan for each permit.

Response: The NMS manager or superintendent and other NMSP staff will review every permit application (including the deployment and stabilization plans) for artificial reef development within NMS boundaries. The NMSP's assessment is independent of the permit applicant's. In some cases NMSP may obtain outside expertise to assist in its assessment.

Comment 12. One commenter felt that the NMSP should not put itself in a sponsorship or permittee role for any artificial reef project.

Response: As a permitting agency, the NMSP will not sponsor any artificial reef project for which it is processing a permit application or expects to receive a permit application in the future. The NMSP will also not co-apply for any such permit.

Comment 13. One commenter wanted clarification as to why NOAA would consider an applicant eligible for a permit and allow him/her to go through the effort of submitting a proposal, knowing that NOAA was not going to approve the request?

Response: The NMSP's permitting process does not prevent an applicant from submitting an application to conduct activities within sanctuaries. After receiving and reviewing an application, the NMSP will decide whether or not to approve the activity. Based on the nature, scope, and complexity of the proposal, the review process and need for additional information may vary. In some cases, it may be possible for the NMSP to dismiss an application without asking for additional information from the applicant. In others, the NMSP may need this additional information to make a final determination.

Comment 14. One commenter stated that NMSP should require copies of data and reports, and that the projects should make management recommendations with justifications.

Response: The NMSP has monitoring and reporting components described within the policy. The NMSP will assess results and make adjustments to

management practices when warranted by information obtained from the monitoring reports.

Comment 15. One commenter felt that the policy should allow for involvement of all stakeholders and that it should not have special provisions for Native American tribes.

Response: Special provisions related to Native American Tribes are warranted in circumstances such as when tribal treaty rights or NMSP regulations provide involvement of tribes in permit decisionmaking. In general this only applies to the Olympic Coast National Marine Sanctuary but will be considered on a case-by-case basis for other NMSs.

Comment 16. One commenter was concerned that the section in the policy on "Authorizations" was the weakest. They felt the process described in this section was a means to circumvent requirements of NMSA and that proposals should still be held to the same regulations, including enhancing resources.

Response: The NMSP reviews artificial reef projects with the same level of scrutiny, whether they are being considered under authorizations or other forms of approval.

Comment 17. One commenter did not agree with the five-year duration for special use permits.

Response: The five-year duration for special use permits is mandated by the NMSA. When a special use permit is issued, the permit cannot be issued for a period longer than five years, but may be renewed.

Comment 18. One commenter wanted clarification on what type of monitoring NOAA was referring to in the section of the policy that describes evaluating the effects of a project.

Response: NOAA was referring to all forms of monitoring required under a permit and described in section 2.2.2 (page 10) of the policy.

Comment 19. One commenter questioned why NOAA was requiring the permittee to prove that there are funds available to remove the reef if something goes wrong.

Response: NOAA was primarily referring to problems encountered during installation. In the event of a problem, NOAA must be certain the applicant has funds to ensure there will be no damage to NMS resources, which may include removal of the artificial reef. Additionally, should pieces separate from the main structure of the artificial reef, NOAA may require the permittee to remove them from the Sanctuary.

Comment 20. One commenter wanted to know if bonds would be retroactive

to cover materials already in the Florida Keys NMS (FKNMS).

Response: Bonds will not be required retroactively for preexisting materials within the Sanctuary.

Comment 21. One commenter wanted to know how long the NMSP considered to be the life of a project.

Response: The duration of a project is as long as the artificial reef is within the Sanctuary.

Comment 22. Some commenters felt that it is difficult to obtain a bond for monitoring.

Response: A bond is not necessarily the only way to demonstrate that an applicant has financial resources available. When discussing the issue of obtaining a bond for monitoring purposes, the policy is referring to the permittee providing some form of financial security. If a bond is not a practical form of financial security, the permittee may find another method. The policy has been revised to better express this point.

Comment 23. One commenter expressed concerns about an artificial reef releasing toxic materials or other pollutants into the water after it is placed on the bottom. The commenter suggested that the policy should address the issue more directly.

Response: The NMSP agrees artificial reefs placed inside NMSs must not release into the water pollutants of any kind that have the potential to adversely affect sanctuary resources. This issue is discussed in Appendix B to the guidelines as an issue that the NMSP should consider when reviewing applications to establish artificial reefs. Furthermore, potential pollutants must be disclosed in the permit application as specified in Appendix C. The NMSP will consult with the Environmental Protection Agency to consider this information and to assess the impacts it would have on sanctuary resources.

Comment 24: Several comments were received on how NOAA will evaluate the effects of removal of an artificial reef.

Response: If an artificial reef is not permanent and NOAA requires removal as part of the project, the effects of that removal process will be evaluated before a permit is issued. NOAA may also conduct a supplemental analysis immediately prior to removal of the artificial reef to consider whether removal is inappropriate.

Comment 25. One commenter felt that Executive Order 13089 on Coral Reef Protection should have been included in the NEPA Documentation and Interagency Consultation section of the policy.

Response: The policy applies to all NMSs (most of which do not have coral reef resources). Therefore, Executive Order 13089 will not apply to every artificial reef proposal for every NMS. When the requirements of Executive Order 13089 apply to a proposed artificial reef development project, the NMSP will take the required steps to ensure the Executive Order is followed.

Comment 26. One commenter thought that the NMSP should provide an analysis of each alternative that the applicant is allowed to pursue under the National Environmental Policy Act (NEPA).

Response: As indicated in Appendix C to the policy, a permit application to establish an artificial reef in a NMS must include all information necessary for the NMSP to prepare the appropriate NEPA documentation. In determining the completeness of the permit application, the NMSP will ensure the applicant has submitted sufficient information to fully analyze the full range of reasonable alternatives as required by NEPA and its implementing regulations.

Comment 27. One commenter pointed out that the NMSP does not have to prepare and release a draft NEPA analysis document for public comment for artificial reef projects that do not require the preparation of an environmental impact statement.

Response: Section 5.02(b)(1) of NOAA Administrative Order 216-6 encourages NOAA programs to release a draft environmental assessment to the public to the extent possible. NOAA realizes that this action is not required under NEPA, but has determined that it is appropriate in cases involving the establishment of artificial reefs in NMSs.

Comment 28. One commenter wanted the policy to recognize that artificial reefs may be beneficial for Essential Fish Habitat (EFH).

Response: It is not the role of the NMSP to artificially create new EFH (as defined in the Magnuson-Stevens Fishery Conservation and Management Act). The NMSP, in consultation with NOAA Fisheries, will consider the extent that any proposed artificial reef may adversely affect EFH that naturally occurs in the vicinity of the project.

Comment 29. One commenter suggested that biological monitoring be specifically included in the monitoring requirements.

Response: In general, some form of biological monitoring will always be required although the exact monitoring requirements (e.g., parameters to be studied, frequency of data collection) will vary from permit to permit.

Comment 30. One commenter felt that the monitoring of a reef and the placement of a reef are separate projects and should have separate proposals.

Response: NOAA disagrees. Monitoring is an integral part of proposing to place an artificial reef within a NMS. A permittee should not propose to establish an artificial reef inside a NMS unless they are prepared to collect quantifiable monitoring data and have sufficient resources to do so. As discussed in section 2.5.1.1, there are several different types of monitoring that would be part of any artificial reef project. Some will be designed to determine the effectiveness of the artificial reef project in meeting goals and providing benefits to the Sanctuary. Other forms of monitoring will be designed to determine the effects of the project on the resources of the Sanctuary.

Comment 31. One commenter did not agree with the discussion regarding lifetime monitoring.

Response: Stability monitoring will be conducted as long as the artificial reef is in NMS waters. Other forms of monitoring may vary in length depending on the expected life of the project, the questions the monitoring is designed to answer, and other factors.

Comment 32. Some commenters inquired as to what would happen if a permittee were to withdraw from the permitting agreement. Inquiries were also made on how permits will be enforced.

Response: Before the NMSP issues a permit, it must be satisfied that the applicant has sufficient resources to comply with all permit terms and conditions, including the funding of long-term monitoring. The nature of this assurance will vary from permit to permit and is detailed in the policy.

A permittee cannot unilaterally withdraw from a permit agreement without violating the permit or NMSP regulations. If a permittee violates a term or condition of his/her permit, the permittee is subject to possible civil penalties under the NMSA.

Comment 33. Some comments questioned the types of building materials that would be approved in a potential artificial reef permit.

Response: NOAA regulations do not currently discriminate among materials. The policy gives guidance on which materials are better than others. NOAA will consult with the United States Army Corps of Engineers, Environmental Protection Agency, and relevant state agencies on a case-by-case basis to ensure that hazardous materials are not used. Compliance with a sanctuary permit does not necessarily

relieve the permittee of his/her obligation to comply with all other applicable Federal, State, and local laws.

Dated: September 23, 2005.

Richard W. Spinrad,

Assistant Administrator, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release Nos. 33-8612; 34-52477; 35-28033; 39-2439; IC-27070]

RIN 3235-AG96

Adoption of Updated EDGAR Filer Manual

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the Commission) is adopting revisions to the Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) Filer Manual to reflect changes made to improve, reorganize and restructure the EDGAR Filer Manual volumes to make it easier for filers and those wishing to apply for EDGAR access codes to locate the information that they need to apply for EDGAR access, maintain company information and submit a filing. With this reorganization, no changes have been made to the filing process.

The revisions to the Filer Manual reflect changes within Volumes I, II and III, entitled "EDGAR Filer Manual Volume I General Information," "EDGAR Filer Manual Volume II EDGAR Filing," and "EDGAR Filer Manual Volume III N-SAR Supplement" respectively. The updated manual will be incorporated by reference into the Code of Federal Regulations.

EFFECTIVE DATE: October 14, 2005. The incorporation by reference of the EDGAR Filer Manual is approved by the Director of the Federal Register as of October 14, 2005.

FOR FURTHER INFORMATION CONTACT: In the Office of Information Technology, Rick Heroux, at (202) 551-8800; for questions concerning the Division of Corporation Finance filings, in the Division of Corporation Finance, Herbert Scholl, Office Chief, EDGAR and Information Analysis, at (202) 942-

2940; for questions concerning the Division of Investment Management filings, in the Division of Investment Management, Ruth Armfield Sanders, Senior Special Counsel, at (202) 551-6989; and, in the Office of Filings and Information Services, Velma Smith, at (202) 942-8900.

SUPPLEMENTARY INFORMATION: Today we are adopting an updated EDGAR Filer Manual (Filer Manual). The Filer Manual describes how to become an EDGAR filer and the technical formatting requirements for the preparation and submission of electronic filings through the EDGAR system.¹ It also describes the requirements for filing using EDGARLink² and the Online Forms/XML Web site.

The Filer Manual contains all the technical specifications for filers to submit filings using the EDGAR system. Filers must comply with the applicable provisions of the Filer Manual in order to assure the timely acceptance and processing of filings made in electronic format.³ Filers should consult the Filer Manual in conjunction with our rules governing mandated electronic filing when preparing documents for electronic submission.⁴

¹ We originally adopted the Filer Manual on April 1, 1993, with an effective date of April 26, 1993. Release No. 33-6986 (April 1, 1993) [58 FR 18638]. We implemented the most recent update to the Filer Manual on June 6, 2005. See Release No. 33-8573 (May 19, 2005) [70 FR 30899].

² This is the filer assistance software we provide filers filing on the EDGAR system.

³ See Rule 301 of Regulation S-T (17 CFR 232.301).

⁴ See Release Nos. 33-6977 (February 23, 1993) [58 FR 14628], IC-19284 (February 23, 1993) [58 FR 14848], 35-25746 (February 23, 1993) [58 FR 14999], and 33-6980 (February 23, 1993) [58 FR 15009] in which we comprehensively discuss the rules we adopted to govern mandated electronic filing. See also Release No. 33-7122 (December 19, 1994) [59 FR 67752], in which we made the EDGAR rules final and applicable to all domestic registrants; Release No. 33-7427 (July 1, 1997) [62 FR 36450], in which we adopted minor amendments to the EDGAR rules; Release No. 33-7472 (October 24, 1997) [62 FR 58647], in which we announced that, as of January 1, 1998, we would not accept in paper filings that we require filers to submit electronically; Release No. 34-40934 (January 12, 1999) [64 FR 2843], in which we made mandatory the electronic filing of Form 13F; Release No. 33-7684 (May 17, 1999) [64 FR 27888], in which we adopted amendments to implement the first stage of EDGAR modernization; Release No. 33-7855 (April 24, 2000) [65 FR 24788], in which we implemented EDGAR Release 7.0; Release No. 33-7999 (August 7, 2001) [66 FR 42941], in which we implemented EDGAR Release 7.5; Release No. 33-8007 (September 24, 2001) [66 FR 49829], in which we implemented EDGAR Release 8.0; Release No. 33-8224 (April 30, 2003) [66 FR 24345], in which we implemented EDGAR Release 8.5; Release Nos. 33-8255 (July 22, 2003) [68 FR 44876] and 33-8255A (September 4, 2003) [68 FR 53289] in which we implemented EDGAR Release 8.6; Release No. 33-8409 (April 19, 2004) [69 FR 21954] in which we implemented EDGAR Release 8.7;

The revisions to the EDGAR Filer Manual volumes are being made to improve, reorganize and restructure the EDGAR Filer Manual volumes to make it easier for filers, and those wishing to apply for EDGAR access codes, to locate the information that they need to apply for EDGAR access, maintain company information and submit electronic filings. The EDGAR Filer Manual has also been rearranged to eliminate information that was repeated between the different volumes and to be more aligned with the logical functions performed by EDGAR users. The reorganized filer manual does not include any changes to the filing process.

The EDGAR Filer Manual Volume I General Information covers the EDGAR application process, outlines how to keep company data, which is stored in EDGAR, current and provides a brief introduction to the filing process. The appendices in this volume, as well as those that are a part of the other volumes, "Glossary of Commonly Used Terms, Acronyms, and Abbreviations" and "Frequently Asked Questions" for example, only contain information specific to the processes and concepts covered within the volume. The appendices are no longer repeated in each volume. Volume I is intended to be a reference for those that need to obtain EDGAR access, those that are new to EDGAR and those that are responsible for keeping company information current.

The EDGAR Filer Manual Volume II EDGAR Filing focuses entirely on the filing process. It illustrates each step of the process to submit an electronic submission and helps filers understand the tools provided by the SEC for constructing and transmitting those submissions, concisely consolidating information previously provided in the former EDGAR Release 9.0 EDGARLink Filer Manual Volume I and EDGAR Release 9.0 OnlineForms Filer Manual Volume III. It also provides a much improved Index to Forms which, in addition to the Submission Type and Description, adds the name of the tool (e.g., EDGARLink or Online Forms/XML Web site), the template number that contains that particular submission type and the Filer Constructed Form Specification (formerly known as "Reduced Content Filing Specification") that should be used by those that

Release No. 33-8454 (August 6, 2004) [69 FR 49803] in which we implemented EDGAR Release 8.8; Release No. 33-8528 (February 3, 2005) [70 FR 6573] in which we implemented EDGAR Release 8.10; and Release No. 33-8573 (May 19, 2005) [70 FR 30899] in which we implemented EDGAR Release 9.0.