Request for Clarification

***Federal Register* / Vol. 79, January 6, 2014 / Proposed Rules**

Department of The Navy (DoD.) (No. USAN-2011-0016)

Background: 32 CFR 767.3 (Definitions) defines *Sunken Military Craft* to mean, "any sunken warship, naval auxiliary or other vessel that was owned or operated by a government on military noncommercial services when it sank." The Diving Equipment and Marketing Association (DEMA) is the world-wide trade group representing all of scuba diving and snorkeling interests, including divers, dive training agencies, and dive manufacturers. We seek the following clarification of the intent of the proposed rule, in areas not addressed in the 47 comments submitted to Do.N by the March 7, 2014 deadline for comments.

Requested Clarification: Does this definition include vessels that have been purposely sunk for the purposes of creating an artificial reef to attract fishing and diving? For example, off the coast of California, Texas, Florida, and several other states, former military craft have been purposely sunk. This definition seems to imply that if the vessel "was at one time owned or operated" by a government (potentially this could include any state government), when it sank, then it is protected under these new regulations from being "disturbed" among other things, absent the issuance of a permit for specified purposes. Because we are uncertain of the timing of transfers of title, would these new regulations apply in the case of the sinking's of vessels such as the *Yukon* in California, the *Texas Clipper,* and the *Oriskany* or *Vandenberg*, in Florida.

Purposes of Request for Clarification: Divers who choose to explore wrecks do penetrate wrecks, and do not just examine the wrecks remotely. The serious penalties to which divers, dive boat operators, and dive captains could be subject to for violation of the SMCA and its regulations ($100,000 per violation, damages, forfeiture, etc.) are very serious. The uncertainty of whether such sunken artificial reefs are intended to come within the definition of protected sunken military craft will cause a chilling effect for both divers and dive boat operators.

The confusion partially exists because of the stated position of the U.S. Department of Homeland Security, United States Coast Guard, in their website publication, "Coast Guard History – Frequently Asked Questions" (www.uscg.mil/history/FAQS/USCG_Shipwreck_Policy.asp). The question was, "Who owns U.S. Coast Guard ship and aircraft wrecks?" The answer by the U.S. Coast Guard was, "Vessels and aircraft sunk as artificial reefs have been transferred to other agencies; the Coast Guard does not own or manage these ships or aircraft."

Please let us know if the Department of the Navy, and the Naval History & Heritage Command, will adopt a similar position for vessels and aircraft sunk as artificial reefs.

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Background: The regulation states (on page 621) that "non-intrusive activities including diving adjacent to or remotely documenting sites do not require a permit authorization from the NHHC." The Diving Equipment and Marketing Association (DEMA) is the world-wide trade group representing all of scuba diving and snorkeling interests, including divers, dive training agencies, and dive manufacturers. We seek the following clarification of the intent of the proposed rule, in areas not addressed in the 47 comments submitted to DoN by the March 7, 2014 deadline for comments.

Requested Clarification: Does the regulation mean that if a sunken military craft is protected, in other words, it cannot be "disturbed" absent a permit being issued; does this mean that diving on that vessel is prohibited unless the diving activity is only "adjacent to" or "remote" (away from), the sunken vessel? Would this mean that recreational wreck divers could no longer enter sunken military craft (as that term is defined in 32 CFR Section 767.3) without a permit, even if they never took or extracted anything from the vessel or aircraft?

Purposes of Request for Clarification: Divers who choose to explore wrecks do penetrate wrecks, by entering the internal structure of the wreck for observation purposes. Divers do not just examine the wrecks remotely. The serious penalties to which divers, dive boat operators, and dive captains could be subject to for violation of the SMCA and its regulations ($100,000 per violation, damages, forfeiture, etc.) are very serious. The uncertainty of whether normal scuba diving activity involving the entry of a wreck comes within the definition of "disturb" or "disturbance" of a protected sunken military craft will cause a chilling effect for both divers and dive boat operators. In addition, whether a particular sunken military vessel is protected depends upon facts related to its status and type of service at the time it sank, facts likely unknown to 99.9% of the diving world.

No reasonable person would believe that it is not a violation of the law to enter the White House unattended, or to break the seal on the Tomb of the Unknown Soldier, but divers exploring wrecks that might be subject to the SMCA and its regulations would have to know ahead of time that the wreck was "owned or operated by a government" at the time of sinking, and that the vessel or aircraft was "on military noncommercial service" at the time it sank. How can a diver be penalized for entering into a vessel, without the knowledge ahead of time that the wreck is protected, and, in addition, whether such entry in of itself constitutes a "disturbance"?