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April 16, 2014

***Delivered Via Email: [NHHCUnderwaterArchaeology@navy.mil](mailto:NHHCUnderwaterArchaeology@navy.mil)  
and Certified Mail***

Dr. Robert Neyland  
Underwater Archaeology Branch  
Naval History & Heritage Command  
Department of the Navy  
805 Kidder Breese Street SE, BL 57  
Washington Navy Yard, DC 20374

Re: *Federal Register* / Vol. 79, January 6, 2014 / Proposed Rules  
Department of The Navy (DoD.) (No. USAN-2011-0016)  
Sunken Military Craft, Proposed Rule

Dear Dr. Neyland:

The purpose of this correspondence is to request clarification on behalf of the Diving Equipment and Marketing Association (DEMA), in regard to the recently published proposed rules dealing with sunken military craft. As you may know, DEMA is the worldwide trade group representing scuba diving manufacturers, training agencies, retailers, resorts, and the more than 2.5 million active scuba divers and 11 million snorkelers in the US. Our office serves as Government Affairs consultants for DEMA and has been in this position for more than 25 years.

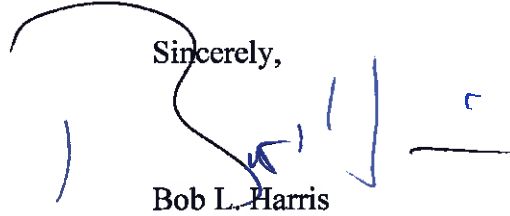
We realize the comment period on the proposed rule expired on March 7, 2014. We do not wish to comment on the proposed rule but we are seeking guidance and clarification on two issues, primarily as result of the uncertainties that are present in the language of the proposed rule, as well as issues which have been raised by the 47 comments received by the Department of Navy. Three of the comments submitted were specific to interests of the diving community (USN-2011-0016-0044; USN-2011-0016-0039; USN-2011-0016-0046), but those comments did not request the same clarification sought here by DEMA and its membership.

Attached to this letter are two separate requests for clarification, along with the language from the U.S. Coast Guard referenced in our requests. There has been considerable discussion both within and outside the scuba diving community as to the impact of these new regulations, and we are just trying to find out which interpretations will be enforced.

Dr. Robert Neyland  
Department of Navy  
April 16, 2014  
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We thank you very much for your assistance, and look forward to your response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bob L. Harris", with a horizontal line extending to the right.

Bob L. Harris

BLH/jms  
Enclosures

cc: Mr. Thomas Ingram, Executive Director, DEMA  
DEMA Board of Directors  
Ole Varmer, Esq., NOAA

***Federal Register / Vol. 79, January 6, 2014 / Proposed Rules***  
**Department of The Navy (DoD.) (No. USAN-2011-0016)**

**Background:** The proposed rule, 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 DoN 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 or divestiture 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.

Again, the confusion partially exists because we are unaware of a list of sunken military craft so designated under Title XIV – Sunken Military Craft – Section 1408 (3) (A-C), such that a diver penetrating a wreck would have reasonable notice that they were committing an act which could subject them to \$100,000 or more in civil penalties, damages, and forfeiture of their vessel and equipment.

We are aware of the stated position of the U.S. Department of Homeland Security, United States Coast Guard, on their website, “Coast Guard History – Frequently Asked Questions” ([www.uscg.mil/history/FAQS/USCG\\_Shipwreck\\_Policy.asp](http://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.

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

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

**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 sunken 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.

Again, the confusion partially exists because we are unaware of a list of sunken military craft so designated under Title XIV – Sunken Military Craft – Section 1408 (3) (A-C), such that a diver penetrating a wreck would have reasonable notice that they were committing an act which could subject them to \$100,000 or more in civil penalties, damages, and forfeiture of their vessel and equipment.

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”?



## Coast Guard History

### *Frequently Asked Questions*

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***The following are commonly asked questions concerning Coast Guard ship and aircraft wrecks.***

#### ***Who owns U.S. Coast Guard ship and aircraft wrecks?***

The United States of America holds legal title to the wreck. The U.S. Coast Guard is the Federal agency that retains custody for the wrecks unless specific, formal action is taken to dispose of them. The administrative act of striking an aircraft or ship from the active list does not constitute disposal. Even aircraft and ship wrecks that are stricken from the active list remain the property of the United States until such time affirmative action is taken to dispose of these properties in accordance with law. Coast Guard vessels sold to commercial businesses or private citizens are no longer U.S. Government property. 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.

#### ***What do I do if I want to dive on Coast Guard ship or aircraft wrecks?***

Divers may dive on Coast Guard ship and aircraft wrecks at their own risk. However, federal property law dictates that no portion of a government wreck may be disturbed or removed. Unauthorized removal of any property from a U.S. Coast Guard wreck is illegal. Sections of the U.S. Code have been successfully applied in prosecuting individuals who violate Coast Guard wreck sites. Coast Guard wrecks may contain unexploded ordnance and other hazards and should be approached with the utmost caution. The Coast Guard strongly encourages cooperation with other agencies and individuals interested in preserving our maritime and aviation heritage. The diving public is encouraged to report the location of underwater ship and aircraft wreck sites to the Coast Guard Historian Office. Documentation of these wreck locations allows the Coast Guard to evaluate and preserve important sites for the future.

#### ***What if I witness another diver removing parts from a Coast Guard wreck?***

If you witness the theft of material from a Coast Guard wreck, report it to the U.S. Coast Guard and to your State Historic Preservation Officer or State Underwater Archaeologist. Vandalism of U.S. Government property is illegal and leads to the destruction of historically valuable underwater sites.

#### ***What if I want to recover a Coast Guard-owned wreck?***

Recovery of historic ship, aircraft wreck or associated components will be considered only for educational or scientific purposes. It is unlikely the Coast Guard will recommend the disposal and sale of historic ship or aircraft wrecks. The Coast Guard is currently working on an official policy in this regard, which will likely follow the U.S. Navy's policy. It has been Navy policy not to dispose of historic ship and aircraft wrecks for the following reasons:

- *Congress has mandated through the NHPA that Federal Agencies make every effort to preserve their historic cultural resources.*
- *The remains of crew members, if any, deserve respect and should remain undisturbed unless proper retrieval and burial become necessary.*
- *There is a possibility that live explosives or ordnance may still be on board.*
- *Arbitrary disposal and sale of wrecks may foster commercial exploitation of cultural resources.*
- *Abandonment of wrecks will deplete a finite inventory of significant cultural resources.*

**Under no circumstances should salvage of Coast Guard ship or aircraft wrecks be undertaken without prior and specific written approval by the Coast Guard Historian's Office!**

#### ***Can I penetrate a Coast Guard ship or aircraft wreck?***

No, the Sunken Military Craft Act, Pub.L. 108-375, Div. A, Title XIV, Sections 1401 to 1408, Oct. 28, 2004, 118 Stat. 2094, provides that no person may engage in or attempt to engage in any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft except as otherwise authorized by law. Further, no person may possess, disturb, remove, or injure any sunken military craft in violation of this Act or any prohibition, rule, regulation, ordinance, or permit that applies under any other applicable law.

**Justification:** Throughout history, warships and other craft in the service of the government have been accorded special protection under the concept of sovereign immunity, which exempts a warship or other governmental vessel in noncommercial service from the jurisdiction of any other state. In the modern era, this doctrine has been accepted as customary law by the courts in most jurisdictions as well as having been memorialized in articles 95 and 96 of the 1982 UN Law of the Sea Convention.

Sunken military vessels often contain military or diplomatic material and naval technological modifications of a sensitive nature which may compromise national security. They also often contain the remains of naval personnel, which entitles them to the same protection as military gravesites on land. There are safety concerns, both for divers and the surrounding environment, in that careless activity could trigger off unexploded ordnance or release of fuel or other hazardous material into the ocean environment. Additionally, several articles in UNCLOS recognize the need for all States to cooperate to protect archaeological and historical objects found at sea.

The United States has been very aggressive in using this doctrine as a rationale for protecting our sunken warships and denying access to them or the pursuit of salvage claims against them since the nineteenth century.

#### ***What about wreck sites that are debris fields rather than whole aircraft or ships?***

Wreck sites that are not entire aircraft or ships, but are parts strewn in a debris field are considered archaeological sites. Such sites still contain U.S. Government property and must be managed by the Coast Guard in accordance with the National Historic Preservation Act. Contact the Coast Guard directly for further information.

#### ***Federal Laws and Regulations Relating to U.S. Coast Guard Submerged Ship and Aircraft Wrecks***

- Antiquities Act (16 U.S.C. 433).



- National Historic Preservation Act of 1966(16 U.S.C. 470).
- Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469).
- Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa).
- Theft of Government Property (18 U.S.C. 641).
- Abandoned Shipwreck Act of 1987 (43 U.S.C. 2101).
- Documents, Historical Artifacts, and Condemned or Obsolete Combat Material: Loan, Gift, or Exchange(10 U.S.C. 2572).
- Archaeological Resources Protection Act Final Uniform Regulations (32 CFR 229).
- Protection of Historic Properties (36 CFR 800).
- Secretary of the Interior's Standards for Historic Preservation Projects (36 CFR 68).
- Abandoned Shipwreck Act Guidelines (55 FR 50116).
- National Register of Historic Places (36 CFR 60).
- Determinations of Eligibility for Inclusion in the National Register of Historic Places (36 CFR 63).
- Recovery of Scientific, Prehistoric, Historic, and Archaeological Data (36 CFR 66)
- Curation of Federally-Owned and Administered Archaeological Collections (36 CFR 79).
- Sunken Military Craft Act (Pub.L. 108-375, 10 U.S.C. 113 Note & Stat. 2094-2098, Title XIV)

For further information, contact the Coast Guard Historian's Office at:

United States Coast Guard Historian's Office (CG-09224)  
U.S. Coast Guard Headquarters  
2100 2nd ST, S.W.  
Washington D.C. 20593-0001

202-372-4650.

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