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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

10 CLIFTON B. CRAFT
11 JACK DEAN FERGUSON
12 DONALD L. JERNIGAN
13 MICHAEL PATRICK KING
14 THOMAS D. STOCKS and
15 WILLIAM LEE WILSON,

16 Plaintiffs

17 -vs.-

18 C.A. No. CV 92-1769-SVW (Sx)
19 Summary Judgement Brief

20 THE NATIONAL PARK SERVICE,
21 THE NATIONAL OCEANIC AND ATMOSPHERIC
22 ADMINISTRATION,
23 THE NATIONAL MARINE FISHERIES SERVICE and
24 THE UNITED STATES OF AMERICA,

25 Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGEMENT

September 7, 1992

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I. Statement of Jurisdiction and Venue

This case is brought pursuant to the Administrative Procedures Act, 5 U.C.S. §701 *et seq.*, (hereinafter, "APA"), which provides for the review of final agency actions by the United States District Court. The acts from which this appeal arise occurred in the waters of the Channel Islands National Marine Sanctuary (hereinafter, "CINMS"), which is located in Santa Barbara and Ventura Counties, within the jurisdiction of the U.S. District Court for the Central District of California.

II. Statement of Facts

The CINMS was designated on September 22, 1980. On October 2, 1987, the *Vision*, a scuba diving charter vessel owned and operated by Truth Aquatics, Inc. of Santa Barbara, brought a boat load of recreational scuba divers, including the Defendants, to the CINMS, after learning that their previously-scheduled charter to the so-called Honda shipwrecks near Vandenberg Air Force Base had been, under suspicious circumstances, cancelled at the last minute. Unbeknownst to the other divers on the *Vision*, two undercover National Park Service Rangers, Yvette Menard and Mark Senning, were on board the dive boat, hoping to catch the divers violating the CINMS regulations. It is important to bear in mind that these divers--for at least twenty years prior to the designation of the waters around the Channel Islands as the CINMS--had been openly and freely salvaging artifacts from the shipwrecks they had discovered there.

The *Vision* anchored over two shipwrecks within the CINMS, the *Winsfield Scott*, which is located in the waters of Ventura County and the *Goldenhorn*, in Santa Barbara County waters. Several of the divers were allegedly observed while

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2 underwater "altering the seabed" or removing historical and cultural resources, in
3 violation of the CINMS regulations. An example of one such identification is
4 described.

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6 Plaintiff Clifton Craft testified that because he would not be collecting
7 artifacts, he had left his wreck diving tools in his truck at the marina parking lot. This
8 fact was corroborated by the arrest report of the undercover Rangers, who found no
9 tools or artifacts in Craft's possession when his property was inventoried as he left
10 the boat. In the Matter of Clifton Craft, et al. Volume IV, Exh. 195, slip op. at 22;
11 See also Vol. I, Exh. 19. The only evidence against Craft was through the testimony
12 of Ranger Menard, who described observing a bearded, balding man of a large build
13 striking rocks on the bottom with a hammer. This identification--as were all of the
14 "eyewitness" accounts--was made of a diver who was wearing a full wetsuits, a
15 neoprene hood and a face masks, viewed underwater through turbid waters. She
16 later stated that she noticed a single tattoo on Craft's right arm when he was on the
17 boat.

18
19 Craft even donned his diving gear during the administrative hearing to
20 demonstrate the difficulty of positively identifying an individual so outfitted
21 (notwithstanding the fact that the hearing room was not underwater!). Vol. I Exh. 46;
22 Tr. at 440-2. Craft removed the wetsuit jacket to reveal an upper body with more than
23 a dozen tattoos. Although three of the divers onboard the *Viston* were, like Craft,
24 large, bearded and balding--and one, as the Ranger reported, had a single tattoo on
25 his right arm--the lack of corroborating evidence against Craft and the problematic
26 nature of an underwater identification of a fully-equipped diver, Transcript at pp.
27 3623-24; Craft was nevertheless charged with, and found guilty of "altering the
28 seabed".

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3 In spite of these problems, each and every underwater identification
4 alleged by the Rangers were accepted as accurate by Department of Commerce
5 Administrative Law Judge Hugh J. Dolan, because

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7 These Respondents [Plaintiffs herein] by their conduct individually and as a group
8 have demonstrated that they deserve no consideration as credible persons....In the
9 investigation they lied. In this proceeding they continued to prevaricate. No
utterance from their mouths, individually or collectively, deserves consideration as
to credibility... In the Matter of Clifton Craft, et al., supra, slip op. at pp. 4-5.

10 When the *Vision* returned to the dock, it was met by enforcement officers
11 from the National Marine Fisheries Service, the National Park Service and the Santa
12 Barbara County Sheriff's Office. Twenty of the divers were interviewed; many
13 subsequently were charged with violations of State criminal laws in both Santa
14 Barbara and Ventura Counties. While the criminal prosecutions were pending,
15 NOAA charged the twenty divers with the violations of CINMS regulations, for
16 which civil penalties were sought. In light of ALJ's Dolan's opinion of the
17 Respondents below, it should not surprise this Court to learn that the Plaintiffs herein
18 were found guilty of each and every charge lodged against them by NOAA.

19
20 The National Marine Sanctuary Program

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22 Since the enactment of the MPRSA in 1970, there has been tension and
23 litigation between the diving public and NOAA, which administers the National
24 Marine Sanctuary program. From 1984 until 1990, adversarial litigation between
25 underwater photographer Gary Gentile decompression diver and the agency
26 concerned whether the shipwreck of the famous Civil War ironclad, U.S.S. *Monitor*-
27 -designated as this nation's first National Marine Sanctuary in 1975--would be
28 accessible to the American citizens who owned it. Gentile merely sought a permit in

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2 order to photograph the shipwreck, while NOAA sought to preclude public access to
3 the *Monitor*, ostensibly because of its concern for the safety of diving on scuba to
4 depths of 235 feet.

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6 The agency was rebuffed by its own Administrative Law Judge who
7 strongly recommended that the diving permit be issued, finding that NOAA had
8 stonewalled the permit applicant for years and covered up the fact that it had
9 previously issued a permit to Jacques Cousteau to do exactly what a U.S. citizen
10 sought to do. In the Matter of Gary Gentile ___ O.R.W. ___ (Nov. 20, 1989).

11
12 Since the designation of the *Monitor*, there has been a proliferation of
13 National Marine Sanctuaries across the country, the most recent of which, the Florida
14 Keys NMS, encompasses thousands of square miles of submerged lands
15 surrounding a chain of islands stretching for 120 miles from the southern tip of
16 Florida and including the most heavily-dived waters in the United States. Florida
17 Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101-605, 104 Stat.
18 3089 (1990). The United States has brought suit against prominent treasure hunter
19 Mel Fisher, who holds federal admiralty arrests of the widely-scattered 1622 Spanish
20 galleons shipwrecks *Arocha* and *Santa Margarita*, now located within the Sanctuary,
21 United States v. Fisher ___ F.Supp. ___ No. 91-10027 (S.D. Fla. 1992). The
22 litigation over the Florida Keys NMS raises the question of whether treasure salvors
23 who had for decades searched for and recovered valuable shipwrecks under the
24 protection of the federal admiralty courts can continue to pursue their vocation in light
25 of the sudden federal "ownership" of the Sanctuary's cultural resources.

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27 Thus, the questions implicated in the instant litigation, far from merely
28 being the appeals of dissatisfied litigants, in fact raise significant questions of national

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2 importance concerning the federal ownership and management of cultural resources.
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5 **III. Statement of the Standard of Review**
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7 This case, arising under the Administrative Procedures Act, *supra*, is before
8 this Court on the Plaintiffs' Motion for Summary Judgment pursuant to FRCP 56.
9 The facts of the case were established in a 1988 administrative law hearing of several
10 weeks' duration; the issues before this Court are purely legal in nature.
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12 When reviewing final agency action under the APA, the scope of review is
13 ordinarily an arbitrary and capricious/abuse of discretion standard. 5 U.S.C. §706
14 (2)(A) authorizes a reviewing court to set aside agency findings which are not in
15 accordance with law, or unsupported by substantial evidence. Good Samaritan
16 Hospital v. Mathews 609 F. 2d 949 (9th Cir. 1979). While the agency is given
17 deference in the interpretation of its own regulations, the reviewing court has a duty to
18 see to it that the agency's actions are consonant with the Congressional intent in
19 enacting the underlying legislation. *Id.* at 956; Barlow v. Collins 397 U.S. 159, 90
20 S.Ct. 832, 25 L.Ed. 192 (1970).
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22 It is submitted that, like the tenant farmers in Barlow, supra, the Plaintiffs--
23 pre-existing users of the waters of the CINMS--were a class to specifically be
24 protected from the unilateral rescission of their right of use by virtue of the
25 designation of the sanctuary. 16 U.S.C. §1434 (c).
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27 In reviewing the civil convictions below, this Court must bear in mind that
28 the ALJ has limited jurisdiction to *interpret* the CINMS regulations. As ALJ Dolan

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put it, "[T]his Tribunal takes the law as it is written. It is not empowered to rewrite or misconstrue the statutes or regulations." *Id.* It is submitted that in effect, the ALJ below did precisely this by broadly interpreting vague regulations to encompass the divers' activities; by assessing the maximum civil penalties permitted for actions which caused, at best, only negligible injury to shipwreck sites that had previously been heavily salvaged and which remained in marine peril due to the unremitting action of the elements; and in endorsing the federal government's overzealous effort to make an example of divers who were exercising what had been, for decades prior to the creation of the CINMS, their unfettered right to search for and recover artifacts from shipwrecks.

It is the province of this Court to determine the validity of the ALJ's application of CINMS regulations to such pre-existing legal use of the sanctuary's waters; to pass judgement on the vagueness and overbreadth of the "altering the seabed" regulation and to decide if the imposition of the maximum civil penalties permitted under the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §1401 *et seq.*, ("MPRSA") is justified by the actions for which the Plaintiffs herein were found guilty.

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2 **IV. As Applied to the Plaintiffs' Activities,**
3 **the CINMS Regulation Proscribing "Altering the Seabed"**
4 **is Unconstitutionally Vague and Overbroad**

5 Plaintiffs Craft, Ferguson and Wilson were convicted of violating 15 CFR
6 §935.7 (a)(2)(iii), which proscribes the "altering" of the seabed. The actions of the
7 Plaintiffs which gave rise to their convictions constituted the hand fanning of the
8 bottom sediments and/or the striking of rocks with a hand held geologist's hammer.
9 For instance, in the case of Plaintiff Craft, this--the only charge against him--was for
10 having dug "a trench one to three inches deep". Tr. at 354. The Rangers could not
11 relocate the "trench" on a return dive to the *Winfield Scott* several days later. Tr. at .

12 The administrative history of the CINMS demonstrates quite clearly that the
13 regulation at issue was intended to govern the alteration of the seabed through the
14 impact of major industrial and/or commercial uses of the CINMS: it was never meant
15 to proscribe or regulate the *de minimus* "altering" of the seabed caused by the manual
16 acts of individuals. When §935.7 (a)(2)(iii) is applied so as to proscribe the acts of
17 Plaintiffs Craft, Ferguson and Wilson, the regulation is clearly, and impermissibly,
18 vague and overbroad.

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20 A simple reading of the regulation demonstrates that its focus is
21 upon proscribing industrial and/or commercial uses or impacts upon the seabed
22 within the CINMS. 15 CFR §935.7 (a) provides that:

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24 [2] *Alteration of, or construction on, the seabed.* Except in
25 connection with the laying of any pipeline No person shall:
26 (i) Construct any structure other than a navigation aid, or
27 (ii) Dredge or otherwise alter the seabed in any way,
28 other than
[A] to anchor vessels, or
[B] to bottom trawl from a commercial fishing vessel. [Boldface
supplied]

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This Court may take judicial notice of the fact that the permitted activities under the regulation, namely anchoring a vessel and bottom trawling, have an infinitely greater impact upon the seabed than does the hand fanning or manually hammering of an individual diver. The Sindia Expedition, Inc. v. The Sindia 8905 F. 2d 116, 117 n.t (3d Cir. 1990). That the intent of the regulatory prohibition is to govern the impacts upon the seabed brought about by major industrial and/or commercial uses of the CINMS is manifest in the administrative history of the Sanctuary.

§935.7 (a)(2)(iii) is first discussed in the Final Environmental Impact Statement ("FEIS") for the CINMS. The regulation is first mentioned at p. C-21 of the FEIS; it is discussed exclusively in the context of dredging:

The impacts of prohibiting seabed alteration and construction are expected to be minor since all current dredging occurs outside the sanctuary. Appendix at p. 4; hereinafter, "(A-4)".

Again, at pp. F-118-9 (A-12-13) of the FEIS, the regulation proscribing the "alteration" of the seabed is discussed exclusively in terms of dredging or dredge disposal activity:

"[T]his regulation will enhance resource protection by prohibiting the presence of large, and often noisy, dredging machinery..."

According to the FEIS, the purpose of the prohibition is the protection of benthic communities and pelagic fish resources that might be smothered or otherwise damaged if dredging were to take place near the shoreline. Thus, the regulation is wholly unrelated to the protection of archaeological and historical resources within the CINMS. FEIS at p.F-143; (A-16)

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2 In the Designation Document for the CINMS, the so-called "constitution" of
3 the Sanctuary, 15 CFR Part 935, 45 Fed Reg 65198 (October 2, 1980), the "altering
4 the seabed" prohibition is cited as one of the regulatory means of achieving,

5 "... the primary purpose of managing the area and of these implementing
6 regulations is to protect and to preserve the marine birds and mammals, their habitats
7 and other natural resources from those activities which pose significant threats." 45
8 Fed Reg 65199.

9 It should be obvious to even the casual observer that a diver's hand-fanning
10 or hammering on a submerged rock is not an activity that poses a significant threat
11 to the natural resources of the CINMS.

12 While it is manifest from the foregoing that NOAA never intended §935.7
13 (a)(2)(ii) to have the broad reach that the prosecution below has given it, when the
14 "altering the seabed" prohibition is viewed from the Plaintiffs' perspective--that is,
15 from that of one whose conduct must conform with it--it is evident that the regulation
16 has run afoul of important constitutional principles of vagueness as well. It is well
17 settled that procedural due process requires that a criminal statute give fair warning
18 of the acts or omissions which it declares to be prohibited and punishable.
19 Cilagenceal v. Municipal Court of Antelope App., 166 Cal. Rptr. 573, 575; 108
20 Cal. App. 3d 394, 397 (1980).

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23 "Void for vagueness simply means that criminal responsibility should not
24 attach where one could not reasonably understand that his contemplated conduct is
25 proscribed." U.S. v. National Dairy Products Corp., 372 U.S. 29, 31 (1963);
26 Bowland v. Municipal Court 18 Cal. 3d 479, 492 (1976). In discussing the due
27 process requirement of legislative specificity, the Supreme Court, per Justice
28 Sutherland, in Connally v. General Const. Co., 269 U.S. 383, 391 (1926), 46 S.Ct.

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126, 127, 70 L.Ed. 322, set forth what is considered to be the classic formulation of the test for constitutional vagueness:

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties ... And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

In U.S. v. Diaz, 499 F. 2d 113 (9th Cir. 1974), an otherwise valid federal statute prohibiting the appropriation of any "object of antiquity" situated on federal lands was found unconstitutionally vague when the statute was applied to 3-4 year old Apache ceremonial masks that the defendant had found in a cave on an Indian Reservation.

But a conviction under the same statute was affirmed where the defendants had made several visits to an ancient Indian burial ground in a National Forest and illegally excavated 800-900 year old artifacts. U.S. v. Smyer, 596 F.2d 939 (10th Cir. 1979). Smyer and Diaz are not inconsistent: taken together, the cases demonstrate that a statute may be sufficiently clear standing alone to withstand constitutional scrutiny, yet when applied to conduct not clearly prohibited, violate due process.

Thus, while §935.7 (a)(2)(iii) would be deemed to comply with procedural due process in a prosecution for illegal dredging within the CINMS, the regulation does not pass constitutional muster when the prosecution stretches an otherwise valid statute to encompass actions of individuals such as hand fanning the bottom or manually striking submerged rocks with a hammer--conduct which is clearly outside what one would reasonably believe to be the regulation's intended scope.

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Well-settled principles of statutory construction mandate the same conclusion:

Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Singer, 2A Statutes and Statutory Construction Sands 4th Ed., 1984 Revis.

Thus, to discern the meaning of the term "altering", one would look to its context and find reference to major physical impacts upon the seabed: laying of pipeline, construction and dredging. One would not conclude that the term "altering" was meant to encompass the *de minimus* impact on the seabed from manual tools or hand-fanning the sand. As the California Supreme Court observed,

The due process guarantee of fair notice is violated when an act is made punishable under a pre-existing statute ... by means of an unforeseeable judicial enlargement thereof. People v. Weidert (1985) 39 Cal. 3d 836, 850, 218 Cal. Rptr. 57.

The acts for which Plaintiffs Craft, Ferguson and Wilson were convicted do not constitute the conduct envisioned by NOAA in proscribing "altering the seabed". The Administrative history of the CINMS reveals that the regulation was meant to proscribe major industrial and/or commercial impacts upon the seabed, such as from dredging operations. Nor would a person of common intelligence conclude that the regulation's reach extends to the impact (if any) on the seabed caused by the manual acts of recreational scuba divers. As such, when applied to the Plaintiffs' actions, 15 CFR §935.7 (a)(2)(iii) is unconstitutionally vague. This Court should vacate the convictions obtained thereunder.

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3 **V. The Plaintiffs' Pre-existing Right to Dive**
4 **and Salvage the Shipwrecks in the CINMS**
5 **Was Unilaterally Rescinded by NOAA,**
6 **In Violation of the MPRSA**

7 Plaintiffs Ferguson, Jernigan, King, Stocks and Wilson were convicted of
8 violating 15 CFR §935.7 (a)(5), proscribing the removal or damaging of historical
9 or cultural resources found within the CINMS. Yet the evidence before the agency
10 was uncontroverted that the Plaintiffs and their colleagues had freely and openly
11 been salvaging artifacts from the shipwrecks of the S.S. *Winfield Scott* and the
12 *Golden Horn* for decades prior to the designation of the waters within which they
13 lay as the CINMS.

14 Plaintiff Craft testified that over the past 20 years, he had spent
15 approximately 500 hours underwater exploring and salvaging the *Winfield Scott*.
16 Craft further related that these activities had included extensive digging, dredging
17 and even the dynamiting of the wreck site, which had yielded hundreds of gold coins
18 to persevering divers. Transcript at pp. 3594-3621. Plaintiff Wilson related a similar
19 history of openly and freely diving the wreck site and recovering artifacts for
20 restoration and public display. Tr. at p. These public activities were widely known
21 and reported in the mass media in Southern California and to the diving community
22 throughout the nation in scuba diving magazines. Tr. at p.3602.

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24 One such article¹, "There is Gold on the *Winfield Scott*" published in the
25 September, 1969 issue of "Skin Diver" magazine (A-18-22), describes the condition

26 Although discussed during the hearing before the Administrative Law Judge. (Tr. at pp. 2473-74; 3680-
27 etc.) the article inexplicably does not appear in the Administrative Record assembled by the United
28 States. Nevertheless, the article may be cited as authoritative pursuant to Federal Rule of Evidence 803
(6), Statement in Ancient Document. See also, United States v. Steinmeiz, F.2d _____, No. 91-5582
29 1st Cir., Aug 21, 1992), Slip Op. at 2, n.2.

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of the shipwreck then:

A normal dive of the *Winfield Scott* is anything but thrilling. Casual observation discloses nothing but miscellaneous, unidentifiable chunks of iron wreckage, blended into the shallow rocky bottom. (A-20)

Dick Anderson's article describes the thrill of recovering gold coins lost since the Gold Rush, the electrifying effect of his find upon his fellow divers, and the inevitable result:

It took about two days for news of our gold find to reach every diver in Southern California. Charter-boats loads of scuba divers are heading to Anacapa Island by the score. (A-22).

Thus, the Plaintiffs' testimony is corroborated: the recovery of artifacts from the *Winfield Scott*--as well as from the other shipwreck sites in what is now the CINMS--was a widely-publicized activity of which NOAA was well aware at the time of the Sanctuary's designation. Nevertheless, the administrative history of the CINMS makes little mention of this public use of the marine resources, and makes even less of an attempt to accommodate scuba divers' pre-existing right to continue to recover artifacts from the wrecks which they had previously been freely and openly salvaging.

The MPRSA, at 16 U.S.C. §1434 (c), provides that:

Access and valid rights
(1) Nothing in this title shall be construed as terminating or granting the Secretary the right to terminate any valid lease, permit, license or right of subsistence use or of access...

In the CINMS, this statute was interpreted as requiring that even those pre-existing uses of the marine environment that had far greater potential to interfere

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damage upon the marine environment--such as the oil and gas exploration and development and pipeline placement (i.e., "altering the seabed") at the 17 active leases within the CINMS at the time of its designation--be permitted to continue. "National Marine Sanctuary Program: Balancing Resource Protection With Multiple Use" 18 Houston L. Rev. 1037, 1046 (1981). This determination was made, ostensibly, only after "...[E]xtensive data on the existing human activities in the two areas [the CINMS and the Point Reyes NMS] were reviewed, the potential impact of such activity analyzed, and the existing management and regulatory authorities applicable to these activities evaluated." *Id.* Yet in the case of §935.7 (a)(5), making illegal the long and traditional use of artifact recovery from wrecked and abandoned shipwrecks, there is simply no evidence whatsoever that any effort at balancing or accommodating this pre-existing public use was even attempted.

The FEIS simply makes merely passing mention of shipwreck diving in the CINMS. At p. E-55-56 (A-5-6):

No extensive onsite inventory of the cultural and historical resources of the study area has yet been conducted.... The discipline of underwater archaeology is relatively new and has not yet been extensively applied in the study area. As a result, most of the information which is currently available concerning underwater sites is based on the reports of amateur collectors and sport divers.

In Section E. 3. of the FEIS, "Human Activities", which ostensibly "describes the scale and intensity of the major area uses, §g., entitled "Recreation", contains a narrative description of scuba diving within the CINMS, yet nowhere is the one activity to be proscribed--the collection of artifacts from shipwrecks--even mentioned! No effort was made to quantify the extent of what the FEIS had (in other sections) recognized as a public use of the shipwrecks within the CINMS. Nor does the FEIS identify or describe those shipwrecks which were considered to

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be historically and/or archaeologically significant and hence, worthy of protection. The FEIS contained no evaluation of the contemporary condition of any of the shipwreck sites. In analyzing the effect of §935.7 (a)(5) on the users of the CINMS shipwrecks, the sum and substance of NOAA's conclusion is a mere tautology:

This regulation should not significantly effect activities within the sanctuary, except the collection of historical artifacts by recreational divers. FEIS at F-125-6, (A-14-15).

Such "analysis" is woefully inadequate to comply with the strictures of the National Environmental Policy Act ("NEPA"): "...it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.... NEPA merely prohibits uninformed--rather than unwise--agency action." Robertson v. Methow Valley Citizens Council 490 U.S. 332, 109 S.Ct. 1835, 1846 (1989).

The Ninth Circuit deemed an EIS deficient that reflected only a feeble attempt to describe the environment as it existed prior to the proposed federal action. The reviewing court was required to, "...make a pragmatic judgement whether the EIS' form, content and preparation foster both informed decision-making and informed public participation." California v. Block 690 F. 2d 753, 761 (9th Cir. 1982). In the instant case, as demonstrated by the paucity of information in the administrative history, there can be little question but that NOAA's decision to proscribe the collection of artifacts from all shipwrecks within the CINMS was anything but uninformed.

The right of salvage, or the rescue distressed property from marine peril, is of ancient vintage and has for centuries been a fundamental tenet of federal admiralty

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law:

Under the maritime law of salvage, a salvor has the right to search and explore navigable waters for salvageable sites. Upon "finding" a site which is not being worked by another salvor, he may undertake to rescue the imperiled cargo and bring it before the Admiralty Court for a determination of a salvage award. Cobb Coin Co. Inc. v. The Unidentified Wreck 549 F.Supp. 540, 555 (S.D.Fla. 1983).

It has been well-settled that marine peril exists as a matter of law on a shipwrecked vessel, as "[E]ven after discovery of the vessel's location it is still in peril of being lost through the actions of the elements." Treasure Salvors, Inc. v. the Unidentified, etc. Vessel 569 F. 2d 330, 339 (5th Cir. 1978).

Moreover, federal admiralty law has established that recreational scuba divers have the right to continue to recover artifacts from historic shipwrecks without the molestation or interference from interlopers. In Indian River Recovery Co. v. The China, a commercial salvor sought the exclusive right to recover a cargo of nineteenth century English ironstone china from a well-known shipwreck located at the mouth of Delaware Bay. Alarmed at the imminent destruction of a popular sport scuba diving and fishing destination, many of the charter boat captains, divers and fishermen of coastal Delaware and New Jersey coalesced into the nonprofit "Ocean Watch" and intervened in the admiralty litigation initiated by the would-be salvor.

The District Court ruled that Ocean Watch's prior competing interest in the shipwreck from its members' fifteen years of continuous diving and salvaging china as well as its interest in preserving its right to continue to recover artifacts from the so-called "China Wreck" gave the organization standing to intervene and contest the claim the commercial salvor's claim to exclusive salvage rights to the wreck. 108 F.R.D. 383, 387 (D.Del. 1985). On the merits of the competing claims, the

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admiralty court found that:

Members of Ocean Watch began to use and possess the China Wreck fifteen years before IRRC's late arrival. Ocean Watch has proven its ability to salvage the wreck in a manner that provides substantial recreational enjoyment and commercial success. It has every intention of continuing to use and possess the wreck as it has in the past, and to salvage it in a way that benefits the sport-diving and fishing communities. Ocean Watch has established its superior right to dive the China Wreck under the law of finds and is entitled to an order permanently enjoining IRRC from commercially salvaging the wreck. 645 F. Supp. 141, 144-5 (D.Del. 1986).

In the case of the *Winfield Scott* and the *Goldenhorn*, it is NOAA that is the late arrival. Like IRRC with the China Wreck, the agency seeks to unilaterally rescind any pre-existing rights the sport diving community had established in the shipwrecks through decades of the open, continuous and notorious recovery and restoration of artifacts from the shipwrecks.

Notwithstanding the fact that such an action by NOAA is in direct contravention of §1434 (c) of the MRPSA—the statute which authorized the creation of the CINMS—in the instant litigation, the Plaintiffs' pre-existing right to dive and salvage the shipwrecks within the CINMS is firmly grounded in admiralty law. It has long been well-settled that, "[T]here is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice." Garratt v. Moore-McCormack Co. 317 U.S. 239, 243, 63 S.Ct. 246, 87 L.Ed. 239 (1942).

This Court should recognize the Plaintiffs' pre-existing rights as salvors of the *Goldenhorn* and *Winfield Scott* shipwrecks within the CINMS. Such a result is not only pre-ordained pursuant to the MRPSA, it is a fundamental right arising out of federal admiralty law. For the foregoing reasons, the convictions of the Plaintiffs for violation of §935.7(a)(5) of the CINMS regulations must be vacated.

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3 VI. The Civil Penalties Meted Out For Violations
4 of CINMS Regulations Were Disproportionate to the
5 Negligible Harm Inflicted to Sanctuary Resources
6 and Must be Remanded

7 ALJ Dolan recommended, and NOAA in fact meted out stiff civil penalties
8 for each of the convictions. In particular, Plaintiff Jack Ferguson, who served as the
9 divemaster of the charter voyage, was, by virtue of his position, singled out by
10 Dolan as the "ringleader" of the group and fined \$100,000.00, the maximum penalty
11 permitted under the regulations. In the Matter of Clifton Craft, et al, supra. slip op.
12 at 33. Such a penalty is grossly disproportionate to the harm--if any--done to the
13 shipwreck sites and seriously misapprehends the role that the divemaster plays in
14 relation to the other divers on the charter.

15 Ranger and underwater undercover agent Yvonne Menard testified that the
16 "divemaster" was a diver with an advanced training certification whose duty was to
17 log the individual divers in and out of the water, to describe to them collectively the
18 significant safety considerations for the particular dive and most importantly, to be
19 responsible for the response in the event of any diving emergency. Tr. at pp. 60,
20 802-3. Menard understood from her diving experience that the divemaster is not to
21 be considered--as ALJ Dolan apparently did--to be the commander-in-chief of all of
22 the divers.

23
24 The evidence before the ALJ was uncontroverted that the shipwreck sites of
25 both the *Goldenhorn* and the *Winfield Scott* had been heavily impacted by
26 professional salvors and by decades of recreational scuba diving. In the case of the
27 *Winfield Scott*, the shipwreck had been dynamited and torn apart in the 1890's,
28 further blasted in the search for scrap metal during the Second World War, and

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2 subjected to the modern day gold rush of thousands of divers eager to recover a
3 piece of her remaining gold. *See generally*, Delgado, "Water Soaked and Covered
4 With Barnacles" Vol V, Exh. 204; Anderson, *supra*. Tr. at pp. 3590-3622; 3678-
5 84.

6
7 Underwater archaeologist Jack Pierson testified that the archaeological
8 potential of the *Winfield Scott* had been greatly diminished due to the great degree of
9 disturbance of the shipwreck. Because of its location in richly oxygenated shallow
10 water, near to shore, the shipwreck was subjected to further deterioration from the
11 actions of the waves, chemical decomposition through the corrosive effect of
12 saltwater and biological decomposition caused by marine organisms. Moreover, the
13 *Winfield Scott* is by no means unique, as at least ten other similar shipwrecks from
14 the California Gold Rush era are extant off the coast, each of which are in a far better
15 states of preservation. Tr. at pp. 398-417. In October, 1987, the *Winfield Scott* had
16 not yet been nominated to the National Register of Historic Places, the official
17 federal registry of those sites deemed to be of particular archaeological or historic
18 significance. In the Matter of Clifton Craft, et al. supra at 32.

19
20 Pierson further discounted the significance of the objects allegedly
21 recovered by certain of the Plaintiffs: there were literally thousands of the small brass
22 nails used to affix copper sheeting to the vessel's hull; for more than a century, the
23 lumps of coal were commonplace on ships navigating the Pacific coast. Tr. at 417-9.

24
25 Similarly, the *Goldenhorn* shipwreck consist only of a flattened steel hull
26 flush on a bedrock bottom, continually raked by the waves on the seaward side of
27 Santa Rosa Island. With little or no sand protecting its corroding frames, any
28 artifacts which once might have present have washed away; organic material such as

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the "line and shroud" allegedly recovered from the *Goldenhorn* by Plaintiff Wilson would have long since disappeared. Tr. at pp. 419-24; 443-4. The *Goldenhorn* had not been nominated for the National Register of Historic Places at the time of the underlying prosecution, either. In the Matter of Clifton Craft, et al. supra.

As the shipwrecks lay in an exposed, hostile environment, had each previously been heavily salvaged both commercially and for decades prior to the creation of the CINMS by recreational divers (including the Plaintiffs), the recovery of the small, commonplace artifacts by the Plaintiffs for preservation and display should be viewed not, as did the ALJ, as vandalism or looting, but rather as their rescue from marine peril and inevitable destruction. In light of the Plaintiffs' pre-existing right to engage in the salvage of shipwrecks in what was later designated as the CINMS, the civil penalties imposed are clearly disproportionate to whatever negligible harm--if any--done to the sanctuary resources.

As did the ALJ, the case of Plaintiff and divemaster Jack Ferguson bears particularly close scrutiny on review. In finding guilt for each of the offenses charged, the ALJ

...reluctantly impose[d] the inadequate civil penalties assessed by Agency Counsel in six of the seven cases....Mr. Ferguson is a special case. As the divemaster he bore a special responsibility. Craft, supra at 33.

Yet ascribing responsibility for the acts--or lack thereof--by the charter vessel's leading *safety* diver is a clearly erroneous finding of legal liability for the actions of others which is unsupported by any testimony nor by any other evidence on the record whatsoever. Even the government witnesses understood that Ferguson's function was not that of "commander-in-chief" of all of his fellow divers, as the ALJ's punitive imposition would suggest, but rather, a strictly administrative post as

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the lead diving safety officer.

Reviewing courts are required to base their decisions upon the record in the case below. If the agency's finding cannot be sustained upon the administrative record made, the reviewing court must remand the determination in question for further consideration. United States Lines v. Federal Maritime Commission 584 F.2d 519 (D.C. Cir. 1978).

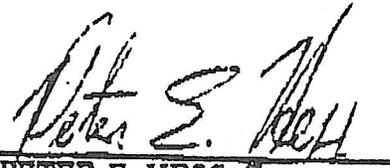
The \$100,000.00 penalty imposed upon Ferguson is not only disproportionate to the negligible harm done to sanctuary resources; it is nothing less than outrageous when compared to the other civil fines assessed--the nearest to Ferguson's being lower by a factor of ten! Moreover, it is manifest that the Ferguson fine is base upon a clearly erroneous legal standard of liability unsupported on the record as a whole. If the civil penalties assessed hereunder are to be sustained in light of the Plaintiffs' other legal arguments, at the very least this case must be remanded to the administrative agency for the determination of a civil penalty proportionate to the harm done to sanctuary resources by Ferguson himself, and not by those for whose actions he bore no legal responsibility whatsoever.

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VII. Conclusion

For the foregoing reasons, the Plaintiffs respectfully request that this Honorable Court grant their Motion for Summary Judgment and vacate the civil penalties assessed against them by the agency below. In the alternative, the Plaintiffs request that the Court find the penalties disproportionate to the negligible harm, if any, inflicted upon the resources of the CINMS and remand this case to the agency for a new determination of civil liability.

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