



designated as part of the Monitor Marine Sanctuary.<sup>1</sup> Appellant has filed some 11 applications for various permits over the last 5 years. This is his second administrative appeal after an unsuccessful attempt to have the earlier Agency denial action reversed in a Federal District Court. The denial of three proposals, Nos. 3, 10 and 11, to perform underwater photography of the USS Monitor are for consideration here.

The grounds for the appeal as set forth in a letter dated August 28, 1989 are as follows:

- 1) The NOAA and/or U.S. Navy diving standards against which Mr. Gentile's permit applications were judged are antiquated, in violation of NOAA's own diving regulations, and in contravention of the standards accepted and administered by other federal agencies in that they fail to adequately account for recent technological and procedural innovations which have been proven to minimize the safety risks of deep diving on Scuba equipment by the permit applicant.
- 2) Mr. Gentile and the other divers whose Scuba diving vitas were made a part of the applications were wrongfully and improperly classified and judged against a sport, or novice diver standard.
- 3) The administrative officials who participated in the permit denial process were non-disinterested, bore a personal antipathy toward Mr. Gentile, and had ulterior and capricious motives for denying the applicant access to the Monitor Marine Sanctuary.

The 30 day period for holding the hearing was extended because of a delay in transmitting the file to this Office. The informal hearing provided for in the Regulations was conducted on October 18, 1989. This decision is rendered on an expedited basis based on the requirement that it issue within 30 days after the Hearing.

Agency Counsel's suggestion that the due dates prescribed by the regulations not be followed was denied. It is hornbook-law that an Agency must follow its own regulations. The fact that inordinate delay has dogged this appellant's requests should move Counsel and the Agency to at least attempt to follow the timetable which the Agency has prescribed.

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<sup>1</sup> A summary history of the Monitor and Sanctuary is set forth in the 17th annual report of the Council on Environmental Quality (1986 at pp 148-150).

## DISCUSSION

For almost five years this appellant has been involved in a dispute over his entitlement to scuba dive on the wreck of the USS Monitor. Appellant asserts a right as an American citizen to personally visit and photograph the wreck site some 220' deep off Cape Hatteras, within a Marine Sanctuary. Agency officials have repeatedly refused those requests and have prevailed in prior administrative and judicial review. The sole predicate for such denial has not been directly related to the purposes of the Sanctuary, but has rather been expressed as involving a personal safety concern for the divers. Unfortunately, but also inevitably, some acrimony has developed, principally over the delay. Respondents belligerence has not served to facilitate requests. However, as I have previously observed, antagonism and reprehensible behavior does not warrant official recrimination or sanctions (Dorr 4 O.R.W. 191 (NOAA 1985)). The failure to act or issue an opinion on appellant's requests by the diving office of NOAA for over a year when there was "...not a hell of a lot of thinking" involved in reaching the adverse determination, demonstrates a very unfortunate attitude and mindset on the part of the NOAA officials. Five minute determinations simply should not take over a year. Nor should citizens be led on with suggestions or requests for changes which will not alter the initial decision.

This appellant is not an academician or a scientist, at least in the grant proposal preparation sense. The permit requirement imposed for this most usual Sanctuary, though appropriate, is completely foreign to a wreck diver such as Mr. Gentile. The treatment he has received, particularly when contrasted to that shown to the Costeau Society is remarkable. While he was stonewalled, Costeau was encouraged. For example, despite initial reservation about the latter's application, within 30 days conditions were negotiated and a permit issued to scuba dive the Monitor. That permit, a public record, was neither provided as a model nor ever revealed to this appellant. Its existence was extracted from a reluctant Agency witness during my attempt to ascertain some sense of the history of activity at the site. Review of that testimony demonstrates more than a lack of candor on the part of that Agency representative.

The Costeau permit experience is also significant because it appears to reflect that there is not a well defined process for considering such requests. There the diving office was not consulted, and the permit was granted. Here the diving office appears to have interposed a block, and the committee mandated to be involved in the process does not appear to have been consulted. In neither case, has the requirement that the activity constitute "research" been addressed in any detail. In fact, at the outset

the Costeau applicant denies that research is involved! Numerous other critical comparisons between these two permit requests may be made based upon materials in this record.

The letter of denial fails to address the five factors or criteria listed in the regulations. It appears to trivialize the appellant's requests by alluding to non-germane matters. The Agency has published standards, it is obliged to rely upon and address them either in granting or denying proposals for permits.

I am not unmindful of the prior administrative and judicial decisions. In the present state of the record, the basis for the Agency action is no longer defensible.

### FINDINGS

1. The evidence of record, taken as a whole, is credible and, when examined in the light of each witnesses background and experience, is not inconsistent. Diving presents elements of danger. The risk increases below 130 feet. The Agency witnesses cited standards which the Agency has adopted for the conduct of its diving activities. Staged decompression divers, including appellant, sometimes penetrate to depths below 200 feet. This is well beyond the NOAA, Navy and OSHA standards. It appears that a significant number of trained scuba divers frequently penetrate to depths at and in excess of 200 feet. There is certainly an element of increased risk, but not to the extent that restrictions on personal activity can be justified.

The Agency witnesses, most of whom are themselves scuba divers, do not venture to such depths. However, they probably don't: smoke, ride motorcycles, parachute, hang glide, scale mountain peaks, skydive, spelunk, drive speed boats, fish commercially, or engage in other such activities permitted in society. In retrospect, many would say it was foolhardy for the past Secretary of Commerce to be involved in a Rodeo type activity, being over three score years in age. There has been no attempt to impose an OSHA or other federal agency standard for such riding activity, fatal though it was. Similarly, the staged decompression diving of Ms. Connell, who is approaching three score years, is the mother of 11 and grandmother of 10, is not an activity to be proscribed by bureaucratic fiat.

A venturesome minority will always be eager to get off on their own, and no obstacles should be placed in their path; let them take risks, for God's sake, let them get lost, sunburnt, stranded, drowned, eaten by bears, buried alive under avalanches - that is the right and privilege of any free American.

16 Idaho Law Review 407,420 (1980).

2. In addition to the problem of Nitrogen Narcosis, (Rapture of the deep), which is similar to alcohol intoxication, Decompression Sickness (the bends) is a diving hazard which increases with depth. The use of a decompression chamber is sometimes indicated, though breathing oxygen during staged decompression apparently lessens the

incidence of that condition. Oxygen toxicity, though alluded to, does not appear to be significantly involved or increased by scuba diving.

3. The NOAA and Navy diving program and tables represent well informed compilations of information based on extensive experience. They appear to be consistent with, though they vary somewhat from, the similar publications of other nations such as Great Britain and France. The conservative approach which they represent reflects the imprecise nature of evaluating the subjective effects of this activity upon various divers at various times. Mathematically precise predictions of the effect of depth and time upon all divers are not possible.

4. It is understandable and valid that scientific research activity in which the Agency participates or contributes funds may properly be subject to a more stringent safety review process, which would support the use of Agency safety standards. However, the record does not reflect that the Agency "participated" or contributed funds to the Costeau or appellant's proposal. Review of proposals and observation do not constitute participation.

5. Agency's repeated denials of the appellant's requests for permits has been principally based upon the safety concerns issue, particularly Nitrogen Narcosis. That concern is unduly exaggerated and contrary to the experience of the scuba diving community as reflected in the record.

6. Respondent has been treated differently from others by the Agency, namely the Costeau Society. Specifically, if the element of Nitrogen Narcosis, which is relied upon by Agency Counsel, in staged decompression dives was applied equally to the Costeau application, it too would have been denied. The presence of a larger decompression chamber and other safety equipment aboard the Calypso do not appear to significantly impact or address the Nitrogen Narcosis concern.

7. Conditions<sup>1</sup> at the Monitor site do not appear to vary significantly from other diving sites. Depth, currents, turbidity, temperature and the like, all vary significantly from day to day oftentimes contraindicating diving.

8. The Agency asserts that staged decompression dives appear to be unduly hazardous, while the appellant portrays them as almost routine. Both represent honestly held views at near opposite ends of a spectrum to which there is a middle ground. This position is not a compromise, but rather reflects an area where those who take risks venture beyond that which the academic and bureaucratic segments of the scientific community accept, by relying upon additional instrumentation and equipment, as well as experience.

9. Appellee is not a sport or recreation diver as the terms are commonly understood. The activity of Mr. Gentile and his witnesses such as Messers. Watts, Deans and Bielenda lies in the penumbral area between sport and commercial divers due to the increased depth as well as the profit and business aspects of their activities.
10. The fact that an activity is to be conducted within a federal reservation does not, in the absence of special circumstances, justify the imposition of special conditions or standards. Diving within areas under the jurisdiction of NOAA's sister Agency, the National Park Service, is not restricted. This is no different than diving in a Marine Sanctuary. The comment of the NOAA Representative to the effect that the National Park Service is not in the business of granting permits is absurd.
11. The record demonstrates that Dr. Morgan Wells and Edward Miller, who spoke for the Agency, had, have and continue to reflect an "unalterable closed mind on matters critical to the disposition of the case" United Steelworkers of America v. Marshall, 647 F.2d 1189, 1209 (D.C. Cir. 1979). However, there has not been any showing of "fraud or at least a pecuniary interest in the outcome". Howlett v. Walker, 417 F.Supp 84, 86 (N.D. Ill. 1976). The closed minds are tied directly to their sole reliance on the NOAA diving regulations and Navy tables and do not appear to be based upon any extraneous or improper motives.
12. The inordinate delay in the processing of appellant's requests is not explained by Agency Counsel's expression respecting "the stately pace of bureaucratic decision making". The situation here is better described in the presidential phrase about being left twisting gently in the breeze. Agency personnel did not go out of their way to assist appellant to formulate his proposals as it asserted by Agency Counsel. The contrast to the reception and attitude toward the Costeau Society with which the agency representatives worked very quickly and issued a permit within a month is at least remarkable.
13. The evidence of record and the relevant chart information reflect that the depth of the Monitor is approximately 220 feet.
14. The requirement that vessel anchors be placed outside the sanctuary limits is reasonable. Multiple anchors would allow positioning at or close to the Monitor.
15. The evidence and representations respecting the state of the Monitor and the rate of its deterioration do not support any specific finding or conclusion.

CONCLUSION

With respect to the three grounds for the appeal, I conclude that:

- 1) The standards adopted for Agency use by NOAA and/or the United States Navy may not be imposed upon the public sector merely because the proposed activity is to be carried out within a Marine Sanctuary.
- 2) The appellant and other staged decompression divers are not sport or novice divers. Their training, experience and certifications reflect a substantially greater proficiency.
- 3) While the record reflects that a disaccord between appellant and the NOAA Monitor Marine Sanctuary and Diving Program officials developed over the the almost 5 years during which appellant has sought permits, it does not appear that personal antipathy, or other ulterior and capricious motives generated the denial of the requests on appeal here. The record demonstrates that the NOAA officials are strongly committed to the application of the diving standards which they have authored and the Agency has adopted. Under those standards neither appellant nor other scuba equipped divers would be approved.

RECOMMENDED DECISION

I recommend that the Agency determination to deny the permit requested be reversed and that the matter be remanded for consideration, comments and decision on all aspects of the proposal, applying each of the five factors set forth in the regulations (15 C.F.R. § 924.6) by the appropriate agency officials including the Advisory Council on Historic Preservation.

  
 Hugh J. Dolan  
 Administrative Law Judge

Nov 20, 1989  
 Date