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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Final Notice of a New Category of Special Use Permit Related to the Operation of Desalination Facilities Producing Potable Water for Consumption.

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice

SUMMARY: On January 12, 2017, NOAA published a notice in the Federal Register proposing two new categories of special use permits (SUP) related to the operation of desalination facilities, and requesting public comment. NOAA hereby gives public notice that the Office of National Marine Sanctuaries will adopt a new SUP category pursuant to the requirements of Section 310 of the National Marine Sanctuaries Act (NMSA). The SUP category is for the continued presence of a pipeline transporting seawater to or from a desalination facility. The second category previously proposed for the use of sediment to filter seawater for desalination is removed. This notice also includes background information on the use of desalination in

Monterey Bay National Marine Sanctuary (MBNMS) and ONMS regulations applicable to activities that disturb submerged lands or discharge into sanctuaries, explains why a SUP is appropriate for this category of actions, explains why issuance of a new SUP category will not result in additional regulatory review, explains how the SUP category will facilitate and streamline the administration and management of desalination permits, as appropriate, and provides responses to public comments received. At this time, most proposed desalination activity in sanctuaries occurs in MBNMS, and the scientific studies used for environmental impact and comparative cost analyses were regionally based, so the SUP category only applies to MBNMS.

DATES: This notice becomes effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Please see "FOR FURTHER INFORMATION CONTACT". This Federal Register document is also accessible via the Internet at: http://montereybay.noaa.gov.

FOR FURTHER INFORMATION CONTACT: Bridget Hoover, Monterey Bay National Marine Sanctuary, 99 Pacific Street, Bldg 455A, Monterey, CA 93940, (831)647-4217, bridget.hoover@noaa.gov.

SUPPLEMENTARY INFORMATION: Pursuant to Section 310 of the National Marine Sanctuaries Act, 16 U.S.C. § 1441, NOAA issues

this notice of a Special Use Permit (SUP) category applicable to Monterey Bay National Marine Sanctuary (MBNMS) for the continued presence of a pipeline transporting seawater to or from a desalination facility.

I. Background

Introduction to Desalination Projects in Sanctuaries

There is a growing public concern about ensuring adequate water resources to support populations along the California coast. Communities have been working together to develop strategies for addressing the long-term drought California has recently experienced and the resulting water scarcity. In the Monterey Bay area, desalination has been identified as one of the essential components of water resource portfolios. NOAA's initial proposal was to apply the proposed SUP categories across the National Marine Sanctuary System, which could have resulted in the SUP categories applying to Olympic Coast and Florida Keys national marine sanctuaries (the other two sanctuaries adjacent to land such that desalination facilities could be constructed) in addition to MBNMS (82 FR 3751). However, since most desalination activity in sanctuaries occurs in MBNMS, and the scientific studies used for environmental impact and comparative cost analyses were regionally based, the SUP category only applies to MBNMS.

Desalination is the process by which salts and other minerals are removed from seawater or brackish water to produce potable fresh water. The installation and operation of desalination facilities near a national marine sanctuary may involve access to and use of sanctuary resources and include activities prohibited by a sanctuary's regulations. One potentially applicable prohibition is for activities that cause the alteration of, or placement of structures on or in the seabed 15 CFR § 922.132(a)(4). For example, installation of certain desalination facility structures such as an intake or outfall pipeline on, beneath, or attached to the ocean floor would be prohibited by sanctuary regulations and could only occur with sanctuary approval. Another prohibition potentially applicable to desalination projects is discharging or depositing any material or matter from within or into sanctuaries 15 CFR 922.132(a)(2). The disposal of brine effluent from a desalination facility, and most other materials, into sanctuary waters would be prohibited unless approved by the sanctuary.

Multiple federal, state and local permits are typically required for any construction and operation of desalination facilities, including when a facility is proposed near a national marine sanctuary. In 2010, NOAA, in collaboration with the California Coastal Commission and California Central Coast

Regional Water Quality Control Board, published specific guidelines for new desalination plants in a report titled Guidelines for Desalination Plants in Monterey Bay National Marine Sanctuary (MBNMS 2010, http://montereybay.noaa.gov/resourcepro/resmanissues/pdf/050610desal.pdf). These non-regulatory guidelines were developed to help ensure that any future desalination plants in or adjacent to MBNMS would be sited, designed, and operated in a manner that results in minimal impacts to the marine environment. These guidelines address numerous issues associated with desalination including site selection, construction and operational impacts, plant discharges, and intake systems. The guidelines encourage the use of subsurface intake systems and associated pipelines, which have less potential to cause environmental harm to sensitive marine organisms and habitats than other types of intakes. Open water intakes have the potential to trap organisms on the intake screens (impingement) or impact organisms small enough to pass through the screen during the processing of the saltwater (entrainment). Subsurface intakes have the potential to minimize or eliminate impingement and entrainment impacts (Chambers Group Memo 2010). When subsurface intakes are not feasible, and a new pipeline for an open water intake is necessary, placement should be thoroughly evaluated to minimize

disturbances to biological resources. In addition, the guidelines encourage co-location with existing facilities (e.g., sewage treatment plants) to dilute brine by blending it with existing effluent for ocean discharges.

The guidelines also examine which statutory and regulatory authorities would apply to desalination projects located near national marine sanctuaries. The guidelines explain that NOAA could potentially allow the construction and operation of desalination facilities through sanctuary authorization of other state and federal permits, such as the State of California's Coastal Development Permit and National Pollution Discharge Elimination System (NPDES) permit.

Authorizations and Special Use Permits (SUP)

This section provides information on the difference between authorizations and special use permits (SUPs); explains why an SUP category for the continued presence of a pipeline transporting seawater to and from a desalination facility is appropriate; explains how this SUP category will facilitate sanctuary management in a way that enables desalination facilities, as appropriate; and articulates the scope of coverage of this SUP category.

Depending on the type of activity or project proposed, NOAA has various regulatory mechanisms it can use to allow otherwise

prohibited activities to occur within national marine sanctuaries. Two of these mechanisms are authorizations and SUPs. Authorizations allow an entity to conduct an activity prohibited by sanctuary regulations if such activity is specifically authorized by any valid Federal, State, or local lease, permit, license, approval, or other authorization issued after the effective date of sanctuary regulation (15 CFR § 922.49). In contrast, SUPs can only be issued for activities that are needed: (1) to establish conditions of access to and use of any sanctuary resources; or (2) to promote public use and understanding of a sanctuary resource (16 U.S.C. § 1441(a)). In addition, the activities covered under an SUP must be compatible with the purposes for which the sanctuary is designated and with protection of sanctuary resources (16 U.S.C. § 1441(c)). SUPs may only be issued for activities that can be conducted in a manner that does not destroy, cause the loss of, or injure sanctuary resources (16 U.S.C. § 1441(c)). Finally, SUPs may authorize the conduct of an activity for up to five years and may be renewed (16 U.S.C. § 1441(c)).

As mentioned above, NOAA has the ability to issue an authorization for a desalination project. Authorizations would address the desalination projects' pipeline installation, maintenance, and removal, and brine discharge within the

national marine sanctuary. For a desalination facility intake or outfall, an authorization of a California Coastal Development permit would be required for any seafloor disturbance, prior to issuance of an SUP for the continued presence of a pipeline transporting seawater to or from a desalination facility. Brine discharges would be covered by an authorization of another approval, such as the NPDES permit.

In addition, the NMSA gives NOAA authority to develop categories of SUP and to assess fees that may be applied to expenses of issuing and administering SUPs and expenses of managing national marine sanctuaries (16 U.S.C. 1441(d)(3)). In the case of a proposal for a desalination project in or near MBNMS, NOAA has found that there is a significant time and resource investment to review the environmental analysis and process a permit application for this type of large-scale coastal development project. Applicable SUP fees that may be assessed for permitting certain aspects of desalination projects would include the processing of applications, preparation and review of environmental analysis, as well as long-term monitoring of the impacts of the activity to sanctuary resources, and assessment of fair market value for the use of the resource.

NOAA has determined that the continued use of sanctuary resources (namely, the substrate, seafloor, and/or water column) by the presence of the pipeline could be carried out in a manner that is consistent with Section 310 of the NMSA. As such, an SUP is an appropriate mechanism for NOAA to approve the continued presence of a pipeline and recover applicable costs associated with managing the sanctuary in a manner that allows desalination projects to occur within or near MBNMS and facilitates the more efficient administration of desalination permits and allowances.[1] NOAA has further determined that issuance of this new SUP category will not result in additional regulatory review of desalination proposals, because an applicant would still need only submit one permit application even if NOAA ultimately issues multiple permits for the action, and because the same environmental review process pursuant to the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA), as required, would apply.

While NOAA could conceivably propose new SUP categories for other types of pipelines, utility lines, or use of sediment

[1] This management approach has been applied with respect to submarine fiber optic cables in Olympic Coast and Stellwagen Bank national marine sanctuaries, where the installation of the infrastructure was considered via a separate authorization and the continued presence of the infrastructure was addressed through an SUP (76 FR 56973; ONMS 2002).

associated with activities other than desalination (e.g., sewage treatment, or power generating facilities), NOAA elected to limit the focus of this SUP category to desalination activities in MBNMS, as desalination is currently a pressing issue on the California central coast. There is enough information on the types of activities associated with the continued presence of pipelines for desalination to make a determination that under certain conditions, and if correctly sited and compliant with MBNMS Desalination Guidelines, the continued presence of desalination pipelines is not likely to result in injury to sanctuary resources, which is a requirement for SUPs. It would be too speculative at this point for NOAA to analyze impacts of other types of pipelines, or other project impacts in the absence of a more clearly defined need or proposal for such activities.

The second category previously proposed for the use of sediment to filter seawater for desalination has been removed from this final notice as NOAA recognizes that it may be a disincentive for the industry to select subsurface seawater intake, which is considered to have a smaller environmental impact than other types of intake. Moreover, the remaining SUP category will apply only to MBNMS because NOAA is not able to determine that the activities covered under this SUP category

would always meet the "no injury" criteria for SUPs specified in the NMSA for all sites, at this time.

NMSA Special Use Permits

This section provides more information of the history of SUPs, how SUPs are applied, and how SUP fees are assessed and applied.

Congress first granted NOAA the authority to issue SUPs for the conduct of specific activities in national marine sanctuaries in the 1988 Amendments to the National Marine Sanctuaries Act (NMSA; 16 U.S.C. 1431 *et seq.*) (Pub. L. 100-627). NMSA section 310 allows NOAA to issue SUPs to establish conditions of access to and use of any sanctuary resource or to promote public use and understanding of a sanctuary resource. In the National Marine Sanctuaries Amendments Act of 2000 (Pub. L. 106-513), Congress added a requirement that prior to requiring an SUP for any category of activity, NOAA shall give appropriate public notice. NMSA section 310(b) states that ''[NOAA] shall provide appropriate public notice before identifying any category of activity subject to a special use permit under subsection (a).'' On January 30, 2006, NOAA published a list of five categories for which the requirements of SUPs would be applicable (71 FR 4898). NOAA further refined this list of

categories for which an SUP could be issued on May 3, 2013 (78 FR 25957).

In January 2013, NOAA clarified that simply being consistent with one of the categories does not guarantee approval of an SUP for any given activity. Applications are reviewed for consistency with the SUP requirements in section 310(c) of the NMSA, 16 U.S.C. § 1441(c), as well as the published description of the category. Of particular importance, SUPs may only be issued for activities NOAA determines can be conducted in a manner that does not destroy, cause the loss of, or injure sanctuary resources (NMSA section 310(c)(3), 16 U.S.C. § 1441(c)(3)). Individual permit applications that would require an SUP are also reviewed with respect to all other pertinent regulations and statutes, including NEPA, 42 U.S.C. §§ 4321 et seq, and any required consultations, permits or authorizations. NOAA would assess whether activities associated with proposed desalination projects are appropriate for this new SUP category on a case-by-case basis, and as part of the federal environmental review process required by NEPA. Under NEPA, NOAA would analyze the environmental impacts of the entire proposed federal action (i.e., the approval or denial of a desalination project) including the issuance of any SUPs and sanctuary authorizations.

Pursuant to NMSA section 310(d), NOAA may assess three types of fees associated with the conduct of any activity under an SUP: (1) administrative costs of issuing the permit; (2) implementation and monitoring costs; and (3) fair market value (FMV) of the use of the sanctuary resource (16 USC 1441(d)). On November 19, 2015, NOAA published a Federal Register notice finalizing the methods, formulas and rationale for the calculations it uses to assess fees associated with the existing seven SUP categories (80 FR 72415).

NOAA will use the same methods previously established in the Federal Register for assessing an application fee, administrative costs, and implementation and monitoring costs of this new SUP category. NOAA will require a non-refundable $50 application fee. The labor costs assessed, as part of administrative costs, will be based on a Federal regional labor rate that will be updated every year to account for staff changes as well as inflation. Administrative costs will include: any environmental analyses and consultations associated with evaluating the SUP application and issuing the permit; equipment used in permit review and issuance (e.g., vessels, dive equipment, and vehicles); and general overhead. The administrative fees may be assessed even if after full environmental review, it is deemed that an authorization or SUP

is not appropriate and will not be issued by MBNMS. Where applicable, applicants would be notified of the estimate of the fees resulting from administrative costs at the onset of the application process and would need to acknowledge willingness to pay before NOAA processes the permit application. The permit issuance would be conditioned on payment of these fees. For desalination projects that have submitted complete permit applications and are in the environmental review process as of the effective date of this notice, SUP fees will not be assessed retroactively but may be assessed moving forward beginning on the effective date of this notice.

NOAA may also assess a fee for costs associated with the conduct or implementation of a permitted activity as well as the costs of monitoring the activity. The latter costs would cover the expenses of monitoring the impacts of a permitted activity and compliance with the terms and conditions of the permit. Examples of implementation and monitoring costs can include the cost of site preparation, site examination, and the use of vessels and aircraft.

Lastly, NOAA can assess a fee for fair market value (FMV) for use of sanctuary resources. NOAA's method for assessing FMV for this new category of SUP is described in subsequent sections of this Federal Register notice.

II. Description of New Special Use Permit Category

With this final notice, NOAA adds a new category of SUP for "the continued presence of a pipeline transporting seawater to or from a desalination facility". At this time, the special use permit category goes into effect immediately upon the effective date of this notice and fees may be assessed from this date going forward.

NOAA determined that pipelines transporting seawater for purposes of onshore desalination, that have been laid on, attached to, or drilled or bored within the submerged lands of a national marine sanctuary, after appropriate environmental review, application of best management practices, and compliance with MBNMS Desalination Guidelines, could remain in place without causing injury to sanctuary resources. Therefore, NOAA's establishment of an SUP category is appropriate. For purposes of this SUP category, NOAA is using "transporting seawater to or from a desalination facility" to mean water being pumped from MBNMS or the submerged lands of MBNMS into a facility and/or concentrated brine water being pumped out of a facility through a pipe and into MBNMS (brine discharge is addressed below).

In order to avoid or minimize impacts to the marine environment due to the presence of the pipeline, the best

management practices (BMP) from the MBNMS Desalination Guidelines will be followed to ensure proper siting, sizing, engineering, and configuration of intake and outfall pipelines. New desalination pipelines are manufactured with high tensile stainless steel to avoid breakage or corrosion in seawater and would be monitored annually to evaluate their continued integrity. Submerged pipelines should have little propensity for movement or shifting. There are many pipelines associated with power plants and wastewater facilities in this region that have been in existence for more than 50 years with little to no adverse impacts due to their presence on the seafloor (MLML 2006; MRWPCA 2014).

Existing pipelines installed prior to the publication of the final Federal Register notice for this new SUP category are exempt from this SUP category. Moreover, existing pipelines that do not fall under the purview of this SUP category include sewage treatment plant, power plant and aquaculture facility pipes.

III. Fair Market Value Calculation

NOAA will use the same methods previously established in the Federal Register for assessing an application fee,

administrative costs, and implementation and monitoring costs of the new SUP category (November 19, 2015; 80 FR 72415).

The annual fair market value for the continued presence of a pipeline transporting seawater to or from a desalination facility will be calculated by assessing the volume of the pipeline in cubic inches multiplied by a value of $0.02 per cubic inch. The annual FMV equation is:

Annual FMV = ((V x $0.02/$in^3$)x N)/yr

Where:

V = volume of the pipeline (in^3) = ((π x r^2) x L);

π = 3.14159;

r = radius of the pipeline (in); and

L = length of the pipeline (in) for the portion within the sanctuary. For more than one pipeline, the average length of all pipelines will be calculated.

N = number of pipelines

FMV costs will be paid as annual rent for the duration of the permit. In developing the FMV calculation for this SUP category, NOAA examined: a conceptually similar SUP category for the continued presence of submarine cables; the California State Lands Commission (CSLC) lease process for pipelines, conduit, or fiber optic cables; and offset requirements established by CSLC for an open water desalination project in Southern California.

NOAA's FMV calculation for the continued presence of submarine cables in a national marine sanctuary uses the overall linear distance (length) the infrastructure occupies on or within the seafloor within the sanctuary in assessing FMV ("Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries"; 67 FR 55201). NOAA's FMV methodology to assess a fee for the presence of a pipeline uses the volume of the pipeline, which includes both its length (linear distance) and area, thus accounting for its total presence on or within the submerged lands.

In addition, NOAA surveyed comparable fees assessed by the State of California for the issuance of leases in submerged lands of the state for pipelines, conduits or fiber optic cables. The value of $0.02 per cubic inch of pipeline was established because NOAA considers this to be a similar metric (i.e., a state lease for allowing pipelines) to one of the options the CSLC uses to calculate the cost of the issuance of leases in submerged lands of the state for pipelines, conduits or fiber optic cables (CCR Title 2. Division 3. Chapter 1. Article 2 CCR 2003. (Rent and other considerations)(a)(4)). In order to calculate the cost, the CSLC uses one of three approaches: a cost based on a linear value (cost per diameter inch per lineal foot of pipe, cable, conduit within the state

lands); a case by case rate to process an environmental impact report which is paid upfront; or nine percent of the appraised value of the leased land. In order to calculate the FMV of the continued presence of a pipeline, NOAA selected to use a mathematical approach based on the size and footprint of the project pipelines within the sanctuary. Therefore, NOAA's monetary multiplier is comparable to the first approach the CSLC could consider.

Example

In the FMV example provided below, a special use permit for a desalination plant project includes one, 100-foot long seawater intake pipelines with a 15-inch radius to be bored into the submerged lands of a sanctuary.

Annual FMV = ((V x \$0.02/in^3) x N)/yr

V = (π r^2 x L)

π = 3.14159

r = 15 in

L = (100 ft) x (12 in/ft) = 1200 in

V = 3.14159 x (15 in)^2 x 1200 in = 848,230 in^3

N = number of pipelines = 1

Annual FMV = ((848,230 in^3 x \$0.02/in^3)x 1)/yr

Annual FMV for a pipeline of this size = \$16,964/yr.

This annual cost would be applicable for the length of the permit.

Using the above calculation, a single pipeline of this size would have an annual FMV of $16,964/yr. This arrangement could be used for a desalination facility that would produce approximately one million gallons of water per day or 365 million gallons of water per year. Thus, the example of the FMV for the continued presence of 1 pipeline within MBNMS would add a cost of $0.0000465/gallon, or approximately 1 cent for every 215 gallons of freshwater produced. This figure is obtained by dividing the FMV for the continued presence of a pipeline by 365 million gallons/year, since the example assumes a one million gallons per day capacity. The calculation is: ($16,964/year) / (365 million gallons/year) = $0.0000465/gallon.

Cost Comparison for Open Water Intake Desalination Facility

In addition to the comparison method described above for charging for the volume of the pipeline in cubic inches, NOAA also looked at a similar open water pipeline project in Southern California that uses desalination to provide drinking water in order to estimate the magnitude of costs of regulatory compliance (not fair market value) associated with the permitting of desalination facilities in a real-world setting.

That open water pipeline project was proposed by Cabrillo, LLC and Poseidon, LLC and received a permit by the California Coastal Commission in 2008. The CSLC required the project to invest in various offset and restoration efforts to mitigate the impacts of the facility, such as obtaining 25,000 tons of carbon offsets for the construction and operational impacts. In that project, the average offset price from 2011 to 2016 was $14.87 per ton of carbon offset, for a total of $371,750. In addition, the facility was required to restore a minimum of 37 acres of wetlands (up to 55.4 acres) with a non-cancelable deposit of $3.7 million and to provide a deposit of $25,000 to the CSLC to reimburse staff expenses incurred to monitor compliance with the terms of the lease. While these costs associated with environmental compliance are not directly comparable with the FMV for this new SUP category, they provide context for the scale of costs required by various agencies to permit or authorize large coastal projects such as a desalination plant.

Conclusion

The fees that NOAA may assess per the above calculations are comparable to other agencies' fees for desalination facilities and not prohibitively expensive. For a proposed desalination project that would require an SUP, NOAA considered

the annual cost of the fees based on the example presented in this notice, and converted it to a dollar per gallon figure that can be applied to future proposed projects of varying size and scale. NOAA determined that the total cost of the fair market value using the SUP category would amount to approximately $0.0000465/gallon for a facility of a scale similar to the example used in this notice (i.e., one 100-foot pipelines for a 1 MGD facility). As stated above, this would be in addition to the potential administrative cost associated with the issuance of the permit, including the environmental review and application review of an SUP, and implementation and monitoring costs, as appropriate.

This notice finalizes the list of eight categories for which the requirements of SUPs would be applicable:

1. The placement and recovery of objects associated with public or private events on non-living substrate of the submerged lands of any national marine sanctuary.
2. The placement and recovery of objects related to commercial filming.
3. The continued presence of commercial submarine cables on or within the submerged lands of any national marine sanctuary.

4. The disposal of cremated human remains within or into any national marine sanctuary.
5. Recreational diving near the USS Monitor.
6. Fireworks displays.
7. The operation of aircraft below the minimum altitude in restricted zones of national marine sanctuaries.
8. The continued presence of a pipeline transporting seawater to or from a desalination facility in the Monterey Bay National Marine Sanctuary.

IV. Waiver or Reduction of Fees

As described in the November 19, 2015, Federal Register notice (80 FR 72415), NOAA may accept in-kind contributions in lieu of a fee, or waive or reduce any fee assessed for any activity that does not derive profit from the access to or use of sanctuary resources. NOAA may consider the benefits of the activity to support the goals and objectives of the sanctuary as an in-kind contribution in lieu of a fee.

V. Changes between proposed notice and final notice

Based on NOAA's analysis of the topics raised during the public comment period, NOAA made several changes between the notice of proposed new SUP categories and this final notice.

First, NOAA removed the proposed SUP category for the use of sediment to filter seawater for desalination. While NOAA is confident in the method it developed for the calculation of FMV for this category, it recognizes that this SUP category may not always meet the "no injury" criteria for SUPs specified in the NMSA for all sites. In addition, it may be interpreted as a disincentive against the use of subsurface intakes of water, which is the method recommended in the 2010 guidelines.

Second, NOAA has limited the applicability of the remaining SUP category (for the continued presence of a pipeline transporting seawater to and from a desalination facility) to MBNMS instead of applying it to the National Marine Sanctuary System, for the following reasons. While all of the sanctuaries have authority to issue SUPs, only six national marine sanctuaries currently have regulations enabling them to issue authorizations: Florida Keys, Flower Garden Banks, Monterey Bay, Olympic Coast, Stellwagen Bank, and Thunder Bay. Of these sites, Florida Keys and Olympic Coast NMSs are the only sites adjacent to land where desalination facilities could be placed; therefore, they are the only two national marine sanctuaries in addition to MBNMS where the proposed SUP categories could have applied. These two national marine sanctuaries are in very different ecosystems than MBNMS, and NOAA based its evaluation

of the likelihood of injury to sanctuary resources on central California examples. In addition, the cost methods for this category were regionally based in California. Therefore, NOAA decided that it was not appropriate to extend the remaining SUP category to other national marine sanctuaries at this time, although it may revisit this issue in the future as necessary and appropriate.

The estimated cost per gallon of desalinated water as proposed in the January notice is reduced from $ 0.00008 /gallon to approximately $ 0.00005/gallon in this final notice, reflecting the annual FMV for the continued presence of a pipeline and removing the additional cost for the use of sediment to filter the water in the example provided.

IV. Response to Comments

NOAA received seven individual submissions on the draft federal register notice, docket #NOAA-NOS-2016-0156. NOAA sorted and organized the seven submissions into 27 unique comment topics. NOAA's response to these comments follows.

Comment 1: Marine sanctuaries were designated for having special resources, and as such, they deserve enhanced protection. These

activities should be sited outside of sanctuary boundaries, or NOAA should not allow any new pipelines in sanctuaries.

Response: The NMSA directs NOAA to allow public and private uses of the resources to the extent compatible with resource protection. NOAA evaluates impacts of any intake pipelines through the NEPA (and CEQA analysis as appropriate). An SUP could only be issued if the activity is conducted in a manner that does not destroy, cause the loss of, or injure sanctuary resources.

Comment 2: Requiring two permits for a single pipeline appears inconsistent with ONMS's statutory authority under 16 U.S.C. § 1441(a).

Response: Under 16 U.S.C. 1441(a), NOAA has the authority to issue special use permits if necessary to "establish conditions of access to and use of any sanctuary resource; or promote public use and understanding of a sanctuary resource." The issuance of an SUP for desalination activities would establish conditional long-term use of a sanctuary resource (the substrate, seafloor, and/or water column); therefore, NOAA believes that the SUP category is consistent with 16 U.S.C. 1441(a).

The general sanctuary and MBNMS regulations also provide for the authorization of other State and Federal permits as a separate type of permit necessary to allow an activity otherwise prohibited by regulation. The activities that may be subject to such authorization (for example, a NPDES permit for discharges) are different from the activity within the scope of this SUP category. Together, the issuance of SUPs and authorizations ensure sanctuary resource protection while allowing compatible uses, in alignment with the policies and purposes of the NMSA.

Comment 3: The proposed new SUP categories are duplicative of approvals ONMS can grant using existing authority and would impose unnecessary regulatory burden and substantial unjustified costs.

Response: The authorization of the applicable State permits for a desalination plant would only address allowing the prohibited activity at issue, and if issued for a desalination plant it would cover the construction of a pipeline or discharge of brine. The activities that may be subject to such authorization are different from the activity within the scope of this SUP category. Authorizations do not address the FMV of the private use of a public resource or provide a mechanism for assessing

and applying costs of the use of this resource to sanctuary management.

As described above, NOAA has determined that an SUP is an appropriate mechanism for NOAA to approve the continued presence of a pipeline and assess and apply applicable costs in a manner that allows desalination projects to occur within or near MBNMS and to facilitate the more efficient administration of desalination permits. In addition, the current ONMS permit application process allows for multiple permits and authorizations to be issued under one permit application, thereby streamlining the permit application process.

The fees associated with SUPs have been used by NOAA for various other SUP categories. The fee categories include administrative costs per 16 U.S.C. 1441(d)(2)(A), implementation and monitoring costs per 16 U.S.C. 1441(d)(2)(B), and FMV per 16 U.S.C. 1441(d)(2)(C)) for use of sanctuary resources. NOAA believes these costs are appropriate to properly assess a desalination facility operating in a national marine sanctuary.

Comment 4: Test slant well permits were issued without this SUP category, and permits issued for that project contained conditions, such as requiring monitoring. NOAA should do what it has previously done.

Response: NOAA began consideration for this new SUP category during the NEPA review for the California American Water test well pilot project, and has now completed the SUP process through the issuance of this final notice. As described above, NOAA has concluded that an SUP category was needed and appropriate for the continued existence of pipelines transporting seawater to and from a desalination facility; therefore, NOAA began to pursue the new category for desalination facilities. This approach is in line with past large-scale and intensive infrastructure projects like the submarine cable SUP category. In looking at NOAA's history, SUPs for "the continued presence of submarine cables" were issued along with authorizing other state and federal permits as needed prior to the development of that category for SUPs. Since the two authorizations for the test well were issued prior to this final notice, that pipeline will be considered existing and therefore exempted.

Comment 5: California American Water commented that the company provided some financial assistance for environmental review of the large-scale Monterey Peninsula Water Supply Project (MPWSP) by paying for a portion of the Federal labor costs, and should not be charged additional administrative fees.

Response: The environmental review for the MPWSP involved re-writing an extensive environmental impact review (EIR), as required by CEQA, and adding the components necessary to meet the standards of an Environmental Impact Statement (EIS) under NEPA. This resulted in a document that was over 1,500 pages for the joint EIR/EIS, and included over 2,000 pages of appendices. The applicant was required by the State of California to pay for the cost of the California Public Utilities Commission (CPUC) environmental review, which involved a large team, working over multiple years to produce the document. CalAm paid for a NEPA consultant through the CPUC, but has not paid for any federal labor costs for MBNMS staff related to the NEPA process or permit application. No retroactive fees would be assessed; fees may only be assessed following the effective date of this notice and appropriate notice to CalAm. For the reasons stated throughout this notice, NOAA has determined that SUP fees for the continued existence of desalination pipelines are needed and appropriate.

Comment 6: If ONMS decides to finalize the new SUP categories, they should not apply to the MPWSP because of the retroactive effect they would have on the project. This project has been

underway for many years, and NOAA's action would add significant costs to the project.

Response: NOAA would not retroactively assess fees for any costs incurred prior to the publication of this final notice. When the new category takes effect, existing applicants will be notified that the SUP category exists, and that fees may start to be assessed for the processing of that permit application. After that notification to the applicants, fees will be assessed from that date going forward.

The MPWSP permit application was received in 2015, and NOAA has made every effort to inform the permit applicants of its intent to develop a new SUP category for desalination to cover some of these federal costs for the environmental review as well as future monitoring and other costs.

Comment 7: Adding SUP categories for some desalination activities and using existing authority for others (i.e.; brine discharge and construction) creates additional regulatory barriers for desalination projects.

Response: The addition of an SUP does not result in additional regulatory barriers for desalination projects. With the use of a single permit application for various authorizations and permits, NOAA intends to streamline the application process and

reduce the burden on the applicant. An applicant would still need only submit one permit application, and NOAA determines the types of permits required for any activities, as it always has. Similarly, SUP categories are assessed through the same federal environmental review process pursuant to the NEPA and CEQA, as required, by which permits for disturbance of the seabed or discharge activities are evaluated.

Moreover, as described above, NOAA has determined that a SUP category is necessary and appropriate to cover the continued existence of pipelines transporting seawater to and from a desalination facility. Carrying out a proposed desalination project in or near a national marine sanctuary requires agency review and permit approval before going forward. NOAA's authorizing state and federal permits for construction (coastal development) and brine discharge (NPDES) are considered under authorization regulations, and do not require that NOAA make a finding of no injury or loss to sanctuary resources. NOAA may also issue general permits for short-term activities, which are generally not "intrusive". Because a pipeline would continually be in long-term use (at least five years up to the life of the project), NOAA has considered this operation and extractive use as a separate activity under the statutory authority of NMSA Section 310, which requires monitoring and a fair market value

for its use of a sanctuary resource (the substrate, seafloor, and/or water column).

Comment 8: Open ocean intakes should be precluded from use in sanctuary waters as a matter of policy.

Response: In 2010, NOAA published guidance recommending subsurface water intake for desalination projects rather than open ocean intakes. The comment to preclude open ocean intakes through regulation is beyond the scope of this action.

Comment 9: NOAA should establish a third category of SUP for open ocean intakes, or combine open ocean intakes with subsurface intakes into a single SUP category for intakes.

Response: The SUP category for the "presence of a pipeline" being finalized with this action includes pipelines placed both below and attached to the surface of the seafloor and would include open water intakes.

Comment 10: Commenters also advocate for the inclusion of an additional category of SUP for brine discharges from desalination facilities primarily because additional monitoring would be needed.

Response: SUPs cannot be issued for any activity that injures sanctuary resources. At this time, NOAA cannot determine categorically that brine discharges would not have negative impacts on sanctuary resources; therefore, brine discharges are not appropriate categories for an SUP. However, NOAA is reviewing and may authorize the NPDES permit for brine discharges for desalination, with terms and conditions for monitoring any potential impacts as needed. Both an SUP and an authorization may require continued monitoring and reporting for the life of the project.

Comment 11: Authorization of permits granted by other agencies may or may not prevent sanctuary resources (including marine life) from being destroyed, lost, or injured.

Response: The comment is accurate. The NMSA directs NOAA to allow public and private uses of the resources to the extent compatible with resource protection. 16 U.S.C. § 1431(b)(6). The MBNMS regulations do not require a finding of no injury for the issuance of an authorization (15 C.F.R. 922.49,). An authorization can be issued for certain prohibited activities to occur, after thorough analysis of impacts to sanctuary resources through the NEPA process.

Comment 12: As currently written, it is unclear whether a desalination project would need to obtain one or two separate permits for the "continued presence of a pipeline" category to accommodate both an intake pipeline and discharge pipeline. This could lead to inconsistent application of rule, as well as create yet another disincentive for using subsurface intakes.

Response: NOAA does not differentiate between an intake or discharge pipeline. This SUP category is intended to apply to any new pipeline transporting seawater to or from a desalination facility that will have a continued presence in the sanctuary.

Comment 13: The category description should use clear language so that permit standards are consistent with the most current information available. Does NOAA intend to update the MBNMS Desalination Guidelines published in 2010 to account for new information?

Response: At this time, the recommendations in the 2010 Desalination Guidelines are still appropriate. If new information becomes available that would require NOAA to update the guidelines with new recommendations, NOAA would do so. NOAA will incorporate the most current standards in any permit condition when issuing an authorization or an SUP.

Comment 14: NOAA's proposed SUP fees for the continuing presence of pipelines are duplicative of other state or local agencies fees (e.g.; CSLC).

Response: It is not uncommon for multiple agencies to charge a fee for permits and/or leases for use of a public resource. When a project is proposed within the boundaries of MBNMS, it is NOAA's responsibility to assess the risk of issuing the permit and, if appropriate, apply its permitting authority as mandated by the NMSA. The fees associated with this SUP are designed to facilitate and streamline the federal responsibility to assess and monitor the potential impacts of a private use of a public resource. This is separate from, and occurs in addition to, the fees and costs associated with the issuance of the state permits.

Comment 15: The costs imposed by these new SUP categories could deter investments in desalination plants, which are needed in California to alleviate water shortages.

Response: NOAA understands and appreciates the need to alleviate water shortages in California. NOAA's action in creating this permit category is taken in response to this need to fulfill the NMSA purpose of facilitating uses of sanctuary resources to the extent compatible with resource protection. The SUP fees would

be a small percentage of the overall costs of the desalination project and would be calculated in a way comparable to State fees and fees previously assessed by NOAA in similar circumstances (such as for submarine cables in sanctuaries). Based on NOAA's analysis of these prior transactions and experience with infrastructure projects in sanctuaries, the SUP fees are unlikely to have a significant deterrent effect.

Comment 16: The two categories of SUP fees will discourage the development of subsurface intakes, the very design that NOAA has recommended and prefers to reduce environmental impacts in sanctuaries.

Response: NOAA believes that subsurface feasibility will be determined by the appropriate studies, design and citing of the project. The SUP category for "presence of a pipeline" would apply to varied types of intakes. In addition, NOAA's decision to eliminate the proposed second category, for the use of sediment for filtration, reduces the overall fees and results in equal treatment for the continuing presence of a pipeline regardless of the type of intake.

Comment 17: The agency should not charge fees when the "FMV" of the sediment, however calculated, is offset by increased costs

incurred to minimize impacts to marine life in the sanctuary (i.e. the subsurface wells cost more money to install than open-ocean intakes).

Response: NOAA's consideration of the proposed SUP categories for desalination facilities has taken into account most costs and fees related to these projects. Nonetheless, NOAA has eliminated the proposed second category, for the use of sediment for filtration. This would reduce the overall fees for a subsurface intake project.

Comment 18: SUP categories of general applicability that target one state are inappropriate.

Response: NOAA initially proposed to apply the SUP categories for desalination to the whole National Marine Sanctuary System, but noted that only three sanctuaries would ever likely need to consider a desalination project: Olympic Coast, Florida Keys, and Thunder Bay NMSs. NOAA acknowledges that the majority of studies from desalination projects used in the analysis were based in California, because that was the best available information. This is one of the reasons NOAA has decided to narrow the scope of the SUP so that it only applies to MBNMS.

Comment 19: Pipelines related to sewage treatment and power generation are more widespread than desalination plants and should be analyzed in a similar fashion. ONMS offers no valid justification for singling out desalination plants in California for SUPs.

Response: The proposed SUP Federal Register notice explicitly noted that the need for new additional pipelines for sewage treatment and power generation has not been established as most of the infrastructure for the existing facilities has been in place for many years. In contrast, desalination, or the need for a stable potable water supply, is a current issue along the West Coast with well documented studies on the topic. This is the same approach NOAA has taken in the past. In the 2006 SUP notice NOAA stated:

> The list of categories of activities in this notice are not necessarily those activities NOAA thinks will be increasing in frequency in the future. Rather, the list represents all categories of activities for which NOAA has issued special use permits in the last few years or for which NOAA expects to receive an application in the near future (71 FR 4898).

Moreover, given NOAA is now finalizing this SUP category to apply only in MBNMS, it is worth noting that MBNMS has specific

regulatory language that does not allow permits to be issued to allow new sewage disposal facilities in the sanctuary. 15 CFR 922.132(f).

Comment 20: The FMV calculation for the pipeline SUP is unreasonable and should be revisited.

Response: The FMV calculation is a similar metric to one of the options the State uses to calculate the cost of the issuance of leases in submerged lands of the State for pipelines, conduits, or fiber optic cables. The calculation for the volume of the pipeline, which includes both its length and area, accounts for its total presence on or within the submerged lands. NOAA believes the FMV would add very little additional cost to the production of fresh water (at approximately 1 cent for every 215 gallons of water produced), for one hypothetical design comparable to what is being considered for coastal California.

Comment 21: Some of the pipelines in question will actually be bored as slant wells into subsurface aquifers. This is not "filtering" and no fee should be charged for the use of sand as "filtration".

Response: NOAA believes that the proposed SUP category for the use of sediment as filtration was justified and provided

references in the proposed notice. Nevertheless, NOAA has elected to remove the SUP for "use of sediment to filter seawater for desalination".

Comment 22: In the fiber optic cable context, NOAA economists issued an economic report describing and applying accepted methodologies for calculating FMV. This FMV should undergo the level of analysis conducted in that example.

Response: Given the limited availability of studies for this activity, NOAA believes the level of analysis conducted for the desalination SUP category is sufficient, but will continue to monitor this activity. If additional information becomes available or relevant for FMV calculation, NOAA will revisit the issue and may, as needed, revise the FMV calculation.

Comment 23: The FMV for sand filtration bases its calculation on the price of a commercially sold cubic foot of sand, discounted for overhead. This is not a reasonable comparison, given less costly means of filtration.

Response: NOAA did not base the calculation of the FMV on the price of a commercially sold cubic foot of sand. Rather, NOAA compared that cost to the FMV calculated for this use to provide perspective in an area where little data is available. NOAA has

elected to remove the SUP for "use of sediment to filter seawater for desalination" as described above.

Comment 24: The agency fails to recognize that pretreatment is still necessary even for subsurface intakes.

Response: NOAA did not intend to imply that pre-treatment was not necessary for subsurface intakes. Rather, NOAA compared the information about pre-treatment cost to provide perspective in an area where little data is available.

Comment 25: SUPs were not raised as a potential requirement for desalination projects prior to this notice. SUPs were also not included in the 2010 Desalination Guidelines.

Response: While NOAA did not formally have categories for this activity until now, NOAA has made every effort to inform existing permit applicants of its intent to develop new SUP categories for desalination since 2015. It is NOAA's responsibility to determine the appropriate type of permit for any permit application, whether a sanctuary general permit, authorization, or SUP. At the time of publishing the 2010 guidelines, NOAA had not yet conducted a full analysis of potential SUP categories for desalination facilities. Since then, NOAA has conducted this analysis and has considered

statutory and regulatory factors, including the no-injury threshold for SUPs, the nature of a desalination pipeline as a continued use of public resources in a way that may preclude other use of the resource, the ability of the agency to combine and streamline its permitting and environmental review regardless of an additional SUP category, and the ability to apply SUP fees to facilitate more efficient issuance and administration of desalination permits and sanctuary management under NMSA Section 310(d)(3).

Comment 26: The agency should clarify that it does not intend to charge fees for portions of the pipeline that are not on or below the sanctuary lands.

Response: The explanation on charging fees only for portions of pipelines in the sanctuary is included in this Federal Register notice under Section III. When defining the length of the pipeline for the pipeline SUP category, it states "L = length of the pipeline (in) for the portion within the sanctuary". NOAA will not include the portion of the pipeline that is above the mean high water mark.

Comment 27: NOAA should allow recreational fishing in sanctuaries.

Response: This comment is beyond the scope of this action.

V. Classification

A. National Environmental Policy Act

NOAA has concluded that this action will not have a significant effect, individually or cumulatively, on the human environment. This action is categorically excluded from the requirement to prepare an Environmental Assessment or Environmental Impact Statement in accordance with the NOAA Categorical Exclusion G7 and because there are no extraordinary circumstances precluding the application of this categorical exclusion. Specifically, this action is a notice of an administrative and legal nature, and any future effects of subsequent actions are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject to later NEPA analysis. This action would only establish the two new special use permit categories and the methods for calculating fair market value for applicable projects. It does not commit the outcome of any particular federal action taken by NOAA. Furthermore, individual permit actions taken by ONMS will be subject to additional case-by-case analysis, as required under NEPA, which will be completed as new permit applications are submitted for specific projects and activities. In addition,

NOAA may, in certain circumstances, combine its special use permit authority with other regulatory authorities to allow activities not described above that may result in environmental impacts and thus require the preparation of an environmental assessment or environmental impact statement. In these situations, NOAA will ensure that the appropriate NEPA documentation is prepared prior to taking final action on a permit or making any irretrievable or irreversible commitment of agency resources. The NEPA analysis would describe the impacts of the full project (i.e., both construction (allowed with an authorization) and operations (allowed with an SUP)).

B. Paperwork Reduction Act

Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. Applications for the special use permits discussed in this notice involve a collection-of information requirement subject to the requirements of the PRA. OMB has approved this collection-of-information requirement under OMB control number 0648-0141. The collection-of-

information requirement applies to persons seeking special use permits and is necessary to determine whether the proposed activities are consistent with the terms and conditions of special use permits prescribed by the NMSA. Public reporting burden for this collection of information is estimated to average twenty four (24) hours per response (application, annual report, and financial report), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This estimate does not include additional time that may be required should the applicant be required to provide information to NOAA for the preparation of documentation that may be required under NEPA.

Authority: 16 U.S.C. 1431 et seq.

Dated: August 11, 2017.

John Armor,

Director,

Office of National Marine Sanctuaries

References:

1. MBNMS Guidelines for Desalination Plants in the MBNMS; May 2010, online: http://montereybay.noaa.gov/resourcepro/resmanissues/pdf/050610desal.pdf.

2. ONMS Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries, Aug 2002.

3. NOAA Final Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System; May 2013, online: http://sanctuaries.noaa.gov/management/fr/78fr25957.pdf

4. NOAA Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System; January 2013, online: https://sanctuaries.noaa.gov/management/fr/78fr2957.pdf

5. NOAA Office of National Marine Sanctuaries Final Policy and Permit Guidance for Submarine Cable Projects; September 2011, online: http://sanctuaries.noaa.gov/management/fr/submarinecablespolicy.pdf

6. Moss Landing Marine Lab, Ecological Effects of the Moss Landing Powerplant Thermal Discharge; June 2006.

7. Ballard Marine Construction report prepared for Monterey Regional Water Pollution Control Agency; 2014.

8. Chambers Group Memo: Pretreatment and Design Considerations for Large-Scale Seawater Facilities; 2010, online: http://www.mwdoc.com/cms2/ckfinder/files/files/Evaluation%20of%20Potential%20Impacts%20%20to%20Marine%20Life%20by%20Slant%20Wells%20-%20MLPA%20DEIR%20Comment%202010-10-13.pdf

9. NOAA National Centers for Environmental Information website; Table 1; online: https://www.ngdc.noaa.gov/mgg/global/etopo1_ocean_volumes.html.

10. Final Notice of Fee Calculations for Special Use Permits; 80 FR 72415 (November 19, 2015); online: https://www.federalregister.gov/documents/2015/11/19/2015-29524/final-notice-of-fee-calculations-for-special-use-permits

11. Final Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System; 71 FR 4898 (January 30, 2006); online: https://www.federalregister.gov/documents/2006/01/30/06-808/final-notice-of-applicability-of-special-use-permit-requirements-to-certain-categories-of-activities

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