

ADMINISTRATIVE AND CIVIL LAW DEPARTMENT



Environmental Law Deskbook

2015

The Judge Advocate General's School
United States Army

ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

ENVIRONMENTAL LAW DESKBOOK

2015

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CHAPTER A
INTRODUCTION

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I. A BRIEF HISTORY.

- A. “Humanity faces an unprecedented challenge as our numbers grow, while Earth and its capacity to support us do not. People across the United States and around the world aspire to better lives for themselves and for their children: food shelter, a safe and healthy environment, education, jobs, and other material needs and conveniences. Industries strive to produce more goods, farmers to grow more crops; and human demands on forests, fields, rivers, and oceans increase. Our challenge is to create a future in which prosperity and opportunity increase while life flourishes and pressures on oceans, earth, and atmosphere—the biosphere—diminish; to create, as the Council’s vision suggests, ‘a life sustaining Earth’ that supports ‘a dignified, peaceful, and equitable existence.’” —*President’s Council on Sustainable Development, Towards a Sustainable America: Advancing Prosperity, Opportunity and a Healthy Environment for the 21st Century*
- B. American and international widespread concern about the environment is a relatively recent development that has fueled rapid growth in environmental regulation. This public and political focus has led to an increased responsibility for stewardship of the environment for the Army and the Department of Defense (DoD). While the vast amount of federal and state regulation arrived within the past few decades, local municipalities and states first drafted laws aimed at environmental protection much earlier in the country’s history. These laws found roots in common law principles such as nuisance, public trust, and torts with efforts toward protecting property rights, commerce, health, and safety.
- C. In the latter half of the 19th Century and the early 20th Century writers such as John Muir and Henry David Thoreau began to give a voice to environmental issues. The Federal Government got involved in the conservation movement when President Theodore Roosevelt, a nature conservationist, doubled the number of national parks and nearly quadrupled the national forest acreage during his administration.
- D. Environmental tragedies that threatened the public health and commerce, such as the atmospheric inversion in Donora, PA in 1948, which killed 20 people; the Cuyahoga River catching fire numerous times between the 1930s and 1960s, and the seepage of pollutants from the Love Canal, all gave rise to the swell of environmental awareness and need for regulation.

- E. President Richard Nixon created the Environmental Protection Agency (EPA) in 1970 to protect human health and the environment.
1. The EPA's mission is "[t]he establishment and enforcement of environmental protection standards consistent with national environmental goals. . . . The conduct of research on the adverse effects of pollution and on methods and equipment for controlling it; the gathering of information on pollution; and the use of this information in strengthening environmental protection programs and recommending policy changes . . . assisting others, through grants, technical assistance and other means, in arresting pollution of the environment . . . assisting the Council on Environmental Quality in developing and recommending to the President new policies for the protection of the environment." — *President Richard M. Nixon, Reorganization Plan Number 3, dated July 9, 1970.*
 2. In 1970, there were only a few hundred pages in the Code of Federal Regulations (C.F.R.) devoted to environmental protection. Today, there are thousands of pages of environmental regulations in the C.F.R. implementing dozens of pieces of environmental legislation. In addition, many states have enacted environmental regulatory schemes that rival their federal counterparts in scope and complexity.
- F. Throughout the history of environmental regulation, many of the legal, moral, political, and economic arguments made either in support of more aggressive regulation or criticizing the already burdensome regulation regime, contain common areas of contention.
1. Which level of government is the most appropriate to provide necessary environmental regulation, the federal or state and local government?
 2. Should we rethink our actions to protect biodiversity?
 3. What science supports human impacts upon the environment and subsequent environmental initiatives?
 4. To what extent should private property rights and property values be considered?
 5. What place does a cost-benefit analysis have when creating regulatory schemes?

6. Can a market system similarly provide for the protection of the environment as that of regulation?
7. What is the true harm or threat of human activities to humans and the environment?

II. THE ARMY ENVIRONMENTAL STRATEGY.

A. In 1992, then Army Chief of Staff General Sullivan announced that as part of the Army's Environmental Strategy into the 21st Century, "The Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission." The Army's current strategy, issued in 2004, is: "Sustain the mission; secure the future."—*R.L. Brownlee, Secretary of the Army and General Peter J. Schoomaker, United States Army, Chief of Staff, The Army Strategy for the Environment*. The purposes of this strategy are:

1. Strengthen the Army contribution to joint operational capability.
2. Meet current and future training, testing, and other mission requirements.
3. Improve our ability to operate installations, to include growing joint interdependency.
4. Reduce costs and minimize impacts so the Army can do more, and do it better.
5. Enhance human health, safety, and well-being.
6. Be an active citizen within our communities, as well as a good neighbor.

B. The Strategy contains the following components:

1. Vision. "Sustainable operations, installations, systems, and communities enabling the Army mission."—*R.L. Brownlee, Secretary of the Army and General Peter J. Schoomaker, United States Army, Chief of Staff, The Army Strategy for the Environment*
2. Mission. "Sustain the environment to enable the Army mission and secure the future."—*R.L. Brownlee, Secretary of the Army*

and General Peter J. Schoomaker, United States Army, Chief of Staff, The Army Strategy for the Environment

3. Goals: “Foster a sustainability ethic. Strengthen Army operations. Meet test, training, and mission requirements. Minimize impacts and total ownership costs. Enhance well-being. Drive innovation.”—*R.L. Brownlee, Secretary of the Army and General Peter J. Schoomaker, United States Army, Chief of Staff, The Army Strategy for the Environment*
 4. “We must strive to become systems thinkers if we are to benefit from the interrelationships of the triple bottom line of sustainability: mission, environment, and community.”—*R.L. Brownlee, Secretary of the Army and General Peter J. Schoomaker, United States Army, Chief of Staff, The Army Strategy for the Environment*
- C. DoD places considerable emphasis on dealing with environmental problems caused by past practices and ensuring that current environmental standards are achieved at all facilities subject to regulation. More importantly, DoD's leadership has demanded that protection of the environment be considered part of the military's mission. As Secretary Cheney said in a 1989 memorandum to the Service Secretaries:

Federal facilities, including military bases, must meet environmental standards. Congress has repeatedly expressed a similar sentiment. As the largest Federal agency, the Department of Defense has a great responsibility to meet this challenge. It must be a command priority at all levels. We must demonstrate commitment with accountability for responding to the Nation's environmental agenda. I want every command to be an environmental standard by which Federal agencies are judged.

III. ENVIRONMENTAL LAW PRACTICE OVERVIEW.

- A. DoD installations interact with multiple sources of environmental regulators.
 1. At the federal level, the EPA administers most environmental statutes. EPA divided the country into 10 regions. While

subject to direction from EPA National Headquarters in Washington, D.C., each EPA region has a distinctive “personality” that is often displayed when enforcing environmental requirements at federal facilities. DoD established Regional Environmental Offices (REOs) to “[s]upport the Army/DoD through coordination, and facilitation of regional environmental issues and activities to strengthen community relations.” The EPA’s primary functions are:

- a. Develop and enforce regulations;
 - b. Offer financial assistance;
 - c. Perform environmental research;
 - d. Sponsor voluntary programs and partnerships;
 - e. Promote environmental education, and
 - f. Publish information.
2. Increasingly, state and local agencies are administering and enforcing environmental requirements that affect federal facilities. Some of these requirements are based on federal programs that EPA or other federal agencies delegated to the state. Other requirements are unique to the state or products of local initiatives. Typically, states assign principal responsibility for environmental regulation to various branches or divisions within their existing departments of natural resources or health.
3. Beyond the agencies within the DoD and the EPA, other organizations will play a critical role in environmental matters, to include:
- a. Congress;
 - b. Department of the Interior;
 - (1) U.S. Fish and Wildlife Service (FWS);
 - (2) Bureau of Land Management (BLM);
 - (a) National Parks Service (NPS);

- (b) Bureau of Indian Affairs (BIA);
- c. Department of Commerce;
 - (1) National Oceanic and Atmospheric Administration (NOAA);
 - (2) NOAA Fisheries Service (National Marine Fisheries Service (NMFS));
- d. Department of Justice (DoJ);
- e. State governors, legislators, and regulators;
- f. Local/municipal legislators and regulators;
- g. Quasi-governmental entities, e.g., land use commissions and Native American tribes;
- h. National environmental advocacy groups, e.g., Natural Resources Defense Council, and
- i. Local citizens and organized groups.
- j. Environmental law applications at an overseas installation or during deployed operations are covered in Chapter XI of this deskbook.

B. The Judge Advocate's Role.

- 1. Army Regulation (AR) 200-1 tasks judge advocates (JAs) with:
 - a. Providing advice and guidance to commanders on their legal responsibilities for complying with all applicable environmental laws, regulations, initiatives, and Executive Orders. This includes providing guidance and legal opinions to commanders on the applicability of federal, state, local, and host nation laws and regulations governing hazardous materials for Army installations.

- b. Providing counsel on all environmental permits, agreements, notices of violation (NOV), enforcement actions, and reports of liability.
 - c. Reviewing all Installation Natural Resources Management Plans (INRMPs).
2. In addition to the responsibilities outlined in AR 200-1, installation legal offices should consider the following general guidance:
- a. Each installation should employ an environmental law specialist (ELS).
 - b. The ELS should be proactively involved in installation activities with potential environmental consequences, e.g., membership on the installation Environmental Quality Control Committee (EQCC).
 - c. Protect the commander and ensure decision-makers have the information they need to make environmentally sound decisions. The ELS should:
 - (1) Review environmental documentation and plans prepared by other agencies, e.g., Corps of Engineers and tenant commands;
 - (2) Be advised of all environmental inspections by federal, state, local, and Army agencies;
 - (3) Participate in environmental inspections from outside agencies, as well as internal and external Environmental Performance Assessment System (EPAS) audits;
 - (4) Receive a copy of all inspection reports, NOV, administrative orders, etc.;
 - (5) Participate in all environmental consultations, and
 - (6) Review all command environmental responses.

- d. The ELS must be familiar with all federal, state, and local environmental compliance requirements affecting the installation. Equally important, the ELS must be fluent in the Army's program and requirements for environmental compliance. The ELS must be actively involved in internal environmental compliance inspections/audits of installation activities and facilities.
 - (1) By virtue of training and experience, there are usually a number of personnel at an Army installation better qualified than the ELS to conduct an audit of an installation's activities for compliance with environmental requirements.
 - (2) At a minimum, the ELS should meet with the audit team prior to the audit's initiation, review the audit protocol(s), and ensure that the audit team understands the environmental requirements applicable to the activities and facilities scheduled for auditing. During the pre-audit meeting, the ELS should stress:
 - (a) Any limitations in conducting the audit should be clearly stated in the audit report (shortage of time, lack of supporting documentation, unavailability of key personnel, etc.);
 - (b) All documents reviewed and persons interviewed that become the basis of findings should be clearly identified, and significant documents should be copied and attached as enclosures;
 - (c) All conclusions stated in the audit report should be based on facts and cited as justification for each conclusion;
 - (d) Anecdotal information should be clearly identified and qualified as appropriate (e.g., "It was reported by Mr. John Smith, the assistant Sewage Treatment Plan Operator, that over the last year. . .");

- (e) Include recommendations for site-specific corrective action and ways to avoid or minimize future risks of noncompliance as part of the audit report, and
 - (f) The audit team should be primarily concerned with making factual observations and conclusions; legal conclusions should not be made a part of the audit report unless first reviewed for accuracy by an attorney.
- (3) The ELS should also be familiar with the purpose of and procedures applicable to the EPAS and participate in the EPAS process as appropriate. The Environmental Assessment Management (TEAM) Guide is the standard DoD protocol manual used by EPAS auditors. The TEAM Guide contains federal regulations, DoD Directives, Executive Orders, and is supplemented with an Army Manual and a state and local manual.
- (a) The EPAS is a centrally funded Department of the Army program established in 1992 and managed by the Army Environmental Command (AEC).
 - (b) Army commands (ACOM) coordinate the scheduling of the EPAS audit, provide oversight, and assist in the identification, planning, and programming for necessary corrective actions discovered in the EPAS process.
 - (c) The program is intended to provide installation commanders with a tool for attaining, sustaining, and monitoring compliance with all applicable environmental laws and regulations.
 - (d) External EPAS audits, using a team of independent assessors not associated with the installation, will be conducted at active Army installations every three years. Installations must develop management

and funding plans to correct deficiencies identified during external assessments.

(e) In addition to external audits, installations are responsible for performing annual internal audits, except in years when an external assessment is conducted. Installation personnel conduct internal assessments. Deviations from the annual internal audit cycle require justification and HQDA approval.

(f) In the Reserve Component (RC), the EPAS is known as the Environmental Performance Assessment Army Reserve (EPAAR) and Environmental Performance Assessment System–Army National Guard (EPAS-ARNG).

3. The Army's Environmental Law Division will (AR 200-1):
 - a. Serve as legal advisor to the Assistant Chief of Staff for Installation Management and Director of Environmental Programs;
 - b. Advise the Army Secretariat;
 - c. Provide technical channel supervision, coordination, and advice to Army counsel;
 - d. Monitor and advise on legislation and regulatory developments;
 - e. Review all draft environmental orders, consent agreements, and settlements with federal, state, or other regulatory officials before signature;
 - f. Assist all Army commands and units, including the National Guard Bureau, on drafting or negotiating interagency agreements or orders;
 - g. Represent the Army in federal and state litigation, and administrative actions, and

- h. Serve as initial denial authority for Freedom of Information Act requests pertaining to environmental activities.

B. Environmental Quality Control Committee (EQCC).

1. Every installation, major subordinate command, and ACOM is required by AR 200-1 to have an EQCC. Overseas, the EQCC may be organized at the military community level. The EQCC will include representatives from each major, sub-installation, and tenant activity. EQCC membership will include representatives of the operational, engineering, planning, resource management, legal, medical, and safety services of the command.
2. The purpose of the EQCC is to advise the installation commander on environmental priorities, policies, strategies, and programs. The EQCC also coordinates the activities of environmental programs covered in AR 200-1.
3. The installation commander or his designated representative must chair the EQCC. Delegates should also be given authority to assign coordination responsibilities to resolve identified problems. The EQCC normally meets monthly.
 - a. At many installations, meetings of the entire EQCC on a monthly basis may not be practical. At a minimum, the ELS should meet formally on a monthly basis with the installation's environmental coordinator, representatives from the safety, training, and preventative medicine offices, and also with the direct overseers of the installation's building and maintenance activities. This "mini-EQCC" should examine all ongoing and upcoming installation activities for their environmental impacts and determine what, if any, permits or corrective actions are required. Informal discussion between members of the mini-EQCC should occur frequently on an "as needed" basis.
 - b. Minutes of all EQCC and mini-EQCC meetings should be taken and maintained. A summary of the minutes should be provided to the chairman of the EQCC. The summary should highlight problems identified and recommend courses of action to resolve those problems. Problems that could result in adverse publicity for the installation or

command should be discussed thoroughly with the installation's public affairs officer.

C. Affirmative Claims.

1. The Services have affirmative environmental claims programs to recover costs and conduct cost avoidance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and state laws, including environmental cost recovery, torts, and contribution (Uniform Contribution Among Tortfeasors Act). See 10 U.S.C. § 2703.
2. The Services generally seek affirmative claims actions against responsible contractors or 3rd parties. The funds collected are not reappropriated, instead, the funds are applied to cleanups and Service environmental funding accounts. To date, the Services have collected more than \$90 million in funds or services under the program.

IV. LEGAL UNDERPINNINGS.

A. The Unitary Executive Doctrine.

1. In most cases, federal environmental laws apply to federal agencies and their facilities. Enforcement of federal law against noncomplying federal agencies, however, has sometimes proven problematic. The EPA cannot sue another federal agency, and can unilaterally issue compliance orders or assess fines only in very limited circumstances because of the “unitary executive doctrine.” In 1987, Henry Habicht III, then the DOJ’s Assistant Attorney General for the Land and Natural Resources Division, described the doctrine as follows:

[T]he President has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibilities under Article II, even though Executive branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered to comply with an administrative order *without the prior opportunity to contest the order within the executive Branch*. (Emphasis in original).

—Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 210 (1987).

2. To resolve the inherent tension between the unitary executive doctrine and EPA's duty to regulate federal agencies, President Carter issued Executive Orders 12088 and 12146. Collectively, these Executive Orders provide federal agencies with a dispute resolution process that offers federal agencies the opportunity to challenge the terms of an EPA proposed order through various levels of EPA's regional and national bureaucracy.

a. Executive Order 12088 provides in relevant part:

(1) 1-602. The Administrator [of EPA] shall make every effort to resolve conflicts regarding such violation [of an applicable pollution control standard] between Executive Agencies. . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget (OMB) to resolve the conflict.

(2) 1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

b. Executive Order 12146 provides in relevant part:

(3) 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

(4) 1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal

dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding into any court, except where there is specific statutory vesting of responsibility for resolution elsewhere.

- c. Note that under Executive Order 12,088, resolution of disputes by OMB rests upon request of the EPA Administrator. Under Executive Order 12146, on the other hand, either of any two disputing Federal agencies can submit the case to the DoJ.
3. Although the unitary executive doctrine precludes civil judicial enforcement by EPA as an enforcement option against federal agencies, the Administrator may request that the DoJ initiate a civil suit against the contractor who administers any portion of the installation's environmental program.
- B. Sovereign Immunity.
1. The DoD enjoys its position as a sovereign among the Government of the United States. The doctrine of sovereign immunity results in DoD not bearing a responsibility to follow a lesser authority's laws (i.e., states) and not being subject to suit without its consent. In essence, state and local governments cannot curtail DoD functions. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.
 2. The United States Government is subject to suit only when it has waived its sovereign immunity. Only Congress can waive the Government's sovereign immunity, and the waiver must be "unequivocally expressed" within the law, that is clear, concise, and unambiguous (DOE v. Ohio, 503 U.S. 607 (1992)). Congress has waived sovereign immunity for most environmental statutes.
- C. Cooperative Federalism.
1. Most environmental statutes contain provisions allowing EPA to delegate permitting, oversight, and enforcement responsibilities to the states, and the clear trend is to allow even greater state control and authority over federal activities and installations.

- a. This system of delegation is known as “cooperative federalism.” Under this system, the federal government establishes minimum standards and procedural requirements based on statutory mandates and the states develop implementation and enforcement programs that are no less stringent.
 - (1) Once the state has demonstrated that its program is no less stringent and capable of enforcement, the state assumes, subject to EPA oversight and right of revocation, enforcement authority. Once approved, actions taken under the state program have the same effect as if the EPA had taken the action. Even after delegation, however, EPA reserves parallel enforcement authority if it is dissatisfied with a state response (known as “overfiling”).
 - (2) Delegation authority exists in RCRA, CAA, CWA, and the Safe Drinking Water Act (SDWA).
 - b. Some environmental statutes permit states to operate, subject to general preemption principles governing impediments to federal goals and procedures, a parallel program that is completely independent of the equivalent federal program.
 - c. Regardless of the type of program administered by the state, EPA will always retain at least concurrent inspection and enforcement authority.
2. Once EPA delegates its authority to implement and enforce an environmental program, EPA will not rescind the authority unless the state’s program becomes less stringent than the federal standard, the state implements inconsistent laws, or the state fails to enforce compliance (see *e.g.*, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6926). Revocation of a program may also require a public hearing and a reasonable time to correct the problem (see RCRA, 42 U.S.C. § 6926(e)).

D. Overfiling.

1. EPA maintains supervisory authority for state environmental standards and enforcement. If a state fails to properly implement or enforce a program, EPA could revoke the delegation of authority; however, this action is unlikely to occur given the enormous amount of resources EPA would have to expend to take over the program.
2. EPA maintains the ability to take enforcement action against an entity, including a DoD activity, in addition to a state enforcement action for failure to meet state requirements. This is known as “overfiling” and can occur when EPA determines that state enforcement has not addressed the matter sufficiently.
3. EPA’s legal basis and use of overfiling is debated among both scholars and courts. Compare *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999) to *United States v. Power Engineering Co.*, 303 F.2d 1232 (10th Cir. 2002).

E. Administrative Rulemaking.

1. In the late 1960s, a congressional formal adjudication hearing took place into whether dichloro-diphenyl—trichloroethylene (DDT) should be reregistered. The hearing took about 7 months and produced 9000 pages of testimony. This process foreshadowed the need to revamp the rulemaking process in light of the onslaught of environmental laws just a decade later.
2. Informal Rulemaking. Federal agencies can utilize informal rulemaking unless a statute otherwise requires. EPA generally uses informal rulemaking when establishing environmental regulations. Section 4 of the Administrative Procedures Act (APA) requires:
 - a. Public notice in the Federal Register of proposed actions;
 - b. Opportunity for public comment (written), and
 - c. Publication of the final rule in the Federal Register with a statement of purpose and reason.
3. Negotiated Rulemaking. Negotiated rulemaking within environmental regulation would result in EPA consulting with those entities that would be primarily affected by the proposed rule prior to publishing the rule for public comment. While this

method is not mandated, it is often used as an expected efficiency to eliminate potential challenges.

F. Public Trust Doctrine.

1. The public trust doctrine holds that the government has a responsibility to preserve or maintain physical resources (natural or environmental) for the benefit of the public, i.e., subordination of private property rights in favor of public interests.
2. Examples of application of the doctrine are found in restrictions on shoreline development, fishing, and waterway navigation, as well as oil and mineral rights, forestry, and transportation.

G. The Tragedy of the Commons (see Garrett Hardin, 168 Science 1243 (1968)). When resources are available to persons without cost or limit, the resource is generally used either to the harm of others or the environment. Example: If there is an open pasture, and herdsman may keep as many cattle as they wish on the pasture, there is an incentive for each herdsman to add cattle to their herd as long as the land will sustain the cattle because it benefits the individual herdsman, but serves as a detriment to the other herdsman who could not put additional cattle on the pasture and to the environment because of the additional degradation of the pasture by maximum use.

H. Common Law Torts.

1. Prior to the environmental regulation boom of the 1970s, common law torts served as the problem-solving vehicle involving environmental disputes, when human use of resources interferes with others' interests.
2. Nuisance is a common law theory that intends to protect an individual's interest in the use and enjoyment of property without interference by others. Nuisance can be divided into both private and public cases. Private nuisance involves interference with a private property right, while public nuisance generally involved a crime against a state or government entity that involved interference with public property or endangered the public health. Generally, nuisance cases require a showing of significant harm.

- a. Examples of environmental private nuisance cases are: nuisance of stench from a pig sty (Aldred's Case, 77 Eng. Rep. 816 (1611)); noxious fumes from a fertilizer plant (Susquehanna Fertilizer Co. v. Malone, 73 Md. 268 (1890)), and nuisance of smoke damage to crops and trees (Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331 (1904)).
 - b. Examples of environmental public nuisance cases are: discharge of sewage in the Desplaines River (Missouri v. Illinois, 200 U.S. 496 (1906)), and discharge of noxious gas from a copper company (Georgia v. Tennessee Copper Co., 296 U.S. 230 (1907)).
3. Trespass is a specific interference with a property interest such as the exclusive possession of land; this can include use, contamination, or invasion. Intentional trespass actions generally involve strict liability for damages, and involve some level of intent.
4. Negligence is found when a party does not exercise the due care expected of a reasonable person, either through action or inaction that causes environmental or property interest damage. Accidental and inadvertent interference with property interests gave rise to the common law actions.
5. Ultra hazardous activities/strict liability describes a tort action that arises from situations that are inherently dangerous or unreasonable under the circumstances and result in injury. Examples of ultra hazardous environmental activities would be disposing of hazardous materials, drilling oil wells, and spraying pesticide. See Prosser and Keaton on the Law of Torts, 550 (5th ed. 1984).

V. ENVIRONMENTAL COMPLIANCE.

- A. Federal facilities are required to comply with applicable federal law, and state environmental laws that are encompassed by a waiver of sovereign immunity. A sample waiver of sovereign immunity reads as follows: "Each Federal agency shall be subject to and comply with all Federal, State, interstate, and local requirements, both substantive and procedural, respecting abatement and control of [air, water, etc.] pollution in the same manner, and to the same extent, as any person is subject to such requirements."

--Caution: this is a *sample* waiver provision. Each statutory waiver has its own unique language, and the applicable waiver must be reviewed in analyzing any specific problem.

- B. In determining whether or not a state environmental requirement is binding on a federal facility, use the following analysis:
1. Starting point: Hancock v. Train, 426 U.S. 167 (1976). Bottom line: we need not comply unless Congress has relinquished federal supremacy, and we cannot pay money to the state unless Congress has authorized the expenditure.
 - a. Identify exactly what it is that the state is requiring the Agency to do.
 - b. What waiver of federal supremacy is the state relying on?
 - c. Does the state requirement fit within the federal statutory program that creates the waiver? See, e.g., Kelley v. United States, 618 F. Supp. 1103 (W.D. Mich. 1985) (Clean Water Act (CWA) waiver does not render federal agency liable for violation of state law designed to protect underground water because the CWA generally does not address underground water issues); Goodyear Atomic Corp. v. Miller, 406 U.S. 174, 185-195 (1988) (dissenting opinion) (state work place regulatory scheme is not encompassed within the federal waiver of sovereign immunity regarding workman's compensation laws).
 2. Are there other “defenses?”
 - a. Exclusive federal legislative jurisdiction? While it could insulate a federal facility from state regulation, DoJ has declined to raise this defense.
 - b. Typical waiver language: “. . . in the same manner, and to the same extent as any person” Does state law discriminate (e.g., are municipalities or state agencies exempted)?
 - c. Does the state's law or regulation embody a “requirement” that is encompassed within the limits of the waiver of sovereign immunity?

- (1) Based on language in Hancock, some courts have distinguished between environmentally protective provisions of state law and remedial provisions, finding that the latter do not constitute “requirements.” See e.g., Florida Dep't of Envir. Reg. v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985) (state provision creating liability for environmental damage held not to be a “requirement” for purposes of the RCRA).
- (2) Has the requirement been regularly promulgated through a routine administrative process, or is it *ad hoc*?
- (3) Does the requirement mandate “relatively precise standards capable of uniform application?” Romero-Barcelo v. Brown, 643 F.2d 835, 855 (1st Cir. 1979), *rev'd on other grounds, sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (criminal and civil nuisance statutes held not to create specific standards that a federal agency must adhere to); see also Kelley v. United States, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (state statute proscribing discharging “any substance which is or may become injurious to the public health, safety or welfare” does not create a “requirement” that a federal agency must comply with).

C. If We Must Comply.

1. Plan and coordinate compliance measures.
2. If there are problems, seek to negotiate a delayed compliance agreement with the state.
3. If only a portion of the state's requirements can be achieved immediately, negotiate a compliance timetable for actions that cannot be accomplished immediately.
4. Caution: do not negotiate an agreement with obligations that the command cannot meet.
5. Caution: note fiscal law considerations.

6. May the command try to comply with state requirements even if not required to as a matter of law? Ask:
 - a. Will it improve our relationship with the regulators?
 - b. Is it the smart thing to do:
 - (1) Environmentally?
 - (2) Economically?

D. Reporting Potential Liability of Army Activities and People.

1. Criminal indictments or information against Army and civilian personnel for violations of environmental laws must be reported through command channels.
 - a. Criminal actions involving Civil/Public Works activities or personnel will be reported to the Director of Civil/Public Works.
 - b. Other criminal actions will be reported to the Director of Environmental Programs (DEP) and the Environmental Law Division (ELD).
2. Enforcement action will be reported through the Army Environmental Quality Reporting System (AEQRS) within 48 hours and any fine or penalty within 24 hours (and through command channels to HQDA (DAIM-ED (ODEP) and JALS-ELD). Tenants are expected to notify the installation commander of enforcement actions with 24 hours.
3. Installation ELSs will report an enforcement action that proposes or is likely to propose a fine, penalty, fee, or tax within 24 hours of receipt. ELSs will make the report simultaneously to the ELS supporting the installation's Installation Management Command (IMCOM) region and ELD via e-mail. Any actual or potential enforcement action that is likely to draw media attention or may impact the surrounding community must be reported immediately through legal channels. Installation ELSs will report the enforcement action simultaneously to the ELS supporting the installation's IMCOM region and to ELD. The installation ELS must report an enforcement action in which a

fine, penalty, fee, or tax has not been proposed, and is not likely to be proposed, to the ELS supporting the installation's IMCOM region within 48 hours of receipt. Subsequent reports should be provided whenever there is a significant development.

4. In accordance with AR 27-40, para. 3-1c.(4), ELD must be notified immediately of any service of summons, complaint, or other process or pleading commencing civil litigation against the United States or a Soldier or employee. Actions involving Civil/Public Works employees must be reported to the Chief Counsel, U.S. Army Corps of Engineers (USACE).
- E. After receiving an NOV, the installation will forward through command channels a plan for corrective action. The plan will include corrective milestones, cost estimates, and any associated documentation.
- F. If an installation cannot immediately comply with state or federal environmental requirements, the ELS will help negotiate a delayed compliance schedule that can be achieved.
1. Compliance orders/agreements may shield the command from citizen suits and other enforcement actions.
 2. The order/agreement can result in an obligation enforceable in court, through injunctions and possibly penalties for violations.
 3. Compliance orders, consent agreements, and settlements are negotiated at the installation level, but must be coordinated with ELD for review prior to being signed by the installation commander.
 4. Caution: the Anti-Deficiency Act, 31 U.S.C. § 1341 (ADA). Negligent violations of the ADA trigger a requirement that administrative discipline (up to removal from office) be imposed against the violator. Knowing and willful violation of the ADA can expose violators to possible criminal sanctions. 31 U.S.C. §§ 1349, 1350 and 1518, 1519. To avoid ADA violations:
 - a. Observe the limitations on using Operations and Maintenance Account (OMA) funds for construction projects.
 - b. Avoid incurring an unconditional obligation to install pollution control equipment or otherwise spend money in

future fiscal years in advance of an appropriation of funds.

- c. Include a condition that the required actions will be taken subject to availability of funds.
 - (1) If possible, condition actions upon the installation receiving funding that Congress authorizes for the specific project necessary to achieve compliance.
 - (2) Alternatively, make actions subject to funding that Congress authorizes for the project coupled with a commitment to request such funds (and then ensure that they are requested).
 - (3) Alternatively, condition actions upon the availability of funding allocated to the installation that can be used for the project.
 - (4) Alternatively, make actions subject to the availability of any funding that can be used for the project. This provision, if used, typically requires the installation to seek funding directly from the IMCOM. It is particularly important, therefore, to coordinate closely with the IMCOM before proposing the use of such funds.

5. What about Presidential exemptions?

- a. The President may exempt federal activities from compliance with some environmental requirements for up to a year at a time if this would be in the paramount interests of the U.S. See *e.g.*, 42 U.S.C. § 7418(b) and 42 U.S.C. § 6961(a).
- b. Presidential exemptions have been granted in a limited number of situations.
 - (1) President Carter exempted Fort Allen, Puerto Rico, from selected provisions of the CWA, RCRA, CAA, and the Noise Control Act of 1972, to facilitate the relocation and temporary housing of Haitian and Cuban refugees. See Executive

Order 12244, Exemption for Fort Allen, 3 October 1980, 45 Fed. Reg. 66,443.

- (2) Pursuant to 40 C.F.R. § 1506.11, DoD was permitted to execute two missions in support of Operation Desert Shield/Desert Storm without complying with the formal documentation requirements of NEPA. However, DoD was required to use “alternative methods of considering environmental impacts.” See Swenson, *Desert Storm, Desert Flood: A Guide to Emergency and Other Exemptions from NEPA and Other Environmental Laws*, 2 Fed. Facility Envtl. J. 3 (1991).
- (3) President Clinton, for national security reasons, exempted the United States Air Force’s operating location near Groom Lake, Nevada, from selected provisions of RCRA. See Presidential Determination No. 95-45, Presidential Determination on Classified Information Concerning the Air Force’s Operating Location Near Groom Lake, Nevada, 29 September 1995; Presidential Determination No. 96-54, Presidential Determination on Classified Information Concerning the Air Force’s Operating Location Near Groom Lake, Nevada, 28 September 1996; and, Presidential Determination No. 97-35, Presidential Determination on Classified Information Concerning the Air Force’s Operating Location Near Groom Lake, Nevada, 26 September 1997. See also, Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998).
- (4) Other exemptions include Operations Restore Hope (Haiti) and Sea Signal (Cuba). See Memorandum, Paul G. Kaminski, Under Secretary of Defense (Acquisition and Technology), to Director, Joint Staff, Subject: Exemption from Environmental Review Requirements for Cuban Migrant Holding Camps at Guantanamo, Cuba (OPERATION SEA SIGNAL Phase V) (5 Dec. 1994); Center For Law and Military Operations, The Judge Advocate General’s School, United States Army, After Action Report, United States Army Legal Lessons Learned, Operation Restore

Hope, 5 December 1992-5 May 1993, 23 (30 Mar. 1995).

- (5) Current Issue. Arguably, use of Mid-Frequency Active Sonar by the U.S. Navy at sea violated the Marine Mammal Protection Act (MMPA). Congress amended the MMPA in the 2004 National Defense Authorization Act to allow the Secretary of Defense to exempt “military readiness activities” after consultation with the Secretary of Commerce or the Secretary of the Interior. The Secretary of Defense has invoked this exemption twice. See Memorandum, Gordon England, Deputy Secretary of Defense, to Donald C. Winter, Secretary of the Navy, Subject: National Defense Exemption from Requirements of the Marine Mammal Protection Act for Certain DoD Military Readiness Activities That Employ Mid-Frequency Active Sonar or Improved Extended Echo Ranging Sonobuoys (23 Jan. 2007). In January 2008, President Bush issued exemptions for the U.S. Navy regarding the Coastal Zone Management Act (CZMA) (designed to protect coastal and marine resources, including whales and other marine mammals) and NEPA. The CZMA has a provision allowing the President to exempt certain federal activities from the law’s limits; however, NEPA does not give the President exemption authority. A Federal District Court in California ordered the Navy to adopt certain training restrictions prior to the exemptions’ issuance. Ultimately, the Supreme Court ruled that restraining order granted by the court was not merited, and did not decide whether the President can issue an exemption that conflicts with a court order, and whether the President can exempt a federal agency from NEPA. See Winter v. NRDC, 555 U.S. ____ (2008).

- c. Exemptions are relatively rare, and currently contentious. Absent a war or other exigent circumstances, it is unlikely that Presidential exemptions will be sought in the future to excuse federal facilities from complying with federal, state, or local environmental requirements.

VI. FUNDING.

- A. In the Army, funding for environmental compliance and restoration (cleanup) can come from five sources:
1. The Defense Environmental Restoration Account (DERA);
 2. Base Realignment and Closure (BRAC);
 3. Operations and Maintenance Account (OMA);
 4. Research, Development, Testing, and Evaluation (RDT&E), and
 5. Military Construction Account (MCA).
- B. DERA was established by the Superfund Amendments and Reauthorization Act (SARA) § 211 (10 U.S.C. § 2703). Beginning in FY 97, Congress devolved the Defense Environmental Restoration Program (DERP), authorizing and appropriating funds for individual transfer accounts for the Army, Navy, Air Force, Defense Agencies, formerly used defense sites (FUDS), and the Deputy Under Secretary of Defense for Installations and Environment (DUSD (I&E)).
1. The Army's transfer account is the Environmental Restoration, Army (ERA) account.
 2. The DUSD (I&E) establishes cleanup goals for the Services and provides program management oversight, but the individual Services program, budget, and manage their respective transfer accounts.
 3. Although the AEC develops the Army's installation restoration budget, ERA funds are managed and distributed by the IMCOM.
 4. Environmental Restoration (ER) funds shield installations from the immediate impact of funding environmental cleanups. Instead of using OMA or RDT&E, ER funds finance most installation-level restoration activities.
 5. Pursuant to a December 29, 2008 memorandum by the Deputy Under Secretary of Defense, "Interim Policy for Defense Environmental Restoration Program (DERP) Eligibility," the following significant changes were made:

- a. Cut-off dates for eligibility were removed, and
- b. Long-term management costs can be included (e.g. groundwater pump and treat operations).
- c. The following events are not considered “environmental restoration:”
 - (1) RCRA closure and post-closure care of RCRA permitted or interim status units;
 - (2) Routine operations, management, or maintenance;
 - (3) Removal of aboveground or underground storage tanks and associated piping;
 - (4) OCONUS responses;
 - (5) Immediate or short-term response required to limit, address, or mitigate a spill or release;
 - (6) Explosives or munitions emergency responses;
 - (7) Asbestos and lead-based paint responses;
 - (8) Non-DoD activities (e.g., contractor-owned/operated facilities, State National Guard facilities);
 - (9) Duplicative responses under another authority;
 - (10) Activities subject to a legal agreement;
 - (11) No record of DoD ownership;
 - (12) Act of war;
 - (13) Responses at Defense Plant Corporation or Army Corps of Engineers non-military activities;

- (14) Activities related to Nuclear Regulatory Commission license (Atomic Energy Act), and
 - (15) Activities subject to a specific appropriation.
 - d. The following are not eligible for ERA or BRAC funding:
 - (1) Fines or penalties (unless expressly authorized by appropriation);
 - (2) EPA administrative and oversight costs, and
 - (3) Court judgments and compromise settlements.
- C. Current compliance requirements (including training) must be satisfied with OMA funds.
- D. Programming and Budgeting. Environmental requirements must be funded from the appropriate account of the proponent who has the responsibility for the action, not necessarily the Installations Program Evaluation Group (II PEG) environmental program accounts. AR 200-1, para. 15-1.
 - 1. Commensurate with their responsibilities, Army organizations (to include tenants) will plan, program, budget, and execute resources to:
 - a. Mitigate actual or imminent health and environmental hazards.
 - b. Comply with federal, state and local statutes, regulations, agreements, and other judgments, applicable executive orders (EOs), Final Governing Standards (FGS), and legally-binding international agreements at overseas installations.
 - c. Sustain the quality and continued availability of lands for essential operations, training, and testing by protecting natural and cultural resources.
 - d. Maintain an adequately trained and staffed organization for environmental monitoring and program management.

- e. Employ cost-effective pollution prevention and reuse/recycle-based solutions in all mission areas as the preferred approach in meeting compliance requirements, reducing operating costs, and maintaining environmental stewardship.
 - f. Focus environmental quality technology (EQT) research and innovative applications to achieve program goals and reduce program costs.
 - g. Address environmental quality costs associated with weapons system life cycle within the context and requirements of the life cycle cost estimate, and adequately assess these costs in the acquisition milestone review process
2. The Environmental Program Requirements (EPR) Report satisfies the requirement of Executive Order 12088 that federal agencies submit to EPA detailed plans showing how they are budgeting sufficient funds to achieve and maintain environmental compliance. Installation compliance with the EPR process is likely to receive increased scrutiny in the future as compliance costs/demands increase and available funds decrease. The EPR Report also accompanies the President's annual budget submission to Congress. In imposing this requirement, Congress stated: “[K]nowing that their input on environmental funding requirements is going to subject [them] to Congressional oversight will provide a greater incentive to base commanders to improve the accuracy and realism of their funding estimates.” *National Defense Authorization Act For Fiscal Year 1991: Report of the House of Representatives Armed Services Committee on H.R. 4739, 101st Cong., 2nd Sess. 250 (1990).*

VII. ENFORCEMENT.

- A. The EPA has the primary regulatory authority and responsibility for the enforcement of most environmental statutes. EPA has three basic enforcement options when dealing with federal facilities:
 1. Criminal prosecution (against individuals);
 2. Civil judicial action (against government contractors), and

3. Administrative enforcement actions.
- B. EPA's Enforcement Objectives (EPA Enforcement Manual):
1. Ensure that the alleged violator is and will be in compliance;
 2. Punish noncompliance;
 3. Deter the alleged violator and others from not complying, and
 4. Correct the harm the noncompliance caused.
- C. EPA Enforcement Preferences.
1. Administrative and civil enforcement actions employ a strict liability standard and are, thus, generally favored over criminal enforcement actions that require a greater showing of culpability. Criminal enforcement actions are normally initiated where there is egregious conduct and/or clearly culpable conduct that results in significant harm to human health and/or the environment.
 2. Administrative cases are generally favored over civil enforcement actions because:
 - a. The proceedings at an administrative hearing are much less formal than those employed in the judicial process;
 - b. The Presiding Officer is an EPA employee as opposed to a district court judge, and
 - c. Civil judicial cases require review and approval by DOJ and EPA, as opposed to administrative determinations that require approval at the EPA Region level.
 3. In addition, because the unitary executive doctrine precludes civil judicial action against federal facilities (except government contractors), administrative enforcement actions are the most common enforcement actions taken against federal facilities.
- D. State Enforcement Actions.

1. Explicit waivers of sovereign immunity have exposed federal installations to fines and penalties by states, a trend that is likely to continue. States experience problems trying to force federal facilities to comply with state environmental requirements. While Congress has included a waiver of sovereign immunity provision in nearly all environmental legislation, courts have frequently found that the waivers were not broad enough to permit effective enforcement. Initially, disputes focused on whether federal facilities were required to obtain state issued permits. For example, in Hancock v. Train, 426 U.S. 167 (1976), the Court held that the waiver provision in the Clean Air Act (CAA) did not constitute the "clear and unequivocal waiver" required to constitutionally subject federal facilities to state permitting requirements. Congress responded to Hancock by amending the CAA waiver and ensuring that all environmental statutes passed or amended subsequently contained waivers of immunity that clearly required federal agencies to obtain applicable state permits. Congress' response to Hancock did not answer the issue of whether or not states can impose fines on federal agencies for CAA violations at federal facilities.
2. In 1992, the Federal Facility Compliance Act (FFCA) (Pub. L. No. 102-386, 106 Stat. 1505) explicitly waived the federal government's sovereign immunity from civil penalties for violations of the solid and hazardous waste management sections of RCRA. Prior to the enactment of the FFCA, the Supreme Court had held that the waiver of sovereign immunity in RCRA was not sufficiently explicit to allow states to impose punitive fines for past violations of RCRA. See United States Department of Energy v. Ohio, 503 U.S. 607 (1992). Note: the Energy Policy Act of 2005 (Pub. L. No. 109-58, 119 Stat. 594) waived federal sovereign immunity covering fines and penalties resulting from underground storage tanks.
3. The government's sovereign immunity for violations of Subchapter IV of the Toxic Substance Control Act (TSCA) was waived by the Lead Based Paint Hazard Reduction Act of 1992 (Pub. Law No. 94-469 (1992)).
4. In 1996, the sovereign immunity provisions of the SDWA were amended to allow for the imposition of fines and penalties by the states.
5. Congress entertained amending the sovereign immunity provisions of both the CWA and the Comprehensive

Environmental Response, Compensation, and Liability Act (CERCLA) to permit fines and penalties by the states for violations by federal agencies.

6. As to the CAA, the current DoD position is that the waiver of sovereign immunity is not so explicit as to permit fines and penalties against federal agencies, although there is a split of authority on this issue among federal courts of appeal.

E. Administrative Enforcement Actions.

1. Payment of fines and penalties. Penalties imposed by the EPA are typically assessed by determining a gravity-based penalty for a particular violation, considering any economic benefit, and adjusting the penalty for special circumstances. See e.g., EPA, Revised RCRA Civil Penalty Policy (October 29, 1990), *reprinted in*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 35,273 (October 1990).
2. The gravity-based penalty is determined by reference to a matrix that considers both the potential for harm and the extent of deviation from the RCRA requirement. Each violation is characterized as either "major," "moderate," or "minor" under each factor. The results are then compared on a matrix to determine the appropriate penalty range.
 - a. The "potential for harm" factor considers both the risks to human health and the environment and the adverse impact the violation may have on the RCRA regulatory process. As used in the penalty matrix, the different degrees of "potential for harm" are defined as follows:
 - (1) Major: the violation creates a substantial likelihood of exposure to hazardous waste (HW) or may have a substantial adverse effect on purposes or procedures for implementing RCRA.
 - (2) Moderate: the violation creates a significant likelihood of exposure to HW or may have a significant adverse effect on purposes or procedures for implementing RCRA.
 - (3) Minor: the violation creates a relatively low likelihood of exposure to HW or may have an

adverse effect on purposes or procedures for implementing RCRA.

- b. “Extent of deviation from the requirement” measures the degree to which the violation renders the requirement inoperative. As used in the penalty matrix, the different degrees of deviation are defined as follows:
 - (4) Major: the violation constitutes substantial noncompliance.
 - (5) Moderate: the violation significantly deviates from the requirement, but some of the requirements are implemented as intended.
 - (6) Minor: the violation deviates from the requirement somewhat, but most of the requirements are met.
- 3. Multiple penalties for each violation are possible: “A separate penalty should be assessed for each violation that results from an independent act (or failure to act) . . . [that] is substantially distinguishable from any other charge.” For example, where different elements of proof are required, multiple penalties are appropriate.
- 4. Multi-day penalties are also possible. They “should generally be calculated in the case of continuing egregious violations. However, per day assessment may be appropriate in other cases.”
- 5. EPA also attempts to recoup, as part of any penalty assessed, the economic benefit of noncompliance. The “benefit” is calculated based on computation of interest earned on avoided costs during the period of noncompliance and the marginal tax rate of the entity. This calculation is inappropriate for application to federal facilities, but may still be useful for guidance in penalty assessments.
- 6. There are a number of penalty adjustment factors.
 - a. Good faith effort to comply/lack of good faith can justify 25-40% reduction/increase in otherwise appropriate fine. Examples of good faith efforts:

- (1) Self-audits;
 - (2) Internal disciplinary action, and
 - (3) Anything else not *required* by RCRA for compliance, but still performed, e.g., the EQCC or any of its working groups.
- b. Degree of willfulness and/or negligence.
- (4) Mitigation or aggravation of 25-40% may be justified.
 - (5) Factors: control over events, speed of remedy, foreseeability, and precautions.
- c. History of noncompliance (upward adjustment only, of 25-40%): “The [EPA] may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate wide indifference to environmental protection.” As a result of this, an installation's past compliance problems could subject it to a substantially enhanced fine.
- d. “Other unique factors” provision may permit argument of military-unique factors, e.g., short-notice deployment of personnel contributed to violation. These factors can either result in reduction or enhancement of the fine.
7. Sources of funds to pay fines and penalties.
- a. Congress prohibits the use of Environmental Restoration funds to pay fines and penalties for violations of environmental requirements (see, e.g., National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 321, 108 Stat. 2663 (October 5, 1994)).
 - b. As a result, it is likely that fines and penalties will be paid out of OMA funds.

- F. Criminal Enforcement. Each of the major environmental statutes contain provisions that provide for criminal sanctions, including fines and/or imprisonment.
1. Fines and penalties.
 - a. Federal employees can be held individually liable for fines and penalties resulting from violations of most environmental statutes.
 - b. Currently, only three statutes specifically provide that federal employees cannot be held individually liable for fines and penalties regarding environmental violations resulting from performance of their official duties; see 33 U.S.C. § 1323(a)(2)(C) (CWA); 42 U.S.C. § 7418(a) (CAA); and 42 U.S.C. § 6961(a) (RCRA). An employee engaged in misconduct, however, may be perceived as acting outside the scope of his official duties.
 2. Criminal liability.
 - a. While all major environmental statutes have criminal provisions for knowing violations, some permit prosecution for merely negligent acts. See CWA, 33 U.S.C. § 1319(c)(1) (negligent release of a contaminant into navigable waters of the U.S.); and CAA, 42 U.S.C. § 7413(c)(4) (negligent release of a hazardous pollutant into the ambient air that places others in imminent danger).
 - b. In most cases, to establish a knowing violation, the government need only prove knowledge of the actions taken, not knowledge of the environmental statute itself. In addition, responsible officials who have knowledge of a wrongful act and the authority to take action, but fail to do so, may also face prosecution.
 - c. The number of federal criminal prosecutions has risen since the inception of most environmental laws. Moreover, jail time adjudged by federal judges and actually served by individual defendants also increased. See United States Department of Justice, Environmental and Natural Resources Division, Summary of Litigation Accomplishments for Fiscal Year 2008.

- d. EPA has shifted its enforcement strategy from a quantitative pursuit of as many indictments and convictions as possible to a more qualitative pursuit of egregious conduct and environmental damage.
- e. EPA has shifted some focus from corporate liability to personal liability.
- f. Although the number of DoD personnel criminally prosecuted for violations of environmental statutes has been few compared with the overall number of federal and state prosecutions, at least sixteen DoD personnel have been prosecuted. Thirteen of the prosecutions were federal, and ten of the thirteen were convicted. Of the three prosecuted in state courts, two were convicted; the complaint against the third was dismissed after removal to Federal Court.
 - (1) United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) (the “Aberdeen Case”). In May 1989, three civilians (SES, GM-15, GM-14) of the Army Chemical Research and Development Command, Aberdeen Proving Ground, were convicted of various RCRA violations involving illegal treatment, storage, and disposal of hazardous wastes. The three were sentenced to three years of probation and 1,000 hours of community service. DoJ denied requests to reimburse them for attorney fees of about \$108,000 each. Matter of: William Dee, et al. -- Requests for Payments of Attorneys' Fees, Comp. Gen. Op. B-242891 (Sep. 13, 1991).
 - (2) United States v. Carr, 880 F.2d 1550 (2d Cir. 1989). Mr. David Carr, a civilian range foreman at Fort Drum, was initially charged with 37 counts of violating of the CWA, four counts of illegal disposal of hazardous wastes in violation of RCRA, and two CERCLA counts for which he was convicted. The indictment charged Carr with the supervision and direction of other civilian employees in the disposal of about 100 to 150 five-gallon cans of paint into a pond on the installation. In December 1988, Carr was sentenced for two violations of CERCLA for twice failing to report a spill of

hazardous substances. On each count, imposition of a prison sentence was suspended. Carr was given one year of probation; he also paid \$300 in fines and assessments.

- (3) United States v. Bond, Cr. 91-0287-GT, S.D. Cal (Apr. 9, 1991). Mr. Cletus Bond, a civilian employee of the Navy, pled guilty to one count of negligent discharge of pollutants (radiator fluid contaminated with anti-freeze) in violation of the CWA. He was sentenced to one year of probation and a \$500 fine. Mr. Bond was a supervisor at the Navy Exchange Auto Repair Facility, San Diego, California. The radiator fluid was discharged into a storm drain and flowed into a nearby Creek.
- (4) United States v. Pond, Cr. S-90-0420, D. Md. (Apr. 17, 1991), 21 Env. L. Rep. 10444 (1991). Mr. Richard Pond, civilian manager of the wastewater treatment plant at Fort Meade, was convicted in January 1991 of one felony count of violating a CWA permit, eight felony counts of making false statements on discharge monitoring reports, and a misdemeanor violation for theft of government property by using government lab equipment to analyze water samples for a privately owned wastewater treatment plant. Pond was sentenced to eight months in prison, followed by one year of supervised release (including four months of home detention), 60 hours of community service, and restitution of \$99.99.
- (5) United States v. Curtis, 988 F.2d 946 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 177 (1993). From 1986 to 1989, John Curtis was the director of the fuels division at Adak Naval Air Station, Alaska. Among his responsibilities was the operation of several miles of pipelines. Over a five-month period spanning from October 1988 to February 1989, Curtis ignored repeated employee warnings of a pipeline leak. As a result, thousands of gallons of fuel flowed into an inlet of the Bering Sea. The employees finally took Curtis to the site of the leak, but the pipeline was not turned off until the base environmental manager was told what was happening. In October 1991, Curtis was

indicted on five felony counts for knowing violations of the CWA. He was convicted in March 1992 of three violations of the CWA, one felony count for a knowing violation, and two lesser-included misdemeanor counts for negligent violations. Curtis was sentenced to serve 10 months in jail.

- (6) United States v. Dunn, Larimore, and Divinyi, Cr. No. 92-117-COL (JRE) (M.D. Ga. 1992). Three civilian employees (two GS-12s and one GS-11) at Fort Benning, Georgia, were indicted on 29 January 1992 for one count of conspiracy to violate the Endangered Species Act (ESA). Two of the individuals (the chief of the natural resources management division and the forestry supervisor) were also indicted on six counts of making false official statements. The chief of the environmental management division was also indicted on one count of making a false official statement. The offenses revolved around requests submitted from 1985-1989 for commercial timber harvesting at Fort Benning, on which requests defendants are alleged to have knowingly failed to note the habitat of the red-cockaded woodpecker, an endangered species.
- (7) California v. Hernandez, No. 25148 (Riverside Mun. Ct. May 11, 1992). In March 1991, Mr. Andy Hernandez, sewage treatment plant foreman at March Air Force Base (AFB), changed sludge test results for biochemical oxygen demand to bring the results within the level authorized by the plant discharge permit. Hernandez made these changes without doing any additional tests. In May 1992, Hernandez pled guilty to falsifying a wastewater test record. He was given a suspended sentence to pay a \$5,000 fine and placed on probation for 18 months.
- (8) United States v. Lewis, Cr. 3-88-50, S.D. Ohio (Dec. 14, 1988). Mr. Lewis, an Army employee and former Radiation Protection and Safety Officer at Wright Patterson AFB, pled guilty to unlawful possession of a radioactive byproduct material.

- (9) United States v. Shackelford, E.D Va. (Feb. 27, 1992). Mr. Henry E. Shackelford, Jr., an employee at Langley AFB, pled guilty to improper use and disposal of a pesticide.
- (10) United States v. Ferrin, S.D. Cal. (Aug. 15, 1994). Mr. James A. Ferrin, a supervisor at San Diego Naval Station, was convicted of disposing hazardous waste, treatment without a permit, and false statement.
- (11) California v. Lam, (Cal. State) (May 29, 1992). Mr. Sam Lam, an environmental manager at the Marine Corps' El Toro Air Station, was initially charged with felonies based on reports he caused to be dumped in a municipal landfill ninety 55-gallon drums containing leaded paint waste and heavy metals. In May 1992, Lam was convicted of five misdemeanor counts each for unlawful transportation and disposal of HW. He was sentenced on one count to pay a \$5,000 fine, ordered to complete a hazardous materials handling course, and placed on probation for 3 years. Sentencing on the remaining nine counts was suspended for the period of probation. The Navy/USMC concluded that while Lam's conduct was negligent, he had acted in good faith and, therefore, was within the scope of his employment. As a result, they supported his request that DoJ pay his private attorney's fees. DoJ approved Lam's request, authorizing payment of attorney's fees of up to \$90.00 per hour.

g. Representation. If a federal employee is indicted for an environmental crime, and it is a:

- (1) Federal prosecution, representation will normally be provided by a private attorney hired at the employee's expense. See 28 C.F.R. § 50.15.
- (2) Military prosecution, representation provided by the U.S. Army Trial Defense Service (TDS).
 - (a) Military personnel facing a criminal investigation conducted by EPA or other

federal law enforcement agencies may request representation by TDS, but “representation and advice will be limited to that required to protect the client from pending or potential judicial, nonjudicial, or adverse administrative actions within DA.” TDS counsel are not authorized to advise military clients concerning concurrent civilian court or grand jury proceedings. See Standing Operating Procedures, U.S. Army Trial Defense Service (USATDS SOP).

- (b) TDS counsel are able to provide “suspect counseling” in the critical period when an investigation is in its early stages, but once it is clear that adverse actions are going to be pursued outside the military, TDS counsel must withdraw from representation. See USATDS SOP.

3. State prosecution, representation by DoJ is possible if it is in the Government's best interests (i.e., acting within scope of duties and not in violation of federal law). See 28 C.F.R. § 50.15.

- (1) Satisfying the second prong of the test (not in violation of federal law) may prove especially difficult since many state environmental statutes are modeled after federal statutes.

- (2) The Marine Corps, however, was able to persuade DOJ to pay (up to \$90.00 per hour) to represent a civilian employee charged with criminal violations of California environmental law. See California v. Lam (Cal. State) (May 29, 1992).

4. Attorney-client privilege.

- a. There is no attorney client privilege between an attorney and a commander on environmental compliance issues—at least in cases involving federal investigations and prosecutions.

- b. Note, however, that the initial communication between a service member and a legal assistance or TDS attorney is privileged, but once it is determined that representation by a military attorney will no longer be available, the attorney-client relationship ends and further communications will not be covered by the privilege.

5. Official immunity.

- a. Actions are necessary and proper; i.e., they are reasonably required to accomplish a government objective, task, or mission and they are taken with due regard for the safety, well-being, and property interests of others.
- b. The actions taken did not violate federal law.
- c. Immunity is not available in federal criminal prosecutions; it is theoretically available in state prosecutions. Because most state environmental requirements are based on federal requirements, however, immunity will likely be precluded.

VIII. FEES AND TAXES.

- A. The Army's policy is to pay all nondiscriminatory administrative fees and assessments imposed by state and local governments for state and local permits and to defray the costs of their environmental programs.
- B. Sovereign immunity has not been waived for state taxation. "Excessive" environmental permitting and operating fees can constitute disguised taxes. States and local governments often assess three generic types of "fees" against federal facilities, which do not normally constitute reasonable service charges.
 - 1. Remedial Fund Fees. Fees that fund cleanup activities, or mini-superfunds, do not constitute reasonable service charges and should not be paid. DoD conducts its own cleanups and receives no benefits from programs funded by these fees.
 - 2. Broad "Program" Fees. States typically establish broad programs to address particular environmental media. Some program elements, such as permit review and processing,

inspections, and compliance monitoring may be paid as reasonable service charges. Other portions, such as special grant or loan programs of which we cannot take advantage, are objectionable and should not be paid. Commands must analyze these programs on a case-by-case basis and negotiate with regulators to determine the proportion of the fee to be paid.

3. Insurance-type programs. Many states require regulated facilities of certain types, especially underground storage tanks, to pay into an insurance fund that is available to help pay the cost of pollution caused by the facility. Because DoD funds its own cleanup efforts, payment of the fee violates the second prong of the Massachusetts test (see Massachusetts v. United States, 435 U.S. 444, 464-67 (1978)) and the fiscal self-insurance rule.
- C. The label placed on the requested payment is not important. A fee is an amount that, if calculated correctly, allows an agency to recover a reasonable approximation of the costs it incurs in acting on a license request and providing a benefit or service. A tax is an enforced contribution to provide for the general support of the government.
1. A three-step test is used to determine if a “fee” is actually a tax. Under the Massachusetts test, determine whether or not:
 - a. The fee is imposed in a nondiscriminatory manner; i.e., are local governmental or other entities exempted? (Theory: a tax can be discriminatory, but a valid permit fee or user fee cannot.);
 - b. The fee is a fair approximation of the cost of the benefit received. The “benefit” is generally the overhead expense for operating the permit system and the costs of conducting inspections, and
 - c. The fee is not structured to produce revenues that will exceed the total cost to the state of the “benefits” it confers. Fees that are structured to produce excess revenue are often structured so that all funds received are channeled into the state's general revenue fund.
 2. If the charge is nondiscriminatory (a fair approximation of the cost of the benefit received) and not structured to produce

revenues that will exceed the total cost to the state of the benefits it confers, then it will normally be a permissible fee.

3. With rare exceptions, unless the fee is discriminatory, some portion (i.e., the reasonable portion) of a state imposed fee is payable.
4. The fee/tax analysis issue is not completely settled as the Comptroller General issued an opinion in June 2006 rejecting the Massachusetts test, i.e., if there is no legal basis for making a payment, then it is an Anti-Deficiency Act violation. See In the Matter of Forest Service–Surface Water Management Fees, B-306666, June 5, 2006).

IX. CONCLUSION.

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CHAPTER B

THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

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I. REFERENCES.

A. Federal Statutes and Regulations.

1. 42 U.S.C. §§ 4321-4370d (National Environmental Policy Act (NEPA))
2. 40 C.F.R. Parts 1500-1508 (Council on Environmental Quality (CEQ) Regulations)
3. 46 Fed. Reg. 18026 (March 23, 1981), Council on Environmental Quality, Forty Most Asked Questions Concerning National Environmental Policy Act Regulations

B. Executive Orders.

1. Executive Order 11514, Protection and Enhancement of Environmental Quality, March 5, 1970
2. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, January 4, 1979, *reprinted at* 42 C.F.R. § 4321

C. Service Regulations, Instructions, and Policy Guidance.

1. 32 C.F.R. pt. 651, Environmental Analysis of Army Actions (also designated AR 200-2)
2. DoDD 6050.7, Environmental Effects Abroad of Major Department of Defense Actions
3. SECNAVINST 5090.6A, Environmental Planning for Department of the Navy Actions
4. OPNAVINST 5090.1C, Environmental Readiness Program Manual
5. MCO P5090.2A, Environmental Compliance and Protection Manual
6. AFR 19-2, Environmental Impact Analysis Process
7. AFI 32-7061, Environmental Impact Analysis
8. AR 200-1, Environmental Protection and Enhancement

9. AR 210-20, Real Property Master Planning for Army Installations

II. OVERVIEW.

- A. History. In 1969, Congress enacted NEPA. Congress intended The Act:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation; and to establish a Council on Environmental Quality. 42 U.S.C. § 4321.

This national policy pledges:

To use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. 42 U.S.C. § 4331(a).

- B. Requirements.

1. NEPA imposes two basic requirements on federal agencies (NEPA does not apply to states, local governments, or private entities).
 - a. It requires the agency to consider every significant aspect of the environmental impact of a proposed action.
 - b. It ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.

Many issues involving NEPA can be resolved by keeping in mind these two goals: an informed decision-maker and meaningful public participation.

2. NEPA does not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it requires that

agencies take a “hard look” at the environmental consequences before undertaking a major action. NEPA itself also doesn’t control pollution, set environmental standards, or identify risks to the human health and environment.

- C. NEPA was not designed to prevent all possible harm to the environment, but rather to influence the decision-making process by making government officials notice environmental considerations and take them into account.
 - 1. NEPA does not mandate particular results, but simply prescribes a decision-making process.
 - 2. “[I]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . NEPA merely prohibits uninformed -- rather than unwise -- agency action.” Robertson v. Methow Valley Citizens Council, 109 S. Ct. 1835, 1846 (1989).
- D. NEPA incorporates reviews and analysis of other environmental laws and policies. For example, in order to complete NEPA analysis of construction of a dam on a waterway, examination of CWA applications may be necessary. NEPA frequently must also incorporate the results of consultation under the Endangered Species Act and the National Historic Preservation Act.
- E. NEPA Documents
 - 1. The law itself simply states “all agencies . . . shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement on the environmental impact of the proposed action...”

The CEQ regulations named this “detailed statement” an environmental impact statement (EIS); they also created the environmental assessment (EA). The Army regulations created a third document, the record of environmental consideration (REC). These are described more fully in sections VII, VIII, and IX. They may be understood by the principle that the greater the environmental impact, the larger the document and the more public participation will be involved. This can be summarized as follows:

	Level of Impact	Usual Length	Publication	Public Comment Period
REC	In a category of actions with no significant impacts	1 – 2 pages	None	None
EA	Less than significant	100 – 200 pages	Local	30 days
EIS	Significant	500+ pages	Federal Register and local	<ul style="list-style-type: none"> - Public scoping - 45 day comment period - 30 day additional waiting period

III. KEY DEFINITIONS.

- A. **[The] Council on Environmental Quality (CEQ)** is a staff office of the Executive Office of the President created by NEPA. 42 U.S.C. § 4342. The purpose of the CEQ is to “provide a consistent and expert source of review of national policies, environmental problems and trends, both long-term and short-term.” 115 Cong. Rec. 26572 (1969) (statement of Rep. Dingell). NEPA is implemented through the CEQ regulations and agency regulations that are consistent with the CEQ regulations.
- B. **Human environment** means the natural and physical environment and the relationship of people with that environment. 40 C.F.R. § 1508.14. When an environmental impact statement (EIS) is prepared and economic or social and natural or physical environmental effects are interrelated, then the EIS

will discuss all of these effects on the human environment. It should be noted that economic or social effects are not intended by themselves to require preparation of an EIS.

- C. **Impacts** and **effects** are synonymous under the CEQ regulations.
1. **Effects** include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial. 40 C.F.R. § 1508.8.
 2. **Impacts** include direct, indirect, and cumulative impacts.
 - a. Direct impacts are caused by an action and occur at the same time and place as the action.
 - b. Indirect impacts are caused by an action, but occur later in time or distance from the action that caused them, and are reasonably foreseeable.
 - c. Cumulative impacts result from the incremental impact of an action when added to past, current, or reasonably foreseeable future actions. Cumulative impacts can result from individually minor, but collectively significant, actions taking place over a period of time. 40 C.F.R. § 1508.7.
 - d. An agency need not consider impacts or effects that are highly speculative or indefinite in nature. Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985). As seen from the different regulations, an agency need only consider those effects that are reasonably foreseeable. An agency does not have to let "its imagination run wild as to whether there will be any environmental impact." First National Bank of Homestead v. Watson, 363 F. Supp. 466, 473 (D.D.C. 1973) (emphasis in original).
- D. **Mitigation** consists of actions that reduce the severity or intensity of impacts of other actions. 40 C.F.R. § 1508.20.

- E. **Categorical Exclusions (CX)** are actions, which under normal circumstances, do not have, individually or cumulatively, a significant effect on the quality of the human environment, and for which neither an environmental assessment nor an EIS is required. 40 C.F.R. § 1508.4.
- F. **Environmental Assessments (EA)** are concise public documents that provide sufficient evidence and analysis to determine whether an EIS is required and which aid an agency's compliance with NEPA when no EIS is necessary. 40 C.F.R. § 1508.9.
- G. **Finding of No Significant Impact (FONSI)** is a document prepared by a federal agency briefly presenting the reasons why an action will have no significant effect on the human environment, and for which an EIS will not be prepared. It is a possible finding resulting from an EA. 40 C.F.R. § 1508.13.
- H. **Environmental Impact Statements (EIS)** are detailed written statements whose purpose is to: 1) serve as an action-forcing device to insure that the policies and goals defined in NEPA are infused into the ongoing programs and actions of the Federal Government; 2) provide full and fair discussion of significant environmental impacts; and 3) inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. 40 C.F.R. § 1502.1.
- I. A **proponent** is the unit, element, or organization that is responsible for initiating and/or carrying out the proposed action, and the lowest level decision-maker for the proposed action in question. The proponent has the responsibility for preparing and/or securing funding for the preparation of any necessary environmental documentation. 67 Fed. Reg. 15332 (2002) (32 C.F.R. § 651 (Appendix F)).
- J. A **proposal** exists at the stage in the development of an action when an agency subject to NEPA has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the effect can be meaningfully evaluated. 40 C.F.R. § 1508.23.

IV. TYPES OF ACTIONS COVERED BY NEPA.

- A. Major Federal Actions. NEPA applies only to actions with effects that may be major and that are potentially subject to federal control and responsibility. 40 C.F.R. § 1508.18. Actions include:

1. Projects and programs partly or entirely financed, assisted, conducted, regulated, or approved (issued permit) by federal agencies, and
 2. New or revised federal agency rules, regulations, plans, policies, or procedures, as well as legislative proposals.
- B. General Guidance. Federal actions tend to fall within one of the following categories (40 C.F.R. § 1508.18(b)):
1. Adoption of official policy (rules, regulations, agency interpretations);
 2. Adoption of formal plans or official documents prepared or approved by federal agencies that guide future uses of federal resources;
 3. Adoption of programs to implement a specific policy or plan, and
 4. Approval of, or issuing a permit for, specific projects located in a defined geographic area.
- C. Army Guidance. Actions requiring environmental documentation (32 C.F.R § 651.10):
1. Policies, regulations, and procedures (for example Army and installation regulations);
 2. New management and operational concepts and programs (in areas such as logistics, research and development, procurement, personnel assignment);
 3. Projects involving facilities construction;
 4. Activities such as individual and unit training, flight operations, and facility test and evaluation programs;
 5. Activities involving radioactive materials;
 6. Leases, easements, permits, licenses, and other forms of permission for use of Army land;

7. Research and development in such areas as genetic engineering, laser testing, and electromagnetic pulse generation, and
8. Federal contracts, grants, subsidies, and loans.

V. EXCEPTIONS TO THE REQUIREMENT FOR NEPA COMPLIANCE.

- A. Proposed Actions Involving Classified Information (40 C.F.R. § 1507.3(c); 32 C.F.R § 651.13).
 1. “[Classified information] does not relieve a proponent [of an action] of the necessity to assess and document the environmental effects of the proposed action.” 32 C.F.R § 651.13(b). However, where classified information would be compromised, a full EIS need not be produced. See, e.g., Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981); Laine v. Weinberger, 541 F. Supp. 599 (C.D. Cal. 1982). See also San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006) (discussion on revealing sensitive information during NEPA process).
 2. Possible approach: segregate classified data and process unclassified material routinely. A recent example is the 2010 EIS for Guam, which included a classified annex involving the weapons placement for an Air and Missile Defense Task Force. All other aspects of the stationing action were included in the portion of the EIS that was made available to the public.
- B. Statutory Exemptions.
 1. Congress must explicitly excuse noncompliance.
 2. Few such exemptions have been enacted that affect the military. Two examples, however, are the 1988 and 1990 Base Realignment and Closure (BRAC) Acts. These Acts specifically exempted the Commissions on Base Realignment and Closure from having to prepare an EIS concerning their selection of bases for closure or realignment. While the decisions for BRAC 2005 were not subject to NEPA, any disposal of property, relocation, or new functions at the installation were subject to NEPA requirements.

C. Statutory Conflicts.

1. If the requirements of another federal statute make NEPA compliance impossible, then NEPA compliance is excused.
2. Interpreted narrowly by the courts; compliance must be impossible, not merely inconvenient. See e.g., Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976); U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP I), 412 U.S. 669, 694-95 (1973); Cf. Weinberger v. Catholic Actions of Hawaii, 454 U.S. 139 (1981).

D. Emergency Actions (40 C.F.R. § 1506.11; 32 C.F.R § 651.11(b)).

1. The NEPA decision-making process need not precede actions taken in response to emergencies.
2. Emergencies are situations requiring immediate action to:
 - a. Protect life and property, or
 - b. Protect national defense and national security.
3. Exemption from NEPA process only applies to actions necessary to control the immediate effects of the emergency.
4. The agency must consult with the CEQ and determine alternative arrangements. Alternative arrangements are limited to “the actions necessary to control the immediate impacts of the emergency.” This could include completing an EA while a required EIS is under preparation. It could also include imposition of limitations or requirements for testing while the emergency actions take place. See Valley Citizens for a Safe Environment v. Vest, 1991 WL 330963 (Civ-A No. 3077-F) (D. Mass. May 30, 1991).
5. The Navy recently received permission to conduct its training using mid-frequency sonar off the coast of California under an emergency basis that was coordinated with the CEQ. Alternative arrangements included public review of post-exercise assessments and marine life research requirements. The district court found the arrangements inappropriate under the circumstances and this decision was upheld on appeal. NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008). The

decision was reversed on other grounds, Winter v. NRDC, 129 S.Ct. 365 (2008)

VI. NEPA DOCUMENTATION REQUIREMENTS.

- A. General Requirements for Analyzing Environmental Impacts of Major Federal Actions.
 - 1. “[All agencies shall] utilize a systematic, interdisciplinary approach to insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making, which may have an impact on man’s environment.” 42 U.S.C. § 4332(2)(A).
 - 2. “[All agencies shall] identify and develop methods and procedures which will insure that presently unqualified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.” 42 U.S.C. § 4332 (2)(B).
- B. In determining what type of documentation is necessary for a particular action, it first must be determined whether the action:
 - 1. Qualifies for a categorical exclusion;
 - 2. Requires an environmental assessment, or
 - 3. Requires an environmental impact statement.
- C. What is the Scope of the Document – Where Does the Action End for Purposes of the Analysis?
 - 1. Would it be irrational and unwise to implement the proposal unless further steps were to be pursued later? Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. 1974); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).
 - 2. Does the proposal have an “independent utility” apart from possible related future actions? Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir. 1975).
 - 3. CEQ Tests (40 C.F.R. § 1508.25(a)).

- a. Connected actions are closely related actions if they:
 - (1) Automatically trigger other actions which may require an EIS,
 - (2) Cannot or will not proceed unless other actions are taken, or
 - (3) Are interdependent parts of a larger action or depend on the larger action for their justification.
- b. Cumulative actions are those that when viewed with other proposed actions have incremental significant impacts.
- c. Similar actions are those that when viewed with other reasonably foreseeable agency actions resemble the other actions and provide a basis for evaluating their environmental consequences.

VII. CATEGORICAL EXCLUSION (CX).

- A. CXs reduce unnecessary paperwork and delay by eliminating EA and EIS procedures when appropriate. The Army has identified 52 types of activities that qualify as CXs. See 32 C.F.R. § 651.11(c); 32 C.F.R. pt. 651 Subpart D; 32 C.F.R. § 651 Appendix B. Subordinate commands cannot modify this CX list. Requests for modification of the CX list should be sent through AEC to the ASA (I&E), for CEQ approval. 32 C.F.R. § 651.31. Before utilizing a CX, the screening criteria must be met. See 32 C.F.R. § 651.29.
- B. Criteria for Establishing CX Categories.
 - 1. Minimal or no individual or cumulative effect on the quality of the environment.
 - 2. No environmentally controversial change to existing conditions.
 - 3. Similar actions have been examined and qualify for CX treatment.
- C. Screening Criteria for CX Application.
 - 1. Action may not be segmented.

2. No exceptional circumstances exist. 32 CFR 651.29.
3. One or more CX encompasses the action.

D. CX application is inappropriate where:

1. Reasonable likelihood of significant effects on public health, safety, or the environment (direct, indirect, or cumulative);
2. Uncertain, unique, or scientifically controversial environmental risks are involved;
3. The project is greater in scope or size than that normally encompassed in the CX category;
4. Poor environmental conditions may be degraded. See Hanly v. Kleindienst (Hanly II), 471 F.2d 823 (2d Cir. 1972);
5. The proposal will initiate degrading influence in areas still in substantially natural condition;
6. Unproven technology will be employed;
7. Threatened or endangered species, archeological or historic sites, or other protected resources are present (i.e., environmentally sensitive areas);
8. Hazardous or toxic substances will be used with risk of exposure (release) to the environment;
9. The project will affect prime or unique agricultural land, wetlands, coastal zones, wilderness areas, floodplains, or wild and scenic river areas;
10. Releases of petroleum, oils, and lubricants (POL) except from a properly functioning engine or vehicle, application of pesticides and herbicides, or where the proposed action results in the requirement to develop or amend a Spill Prevention, Control, or Countermeasures Plan;

11. When a review of an action that might otherwise qualify for a Record of Non-applicability (RONA) reveals that air emissions exceed de minimis levels or otherwise that a formal CAA conformity determination is required;
 12. Violation of any federal, state, or local law may occur;
 13. Effects may be “highly controversial,” and
 14. A precedent for future actions that would be likely to have a future significant effect.
- E. Many federal agencies do not require any formal documentation if a proposed action qualifies as a CX; however, the Army requires a Record of Environmental Consideration (REC) for some CX actions. See Figure 3, 32 C.F.R. § 651.19. While a particular format is not absolutely prescribed, the format illustrated at Figure 3 cited above is recommended. Each CX in 32 CFR Part 651 Appen B states whether a REC is required or not. The REC is an internal document and is not normally made available to the public except in unusual circumstances or through a Freedom of Information Act request.
- F. CX application does not relieve compliance with other environmental laws (e.g., RCRA).

VIII. ENVIRONMENTAL ASSESSMENTS (EAs).

- A. EAs are primarily intended to determine whether an EIS must be prepared and to provide a public record of environmental considerations. Secondly, EAs aid NEPA “compliance” (environmental consideration) when no EIS is required and also facilitate the preparation of an EIS if one is necessary. 40 C.F.R. § 1508.9.
- B. Under 32 C.F.R. § 651.32 an EA will be prepared if a proposed action:
1. Is not an emergency;
 2. Is not exempt from or an exception to NEPA;
 3. Does not qualify as a CX;

4. Is not adequately covered by existing NEPA analysis and documentation, or
 5. Does not normally require an EIS.
- C. Actions normally requiring an EA are listed at 32 C.F.R. § 651.33 and include:
1. Special field training or testing on the installation, beyond the scope of the annual training cycle;
 2. Military construction that exceeds 5 contiguous acres on Army land of a nature or magnitude not within the annual installation training cycle or installation master plan;
 3. Herbicide, insecticide, or rodenticide use programs. *But note, Society for Animal Rights v. Schlesinger, 512 F.2d 915 (D.C. Cir. 1975) (uncontested CEQ decision that EIS was required for extermination of 10 million blackbirds at Fort Campbell);*
 4. Substantial proposed changes in Army-wide doctrine or policy that potentially have an adverse effect on the environment;
 5. Changes to established installation land use that generate impacts on the environment;
 6. Repair or alteration that affects historically significant structures;
 7. Development of a laboratory using dangerous or hazardous chemicals, drugs, and other materials;
 8. Actions that could cause soil erosion or potentially affect prime or unique farm land, wetlands, floodplains, coastal zones, wilderness areas, wild and scenic river areas, or areas of critical environmental concern;
 9. New weapon systems development and acquisition;
 10. Significant alterations of the installation master plan and land and natural resource management plans;

11. Actions that take place in or adversely affect important wildlife habitats, including wildlife refuges;
 12. Timber management and harvesting programs;
 13. Field activities on land not controlled by the military, including firing missiles and weapons over navigable waters of the U.S. See Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (S.D. Me. 1972);
 14. Actions with significant local or regional effects on energy or water availability;
 15. Actions that affect any species on, or proposed to be placed on, federal lists of endangered or threatened species, or are on applicable state or territorial lists of endangered or threatened species, and
 16. Production of hazardous or toxic materials.
- D. Proponents may, but need not, follow the format established for EISs in preparing an EA. See 32 C.F.R. Part 651 Appendix E. At a minimum, 32 C.F.R. § 651.34 requires that each EA:
1. Have a signature (Review and Approval) page;
 2. Describe the proposed action;
 3. Discuss the purpose of, and need for, the proposed action;
 4. Identify appropriate and reasonable alternative actions that have been considered, including the no-action alternative and alternatives eliminated from consideration;
 5. Describe the affected environment;
 6. Discuss the environmental impacts of the proposal and the alternatives in comparative form;
 - a. The no-action alternative serves as the baseline for comparison of environmental effects of the proposed action and other alternatives.

- b. The no-action alternative may result in degraded environmental conditions over time due to predictable consequences from not fulfilling the proponent's need.
- 7. List the agencies and persons consulted in preparing the EA. While scoping (a determination of overall extent of project and potential of its cumulative environmental effects) is not absolutely required for an EA, some facsimile of scoping should be used to identify relevant environmental concerns.
- 8. Contain an explicit Finding of No Significant Impact (FONSI) or a conclusion that an EIS is necessary and a statement that a notice of intent will be published prior to preparation of the EIS, and
 - a. Specific guidance on preparing FONSI can be found at 32 C.F.R. § 651.35.
 - b. A FONSI must include a discussion of (40 C.F.R. § 1508.13):
 - (1) The reasons that the action will not have a significant impact;
 - (2) The mitigation necessary to reduce significance of impacts to insignificance (mitigated FONSI which is not the preferred method), and
 - (3) The public review of a FONSI (there is no requirement for agency to provide a written response to specific public comments as is required with draft EIS).
- 9. Contain evidence that the decision-maker has reviewed the EA along with other appropriate planning documents.
- E. Additional Processing Requirements for Processing and Signing EAs.
 - 1. All EAs must be reviewed by the installation or activity Staff Judge Advocate (SJA) or chief legal advisor before submission to the commander.
 - 2. All EAs must be signed by the project's decision-maker. In no case will this approving official be lower than the installation or activity commander.

3. If the scope of the project is local in nature, the FONSI will be published in the local media. Additionally, the FONSI will be submitted to HQDA before public release and publication when the project is:
 - a. Of national interest,
 - b. A base realignment and closure action, or
 - c. An HQDA sponsored action.

F. Common EA Shortfalls.

1. An EA must be a planning document, and must be prepared before work on the project is begun. Doing EA documentation after the fact is an invitation for a lawsuit from a concerned/disgruntled individual, citizen group, or affected organization.
2. The EA must be prepared using an “interdisciplinary approach.”
 - a. Find and use experts. Experts can be hired. The Army has diverse experts available to it internally through such agencies as AEC, Army Center for Health Promotion and Preventative Medicine (CHPPM), and the Corps of Engineers (ACOE).
 - b. Other federal and state agencies should also be consulted in order to take advantage of their expertise.
3. As the proposal gets amended, the EA must be reevaluated to ensure it covers the pertinent aspects of the current project.
4. Provide for public participation to the “extent practicable.” 32 C.F.R. § 651.36(b). See Section G, below.
5. Ensure discussions are not conclusory statements without any analytical data to support a FONSI. Protect Key West v. Cheney, 795 F. Supp. 1552 (S.D. Fla. 1992).
6. Ensure cumulative impacts are considered, i.e., specific impacts of the project when combined with other past, present and reasonably

foreseeable future actions that are related to the proposed project. Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985).

7. An Administrative Record (AR) must be compiled to support the EA. The AR must thoroughly document all records, resources, and information on which the decision-maker is expected to make a decision. Use of the scoping process assists in compiling the AR.
8. The EA must actually be considered by the decision-maker prior to any irretrievable commitment of resources being made to the proposed action. The CEQ regulations state that an EA is intended to be less than 25 pages. In practice, they average about 150 pages. Agencies should examine the situation for applicability of an EIS if the document is going to be voluminous.

G. Publication.

1. The Army will make the completed EA and draft FONSI available to the public for comment for 30 days. 32 C.F.R. § 651.14 (b); 32 C.F.R. § 651.35.
2. The 30-day period can be reduced to 15 days if the full period would jeopardize the project and the full comment period “would provide no public benefit.” 32 C.F.R. § 651.14(b)(2)(iii)

IX. ENVIRONMENTAL IMPACT STATEMENTS (EISs).

- A. General. “[An EIS is required in] every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Socioeconomic impacts alone do not necessitate the preparation of an EIS. See Tongass Conservation Society v. Cheney, 924 F.2d 1137 (D.C. Cir. 1991).
- B. Conditions Requiring an EIS. 32 C.F.R. § 651.41 requires the preparation of an EIS by the proponent when a proposed action has the potential to:
 1. Significantly affect environmental quality or public health or safety. Several sections in the CEQ regulations clarify when a proposed action is one that significantly affects [has an impact on] the human environment. 40 C.F.R § 1508.3 defines “affecting” as “will or may have an effect on.” Effects include:

- a. Direct effects, which are caused by the action and occur at the same time and place.
 - b. Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.
2. Significantly affect historic or archaeological resources, and recreational or ecologically significant areas;
 3. Significantly affect prime and unique farmlands located off-post, wetlands, floodplains, coastal zones, or ecologically important areas, or other areas of unique or critical environmental sensitivity;
 4. Result in significant or uncertain environmental effects, or unique or unknown environmental risks;
 5. Significantly affect a federally listed threatened or endangered plant or animal species, a federal candidate species, a species proposed for federal listing, or critical habitat;
 6. Either establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects;
 7. Adversely interact with other actions with individually insignificant effects so that cumulatively significant environmental effects result;
 8. Involve the production, storage, transportation, use, treatment, and disposal of hazardous or toxic materials that may have a significant environmental impact;
 9. Be highly controversial from an environmental standpoint;
 10. Cause loss or destruction of significant scientific, cultural, or historical resources;

11. The determination of whether an effect is “significant” requires an analysis of both context and intensity:
 - a. Context. This means that the significance of an action must be analyzed in several ways such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the local community or environment rather than in the world as a whole. Both short- and long-term effects are relevant.
 - b. Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity (40 C.F.R. § 1508.27):
 - (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial;
 - (2) The degree to which the proposed action affects public health or safety;
 - (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;
 - (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial;
 - (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks;
 - (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration;

- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively notable impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts;
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources;
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act (ESA), and
- (10) Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment.

C. Actions normally requiring an EIS (32 C.F.R. § 651.42):

1. Significant expansion of a military facility (such as a depot or major training installation);
2. Construction in an environmentally sensitive area (e.g., wetlands, coastal zone);
3. Disposal of nuclear materials and other hazardous or toxic waste (except, in most routine cases, when a RCRA permit has been obtained);
4. Land acquisition, outleasing, and other actions that may lead to a significant change in land use;
5. CONUS realignment of brigade or larger units in peacetime (unless the only impacts are socioeconomic) (the Army has prepared EISs to cover stationing of Brigade Combat Teams through the period of the Wars in Afghanistan and Iraq); In. Ilio'ulaokalani Coalition v.

Rumsfeld, 464 F.3d. 1083 (9th Cir. 2006), the court ruled that the Army violated the NEPA when it designated 2d Brigade, 25th Infantry Division, for conversion to a Stryker Brigade Combat Team in Hawaii because it didn't consider alternatives to Hawaii stationing. The Army prepared a supplemental EIS to address this issue, and it was not challenged.

6. Closure of a major installation (unless the only impacts are socioeconomic);
7. Training exercises conducted outside the installation when significant environmental damage might occur, and
8. Major changes in the installation's mission affecting areas of critical environmental concern.

D. Key Steps in the EIS Process.

1. Notice of Intent (NOI): The Army will publish a notice in the federal register with brief details about the project so that affected members of the public can participate. 32 CFR 651.45
2. Scoping. Scoping immediately follows the NOI and allows the Army to learn from the public what some of the major issues will be for the EIS. Scoping identifies environmental, social, and economic impacts of a proposed project through public participation. Through the scoping process, the following questions should be answered:
 - (i) What alternative actions should be evaluated?
 - (ii) What environmental impacts should be evaluated?
 - (iii) What evidence is available?
 - (iv) Who will be responsible for obtaining the data and preparing the EIS?
 - (v) What time limits should be established?
- a. Starting points.

- (1) Develop a coherent statement of the proposal and alternative courses of action to achieve the proposal.
 - (2) Conduct preliminary research regarding potential environmental impacts, and identify potentially interested parties and groups.
- b. Determine how the public will participate.
- (1) Public notice is required. Make a serious, good-faith effort to reach potentially interested parties.
 - (2) Invite written comments.
 - (3) Invite telephonic input.
 - (4) Conduct one or more public meetings or hearings. Arguably, this is the best approach—it allows the development of working relationships, and it lets people see that their input is being considered. In conducting a public meeting, it is very important to keep an open mind while also focusing on gathering specific input from attendees and not debating or defending the proposed action or any alternative. Nevertheless, scoping does not require public meetings. 32 CFR 651.48(a)
- c. Prepare and distribute information packets.
- (1) Briefly explain the proposal.
 - (2) Identify alternatives the agency proposes to consider.
 - (3) Identify environmental issues and impacts.
 - (4) Explain the purpose of the scoping process, i.e., gathering specific comments to guide preparation of an EIS.
 - (a) What environmental impacts should be addressed?

(b) What alternatives should be evaluated?

(c) What resources should be consulted?

(5) Explain that no decision has been made on the contents of the EIS, or whether to proceed with the proposal, or how to proceed if it is pursued.

(6) Explain how the public can participate in the process.

3. Draft EIS (DEIS).

a. Follow the format described at 32 C.F.R. § 651.45.

b. Identify environmental issues and adequately evaluate environmental impacts.

c. Discuss the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity.

d. Consider all reasonable alternative courses of action, including:

(7) The alternative of “no action;”

(8) Reasonable alternatives beyond the decision-maker’s authority;

e. Identify irreversible commitments of resources;

f. Identify unavoidable adverse consequences if the proposal is implemented;

g. If there is one, identify the preferred alternative (only the Final EIS *must* have a preferred alternative identified);

h. Identify mitigation measures that will be implemented and discuss how mitigation will be ensured, and

- i. Distribute copies of the PDEIS to HQDA agencies for review and comment.
- j. Staffing and publication:

There will be a notice of availability published in the federal register for the DEIS, followed by a 45-day public comment period. This period can be made longer initially or can be extended upon public request.

The Deputy Assistant Secretary of the Army for Environmental Safety and Occupational Health (DASA-ES&OH) must approve publication of the notice of availability.

- 4. Final EIS (FEIS).
 - a. Acknowledge and address public comments on the DEIS. This is often done in a separate appendix.
 - b. Make corrections or additions as necessary.
 - c. Prepare Notice of Availability (NOA) for publication by the EPA in the Federal Register.
 - d. Take no action for 30 days following publication of the NOA. Although this is not officially a comment period, members of the public may comment. These comments can be addressed in the record of decision (See below)
- 5. Issue the Record of Decision (ROD). The ROD must include (32 CFR 651.45(j)):
 - a. A concise statement of the final decision and the reasons for choosing it.
 - b. An identification of all alternatives to the proposed action and the preferred alternative.
 - c. A statement that all practicable means of mitigation have been adopted, or reasons why mitigation was not adopted.

The ROD is the final agency decision for purposes of jurisdiction under the Administrative Procedure Act. (See Section XI B)

E. Mitigation Plans.

1. NEPA requires federal agencies to mitigate the adverse effects of their actions to the extent possible.
2. Agencies must include a reasonably detailed discussion of possible mitigation measures. While discussion is required, agency implementation is not. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).
3. 32 C.F.R. § 651.45(m) emphasizes the need to develop and implement mitigation plans. See *also* 32 C.F.R. Part 651 Appendix C.

F. Supplemental EISs. Agencies are required to supplement an EIS or DEIS if there “are significant new circumstances or information relevant to environmental concerns and bearing on the proposed actions or its impacts.” 40 C.F.R. § 1502. Courts are required to defer to an agency’s determination regarding the significance of new information unless the agency has acted arbitrarily or capriciously. Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1961 (1989).

G. Common Shortcoming of EISs.

1. Failure to compile an adequate administrative record detailing all information relied on in reaching a decision regarding the proposed action.
2. Sweeping conclusions unsupported by facts.
3. Vagueness regarding important issues.
4. Internal contradictions.
5. Disregard for local land use plans.
6. Inadequate treatment of secondary and cumulative environmental impacts.

7. Failure to adequately address realistic alternatives.
8. Failure to make an unbiased comparison between realistic alternatives.

X. NEPA COMPLIANCE OVERSEAS.

- A. In 1979, President Carter issued Executive Order (EO) 12114 formally adopting the position that NEPA does not apply to the actions of federal agencies overseas. Nevertheless environmental groups have steadily challenged federal actions overseas for failing to abide by the EIS requirement of NEPA.
 1. The most significant challenge to date came in the case, Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993). The court in this case held that the National Science Foundation should have complied with NEPA before deciding to build an incinerator to burn refuse in Antarctica. The Court's holding relied on:
 - a. The determination that NEPA only regulates domestic procedural decision-making;
 - b. Antarctica has no sovereign, thus there can be no conflicts-of-laws dilemma, and
 - c. The U.S. exercises extensive legislative control over Antarctica.
 2. The next court to review NEPA's extraterritorial reach viewed the Massey decision as being limited to its unique facts. Additionally, the court in NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993), followed previous court rulings on this issue and found that since Congress had not clearly expressed an intent to apply NEPA abroad, the presumption against the extraterritorial application of statutes clearly applied. See Greenpeace U.S.A. v. Stone, 748 F. Supp. 749 (D. Haw. 1990); and Nuclear Resource Defense Council (NRDC) v. Nuclear Regulatory Commission, 647 F.2d 1345 (D.C. Cir. 1981). See *also*, E.E.O.C. v. Arabian American Oil Co. (ARAMCO), 111 S. Ct. 1227 (1991); and Smith v. United States, 113 S. Ct. 1178 (1993)). This was especially true in Aspin since the plaintiffs were attempting to force DoD to prepare EISs for the operation of U.S.

military installations in Japan, and these operations are governed by complex and long standing treaty arrangements. The court felt that any requirement to prepare these EISs would risk intruding upon a security relationship between the U.S. and a sovereign power.

- B. Notwithstanding the position in EO 12114 that NEPA does not apply overseas, the EO still requires consideration of environmental impacts of actions taken abroad in certain circumstances. These requirements, as they apply to DoD, are set out in DoDD 6050.7, Environmental Effects Abroad of Major DoD Actions (31 March 1979), and at 32 C.F.R. Part 651 Subpart H. DoDD 6050.7 is discussed in Chap. XI of this deskbook.

XI. ADDITIONAL NEPA ISSUES.

A. Remedies for Violations.

1. NEPA itself provides no remedy (citizen suit provision) for failing to meet its requirements. Suits must be brought under the Administrative Procedure Act (APA) alleging the agency acted in an arbitrary and capricious manner in preparing the EA or EIS or issuing a FONSI, or otherwise abused its discretion. See Marsh v. Oregon Natural Resources, 109 S. Ct. 1851 (1989); Sierra Club v. Flowers, 526 F.3d 1353 (11th Cir. 2008). The most common remedy sought is an injunction, which stops further agency action until it fully complies with NEPA's mandates.
2. Upon proving a violation has occurred, the plaintiff is entitled to *some* remedy. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
3. There is precedent suggesting that courts still can apply equitable principles in deciding whether to enjoin the violation.
 - a. Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531 (1987) (Court overruled the 9th Circuit's opinion that a violation of an environmental statute almost automatically requires an injunctive remedy).
 - b. Weinberger v. Barcelo-Romero, 456 U.S. 305 (1982) (Court refused to enjoin a Clean Water Act violation, instead ordering the Navy to apply for a discharge permit).

- c. Wisconsin v. Weinberger, 745 F.2d 412, 424-28 (7th Cir. 1984) (in dicta, the court states that an injunction should not be the automatic remedy when NEPA is violated).
- d. Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976) (the Court fashioned a remedy other than an injunction for a violation of NEPA).
- e. *But see*, Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989) (the Court distinguished Amoco Production Company, and found that unimpeded bureaucratic inertia may foreclose serious re-evaluation of a project after a NEPA violation has been identified, and held that the resulting commitment to the project may constitute the irreparable harm to the decision-making process that NEPA requires.)
- f. The Supreme Court recently affirmed that the existence of a NEPA violation does not create a presumption that injunctive relief is appropriate. Monsanto v. Gerston Seed Farms, Inc., 2010 WL 2471057 (U.S.)

4. Attorneys' fees may be part of a judicial remedy under the APA.

B. Judicial Review.

- 1. Standing. A person seeking judicial review under the general review provisions of the APA must identify some final agency action that has injured him in a manner that falls within the "zone of protected interests" sought to be protected by the statute. Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990).
- 2. Standard for reviewing decision not to prepare an EIS.
 - a. There is a split of authority on the applicable standard of review. See River Rd. Alliance, Inc. v. Corps of Engineers, 475 U.S. 1055, 106 S. Ct. 1283 (1986) (White, J, dissenting from denial of *certiorari*); and Gee v. Boyd, 471 U.S. 1058, 105 S. Ct. 2123 (1985) (White, J, dissenting from denial of *certiorari*).
 - b. Arbitrary, capricious, or abuse of discretion—1st, 2d, 4th, and 7th Circuits.

- c. Reasonableness—5th (and probably 11th), 8th, 9th, and 10th Circuits, and possibly the 3d Circuit.
 - d. Hybrid--Court of Appeals for the District of Columbia Circuit; See Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983).
 - e. The Supreme Court probably answered the question in Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851 (1989), when it ruled that the arbitrary and capricious standard should be used in reviewing an agency decision not to prepare a supplemental EIS.
- C. Emergency Provisions. NEPA contains no emergency exception procedures within the statute, but states that actions should be “consistent with other essential considerations of national policy.” See 42 USC §4331.
- 1. “Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the [CEQ] about alternative arrangements. Agencies and the [CEQ] will limit such arrangements to actions necessary to control the immediate impacts of the emergency.” 40 C.F.R. §1506.11.
 - 2. Disasters such as Hurricane Katrina in 2005 have prompted exceptions for federal actions under NEPA. The CEQ gave the following guidance on factors to consider when seeking alternative arrangements:
 - a. Nature and scope of the emergency;
 - b. Actions necessary to control the immediate impacts of the emergency;
 - c. Potential adverse effects of the proposed action;
 - d. Components of the NEPA process that can be followed and provide value to decision-making (e.g., coordination with affected agencies and the public);
 - e. Duration of the emergency, and

- f. Potential mitigation measures.
3. Alternative arrangements are still subject to judicial review. See Valley Citizens for a Safe Environment v. Vest, 1991 US Dist Lexis 21863 (1991).
- D. Sensitive Information and Terrorist Activity. San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006).
1. The possibility of a terrorist attack on a federal facility is not too remote to require analysis under NEPA. “If the risk of a terrorist attack is not insignificant, then NEPA obligates [a federal agency] to take a ‘hard look’ at the environmental consequences of that risk.”
 2. Risk assessments can be qualitative as opposed to numeric.
 3. Agencies do not have to conduct a “worst-case analysis,” but the current CEQ regulation requires analysis of potentially catastrophic consequences even if the probability of occurrence is low.
 4. Sensitive information may be withheld from public disclosure under NEPA, but it still must be factored in the NEPA analysis and decision-making process.
- E. Climate Change and NEPA. There are several factors that now require federal agencies to consider in NEPA documents how major federal actions could affect sources and sinks of greenhouse gases (GHGs) and how climate change could potentially influence such actions.
1. Case Law: Several federal court decisions over the last few years have required federal agencies to analyze climate change and related issues in NEPA documents. See Mayo Foundation v. Surface Transportation Board, 472 F.3d 545 (8th Cir. 2006); Center for Biological Diversity v. NHTSA, 508 F.3d 508 (9th Cir. 2007); Sierra Club v. Clinton, 689 F. Supp 2d 1123 (D. Minn 2010). But see also North Carolina Alliance for Transportation Reform v. Department of Transportation, 2010 WL 1992816 (M.D.N.C.)
 2. CEQ Draft Guidance:
 - a. Released 18 Feb 2010: “[I]f a proposed action would be reasonably anticipated to cause direct emissions of 25,000

metric tons or more of CO₂-equivalent GHG emissions on an annual basis . . . A quantitative and qualitative assessment may be meaningful to decision makers and the public.”

- (1) Specifically does NOT address Federal land and resources management actions
- (2) Agencies should consider reducing vulnerability to climate change impacts
- (3) 25K Tons is NOT an “absolute standard of insignificant effects.”

b. Bottom line: Army NEPA documents need to consider climate change. This includes actions introducing new vehicles to an installation. Because climate change is a global phenomenon, we would be allowed to say there is no net gain if the vehicles are simply moving from one installation to another.

F. Environmental Justice. Executive Order 12898 requires federal agencies to avoid disproportionate placement of adverse impacts on minority and low income communities. This requirement should be incorporated in environmental planning under NEPA when a minority or low income community outside the installation may be affected by the federal action.

G. Children. Federal agencies must investigate any environmental effects of their actions with respect to children under the provisions of Executive Order 13045. The agency’s finding must assess whether the action has any health or safety risks that disproportionately affect children.

XII. CONCLUSION.

NEPA compliance is very important. Although the law applies only in the United States, it can affect the ability of units to transform and deploy. It is also one of the main ways that plaintiffs can challenge Army actions.

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CHAPTER C
THE ENDANGERED SPECIES ACT

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I. REFERENCES.

A. Federal Statutes and Regulations.

1. The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544.
2. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d.
3. The Sikes Act, 16 U.S.C. § 670a-f, *as amended by* The Sikes Act Improvement Act of 1997, Pub. L. No. 105-85, sec. 2901-2914.
 - a. Requires each military department to manage the natural resources at its installations to provide for “sustained multiple purpose uses” and public access “necessary or appropriate to those uses.”
 - b. Natural resource planning and management must occur through a statutorily mandated process that establishes time lines, prescribes necessary elements, and requires open and coordinated preparation.
 - (1) DoD installations were required to implement formal integrated natural resource management plan (INRMP) not later than 18 November 2001. Installations with existing “cooperative plans” must negotiate with the U.S. Fish and Wildlife Service (FWS) and the appropriate state fish and wildlife agency regarding changes necessary to ensure such plans meet the INRMP requirements of the 1997 Sikes Act amendments.
 - (2) Each INRMP must reflect the “mutual agreement” of the FWS and the state fish and wildlife agency concerned.
 - (a) Only those portions of the INRMP that concern “conservation, protection, and management of fish and wildlife resources” are subject to “mutual agreement.”

(b) DoD need not reach agreement with the FWS and state fish and wildlife agencies on INRMP provisions that address military training and land use planning areas beyond fish and wildlife.

(3) When developing INRMPs, installations must consider other statutory mandates; e.g., necessary levels of NEPA analysis/documentation and consultation under § 7 of the ESA.

4. Title 50, Code of Federal Regulations.

a. Part 17 - Endangered and threatened wildlife and plants.

b. Part 402 - Interagency cooperation. Subpart B addresses consultation procedures.

c. Part 424 - Listing endangered and threatened species and designating critical habitat.

d. Parts 450-453 - Endangered species exemption process.

B. State Authority.

1. 16 U.S.C. § 1535(f) provides that state laws that prohibit the “taking” of endangered or threatened species may be more, but not less, restrictive than federal law.

2. 10 U.S.C. § 2671 requires that all hunting, fishing, and trapping on military installations be in accordance with state law, and that appropriate state licenses be obtained for such activities on the installation.

C. Related Army Regulations. AR 200-1, Environmental Protection and Enhancement.

II. INTRODUCTION.

A. Purpose.

1. Congress’s purpose in enacting the ESA was to:

- a. Establish a program for the conservation of endangered and threatened species, and
 - b. Create a means whereby the ecosystems upon which endangered and threatened species depend may be conserved. 16 U.S.C. § 1531(b).
2. In interpreting Congressional intent, the Supreme Court declared that the statute's purpose is "to halt and reverse the trend toward species extinction, whatever the cost." Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

B. Applicability.

1. Often referred to as the "pit bull" of environmental legislation, the ESA is a broad and powerful statute.
2. Federal circuit litigation highlights the ESA's wide-sweeping scope. See National Association of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir 1997), where the District of Columbia Circuit held that the ESA's prohibition against the "taking" of an endangered species of fly found only in California was a constitutional exercise of Congress' Commerce Clause power.
 - a. Commerce Clause Background.
 - (1) Congress' constitutionally based power to regulate commerce has given rise to most environmental protection statutes, including the ESA.
 - (2) Congress' Commerce Clause power extends to the regulation of (U.S. v. Lopez, 514 U.S. 549 (1995)):
 - (a) The use of channels of interstate commerce;
 - (b) The instrumentalities of interstate commerce, or persons or things in interstate commerce, and
 - (c) Those activities that substantially affect interstate commerce.

b. Reasoning in National Association of Home Builders.

- (1) Majority. The majority found that the ESA's "takings" prohibition (contained in § 9 of the statute) is a constitutional regulation of both "the use of channels of interstate commerce" and "activities that substantially affect interstate commerce."
 - (a) Use of Channels of Interstate Commerce. The majority reasoned that the ESA's prohibition on "takings" is necessary to enable the government to control the transport of endangered species in interstate commerce (also prohibited by § 9 of the Act) and keep interstate commerce channels free of "immoral and injurious uses."
 - (b) Activities Substantially Affecting Interstate Commerce.
 - (i) The majority concluded, first, that the "takings" prohibition prevents the destruction of biodiversity and, thereby, protects the current and future interstate commerce that relies on it. In so finding, the majority cited the economic value of plants and animals to medical, pharmaceutical, and genetic research.
 - (ii) The majority also reasoned that the "takings" prohibition prevents destructive interstate competition by preventing states from lowering their standards for endangered species protection in order to attract development.
- (2) The concurrence agreed with the majority's conclusion, but not its rationale, concluding that loss of biodiversity itself has a substantial effect on interstate commerce, even where it is impossible

to know if any given species may have some future medical, genetic, or economic value.

- (3) Dissent. Killing of flies is not “commerce,” and killing of flies that occurs only in California is not “interstate.”

III. KEY DEFINITIONS.

- A. Action. All activities or programs of any kind authorized, funded, or carried out, in whole or in part, by federal agencies in the U.S. 50 C.F.R. § 402.02.
- B. Biological Assessment (BA). The information prepared by or under the direction of the federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. 50 C.F.R. § 402.02.
- C. Biological Opinion (BO). The document that states the opinion of the FWS or the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS) as to whether a federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.02.
- D. Candidate Species. Any species being considered for listing as an endangered or threatened species, but not yet the subject of a proposed rule. 50 C.F.R. § 424.02(b). Such species are not protected by the ESA, but are subject to conservation requirements.
- E. Confer. Informal discussions between a federal agency and the FWS or NMFS regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects. 50 C.F.R. § 402.02.
- F. Conserve. To use all means necessary to bring an endangered or threatened species to the point where the protection of the ESA is no longer needed. 16 U.S.C. § 1532(3); 50 C.F.R. § 424.02(c).
- G. Critical Habitat. Specific areas in which are found those physical or biological features essential to the conservation of a species and which may require special management consideration or protection. Critical habitat may include areas outside the geographical area occupied by

the species at the time it is listed. 16 U.S.C. § 1532(5)(A); 50 C.F.R. § 424.02(d). The designation of critical habitat must take into consideration the economic impact of the designation. 16 U.S.C. § 1533(b)(2). In response to the DoD's "Readiness and Range Preservation Initiative" seeking legislation to mitigate encroachment of environmental laws on military training, Congress in 2002 approved an amendment to the ESA providing that the FWS would not designate as critical habitat any DoD-controlled lands that are subject to an INRMP. 16 U.S.C. § 1533(a)(3)(B).

- H. Destruction or Adverse Modification. A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. 50 C.F.R. § 402.02.
- I. Endangered Species. A species in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6); 50 C.F.R. § 424.02(e). Listing is based solely on biological criteria derived from scientific and commercial data. 16 U.S.C. §§ 1533(a)(1) and (b)(1)(A).
- J. Formal Consultation. A process between the FWS or the NMFS and the federal agency that commences with the federal agency's written request for consultation and concludes with the Service's issuance of a BO. 50 C.F.R. § 402.02.
- K. Harass. An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. 50 C.F.R. § 17.3.
- L. Harm. An act that actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3.
- M. Informal Consultation. An optional process that includes all discussions, correspondence, etc., between the FWS or NMFS and the federal agency prior to formal consultation, if required. 50 C.F.R. § 402.02.
- N. Jeopardize. To engage in an action that would reasonably be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. 50 C.F.R. § 402.02.

- O. Listed Species. Any species of fish, wildlife, or plant that has been determined to be endangered or threatened. 50 C.F.R. § 402.02.
- P. Major Construction Activity. A construction project or other similar activity on a scale that would trigger the requirement for an Environmental Impact Statement (EIS) by significantly affecting the quality of the human environment. 50 C.F.R. § 402.02.
- Q. Person. An individual, corporation, partnership, association, or any other private entity; any officer, employee, agent, department, or instrumentality of the federal government; any state, municipality, or political subdivision of a state; or any other entity subject to the jurisdiction of the U.S. 16 U.S.C. § 1532(13).
- R. Proposed Critical Habitat. Habitat proposed in the Federal Register to be designated or revised as critical habitat under the ESA for any listed or proposed species.
- S. Proposed Species. Any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under the ESA. 50 C.F.R. § 402.02.
- T. State-listed Species. Those species listed as endangered or threatened under state law. Such species are not protected by the ESA, but are subject to conservation requirements.
- U. Take. To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).
- V. Threatened Species. A species likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02(m). Listing is based solely on biological criteria derived from scientific and commercial data. 16 U.S.C. § 1533(a)(1) and (b)(1)(A).

IV. KEY PROVISIONS.

- A. The FWS and the NMFS administer the ESA. Terrestrial biology is primarily the responsibility of the FWS. Marine biology is primarily the responsibility of the NMFS.

- B. Endangered and threatened wildlife species (including mammals, birds, reptiles, amphibians, fish, clams, snails, insects, arachnids, and crustaceans) are listed at 50 C.F.R. § 17.11.
- C. Endangered and threatened plant species are listed at 50 C.F.R. § 17.12.
- D. The ESA requires federal agencies to act to “conserve” endangered and threatened species. In furtherance of those goals, the ESA prohibits the “taking” of any endangered fish or wildlife species and the removal or destruction of any endangered plant species. 16 U.S.C. § 1538. Further, when a federal agency proposes taking any action that would affect an endangered or threatened species or result in the destruction or adverse modification of its critical habitat, the agency must “consult” with the FWS/NMFS. 16 U.S.C. § 1536(a)(2) & (3). Where agency action would affect a proposed species or result in the destruction or adverse modification of proposed critical habitat, the agency must “confer” with the FWS/NMFS. 16 U.S.C. § 1536 (a)(4).
- E. When a proposed agency action cannot be undertaken without jeopardizing an endangered species or its habitat, the preservation of the species must be accorded priority. See, e.g., Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). Once it is determined that the agency’s action would harm a listed species, there is no balancing of competing interests, unless those interests are between or among endangered species. See, e.g., Palila v. Hawaii Dep’t of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988).
- F. 1214 animal species have been listed as either endangered or threatened. Listed endangered and threatened plant species total 750. Installations increasingly have to cope with the presence of indigenous endangered species (e.g., the desert tortoise at Fort Irwin and the red-cockaded woodpecker at Forts Benning, Bragg, Polk, and Stewart). Moreover, there has been increased pressure by environmentalists to use military installations as habitat for endangered species being reintroduced into the wild from captive breeding programs (e.g., introduction of the Mexican grey wolf onto White Sands Missile Range, New Mexico).

V. MECHANICS.

- A. Listing Endangered or Threatened Species.

1. The Secretaries of the Interior and Commerce determine whether a species is endangered or threatened. This determination must be based solely on the best scientific and commercial data regarding a species' status available at the time. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b). Economic considerations may not be considered.
2. Once a species is determined to be either endangered or threatened, a final rule to implement such determination is published in the Federal Register.
 - a. Generally, listing decisions must be accomplished within one year from the date either Secretary proposes a species be listed. Oregon Natural Resources Council, Inc. v. Kantor, 99 F. 3d 334 (9th Cir. 1996). This period can be extended by up to 6 months if there is substantial disagreement among scientists knowledgeable about the species concerned regarding the sufficiency or accuracy of information relevant to the listing determination. 16 U.S.C. § 1533(b)(6); 50 C.F.R. § 424.17(a).
 - b. The ESA does not prevent the Secretaries of the Interior or Commerce from listing a species as endangered simply because the 12 or 18 month time limit has expired. Congress established these time limits to speed up the listing process so that more species would be listed. The time limits were designed merely as an impetus to act rather than a bar on subsequent action. Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392 (9th Cir. 1995).
3. After a species has been listed, it may be removed only if the Secretary concerned finds that:
 - a. The species has become extinct;
 - b. The species has recovered to a point that the best scientific and commercial data available indicate that it is no longer endangered or threatened, or
 - c. The original listing was in error. 50 C.F.R. § 424.11.

B. Designating Critical Habitat.

1. The Secretaries of the Interior and Commerce must also make critical habitat determinations “to the maximum extent prudent and determinable” at the same time a species is listed as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A).
 2. In most cases, concurrent critical habitat determinations are rarely made. Political, commercial, and economic interests lobby the FWS and NMFS to avoid making such determinations out of fear that critical habitat designations will negatively impact on property use or otherwise restrict activities in the affected area. Unlike species listing decisions, critical habitat designations must take into consideration economic as well as any other relevant impact of the designation. 16 U.S.C. § 1533(b)(2).
 3. The Secretaries of the Interior and Commerce may exclude any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of inclusion, unless the failure to include the area will result in the extinction of the species concerned. 16 U.S.C. § 1533(b)(2).
 4. Section 318 of the National Defense Authorization Act of 2004 amended § 4(a)(3) of the ESA (16 U.S.C. § 1533(a)(3)) to prevent the Secretary of Interior from designating DoD land as critical habitat if the land has a written integrated natural resource management plan under the Sikes Act.
 5. Maps of critical habitat for fish and wildlife and plants are listed at 50 C.F.R. §§ 17.95 & 17.96, respectively.
- C. Recovery Plans. Once a species is listed, the Secretary concerned must develop and implement a recovery plan for the conservation and survival of that endangered or threatened species, unless he finds that such a plan will not promote the conservation of the species. These plans detail passive as well as affirmative steps required to save a species from extinction. 16 U.S.C. § 1533(f). Like designation of critical habitat, the development of recovery plans for endangered and threatened species has not kept pace with the listing of such species.

VI. AFFIRMATIVE DUTIES OF FEDERAL AGENCIES UNDER SECTION 7 OF THE ESA -- 16 U.S.C. § 1536.

- A. Section 7 (16 U.S.C. § 1536) of the Act applies only to federal agencies. Often described as “the heart of the ESA,” § 7 imposes a

number of affirmative obligations on federal agencies, including the Army.

B. Conservation.

1. Federal agencies are required to carry out programs for the conservation of listed species. 16 U.S.C. § 1536(a)(1). Agencies will, however, be given some discretion in carrying out their duties to conserve listed species. See Pyramid Lake Paiute Tribe of Indians v. Navy, 898 F.2d 1410 (9th Cir. 1990).
2. The Army has determined that in order to discharge its conservation responsibilities under the ESA it will take affirmative measures to promote species growth and avoid actions likely to jeopardize endangered and threatened species.

C. Avoid Actions That Jeopardize Species or Habitat.

1. Federal agencies are required to ensure that agency actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2).
2. If an area on the installation is designated as critical habitat for an endangered or threatened species, the commander has a duty to protect that habitat even if the species itself is not present on the installation.

D. Consult.

1. Federal agencies must consult with the appropriate Service (FWS or NMFS) whenever the agency carries out required programs for the conservation of listed species, or anticipates taking any action that may affect a listed species or critical habitat. 16 U.S.C. § 1536(a).
2. The term “action” is very broadly defined and includes virtually any conceivable activity that could affect, beneficially or adversely, a listed species. See 50 C.F.R. § 402.02. See *a/so* Lane County Audubon Society v. Jamison, 958 F.2d 290 (9th Cir. 1992), where the court held that the Bureau of Land Management’s strategy for managing 1,149,954 acres of old-growth timber associated with the endangered northern spotted owl constituted “agency action” requiring consultation.

3. Upon initiation of consultation, an agency is not permitted to make an irretrievable commitment of resources that has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d).
4. Consultation can be either “formal” or “informal.”
 - a. Informal consultation, consisting of discussions and exchange of correspondence, is an optional process. 50 C.F.R. § 402.02. It should be used when it is unclear whether or not the proposed agency action will affect a listed species. Installations can and should enter into early informal consultations with the FWS or NMFS to determine whether anticipated or ongoing actions will result in effects that may trigger the formal consultation requirement.
 - b. The informal consultation process will result in a decision by the agency on whether or not it is appropriate to engage in formal consultation with the FWS or NMFS.
 - c. If, during informal consultation, the agency, with the written concurrence of the FWS or NMFS, determines that the proposed action is not likely to affect listed species or critical habitat, the consultation process is terminated and no further action is necessary.
 - d. Formal consultation is mandatory where it is determined that a protected species or critical habitat may be affected by the proposed action. Formal consultation procedures are explained in detail at 50 C.F.R. § 402.14.

E. Confer.

1. Federal agencies must confer with the FWS/NMFS whenever any agency action is likely to jeopardize a proposed species or result in the destruction or adverse modification of proposed critical habitat. 16 U.S.C. § 1536(a)(4).
2. A conference generally consists of informal discussions resulting in the FWS or NMFS making recommendations on appropriate agency actions. These discussions can be used to assist in:

- a. Preparing agency comments on the economic impact of designating an area as critical habitat.
 - b. Pre-planning for agency actions necessary if the species is listed.
 - c. Deciding whether or not consultation will be required if the species is listed.
3. Unlike the consultation process, federal agencies are not prohibited from making irretrievable commitments of resources after beginning a conference.

F. Conduct Biological Assessments (BA).

1. 16 U.S.C. § 1536(c) requires federal agencies to conduct BAs for major construction and other activities having similar physical impacts on the environment, if any listed or proposed species is present in the area directly or indirectly affected by the action.
2. In the Army, installation wildlife and operational personnel should prepare the BA. Outside experts and consultants should be retained as appropriate to ensure that the assessment is thorough and scientifically defensible. The contents of a BA are at the discretion of the federal agency and will depend on the precise nature of the federal action. 50 C.F.R. § 402.12(f). At a minimum, however, the BA should contain:
 - a. A description of the proposed action to include any appropriate environmental enhancements/mitigation to be conducted concurrently.
 - b. A description of the affected environment (to include the listed or proposed species).
 - c. A description of how the proposed action will affect the species, including consideration of cumulative effects, if applicable.
3. Although technically required only when major construction is involved, BAs should be prepared whenever possible. Doing so:

- a. Satisfies the agency's obligation to use the best scientific and commercial data in fulfilling its § 7 consultation responsibilities. 50 C.F.R. § 402.14(d) requires that federal agencies requesting formal consultation provide the FWS/NMFS with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat.
 - b. Helps address the practical problems caused by lack of Service expertise concerning a particular listed species and the Service's lack of interest in finding creative solutions that will protect the species and still allow for completion of the military mission.
4. If the BA results in a determination that the proposed action may affect a listed species or result in the destruction or adverse modification of critical habitat, formal consultation with the FWS or NMFS is required.
 5. If the BA results in a determination that the proposed action may affect a proposed species or result in the destruction or adverse modification of proposed critical habitat, a conference with the FWS or NMFS is required.
- G. Overseas Applicability of § 7 Requirements.
1. Section 7 does not contain any express language indicating whether Congress intended that it apply to federal agency actions overseas.
 2. Several other provisions of the ESA do expressly relate to government action designed to protect endangered species overseas. These provisions caused one court to conclude that § 7 consultation requirements also apply overseas. Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990). The Supreme Court overturned the 8th Circuit holding that the plaintiffs did not have proper standing to challenge this issue. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The Supreme Court did not address the extraterritorial applicability issue, which may be raised in a later case.

VII. THE BIOLOGICAL OPINION (BO).

- A. Based on consultation with the agency and the BA (if any), the FWS/NMFS will issue a BO. 16 U.S.C. § 1536(b)(3)(A). The purpose of the BO is to advise the agency on how the proposed action will affect listed species or critical habitat.

- B. There are 3 possible findings in a BO:
 - 1. The proposed action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a “no jeopardy” BO).
 - 2. The proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, but there are reasonable and prudent alternatives to the proposed action (a “jeopardy with reasonable and prudent alternatives” BO).
 - 3. The proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, and there are no reasonable and prudent alternatives to the proposed action (a “jeopardy” BO).

- C. Incidental Takes. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).
 - 1. In cases involving “no jeopardy” and “jeopardy with reasonable and prudent alternatives” BO, proposed federal actions are likely to proceed and may result in the loss of individual members of an endangered or threatened species population incidental to such agency action.
 - 2. If the FWS/NMFS determines that such “incidental takes” will not violate the ESA, the Service concerned will provide an “incidental take statement” with the BO. The “incidental take statement” specifies:
 - a. The impact of the incidental taking on the species;
 - b. The measures necessary or appropriate to minimize the impact of the taking;

- c. The terms or conditions with which the agency must comply to implement the measures necessary to minimize the impact of the taking, and
 - d. The procedures to be used for handling or disposing of any species actually taken.
- D. A federal agency is not absolutely bound by the BO. If it deviates from any recommended alternatives, however, it has no protection from the opinion's incidental take statement. Any taking without the protection of an incidental take statement or a permit will be a violation of the ESA and could result in criminal or civil penalties. So long as there is no incidental taking as a result of the agency's deviation from the BO, the agency will not be in violation of the ESA if it takes "alternative, reasonably adequate steps to ensure the continued existence of any endangered or threatened species." Village of Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989).
- E. A BO from FWS that an activity will not adversely impact an endangered species does not necessarily guarantee that a federal action can proceed. Courts will review BOs based on an arbitrary and capricious standard. See Greenpeace Action v. Franklin, 982 F.2d 1342 (9th Cir. 1992), *amended opinion and order*, 14 F.3d 1324 (9th Cir. 1993); Center for Biological Diversity v. Rumsfeld, No. 99-203 (D. Ariz. 2002). Also, an agency may not blindly rely on the BO if such reliance is arbitrary and capricious. See Pyramid Lake Paiute Tribe of Indians v. Navy, 898 F.2d 1410 (9th Cir. 1990).

VIII. PROHIBITED ACTS -- 16 U.S.C. § 1538 (SECTION 9).

- A. Section 9 of the ESA prohibits a wide range of conduct deemed threatening to species, including importing, exporting, removing, taking, damaging, destroying, possessing, selling, carrying, transporting, shipping, delivering, and receiving. 16 U.S.C. § 1538(a).
- B. The most important prohibitions are phrased in terms of endangered species only; however, implementing regulations have extended most of the § 9 prohibitions to threatened species as well.
- C. The § 9 prohibitions apply to "any person subject to the jurisdiction of the United States." This includes individuals as well as federal agencies. Violators are subject to criminal and civil liability.
- D. Takings.

1. Arguably, the most significant of the § 9 prohibitions for the Army and its personnel.
2. In recent years, one of the most hotly contested issues in the takings arena has been whether adverse habitat modification constitutes an unlawful § 9 taking.
 - a. Section 9 does not expressly forbid adverse habitat modification; however, it does forbid the taking of endangered fish and wildlife species, which the Act defines to include the harming of such species. 16 U.S.C. § 1532(19).
 - b. The ESA itself does not define the term “harm.” Under the implementing Interior and Commerce Department regulations, however, “harm” includes “significant habitat modification or degradation [that] actually kills or injures wildlife by significantly impairing essential behavioral patterns” 50 C.F.R. § 17.3.
 - c. In Palila v. Hawaii Dep’t of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988), the 9th Circuit upheld this regulatory expansion of the concept of “takings.” The court concluded that when Congress used the term “take” in the ESA, it intended to define the term broadly; and, therefore, the regulatory interpretation embodied in 50 C.F.R. § 17.3 followed the plain language of the Act by protecting ecosystems on which endangered species depend as part of the overall scheme to conserve listed species. The District of Columbia Circuit disagreed, finding that the regulatory definition of “harm” was “neither clearly authorized by Congress nor a ‘reasonable interpretation’ of the statute.” Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994), *rev’d*, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).
 - d. In 1995, the Supreme Court resolved the issue, holding that the Secretary of the Interior reasonably construed Congress’ intent when he defined “harm” to include habitat modification. Accordingly, habitat modification or degradation that indirectly kills or injures a species can constitute “harm” and, therefore, a taking of the species under § 9 of the Act. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

E. Plant Species.

1. Section 9 protects plants as well as fish and wildlife. 16 U.S.C. § 1538(a)(2).
2. Under § 9 of the ESA, it is unlawful for any person subject to the jurisdiction of the U.S. to remove and reduce to possession any endangered plant from areas under federal jurisdiction or to maliciously damage or destroy any endangered plant in such areas. It is also an ESA violation to remove, cut, dig up, damage, or destroy endangered plants in any other area in knowing violation of state law or in the course of any violation of a state criminal trespass statute. 16 U.S.C. § 1538(a)(2)(B).
3. Most § 9 prohibitions regarding endangered plant species have also been extended to threatened plant species via implementing federal regulations.

IX. EXCEPTIONS AND EXEMPTIONS.

- A. Permits. 16 U.S.C. § 1539(a). The FWS/NMFS can issue permits for takings of protected species for scientific purposes or to enhance the propagation or survival of the affected species. Permittees must submit a conservation plan that specifies:
1. The impact resulting from such takings;
 2. The mitigating steps that will be taken to minimize the effects of the taking, including the funding that will be available to implement such steps, and
 3. What alternatives to taking were considered and why they could not be utilized. 16 U.S.C. § 1539(a)(2)(A).
- B. Endangered Species Committee. 16 U.S.C. § 1536 (e) - (i).
1. Background.
 - a. In 1978, the Supreme Court enjoined the Tennessee Valley Authority from finishing construction on a virtually completed \$100 million dam project because the reservoir created by the dam would completely inundate a portion of the Little Tennessee River that had been

designated as critical habitat for the snail darter, a small fish listed as endangered under the ESA. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

- b. In so ruling, the Court commented as follows: “It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result One would be hard pressed to find a statutory provision whose terms were any plainer than those of § 7 of the Endangered Species Act. This language admits of no exceptions (emphasis added).”
- c. Astonished by the plain language of its own statute, Congress responded to Tennessee Valley Authority v. Hill by extensively amending the ESA. Among the changes, Congress established the Endangered Species Committee (ESC) and created a complex exemption process under § 7 of the Act.

2. The ESC and the § 7 exemption process.

- a. The ESC is composed of 7 members, including the Secretary of the Army. 16 U.S.C. § 1536(e)(3). The ESC can grant federal agencies an exemption from the § 7 requirement to ensure that agency actions are not likely to jeopardize an endangered or threatened species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(e)(2).
- b. Normally, ESC exemptions are permanent with respect to all endangered or threatened species associated with the federal action (16 U.S.C. § 1536 (h)(2)(A)) and are considered final agency actions for purposes of citizen suits. 16 U.S.C. §§ 1536(h)(1) and (n).
- c. Criteria for granting an exemption. 16 U.S.C. § 1536(h)(1). The ESC shall grant an exemption if it determines that:

- (1) There are no reasonable and prudent alternatives to the agency action.
- (2) The benefits clearly outweigh the benefits of alternative courses of action consistent with preserving the species or critical habitat.
- (3) The action is of regional or national significance.
- (4) There has been no irretrievable commitment of resources.
- (5) Necessary and appropriate mitigation and enhancement measures are established.
- (6) It is determined that consultation was carried out in good faith and any required assessments were completed.

C. National Security Exemption. 16 U.S.C. § 1536(j).

1. 16 U.S.C. § 1536(j) provides that the ESC “shall grant an exemption for any agency action if the Secretary of Defense finds that such an exemption is necessary for reasons of national security.”
2. Congress intended, however, that this exemption only be used in cases of imminent danger to the United States. Under normal circumstances, the agency should first seek a routine exemption from the ESC.

X. PENALTIES AND ENFORCEMENT—16 U.S.C. § 1540 (SECTION 11).

A. Violations of the ESA can result in either civil or criminal sanctions.

1. Civil penalties.
 - a. Each knowing violation can result in penalties of up to \$25,000.

- b. Other violations (negligence) can result in penalties of up to \$500 per violation.
 - c. Government employees are not immune.
 - 2. Criminal penalties.
 - a. Any person can face criminal charges for a knowing violation of the ESA. The government need only prove the person had the general intent to commit the act that constituted a violation of the ESA. Specific intent to actually harm or kill an endangered or threatened species is not required. See United States v. Billey, 667 F. Supp. 1485 (S.D. Fla. 1987); United States v. St. Onge, 676 F. Supp. 1044 (D. Mont. 1988); United States v. Ivey, 949 F.2d 759 (5th Cir. 1991), *cert. denied*, 506 U.S. 819 (1992).
 - b. The maximum penalty for knowing violations is imprisonment for not more than one year, a fine of up to \$50,000, or both.
 - c. Negligent violations can result in confinement for not more than six months, a fine of not more than \$25,000, or both.
- B. Civil and criminal sanctions can be sought for violations of omission (e.g., failing to carry out programs to conserve an endangered species or to confer with the FWS or NMFS), as well as for commissions of prohibited acts (takings or importing and/or exporting listed species).
- C. “Citizen suits” can also be brought against a federal agency for violations of the ESA.
 - 1. Under the ESA, “any person may commence a civil suit . . . to enjoin any person, including the United States” from violating the Act. 16 U.S.C. § 1540(g)(1)(A).
 - a. A common issue in citizen suit cases is whether the plaintiff has standing to litigate. Traditionally, courts have applied a “zone of interests” test to resolve standing controversies. The “zone of interests” test requires that a plaintiff’s grievance arguably fall within the zone of interests protected or regulated by the statutory provision

or constitutional guarantee invoked in the suit. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

- b. In Bennett v. Spear, 117 S. Ct. 1154 (1997), the Supreme Court held that the “zone of interest” test does not apply to suits brought under the ESA’s citizen suit provision since Congress expressly negated application of the test by providing in § 1540(g) that “any person may commence a civil suit.” The Court further concluded that plaintiffs who suffer economic harm as a result of ESA jeopardy determinations have standing to bring suit under the Administrative Procedure Act (APA).
2. Plaintiffs must give written notice of their intent to sue. Such notice must be served on the Secretary concerned and all alleged violators at least 60 days before any lawsuit is filed. 16 U.S.C. § 1540(g)(2). The 60-day notice requirement does not apply to suits brought under the APA.
3. The standard of review of an agency’s action is the APA’s “arbitrary or capricious standard.” Application of the APA standard must be accomplished consistent with the commander’s responsibility to use “all methods and procedures which are necessary to prevent the loss of any endangered species, regardless of cost.” Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
4. Significantly, the ESA provides that courts may award the costs of litigation (including reasonable attorney and expert witness fees) to either party. 16 U.S.C. § 1540(g)(4). For suits brought under the APA, successful plaintiffs may be able to recover attorney fees under the Equal Access to Justice Act.

XI. ARMY GUIDANCE.

- A. The Army will be a leader in conserving and protecting endangered species. Mission requirements do not justify violating the ESA. Commanders will engage in proactive planning and management to prevent conflicts between the Army’s missions and endangered species.
- B. Preserving biodiversity is an important goal of Army land stewardship.

1. The Army will work closely with FWS. Installations will engage in early informal consultations when planning actions.
2. The primary planning tool to assist in meeting the Army's obligations under the ESA is the Endangered Species Management Plan (ESMP).
 - a. Installations will prepare ESMPs for listed species and critical habitat present on the installation, including areas used by tenant organizations.
 - b. Commands and HQDA will also prepare ESMPs when the species has or could have a significant impact on the Army's mission.
 - c. Elements of the ESMP:
 - (1) Specific management guidelines and actions necessary to achieve survival and recovery of the species and conservation of critical habitat.
 - (2) Objective, measurable criteria that would meet the installation's conservation goals, and milestones for achieving those goals.
 - (3) Estimates of the time and cost to carry out those measures needed to achieve the conservation goals.
 - (4) A checklist for use by those monitoring installation compliance with ESMPs. The checklist should identify actions, tasks, and steps required to effectively implement the ESMP over its projected life. It should also include milestones for achieving conservation goals, and the key conservation measures specified in the ESMP.
 - (5) The FY09 NDAA also allows for mitigation banking.

XII. CONCLUSION.

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CHAPTER D
ENCROACHMENT

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I. REFERENCES.

- A. 10 U.S.C. § 2684a
- B. 10 U.S.C. § 2869
- C. 16 U.S.C. § 670a-f (Sikes Act)
- D. DODI 4165.57, Air Installations Compatible Use Zones
- E. AFI 32-7063, Air Installation Compatible Use Zone Program
- F. DA Memorandum, Army Range and Training Land Acquisitions and Army Compatible Use Buffers, 19 May 2003
- G. DA Publication, Army Range and Training Land Strategy, 11 February 2004

II. INTRODUCTION.

- A. Private and commercial property interests and development, along with a loss of habitat for threatened and endangered species has “encroached” upon military installation operations. What had been rural and remote sites, military installations now encounter development and environmental restrictions surrounding every installation. The restrictions range from noise management and land use limitations, to impairing substance regulation (e.g., dust and smoke) to protection of species and ecosystems. Most significantly, these restrictions threaten the “train as we fight” operational necessity through type, timing, and location of training.
- B. The Sikes Act authorizes the Secretary of each Service to “enter into cooperative agreements with States, local governments, nongovernmental organizations, and individuals to provide for the maintenance and improvement of natural resources on, or to benefit natural and historic research on, Department of Defense installations.” Such an agreement shall address conservation, protection, and management of fish and wildlife resources among the parties. Such agreements may also address water rights. The goals of the agreements are:
 - 1. The conservation and rehabilitation of natural resources on military installations;
 - 2. The sustainable multipurpose use of the resources, which shall include hunting, fishing, trapping, and nonconsumptive uses, and
 - 3. Subject to safety requirements and military security, public access to military installations to facilitate use.

- C. The first such effort to curb encroachment involved the Private Lands Initiative (PLI) at Ft. Bragg. The Army and several nongovernmental organizations partnered to share the cost of purchasing land and conservation easements concerning the habitat of the red-cockaded woodpecker (RCW). The purpose of these purchases was to restore the RCW population in the area by protecting the long-leaf pine tree on private lands, thereby loosening training restrictions on military property. This program's success led to the eventual codification of the encroachment program through the 2003 National Defense Authorization Act.
- D. Through the Readiness and Environmental Protection Initiative (REPI) authorized by 10 U.S.C. Section 2684a, Congress provides funds to the military to address encroachment issues at military installations. The Army refers to its program as "Army Compatible Use Buffer Zones" (ACUB) and the Air Force and Navy term it "Air Installation Compatible Use Zones" (AICUZ).
 - 1. ACUB is not:
 - a. A program to purchase land/property, or
 - b. A program to acquire additional training areas.
 - 2. Benefits of ACUB:
 - a. Training flexibility;
 - b. Financial support to conservation groups
 - c. Landowners receive financial benefit while potentially retaining ownership, and
 - d. Influence development patterns.
- E. Success Stories.
 - 1. The Army has protected more than 120,000 acres at 29 installations.
 - 2. The Army has spent more than \$118 million with partner contributions at more than \$169 million.

III. AGREEMENTS.

- A. To address the use or development of real property in the vicinity of, or ecologically related to, a military installation, the Secretary of Defense or any military department may enter into an agreement with a state or private entity that has as its stated principal purpose or goal the

conservation, restoration, or preservation of land and natural resources. 10 U.S.C. § 2684a. Examples of authorized parties include Ducks Unlimited, The Sierra Club, Natural Resources Defense Council, State of Virginia, City of San Diego, etc.

1. The agreement will address the other party's right, title, and interest in the property, and the cost sharing borne by the U.S. in acquiring the right, title, or interest. The Army must acquire a property interest. Absent outright purchase, the property rights acquired would be categorized as conservation easements.
 - a. The U.S. may expend funds, using Operations and Maintenance (OMA) funds, for this purpose. The cost paid by the U.S. may not exceed the fair market value of the property or the interest acquired.
 - b. The U.S. may provide in-kind services (including services related to the acquisition or maintenance of the property) equal to the value of the property interest obtained.
 - c. A Service may convey/exchange real property instead of making a financial contribution to acquire the property rights. Any land conveyed by the Service must be excess to the needs of DoD. The property interests conveyed can be located at another installation.
 - d. The Service Secretary will reserve the right to demand its interests in the property be exercised should it become operationally necessary.
 - e. The other party must bear some cost in the acquisition.
 - f. The partner entity can protect cultural resources off of the military installation if the agreement would relieve a restriction on a mission activity.
2. The owner of the property must consent to the acquisition.

B. Army Implementation.

1. The Army will prioritize ACUB projects based on:
 - a. Value to mission;
 - b. Degree of encroachment, and
 - c. Reversibility of threat.

2. Army ACUB proposals will be developed by the public affairs office, range operators, master planners, environmental specialists and managers, and staff judge advocates—all under the direction of the garrison commander, and the partner entity.
3. HQDA (G-3), U.S. Army Environmental Command (USAEC), Installation Management Command (IMCOM), and other relevant commands as necessary, will conduct site visits regarding proposals. Other components such as the Army Corps of Engineers (ACOE) may also require involvement. Proposals will also be reviewed by the Army Training Support Center, Environmental Law Division, and the ACOE. The National Guard Bureau will act as the intermediary before forwarding validated proposals to HQDA regarding National Guard installations.
4. Proposal template will include:
 - a. Training and testing background to include the mission and infrastructure;
 - b. Ecological background;
 - c. Purpose and need;
 - d. Alternatives considered, including no action;
 - e. Current or anticipated training restrictions;
 - f. Benefits;
 - g. Potential partners;
 - h. Funding and cost estimates;
 - i. A timeline with milestones;
 - j. Maps;
 - k. Public participation plan (scoping), and
 - l. NEPA analysis, as applicable.
5. Proposal process.
 - a. Installation evaluates training and prepares proposal.
 - b. Potential partner identifies property and develops relationship with landowner.

- c. Proposal submitted to HQDA for review.
- d. Assistant Chief of Staff for Installation Management reviews.
- e. Installation and partner entity negotiate terms of potential agreement.
- f. Cooperative agreement formalized, and
- g. Agreement executed.

C. Partner Entity Role.

- 1. Identify willing landowner.
- 2. Acquire easement interest in property. Types of easements include:
 - a. Conservation;
 - b. Access;
 - c. Grazing;
 - d. Agriculture;
 - e. Development rights, or
 - f. Water use.
- 3. Manage and enforce the easement.
- 4. Partners must share in the cost of the acquisition. This can be through the provision of funds, in-kind services, interest in other real property, acquisition costs and services (e.g., title searches, surveys, etc.) or management costs.
- 5. The FY09 NDAA provides the Services with the opportunity to provide funds to pay for management of natural resources off the installation.

IV. TAKINGS.

- A. While the intent and requirement of the encroachment legislation is to combine efforts with willing landowners, a significant legal background to the encroachment program is the historical doctrine of takings. The 5th Amendment's Constitutional protection of "Nor shall private property be

taken for public use without just compensation” should always be considered.

- B. Eminent domain, or condemnation, is the government’s exercise of seizing a citizen’s private property or a property interest for just compensation without the landowner’s consent.
- C. Inverse condemnation occurs when the government has taken private property without bringing formal condemnation proceedings. The owner therefore must sue the government for just compensation. Inverse condemnation can be a physical taking or regulatory taking, that is, one by which a government activity makes the land unusable for a reasonable purpose. See Tucker Act, 28 U.S.C. § 1491.
- D. Cases.
 - 1. Causby v. United States, 328 U.S. 256 (1946). A chicken farm was located about ½ mile off the end of an Army runway. Planes flew between 60 and 80 feet over the house and barn. The court found that the air is a public highway, and the Federal Aviation Act of 1958 later used this justification to create government sovereignty on the use of airspace. Only a taking if flights are so low and for direct and immediate interference with use and enjoyment of land.
 - 2. Richards v. Washington Terminal Co., 233 U.S. 546 (1914). Plaintiff sought compensation for smoke and exhaust resulting from railroad operations near his property. The Court distinguished between takings and public and private nuisance saying, “Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a ‘taking’ within the constitutional provision.” Basically, a decrease in property value alone is not enough to prove a taking.
 - 3. Chester Cox, Jr. v. City of Wichita Falls, 253 F.3d 700 (5th Cir. 2001). The city zoning board had included Sheppard Air Force Base operations in some of its zoning ordinances. Cox argued that this effectively allowed the Federal Government to destroy property rights without just compensation through the actions of a local zoning board. The courts held that the Federal Government did not force the local zoning board to act, and their participation in the zoning was for planning purposes; therefore, it was really the local government that was regulating the land use and there was no federal taking.

V. CONCLUSION.

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CHAPTER E

THE ENVIRONMENT IN OVERSEAS AND DEPLOYED OPERATIONS

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I. REFERENCES.

- A. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, 44 Fed. Reg. 1957 (1979)
- B. DODD 6050.7, Environmental Effects Abroad of Major Department of Defense Actions
- C. DODI 4715.05, Management of Environmental Compliance at Installations Outside the United States (November 1, 2013)
- D. DODI 4715.08, Remediation of Environmental Contamination Outside the United States (November 1, 2013)
- E. Joint Chiefs of Staff, Joint Pub. 3-34, Joint Engineer Operations
- F. Joint Chiefs of Staff, Staff Manual 3122.03C, Joint Operation Planning and Execution System Vol. II: (Planning Formats and Guidance)
- G. AR 200-1, Environmental Protection and Enhancement
- H. FM 3-34.5/MCRP 4-11B, Environmental Considerations
- I. Technical Manual (TM) 3-34.489, The Soldier and the Environment
- J. AFI 32-7006, Environmental Programs in Foreign Countries
- K. SECNAVINST 5090.1C, Environmental Readiness Program Manual
- L. MCO P5090.2A, Environmental Compliance and Protection Manual

II. INTRODUCTION.

- A. “While complete protection of the environment will not always be possible due to its competition with other risks that the commander must assess, planning must carefully and continuously address the full range of environmental considerations in joint operations.” Joint Pub. 3-34, Appendix D-1. Protecting the environment is a major international, U.S., and Department of Defense (DoD) concern. The international community is increasingly vigilant in its oversight of the environmental consequences of military operations. Judge Advocates (JAs) must ensure that leaders are aware of both the rules and the importance of environmental compliance and protection. “The goal of compliance is to minimize potential adverse impacts on human health and the environment while maximizing readiness and operational effectiveness.” Joint Pub. 3-34, Appendix D-1. Failure to take adequate account of environmental

considerations can jeopardize Soldiers' health and welfare; impede current and future operations; generate domestic and international criticism; waste operational funds to fines and penalties; produce costly litigation; limit future uses of land and resources; and result in personal liability for leaders and Soldiers.

- B. Most theaters of operation will have a designated Environmental Executive Agent (EEA), or in the absence of an EEA, the combatant commander will serve as the DoD executive agent. The EEA acts as the regulatory authority for DoD operations in the overseas area. Identification of the EEA and establishment of a communication link to the EEA is a key element to environmental operations.

III. PLANNING RESOURCES.

- A. As a general rule, domestic environmental statutes have no extraterritorial application during overseas operations. E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991); Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993. For a statute to apply outside the United States, there must be language within the statute that makes a clear expression of Congress' intent for extraterritorial application.
- B. Although the strict requirements of domestic statutes generally do not apply to most overseas operations, U.S. executive branch policy is often couched as a requirement to adhere to U.S. environmental requirements, if feasible. As discussed below, this does not mean that a waiver is required for operations that cannot comply with domestic laws. Thus, many of the substantive concepts from our domestic environmental laws are adopted in various policy formats. There are several policy references that apply, depending on the location (fixed overseas installation v. deployment) and nature of the action.

IV. ENVIRONMENTAL PLANNING PROCESS.

- A. Executive Order (EO) 12114 creates "NEPA-like" rules for overseas operations by requiring environmental impact analysis of major federal actions affecting the environment outside of the United States, even though NEPA does not generally have extraterritorial effect. Department of Defense Directive (DoDD) 6050.7 implements EO 12114 and provides definitions, the review process, and document requirements for environmental analysis. The policies require a "NEPA-like" process when a major Federal action would significantly affect the environment:
 - 1. in the global commons;
 - 2. of a foreign nation that is not involved in the action (see IV.C. below);

3. of a foreign nation involving:
 - a. a product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because its toxic effects to the environment create a serious public health risk, or
 - b. a physical project that is prohibited or strictly regulated in the United States by federal law to protect the environment against radioactive substances; and
 4. outside the United States that significantly harms natural or ecological resources of global importance designated by the President or Secretary of State.
- B. The Directive specifically exempts various actions from the process:
1. Actions that DoD components concerned determine do not create significant harm outside the U.S.
 2. Actions taken by the President.
 3. Actions taken by or pursuant to the President or a cabinet officer in the course of armed conflict, or when the national security or the national interest is involved. The determination that the national security or interest is involved must be made in writing by the Assistant Secretary of Defense (M&RA).
 4. The activities of the intelligence components utilized by the Secretary of Defense and arms transfers.
 5. Disaster and emergency relief actions.
- C. The Participating Nation Exception. As a JA proceeds through the regulatory flowchart of required analysis and actions, the most important and frequently-encountered problem is the “participating nation” determination.
1. What is a participating nation? The threshold issue appears to be whether or not the host nation is participating in the operation. If the nation is participating, then no study or review is technically required. Out of four relatively recent contingency operations (Somalia; Haiti; Guantanamo Bay, Cuba; and Bosnia), the United States relied upon the exception in Haiti and Bosnia. In Somalia and Guantanamo Bay, because neither Somalia nor Cuba participated with U.S. forces in the operations, the United States could not utilize the participating nation exception. Accordingly, the U.S. had a choice of accepting the formal

obligation to conduct either an ES or an ER, or seek an exemption. In both cases, the U.S. sought and received an exemption.

2. How do the JA and operational planner distinguish between participating and non-participating nations? The foreign nation's involvement may be signaled by either direct or indirect involvement with the U.S., or by involvement through a third nation or international organization.
3. One technique for discerning participating nation status is to consider the nature of the entrance into the host nation. There are generally three ways that military forces enter a foreign nation:
 - a. Forced entry, U.S. forces that execute a forced entry would rarely deal with a participating nation;
 - b. Semi-permissive entry, and
 - c. Permissive entry: typically involves a participating (cooperating) nation.
4. The semi-permissive entry presents a much more complex question. In this case, the JA must look to the actual conduct of the host nation. If the host nation has signed a stationing or SOFA, or has in a less formal way agreed to the terms of the U.S. deployment within the host nation's borders, the host nation is probably participating with the U.S. (at a minimum, in an indirect manner). If the host nation expressly agrees to the entry and to cooperate with the U.S. military forces, the case for concluding that the nation is participating is even stronger. Finally, if the host nation agrees to work with the U.S. on conducting a bilateral environmental review, the case is stronger still.
5. There is no requirement for a SOFA or other international agreement between the host nation and U.S. forces to document participating nation status. Participation and cooperation, however evidenced, are the only elements required under EO 12114 and its implementing directive. JAs should look to the most logical and obvious places for evidence of such participation. In recent operations, the U.S. and its host nation partners documented the requisite participation within such agreements.
6. The decision to assume participating nation status is made at the combatant command level. In addition, once this election is made, the second decision as to what type of environmental audit to perform is also made at the same level.

7. If the facts in a particular operation show that the host nation is a participating nation, no further action would be required under regulations that implement EO 12114 (meaning no formal documented review or study is required under DODD 6050.7).
 8. If the nation is not participating, consider other exemptions before preparing the formal documentation. Unlike the participating nation exception, some exemptions require that the military leader take an affirmative step to gain a variance from the formal documentation requirements.
 9. Once the exemption is approved, then the exempted status should be integrated into the OPLAN. If this event occurs after the OPLAN is approved, the exempted status should be added as a fragmentary order (FRAGO) to provide supplemental guidance to the environmental consideration section of the OPLAN.
- D. Documentation Requirements. Where applicable, the Directive requires that the NEPA-like process use specific documentation processes:
1. Environmental Studies (ES) are conducted bilaterally or multilaterally. The ES should contain a review of the affected environment, significant actions taken to avoid environmental harm, and a description of other significant environmental considerations as appropriate.
 2. Environmental Reviews (ER) are prepared unilaterally by the U.S. and should be a specific project document. In general, it should include a description of the affected environment, predicted effect of the proposed action on the affected environment, and significant actions being taken to protect or improve the environment in light of the proposed action.

V. COMPLIANCE AND REMEDIATION AUTHORITIES AT INSTALLATIONS OUTSIDE THE UNITED STATES

- A. Once planning considerations are addressed, the JA must determine what rules apply for compliance and remediation matters. Although domestic U.S. law does not generally apply overseas, DoD policy adopts many of the substantive requirements of our domestic laws. The policies differ based on whether the action occurs at a fixed installation or in a deployed context. At an established installation, two different resources apply to address compliance and remediation issues. A valuable resource is the Defense Environmental Network and Information Exchange (DENIX) at www.denix.osd.mil.
- B. Compliance.

1. Department of Defense Instruction (DoDI) 4715.05, *Environmental Compliance at Installations Outside the United States* (November 1, 2013), is the authority for compliance matters, such as protection of air, water, natural resources and other environmental categories. The DoDI only applies to established installations under DoD control in foreign countries. It does not apply to off-installation operations and training, operations of military aircraft and vessels, off-installation operational and training deployments, or to contingency locations.
2. The DoDI provides for the designation of a DoD Lead Environmental Component (LEC) for specific countries and overseas geographic locations, and designates which countries require Final Governing Standards (FGS).
3. The DoDI establishes environmental compliance standards for protecting human health at overseas installations published as the Overseas Environmental Baseline Guidance Document (OEBGD). DoD Pub 4715.05-G, *Overseas Environmental Baseline Guidance Document* (1 May 2007). The OEBGD is a generic document that establishes a set of objective criteria and management practices to protect human health and the environment. As a relationship is established in a particular country, the LEC develops country specific standards known as Final Governing Standards (FGS), which is a comprehensive set of country-specific substantive provisions. The LEC determines the FGS by using the OEBGD standard unless it is inconsistent with host-nation law and the host-nation law is more protective. If the issue is not addressed in the OEBGD, the EEA must consider host-nation law.

C. Remediation.

1. Cleaning up environmental contamination attributable to our activities on DoD installations outside the territorial jurisdiction of the United States is controlled by DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States* (November 1, 2013). The DoDI specifically prohibits remediation to address:
 - a. Off-installation contamination from any source unless remediation is specifically required by applicable international agreement;
 - b. Environmental contamination at installations approved by OSD for realignment, EXCEPT for remedial measures needed to prevent immediate exposure of US forces and personnel to environmental

contamination that poses a Substantial impact to human health and safety (SIHS);

- c. Contamination at installations after they are returned to the host nation UNLESS required by applicable international agreement
2. "Installations" means "enduring locations", so the DoDI does not apply to contingency locations. The DoDI does not apply to spill responses governed by DoDI 4715.05.
3. In all cases, DoD will follow applicable international agreements that require remediation. Under the DoDI, remediation is required to address a SIHS due to environmental contamination on a DoD installation that was caused by DoD activities. Remediation of contamination from non-DoD activities on DoD installations may be permissible under limited circumstances.
4. The substantial impact (SI) determination is made by the responsible in-theater Component commander, after consultation with appropriate DoD medical authority and the DoD LEC (if any). SI determination authority may be delegated to a subordinate general officer, but consultation is still required. SIHS is the only justification for remediation other than remediation required by applicable international agreement, absent extraordinary circumstances.

VI. AUTHORITIES AT NON-ESTABLISHED OVERSEAS INSTALLATIONS.

- A. In some countries and in most contingency operations, installations have not been established, and the DoDIs do not apply. Although environmental issues often have a significant impact on operations, there is a paucity of guidance available to guide the practitioner in advising the commander in a deployed contingency operation.
- B. The Joint Operational Planning Execution System (JOPES) incorporates environmental considerations into operational planning, and devotes Annex L of the OORDER to these issues. While complete protection of the environment will not always be possible due to its competition with other risks and mission objectives, planners should carefully and continuously address the full range of environmental considerations in joint operations. Joint Pub. 3-34 elaborates on the roles and responsibilities of commanders, JAs, and others in the process of drafting Annex L. Combatant commanders and subordinate joint force commanders should demonstrate "proactive environmental leadership during all phases of joint operations across the range of military operations." Joint Pub. 3-34, Appendix D-1. They should also ensure that environmental considerations are an integral part of the

planning and decision-making process. The combatant command and subordinate joint force engineer have a primary role in drafting and executing Annex L. Other principals with environmental responsibilities include the staff judge advocate, public affairs officer, surgeon, civil affairs officer, chemical officer, ordnance, and J-4. Commanders may establish a Joint Environmental Management Board to bring together leaders and staff with expertise to ensure unity of effort in environmental matters.

- C. While the engineer has responsibility for development of Annex L, there is a shared responsibility with other staff elements, and the JA is a critical cog in this process. To begin this effort, the JA should gather all the relevant resources and authorities that might apply in that theater of operation. The JA should contact the combatant command's legal advisor to determine DoD's position relative to whether any host nation law applies, obtain copies of relevant treaties or international agreements, and have a firm understanding of the Law of Armed Conflict (LOAC). If the command wishes to contact foreign governments to discuss environmental agreements or issues, the command should obtain higher headquarter permission before engaging in "formal" communications regarding the environment.

- D. The goal of the OPORD planning process is to plan an operation that achieves mission objectives while minimizing the environmental effects and observing environmental requirements. Environmental considerations are extremely relevant in all phases of an operation, and the considerations often shift during the lifecycle of a conflict. In many operations, checklists were used to construct an environmental compliance model that took into account each element or item on the checklist. United States policy is always to conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment. Accordingly, from the planning to execution phase, the environment is an important aspect of U.S. operations.
 - 1. Pre-Conflict Stage. During pre-deployment planning, environmental considerations are generally addressed as functions of risk, much like the application of safety considerations. The operational planning model incorporates environmental issues into each stage of the military decision-making process. The OPORD will want to reflect considerations regarding geology, hydrology, climate, environmentally sensitive ecosystems, waste management, environmental hazards, and other characteristics of the battlefield which can in turn shape the development of courses of action. Once risks are identified, they can be balanced against mission accomplishment goals, and help the commander determine how to proceed.

 - 2. Conflict Stage. As the mission progresses towards operations, the level of environmental protection will vary depending on the focus of the operation. Combat operations involve less environmental protection

than humanitarian operations because commanders generally weigh strategic objectives and force protection more heavily than environmental concerns. All operations should implement strategies to prevent unnecessarily complicating the post-conflict phase by creating extreme environmental problems. Probably the most relevant consideration of environmental factors in this stage involves LOAC principles. While all phases of operations have LOAC concerns, this phase is perhaps the most relevant because of the targeting implications. In general, it is lawful to cause collateral damage to the environment during an attack on a legitimate military target, but a commander has an affirmative obligation to avoid unnecessary damage to the environment to the extent that it is practical to do so consistent with mission accomplishment. The customary LOW balancing of military necessity, proportionality and avoidance of superfluous injury and destruction apply to provide a threshold level of protection for the environment.

3. **Post-Conflict Stage.** Once hostilities abate, the commander's attention turns to base camp, force protection and sustainment type issues. While the U.S. domestic environmental laws and policy directives likely do not apply in this situation, they often provide valuable models for commands to follow. This stage is full of environmental issues and considerations for the JA. Mission aims and humanitarian goals may be aided by environmental improvements designed to convince the populace to support the host nation government, participate in securing their community, and contribute to reconstruction efforts.
4. **Base Camp Site Selection.** An early critical decision is selecting the base camp location. Troops require a safe and hazard free location. The Environmental Baseline Survey (EBS) is an important tool in this selection process. The primary purpose of an EBS is to identify environmental, health, and safety conditions that pose a potential health threat to military personnel and civilians who occupy properties used by the United States. The secondary purpose is to document environmental conditions at the initial occupancy of property to prevent the United States from receiving unfounded claims for past environmental damage. Judge Advocates must also integrate a directive for documentation of initial environmental conditions into the OPLAN.
5. **Environmental protection strategies apply in four broad areas of base operations (BASOPS), and should be incorporated into planning:**
 - a. **Hazardous substance control.**

- (1) This area applies to such issues as the management of hazardous materials and oil products, disposal of hazardous waste (including pesticides, medical and infectious waste, etc.), spill prevention, containment, and response, and air emissions (e.g., burning).
 - (2) The Basel Convention of 1989, which the United States has signed but not ratified, imposes strict rules on signatory countries with respect to the movement of hazardous waste across international boundaries. The lead agency for DoD with respect to the Basel Convention is the Defense Logistics Agency (DLA). Should an operation involve potential Basel Convention issues, contact DLA.
- b. Natural habitat and wildlife protection. This can include issues regarding forests, croplands, waterways, fisheries and endangered or threatened species.
 - c. Resource conservation. This includes issues such as water certification and wastewater management; pollution prevention and recycling efforts to reduce waste generation and logistic efforts; energy efficiency considerations, and noise abatement.
 - d. Cultural resource protection. United States Forces should respect and preserve cultural and religious resources such as buildings, religious structures, monuments, and archaeological sites whenever possible.
- E. Base/Site Closure. Annex L of relevant OPLANs should contain guidance on environmental remediation required prior to closure or turnover of U.S.-used facilities in a deployed environment. A closure survey will provide a measurement of change of the environmental conditions against an EBS, if one was completed. This process will assist in the potential adjudication of claims.

VII. MISCELLANEOUS CONSIDERATIONS.

- A. United States policy is always to conduct a good faith environmental audit to reduce potential adverse consequences to the host nation's environment. Joint Pub. 3-34. The practical result of the U.S. policy is that U.S. forces require "adherence to U.S. domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment." Accordingly, from the planning phase to the execution phase, the environment is an important aspect of all U.S. operations. Early involvement by JAs is essential to ensure that all appropriate environmental reviews have been

completed either prior to the entry of U.S. forces, or as soon thereafter as is possible. Additionally, JAs at all levels of command must be cognizant of an operation's environmental dimension so that they can ensure that the doctrinally-required consideration is integrated into OPLANs and OPORDs, training events, and civil-military operations.

- B. JAs must be aware of the significant role contractors play in environmental matters. Contractors will likely perform many of the environmental missions during an operation, whether under a Logistics Civilian Augmentation Program (LOGCAP) contract or another contract. Involve contract and fiscal law experts early. During the contracting process, JAs must carefully determine whether the various environmental standards and authorities apply to the particular operation. DoDI 4715.5 and the Overseas Environmental Baseline Guideline Document (OEBGD) do not apply during hostilities and contingency operations. If Annex L of the operations plan (OPLAN) or operations order (OPORD) incorporates only limited elements of the OEBGD, then full OEBGD compliance should not be required in support contracts.

VIII. TRADITIONAL LAW OF WAR (LOW) APPLICATION.

- A. Conventional Law. A number of LOW treaties impact environmental operations.
 - 1. Hague Convention No. IV (Hague IV). Hague IV and the regulations attached to it represent the first time that environmental principles were codified into treaty law. Hague IV restated the customary principle that methods of warfare are not unlimited (serving as the baseline statement for environmental war principles). Hague IV environmental protections enjoy the widest spectrum of application of any of the LOW conventions. They apply to all property, wherever located, and by whomever owned.
 - a. Article 23e forbids the use or release of force calculated to cause unnecessary suffering or destruction. JAs should analyze the application of these principles to environmental issues in the same manner they would address the possible destruction or suffering associated with any other weapon use or targeting decision.
 - b. Hague IV also prohibits destruction or damage of property in the absence of military necessity. When performing the analysis required for the foregoing test, the JA should pay particular attention to the geographical extent (i.e., how widespread the damage will be), longevity, and severity of the damage upon the target area's environment.

2. The 1925 Gas Protocol. The Gas Protocol bans the use of “asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices . . .” during war. This treaty is important because many chemicals (especially herbicides) are extremely persistent, cause devastating damage to the environment, and even demonstrate the ability to multiply their destructive force by working their way up the food chain. During the ratification of the Gas Protocol, the U.S. reserved its right to use both herbicides and riot control agents (RCA).
3. The 1993 Chemical Weapons Convention (CWC). The CWC complements the Gas Protocol. EO 11850 specifies U.S. policy relative to the use of chemicals, herbicides, and RCA, and sets out several clear rules regarding the CWC. As a general rule, the U.S. renounces the use of both herbicides and RCA against combatants, which also may not be used “in war” in the absence of national command authority (NCA) authorization. In regard to herbicides, the EO sets out the two uses that are expressly permitted, even without NCA authorization: domestic use and control of vegetation within and around the “immediate defensive perimeters” of U.S. installations.
4. 1980 Conventional Weapons Convention (COWC). Only Optional Protocol II has environmental significance because it places restrictions on the use of mines, booby traps, and other devices. The significance of this treaty lies in the fundamental right to a safe human environment; the COWC bans the indiscriminate use of these devices. Indiscriminate use is defined as use that:
 - a. Is not directed against a military objective;
 - b. Employs a method or means of delivery that cannot be directed at a specific military objective; or
 - c. May be expected to cause incidental loss of civilian life or injury to civilian objects (including the environment), which would be excessive in relation to the concrete and direct military advantage to be gained.
5. The Fourth Geneva Convention (GC IV). The GC IV is a powerful environmental convention, but it does not have the wide application enjoyed by Hague IV. The most important provision, Article 53, protects only the environment of an occupied territory by prohibiting the destruction or damage of property (including the environment) in the absence of “absolute military necessity.” Article 147 provides the enforcement mechanism; under its provisions, “extensive” damage or

destruction of property, not justified by military necessity, is a “grave breach” of the conventions. All other violations that do not rise to this level are lesser breaches (sometimes referred to as “simple breaches”). The distinction between these two types of breaches is important. A grave breach requires parties to the conventions to search out, and then either prosecute or extradite, persons suspected of committing a grave breach. A simple breach only requires parties to take measures necessary for the suppression of the type of conduct that caused the breach. U.S. policy requires the prompt reporting and investigation of all alleged war crimes (including environmental violations), as well as taking appropriate corrective action as a remedy when necessary. DODD 2311.01E. These obligations make Soldiers vulnerable to adverse actions if they are not well-trained relative to their responsibilities under environmental operational provisions.

6. The Environmental Modification Convention (ENMOD). Unlike all the other environmental LOW treaties, which ban the effect of various weapon systems upon the environment, ENMOD bans the manipulation or use of the environment itself as a weapon. Any use or manipulation of the environment that is widespread, long-lasting or severe violates ENMOD (single element requirement). Another distinction between the ENMOD Convention and other treaties is that the ENMOD only prohibits environmental modifications that cause damage to another party to ENMOD.
 - a. The application of ENMOD is limited, as it only bans efforts to manipulate the environment with extremely advanced technology. The simple diversion of a river, destruction of a dam, or even the release of millions of barrels of oil do not constitute “manipulation” as contemplated under the provisions of the ENMOD. Instead, the technology must alter the “natural processes, dynamics, composition or structure of the earth” Examples of this type of manipulation are:
 - (1) Alteration of atmospheric conditions to alter weather patterns;
 - (2) Earthquake modification, and
 - (3) Ocean current modification (tidal waves etc.).
 - b. The drafters incorporated the distinction between high versus low technological modification into the ENMOD Convention to prevent the unrealistic extension of ENMOD. For example, if the ENMOD Convention reached low technological activities, then actions such as cutting down trees to build a defensive position

or an airfield, diverting water to create a barrier, or bulldozing earth might all be considered activities that violate ENMOD. JAs should understand that none of these activities, or similar low technological activities, is controlled by ENMOD.

- c. ENMOD does not regulate the use of chemicals to destroy water supplies or poison the atmosphere. As before, this is the application of a relatively low technology, which ENMOD does not reach. Although the relevance of ENMOD appears to be minimal given the current state of military technology, JAs should become familiar with the basic tenets of the ENMOD. This degree of expertise is important because some nations argue for a more pervasive application of this treaty. Judge Advocates serving as part of a multinational force must be ready to provide advice relative to ENMOD, even if this advice amounts only to an explanation as to why ENMOD has no application, despite the position of other coalition states. See Australian Defence Force Publication 37, *The Law of Armed Conflict 4-5 to 4-6* (1994) [hereinafter ADFP 37] (ADFP 37 states that the ENMOD Convention prohibits “any means or method of attack which is likely to cause widespread, long-term or severe damage to the natural environment.” This arguably gross overstatement of the actual limitations placed upon a commander by ENMOD ignores the “high technology” requirement, and serves as an example of the type of misinformation that requires judge advocates to be conversant in treaties like the ENMOD Convention.).

- 7. The 1977 Protocols Additional to the Geneva Conventions (AP I & AP II). The U.S. has not yet ratified AP I; accordingly, the U.S. is ostensibly bound by only the provisions within AP I that reflect customary international law. To some extent, AP I, Articles 35, 54, 55, and 56 (the environmental protection provisions within AP I), merely restate Hague IV and GC IV environmental protections. To that extent, these provisions are enforceable. However, the main focus of AP I protections go far beyond the previous baseline protections. AP I is much more specific relative to the declaration of these environmental protections. In fact, AP I is the first LOW treaty that specifically provides protections for the environment by name.

- a. The primary difference between AP I and the protections found with the Hague IV or GC IV is that once the degree of damage to the environment reaches a certain level, AP I does not employ the traditional balancing of military necessity against the quantum of expected destruction. Instead, it establishes this level as an absolute ceiling of permissible destruction. Any act

that exceeds that ceiling, despite the importance of the military mission or objective, is a violation of the LOW.

- b. This absolute standard is laid out in Articles 35 and 55 as any “method of warfare which is intended, or may be expected, to cause widespread, long-term and severe damage to the environment.” The individual meanings of the terms “widespread,” “long-term” and “severe” damage have been debated at length. The ceiling is only reached when all three elements are satisfied (unlike the single-element requirement of ENMOD).
- c. Most experts and the Commentary to AP I state that “long-term” should be measured in decades (twenty to thirty years). Although the other two terms remain largely subject to interpretation, a number of credible interpretations have been forwarded. See Claude Pilloud, International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949, at 410 to 420 (Yves Sandoz ed., 1987). Within AP I, the term “widespread” probably means several hundred square kilometers, as it does in ENMOD. “Severe” can be explained by Article 55’s reference to any act that “prejudices the health or survival of the population.” Because the general protection found in Articles 35 and 55 require the presence of all three of these elements, the threshold is set very high. See G. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT’L L. 109, 146-47 (1985).
- d. Specific AP I protections include Article 55’s absolute ban on reprisals against the environment; Article 54’s absolute prohibition on the destruction of agricultural areas and other areas that are indispensable to the survival of the civilian population; and Article 56’s absolute ban on targeting works on installations containing dangerous forces (dams, dikes, nuclear plants, etc.), if such targeting would result in substantial harm to civilian persons or property.
- e. Although the foregoing protections are typically described as “absolute,” the protections do not apply in a number of circumstances. For instance, agricultural areas or other food production centers used solely to supply the enemy fighting force are not protected. A knowing violation of Article 56 is a grave breach. Additionally, with respect to the three-element threshold set out in Articles 35 and 55, the standard is so high that a violation of these provisions may also be a grave breach, because the amount of damage required would seem to satisfy

the “extensive” damage test set out by GC IV, Article 147. See Report of the Secretary-General on the Protection of the Environment in Times of Armed Conflict, U.N. GAOR, 6th Comm., 48th Sess., Agenda Item 144, at 17, U.N. Doc. A/48/269 (29 July 1993).

8. Convention for the Protection of Cultural Property in the Event of Armed Conflict. The United States ratified this 1954 Convention in September 2008. Cultural property falls within a broad spectrum of environmental law, and this Convention protects both movable and immovable objects, to include: monuments, art, archaeological sites, manuscripts, books, and scientific collections from theft, pillage, misappropriation, vandalism, requisitioning, and the export of such objects as an occupying power. The Convention also requires contracting States to import protected objects, and return them upon cessation of armed conflict. Occupying powers also assume the obligations of protection just as the party State had prior to the armed conflict. Judge Advocates should be aware that parties to the Convention must develop inventories of protected items and have emergency plans in place in the event of an armed conflict, and also be able to recognize the symbol of the International Register indicating such protected status.
9. In cases not covered by the specific provisions of the LOW, civilians and combatants remain under the protection and authority of principles of international law derived from established principles of humanity, and from the dictates of public conscience. This includes protections established by treaties and customary law that protect the environment during periods of peace (if not abrogated by a condition of armed conflict). See Hague IV.

IX. CONCLUSION.

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