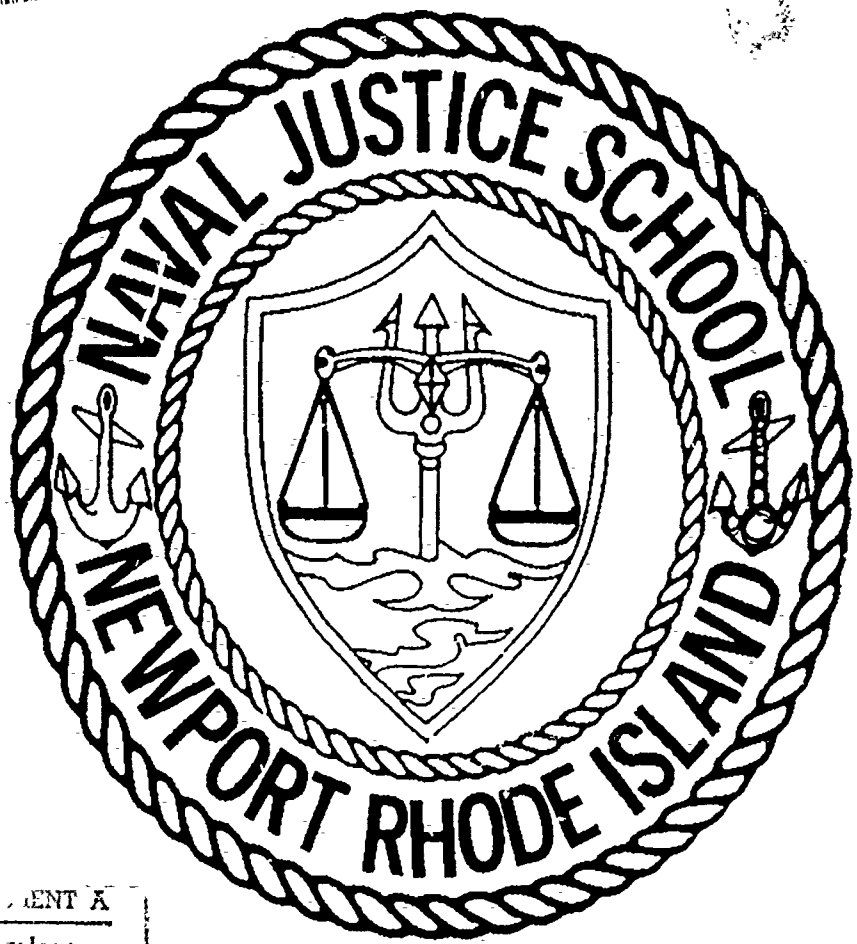
ENVIRONMENTAL LAW

DESKBOOK



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PREFACE

In September 1990, my academic director, Lieutenant Commander Frank Russo, made a detailed study of recent critiques submitted by commanders and other students at the one-week Senior Officer Courses we teach around the country and overseas. He discovered a persistent cry: "We want guidance in environmental law." These officers were well aware of the Navy policy of stewardship of the environment; they simply didn't know how or where to begin. If they knew anything at all, it was the disconcerting notion that they might be held personally liable for an inadvertent environmental step.

Lieutenant Commander Russo sent one of his "Circle-R" grams to the Civil Law Department: "Can we do this?" The answer came back "Yes, but . . . ." The "but" stipulated that the tooling-up process to teach environmental law would require a significant investment of time, faculty training, and money. The commitment of Rear Admiral John E. Gordon, Judge Advocate General of the Navy, and Rear Admiral William L. Schachte, Jr., Commander, Naval Legal Service Command, to Naval Justice School training programs, buttressed by the commitment truth-teller: financial support, enabled me to say yes to each condition.

The first step was to send our civil law staff to as much environmental training as possible. Once we began to develop a foothold, we held an environmental roundtable in March 1991 to discuss how we should organize this Deskbook and what environmental topics should be taught to our varied student audiences. Colonel Rick Lorenz USMC, Commander Pat Genzler, JAGC, USN, Commander Ron Borro, JAGC, USN, and Commander John Crowley, USCG met with my civil law faculty to iron out a framework.

With the blueprint drawn at the roundtable, the Civil Law Division began to build this Deskbook. As appropriate to its content, the Deskbook was built largely from "recycled materials." Materials from all available DoD sources were assembled and tailored for presentation to sea service judge advocates. I hope you find it useful in your efforts to advise the commanders we serve.

A. R. PHILPOTT
Captain, JAGC, U.S. Navy
Commanding Officer
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ACKNOWLEDGMENTS

At the risk of offending Galileo, if this Deskbook has any value, it is because it was built on the work of the following giants:

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HOW TO USE THIS DESKBOOK

This Deskbook was written primarily for the judge advocate with no environmental law background. Each chapter is designed to provide an overview of the key topics in each significant area and, at a minimum, enhance the reader's ability to spot issues. There is no magic to the organization. Any chapter can be read independently; consequently, some duplication exists. This is the first edition of this Deskbook. Please send us your suggestions on how we can improve it in future revisions. The Deskbook as a whole is intended as a ready reference to help you solve problems facing the commander. The following steps may be followed as a general plan of attack in this effort.

Study the Stimulus. What brought the problem to your attention? A Notice of Violation or Noncompliance? A hotline complaint? An entry on the blotter? A casual remark at the club? Review the information available to get a feel for the scope of the problem.

Get an Overview of the Law. Having identified the parameters of the problem, excuse me, challenge, consult the pertinent chapter(s) in this Deskbook to refresh your recollection of the regulatory framework and assist your issue spotting efforts.

Study the Law. Consult the references listed in the first paragraph of the chapter in the Deskbook. Read the statute. Read the implementing regulations. If a state agency is involved, review the state law and regulations. Consult the pertinent service regulations, i.e., OPNAVINST 5090.1A and MCO P11000.8B.

Reconsider the Problem. Go back and read the stimulus documents again in light of your now razor-sharp environmental insight. Make sure you are still on track.

Gather more Information. Your initial research will generate a lot of questions, factual, technical, and legal. Go back to the "scene of the crime" and gather factual information to help answer your questions. If a permit is involved, review the permit.

Check the History. Take some back bearings. This may be a repeat violation. Find out what happened and what was done about it the last time. Find out why it happened again.

Harness Available Expertise. Find out who has the legal or technical expertise to help you solve the problem. Consult the network provided in Appendix IV if you don't have local resources.

Fix the Problem. Build a team of qualified people and ensure they get the resources they need. If the problem cannot be fixed immediately, estimate how long it will take and work up a schedule with milestones. Ensure that someone with sufficient authority monitors progress.

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CHAPTER 1

ENVIRONMENTAL POLICY

0101 REFERENCES

A. SECNAVINST 6240.6E.

B. Article 0832, U.S. Navy Regulations, 1990.

C. OPNAVINST 5090.1A

D. MCO P11000.8B, Real Property Facilities Manual

E. CMC White Letter 2-90, CMC:LFL of 1 May 90

0102 INTRODUCTION. This chapter discusses the various sources of general environmental protection policy in the Department of the Navy (DoN). The themes inherent in these policies lay the foundation for the Navy practices discussed throughout this Deskbook. In a word, the policy is compliance. This fundamental philosophy must be borne in mind in the analysis of every environmental issue.

0103 NAVY REGULATIONS. Article 0832, U.S. Navy Regulations, 1990, provides as follows:

> Environmental Pollution. The commanding officer shall cooperate with federal, state and local governmental authorities in the prevention, control and abatement of environmental pollution. If the requirements of any environmental law or regulation cannot be achieved because of operational considerations, insufficient resources or other reason, the commanding officer shall report to the immediate superior in the chain of command. The commanding officer should be aware of existing policies regarding pollution control, and should recommend remedial measures when appropriate.

0104 SECRETARIAL GUIDANCE

A. The Secretary of the Navy summarized the spirit of the Navy policy in an ALNAV released on Earth Day, 22 April 1991. The message read in part as follows:

> Each of us in the DON is a steward both of America's defense and of the environment in which we serve and live. Our job is to be combat ready, but we must also respect and protect the air, sea and land around us. The Navy and Marine Corps share with the rest of society a public trust in our environment, and we must continuously earn that trust. As members of the sea service we have a time-honored obligation to "turn over the watch" to our shipmates in better shape than we assumed it... The result [of DON environmental protection efforts] has been a cleaner, safer, and healthier environment for ourselves, our communities, and our children.

B. The specifics of DoN policy with regard to environmental protection and natural resource management are promulgated in OPNAVINST 6240.6E. This Instruction assigns responsibilities to the Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) with respect to implementing that policy and requires certain actions by these service chiefs. Particular requirements are discussed throughout this Deskbook.

0105 CNO GUIDANCE. Paragraph 1-5.1 of OPNAVINST 5090.1A provides in part:

> The Navy's ability to accomplish its mission requires daily operations in the land, sea, and air environment. The Navy is committed to operating its ships and shore facilities in a manner compatible with the environment. National defense and environmental protection are, and must be, compatible goals. The chain of command must provide leadership and personal commitment to ensure that all Navy personnel develop and exhibit an environmental protection ethic. Thus, an important part of the Navy's mission shall be to prevent pollution, protect the environment, and conserve natural, historic, and cultural resources.

0106 CMC GUIDANCE. The spirit of Marine Corps environmental compliance policy was summarized in a White Letter from the Commandant to all general officers, commanding officers, and officers in charge. The White Letter read as follows:

> The Secretary of Defense has indicated that the Department of Defense will set the standard for the Nation in complying with laws designed to protect our environment. Increases in funding and personnel have been allocated to assist in this effort and strict Federal regulations and inspection procedures mandate concerned environmental management. As Marines, we will do our part to effect compliance with these regulations and protect the environment of the national areas under our guardianship.

Awareness of environmental protection standards is a first step towards attaining these goals. All Commanders are to conduct the necessary analysis to determine the cost and effort required to bring their facilities into compliance with these regulations and then take such action as necessary to make sure this compliance occurs. Educate your Marines as to their responsibility to assist in this effort, and where needed, teach them technical skills, such as hazardous waste handling, to provide them the ability to practice sound environmental protection management. Encourage them to bring to your attention destructive conditions or improper practices.

Today's activities need to preserve tomorrow. We can, and we must, find ways to train and accomplish our mission in an environmentally acceptable manner. We are the stewards of our air, land, water and natural resources, and as such, are obligated to protect them. Proper care of our environment is cost effective in the long term and, more importantly, it's the right thing to do.

[Postscript] *Treat the environmental restrictions as Rules of Engagement! Most of our future conflicts and crisis response will include ROE's--hence we should develop the thought processes now!*

0107 COAST GUARD GUIDANCE. The Commandant of the Coast Guard set out Coast Guard environmental policy in COMDTNOTE 16479 of 26 April 1991 which read as follows:

1. PURPOSE. This instruction publishes the Commandant's policy concerning Coast Guard in-house compliance with environmental laws and regulations.

2. BACKGROUND. Protection of the marine environment has been a primary Coast Guard mission for many years. Our own compliance with environmental laws and regulation is especially important. Our operational, maintenance and construction activities can have serious negative impacts on the environment and can disrupt or damage the ecosystem.

3. DISCUSSION. Compliance with environmental laws and regulations directly affects our operational efficiency and impacts upon our ability to perform present and future missions. Maintaining a sound environmental ethic in conjunction with safe, effective environmental practices when performing our daily operational and support activities enhances the Coast Guard's image as a leader in the struggle to safeguard our Nation's environment.

4. ACTION. Area and district commanders, commanders of maintenance and logistics commands, unit commanding officers, and Commander, CG Activities Europe shall ensure wide dissemination of this Policy Statement and Instruction.

Enclosure: Environmental Policy Statement

1. The Coast Guard is committed to an aggressive environmental program which fully supports compliance with environmental laws and regulation. Just as we are a leader in maritime environmental law enforcement, so must the Coast Guard be a leader in ensuring our own facilities, operations and personnel comply with environmental standards.

2. It is Coast Guard policy that environmental compliance receive command priority at every level. Inherent in every mission area is the underlying obligation and responsibility as stewards of the land, sea and air to make environmentally sound operational and budgetary decisions. Only by ensuring our own house and actions are in order will we continue to receive the full support of the public and Congress in carrying out our missions.

3. Proactive programs and actions now will reduce the long term costs of reactive response to environmental compliance and remediation, and potential personal civil liability. These efforts include dedication of resources to rectify contamination from past practices, insightful planning for future actions, and concerned actions to eliminate the potential for pollution and waste of our planet's limited resources.

4. I charge each of my operational and support commanders with the responsibility for implementing this policy. It is imperative that we ensure the Coast Guard successfully meets its environmental challenges. J. W. KIME SENDS.

0108 CONCLUSION. As the Secretary of the Navy concluded in a 29 April 1988 memorandum to CNO and CMC: *"The bottom line is that the Navy must do it right from the start because the law requires it and [because] we are under intense scrutiny."*

CHAPTER 2

SOVEREIGN IMMUNITY AND FEDERAL/STATE INTERACTION

0201 REFERENCES

A. Article VI, U.S. Constitution

B. Clean Air Act (CAA), 42 U.S.C. § 7418

C. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6961

D. Clean Water Act (CWA), 33 U.S.C. § 1323

0202 BACKGROUND. As a general rule, the United States Government may not be sued by individuals or other governmental entities. This concept that the sovereign is immune from suit has its historical antecedents in the English notion that the King could do no wrong. The principle was incorporated into our Constitution to ensure that litigation would not hinder essential government functions. Consequently, the United States may not be sued without its consent. That consent can be expressed only by Congress. Congressional waivers of sovereign immunity must be clear and unambiguous; waivers will not be inferred. Moreover, waivers are narrowly construed, especially those affecting the public fisc.

0203 SOVEREIGN IMMUNITY. Most federal environmental statutes contain an express waiver of sovereign immunity. The waiver is broader in some statutes than others. The language of the waiver must be consulted for each Act.

A. For example, the waiver in the Clean Air Act (CAA) makes federal facilities subject to and must comply with all federal, state, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The Clean Water Act (CWA) contains a similar substantive and procedural waiver but, unlike the CAA, the CWA further provides that federal facilities are liable only for those civil penalties arising under federal law or imposed by a state or local court to enforce an order or the process of such court. Both CAA and CWA, however, preserve sovereign immunity for federal officials. No officer, agent or employee of the United States shall be personally liable for any civil penalty under either Act for actions in the performance of their federal duties.

B. In sharp contrast, the waiver of sovereign immunity under the Resource Conservation and Recovery Act (RCRA) is more ambiguous. The procedural and substantive waiver is clear but the parenthetical reference to sanctions has yielded conflicting judicial decisions on the issue of whether federal facilities are subject to civil penalties. Further, some doubt exists regarding whether the waiver language "disposal or management of hazardous waste" embraces generation, treatment, storage, or transportation. Unlike CAA and CWA, RCRA expressly waives immunity for federal officials. Corrective action by Congress to shed light on these gray areas is expected in the near future. Senate Bill 596 proposes to expand the RCRA waiver to include the payment of fines for violations of federal, state, or local, solid or hazardous waste laws.

C. This brief comparison illustrates the necessity of examining each waiver independently of other statutes. The substantive chapters in this Deskbook discuss the pertinent waivers of sovereign immunity throughout. The appendix to this chapter contains the key statutory language in the major regulatory Acts for ready reference, as well as an abbreviated case list.

0204 FEDERAL SUPREMACY

A. Under the Supremacy Clause of Article VI of the U.S. Constitution, the constitution and the laws made pursuant thereto are the supreme law of the land. As a result, the activities of the federal government are generally free from regulation by any state. States may regulate federal activities only when, and only to the extent, that regulation is clearly and unambiguously authorized by Congress.

B. Under their "police powers," states have the authority to enact laws to promote the health, welfare and safety of their citizens. If federal legislation "occupies the field," state legislation is "preempted," i.e., the law will have no effect as applied to federal activities. To uphold state regulation of a federal activity, courts must be satisfied that three criteria have been met:

1. The activity to be regulated is not the subject of exclusive *Federal* control, i.e., the state is not preempted by federal legislation;

2. the state is exercising its police power on the basis of a legitimate interest (public health, welfare, or safety) in the activity to be regulated; and

3. Congress has waived sovereign immunity with respect to the particular activity and the type of regulation.

C. For an excellent illustration of how these principles apply and how quickly they can become complex in an environmental setting, take a brief look at chapter 26 of this Deskbook. Chapter 26 examines the several statutes which

regulate asbestos. Each statute has a different waiver of sovereign immunity and degree of preemption, creating a subtle blend of permissible state and federal regulation.

APPENDIX

FEDERAL FACILITY PROVISIONS OF KEY ENVIRONMENTAL STATUTES

A. Clean Air Act, 42 U.S.C. § 7418 (CAA § 118).

Sec. 118. (a) Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agency, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable. [See recent amendments.]

B. Clean Water Act, 33 U.S.C. § 1323 (CWA § 313).

Sec. 313. (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agency, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. . . . No officer, agency, or

employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.

C. Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (RCRA § 6001).

Sec. 6001. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural)including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or federal court with respect to the enforcement of any such injunctive relief.

D. Underground Storage Tanks, 42 U.S.C. § 6991f (RCRA § 9007).

Sec. 9007. (a) APPLICATION OF SUBTITLE - Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

E. Comprehensive Environmental Restoration, Compensation, and Liability Act, 42 U.S.C. § 9620 (CERCLA § 120).

Sec. 120. FEDERAL FACILITIES. (a) APPLICATION OF ACT TO FEDERAL GOVERNMENT. (1) IN GENERAL. Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act. Nothing in this section shall be construed to affect the liability of any person or entity under sections 106 and 107.

F. Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (SDWA § 1447).

Sec. 1447. (a) Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 1421(d)(2)) shall be subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits, any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty under this title with respect to any act or omission within the scope of his official duties.

SOVEREIGN IMMUNITY CASES

Alabama v. Veteran's Administration, 648 F.Supp. 1208 (M.D. Al. 1986)(Sovereign immunity waived as to both fines and penalties under CAA).

Energy Department v. Ohio, 904 F.2d. 1058 (6th Cir. 1991), U.S. SupCt, No. 90-1342, cert. petition filed 25 Feb 91 (CWA requires federal facilities to comply with state water laws and pay penalties imposed as sanctions under federal law; civil penalties can be obtained by the state using the Citizen's Act provision under RCRA).

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987)(CWA was meant to be primarily enforced by the government, not private citizens).

Ohio v. Department of Energy, 689 F.Supp. 760 (S.D. Oh. 1988)(Waiver of sovereign immunity as to civil penalties under CWA).

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1985)(Language of waiver of sovereign immunity strictly construed in favor of sovereign and may not be modified by implication).

United States v. King, 395 U.S. 1 (1969)(Waiver of sovereign immunity must be clear, concise and unequivocal).

United States v. Washington, 29 ERC 1467 (9th Cir. 1989)(no waiver of sovereign immunity of either penalties or fines under RCRA). But cf. Maine v. U.S. Navy, 702 F.Supp. 322 (D.Me. 1988), appeal pending, (Navy liable for fees, charges and penalties under RCRA).

CHAPTER 3

FEDERAL FACILITY COMPLIANCE

0301 REFERENCE

A. EPA "Federal Facilities Compliance Strategy," November 1988 (The "Yellow Book," pending revision)

0302 OVERVIEW. Due to waivers of sovereign immunity in major environmental statutes, federal facilities must generally comply to the same extent as nongovernmental entities. EPA's goal is to help ensure that federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and major municipal facilities.

A. A Separate Strategy. EPA doesn't have the same enforcement mechanisms available against federal facilities as it does against the private sector. Under the "unitary executive principle," for example, EPA can not sue other federal agencies to enforce environmental statutes. This principle treats all federal agencies as one entity. Thus, the intra-agency dispute does not present a judicial case or controversy. Similarly, EPA cannot assess fines or penalties, except as agreed to in advance through provisions for stipulated penalties in CERCLA Interagency Agreements (IAGs). Whether EPA can issue unilateral orders against federal agencies is unclear. In any event, these restrictions apply only to the federal agency itself, not to contractors or private operators of government facilities.

B. Strategy Overview. The primary features of EPA's federal facility compliance strategy are: compliance promotion and technical assistance; compliance monitoring; and enforcement responses to violations. In addition, the strategy incorporates the state enforcement role in the overall effort to achieve compliance.

C. Applicability. The EPA compliance strategy applies to all federal facilities. The definition of "federal facility" includes: Government-Owned, Contractor Operated (GOCO) facilities; government organizations located in facilities leased from private owners; and government facilities leased to private operators for private use.

0303 COMPLIANCE PROMOTION

A. Environmental Auditing Policy. EPA encouraged all federal agencies to adopt a formal audit program. Each service has done so. The Navy program, the

Environmental Compliance Evaluation system, is discussed in chapter 6 of this Deskbook.

B. Technical Assistance. Executive Order 12088 charged EPA to provide advice and assistance to other federal agencies. This mission is coordinated by the Regional Federal Facilities Coordinator, the primary point of contact at each Region for federal facility issues.

C. Other Assistance. EPA recommends appropriate training programs to federal agencies to achieve and maintain compliance. EPA maintains a number of "hotlines" to answer questions from the field and pass on useful regulatory information. The numbers are in the Yellow Book and discussed in pertinent chapters in this Deskbook.

0304 COMPLIANCE MONITORING

A. Objectives. EPA reviews the compliance status of federal facilities for potential violations. They will collect evidence to support enforcement actions. In addition, this information will be analyzed to identify compliance patterns within federal agencies.

B. Information collection. EPA collects information in a variety of ways. Periodic performance reporting yields routine information on pre-designated topics. Recordkeeping requirements imposed by statute or regulation are also a fertile source of information. Many statutes and regulations require us to notify EPA of problems we encounter, e.g., spills or hazardous releases. When EPA knows what it wants, orders to produce information may be issued.

C. Inspections. The monitoring and information collection objectives are also served by EPA's inspection program. These inspections are usually coordinated with state regulators and may examine the full spectrum of environmental compliance issues. Exhibit V-1 in the Yellow Book lists the media program inspections EPA conducts. We generally grant EPA free access to our facilities, consistent with security clearance requirements. Paragraph 1-5.9 of OPNAVINST 5090.1A provides detailed guidance on access.

0305 ENFORCEMENT RESPONSE.

EPA seeks "timely and appropriate enforcement response" measures to ensure federal facilities achieve and maintain environmental compliance. This approach covers all media programs except CERCLA which is enforced by interagency agreement.

A. Overview. EPA enforcement focuses on negotiation of Compliance Agreements or Consent Orders, rather than suits or civil penalties. The regulations establish dispute resolution procedures to be followed when negotiations are not fruitful. EPA also shapes enforcement priorities through funding, discussed more

fully in chapter 7 of this Deskbook. Generally, EPA will coordinate enforcement with state regulatory agencies. EPA will seek enforcement in place of authorized state program only when the state fails to take necessary action or asks EPA to take the lead.

B. The Process. The first salvo is the Notice of Violation (NOV) or Notice of Noncompliance (NON), issued by the state or EPA respectively. The notice must be written but we may get advance notice by telephone. Addressed to the commander or head of facility, the NON will describe the violation in detail and specify the consequences of not meeting its listed requirements. Typically, the consequence is escalation of enforcement action by referral to higher authority. Where minor violations are involved, the NON may permit the facility to submit a "certification of compliance" after making simple corrections.

C. Facility Response. If the facility concedes the validity of the violation identified in the NON, the facility will submit certification of compliance or remedial action plan. If the facility believes the violation allegation is unjustified or incorrect, the facility may invoke dispute resolution procedures to contest the finding of noncompliance. EPA should acknowledge the response in writing.

D. Federal Facility Compliance Agreements (FFCA) and Consent Orders. The FFCA is used when formal enforcement is deemed necessary. The FFCA will be used unless specific media program authority for a Consent Order exists. Appendix I of the Yellow Book lists the enforcement response authorities for the major environmental statutes. The FFCA must include a compliance schedule. The FFCA requires the federal agency official signing the agreement to seek any additional funding necessary to fulfill its requirements, consistent with the limitations imposed by the Anti-Deficiency Act limitations. The agreement will typically specify that if the federal facility doesn't agree to its terms within a certain time, usually 30 days, dispute resolution procedures will be invoked or order will become final. The opportunity to file an administrative appeal may exist in the case of Consent Orders.

E. Dispute Resolution Procedures. Dispute resolution procedures are used unless media-specific dispute resolution guidance exists, e.g., under RCRA. Resolution may take place at the regional, service headquarters, or departmental level. Executive Order 12088 outlines the procedures to be followed in compliance matters; the dispute resolved ostensibly by the Office of Management and Budget (OMB). Executive Order 12146 outlines procedures for resolution of interagency legal disputes, which are resolved by the Attorney General. Once resolved, EPA will usually make a press release.

0306 STATE ROLE IN ENFORCEMENT. EPA retains parallel authority for enforcement even in states with delegated or authorized programs. Unlike the EPA, states are not hampered by the unitary executive theory and can sue to enforce statutes as authorized and necessary. An FFCA between the facility and

EPA is NOT a bar to an authorized state enforcement action or, in most cases, a citizen suit. EPA will intercede in a state enforcement action against a federal facility at request of either party.

0307 OTHER INFORMATION IN THE YELLOW BOOK. The Yellow Book is a handy reference for judge advocates with environmental responsibilities. Chapter II and Appendix A provide summaries of the major environmental statutes. Appendix F lists reporting, recordkeeping and self-monitoring requirements under major media programs. Chapter VIII summarizes EPA's organization and lists the Federal Facilities Coordinators in each region. One page is missing from the Yellow Book; the text is provided in the appendix to this chapter. This page should be inserted as page 3 of Attachment 4 to Appendix K, relating to model language for dispute resolution.

Yellow Book
Page 3, Attachment 4, Appendix K

... day escalation period, the Parties shall be deemed to have agreed with U.S. EPA's position with respect to the dispute.

D. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to Subparts A, B or C of this Part. The Parties shall each designate an individual and an alternate to serve on the DRC. The individuals designated to serve on the DRC shall be employed at the policy level (5 ES or equivalent) or be delegated the authority to participate on the DRC for the purposes of dispute resolution under this Agreement. Following escalation of a dispute to the DRC as set forth in Subpart C, the DRC shall have thirty (30) days to unanimously resolve the dispute. If the DRC is unable to unanimously resolve the dispute within this thirty (30) day period any Party may, within ten (10) days of the conclusion of the thirty (30) day dispute resolution period, submit a written notice of dispute to the Administrator of U.S. EPA for final resolution of the dispute. In the event that the dispute is not escalated to the Administrator of U.S. EPA within the designated ten (10) day escalation period, the Parties shall be deemed to have agreed with the U.S. EPA DRC representative's position with respect to the dispute.

E. Upon escalation of a dispute to the Administrator of U.S. EPA pursuant to Subpart D, the Administrator will review and resolve such dispute as expeditiously as possible. Upon resolution, the Administrator shall provide the [Department/Agency] and [State] with a written final decision setting forth resolution of the dispute.

CHAPTER 4

FEES AND TAXES

0401 REFERENCES

A. Article VI, U.S. Constitution

B. OPNAVINST 5090.1A, Chapter 1

0402 FEES AND TAXES GENERALLY. A fee is an amount which, 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 a service. A tax is an enforced contribution to provide for the general support of the government. Taxes can be discriminatory; fees must apply even-handedly.

0403 ENVIRONMENTAL FEES AND TAXES. As discussed in chapter 2 of this Deskbook, the U.S. Constitution prohibits state or local government regulation of federal activities absent a clear and unambiguous waiver by Congress. Several environmental statutes waive federal sovereign immunity to consent to state and local service charges. These waivers do not, however, extend to state taxation. We pay "reasonable fees" for state and local permits. "Excessive" environmental permit and operating fees, on the other hand, may be disguised taxes.

0404 THE TEST. To be considered a legitimate fee, an assessment must satisfy all three prongs of the "Massachusetts test," pronounced in Massachusetts v. United States, 435 U.S. 444, 464-67 (1978). The label placed on the requested payment is not dispositive. A fee by any name will be deemed a tax if any criterion is not met.

A. The fee must be imposed in a nondiscriminatory manner;

B. the fee is a fair approximation of the cost of the benefit received directly by the permit recipient (The "benefit" is generally the state's overhead expense for operating the permit system and the compliance inspections that may be conducted); and

C. the fee is not structured to generate excess revenues, i.e., money above and beyond the state's overhead for the particular program.

0405 PROCEDURES. Disbursing authorities shall consult with command counsel before paying fees presented for the first time. Final positions on the legality of new fees shall be reached in consultation with the Department of Justice (DoJ) at the departmental level. In any event, some portion, i.e., the reasonable portion, of excessive fees are payable. The command must make it plain to the state agency that the delay is caused by necessary legal analysis rather than mere resistance to regulation. If an agency imposes a fee yet refuses to issue the permit, the command must notify CNO (OP-45) and the Comptroller of the Navy.

0406 POLICY CHANGE PENDING? The environmental grapevine suggests that DoD fee/tax policy may soon change. The Defense Environmental Policy Council may opt to abandon the Massachusetts test in favor of the Air Force policy of paying all fees save those which are patently taxes. This would avoid many time-consuming and costly controversies.

0407 ADDITIONAL READING. For a detailed examination of this subject, while it remains alive, see Commander Patrick A. Genzler, JAGC, USN, "Federal Facility Payment of State Environmental Fees," 38 Naval L. Rev. 149 (1989); Lieutenant Colonel Richard E. Lotz, USAF, Federal Facility Provisions of Federal Environmental Statutes: Waiver of Sovereign Immunity for "Requirements" and Fines and Penalties, 31 Air Force L. Rev. 7 (1989); Lieutenant Colonel William D. Benton, USAF, and Byron D. Baur, Applicability of Environmental "Fees" and "Taxes" to Federal Facilities, 31 Air Force L. Rev. 253 (1989).

CHAPTER 5

DON ORGANIZATION FOR ENVIRONMENTAL COMPLIANCE

0501 REFERENCES

A. OPNAVINST 5090.1A, Chapter 1

B. OPNAVINST 5400.24D

C. MCO P11000.8B

0502 INTRODUCTION. This chapter outlines the Navy and Marine Corps environmental program management and organization. The composition, function, and interrelationship of various entities will be discussed.

0503 NAVAL ENVIRONMENTAL PROGRAM MANAGEMENT GROUP (NEPMG). This group consists of key managers, from both Navy and Marine Corps commands, which communicate frequently to ensure effective, consistent DoN policy and program execution to satisfy environmental, natural resources and Navy mission requirements. The NEPMG is made up of one or more individuals from each of the following commands/offices:

A. CNO (Environmental Protection and Occupational Safety and Health Division (OP-45))

B. Commandant of the Marine Corps (CMC)

C. Navy OGC/Navy JAG (NJAG) Environmental Law Office (ELO)

D. Navy Office of Legislative Affairs (OLA)

E. Major Claimants

F. Regional Environmental Coordinators (defined below).

0504 NAVAL ENVIRONMENTAL PROTECTION SUPPORT SERVICE (NEPSS). The NEPSS consists of special offices, in various commands, tasked to provide environmental engineering, research, legal assistance, data

managements, and information exchange services to Navy and Marine Corps activities and to the NEPMG. The NEPSS consists of the following:

A. COMNAVFACENGCOM (serves as the NEPSS manager);

B. Engineering Field Divisions (EFDs provide field level expertise in environmental engineering and legal support);

C. Naval Energy and Environmental Support Activity (NEESA coordinates NEPSS actions and funds and manages NEPSS specialty offices);

D. Four Specialty Offices relating to ordnance, aviation, ships, and the marine environment; and

E. Five Naval Laboratories conducting research, development, testing and evaluation in environmental protection relating to shore facilities, aquatic environments, ships, aircraft systems, and ordnance.

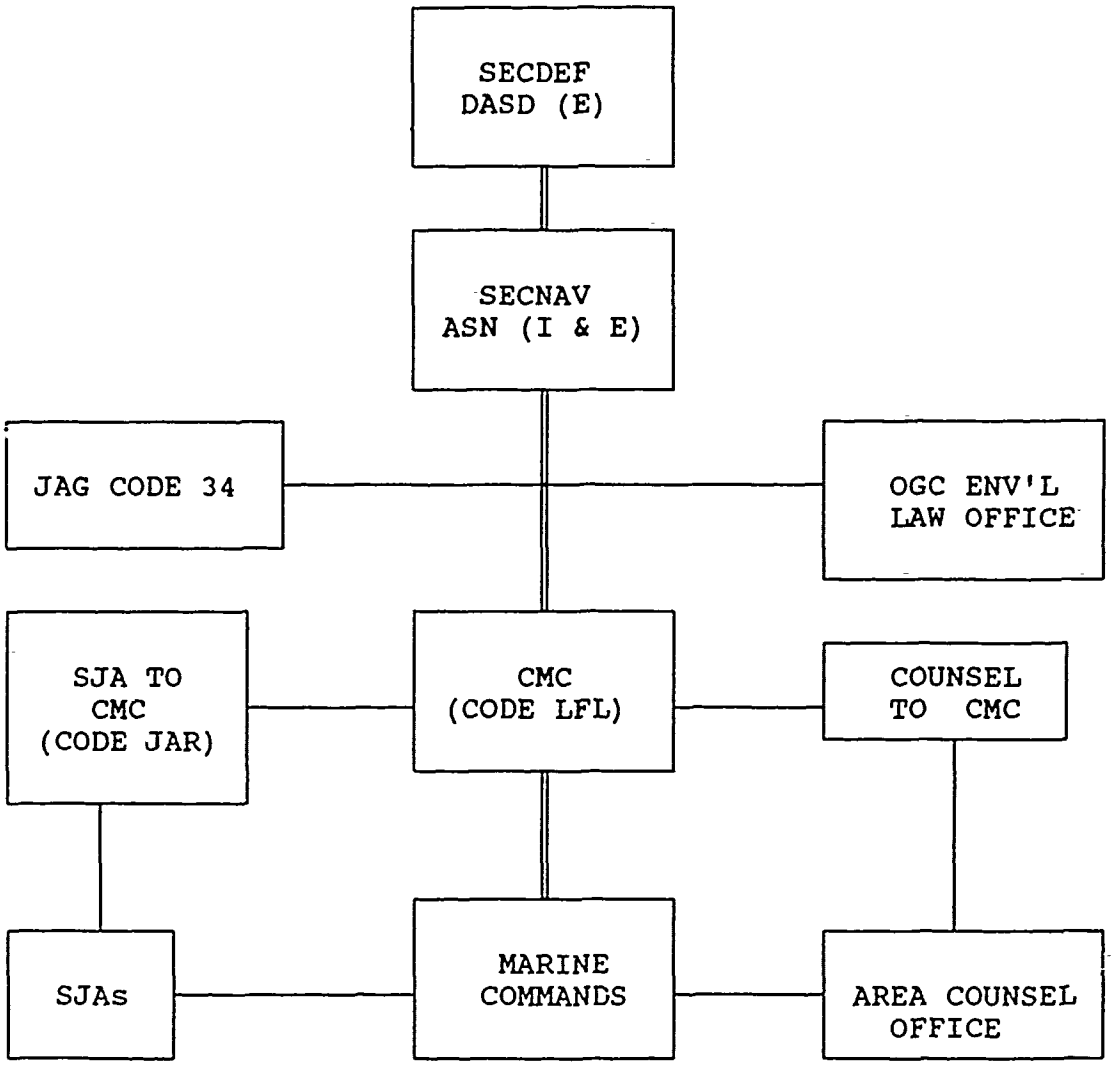
0505 AREA COORDINATORS. Area coordinators and their jurisdictions have been established by OPNAVINST 5400.24D (NOTAL) to coordinate the actions of Navy shore activities within a wide geographic region. Specific area coordinator responsibilities are discussed throughout this Deskbook.

0506 REGIONAL ENVIRONMENTAL COORDINATORS. Regional environmental coordinators serve as the senior Navy officer in a local region to coordinate environmental matters and public affairs. Regional environmental coordinators are designated by area coordinators. Regional environmental coordinators may also be designated as Navy On-Scene Coordinators (NOSCs) for spill response as discussed in chapters 27 and 28 of this Deskbook.

0507 STATE ENVIRONMENTAL COORDINATORS. State environmental coordinators are assigned by area coordinators to attend to Navy interests in a given state. In most cases, regional environmental coordinators will also serve as state coordinators for the states in which they are located.

0508 MARINE CORPS ORGANIZATION. The Marine Corps organization for environmental compliance and legal advice is depicted in the diagram on the following page.

MARINE CORPS ORGANIZATION FOR ENVIRONMENTAL COMPLIANCE



CHAPTER 6

ENVIRONMENTAL COMPLIANCE EVALUATIONS

0601 REFERENCES

A. OPNAVINST 5090.1A, Chapter 4

B. Freedom of Information Act (FOIA)

C. SECNAVINST 5720.42D

D. SECNAVINST 5820.8

E. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25004 (reproduced at "Yellow Book," Appendix D)

0602 OVERVIEW. Federal regulations and EPA policy on Federal facility compliance recommend environmental "auditing" or evaluations as a tool to ensure compliance and reduce Notices of Violations (NOVs). Whether the activity is styled as an audit, assessment, or evaluation, EPA favors any systematic, documented, periodic, and objective review of facility operations and practices related to meeting environmental requirements.

A. The Navy ECE Program. To that end, the Navy has implemented the Environmental Compliance Evaluation (ECE) program which applies to all shore activities within the United States and its territories, and to overseas activities. An effective ECE program reduces the need for EPA inspections at Federal facilities. The ECE program provides a means to monitor, achieve, and maintain compliance with environmental and natural resources regulations. ECEs in the United States and its territories shall address Federal, state, local, DoD and OPNAV environmental and natural resources requirements, as well as the management of those programs.

B. ECE Objectives and Benefits. The ECE program:

1. Verifies whether Navy environmental program management practices are in place, functional, and adequate;

2. identifies actual and potential areas of noncompliance;

3. identifies areas likely to be in noncompliance as a result of projected changes in federal, state, and local requirements;

4. recommends corrective actions, including funding sources, for achieving compliance;

5. provides immediate assistance to shore activities in the implementation of easily accomplished corrective actions.

6. identifies personnel needs to achieve and maintain environmental compliance;

7. identifies training needs of personnel having environmental compliance responsibilities;

8. identifies policies to promote safety and efficiency in achieving environmental compliance;

9. reminds facilities of permit renewal and other deadlines; and

10. provides a store of data useful in planning, justifying funding requests, and responding to regulator rulemaking proposals.

C. ECE Program Structure. The ECE program is structured in tiers, using existing organizations and procedures to the maximum extent possible. The auditing tiers stress action at the local level and provide the requirement for management oversight. Tier 1 is the Activity Self ECE. Tier 2 is the Major Claimant ECE. Navy Inspector General (IG) environmental compliance inspections constitute Tier 3.

0603 ACTIVITY SELF ECE. This ECE is an evaluation conducted by the Navy activity itself. The self ECE examines the activity's environmental and natural resources compliance posture and overall environmental management. The self ECE results in a report to the commanding officer or to the Contracting Officer's Technical Representative (COTR) in the case of Government-Owned/Contractor-Operated (GOCO) facilities. Activity self ECEs shall be performed annually regardless of whether they have a major claimant ECE or Inspector General (IG) environmental compliance inspection that year.

0604 MAJOR CLAIMANT ECE. This Tier 2 Environmental Compliance Evaluation is a detailed environmental and natural resources compliance evaluation conducted by the major claimant. The major claimant ECE produces a report from the major claimant to the activity's commanding officer, or to the COTR in the case of GOCO facilities. ECEs shall be performed by the major claimants at each of their shore activities, including GOCOs, at least every three years. In addition, a major claimant ECE must be conducted no later than six months after an activity has been cited as a "significant non-complier" (SNC) by a regulatory agency.

0605 EXEMPTION PROCEDURES. The Navy has numerous shore

activities which serve only administrative functions and consequently pose little risk to the environment. Recognizing that the limited environmental management requirements at those activities may make ECEs unnecessary, paragraph 4-5.6 of OPNAVINST 5090.1A permits major claimants to exempt them from the ECE requirement. This allows the major claimant to focus their efforts on shore activities with significant environmental responsibilities.

A. The Risk Survey. The first step in the two-part exemption process is the environmental risk survey which the major claimant performs on non-industrial shore activities deemed to pose little or no environmental risk. The survey examines the activity's overall compliance with federal, state, and local environmental requirements and the potential risk its operations may have on the environment. Risk surveys may cover individual activities or entire types of activities.

B. EFD Review. If the major claimant finds that an activity does in fact pose a low environmental risk, exemption from all or portions of the major claimant's ECE may be justified. The major claimant forwards the survey to the Engineering Field Division (EFD) of NAVFACENGCOM serving the major claimant. EFD reviews the risk survey and approves or rejects the exemption.

0606 COMBINING FOR EFFICIENCY. Even where an outright exemption would be inappropriate, several provisions in chapter 4 of OPNAVINST 5090.1A permit commands to coordinate their duties to conduct ECEs with other commands to reduce their administrative burden.

A. Host/Tenant ECEs. At shore activities with tenants, paragraph 4-5.5 of OPNAVINST 5090.1A permits the host and tenant major claimants to perform the ECE jointly. Tenants exempted by the major claimant shall be covered under the ECE performed for the host activity by its major claimant, as well as the host activity's annual self ECE.

B. Overseas. At overseas activities, ECEs may be accomplished as a joint service effort in regions with multiservice installations. ECEs at overseas activities shall address host country laws of general applicability, SOFAs, DOD, OPNAV policies.

0607 ECE REPORT FORMAT. The sheer breadth of regulatory requirements studied in an ECE and the need to summarize their results for annual assessments dictate that a standard format be adopted for their preparation. ECEs follow a standard format and checklists, developed by COMNAVFACENGCOM, to address all Federal, state, and local environmental and natural resources requirements. Like an environmental cousin of a JAG Manual investigation, Part 1 of the ECE provides findings of fact, i.e., factual material including background on the preparation of the ECE and information on the environmental activities determined to be in noncompliance, sorted by the governing environmental statutes

and regulations. The findings of fact are supported by the various appendices on compliance. Part 2 of the ECE contains opinions and recommendations, based on the findings of fact, regarding overall compliance and means for corrective action. This part is more subjective and assists naval authorities in deciding what course of action to take to maintain or achieve compliance. The ECE will also project the total cost of compliance for the period in the six year defense plan (SYDP).

0608 PUBLIC ACCESS TO ECEs. The potential treasure likely to be found in an ECE by someone bent on filing a citizen's suit makes these evaluations prime targets of informal discovery. The risk that the ECE report will become "Plaintiff's Exhibit #1," however, is significantly outweighed by the long term benefits of the ECE program and infinitely preferable to the alternative of not conducting ECEs and remaining in the dark as to the extent of our noncompliance.

A. Releases in General. In most cases, the release of ECEs shall be governed by the Freedom of Information Act (FOIA) and SECNAVINST 5720.42D (NOTAL). In a nutshell, special court-martial convening authorities are authorized to release information under their control in response to a valid FOIA request. To be valid, a FOIA request must be in writing, state what information is desired with adequate particularity, reference the FOIA as authority for the request, and include an offer to pay for reproduction/search costs or request a waiver. The command must act on the request within 10 working days. Materials must be released unless a FOIA exemption applies and the release would jeopardize an important governmental interest.

B. Finality. Draft ECEs are working documents. As such, draft ECEs are not subject to release until approved by the authority who directed that the evaluation be conducted. Per paragraph 4-5.8 of OPNAVINST 5090.1A, ECEs shall not normally be kept in draft form for more than 60 days.

C. Factual Data. As discussed above, Part 1 and the Appendices (checklist) of the ECE set forth factual matters. We anticipate these records will be released. As with any other FOIA request, portions of the factual data containing classified or sensitive unclassified information can be withheld.

D. Opinions and Recommendations. Since Part 2 contains internal advice, recommendations and subjective evaluations, it will usually be exempt from release as deliberative or predecisional material under FOIA exemption b(5). As with any other FOIA request, this must be treated as a denial. If received by a subordinate command, the request must be acknowledged and forwarded to the Initial Denial Authority (IDA) within 10 working days. The IDA is typically the general court-martial convening authority in the chain of command. More details are provided in SECNAVINST 5720.42D (NOTAL).

E. Litigation. FOIA controls the release of ECEs in the vast majority of

cases. ECEs which are requested in the midst of existing or reasonably anticipated litigation, however, may be governed by SECNAVINST 5820.8; Subj: Release of Official Information for Litigation Purposes and Testimony by DON personnel. This Instruction may apply even if the Navy is not now a party to the litigation. Navy JAG (Code 34) has cognizance over these matters and can provide guidance in specific cases. Their number is AV: 221-9870 or Comm: (703) 325-9870.

0609 ADDITIONAL READING. For a detailed examination of this subject, see Colonel J. Michael Abbott, USAF, "Environmental Audits: Pandora's Box or Aladdin's Lamp?" 31 Air Force L. Rev. 225 (1989).

CHAPTER 7

FUNDING ENVIRONMENTAL COMPLIANCE

0701 REFERENCES

A. Superfund Amendments and Reauthorization Act of 1986 (SARA)

B. Defense Environmental Restoration Account (DERA) 10 U.S.C. § 2706

C. The Antideficiency Act, 31 U.S.C. § 1341

D. Office of Management and Budget (OMB) Circular A-106, 31 December 1974 (Reproduced in Appendix G of the EPA's Federal Facilities Compliance Strategy Manual (The "Yellow Book")

E. Executive Order 12088

F. OPNAVINST 5090.1A, Chapter 3

0702 OVERVIEW. Funding for environmental compliance and cleanup activities comes from three sources: The Defense Environmental Restoration Account (DERA); Operations and Maintenance funds; and the Military Construction Account.

A. Defense Environmental Restoration Account (DERA). The Superfund Amendments and Reauthorization Act of 1986 (SARA) established the "Superfund" as the major funding mechanism for environmental restoration projects. Except in rare circumstances, however, DoD installations are ineligible for SARA funding. Instead, Congress established DERA to fund military cleanup projects.

1. DERA is centrally managed at the Departmental level and is used only for environmental restoration projects and activities. Congress appropriated more than $1 billion for DERA in FY91.

2. DERA shields installations from the immediate impact of funding environmental cleanups. Many remedial actions, however, will require long-term operation to implement the remedy selected. Per current DoD policy, DERA will be used to fund the operation and maintenance (O&M) of remedial projects for 10 years. After that, operational expenses will be funded by the installation's O&M money.

B. Navy Environmental Compliance Account (NECA). NECA is the Navy share of the DERA appropriation. DoD doles out the DERA money after determining

the restoration priorities among the services. NECA consists of three discrete appropriations: Operations and Maintenance, Navy (O&MN), Other Procurement, Navy (OPN), and Research, Development, Test and Evaluation (RDT&E). NECA is managed by CNO (OP-45). The Commander, Naval Facilities Engineering Command (COMNAVFACENGCOM) and the Commander, Naval Sea Systems Command (COMNAVSEASYSCOM) have been delegated the authority to execute certain NECA line items for environmental compliance relating to matters under their congnizance.

0703 BUDGETING. Budgeting for major environmental compliance projects is accomplished pursuant to the Office of Management and Budget (OMB) A-106 process. OMB Circular A-106 is reproduced in Appendix G of the Yellow Book. Commanders must ensure that they identify *all* pollution control projects and programs needed to achieve and maintain environmental compliance for the next 5 years. Priority is given to those projects necessary to comply with compliance agreements or to remedy notices of violations (NOVs).

A. The Pollution Control Report (PCR). The PCR is an automated planning and budgeting system the Navy uses to program and execute environmental compliance and restoration projects. All nonrecurring and nonroutine compliance projects, regardless of their funding source, are entered into the PCR system. NAVFACENGCOM uses the information to produce the Navy's A-106 report.

B. The A-106 Process. OMB Circular A-106 implements the requirement of section 3(a) of Executive Order 12088 for federal agencies to submit annual "Pollution Abatement Plans" to EPA for review. EPA prioritizes these plans to shape compliance strategy by determining where our finite dollars will be spent. EPA classifies each project into one of three general categories.

1. Class I: The project is needed to achieve compliance or required by enforcement action.

2. Class II: The project is needed to achieve compliance by pending deadlines for existing or future standards.

3. Class III: The project is needed to replace obsolete facilities, meet expansion needs, to demonstrate leadership, etc.

C. Review. EPA reviews the projects at Regional Offices and EPA Headquarters. The adequacy and priority of each project is rated. EPA forwards the ratings to the federal agency for review.

D. Congressional Interest. Congress is dissatisfied with DoD's performance in reporting its environmental compliance funding requirements. The

FY91 DOD Authorization Act amended 10 U.S.C. § 2706 to require DoD to forward an installation by installation listing of environmental compliance requirements with the President's annual budget submission to Congress. "[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).

0704 FUNDING POLICIES

A. Ashore. The source of funding for Navy environmental compliance at shore facilities depends on whether the funding is for "routine" purposes.

1. Routine Costs. Routine costs typically include staffing, training, permit fees, and NEPA documentation. These routine costs are easily estimable and payable within the facility commanding officer's yearly operating budget. Accordingly, routine costs will be included in the facility's O&MN or Navy Industrial Fund (NIF) budget which will then be submitted to the major claimant. These expenses are not submitted in the PCR/OMB A-106 report.

2. Non-Routine Costs. Non-routine costs include non-recurring compliance projects such as special studies, remedial actions, and corrective actions. Non-routine costs over $10,000, which are required by law or regulation or necessary to achieve environmental compliance, are generally funded by the NECA, rather than the facility's O&MN or NIF budget. A Pollution Control Report (PCR) shall be completed for all nonrecurring, nonroutine costs over $10,000. NIF facilities and Government-Owned, Contractor-Operated (GOCO) facilities are eligible for NECA funding, consistent with use contracts; facilities leased by the Navy are not.

3. Major Construction Costs. There are limitations on the use of O&MN funds for pollution control projects that involve significant construction expenditures. If a compliance action will require construction costing more than $200,000, O&MN funds cannot be used; the project must be funded with MILCON dollars.

B. Shipboard Compliance Costs. Ship alterations performed to meet environment compliance requirements shall be accomplished as part of the Fleet Modernization Program and funded by OPNAV resource sponsors. Special studies, equipment, and RDT&E for new systems shall be budgeted by COMNAVSEASYSCOM.

0705 THE ANTIDEFICIENCY ACT (ADA).

The ADA prohibits federal agencies from incurring an unconditional obligation to install pollution control equipment or otherwise spend money in future fiscal years.

A. The ADA is a key feature of the congressional power of the purse. Appropriations operate as a ceiling within which the federal agency must perform its mission. Obligating the government to spend money not yet appropriated usurps that congressional power. Conversely, Congress prohibits the augmentation of federal appropriations from any source, e.g., we can't sell hot dogs to raise money to clean up the installation. Consequently, we must negotiate delayed compliance schedules with ample flexibility, i.e., we commit to taking specified corrective actions subject to availability of funds.

B. Couching the Commitment. There are many ways to build financial flexibility into the delayed compliance schedule. The following clauses illustrate typical approaches.

1. "Subject to funding that Congress authorizes for the project."

2. "Subject to funding that Congress authorizes for the project," coupled with a commitment to request such funds.

3. "Subject to the availability of funding allocated to the installation that can be used for the project," coupled with a commitment to request funding from Congress.

CHAPTER 8

REPORTING VIOLATIONS

0801 REFERENCE

A. OPNAVINST 5090.1A, Appendix C

0802 BACKGROUND. The 387,000 federal buildings on 27,000 installations, situated on 729 million acres of federal land are subject to seemingly innumerable federal, state, and local environmental requirements, both substantive and procedural. Try as we might, our efforts occasionally fall short of full compliance. When regulators detect suspected violations of those requirements, they let us know. Federal EPA officials may issue notices of noncompliance (NON); state and local officials may issue notices of violation (NOV). In addition, commanders may be honored by warning letters, warning notices, citizen suit notices, consent orders, or any number of other notices of deficiency under various labels. This chapter outlines responsibilities and required action in the event we receive these notices. Adherence to these requirements helps ensure the matter receives the proper attention and is resolved in a manner consistent with environmental laws yet with the minimum adverse impact on mission accomplishment.

0803 RESPONSIBILITIES OF THE NONCOMPLIANT COMMAND. Upon receipt of <u>any</u> notice of noncompliance, whether oral or written, formal or informal, the commanding officer shall harness the technical and legal expertise needed to respond. Commanders can draw on support from command environmental technical personnel, the command staff judge advocate, the cognizant Navy Legal Services Office (NLSO), or Navy Office of General Counsel (OGC) attorney. Additional technical and legal assistance is available from major claimants and from the cognizant Engineering Field Division (EFD) of NAVFACENGCOM. Having assembled the necessary support, the commander can fulfill the following requirements, triggered by receipt of any notice of our noncompliance, in whatever form and by whatever name.

A. <u>Initial Notification</u>. The command must provide initial information on each NOV, NON, written or oral citation, etc., they receive. Using the message format in Appendix C to OPNAVINST 5090.1A, the command must notify CNO, with information copies to the chain of command, Navy OGC (Environmental Law Office (ELO)), COMNAVFACENGCOM, the appropriate EFD, the Navy Energy and Environmental Support Activity (NEESA), Port Hueneme, California, and the regional environmental coordinator. The initial message shall be sent upon receipt of the citation. One message may be used to report violations in more than one

media as a result of multi-media inspections. The required format has been reproduced in the appendix to this chapter for downloading convenience.

B. Preliminary Inquiry. The command must conduct a preliminary inquiry into the facts and circumstances of the violation, obtain legal and technical support, and take corrective action. If asked to pay a fine or penalty, the command will prepare a written investigative report per procedures established by the major claimant or delegated representative. The investigative report shall cover the facts and circumstances of the incident and include such documents, statements, photographs, claims for damage, notice of fine or penalty, and further details as may be required in the particular case. The report may be prepared as a JAG Manual investigation or a letter report. The command forwards the report to the major claimant via the chain of command with copies to Navy OGC (ELO), NEESA, the regional environmental coordinator, and the appropriate NAVFACENGCOM EFD.

C. Followup Notification. Every initial notification must be amplified in at least one followup message. The first followup message should be sent as soon as the information specified in the format is known. In any event, the followup message containing additional details shall be sent not later than six months after the command received the initial NOV. After that, followup messages are required every six months from the receipt of the NOV, until the issuing agency considers the NOV resolved. The required format for followup notifications is also reproduced in the appendix to this chapter for user convenience.

D. Agency Response. While this chapter primarily discusses internal reporting requirements, the command must still prepare all necessary responses to pollution control agencies per policies provided in this Deskbook and OPNAVINST 5090.1A.

E. Fines and Penalties. As a matter of policy, EPA does not impose money penalties on federal facilities except as provided in, and to enforce the terms of interagency agreements (IAGs). State regulatory agencies, however, may assess penalty payments. Commands shall not pay fines or penalties for violation of environmental laws and regulations without first seeking the advice of legal counsel.

1. The commander must consult with on-site or command counsel. If no factual or legal defense exists, we try to negotiate the lowest possible penalty, arrange for payment, and advise all addressees in paragraph 0803A above by message. Payments are made from the operating funds of the activity or major claimant.

2. If a defense exists, the command will forward the investigative report to the major claimant via the chain of command, copy to Navy OGC (ELO), with their recommendation that the fine or penalty be contested. When the

recommendation to contest the violation or noncompliance is rejected, negotiation for payment as discussed above will begin at the local level.

F. Final Notification. When all the issues for a specific NOV are resolved and the issuing agency considers the action complete, the command will send the final followup notification detailing all the particulars to all addressees.

0804 MAJOR CLAIMANT RESPONSIBILITIES. To monitor compliance effectively, major claimants must maintain a list of all pending NOVs or other notices received by activities under their command. Claimants shall compare their list to the DoD Compliance Status Report which is published quarterly by the EPA Office of Federal Activities (OFA). Claimants shall report discrepancies between the two to OFA by letter.

Appendix

INITIAL NOTIFICATION FORMAT

FM: NAVY ACTIVITY/SHIP//CODE//
TO: CNO WASHINGTON DC//45//

INFO: CHAIN OF COMMAND
LEGSVCSUPPGRU OGC WASHINGTON DC//ELO//
REGIONAL ENVIRONMENTAL COORDINATOR//JJJ//
NEESA PORT HUENEME CA//112//
COMNAVFACENGCOM//18//
NAVFACENGCOM EFD//JJJ

//UNCLAS//NO05090//

SUBJ: RECEIPT OF NOTICE OF ENVIRONMENTAL NONCOMPLIANCE

MSGID/GENADMIN/ORIGINATOR//CODE//
REF/A/DOC/OPNAVINST 5090.1A//
RMKS/

1. Activity or ship name in violation.

2. Navy UIC number.

3. Activity address/ship homeport.

4. City (for ships, where violation occurred).

5. State (use 2-letter state abbreviations).

6. County.

7. Point of contact for additional information.

8. POC telephone number.

9. EPA region.

10. Was a NOV received (yes or no)?

Appendix

For this purpose, an NOV is any formal written notification by the EPA or an authorized state or local environmental regulatory agency of a violation or violations of law or regulation, which applies to the regulatory agency's first level of enforcement action. Warning letters or notices of deficiencies are not NOVs, but are to be included on line 12.

If the NOV cites violations under several media, treat them as multiple NOVs, one under each of the applicable medial categories. Only one message is required but the specific information required must be included for each media. Generally, lines 1 through 14 of the message will be the same for the different media violations that result from a multi-media inspection. Lines 15 through 24 will be repeated and tailored for each violation in the different media cited. The media are listed in the chart at the end of this appendix.

One written notice, regardless of the number of individual violations, findings or citations counts as one NOV. Do not include on line 10 items found to be out of compliance by a regulator, but not set forth in writing.

11. Violation description, other than NOV.

This might include, for example, NONs, warning letters, regulatory agency inspectors reports identifying deficiencies, oral inspection outbriefs. Violations involving more than one media are to be handled in the same manner as NOVs.

12. Name of issuing agency and violation number(s).

13. Date of notification (mm/dd/yy).

This is the date that the NOV, etc., was initiated by the regulatory agency, preferably the date on the letterhead.

14. Date of inspection (mm/dd/yy).

This is the date of the inspection during which the violation was detected. If the inspection took several days, use the date noted on the NOV, etc., or, if none, use the date the inspection started.

15. Media.

Appendix

This refers to the law under which the violation was issued. Refer to the table below for the codes.

16. Specific section of regulation or act cited.

17. Permit numbers related to the violation.

18. Total number of individual findings issued by the regulatory agency.

    A "finding" is a specific violation with citation of environmental law or regulation.

19. List each violation separately and classify into one of the following (list should equal total in item 18):

    Class A. Releases to the environment.

    Class B. Violations with the potential to cause a release or damage

    Class C. Administrative violations. A specific violation, citation, or finding which occurs as a result of improper paperwork, report filings, or labeling. This does not include paperwork associated with permit applications.

20. Was a fine assessed or requested?

21. Total dollar amount of fines assessed.

22. Summary of demand for payment.

23. Was a compliance agreement, negotiation, or agreement requested by the regulatory agency?

24. Summary of proposed agreement or schedule.

25. Additional information

    Unusual circumstances or events leading to NOV should be discussed here.

Appendix

FORMAT FOR FOLLOWUP MESSAGES

FM: NAVY ACTIVITY/SHIP//CODE//
TO: CNO WASHINGTON DC//45//

INFO: CHAIN OF COMMAND
LEGSVCSUPPGRU OGC WASHINGTON DC//ELO//
REGIONAL ENVIRONMENTAL COORDINATOR//JJJ//
NEESA PORT HUENEME CA//112//
COMNAVFACENGCOM//18//
NAVFACENGCOM EFD//JJJ

//UNCLAS//NO05090//

SUBJ: FOLLOWUP REPORT OF NOTICE OF ENVIRONMENTAL NONCOMPLIANCE

MSGID/GENADMIN/ORIGINATOR//CODE//
REF/A/DOC/OPNAVINST 5090.1A//
REF/B/DTG OF INITIAL MESSAGE/VIOLATION NUMBER//
RMKS/

1. Activity or ship name in violation.

2. Navy UIC number.

3. Activity address/ship homeport.

4. City (for ships, where violation occurred).

5. State (use 2-letter state abbreviation).

6. County.

7. Point of contact for additional information.

8. POC telephone number.

9. EPA region.

10. Was a fine paid? Yes or no.

Appendix

11. Dollar amount of fine paid.

12. DERA paid.

    This is the total dollar amount of fines disbursed out of the Defense Environmental Restoration Account for CERCLA violations.

13. Was compliance agreement, negotiation, or schedule accepted? Yes or no.

14. Date of agreement (mm/dd/yy).

15. Is the compliance agreement closed (i.e., resolved to the satisfaction of the issuing agency)?

16. Financial obligation resulting from the Compliance Agreement.

17. Fiscal year(s) for which the financial obligations have been incurred.

18. Dollar amount and appropriation of projected costs resulting directly for Compliance Agreements.

19. Is the NOV resolved? Yes or no.

    To be resolved, an NOV must be resolved to the satisfaction of the issuing agency. All individual findings, violations, or citations within the NOV must be resolved for the NOV to be considered resolved for the purposes of this report.

20. Date of resolution (mm/dd/yy).

21. Has the issuing agency concurred with resolution of the issues and removed the violation from their active files? Yes or no.

22. Date of concurrence (mm/dd/yy).

    This is the date on which the regulatory agency confirms, orally or in writing, that all findings are resolved.

23. Expected completion date for issues not immediately corrected (mm/dd/yy).

24. Summary of reasons for not resolving the issues.

25. Is a compliance project required to achieve compliance with NOV?

26. Has project/PCR exhibit been submitted to the major claimant and/or EFD?

If MILCON is required, provide the project number and program year.

27. A-106 project number.

This is the unique identification number assigned to the project in the A-106 Project Report Form. Include only those A-106 projects that have either of the following two compliance status codes: CMPA (required to meet conditions of a signed Federal Facility compliance agreement, consent order or equivalent state or local enforcement action); or INOV (required to meet deficiencies found on inspections by regulatory authority or cited in an NOV or equivalent).

28. Additional information.

Media Codes

Clean Air Act: A
Clean Water Act: W
Safe Drinking Water Act: S
Resource Conversation and Recovery Act
- Subtitle C: Hazardous wastes: C
- Subtitle D: Nonhazardous solid wastes: D
- Subtitle I: Underground storage tanks: I

Toxic Substances Control Act: T
Comprehensive Environmental Response: R
Federal Insecticide, Fungicide and Rodenticide Act: F
Endangered Species Act: E
Historic Preservation Act: H
Archaeological Protection Act: R
Other: Z

CHAPTER 9

ENVIRONMENTAL LITIGATION

0901 INTRODUCTION. Many of the substantive chapters in this Deskbook include discussions of litigation under a specific statute. This litigation may take many forms from a civil action to hold a federal official personally liable for environmental wrongs to a citizen's suit to enforce federal compliance with a statute or regulation. The spectre of litigation tends to freeze command action and may hamper mission accomplishment. While other chapters in this Deskbook seek to promote compliance, the best insurance against litigation, this chapter provides an overview on what litigation generally entails. The aim here is to assist judge advocates in understanding the litigation process, suggest practices which will improve our litigation posture, and identify litigation support.

0902 TYPICAL LITIGATION CHRONOLOGY

A. Filing. The fun begins when the plaintiff files a complaint, typically in the federal district court having jurisdiction over the command. The plaintiff may be an environmental group, a concerned citizen, a state or local government. Under the unitary executive principle, EPA does not bring suit against fellow federal agencies. The prevailing view is that the intra-executive suit would not present a judicial case or controversy.

B. Service. The plaintiff "serves" the defendants with the summons and complaint. If the Secretary of the Navy gets served, the "hired guns" will call you. The litigation will be handled by the half dozen attorneys dedicated to this mission in the Litigation Office of the Office of the General Counsel and the General Litigation Division of the Office of the Judge Advocate General (Code 34). If the command is served instead of SECNAV, IMMEDIATELY notify Code 34 at AV 221-9870 or COMM (703) 325-9870.

C. The Clock Starts. Once service is properly made, the time to respond starts to run. The response time is generally 60 days unless the plaintiff seeks a temporary restraining order (TRO) or preliminary injunction (PI). If a TRO/PI is sought, the time to respond may only be matter of a few days or less.

D. Data Gathering. The command will have to educate lawyers on the facts of the case. This is one area in which the thorough maintenance of the administrative record, discussed below, will be especially helpful.

E. TRO/PI Hearings. If the plaintiff seeks injunctive relief, a public hearing will be held in federal district court. Counsel for each side present legal briefs. If time permits, declarations may be introduced. The decision is typically rendered quickly, based on the administrative record, counsel's briefs, and arguments.

F. TRO/PI Appeals. The loser in district court appeals to the cognizant U.S. Court of Appeals. Counsel file briefs but no new evidence is presented. Counsel argue at a public hearing. The decision is rendered on the record of proceedings in district court and the briefs and arguments of counsel.

G. Motion to Dismiss. In cases in which the plaintiff does not seek a TRO or PI, the next step taken by the Navy is the motion to dismiss. After the motion is filed, counsel exchange briefs. Command input supports the "Statement of Facts" section of the brief. Counsel argue at a public hearing. If the Navy prevails on the motion, plaintiff may appeal.

H. The Answer. If the Navy loses the motion to dismiss or does not file a motion to dismiss, we must file an answer to the complaint. The need to respond to the factual allegations in the complaint typically requires detailed command assistance. Local judge advocates play a key coordinating role.

I. Motion for Summary Judgment. One or both sides will file a motion for summary judgment. Counsel exchange briefs. Command personnel may be asked to prepare affidavits in support of the motion. In essence, the facts are not disputed; we argue that our interpretation of the law as applied to the facts dictates that we would prevail on the merits. Counsel argue at a public hearing. The loser may appeal to the Court of Appeals as discussed above.

J. Discovery. If the court refuses to enter summary judgment for either side, i.e., the court believes a legitimate factual dispute exists, the discovery phase begins. Command personnel will be asked to help us respond to document requests. Personnel may have to be deposed. An attorney representing the Navy will be present at all depositions.

K. Settlement. The case may be settled at any point in the proceedings. The litigation attorneys will assess the cost of defending the action. Once liability attaches, the Navy may have to pay the plaintiff's attorney and expert witness fees. If liability is clear, a quick resolution may be the cheapest way out.

L. Trial. It is unusual for environmental cases to get this far. After an initial flurry of activity, plaintiffs tend to slow down. If the case goes to trial, command personnel may have to testify. The case may last several hours or several weeks and may require the command to expend funds. Again, the loser may appeal.

0903 LITIGATION SUPPORT

A. Litigation Attorneys. The hired guns for environmental litigation defense reside in two camps, led as follows.

1. Commander Steve Banks, JAGC, USN (Ret.)
Trial Attorney (Environmental Litigation)
Litigation Office
Office of the General Counsel
Department of the Navy
Washington, D.C. 20360-5110
AV: 332-3201
COM: (703) 602-3201
FAX: (703) 602-3229

2. Lieutenant Commander Rick Evans, JAGC, USN
Trial Attorney (JAG-34)
Office of the Judge Advocate General
200 Stovall Street
Alexandria, VA 22332-2400
AV: 221-9870
COM: (703) 325-9870
FAX: (703) 325-6615
EMAIL: JAG34

B. Command Counsel Role. Teamwork is critical to successful environmental litigation. Given their experience and expertise in environmental law and litigation, coupled with their rapport with the Department of Justice (DoJ) and Assistant U.S. Attorneys (AUSA), the litigation attorneys from OGC and OJAG will coordinate matters involving DoJ/AUSA, opposing counsel, and the court. The command counsel is involved in a more general practice, coordinating matters with the command and providing them with day to day pre-litigation advice. The legal and factual dimensions of a given case can be presented to the Navy's best advantage only if the two teams work together.

0904 THE ADMINISTRATIVE RECORD

A. Significance. The administrative record is critical to successful environmental law litigation. Review on the administrative record allows the Navy to prevail unless our decision is shown to be arbitrary, capricious or contrary to law. De novo review is appropriate only where there is inadequate factfinding in an adjudicatory proceeding or where judicial action is necessary to enforce certain administrative actions. A complete administrative record avoids burdensome discovery battles and depositions of senior decisionmakers. Attention to detail here will also help contain showcase trials and "grandstanding" plaintiffs.

B. Mandates. Some environmental statutes specify that an administrative record be maintained. Under CERCLA § 113k, for example, selection of the response action must be on the record: "The President shall establish an administrative record upon which the President shall base the selection of a response action." This is crucial if we are a potentially responsible party hoping to avoid financial liability.

C. Contents. To a large extent, the administrative record is what the agency says it is. Some statutes require that a "docket" be kept or set out what the record must contain, e.g., Clean Air Act § 307(d)(rulemaking for NAAQSs) and Clean Water Act § 402 (public hearing on NPDES permit).

1. The administrative record is limited to the materials before the decision maker *at the time the decision was made.* The Navy will be stuck with the record in existence; we can not gun-deck the record with post hoc rationalizations compiled long after the fact.

2. The administrative record must include evidence and materials on all factors required to be considered by the governing statute and all materials actually relied on for the decision. A properly maintained record will show that the actions were within the scope of the decisionmaker's authority and were justifiable under the applicable standard.

3. Unless required by statute, e.g., NEPA, the decisionmaker does *not* necessarily have to consider every piece of paper or material on rejected alternatives. Nevertheless, where two sides are considered and one is rejected, a well-kept record will show that the failed alternative was duly considered.

4. Privileged material need not be included. Protected materials include matters under: the attorney-client privilege; the attorney work product rule; and the exercise of governmental privilege (akin to the deliberative process exemption under section b(5) of FOIA).

5. Courts may order an agency to supplement an administrative record when the record is incomplete (e.g., unconsidered alternatives, existence of controversy, etc.) or to show ex parte contacts, improper influence, etc.

D. Management Practices

1. Organized management practices can help build a record to support Navy/Marine Corps decisions. Keep a record of contacts with concerned groups, including materials they obtain through FOIA or more informal means. Ensure that critics are given the opportunity to comment and that you can prove it (return receipt, etc.). The statute and regulations can be used as checklists to ensure that all required factors are covered.

2. In addition, good record-building practices can help the Navy influence or attack state or other agency decisions. Don't miss an opportunity to comment and request more time to comment if needed. Where possible, insist on responses to your comments. Try to develop a persuasive theme early. Make the administrative record compelling. A well organized record will be more useful than a haphazard compilation of unexplained documents.

E. Precedent. The following cases illustrate the significance of the administrative record in environmental litigation.

1. Asarco, Inc. v. E.P.A., 616 F.2d 1153, 1159 (9th Cir. 1980)(Court ordered supplement to explain the administrative record).

2. Camp v. Pitts, 411 U.S. 138 (1973)(Administrative record should be based on the record in existence, not some post hoc rationalization compiled long after the fact).

3. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (Administrative record should include evidence/materials on all factors required to be considered by the governing statute; Court rejected the litigation affidavits SECTRANS submitted as post hoc rationalizations).

4. Greenpeace, U.S.A. v. Evans, 688 F.Supp. 579 (W.D. Wash. 1987)(Administrative record deficient because it did not show that the agency considered exception).

0905 RECOMMENDED DOs AND DON'Ts

A. Don't be surprised if someone files an environmental law suit against your command. Full compliance is no guarantee against litigation. Litigation is becoming an occupational hazard. Be sensitive to the issues but don't lie awake at night worrying about it.

B. If sued, get into compliance as soon as possible. Under some citizen's suits, achieving compliance within the 60-day notice period will deprive the court of jurisdiction. If it doesn't make the suit "go away" altogether, compliance may minimize damages ultimately awarded.

C. Conduct a good public relations campaign. Don't say anything to anyone (especially the public or the press) that might come back to haunt you.

D. Advise command personnel not to communicate directly with opposing counsel All command communications in connection with the litigation should be made through the attorneys representing the Navy. Urge the command to conduct business as usual unless the court or you advise them to the contrary.

E. Command counsel must keep copies of all correspondence. Respond promptly to requests for information and assistance from litigation attorneys. Give litigation attorneys everything that may have a bearing on the case. Err on the side of too much information.

F. Keep the lines of communication open between the command, command counsel, and litigation attorneys. Keep each other apprised of new developments. Don't be afraid to ask questions.

CHAPTER 10

PERSONAL LIABILITY FOR VIOLATION OF ENVIRONMENTAL LAWS

1001 REFERENCES

A. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2879

B. 28 C.F.R. Parts 15, 50.15, and 50.16. [Department of Justice representation]

C. 28 U.S.C. § 1442 [Removal to federal court]

D. OPNAVINST 5090.1A, Chapter 1

1002 BACKGROUND. Few topics in environmental law generate as much command interest as personal liability. As of January 1991, DoJ's Environmental Crimes Section had obtained 761 indictments leading to 549 convictions, $57 million in monetary penalties, and 348 years in jail. Such statistics gain immediate attention. Happily, as of this writing, no naval officer has been held personally liable for any environmental penalty, civil or criminal, federal or state. Familiarity with the principles in this chapter will help us prolong that record.

1003 CIVIL LIABILITY. Most recent environmental statutes contain provisions that permit assessment of civil penalties for violation of environmental laws. In addition, commanders may be liable under state tort law if their actions cause injury to others, such as suits for health problems from contaminated wells, etc. As a practical matter, their exposure is limited at present as long as they are acting within the scope of their duties.

A. At present, EPA does not seek civil penalties against federal agencies or federal employees. EPA's support for legislation that would change this policy suggests changes may be in the offing. Some states have sought civil penalties against agencies and could conceivably seek penalties against commanding officers.

B. The threat of personal liability varies from statute to statute. The Clean Air Act and the Clean Water Act, two of the primary environmental media statutes, specifically protect individuals acting within the scope of their official duties from civil penalties. In sharp contrast, the Resource Conservation and Recovery Act

(RCRA) contains no similar protection. RCRA governs the disposal of hazardous waste, a problem facing every installation commander.

C. Damage suits for pollution from Navy vessels in navigable waters may be exclusively limited to suits in Admiralty against the United States. This avoids the personal liability exposure presented by state tort suits against individuals.

D. Some environmental laws authorize citizens to sue to compel officials to take action. The court may award attorney's fees to the prevailing litigant. As these are suits against an employee in an official, rather than private, capacity, these fees would be paid by the government.

1004 THE FEDERAL EMPLOYEES LIABILITY REFORM AND TORT COMPENSATION ACT. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) provides for substitution of the United States as a defendant in suits against federal officials based on common law torts so long as they act within the scope of their official duties.

A. Representation. Commanders sued in their personal capacity can ask for Department of Justice (DoJ) representation. These requests are forwarded to DoJ via the chain of command and OJAG (Code 34). If satisfied that the officer acted within the scope of official duties, DoJ may agree to provide representation when it is in the interests of the government to do so. As a matter of policy, DoJ will not provide representation in federal criminal proceedings. In some cases, DoJ may elect to pay for private representation. Otherwise, the cost of private counsel is borne by the employee. Representation by DoJ or an attorney paid for by the government does not relieve an employee of the obligation to pay an adverse judgment.

B. Removal. The prevailing view is that federal defendants will receive more favorable treatment in a federal forum. Under 28 U.S.C. § 1442, federal employees and military personnel acting under color of their office or status may have civil and criminal actions against them in state court removed to federal district court provided there is an averment of a "federal defense." Establishing such a defense may be difficult when the act involved contravenes both state and federal environmental laws. Suits for personal injuries or property damage, however, are automatically removed from state to federal court.

C. Substitution. If DoJ deems that the federal official was acting within the scope of their employment, they may move to substitute the United States for the named defendant in the action. This is not an absolute power. In recent cases, judges have interpreted gray areas in the Westfall Act to permit the court to reject the motion for substitution. DoJ, perhaps reading the writing on the wall, has opined that plaintiffs can ask the court to reverse substitution of the United States under the Westfall Act, thereby reinstituting the suit against the individual, with the attendant potential personal liability in the event of an adverse judgment.

D. Limitations. The Westfall Act does not affect actions for civil penalties, as opposed to civil damages. Nor does it apply where federal statutes authorize action against an individual. In addition, the Act has no application to criminal liability.

E. Help. Personnel served with process for official acts should report the matter immediately to their commanding officer, command counsel, the general litigation division of OJAG (Code 34) at (703) 325-9870 or AV 221-9870, and OGC litigation office (703) 602-3176 or AV 332-3176.

1005 CRIMINAL LIABILITY. Commanders are subject to most state environmental laws unless compliance would make it impossible to carry out specific federal duties. Commanders are assumed to know and expected to comply with environmental laws. Many federal and state prosecutors, believing that environmental compliance takes precedence over the mission accomplishment, are increasingly looking to criminal penalties. Criminal enforcement mechanisms in environmental statutes are typified by easily satisfied mental elements and stiff penalties.

A. The Mental Element. Most statutes provide for felony and misdemeanor prosecutions, depending on severity of violation and mental element. Some statutes, e.g., the Clean Water Act, provide criminal sanctions for "negligent" violations. Other environmental statutes, e.g., the Rivers and Harbors Act, 33 U.S.C. §§ 401-466n (1982), impose strict liability, requiring proof only of the act. Even for a felony, proof of a "knowing" violation means only that the defendant knew a certain activity, e.g., disposal, was occurring, NOT that the action violated a certain statute. Commanders may be held liable if they breach a duty to ensure that violations are avoided; it need not be their hand that turned the valve. Nor can commanders avoid liability by sticking their head in the sand; courts are unsympathetic to the "intentionally ignorant."

B. Penalties. Environmental statutes carry hefty criminal penalties. For example, conviction under RCRA's provision for "knowing endangerment" of another by mishandling hazardous waste carries a maximum punishment of a $250,000 fine and 15 years' imprisonment; negligent discharges under the CWA carry a $25,000 fine and 1 year in jail. The amended federal sentencing guidelines will result in more jail sentences for environmental crimes.

C. Procedural Limitations. Under Mesa v. California, 489 U.S. 121, 103 L.Ed.2d 99 (1989), federal officials cannot remove a state prosecution to federal court unless their federal duties required them to break the law. As discussed above, representation by DOJ is rarely available in federal criminal cases, and probably not in most state criminal cases unless there is a federal duty required breaking the law.

D. Avoiding Prosecution. Prosecutors are unlikely to bring a criminal case where the deterrent value is low. This is especially true where a commander has done everything possible to achieve compliance. Commanders must ensure that all levels of the command understand the commitment to compliance with environmental laws. The first step is to assess the command's compliance status. (Consult chapter 6 of this Deskbook regarding Environmental Compliance Evaluations.) The commander must then take the necessary actions to get into compliance, document the efforts, and request additional resources if necessary. Counterproductive activities such as failing to report leaks and falsification of data merely invite prosecution.

1006 PRIVATE INSURANCE. Whether an officer should obtain private professional liability insurance is a personal decision. For the vast majority of naval personnel, however, such insurance is not warranted.

A. For those who feel their circumstances may invite suits against them personally, e.g., suits by civilians asserting illegal searches or detention or other violations of civil rights, private professional liability insurance is available. Coverage may be purchased for adverse judgments, costs, and attorney fees in non-criminal cases arising out of the performance of official duties. In the event DoJ elects to pay for private representation, this insurance can cover attorney fees in non-criminal proceedings to the extent such fees are not fully reimbursed by the governmemt.

B. Homeowners' policies and personal liability umbrella policies customarily exclude risks associated with professional activities. Insurance will not provide coverage against criminal or civil penalties or the costs of defending a criminal action. Consequently, the utility of private insurance on account of risks associated with environmental compliance is doubtful. Prospective buyers should examine the policy terms closely.

C. The best "insurance" is to embrace the following guidance:

1. Promote the philosophy that environmental compliance is a part of mission;

2. know the applicable requirements;

3. staff, organize and train to ensure compliance;

4. use the environmental compliance evaluation program;

5. respond promptly to notices of violation;

6. correct discrepancies and negotiate compliance schedules with regulators in a spirit of cooperation;

7. keep the chain of command informed;

8. request assistance promptly if problems cannot be resolved with available resources;

9. use the pollution control report (PCR), baserep, casrep, pom and command correspondence to identify funding requirements;

10. document dealings with regulators;

11. select and reward managerial personnel who excel at inter-governmental relations; and

12. maintain accountability and address problems promptly and candidly.

1007 ADDITIONAL READING. For a detailed examination of this subject, see: Commander Larry D. Wynne, JAGC, USN, "A Case for Criminal Enforcement of Federal Environmental Laws," 38 Naval L. Rev. 105 (1989); Major R. Craig Anderson, USAF and Major Robert T. Lee, USAFR, "Private Party Actions Against Federal Officials for Environmental Wrongs," 31 Air Force L. Rev. 31 (1989); Major John J. Bartus, USAFR, "Federal Employee Personal Liability Under Environmental Law: New Ways for the Federal Employee to Get in Trouble," 31 Air Force L. Rev. 45 (1989).

CHAPTER 11

NATIONAL ENVIRONMENTAL POLICY ACT

1101 REFERENCES

A. 42 U.S.C. §§ 4321-4370a (NEPA).

B. 42 U.S.C. § 7609 (EPA review of EISs).

C. 40 C.F.R. Parts 1500-1508 (CEQ Regulations)

D. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, Jan. 4, 1979

E. DoD Directive 6050.1, Environmental Effects in the United States of DoD Actions, July 30, 1979, reprinted at 32 C.F.R. Part 214.

F. DoD Directive 6050.7, Environmental Effects Abroad of Major DOD Actions, Mar. 31, 1979, reprinted at 32 C.F.R. Part 197.

G. CEQ Guidance: The 40 Questions 46 Fed.Reg. 18026 (March 23, 1981)

H. SECNAVINST 5090. of 26 Jul 1991, EVALUATION OF ENVIRONMENTAL EFFECTS FROM DON ACTIONS

I. OPNAVINST 5090.1A, Chapter 5.

1102 STATUTORY PURPOSE. The National Environmental Policy Act (NEPA) was enacted to ensure that environmental factors are given due consideration so that federal actions which affect the human environment are truly necessary (as opposed to expedient) and are undertaken in a manner designed to minimize adverse impacts.

A. The Council on Environmental Quality (CEQ) views the intent of NEPA as ensuring that public officials have an understanding of environmental consequences prior to decision making. The central question is whether that action is deemed necessary by the decisionmaker after a good faith consideration of environmental issues, i.e., whether the decision-maker has considered the environmental consequences his or her decision.

B. NEPA is procedural, rather than substantive, in nature. Accordingly, NEPkA does not mandate the most environmentally favorable result. An agency's

compliance with NEPA is evaluated upon the extent of procedural compliance, i.e., were environmental issues identified, analyzed and considered? The method of evaluation, extent of evaluation and conclusions drawn by the decision maker are not in issue. Nor will the existence of a negative impact on the environment automatically preclude a particular action. The federal agency's actions are subject to collateral attack under the Administrative Procedure Act, however, if their methods, scopes or conclusions are factually inadequate or so erroneous as to be considered arbitrary and capricious.

1103 WHEN DOES NEPA APPLY?

A. Defining "Federal Actions." NEPA applies to "proposals for legislation and other major federal actions significantly affecting the quality of the human environment." A federal action is one with effects that may be major, and potentially subject to Federal control and responsibility. 40 C.F.R. § 1508.18(a).

1. To determine whether an action is "major," consider:

   a. "[A]ctions of superior, larger and considerable importance involving substantial expenditures of money, time and resources";

   b. the "amount of federal funds expended, number of people affected, length of time consumed and extent of government planning involved";

   c. whether it "includes actions with effects that may be major"; or

   d. whether the action poses a threat of substantial environmental harm or is environmentally controversial.

2. An agency may not circumvent the NEPA documentation requirements by dividing the project into parts, each of which when taken alone would not have a specific impact, when the action taken as a whole would have a significant cumulative impact.

3. Expenditure of money and issuing a permit are usually enough of a federal "hook" to trigger NEPA. Generally, if a federal action is involved, NEPA always applies unless an exception applies.

B. Types of Actions Triggering NEPA Review.

1. General Guidance. 40 C.F.R. § 1508.18(b). NEPA review may be triggered by such federal actions as: Adoption of official policies and formal plans;

new management and operational concepts and programs (e.g., research and development); specific projects (e.g., facilities construction); activities (e.g., unit training and flight operations); activities involving radioactive materials; Leases, easements, permits, and other forms of permission to use federal land; hazardous materials clean-up; and federal contracts, grants, subsidies, and loans.

2. Emergency Actions. Actions taken in response to emergencies need not be preceded by the NEPA process. 40 C.F.R. § 1506.11. Emergencies might include search and rescue operations, riot control activities, etc.

3. Statutory Exemptions. Some narrow exemptions exist but there is no "military necessity" exemption.

4. Statutory Conflicts. If the requirements of another federal statute make NEPA compliance impossible, NEPA compliance is excused.

1104 THE DOCUMENTATION REQUIREMENT

A. Procedural Philosophy Applicable to all Environmental Analyses. 42 U.S.C. § 4332(2).

1. Use "a systematic, interdisciplinary approach to ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment."

2. "[I]dentify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decisionmaking along with economic and technical considerations."

B. Three tracks. If the federal action is "major," NEPA will require one of three levels of analysis:

1. Categorical exclusions;

2. An Environmental Assessment (EA); or

3. An Environmental Impact Statement (EIS).

C. Categorical Exclusions (CATEX).

1. The CATEX is used to reduce unnecessary paperwork and delay by eliminating the EA and EIS procedure for various kinds of federal actions which the Department of the Navy (DoN) has determined have no significant impact on the

environment. Paragraph 5-4.2 of OPNAVINST 5090.1A lists 33 categorical exclusions for DoN, e.g., reductions in force, routine movement of ships, etc. The same list is published at 32 C.F.R. 775.

2. Criteria for establishing CATEX categories.

   a. Minimal or no individual or cumulative effect on the quality of the environment.

   b. No environmentally controversial change to existing conditions.

   c. Effect is primarily economic or social.

3. Even if facially within an existing CATEX, this path is inappropriate where:

   a. The action is greater in scope or size than that normally encompassed in the CATEX category or unique circumstances warrant different treatment;

   b. The action threatens a violation of Federal, state, or local law or environmental requirements.

   c. Action will have degrading influence in areas still in substantially natural condition;

   d. Unproven technology will be used;

   e. Threatened or endangered species, or archeological or historic sites, or other protected resources are present;

   f. Hazardous substances will be used with a risk of exposure to the environment or a hazardous waste site may be affected; or

   g. The project affects prime or unique agricultural land, wetlands, coastal zones, wilderness areas, floodplains, or "Wild and Scenic River" areas.

4. Action. If the proposed action clearly fits within a specific CATEX, the command may avoid an EA/FONSI or an EIS but must document the decision per OPNAVINST 5090.1A. Environmental planners are often tempted to look at a given proposal that in their eyes obviously will have no significant impact on the environment and CATEX it. CATEXs are viewed strictly; don't overuse them.

CATEXs are not a substitute for proper environmental documentation and analysis.

D. Environmental Assessments (EAs). The EA is a concise public document providing facts and analysis in plain language for determining the environmental significance of the proposed action. 40 C.F.R. §§ 1501 et. seq.

1. When required. The EA is prepared when the proposed action is not a CATEX and the proposal is not a "major federal action significantly affecting the quality of the human environment" (MFASAQHE). A MFASAQHE requires preparation of an Environmental Impact Statement (EIS)(discussed below). Thus, every non-CATEX federal action will result in either an EA or an EIS. If you know that the proposal is a MFASAQHE, there is no need to prepare an EA as an interim step, unless it will help in preparing the EIS.

2. Contents. The EA may be viewed as a "baby" EIS, considering the same basic issues in that more comprehensive document. Although no particular format is specified, EAs typically follow the general format for an EIS. As the proposed action gets amended, the EA must be reevaluated to ensure it covers the pertinent aspects of the current project. Generally, the EA will:

a. Describe the proposed action and discuss its purpose and the need it satisfies;

b. Identify the appropriate and reasonable alternative actions that have been considered;

c. Describe the affected environment and the impact of the proposal and the alternatives;

d. List the agencies and people consulted in preparing the EA;

e. Show that the decisionmaker has reviewed the EA along with other appropriate planning documents; and

f. Conclude with an explicit "Finding of No Significant Impact" (FONSI) or a conclusion that an EIS is necessary.

3. Public involvement. The EA is a public document, but there is no specific requirement for public hearings, scoping, public notice, publication of a draft, responding to comments, etc. during the preparation of the EA. By regulation, the agency should "involve environmental agencies and the public to the extent practicable" 40 C.F.R. 1501.4(b). Practically, if the proposed action is controversial, the EA will enjoy more weight on judicial review if the public was significantly involved in the process.

4. FONSI. Every EA will result in either a "Finding of No Significant Impact (FONSI) or the conclusion that an EIS is required. The FONSI is a statement indicating why the proposed action will not have significant impact on the human environment and creates an administrative record for review, i.e., why an EIS is unnecessary. The FONSI will include the EA or summarize it. The FONSI must be:

a. Issued before action can proceed;

b. published in the affected area in a manner to reach interested parties effectively;

c. published in the Federal Register if the action is a matter of national concern; and

d. open to the public at hearings during the 30-day review period when the proposed action is similar to one normally requiring preparation of an EIS or the action is a case of first impression.

E. Environmental Impact Statements (EISs). When an action does not fit within a CATEX and an EA would be inadequate, the more comprehensive EIS must be prepared. 40 C.F.R. §§ 1501.4, 1502.1-1502.25, 1508.11.

1. When required. An EIS may be required because the proposal:

a. Is a "major federal action significantly affecting the quality of the human environment" (MFASAQHE). "Major" just reinforces "significantly." "Significantly" requires consideration of both the **context** of the action (i.e. nationwide, regional, local) and the severity of the impact;

b. does not qualify for CATEX treatment and is not an EA candidate;

c. is environmentally controversial, i.e., substantial dispute exists over the scope or nature of the environmental impact, not general opposition to action; or

d. was determined in an EA to require an EIS.

2. Examples. Actions which could be expected to require an EIS include:

a. Significant expansion of a military installation.

b. Significant construction in an environmentally sensitive area (e.g., wetlands).

c. Land acquisition, outleasing, and other actions which may lead to significant change in land use.

d. Closure of a major installation (unless the only impacts are socioeconomic).

e. Training exercises conducted outside the installation when significant environmental damage might occur.

3. Defining the scope of complex or segmented actions. Various tests have been developed to determine whether the EIS must go beyond the immediate proposal.

a. Does the proposal involve an "irretrievable commitment" of resources, practically foreclosing alternative options?

b. Would it be "irrational and unwise" to implement the proposal unless further steps were to be pursued later?

c. Does the proposal have "independent utility" apart from possible related future actions?

d. Are the actions "connected," "cumulative," or "similar"? 40 C.F.R. § 1508.25(a).

4. The EIS process.

a. Scoping. Scoping is used to get interested parties involved and to identify issues that the EIS will need to address. Federal, state, and local agencies, Indian tribes, and "other interested persons" are invited to participate and attend public hearings.

b. Draft EIS (DEIS). The DEIS is a public document: not really a "draft," but a term of art.

c. Public Review. The DEIS is distributed for public comment (at least 45 days). More public hearings are held and are transcribed verbatim

d. Final EIS (FEIS). The FEIS will summarize the public hearings on the Draft EIS and respond to all oral and

written comments made on the Draft.

e. Public Review. No public comment period after FEIS is published, but no decision can be made on the proposed action until 30 days after the public has been notified the FEIS has been filed with EPA. 40 C.F.R. § 1506.18.

f. Record of Decision (ROD). This is a public summary of the Final EIS. The ROD is prepared at the time of decision or when the recommendation goes to Congress. Until the ROD is issued, the agency shall not take any action which will have adverse impact on the environment or limit the choice of reasonable alternatives.

5. Contents of the EIS. Although the regulations indicate that the EIS is intended to be a concise document, prepared in plain language, normally less than 150 pages in fact it can run to thousands of pages and cost as much as $1.5 million. Per 40 C.F.R. § 1502.10, the recommended format is as follows:

a. Summary. Following the cover sheet, the EIS will include a summary which will stress the major conclusions, areas of controversy, and the issues to be resolved, including the choice among the alternatives. The Table of Contents follows the summary.

b. Purpose and Need for Action. Require your planners to articulate their thought processes on the need for the project because the underlying need defines the range of alternatives that must be analyzed in the EIS. Reasonable alternatives are alternative ways to satisfy the underlying need. By stating the need precisely, the EIS can focus on genuine alternatives and obviate debate of others.

c. Alternatives. This section identifies, analyzes, and evaluates **reasonable** alternatives to the action. Analysis should be done on a comparative basis to define the issues and provide a clear basis for decisionmaking.

(1) In addition to the alternative of "no action," reasonable alternatives include actions which are: outside agency control or jurisdiction; technologically feasible; or consistent with the purpose of the proposed action.

(2) This section also identifies the preferred agency alternative. It doesn't matter if the preferred alternative is the one selected by the decisionmaker.

(3) This section may also discuss mitigation measures which avoid, lessen, rectify, or compensate for the adverse impact of the proposed action. Once committed to, mitigation measures must be carried out. (Mitigation in a proposed action in an EA can in some cases reduce a "significant impact" to "less than significant," thereby avoiding the requirement to do an EIS.)

d. Affected Environment. The EIS must succinctly describe the environment and the areas to be affected yet not be longer than necessary to understand the effect of the alternatives. Consequently, after the analytical portion comparing the alternatives is completed, drafters should return to the descriptive portion and pare it down: anything not necessary to support the analysis of alternatives is surplusage.

e. Environmental Consequences. This section examines the environmental impact of the proposed action as compared with the impact of the reasonable alternatives. Direct and indirects effects are discussed.

(1) Direct impacts include "connected actions" (i.e., those which: automatically trigger other actions which may require an EIS; cannot or will not proceed unless other action taken simultaneously; or are interdependent parts of a larger action and depend on larger action for justification) and "cumulative" or "synergistic" impacts, i.e., the incremental impact of the action when added to other past, present or reasonably foreseeable future actions regardless of which agency or person undertakes the other action.

(2) Indirect impacts are caused by the action but later or further away. They can include the related effects on air and water from economic growth, population growth, or shifts in land use patterns.

(3) This section will also examine: possible conflicts with Federal, regional, state or local land use plans or policies; the impact on energy and other resource requirements; and the impact on the cultural environment.

f. The environmental consequences section is followed by the list of the people who prepared the EIS and the list of agencies, organizations, and persons to receive copies of the statement. This is followed by the index and any appendices.

1105 NEPA LITIGATION. As stated above, NEPA is a procedural, not a substantive statute. NEPA itself does not provide a cause of action. Violators of NEPA are not subject to fines, penalties, or criminal sanctions. Consequently, many erroneously assume that NEPA lacks teeth. In fact, NEPA can be a true show-stopper.

A. Types of plaintiffs. Potential NEPA plaintiffs include environmental advocacy groups, politically motivated groups, "NIMBY" groups (Not In My Back Yard) and states. To show standing, the plaintiff must be injured in fact, within the zone of interests protected. Typically, standing is not a serious issue because the injury need not be monetary; the injury may be aesthetic, nuisance (e.g., upset traffic patterns), etc.

B. Judicial Review. The applicable standard of review under the Administrative Procedures Act (APA) may vary with the nature of the plaintiff's attack. Generally, the suits fall into one of two categories.

1. Plaintiff alleges that the agency should have prepared an EA or EIS but did not.

a. The circuits are split on the applicable standard of review in this case. The 1st, 2d, 4th, and 7th Circuits apply an arbitrary, capricious, or abuse of discretion standard. The 5th, 8th, 9th, and 10th Circuits, and possibly the 3d and 11th Circuits, apply a rule of reasonableness. The D.C. Circuit uses a hybrid. The Supreme Court may have answered the question in Oregon Natural Resources Council v. Marsh, 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.

2. Plaintiff alleges that the agency's EA, FONSI, CATEX, or EIS was inadequate.

a. Reviewing courts look for full and fair compliance with NEPA. Applying a "rule of reason," the court will examine whether the NEPA documentation:

(1) Includes sufficient (but not overwhelming) detail to allow the decisionmaker and the public to understand environmental issues;

(2) explains alternatives sufficiently to allow a reasoned choice; and

(3) demonstrates that the agency has in good faith taken a "hard look" at the environmental consequences of a proposed action.

C. Remedies for Violations. The most common remedy for a violation of NEPA is an injunction. Once a violation has been proven, the plaintiff is arguably entitled some remedy. However, precedent suggests that courts still can apply the equitable principles in deciding whether to enjoin the federal action.

1106 MISCELLANEOUS ISSUES

A. The Role of the President's Council on Environmental Quality (CEQ). CEQ advises the President on environmental matters and makes an annual report to the nation on the state of the environment. Some of their authority has eroded: their tasking to review EISs is now performed by EPA. Similarly, interagency environmental disputes are now resolved by OMB. CEQ promulgates NEPA regulations which serve as an informal "Restatement" of NEPA case law. 40 C.F.R. § 1500 et seq.

B. Classified Information. 40 C.F.R. § 1507.3(c). Classified information does not relieve the agency of the requirement to assess and document the environmental effects of the proposed action. A full EIS, however, need not be produced.

C. "Worst Case Analysis" and Insufficient Data. Formerly, agencies were required to consider the "worst case" of environmental effects if there was insufficient information to analyze the impacts. Under the 1985 revision, the agency must inquire whether the incomplete or unavailable information is essential to a reasoned choice among alternatives? If so, and the information is available at reasonable cost, the agency should obtain the information. If the information is not available within the state of the art, or the costs are exorbitant, weigh the risks against the need to

proceed in face of uncertainty. If the agency needs to proceed, make it clear that information is lacking, state the relevance of the missing information, summarize credible existing evidence, and state the agency's evaluation of the impacts based on generally accepted scientific methods.

D. When it's Over. Satisfying NEPA does not necessarily meet the requirements of other statutes. The EA/EIS may be only one requirement. The agency may still need permits required by other laws. Officials may have to coordinate with State Historic Preservation Officer (SHPO) as required by the Historic Preservation Act, fish and wildlife coordination requirements, etc.

1107 BOTTOM LINE. While federal officials will not go to jail for a NEPA violation, failure to adhere to the statute's procedural requirements can be costly in time and money. Given the reliance on the APA and the Federal Rules of Civil Procedure, NEPA litigants with a prima facie case can seriously bog down, if not stop, a proposed action until a judicially adequate EIS is completed. Hopefully, this will encourage planners to fulfill the NEPA requirements vigorously in good faith. The reward is the ability to proceed on the chosen course even if it is not the best alternative from purely an environmental perspective. In reviewing the administrative record, the court cannot substitute its judgment for the agency's. So long as the chosen course is not arbitrary, capricious, without reasonable basis, otherwise in violation of the law, etc., the action will ultimately go forward. As the Supreme Court has said, NEPA prohibits only uninformed decisions, not unwise ones. In NEPA, the name of the game is doing it right from the beginning.

1108 ADDITIONAL READING. For a detailed examination of this subject, see Captain Julie K. Fegley, USAF, "The National Environmental Policy Act: The Underused, Much-Abused, Compliance Tool," 31 Air Force L. Rev. 153 (1989).

APPENDIX

NEPA CASE LAW

American Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983) (While some courts regard general equity principles as applicable to the granting or injunctive relief, some cases refer to a presumption of irreparable injury if NEPA has been violated).

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).

City or Rochester v. U.S. Postal Service, 541 F.2d. 967, (2d Cir. 1976); City of West Chicago, Ill v U.S. Nuclear Regulatory Comm'n, 701 F.2d 632 (7th Cir. 1983); Park

County Resource Council v. U.S. Dept. of Agriculture, 817 F.2d 609 (10th Cir. 1987); Save the YAAK Committee v. Block, 840 F.2d. 714 (9th Cir. 1988)(Divisibility of a federal action under NEPA).

Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1976) (court fashioned a remedy other than an injunction for a violation of NEPA).

Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th C. 1974); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985); Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973)(Tests for determining whether an EIS is required).

Hanly v. Kleindienst (Hanly II), 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973)(EA is judicially reviewable; CATEX treatment inappropriate).

Image of Greater San Antonio v. Brown, 570 F.2d 517 (5th Cir. 1978)(Socioeconomic effects alone will not require the preparation of an EIS, but if interrelated with other factors, they must be discussed).

Julis v. City of Cedar Rapids, Iowa, 349 F. Supp 88 (1972); NRDC v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972); Como-Falcon Coalition, Inc. v. US Dept. of Labor, 465 F. Supp. 850 (1978); aff'd. 609 F.2d. 342 (8th Cir. 1979); cert. denied, 100 S.Ct. 2154 (1980); River Road Alliance, Inc. v. COE, 764 F.2d 445 (7th Cir. 1985), cert. denied 475 U.S. 1055 (1986)(Tests for whether a federal action is "major").

Kleppe v. Sierra Club, 427 U.S. 390 (1976)(When an action is "proposed").

NRDC, Inc. v. Administrator, 451 F.Supp. 1245 (D.D.C. 1978)(EIS must include an "alternatives" section discussing all reasonable alternatives - chosen and reviewed using a "rule of reason").

Pennsylvania v. Morton, 381 F. Supp. 293 (D.C.D.C. 1974) (Environmental values must be taken into consideration at each discrete stage of decision making process).

Pyramid Lake Paiute Tribe of Indians v. Dep't of the Navy, 890 F.2d 1418, (9th Cir. 1990); Alexandria v. FHA, 756 F.2d 1014 (4th Cir. 1985)(Agency CATEX action upheld).

Robertson v. Methow Valley Citizens Council, 109 S.Ct. 1835 (1989) (While discussion of mitigation is necessary, the agency is not required to formulate and adopt a complete plan to mitigate environmental impact; change in regulations rejecting "worst case approach" imposed by the courts upheld).

Sadler v. 218 Housing Corp., 417 F. Supp. 348, (N.D. Ga. 1976)(All environmental impacts, not just those which have an adverse effect, must be considered).

South Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005 (5th Cir. 1980); Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985)(Cumulative impacts must be discussed).

Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989) (Distinguished Amoco Production Company, 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 irreparable harm to the decisionmaking process that NEPA requires).

Sierra Club v. Morton, 514 F.2d 856, (D.C. Cir. 1975), cert. denied, 424 U.S. 901, rev. other grounds, 427 U.S. 390 (Evaluation of the environmental effects of proposed action must be made before irretrievable commitments are made or options precluded).

Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983); River Road Alliance, Inc. v. Corps of Engineers, 475 U.S. 1055, 106 S.Ct. 1283 (1086) (White, J., dissenting from denial of certiorari); Gee v. Boyd, 471 U.S. 1058, 105 S.Ct. 2123 (1985) (White, J, dissenting from denial of certiorari)(Appropriate standard of review of agency decision against preparing an EIS).

Sierra Club v. Sigler, 675 F.2d 957 (5th Cir. 1983)(Analysis of "worst case" scenarios; no longer required).

Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d. 1011 (2nd Cir. 1983)(EIS has a dual purpose: to ensure informed decision making, and to disclose impacts of proposed actions to the public).

State v. Andrus, 483 F. Supp. 255 (D.N.D. 1980)(Mere opposition to a project on other than environmental grounds does not force documentation).

Swain v. Brinegar, 542 F.2d. 364 (7th Cir. 1976)(A proper segment for individual treatment is one with "independent utility" – segments of projects can be separately considered for environmental impacts if they have independent utility and the use or a segmented approach does not preclude an adequate opportunity to consider alternatives.

Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981); Laine v. Weinberger, 541 F. Supp. 599 (C.D. Cal. 1982)(Classified information in the EIS).

Weinberger v. Barcelo-Romero, 465 U.S. 305 (1982) (Court refused to enjoin a Clean Water Act violation, instead ordering the Navy to apply for a discharge permit).

Wisconsin v. Weinberger, 745 F.2d 412, 424-28 (7th Cir. 1984) (Dictum that an injunction should not be the automatic remedy when NEPA is violated).

CHAPTER 12

THE COASTAL ZONE MANAGEMENT ACT

1201 REFERENCES

A. 16 U.S.C. § 1451 et seq.

B. 15 C.F.R. Part 900

1202 PURPOSE. The Coastal Zone Management Act (CZMA) was enacted to encourage states to manage and conserve coastal areas as a unique, irreplaceable resource. This was achieved by funding development of state coastal resource programs and requiring federal agencies to be consistent, if possible, with federally-approved state programs. As a "cross cutting statute," CZMA can apply to a broad range of actions including actions not normally associated with the environment. Like NEPA, CZMA compliance should be on the planning checklist for activities in coastal regions. Long dormant, CZMA is now being used by states and environmental groups as an effective tool to shape federal policies and practices.

1203 KEY FEATURES. Each federal agency activity within or outside the *coastal zone* that *affects* any *land or water use* or *natural resource* of the coastal zone shall be carried out in a manner which is consistent to the *maximum extent practicable* with the *enforceable policies* of approved State management programs.

A. The term "coastal zone" includes coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states. The coastal zone extends:

1. Seaward to the outer limit of the state sovereignty as defined under Submerged Lands Act (usually 3 miles); and

2. inland from the shorelines as defined by the state but only to the extent necessary to control the shorelands, the uses of which have a direct and significant impact on the coastal waters.

B. Federal enclaves are excluded from the definition of "coastal zone" under CZMA. The exclusion applies only to "lands the use of which is by law subject solely to the discretion of, or which is held in trust by, the Federal Government, its officers, or agents." Nevertheless, state environmental regulation, even though enacted as a part of its CZMA management plan, may affect Federal lands if sovereign immunity

has been waived for that brand of regulation. Thus, a state CZMA regulation which regulates water quality would be enforceable on federal land given the CWA waiver of sovereign immunity. In addition, federal agencies are still required to ensure that their activities are consistent "to the maximum extent practicable" (i.e., consistent unless otherwise precluded by law) with the enforceable provisions of the relevant approved state management programs whenever those activities:

1. Are within or outside the coastal zone and affect any land or water use or natural resource of the coastal zone; or

2. constitute undertaking any development project in the coastal zone.

C. "Enforceable Policies" of state management programs are those policies which are legally binding and through which a state exerts control over private and public land and water uses and natural resources in the coastal zone. These policies may be articulated in state constitutions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions. The state program's standards must be sufficiently specific to guide public and private uses. We must follow "requirements" and consider recommendations.

1204 THE CZMA PROCESS

A. First, the federal agency must determine whether the planned activity "affects" a land or water use or natural resource of the coastal zone. This is a **Federal** decision. "Affect" is defined broadly and includes any reasonably anticipated affect on any natural resource, land use, or water use in the coastal zone, including indirect effects which are caused by the activity but that occur later in time or at a different location. The breadth of the definition is underscored by the 1990 amendments which prescribe that direct, indirect, and cumulative effects should be considered, legislatively overruling the Supreme Court's narrow interpretation in Secretary of the Interior v. California, 464 U.S. 312 (1983).

B. If the agency determines the federal activity does affect the land, water use or natural resource, then it must make a Coastal Consistency Determination (CCD). The CCD should compare the action to the enforceable provisions of the federally approved state plan.

1. The CCD must include a brief statement indicating whether the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the management program. It should also include a detailed description of the activity, its associated facilities, and their coastal zone effects.

2. When, as frequently happens, the CCD is prepared in conjunction with a National Environmental Policy Act (NEPA) analysis, planners must take care to

ensure that the CZMA requirements are fully met and not lost amid the myriad requirements of an EA or EIS when the two are handled together.

C. The federal agency submits the CCD and supporting documents to the state for concurrence. The CCD must be provided at least 90 days before final approval of the federal activity. The state must then respond to the CCD by a notification of concurrence or objection. The state has 45 days from receipt of the CCD to respond. A state request for a 15-day extension must be approved; additional extensions are at the federal agency's discretion. If no timely response is received, the federal agency may presume the state concurs.

D. If the state disagrees with the CCD, the response must include the reasons for disagreement and supporting information. The Office of Coastal Resources Management in the National Oceanic and Atmospheric Administration, Department of Commerce, will mediate federal-state disputes. Local public hearings must be conducted when the disagreement involves the administration of a management program. Mediation may be declined by one of the parties.

E. CZMA does not waive sovereign immunity; nor does it contain a citizen suit provision. The requirement for state concurrence with the CCD before a project can continue, however, has much the same effect. CZMA compliance is reviewable and enforceable by courts under the Administrative Procedure Act. Injunctive relief may be available. CZMA also contains an extraordinary provision for appeal that allows the President to exempt activities in the "paramount interest of the United States" after a final order or judgment.

F. Coastal installations should maintain contact with local coastal zone management agencies. Participation in the process of preparing and approving for areas near the installation allows us to advocate for planning which will be compatible with DoD activities and needs. To the extent practicable, agencies should discuss future projects with the state coastal management agency before a CCD is prepared to get their input at the earliest opportunity. Close working relationships are a must and may avoid the discord which can slow down federal projects.

1205 POINT OF CONTACT. The Navy program office for CZMA matters is CNO (OP44E). Their telephone number is AV 225-0900; Comm: 703/325-0900.

CHAPTER 13

EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT

1301 REFERENCES

A. 42 U.S.C. § 11001 et seq.

B. 40 C.F.R. Part 355

C. OPNAVINST 5090.1A, Paras. 9-4.2.4 & 9-5.10

D. 29 C.F.R. § 1910.1200(c) [OSHA regulations which list "hazardous chemicals" incorporated by EPCRA]

1302 OVERVIEW. The Emergency Planning and Community Right To Know Act (EPCRA) was created by Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA). EPCRA requires facilities to plan for potential releases of the various types of hazardous materials and hazardous wastes they store. EPA establishes an EPCRA list of extremely hazardous substances (EHS) for which planning is required. EPCRA also establishes reporting requirements for facilities to notify local emergency planning committees regarding the identity and amount of hazardous wastes and materials being stored at sites within the committee's jurisdiction. Although sovereign immunity has not been waived for EPCRA, as a matter of policy we comply voluntarily with the spirit of the law and report requested information. EPCRA involves facility compliance related to four main areas: Community Emergency Planning; Emergency Release Notification; Hazardous Chemical Reporting; and Toxic Chemical Release Reporting. The requirements in this chapter apply to all Navy shore activities in the United States, including government-owned, contractor-operated (GOCO) facilities.

1303 COMMUNITY EMERGENCY PLANNING. Facilities are required to notify the State Emergency Response Commission (SERC) if an extremely hazardous substance (EHS) is present at the facility in excess of the Threshold Planning Quantity (TPQ).

A. Identification. The first step for Navy shore activities (excluding foreign countries), is to identify the EHSs they use or store. The list of EHSs, from acetone to zinc, is published at 40 C.F.R. Part 355, Appendix A. This list contains many of the same substances found on the CERCLA/CWA lists of reportable

quantities of hazardous substances described in the pertinent chapters in this Deskbook. Next, the facility must determine if they exceed any TPQs for those substances. The TPQ for each substance is listed in the right-hand column of the same Appendix. Each Navy activity that exceeds a TPQ is subject to the requirements of the EPCRA for emergency planning, providing of information, and emergency notification. Existing activity TPQs were to be determined by 1 December 1990.

B. Notification. Each activity that exceeds a TPQ for any EHS must notify the SERC and the Local Emergency Planning committee (LEPC). This initial notification for existing facilities, which was to be accomplished by formal letter before 1 January 1991, identified points of contact and asked to participate in local emergency planning functions. Facilities are required to notify the LEPC regarding:

1. A facility representative who will participate in the planning process;

2. any relevant changes at the facility; and

3. any information requested by the LEPC necessary to develop or implement the community emergency plan.

1304 EMERGENCY RELEASE NOTIFICATION. A facility where a hazardous chemical is used or stored is required to report a release of a reportable quantity of an EHS, or hazardous substance listed under CERCLA (see Chapter 23 of this Deskbook).

A. Requirements. The facility must immediately notify the Community Emergency Coordinator of the LEPCs in the affected area, and to the SERC of the affected states. The facility must also make a follow-up report in writing. This report is different from the report to the National Response Center (NRC) for reportable quantity releases under CERCLA. The contents of EPCRA reports are specified in 40 C.F.R. § 355.40(b).

B. Exceptions. Reporting is not required if the release results in exposure solely to persons within the boundaries of the facility. As defined under 40 C.F.R. § 355.20, "facility" should include the entire installation under most circumstances. Similarly, reporting is not required if the release is federally permitted, continuous, or exempt from reporting under CERCLA. These exceptions apply regardless of whether the reportable quantity for that substance was exceeded.

C. Exclusions. Ordnance items, ammunition, and special weapons are excluded from all EPCRA reporting requirements per paragraph 9-5.2.3 of OPNAVINST 5090.1A.

1305 HAZARDOUS CHEMICAL REPORTING. EPCRA also creates reporting requirements for hazardous chemicals. Hazardous chemicals are defined by reference to regulations promulgated under the Occupational Safety and Health Act (OSHA) at 29 C.F.R. § 1910.1200(c).

A. Affected Facilities. The facility first reviews whether it is required to maintain a Material Safety Data Sheet (MSDS) for any hazardous chemical regulated under OSHA. If it does, the facility is subject to reporting if it possesses an amount which is above the threshold quantity. For EHSs, the threshold quantity is the TPQ or 500 pounds (55 gallons), whichever is less. For other substances, the threshold quantity may be up to 10,000 pounds.

B. Reporting. Activities maintaining OSHA hazardous chemicals in excess of the threshold quantities must submit a copy of the MSDS or a list of reportable hazardous chemicals to the LEPC, SERC and local fire departments. Activities shall submit Emergency and Hazardous Chemical Inventory Forms for all chemicals exceeding the above thresholds to the LEPC, SERC, and the local fire department annually, by 1 March. The pertinent fire department is the department that would routinely be the first alerted during an emergency, regardless of whether they are on- or off-base. If a list is submitted in lieu of the MSDS, it shall contain the following information:

1. A list of the hazardous chemicals for which a MSDS is required under OSHA regulations;

2. the chemical name or the common name of each such chemical as provided on the MSDS; and

3. any hazardous components of each such chemical as provided on the MSDS.

C. Paperwork Reduction. Activities may negotiate with the local planning committees to decrease their EPCRA workload. For example, the activity may be able to satisfy the LEPC requirements with documents that are already available, such as hazardous material inventories, contingency plans, and files of MSDSs.

1306 TOXIC CHEMICAL RELEASE REPORTING. Facilities in SIC Codes 20 through 39, with ten or more full-time employees, must submit a Toxic Chemical Release Inventory Reporting Form if the facility manufactured, processed, or otherwise used a toxic chemical above threshold amounts during the year.

A. Threshold Quantities. For manufactured or processed chemicals, the threshold is 25,000 pounds per year; for used chemicals, 10,000 pounds. The form is submitted to EPA and the designated state agency.

B. Initial Reports. Activities shall submit an EPA Form R for each chemical that applies under the above paragraph. Initial submission of this information is due 1 July 1992 to the EPA, with a copy to the Navy Energy and Environmental Support Activity (NEESA), code 112.

1307 CLASSIFIED MATERIAL. Activity security personnel shall review information to be submitted to the LEPC, SERC or non-Navy fire departments before release to prevent compromise of classified or classifiable information. In cases where information regarding the use of a substance is classified or classifiable, the activity need not comply with this instruction for that substance. Instead, the activity shall develop internal procedures consistent with the intent of EPCRA for protecting personnel and the public. The activity is responsible for reviewing all EPCRA Section 313 (toxic chemical release forms) data prior to submission to the EPA and NEESA.

1308 INFORMATION FOR HEALTH PROFESSIONALS. Health professionals may request information regarding the specific chemical identity of a hazardous chemical, EHS, or toxic chemical.

A. Response Policy. Activities shall provide information in response to written requests for information necessary for patient treatment or emergency planning. Our response may include trade secret information if a written agreement regarding confidentiality is obtained. No written confidentiality agreement is required in an emergency.

B. Medical Emergency. In the event of a medical emergency, the activity shall provide a copy of the MSDS, inventory form, and toxic chemical release form to any treating physician or nurse who requests such information when the physician or nurse determines that:

1. A medical emergency exists;

2. the specific chemical identity is necessary for or will assist in emergency or first-aid diagnoses and treatment; and

3. the individuals to be diagnosed or treated have been exposed to the chemical concerned.

1309 HOST-TENANT RELATIONSHIP. All activities are responsible for implementing the intent of EPCRA to protect the people within the boundary of the facility and within the community.

A. Host Activities. Host activities are responsible for designating a centralized point of contact. The point of contact may be a tenant activity. The centralized contact shall be responsible for coordinating all notifications, public

contact and consolidating planning. Host activities shall use Total Quality Leadership (TQL) to facilitate data collection. Existing organizations such as the Hazardous Material Control and Management Committee may prove helpful in this effort.

B. Tenant Activities. Tenant activities shall provide information to the host activity or central contact. All information shall be submitted sufficiently in advance of the established deadlines to permit the central contact to meet deadlines.

C. Consolidation. If appropriate, Regional Environmental Coordinators may request that all contiguous naval activities within their jurisdiction submit threshold determinations or any other documentation to them for a single submittal to the planning and response committees. This may be appropriate when none of the contiguous activities individually exceeds a threshold, but the threshold is exceeded by the aggregate quantities from the activities.

1310 ENFORCEMENT

A. Civil Penalties. Violations of EPCRA regulations carry a maximum civil penalty of $25,000 per day per violation. For subsequent violations, the maximum daily penalty increases to $75,000.

B. Criminal Penalties. Knowing and willful violations of EPCRA notification requirements carry a maximum punishment of a $25,000 fine and imprisonment for two years. Subsequent convictions increase the maximum punishment to a $50,000 fine and five years' imprisonment per violation.

1311 ASSISTANCE

A. Navy specific questions regarding EPCRA shall be submitted to CNO (OP-45), COMNAVFACENGCOM, or Engineering Field Division (EFD) as appropriate.

B. General questions concerning inventories, forms, calculations, etc. shall be directed to the EPA when possible. The EPA maintains an Emergency Planning and Community Right-to-Know Information Hotline, at (800) 535-0202. In Washington D.C. and Alaska the number is (202) 479-2449. The Hotline is operated from 8:30 a.m. to 7:30 p.m. Eastern time.

C. Assistance in determining Toxic Releases under EPCRA Section 313 may be requested from the Naval Facilities Engineering Command.

CHAPTER 14

ENDANGERED SPECIES PROTECTION

1401 REFERENCES

A. 16 U.S.C. §§ 1531-1544

B. 50 C.F.R. § 17.1 et seq.

C. Navy Real Estate Operations and Natural Resources Management Procedural Manual, NAVFAC P-73, Vol II, Chap 4 (May 87)

D. OPNAV Instruction 5090.1A, Chapter 19

E. Marine Corps Order 11015.4C

1402 INTRODUCTION

A. In 1966, the Federal Government began to take action to prevent the avoidable extinction of plants and animals in the United States, other nations, and the sea. This program culminated in the passage of the 1973 Endangered Species Act (ESA). Congress started from the assumption that the two major causes of extinction were hunting and, more importantly, the destruction of natural habitat.

B. ESA is designed to prohibit a federal agency from taking action which would jeopardize the status of endangered species. Agencies are required to avoid damaging critical habitat and to take positive steps to improve such habitat. The Act has had a significant impact on the Department of the Navy, which manages lands, and conducts operations that may affect endangered species. Judge advocates must have a fundamental understanding of these laws and be prepared to properly advise their clients. Failure to do so may result in delayed construction activity, curtailed operations, as well as civil and criminal penalties.

C. This chapter focuses on ESA, the primary wildlife protection statute. Other related statutes are discussed in the appendix to this chapter, together with a checklist and case list.

1403 DEFINITIONS 16 U.S.C. § 1532; 50 C.F.R. § 424.02

A. "Endangered species" means a species in danger of extinction throughout all or a significant portion of its range, based solely on biological criteria. Listed

species are found in 50 C.F.R. § 17 and is constantly being amended. Don't be confused by state endangered species law. Sovereign immunity has not been waived.

B. "Threatened species" means a species likely to become endangered within the foreseeable future throughout all or a significant portion of its range; based solely on biological criteria.

C. "Critical habitat" means the specific areas which are essential to the conservation of the species and which may require special management consideration or protection. They are listed in 50 C.F.R. § 95 and 226 (marine species). The EPA must consider the economic impact of designating an area a critical habitat.

D. "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct" and any habitat destruction that could result in extinction of a species. In the context of plants, it is unlawful to remove, take, cut, dig up, maliciously damage, or destroy protected plant species on federal land, in knowing violation of state law, or while committing a criminal trespass.

E. "Action" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

1404 AFFIRMATIVE DUTIES UNDER ESA

A. The commander's affirmative duties under ESA are detailed at 16 U.S.C. § 1536 ("Section 7"). They are:

1. Developing programs to conserve listed species.

2. Ensuring that agency action is not likely to jeopardize the continued existence of any listed species directly or indirectly, by reducing its reproduction, numbers, or distribution.

3. Ensuring that agency action is not likely to result in the destruction or adverse modification of critical habitat, including any alterations which adversely modify a physical or biological feature that was the basis for its designation as critical. If an area on the installation is designated "critical habitat," the commander has a duty to protect the critical habitat even if the

threatened or endangered species is not present on the installation.

4. "Consulting" (formally or informally) with the appropriate Service (Fish and Wildlife Service (FWS) or National Marine Fisheries Service) whenever the commander:

   a. Carries out a required program for the conservation of a listed species, or

   b. Anticipates taking any action that may impact on a listed species or its habitat.

   c. Agencies must consult with the Department of Interior whenever their actions adversely affect an endangered species, even if the agencies' actions take place outside the U.S.

5. Preparing a biological assessment regarding endangered species if the proposed action is a "major construction activity," namely any project which is a major Federal action significantly affecting the quality of the human environment as referred to in NEPA.

6. "Conferring" with the Service whenever a proposed action is likely to jeopardize any species proposed to be listed under the ESA or result in the destruction or adverse modification of critical habitat proposed to be designated for the species.

   a. These conferences may be informal in nature; the Service may make advisory recommendations.

   b. These discussions should assist commanders in determining whether consultation will be necessary if the species is listed, in preparing any comments on the designation of "critical habitat," and in otherwise planning for the possible listing of the species.

1405 CONSULTATION PROCEDURES

A. Biological Assessments

1. When required. Federal agencies must consult with the U.S. Fish and Wildlife Service (FWS) to ensure that any agency action is not likely to jeopardize the preservation or critical habitat of any endangered or threatened species.

a. This covers both agency projects and any private activity which requires some type of federal permit to proceed, e.g., water projects, highways, wetlands, harbor projects, etc.

b. If the Secretary of Interior advises that a listed or proposed-to-be listed species exists in an area, a biological assessment must be conducted.

2. Procedure. "Biological assessment" refers to the information prepared by (or under the direction) of the Federal agency concerning the protected species and critical habitat in the action area and the evaluation of potential effects of the action on such species and habitat.

a. If the biological assessment concludes that an endangered species is likely to be affected by the proposed action, formal consultation with FWS must occur.

b. The agency is prohibited from making an irretrievable commitment of resources to the project during the consultation process.

B. Biological opinion

1. Defined. "Biological opinion" is the FWS document, issued at the conclusion of the consultation, that opines whether the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

2. Possible findings. A biological opinion can result in three possible findings:

a. The proposed action will not violate the ESA; the commander may proceed with the proposed action.

b. The proposed action will violate the ESA and there are no prudent alternatives; the action may not proceed.

c. There are reasonable and prudent alternatives to the action proposed that would not violate the ESA. Adoption of the suggested mitigation is a common method of avoiding conflicts between federal actions and endangered species protection.

C. Incidental Takings. If the biological opinion concludes that the proposed action will not violate the ESA or that there are reasonable and prudent alternatives which would not violate the ESA **and** that the "taking" of a listed species

would not violate the ESA, the Service provides an "Incidental Take Statement" with the biological assessment.

1. Requirements. The applicant must show:

   a. The taking will be incidental;

   b. the steps the applicant will take to minimize and mitigate impacts of the taking to the maximum extent practicable;

   c. that adequate funding for the plan exists; and

   d. that the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild.

2. Contents. 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; and

   c. the measures the commander must implement to minimize the impact of the taking.

3. Command Action. The commander **is not** absolutely bound by the Service's biological opinion.

   a. Commanders who deviate from the recommended alternatives, however, enjoy no protection from the opinion's Incidental Take Statement.

   b. Any taking without the protection of an Incidental take statement or a permit will be a violation of the ESA which can result in either criminal or civil liability.

   c. If there is no incidental taking as a result of the commander's deviation from the biological opinion, the commander will not be in violation of the ESA if "alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species" are taken.

D. The Exemption Process. Though rarely used, projects may be exempted from the 1536(a)(2) duty if the Endangered Species Committee, after notice and hearing, makes a finding that:

1. There are no reasonable and prudent alternatives to the agency action;

2. the benefits of action clearly outweigh the benefits of alternatives consistent with conserving the species, and such action is in the public interest;

3. the action has regional or national significance; and

4. neither the agency nor the exemption applicant (if private party) made an irretrievable commitment of resources during the consultation process.

1406 ESA ENFORCEMENT. 16 U.S.C. § 1540

A. Federal Action

1. Civil penalties. Each knowing violation can result in penalties of up to $25,000. Negligent violations can result in penalties of up to $500 per violation. Government employees are not immune.

2. Criminal penalties. DoJ can pursue criminal charges against a federal employee for violation of the ESA. No specific intent to violate the ESA is required. Maximum penalty 1 year and/or $50,000 fine.

3. Both civil and criminal sanctions can be sought for commission of prohibited acts or failing to act as prescribed by law.

B. Citizen Suits

1. "[A]ny person may commence a civil suit . . . to enjoin any person, including the United States . . . . " 16 U.S.C. § 1540(g).

2. The standard of review of the commander's decision is the APA's "arbitrary or capricious standard." Application of the APA standard, however, 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."

3. Courts may award costs of ESA litigation to either party.

1407 COOPERATION WITH STATES AND PRIVATE GROUPS. Federal agency cooperation with the States is mandated in Section 6 (16 U.S.C. § 1535). Although Federal restrictions on "taking" preempt state regulations, the state can play a major role in endangered species protection. By cooperative agreements, states undertake a role in conserving and managing resident endangered and threatened species if they submit a management plan which meets the criteria of Section 6(c). Once the plan is approved by FWS, states become eligible for funding for the plan. The states are prohibited from permitting what is prohibited by the Act, but may establish more restrictive regulations than federal regulations.

APPENDIX

WILDLIFE PROTECTION CHECKLIST

_____ Has the command identified the presence of endangered or threatened species (designated or proposed) on the installation?

_____ Has the command identified the presence of critical habitat on the installation, regardless of whether inhabited?

_____ Has a biological survey of the installation been conducted?

_____ If endangered species are present, has a "no jeopardy" opinion been issued?

_____ Has the command developed a coordinated program for planning construction and training activities, consistent with wildlife protection?

_____ Has the command built a good working relationship with the U.S. Fish and Wildlife Service?

_____ With state agencies?

_____ With private interest groups?

_____ Are there qualified professionals on the installation who know wildlife and can administer the law?

_____ Has the commander's interests in wildlife protection been safeguarded through education and enforcement at all levels of command?

MIGRATORY BIRD TREATY ACT

REFERENCES: 16 U.S.C. § 703 et seq.; 50 C.F.R. § 20.1 et seq.

PURPOSE AND BIRDS COVERED

Implements treaties with Great Britain, Mexico, Japan and the Soviet Union. The birds covered are very extensive, including for example: waterfowl, including ducks, geese, swans; cranes, including whooping and sandhill; rails and coots; shorebirds, including plovers, sandpipers, nipe, woodcock; doves and wild pigeons; and insect eaters including catbirds, robins, martins, hummingbirds, titmice, and warblers.

PRACTICES COVERED - 16 U.S.C. §§ 703, 705

"Unless ... permitted by regulations ..., it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess ... any migratory bird, any part, nest, or egg of any such bird...."

Proscribes not only hunting beyond established limits and transportation of birds, but also baiting birds or allowing toxic chemicals to concentrate in a pond used by birds.

No federal protection for blackbirds, grackles, cowbirds, crows, and magpies creating a health hazard or nuisance. (50 CFR 21.43) No permit is required to scare or herd depredating migratory birds (not including endangered species or bald or golden eagles).

PENALTIES - 16 U.S.C. § 707; Mental element: "knowing"

Misdemeanor: Minor violations of regulations
Felony: Taking with intent to sell

WILD FREE-ROAMING HORSES AND BURROS ACT

REFERENCE: 16 U.S.C. §§ 1331 et seq.; 43 CFR 4700.0-1 et seq.

BASIC PROVISIONS:

Purpose is to preserve wildfree-roaming horses and burros as "living symbols of the historic and pioneer spirit of the West."

Protects from capture, branding, harrassment or death while on public lands

Excess animals are removed for ecological balance.

SIKES ACT

REFERENCES: 16 U.S.C. 670a-f; 10 U.S.C. § 2671(a) [incorporates state law]; NAVFAC P-73, VOL II; OPNAVINST 5090.1A, Chapter 19

BASIC PROVISIONS:

Authorizes and encourages cooperative wildlife, fish and game management agreements among military installations, the Department of the Interior's Fish and Wildlife Service (FWS), and the States.

"[A]ll hunting, fishing and trapping [on military installations shall] be in accordance with the fish and game laws of the State or Territory in which it is located."

Commanders are not bound by state game laws with respect to their own official efforts to limit game (i.e., game near runways), but if they permit hunting by the public, they must follow state law.

They are not required to permit hunts at all, even if the state would desire a hunt.

CRIMINAL PENALTIES - 10 U.S.C. § 2671(c)

Incorporates criminal penalties from state law

WILDERNESS ACT

REFERENCE: 16 U.S.C. §§ 1131 et seq.

PURPOSE AND BASIC PROVISIONS:

Creates the National Wilderness Preservation System to maintain some lands in **their natural condition.**

"Wilderness" features include:

generally appears to have been affected primarily by forces of nature;

outstanding opportunities for solitude and unconfined type of recreation, at least 5000 acres usually; and

other features of scientific, archeologic, scenic or historical value.

Areas managed by Dept. of Agriculture (national forests) and Dept. of Interior (parks, range land) can be designated by Congress; same agency continues to manage the area.

Uses are recreational, scenic, scientific, educational, conservation, and historical.

Except as needed for administration, no motor vehicles, aircraft landing, motorboats, landing of aircraft, building structures are permitted.

Existing aircraft and boat use are grandfathered.

New designations could affect military training, especially low level flights unless grandfathered.

MARINE MAMMAL PROTECTION ACT

REFERENCES: 16 U.S.C. §§ 1361 et seq.

PURPOSE AND BASIC PROVISIONS:

Protects marine mammals from "taking"; absolute moratorium. FWS has jurisdiction over polar bears, sea otters, walruses and manatees; The National Oceanic and Atmospheric Administration (NOAA) and National Marine Fisheries Service (NMFS) have jurisdiction over whales, dolphins, porpoises, seals and sea lions.

"Taking" is broadly defined in § 1372, and includes the negligent or intentional operation of a ship or plane that disturbs or molests marine mammals.

NMFS issues permits for scientific research and display;
separate provision in Title 10 allows military taking for operations use.

Enforceable by citizen groups and has been used to block the transfer of dolphins from private aquariums to Naval Systems Command which administers the Navy's Dolphin program.

CRIMINAL PENALTIES: 1 year and $20,000 fine per violation.

OTHER FEDERAL STATUTES

Bald Eagle Protection Act 16 U.S.C. § 668.

Tule Elk 16 U.S.C. § 763d.

WILDLIFE PROTECTION CASES

Curnutt v. Holk, 230 Cal App 2d 580 (1964)(If commanders permit hunting by the public, they must follow state law).

Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990)(Agencies must consult with DoI whenever their actions adversely affect an endangered species, even if outside the U.S.).

Hughes v. Oklahoma, 441 U.S. 322 (1979), overruling Geer v. Connecticut, 161 U.S. 519 (1896)(state regulation of wild animals and fish is subject to constitutional limitations).

Palila v. Hawaii Dept. of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988)("Taking" can include destruction of habitat).

Kleppe v. New Mexico, 426 U.S. 529 (1976)(Congressional power to regulate wildlife on public lands).

Pyramid Lake Paiute Tribe v. Dept. of Navy, 898 F.2d 1410 (9th Cir. 1990)(Whether an agency must adopt the proposal that would most benefit an endangered species).

Roosevelt Campabello Park Commission v. EPA, 684 F.2d 1541 (lst Cir. 1982); National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976)(Agencies which reject FWS advice and alternatives yet proceed with the project will bear a heavy burden in court if the action is challenged).

TVA V. Hill, 437 U.S. 153 (1978)(Court prohibited completion of the Tellico Dam because of known jeopardy to the endangered snail darter fish; standard of review and its application; resulted in creation of exemption process).

United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987); United States v. St. Onge, 676 F. Supp. 1044 (D. Or. 1988)(Specific intent not required to violate the ESA).

United States v. Engler, 806 F.2d 425 (3rd Cir. 1986), cert. denied 481 U.S. 1019; United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985)(Mental element in Migratory Bird Treaty Act).

United States v. FMC Corp., 572 F.2d 902 (2nd Cir. 1978)(Broad definition of taking under Migratory Bird Treaty Act).

Village of Akutan v. Hodel, 859 F.2d 651 (9th Cir. 1988)(Commander's deviation from the biological opinion will not be in violation of the ESA if he takes "alternative, reasonably adequate steps to insure the continued existence of any endangered or threatened species" and there is no incidental taking).

CHAPTER 15

THE NATIONAL HISTORIC PRESERVATION ACT

1501 REFERENCES

A. 16 U.S.C. § 470 et. seq.

B. 36 C.F.R. Parts 60, 65 & 80

C. Executive Order 11593 of May 13, 1971, "Protection and Enhancement of the Cultural Environment," 3 C.F.R. § 154

D. DoD Directive 4710.1

E. OPNAVINST 5090.1A, Chapter 20

1502 OVERVIEW. In recognition of the importance of preserving historic property, Congress enacted the National Historic Preservation Act (NHPA) to establish a detailed consultative process, known as the Section 106 process. NHPA does not create any substantive rights; rather, it creates a number of affirmative federal duties and establishes a framework for deliberative decisionmaking on projects affecting historic properties.

1503 FEDERAL DUTIES UNDER NHPA. Federal agencies responsibilities under NHPA include the duty to:

A. Administer the cultural properties under their control in a spirit of stewardship for future generations;

B. inventory historical properties;

C. make use of available historical property before acquiring other properties;

D. consider the effect undertakings may have on property on the National Register of Historical Places; and

E. minimize to the maximum extent possible the effect of an undertaking on a "National Landmark."

1504 THE CONSULTATION REQUIREMENT. The Navy is not necessarily prohibited from changing or removing historic properties. Rather, NHPA

establishes a consultative process involving the Navy, the Advisory Council on Historic Preservation, the State Historic Preservation Officer (SHPO), and other "interested parties" before we begin activities which affect a historic site. In some situations, for example, NHPA will be satisfied simply by making an accurate record of the historic property to be changed or destroyed, a process sometimes called "archiving."

A. "Historic Property." Historic property is that property which is listed, or eligible for listing, in the National Register of Historic Places. The property may be real or personal. Generally, the property must be at least 50 years old to qualify. The Register is maintained by the National Park Service, Department of the Interior, which may be reached at (202) 343-9536.

B. "Undertaking." An undertaking is any activity that can result in changes in the character or use of nearby historic properties. Undertakings include new and continuing projects, activities, or programs and any of their elements.

C. "Criteria of Effect." To trigger the Section 106 process, the undertaking must have an effect on a historic property. "Effect" is a term of art; the word should not be used loosely in NHPA documents.

1. Historical property is deemed affected if the undertaking may alter the characteristics that qualify it for inclusion in the National Register. Depending on the property's significant characteristics, alterations to its location, setting or use may be relevant.

2. An undertaking is considered to have an "adverse effect" when the effect on the historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, or other factors which contribute to the property's qualification for the National Register. Adverse effects on historic properties include, but are not limited to:

a. Physical destruction, damage, or alteration of all or part of the property;

b. isolation of the property from its setting;

c. introduction of visual, audible, or atmospheric elements that are out of character with the property or setting; or

d. transfer, lease or sale of the property.

1505 THE SECTION 106 PROCESS. The Section 106 process identifies and evaluates historic properties, assesses the effects of the agency's

proposed action on them, and establishes consultation on how to avoid, reduce or mitigate identified adverse effects.

A. After the federal agency determines that the proposed project is an undertaking, the agency, in consultation with the State Historical Preservation Officer (SHPO), makes a good faith effort to locate historic property which might be affected.

1. If the SHPO and the agency agree that no properties are affected, the process ends. SHPO silence will constitute agreement.

2. If the SHPO and the agency agree that a property is affected, the process continues.

3. If they disagree, or if the Advisory Council on Historic Preservation (Council) requests, the Secretary of the Interior (SECINT) will decide.

B. If a property might be affected, the agency assesses the degree of effect by applying the regulatory "criteria of effect."

1. If the agency finds there will be no effect, it notifies the SHPO. Unless the SHPO objects within 15 days, the process ends.

2. If an effect is found, or if the SHPO makes a timely objection to the "no effect finding," the agency applies regulatory "criteria of adverse effect."

C. The agency determines whether the effect is adverse.

1. If the agency determines the effect is not adverse, the findings are submitted to the Advisory Council; if the Council does not object within 30 days, the 106 process ends.

2. If the agency finds an adverse effect, or the Council registers a timely objection, the effect is presumed adverse and the process continues.

D. The agency consults with the SHPO and interested persons who are invited to participate, receive information, and express their views. Interested persons may include local government representatives, Native American tribal leaders, etc.

1. If the agency and the SHPO agree on how to address the adverse effects, they execute a Memorandum of Agreement (MOA). If the Advisory Council has not participated, they must be given an opportunity to comment. They get 30 days to decide whether to comment and 60 days to do so.

2. If an MOA cannot be negotiated and further consultation will not be fruitful, the consultation ends. The agency must ask the Council to comment. The Council has 60 days to do so.

E. The agency must then consider the Council's comments in reaching a final decision on the proposed undertaking. The process ends as the agency notifies the Council of its decision to the Council The notification should occur, if practicable, before the undertaking begins.

1506 NAVY POINT OF CONTACT. Mr. John B. Murphy, NAVFACENGCOM: (202) 325-7353/7344; AV 221-same).

CHAPTER 16

ARCHAEOLOGICAL RESOURCE PROTECTION ACT (ARPA)

1601 REFERENCES

A. 16 U.S.C. §§ 470aa-470mm

B. 32 C.F.R. § 229

C. Archeological and Historic Data Preservation Act, 16 U.S.C. § 469 et seq.

D. Executive Order 11593, Protection and Enhancement of the Cultural Environment, 13 May 1971

E. DoD Directive 4710.1, Archeological and Historic Resources Management, 21 June 1984

F. DoD Directive 6050.1, Environmental Effects in the United States of DoD Actions, 30 July 1979

1602 OVERVIEW. Recognizing that archaeological resources are an important part of the national heritage, Congress enacted the Archaelogical Resource Protection Act (ARPA) to protect those resources found on federal lands. To that end, ARPA prohibits the excavation, removal, damaging, alteration or defacement of archeological resources on federal property without a permit from the appropriate federal land manager.

1603 ARCHAEOLOGICAL RESOURCE DEFINED. An "archaeological resource" is any material remains of human life or activities, at least 100 years old, which is of archaeological interest. Archaeological resources may include human skeletal remains, pottery, bottles, tools, etc. The term does not, however, include coins, bullets and unworked minerals or rocks.

1604 FEDERAL LAND MANAGER RESPONSIBILITIES. The federal land manager for Navy installations is NAVFACENGCOM. The point of contact there is Mr. John B. Murphy. His telephone number is (703) 325-7353; AV 221-7353/7344. Under ARPA, Federal land manager responsibilities include the duty to:

A. Develop plans to survey lands to determine the nature and extent of archeological resources;

B. prepare a schedule for surveying lands likely to contain the most scientifically valuable archeological resources;

C. approve permit applications for qualified applicants meeting the regulatory criteria;

D. identify all Indian tribes having aboriginal or historic ties to land under the manager's jurisdiction and seek to determine the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes;

E. develop documents and procedures for reporting suspected ARPA violations; and

F. establish a program to increase public awareness of the significance of archeological resources and the need to protect them.

1605 THE PERMIT PROCESS. Individuals desiring to excavate archaeological resources within the scope of ARPA must submit a permit application to the agency which administers the property. Navy ARPA permits are issued by OP-44E. The application shall include the information the Federal land manager deems necessary, including the time, scope and purpose of the proposed work.

A. Excavations must be undertaken to further archeological knowledge in the public interest. Only a "qualified" individual, typically associated with a university or museum, can be granted a permit which provides for curation of the artifacts discovered. Resources which are removed remain the property of the United States. The agency may consider whether the proposed activity conflicts with existing land management plans.

B. If proposed activity of the applicant could damage any Native American religious or cultural site, as determined by the federal land manager, notice must be given to the affected tribe at least 30 days before a permit is issued. The land manager should meet with official representatives of any tribe which considers the site as having religious or cultural importance to discuss their interests and ways to avoid or mitigate the harm or destruction. The appendix to this chapter contains additional information on Native American issues in environmental law.

C. If the permit is denied, or if granted with overly restrictive conditions, the applicant may appeal through the existing administrative procedures or procedures established by the Federal land manager.

1606 FEDERAL ACTIVITIES. The federal land manager need not issue itself a permit to conduct activities unrelated to excavation for archeological purposes.

Similarly, permits are not required for archeological activities carried out at the direction of federal land managers by persons associated with the management of archeological resources. Although the ARPA permitting process does not apply to the federal agency itself, the "section 106" process described under the National Historic Preservation Act (NHPA) does apply.

1607 ENFORCEMENT

A. Criminal Penalties. Knowing permit violations are punishable by a $10,000 fine and one year imprisonment. If the value of the removal or destruction exceeds $500, however, the maximum punishment is increased to $20,000 and two years. If the value exceeds $20,000, the maximum punishment is $100,000 and five years. An active sentence was recently imposed on a man plundering the Gettysburg battlefield.

B. Civil Penalties. After giving notice and a hearing, federal land managers may impose civil penalties for ARPA violations. The amount of the fine is related to the value of the archaeological resource removed and the cost of replacing it.

C. Prevention. To implement ARPA locally and to avoid the adverse publicity due to an ARPA violation, installations known to have archeological resource sites should take steps to inform installation personnel and visitors of ARPA and its criminal penalties for violations. Other installation personnel, particularly military police and security personnel, should be sensitive of the need to report incidents of damage, defacement, excavation, or removal of archeological resources.

APPENDIX

NATIVE AMERICAN ISSUES IN ENVIRONMENTAL LAW

A. REFERENCE: American Indian Religious Freedom Act (AIRFA), Pub. L. 95-341 (1978)

B. Federal agencies should be sensitive to the special concerns of Indian tribes in historic and cultural preservation. Essentially, section 1 of AIRFA secures for Native Americans the religious freedom afforded all citizens under the First Amendment.

C. Agencies should consult Native American leaders before approving a project likely to affect religious practice. Federal agencies must consider, but not necessarily defer to, Native American religious values.

D. AIRFA does not, however, declare that the protection of Native American religions overrides federal policy or gives religious practitioners a veto over an agency action. It does not prohibit agencies from adopting a land use that conflicts with traditional Native American religious beliefs or practices.

E. An agency undertaking a land use project complies with AIRFA by obtaining and considering the views of Native American leaders in the decisionmaking process, and by avoiding unnecessary interference with their religious practices during the project's implementation.

F. Leaders of Native American tribes have a role in the consultation process provided for in NHPA, ARPA and AIRFA. Tribes may participate in the environmental planning process provided for pursuant to the National Environmental Policy Act (NEPA); the NEPA process is an appropriate vehicle for consultation contemplated by these Acts. Formal NEPA procedures, however, should not displace informal planning and cooperation.

CHAPTER 17

PROTECTION OF WETLANDS

1701 REFERENCES

A. Clean Water Act (CWA), 33 U.S.C. §§ 1311, 1344

B. Rivers and Harbors Act, 33 U.S.C. §§ 403, 406

C. 33 C.F.R. Parts 320-330; 40 C.F.R. Part 231

D. Federal Interagency Committee for Wetland Delineation, Federal Manual for Identifying and Delineating Jurisdictional Wetlands (January 1989)

E. OPNAVINST 5090.1A, Chapter 19

1702 POLICY. Wetlands are an important habitat for fish and wildlife, particularly for nesting, spawning, and rearing sites for aquatic and land species. As such, they are critical to food chain production. Wetlands protect other areas from wave action and shoreline erosion. In addition, they are a storage area for floodwaters and provide a natural purification and filtration system for our drinking water supply. Regrettably, perhaps as much as 50 percent of the wetlands that once existed in the continental United States have been destroyed. Consequently, the Administration has adopted a "no net loss of wetlands" goal to protect this natural resource. Implementing Executive Order 11990, the Assistant Secretary of the Navy (Shipbuilding and Logistics) promulgated the DoN policy as follows:

> It is the Department of the Navy policy to permit no overall net loss of Navy and Marine Corps wetlands and to avoid impacting wetlands wherever possible. . . . To that end, we must ensure that our commanding officers have adequate natural resources expertise to carry out these goals and to ensure identification of wetlands under their jurisdiction.

1703 WETLANDS DEFINED. Wetlands are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

A. Under normal circumstances, wetlands exhibit hydrophytic vegetation, hydric soils, and wetland hydrology. Under the Federal Manual, all three criteria must be met for an area to be classified as wetlands. In some cases, however, the presence of one criterion may justify the inference of another. For example, an area may be presumed to have hydrophytic vegetation if hydric soils and wetland hydrology are present. Similarly, the hydrology criterion can be inferred if the area has hydric soil and, under normal circumstances, it supports hydrophytic vegetation.

B. "Hydrophytic vegetation" is plant life growing in, near, or under water that is at least periodically deficient in oxygen as a result of excessive water content. Approximately 7,000 types of plants may grow in wetlands. Of these, about 27 percent are "obligates," i.e., they almost always grow in wetlands under normal conditions. To assist in identification, you can get a list of wetlands vegetation for your region from the Fish and Wildlife Service (FWS).

C. "Hydric soil" is soil that is saturated, flooded or ponded long enough during the growing season to develop anaerobic conditions near the surface. The presence of hydric soil is indicated by:

1. Abundant decomposed plant material;

2. predominately bluish-gray, brownish-black, or black soil color 10-12 inches below the surface;

3. a rotten egg smell; or

4. sandy soil which has dark stains or streaks of organic material 2-3 inches below the surface.

D. "Wetland hydrology" refers to the permanent or periodic inundation or prolonged soil saturation sufficient to create anaerobic conditions in the soil. Indicators include:

1. water-logged soil;

2. standing or flowing water for seven or more consecutive days during the growing season;

3. "drift lines" or small piles of debris oriented in the direction of water movement through an area;

4. debris lodged by the water in or against trees or other objects;

5. water marks on trees or other vertical objects; or

6. thin layers of sediment deposits on leaves or other objects.

1704 THE 404 PERMITTING PROGRAM. As a result of the broader definition of "navigable waters of the United States" in the CWA, as compared with that of the Rivers and Harbors Act (RHA), section 404 of the Clean Water Act (CWA) is the primary tool for protection of wetlands.

A. Unless exempted, no one may discharge dredged or fill material into waters of the United States without a permit issued by the Corps of Engineers (COE) or a state with permitting authority. The term "discharges of fill material" is interpreted very broadly by regulators. It includes the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction and can even include farming activity such as tilling the soil. All federal agencies except for the COE usually must obtain an individual or programmatic permit or qualify under a nationwide permit if they engage in a regulated activity. An agreement for construction or engineering services performed by the COE for other federal agencies does not satisfy the permitting requirement.

B. Exemptions. Several exemptions to the permit requirement exist. Permits are not required, for example, for:

1. The discharge of fill material during construction of a federal project specifically authorized by Congress, provided the effects of the discharge have been considered in an environmental impact statement (EIS);

2. construction of temporary sedimentation basins on a construction site that does not result in a discharge to a navigable water of the United States;

3. maintenance of drainage ditches, etc., where the maintenance does not include any modification that changes the character, scope, or size of the original fill design; or

4. maintenance or emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, bridge abutments or approaches, provided the emergency reconstruction occurs within a reasonable time after the damage.

C. Permits. Permits can be issued by either the district engineer, division engineer, or Chief of Engineers. Typically, the more controversial the proposed project, the higher the approval authority. The COE can issue two types of permits, general and individual.

1. General permits can be obtained faster and more easily than individual permits. General permits can be issued for activities that are similar in

nature and will only have a minimal individual or cumulative impact. The most important general permits are the "nationwide permits."

2. Where a nationwide permit is applicable, the COE usually does not even have to be notified so long as all conditions of the permit are observed. Nationwide permits are listed at 33 C.F.R. section 330.5. Numerous conditions and required management practices apply. A water quality certification or waiver may be needed from the state if a discharge is involved. Activities covered by nationwide permits include:

a. Repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure or fill;

b. repair, rehabilitation, or replacement of any currently serviceable structure or fill constructed prior to the requirement for authorization so long as consistent with the original purpose or plans (Before 25 July 1975 or 1 September 1976 depending on the location);

c. certain minor road crossing fills; and

d. dredge or fill activities that adversely affect wetlands of less than one acre.

3. An individual (or standard) permit must be processed through the public interest review process. Activities that adversely affect more than one acre but less then ten acres must be reported to the local Corps District. They then have 20 days in which they can require the agency to apply for an individual permit. The clear trend is to require an individual permit when more than one acre of wetlands is affected. In any event, all activities that adversely affect more than ten acres of wetlands will require an individual permit.

4. Programmatic permits must be applied for like individual permits. Once obtained, however, programmatic permits obviate duplicate applications for similar activities required by the same program.

D. The Individual Permit Process. The process for obtaining an individual permit is described at 33 CFR Part 325. Following a pre-application consultation with the COE, the federal agency submits the application and COE assigns it an identification number. The COE gives public notice of the application within 15 days of receiving all necessary information. This begins a 15-30 day public comment period, after which the COE will review the proposal and any public comment.

1. The COE will consult with other federal agencies as appropriate, particularly if the proposed action may affect endangered species or historic properties. A public hearing must be held at the request of any interested person

unless their articulated reasons for the hearing are deemed to be "insubstantial." If doubt exists, the hearing "shall" be held.

2. The COE reviews all public comment. In deciding whether to issue a permit, the COE considers the following factors: conservation; economics; aesthetics; flood hazards; navigation; recreation; public concern; water quality; the practicability of alternative locations or methods; and the extent of the beneficial and detrimental effects the activity is likely to have on the public and private uses for which the area is suited.

3. When wetlands are potentially affected by a proposed activity, the COE asks:

a. Is there a practicable alternative? If the project is not water dependent, the COE presumes that practicable alternatives are available unless it is clearly demonstrated otherwise. Practicable alternatives that do not require discharges into wetlands are presumed to have less adverse impact on aquatic ecosystems unless clearly demonstrated otherwise. The practicable alternatives analysis requires considering the project's economics as well as the use of sites not presently owned by the applicant if they can be reasonably obtained.

b. Have all reasonable mitigation efforts been employed? Mitigation generally includes minimizing adverse impacts through avoidance. Where adverse impacts still occur, mitigation by repairing, restoring, or replacing the affected wetlands is required. EPA requires a one-for-one replacement of the area lost for ponded, emergent, or herbaceous wetlands. For forested wetlands, a two-for-one replacement is required.

E. EPA Veto Authority. Under § 1344(c), EPA may veto COE permits by denying or restricting the use of any area as a disposal site for dredged or fill material. Statutory grounds for an EPA veto are unacceptable adverse affects on: municipal water supplies; shellfish beds and fishery areas; wildlife; or recreation areas.

1. If the EPA Regional Administrator notifies the regional engineer in writing that he intends to issue a public notice of a proposed determination to deny, restrict, or withdraw an area from consideration for use as a disposal site, the COE will not issue a 404 permit.

2. The proposed decision to veto a permit must occur after a public comment period of 30 to 60 days. If the Regional Administrator determines that there is "significant public interest" in the proposed determination, a public hearing will be held.

1705 SANCTIONS FOR NONCOMPLIANCE

A. Civil Penalties. No officer, agent, or employee of the United States can be personally liable for any civil penalty arising from performance of official duties in connection with the requirements discussed in this chapter.

B. Criminal Penalties. Knowing and negligent violations carry a maximum punishment of $25,000 fine and one year imprisonment for each violation in the first conviction; $50,000 fine and two years imprisonment for subsequent convictions. Violators may also be prosecuted under the CWA's "knowing endangerment" provision.

C. Civil Remedies. Judicial remedies, including injunctive relief, may be awarded in citizen suits under § 1365.

1706 IMPLEMENTING DON POLICY. To implement the DON policy, responsible officials should ensure:

A. That all facilities and operational actions avoid, to the maximum degree feasible, wetlands destruction or degradation;

B. That any facilities requirement that cannot be sited to avoid wetlands shall be designed to minimize wetlands degradation and will include appropriate compensatory requirements in all-phases of the project's planning, programming, and budgeting process;

C. That any action affecting wetlands is given proper consideration in the environmental review and public notification process per OPNAVINST 5090.1A;

D. That boundaries of legally defined wetlands, on all Navy lands, are identified and mapped before FY-95;

E. That adequate natural resources management expertise is available to installation commanders for the protection, management, identification, and mapping of wetlands;

F. That a copy of all applications for CWA Section 404 permits to fill wetlands, or notification to COE for filling under a nationwide permit, is forwarded to CNO (0P-456); and

G. That personnel address questions to the OPNAV point of contact, Mr. Lewis Shotton, at OP-456, whose telephone number is (703) 325-0427.

CHAPTER 18

NATIONAL MARINE SANCTUARIES

1801 REFERENCES

A. Title III, Marine Protection, Research & Sanctuaries Act, 16 U.S.C. § 1431 et seq. (The "Ocean Dumping Act")

B. 15 C.F.R. Part 922

1802 PURPOSE. The National Marine Sanctuaries Program seeks to protect marine life, plant or animal, in designated areas. The Marine Sanctuaries Program is administered by the Marine & Estuarine Management Division, National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce.

1803 DESIGNATION PROCEDURE. NOAA maintains a list of ocean sites which are candidates for selection as marine sanctuaries. When NOAA determines that a listed site should become an active candidate for selection, it publishes a notice in the Federal Register. The Administration prepares draft environmental documentation and holds public hearings. Ultimately, NOAA will prepare an environmental impact statement, a designation document, a management plan, and regulations governing the sanctuary. A prospectus is also delivered to Congress. Congress or the governor of an affected state can "veto" the designation. But see INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)(unconstitutionality of congressional vetoes).

1804 EFFECT OF DESIGNATION. Designation operates to restrict uses incompatible with the preservation of sanctuary values, e.g., coral, marine mammals, etc.

A. Designation does not terminate valid preexisting leases, permits, licenses or rights, but does subject them to regulation. The regulations for the individual sanctuaries set forth the restrictions on their use.

B. Most, but not all, of these regulations address DoD activities in the sanctuaries. 15 C.F.R. §§ 924, 929, 935-38, and 941-42. Strict liability exists for damages for injuries to sanctuary resources and response costs. Violation of the regulations or conditions of Secretary of Commerce special use permits can result in assessment of civil penalties of up to $50,000 per day.

1805 EXISTING SANCTUARIES. There are now eight marine sanctuaries that range in size from a few acres to hundreds of square miles. The following areas have been designated thus far: USS Monitor, off Cape Hatteras, North Carolina; Key Largo and Looe Key in Florida; Cordell Bank, the Channel Islands, Point Reyes, and Farallon Islands, all in California; Gray's Reef, Georgia; and Fagatele Bay in American Samoa.

1806 PROSPECTIVE SANCTUARIES. There are 29 areas on NOAA's site evaluation list. Of these, four are active candidates for designation: Stellwagen Bank off Massachusetts; the Flower Garden Banks off Texas and Louisiana; and Northern Puget Sound and Western Washington Outer Coast, off the State of Washington. Two others not on NOAA's site evaluation list are also active candidates: Norfolk Canyon, Virginia and Monterey Bay, California. Congress has also directed NOAA to study four other areas: the American Shoal, the Sombrero Key, and the Alligator Reef, all in Florida; and Santa Monica Bay, California. 54 Fed. Reg. 53432 (Dec. 28, 1989).

CHAPTER 19

CLEAN AIR ACT

1901 REFERENCES

A. 42 U.S.C. §§ 7401-7642

B. 40 C.F.R. Parts 50-80

C. OPNAVINST 5090.1A, Chapter 6

D. OPNAVINST 5090.2 (NOTAL)[Ozone depletion]

1902 PURPOSE. The Clean Air Act (CAA) seeks to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Congress created a number of separate programs within the CAA which will be discussed below.

A. Applicability. The CAA contemplates a system of federal standards and oversight, delegating primary implementation responsibility to the states. Federal facilities are subject to state and local air pollution regulations under the waiver of sovereign immunity in section 7418 which was expanded in 1977 and 1990. Per paragraph 17-5.4.1 of OPNAVINST 5090.1A, Navy vessels shall operate under applicable Federal, state and local regulations governing air pollution emissions, provided that such compliance does not jeopardize the safety and welfare of the ship or its personnel.

B. Asbestos and Radon. Though regulated under CAA, asbestos has become such a significant topic it will be treated separately in chapter 26 of this Deskbook. Similarly, radon is a pollutant which may exist in the air but radon is regulated under the Toxic Substances Control Act. The embryonic radon regulation is discussed in chapter 25 of this Deskbook.

1903 FEDERAL RESPONSIBILITIES

A. Clean Air Goals. EPA sets primary and secondary ambient air quality standards to promote public health and welfare. Primary standards protect human health; secondary standards protect agriculture, property, and aesthetics. The standards, called national ambient air quality standards (NAAQS), are set for "criteria" pollutants of public health concern.

1. EPA has established NAAQS for the following "criteria" pollutants: carbon monoxide (CO); hydrocarbons (HC); lead (Pb); nitrogen dioxide (NO2); Ozone (03); sulphur dioxide (SO2); and total suspended particulates (TSP).

2. EPA has divided the states into Air Quality Control Regions (AQCRs). AQCRs are classified as in "attainment" or "nonattainment," indicating whether they meet the pertinent NAAQS for each criteria pollutant. Nonattainment areas are graded on the degree of severity for several pollutants; the more severe the pollution, the more stringent the regulations.

3. In nonattainment areas, EPA may prohibit the construction of new sources or require that they be built with control equipment reducing air pollution to the lowest achievable emission rate (LAER). Facilities in nonattainment areas need to give special attention to the regulatory process.

B. National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. § 7412; 40 C.F.R. Part 61.

1. A "hazardous air pollutant" is a substance, not a criteria pollutant, identified by EPA as a contributor to air pollution which may reasonably be anticipated to result in an increase in mortality, serious irreversible illness, or incapacitating reversible illness.

2. The following substances have been listed: asbestos, benzene, beryllium, coke oven emissions, inorganic arsenic, mercury, radionuclides, and vinyl chloride. Standards may include design, equipment, work practice, operational standards or combinations thereof.

C. State Implementation Plan Oversight. Require states to develop state implementation plans (SIPs) to achieve the NAAQSs. 42 U.S.C. § 7410. EPA requires states to enforce state and federal pollution control rules. EPA may step in for direct enforcement as necessary when states fail to act.

D. Control Technology. EPA establishes minimum control technology for categories of new pollutant sources and for hazardous pollutants. 42 U.S.C. § 7411.

1904 STATE RESPONSIBILITIES. EPA sets the ambient air quality standards but the states are responsible for ensuring the standards are achieved. Thus, the principal vehicles for attainment of the ambient air quality standards in the United States are the 50 individual "state implementation plans" (SIPs).

A. SIP Management. Each SIP must be approved by EPA and must contain a mix of controls and strategies sufficient to achieve and maintain the NAAQS. States attempt to achieve the NAAQS by allocating the economic burden of

attainment among categories of sources as they deem appropriate. Local enforcement provisions must be available.

B. Sanctions. A state's failure to submit a SIP, or obtain approval, or to enforce and implement the SIP can result in federal sanctions.

1. EPA has two sanctions to pressure states into fulfilling their responsibilities: cutting federal funding for highway or sewage treatment projects and drastically increasing the amount of emission reductions needed to offset new source emissions.

2. EPA must impose at least one sanction whenever a State has not corrected its failure within 18 months after EPA identifies the problem. If the state has yet to correct the failure six months later, both sanctions apply. EPA must impose both sanctions if the State shows a "lack of good faith" in making corrections.

C. Federal Implementation Plans. If the SIP fails to produce results or appears likely to fail, EPA can issue a Federal Implementation Plan (FIP). The 1990 amendments require EPA to step in and take corrective action when states don't do their part.

D. State Powers. While states must enforce federal requirements, they are free to develop more stringent pollution controls where necessary or locally desirable. For example, states may require an air pollution permit for each source, even though there is no such requirement in federal law.

E. Organization. Some states, e.g., California, are organized into Air Quality Management Districts, each of which may design its own regulatory scheme to meet local air quality needs. Judge advocates must be familiar with these requirements because activity that is perfectly legal in one district may be contrary to regulations in another.

1905 DUAL REGULATORY SCHEMES. The content of the SIP will vary depending on whether the air there is clean or dirty, i.e., whether the area is in attainment.

A. Clean Air. Areas which are in attainment are regulated under the Prevention of Significant Deterioration (PSD) program. PSD also applies in geographic regions for which there is insufficient data to determine whether the NAAQS has been achieved. The stringency of the PSD regulation may vary with the importance of maintaining air quality in the area.

B. Dirty Air. By contrast, "nonattainment" rules apply where the primary or secondary NAAQS have not been achieved. The consequences include more stringent permitting and control requirements for new and modified sources of

pollution. Regardless of which set of rules applies, state permitting requirements may exist outside of any EPA approved SIP for the attainment or non-attainment areas.

1906 STATIONARY SOURCES. Stationary sources are regulated through AQCR permits. Generally, permits are required for "major sources" and "new sources." Permits must consolidate all limitations on the source, including air toxics. In appropriate cases, EPA can void an AQCR permit, then issue and administer its own permit. Permits are also needed for sources regulated under PSD, NSPS, acid rain, and air toxics programs. The AQCR must collect fees to cover permit program costs.

A. Major Sources. The definition of "major sources" varies with the criteria pollutant it creates. Typically, the standard is 100 tons per year. Lower standards exist to focus on special problems. In extreme ozone nonattainment areas, the threshold is 10 tons per year. The standard is 70 tons per year in serious PM-10 nonattainment areas. (PM-10 refers to particulate matter which is more than 10 microns in diameter, about one-tenth the width of a human hair.)

B. New Sources. In addition to the obvious meaning, "new" sources include new equipment and modifications. New sources need permits to be built and operated. They are subject to "new source performance standards" (NSPS) and technical standards for specific categories of industrial sources called "best available control technology" (BACT) to achieve the "lowest achievable emission rate" (LAER).

C. Emissions Trading, Offsets and "Bubbles." Given that it is more cost effective to further restrict older, more inefficient polluting sources rather than new ones, the CAA permits some flexibility for stationary sources. For example, offsets earned for shutting down an emission source can be saved or sold, at a prescribed discount to insure a net decrease in emissions. A bit of the "bubbling" can be particularly useful. Normally each smoke stack, or motor pool, is a separate "source." With the bubbling concept, the whole installation can be treated as one source. Consequently, increases at one plant may be offset by decreases at another. Bubbling can be used to bypass special federal rules pertaining to major new or modified sources, and it may be recognized by state law. "Bubbling" enables operators to spend their emissions control money most effectively.

1907 MOBILE SOURCES. Mobile sources are regulated primarily on a national level. Since military aircraft are not subject to regulation, the primary concern in DoD is cars and trucks. Despite statutory restrictions, the increasing number of motor vehicles on the road has offset much of the emission reductions gained. Mobile sources still account for about half of the ozone "precursors" and most of the carbon monoxide. To deal with the growing problem, Congress enacted a number of staged programs in the 1990 amendments to attack these emissions from several angles.

A. Emissions Standards. The 1990 amendments establish tighter pollution standards for emissions from automobiles and trucks. These standards will reduce harmful tailpipe emissions on a phased-in basis beginning in model year 1994. Automobile manufacturers will also be required to reduce vehicle emissions resulting from the evaporation of gasoline during refueling. Stricter standards for California can be adopted by other states as well.

B. Inspection and Maintenance of Pollution Controls. Per paragraph 6-5.4.2 of OPNAVINST 5090.1A, Navy commands shall comply with vehicle emission inspection and maintenance (I/M) requirements in all areas where states or their subdivisions have adopted such regulations. Commands are authorized to develop I/M procedures for their fleet vehicles as a part of normal preventive maintenance programs.

C. Traffic Management. The 1990 Amendments look to management of traffic as a complementary method of reducing vehicle emissions. Military officials in San Diego have already been approached on this issue in connection with studying commuting patterns.

D. Fuels. Fuel quality will also be controlled as the regulations under the 1990 amendments take shape. Scheduled limits will be implemented to reduce gasoline volatility and sulfur content and some areas will be required to use cleaner, "reformulated" gasoline beginning in 1995. Further, 26 of the dirtiest areas of the country will have to adopt a program limiting emissions from centrally-fueled fleets of 10 or more vehicles beginning as early as 1998.

E. Navy Vessels. Per paragraph 17-5.4.2 of OPNAVINST 5090.1A, the following operating procedures shall be followed by ships.

1. Navy ships at pierside shall implement operation and maintenance procedures to prevent stack emissions in violation of state and local regulations. Specifically, Navy ships shall comply with the regulations on the opacity of smoke during normal operation of boilers and special periods, such as lighting off, securing, baking out, or testing of boilers.

2. In port, Navy ships shall minimize operation of boilers and diesel engines by using shore-provided "hotel" services whenever operational requirements permit. Blowing of boiler tubes in port shall be limited to the minimum necessary to conform with provisions of chapter 221 of the Navy Ships Technical Manual (NSTM).

3. Navy vessels operating in the territorial sea (out to 12 nm) of foreign countries shall abide by air emission standards defined in the SOFA or international agreement, as described in Chapter 1. If no SOFA or international agreement exists, vessels shall operate consistent with the substantive air emission

standards observed by the host country's military forces until a satisfactory agreement on the subject can be effected. Unless otherwise provided in a SOFA or international agreement, Navy vessels operating temporarily within a foreign jurisdiction are subject to that country's standards to the extent specified by the clearance for visit.

1908 VOLATILE ORGANIC COMPOUNDS (VOCS). One area of regulation that has been of particular concern for the Navy is the limitation on the formulation and application of paints and coatings to reduce solvent emissions, called volatile organic compounds (VOCs). These substances, which play a role in the creation of ozone, are targeted for reduction and elimination in aircraft coatings, architectural, marine, and vehicle coatings. Other sources of VOCs include: fuel transfer operations; refueling operations; maintenance activities using solvents; evaporation ponds; drycleaning plants; and painting work.

A. Regulatory Approach. Some regulations limit formulations, others limit application techniques to reduce air release. EPA and the local agencies are interested in emission controls, "scrubbers" and filters, which can be very expensive when used in large operating areas.

B. Navy Compliance. Only approved solvents, paints, fuels, lubricants, and chemicals shall be used aboard ship. A list of materials prohibited on ships is included in NSTM, chapter 670. The Navy has been able to obtain compliance schedules and variances from local rules upon a showing that our needs are unique, or that complying coatings are not commercially available. Substitutions of coatings must be approved by responsible procurement authorities. NAVFAC environmental engineers are an excellent source of first line information in these technical matters, and may have an ongoing working relationship with certain local agencies.

1909 ACID RAIN. Acid rain occurs when sulfur dioxide (S02) and nitrogen oxide emissions are transformed in the atmosphere and return to the earth in rain, fog or snow. Acid rain damages lakes, harms forests and buildings, contributes to reduced visibility, and is suspected of damaging health. Since the pollutants which contribute to acid rain are emitted mostly from the burning of fossil fuels by electric utilities, this issue has limited significance to DoD.

A. Phased Program. The 1990 amendments created a two phase program, beginning in 1995 and 2000, to achieve permanent sulphur dioxide emission reductions. Phase I affects 110 major power plants in areas with significant problems to reduce their emissions at a rate tied to their energy output and fuel use between 1985 and 1987. Phase II will apply to a larger number of plants and require emission reductions at a rate more than twice as stringent as that applicable during Phase I.

B. Compliance Incentives. Special incentives are provided to encourage use of certain control technologies. Reductions below statutory limits create credits which can be sold to other utilities for their use in meeting the prescribed limits. Violators will be required to pay a $2,000 per ton excess emissions fee and offset the excess the following year.

1910 GLOBAL CLIMATE PROTECTION.

Title VI of the 1990 amendments reflects congressional concern for stratospheric ozone and "greenhouse effect." To reduce the harmful effects of chemicals that deplete the ozone layer, the amendments require EPA to implement a progressively-stringent program to eliminate production of certain classes of chemicals, including chloroflourocarbons (CFCs), halons, carbon tetrachloride, and methyl chloroform. EPA must publicize safe substitutes and ban unsafe substitutes. As these regulations develop, consult DoD Directive 6050.9 of 13 February 1989 (NOTAL), SECNAVINST 5090.5 (NOTAL), and OPNAVINST 5090.2 (NOTAL) regarding policies and responsibilities for elimination of ozone-depleting substances.

1911 TOXIC AIR POLLUTION

A. Background. Toxic air pollutants are those pollutants which are hazardous to human health or the environment but are not specifically covered under another CAA section. These pollutants are typicaliy carcinogens, mutagens, and reproductive toxins. Over the history of the air toxics program only seven pollutants have been regulated. The typical reason cited for the failure of the CAA in this area is the statutory burden on EPA to make findings regarding the health effects of a particular toxic air pollutant before the agency can regulate. EPA made these findings using risk assessment, a process that estimates the risks to human health posed by exposure to toxic air pollution. Risk assessments result in highly inexact and uncertain findings which are vulnerable to judicial challenge, severely slowing EPA's progress.

B. The New Program. Title III of the 1990 amendments replaced the ineffective risk assessment approach with a technology based approach which should significantly enhance EPA's ability to address our nation's toxic air pollution problem. The new legislation contains a list of 189 hazardous air pollutants. Within one year of enactment, EPA is required to develop a list of source categories (industries) that emit one or more of the listed pollutants. This list will contain both major sources and area sources. Major sources are stationary sources which emit more than 10 tons of any one pollutant or 25 tons of a combination of pollutants. Area sources are all other stationary sources of air toxics. Source categories will be regulated in order of their potential risk to public health and the efficiency of grouping sources. EPA will require sources of toxic air pollution to apply the Maximum Achievable Control Technology (MACT). A regulatory schedule for at least 40 industries must be published within two years of enactment, the remainder to be implemented over ten years.

1912 PERMITS. The 1990 amendments introduced a permit program modelled after the National Pollution Elimination Discharge System (NPDES) under the Clean Water Act. The program enhances EPA's ability to enforce the Clean Air Act by requiring every major air pollution source to have an operating permit that outlines its compliance requirements.

A. Program Development. EPA must issue program regulations within one year of enactment. Within three years of enactment, each state must submit a permit program meeting these regulatory requirements to EPA. EPA has one year to accept or reject the state proposal. The Amendments require EPA to levy sanctions against a state that does not submit or enforce a permit program.

B. Permit Applications. All sources subject to the permit program must submit a complete permit application within 12 months of the effective date of the program. The state permitting authority has 18 months to determine whether an application should be approved. Each permit issued to a facility will be for a fixed term of up to five years. The state collects a fee from the permitted facility to defray reasonable direct and indirect costs of the permitting program. This fee will eventually be at least $25 per ton.

C. EPA "Veto." EPA has 45 days to review each permit and to object to permits that violate the Clean Air Act. If EPA fails to object, any person may petition EPA to object within the 60 days following EPA's 45-day review period. EPA must grant or deny the permit within 60 days. Petitioners can seek review of EPA's decision in the Federal Court of Appeals.

D. Variances. Variances can be granted if a source can't comply with a permit but other compelling interests justify deferral of enforcement while the source works to achieve compliance. EPA can issue compliance orders with 1-year compliance schedules. Per paragraph 6-5.2.1 of OPNAVINST 5090.1A, each Navy stationary source unable to achieve timely compliance with applicable emission limitations shall request a variance or other administrative relief from the appropriate regulatory agency to continue operating until compliance can be achieved. Contact the NAVFACENGCOM Engineering Field Division (EFD) for assistance, if needed.

E. Certification. In addition, sources must certify their compliance. EPA has authority to issue administrative subpoenas for compliance data.

1913 ENFORCEMENT. In addition to the powers regarding permits, Title VII of the 1990 amendments creates a panoply of enforcement mechanisms to ensure the congressional intent is achieved.

A. Administrative Penalties. Administrative penalties have been enhanced The 1990 amendments authorize EPA to issue administrative penalty

orders up to $200,000. Inspectors can issue field citations up to $5000 for lesser infractions.

B. Judicial Penalties. Both civil and criminal sanctions have been upgraded under the 1990 amendments. Monetary limits on civil penalties are increased. Criminal penalties for knowing violations are upgraded from misdemeanors to felonies. New criminal provisions for knowing and negligent endangerment will be established.

C. Citizen suits. Section 7604 of the CAA provides that any person may commence a civil action against any violator, including federal agencies. Plaintiffs must give 60 days' notice. The 1990 amendments revised the citizen suit provisions to allow citizens to seek penalties against violators. The money collected from these penalties will be deposited in a U.S. Treasury fund to defray the cost of EPA's compliance and enforcement activities. The government's right to intervene is clarified and citizen plaintiffs will be required to give the United States copies of pleadings and draft settlements.

CHAPTER 20

THE CLEAN WATER ACT

2001 REFERENCES

A. Federal Water Pollution Control Act (a/k/a Clean Water Act), as amended, 33 U.S.C. §§ 1251-1386.

B. 40 C.F.R. Parts 100-140, 400-700.

C. The Refuse Act (§ 13 of the Rivers and Harbors Act of 1899), 33 U.S.C. § 407.

D. OPNAVINST 5090.1A, Chapter 7

2002 OVERVIEW. The Clean Water Act (CWA) was enacted "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." To achieve this no discharge of pollutants goal, CWA regulates the discharge of pollutants into the navigable waters of the United States through five programs: direct discharges (NPDES); indirect discharges to Publicly Owned Treatment Works (POTW); oil spill release; vessel sewage; and disposal of dredged and fill material. This chapter will discuss the first two programs. Disposal of dredge and fill material is discussed in the chapter on Wetlands. Oil spill releases and vessel sewage are discussed in the part of this Deskbook dealing with environmental issues afloat.

A. "Pollutant" means any man-made or induced alteration of the chemical, physical, biological, or radiological integrity of water. Pollutants include: dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, rock, and sand. Sewage from vessels is specifically excluded.

B. "Navigable waters" are any body of water or water course which could remotely affect interstate commerce. All waters which are, ever were, or could be used for interstate commerce, plus all tributaries thereof, all adjacent wetlands, and any waters that could provide a product (fish) or a use (recreation) which could affect interstate commerce. Groundwater is not included.

C. Federal Compliance. Under CWA section 313, federal facilities are subject to "federal, state, interstate and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental agency."

2003 THE STATE ROLE. The governor of a state that desires to administer its "own permit program for discharges into navigable waters" needs to submit a "full and complete description of the program it proposes to establish" to EPA. Any permit must incorporate established technology standards, water quality standards, EPA toxic effluent standards, and EPA new source standards. The permits should include monitoring, record keeping, and reporting requirements. Unless expressly stated, CWA does not preempt state regulation or pollution abatement; states may impose more stringent effluent standards than those required by EPA.

2004 POINT SOURCES. A "point source" is a discernable, confined, discrete conveyance which may discharge pollutants into the water; e.g., pipes, ditches, vehicles, etc. Vessels are included. All "point source" dischargers of pollutants into "navigable waters" must have a National Pollution Discharge Elimination System (NPDES) permit.

A. Federal law specifies a minimum level of pollution control technology that must be employed by each point source. Point sources are grouped by industry or subgroup of industry for purposes of identifying technology requirements. If a source does not fit into any existing industrial category, then the EPA (or state) uses its "best professional judgment" in establishing a control technology requirement.

B. For a variety of regulatory purposes, there are two types of point sources: publically-owned treatment works (POTWs) i.e., sewage treatment plants, and all others. As a policy matter, the EPA has ruled that federal facilities are <u>not</u> treated as POTW's, even if they treat only domestic sewage. Consequently, an extensive discussion of POTW regulation will be omitted in this chapter.

2005 NPDES PERMITS. All point sources must have a National Pollution Discharge Elimination System (NPDES) permit. Permits must incorporate: effluent limitations stringent enough to meet water quality standards; the levels of technology set by the CWA to control various types of effluent; and the nationwide effluent limitations for toxics and certain categories of new sources. Permits typically include other requirements relating to effluent monitoring and calibration and maintenance of monitoring equipment.

2006 WATER QUALITY STANDARDS. States establish water quality standards based on desired uses of the particular water area. Protected waters can include those not within the definition of "waters of the U.S.," including ground water.

A. Before EPA may issue a federal permit the affected state must certify that the permit would not violate state-established water quality standards. This enables the state to impose more stringent local requirements and effectively gives

the state a veto over federal permits.

B. After states have identified a specified use for a body of water, the aggregate of pollution discharges must be limited to ensure that the specified use can be achieved. Some states create narrative standards, e.g., "State waters shall be free of oil, scum, and floating debris in amounts that are unsightly or harmful." Other states impose quantitative standards, e.g., "State waters shall contain not less than 5 parts per million of dissolved oxygen."

C. Pollution sources that discharge into POTW's must meet pre-treatment standards to ensure their effluent can be processed by the POTW.

2007 POLLUTION CONTROL TECHNOLOGY. EPA does not mandate specific control equipment; rather, EPA specifies maximum levels of permissible pollution based on the performance of equipment that it identifies as meeting the appropriate technological requirement. The technological requirements vary, reflecting the different balances between risk of harm, technological feasibility, and cost-benefit considerations, for each category of pollutants. Pollution control is required even if the receiving water already meets applicable water quality standards. Control technology is an evolving variable in water pollution regulation. As better technology is developed, it will have to be employed. States may impose tighter effluent restrictions.

A. Conventional Pollutants. Conventional pollutants include suspended solids, fecal coliform, pH level (i.e., acidity/alkalinity balance), and biological oxygen-demanding pollutants. Effluent limits for conventional pollutants are set to reflect the performance of the "best conventional pollutant control technology" (BCP).

B. Toxic and Nonconventional Pollutants. Toxic pollutants subject to this standard are listed in 40 CFR 401.15. Effluent limits are set to reflect the performance of the "best available technology economically achievable" (BAT).

C. Other Pollutants. Effluent limits for this residual category are set to reflect the performance of the "best practicable control technology currently available" (BPT).

D. New Sources and Pretreatment Requirements. As under the Clean Air Act, new sources are generally subject to more stringent control technology than existing sources. Effluent limits for this category are set to reflect the performance of the "best available demonstrated control technology, processes, operating methods and other alternatives" (NSPS). The permit application process should be coordinated closely with officials establishing the contract specifications.

2008 TECHNOLOGY VARIANCES AND MODIFICATIONS. Under certain circumstances, dischargers of pollutants can obtain a variance or

modification of the control technology that would otherwise be required.

A. Section 301(c) Modifications. BAT requirements may be modified if a lower level of control represents the "maximum use of technology within the economic capability of the owner or operator." This economic standard is not available for BPT requirements or requirements pertaining to toxic pollutants.

B. Section 301(g) Modifications. BAT requirements can be reduced if a lower level of control presents no unacceptable impacts on water quality, human health, or the environment. This modification is applicable for ammonia, chlorine, color, iron, and total phenols. The variance cannot result in a requirement lower than BPT.

C. Section 403 Modifications. EPA's model control technology may be inappropriate, for example, where a given point source may use a process different from that normally employed in its industry. In such cases, the source can request an alternative requirement tailored to its process, given the "fundamentally different factors." Modification of BPT, BCT, and BAT requirements may be approved if achieving the specified level of pollution control would:

1. Result in a cost wholly out of proportion to the cost EPA considered in developing the regulation for the industry group; or

2. create nonwater quality environmental impacts fundamentally more adverse than those EPA considered in developing the regulation for the industry group.

D. Credits. When pollutants are present in the intake water, the discharger may receive a "credit" for those pollutants, thus allowing greater effluent levels in the outflow. Regulations are promulgated at 40 C.F.R. § 122.45(g).

E. Thermal discharges. In some cases, a discharger can receive a variance from the normal limits for thermal pollution. See 40 CFR § 125.70-73.

2009 NEGOTIATING PERMITS. The regulators' proposed permit requirements routinely are negotiable. Recognizing that the regulator occupies the superior position, we cooperate with federal, state, and local officials to make the most of that bargaining room exists. Unreasonable negotiating positions can result in undesirable requirements.

A. If the state is the permitting authority, review the state laws on permit issuance for limitations on agency authority. Many states prohibit the imposition of requirements more stringent than federal requirements. Ensure the state follows its provisions regarding administrative due process in developing the prospective requirements. To counter possible discrimination against federal facilities, review

permit conditions imposed on other similar facilities. Federal facilities need only comply to the same extent as other entities.

B. Consider the grounds for modifications and variances. For water-quality related requirements, consider: the size of the "mixing zone"; the existence of natural pollution of the type to be controlled; and state rules that may allow exemptions "in the public interest," etc. Above all, make sure that you can live with the permit you negotiate.

C. Permit Renewals. Permits are valid for a maximum period of 5 years. Submission of a timely renewal application automatically extends the existing permit.

2010 ENFORCEMENT

A. Reporting. Point sources must monitor their effluent flows, as required by their permits. Generally, pollution control problems must also be reported. Periodically, point sources must submit "Discharge Monitoring Reports" (DMRs) based on their monitoring results. Regrettably, these DMRs, provided under the Freedom of Information Act, often form the basis for citizen suits.

B. Site Inspections. EPA and authorized state inspectors may enter military facilities to inspect equipment, sample effluent, and inspect records. The security requirements of SECNAVINST 5510.1H apply. EPA has an internal program for granting necessary security clearances. Refer problems to OP-45.

C. Administrative Orders. Under § 1319(a), the provisions of the CWA may be enforced by the administrative orders of the EPA or state agencies. Violators are subject to administrative penalties under § 1319(g).

D. Judicial Enforcement.

1. Civil enforcement. Per § 1323(a), the United States is liable only for civil penalties "arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." Generally, CWA civil monetary penalties may not be assessed against federal agencies or personnel.

2. Criminal enforcement. Knowing and negligent violations carry a maximum punishment of a $25,000 fine and one year imprisonment for each violation in the first conviction; $50,000 fine and two years imprisonment for subsequent convictions. The CWA's "knowing endangerment" provision carries a maximum punishment of a $250,000 fine and 15 years imprisonment for any person who knowingly violates the CWA and who knows that their violation places another person in imminent danger of death or serious bodily injury.

3. Injunctions. Regardless of whether civil or criminal penalties are available as an enforcement tool, the greatest threat to an activity may be an injunction. Compliance with an injunction against a specific discharge may only be possible through cessation of the process (industrial or otherwise) which generates the offending pollutant.

4. Citizen suits. Under § 1365, any person may bring an action against a polluter for any ongoing violation of the statute. Citizens may sue to enforce effluent limitations, EPA orders, or state orders. The U.S. district courts may enforce effluent limitations, impose civil penalties, and award attorney fees. Prospective plaintiffs must give 60 days notice to EPA, the state and the violator before bringing the action. Defending facilities should make every possible effort to correct those violations during the 60 days; their reward will be dismissal of the action as to any corrected violation. Settlement agreements may include court-ordered compliance schedules, with stipulated penalties for failure to adhere to those schedules, and payment of court costs and attorneys' fees.

CHAPTER 21

SAFE DRINKING WATER ACT

2101 REFERENCES

A. 42 U.S.C. §§ 300f-300j-11

B. 40 C.F.R. 140-147.

C. DoD Directive 6230.1 of 24 April 1978; Safe Drinking Water (NOTAL)

D. OPNAVINST 5090.1A, Chapter 8

2102 OVERVIEW. The Safe Drinking Water Act (SDWA) accomplishes its objective by regulating contamination of tap water delivered by public water systems (PWS) and contamination of groundwater. The latter program attacks on three fronts: underground injection control (UIC); wellhead protection programs; and sole source aquifer protection programs. Under section 300-j6, federal facilities are expressly subject to the PWS and UIC requirements. A separate waiver of sovereign immunity, applicable to the wellhead protection program, appears at section 300h-7(h). No specific waiver applies to the sole source aquifer program but those issues should be considered during any analysis of environmental impact under the National Environmental Policy Act (NEPA).

2103 PUBLIC WATER SYSTEMS (PWSs)

A. Applicability. The requirements of this program apply to any PWS which has 15 service connections or regularly serves 25 individuals.

B. Goals. EPA sets maximum contaminant level goals (MCLGs) for contaminants "which in the judgment of the Administrator may have an adverse effect on the health of persons and which is known or anticipated to occur in public water systems." A contaminant can be anything which is not water, including physical, chemical, biological, or radiological matter. As goals, MCLGs are not enforceable.

C. Standards. To regulate in practice, EPA establishes maximum contaminant levels (MCLs). MCLs are mandatory limits on drinking water contaminants; an MCL is the maximum permissible level of a contaminant in water delivered to the consumer. EPA defines these MCLs in National Primary Drinking Water Regulations (NPDWRs). EPA sets the MCL "as close as feasible" to the

parallel MCLG, considering available technology, practicability, and cost. If an MCL is not technically or economically achievable, NPDWRs may require a specified treatment technique.

D. State Implementation. EPA may delegate primary PWS enforcement authority to the states. All west coast states have been delegated PWS authority. As with CWA, state regulations must be at least as stringent as federal standards; states are free to impose more stringent requirements. If the state fails to discharge its responsibilities, EPA may step in to take enforcement action. EPA will send the state a notice of violation (NOV), offering advice and technical assistance. If the state fails to respond within 30 days, EPA will issue an administrative compliance order and impose administrative penalties of up to $5,000 per day. If EPA chooses to go to federal court, penalties may be as high as $25,000 per day.

E. Other Rules. Other important PWS regulations include:

1. Some surface water sources require filtration;

2. all systems require disinfection unless granted a variance;

3. variances from NPDWR are available through the state due to raw water characteristics;

4. exemptions from MCLs or required treatment techniques are available through the state when no health risk would result and compelling factors exist, e.g., no alternate water source;

5. when MCLs are exceeded, the PWS owner/operator must notify the public through appropriate means, e.g., newspaper, radio, television, etc.;

6. after 1986, no lead pipes or solder may be used in a PWS; and

7. Navy water systems operators shall meet state certification requirements under paragraph 8-5.3 of OPNAVINST 5090.1A.

2104 UNDERGROUND INJECTION CONTROL (UIC).

The UIC program regulates disposal of fluid wastes into the ground by well injection. Underground injection endangers public health if it introduces a contaminant which may migrate to a PWS. SDWA establishes permit requirements for new UIC well operations. To enforce this provision, EPA may seek injunctive relief and civil penalties up to $25,000 per day. Violation of administrative orders are punishable by civil penalties of $10,000 per day up to $125,000. Willful violations may be punished by 3 years' imprisonment and fines under Title 18.

2105 WELLHEAD PROTECTION AREAS.

A "wellhead protection area" is the surface and underground area surrounding a water well or wellfield for a public system through which contaminants are "reasonably likely to move toward and reach" the well water. 42 U.S.C. § 300h-7.

A. The EPA directed states to submit plans designed to protect wellhead areas from contaminants harmful to human health by July 1989. Many states did not submit plans by the deadline.

B. A state is given primacy if its program adequately protects public water systems. State control measures could look like land use controls. Texas, for example, protects an area 150 feet around a wellhead, called a "sanitary control easement." Federal facilities are subject to state wellhead protection plans under a separate waiver of sovereign immunity.

2106 SOLE SOURCE AQUIFERS

A. EPA may designate aquifers as "sole or principal drinking water source" for a geographic area. At least 48 aquifers have been designated nationwide. If so designated, EPA may "veto" federal expenditures which it determines may contaminate a designated aquifer. Sovereign immunity has not been waived for sole source aquifer plans developed by states. Sole source aquifer requirements should be considered, however in NEPA planning.

B. A critical aquifer protection area (CAPA) may exist within a sole source aquifer. A CAPA is an aquifer which is the sole or principal source of drinking water for an area and which if contaminated would pose a significant health hazard. In designating CAPAs, EPA will consider the vulnerability of the aquifer to contamination, the size of the population served, the benefits of protection, and the costs of degradation.

2107 ENFORCEMENT

A. Emergency Powers. When it determines that an imminent and substantial endangerment to health exists, EPA may issue administrative orders to enforce SDWA provisions. In the alternative, EPA may seek injunctive relief. Failure to comply with administrative or court orders may result in civil penalties of $5,000 per day.

B. Criminal Penalties. Anyone who tampers with a public water system, i e., introduces a contaminant or otherwise interferes with the intent to harm, is liable for a maximum punishment of 5 years imprisonment and fined. Civil fines of up to $50,000 are also available. Threats and attempts to tamper are punishable by 3 years imprisonment and civil fines of $20,000.

2108 CONSERVATION. Paragraph 8-5.6 of OPNAVINST 5090.1A directs implementation of a Navy-wide water conservation program. The initial emphasis is on leak detection and correction, particularly in industrial water use.

2109 ADDITIONAL READING. For a detailed examination of this subject, see Lieutenant Colonel Paul R. Smith USMC, "The Impact of the Safe Drinking Water Act Amendments of 1986 on Military Installations: How Real is the Encroachment Threat?" 38 Naval L. Rev. 49 (1989).

2110 EPA HOTLINE. EPA maintains a hotline to answer SDWA questions from federal facilities and the general public. Their number is (800) 426-4791, Monday through Friday, during East Coast working hours.

CHAPTER 22

RESOURCE CONSERVATION AND RECOVERY ACT

2201 REFERENCES

A. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq.

B. 40 C.F.R. Parts 260-281.

2202 PURPOSE. The Resource Conservation and Recovery Act (RCRA) is the first comprehensive federal effort to deal with solid waste and hazardous waste. Especially as applied to hazardous waste, RCRA regulates from "cradle to grave." The statute and regulations prescribe a hazardous waste management system applicable to those who generate, transport, treat, store or dispose of hazardous wastes which are not regulated by TSCA or CERCLA. Under § 6961, the substantive and procedural provisions of RCRA apply to all elements of the Federal Government.

A. Additional RCRA goals include:

1. Reduce or eliminate the production of hazardous waste as expeditiously as possible.

2. Maximize recovery of resources and energy from waste.

3. Encourage states to assume regulatory and enforcement responsibilities.

4. Develop a scheme for safe and efficient handling of "solid waste."

B. Two-Pronged Approach.

1. Extensive regulation of current hazardous waste practices to prevent current and future harmful releases.

2. Require current and past hazardous waste generators and handlers to take "corrective action" to remedy harmful releases.

2203 DEFINITIONS. § 1004; 40 CFR § 261.

A. "Solid waste" is defined as any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and "other discarded material."

1. "Other discarded material" is any material that is abandoned, recycled or considered "inherently waste-like."

2. "Solid" doesn't mean just solid. The term also includes liquid and contained gaseous material resulting from industrial, commercial, and mining operations, etc.

3. Exclusions from the definition:

a. Point source discharges subject to a NPDES permit under CWA.

b. Solid or dissolved materials in domestic sewage.

c. Material regulated under the Atomic Energy Act of 1954 by the Nuclear Regulatory Commission.

B. "Hazardous Waste" (HW) means any solid waste which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: significantly contribute to an increase in mortality or serious illness; or pose a substantial potential hazard to human health or the environment when improperly managed. Hazardous wastes are identified as "listed" or "characteristic" hazardous wastes.

1. "Listed" hazardous wastes are those on the list of hazardous wastes published by EPA in Appendix II, 40 CFR Part 261. Listed wastes can be "delisted." The regulated entity presents a "delisting petition" to the regulators asking them to categorize the treated mixture as an ordinary solid waste and thereby exempt from regulation. The delisting rules have been tightened up, however, making it more difficult and expensive to obtain a delisting.

2. "Characteristic" hazardous wastes are so named because they exhibit a hazardous characteristic by virtue of their: ignitability; corrosivity (ph); reactivity (explosive nature); or toxicity or leachability (TC).

3. Regulations exclude some wastes from the definition of hazardous waste. These exclusions include: household wastes; mining wastes; oil and gas extraction wastes; utility plant (fossil fuels) wastes; and cement kiln wastes. Hazardous waste lists and characteristics are discussed in more detail in the

appendix to this chapter.

C. Hazardous Mixtures. Some solid wastes become hazardous wastes under the "mixture rule."

1. A mixture of a solid waste and a listed hazardous waste is always a hazardous waste; dilution is irrelevant.

2. A mixture of a solid waste and a characteristic hazardous waste is a hazardous waste only if the mixture still exhibits the hazardous characteristic, e.g., ignitability

D. A "generator" is any person whose act or process produces a hazardous waste identified or listed by EPA, or whose act first causes hazardous waste to become subject to regulation. This broad definition includes infrequent producers of hazardous waste. The production of hazardous waste in process equipment, treatment units, storage tanks and transport vehicles also triggers RCRA.

E. A "transporter" is any person who is engaged in off-site transportation of a hazardous waste. A generator of waste that trucks the waste off-site becomes a transporter.

2204 THE STATE ROLE. RCRA, like the CWA and CAA, contemplates state implementation and federal oversight. Section 3006 authorizes states to develop their own hazardous waste programs. The function is one of authorization, not delegation. The state must have a statutory/regulatory framework and enforcement authority in place; it cannot simply administer the existing federal program. Almost all of the states have EPA approved RCRA programs; Alaska, California, Connecticut, Iowa, Hawaii, Vermont, Puerto Rico, Virgin Islands, American Samoa, and the Pacific Trust Territories do not. Where there is no approved state program, EPA maintains control.

A. To obtain authorization states must demonstrate that their program is:

1. At least as stringent as the federal program;

2. consistent in scope with federal and other state programs, e.g., state programs should not act unreasonably to restrict, impede or ban interstate movement of hazardous waste;

3. supported by adequate enforcement mechanisms, e.g., the panoply of administrative orders, civil and criminal penalties, corrective action orders, and litigation options; and

4. supported by a budget adequate to administer and enforce the

program.

B. When EPA approves the state program, that program and not the federal program applies to operations in that state. Consequently, you will likely deal with state agencies in permitting proceedings and compliance actions rather than EPA. EPA acts in an oversight role to ensure RCRA's minimum requirements, as discussed below, are met. A discussion of the myriad requirements in the several states is beyond the scope of this deskbook but judge advocates must familiarize themselves with local requirements to give complete advice to commanders.

2205 RCRA REGULATORY REQUIREMENTS

A. Requirements Concerning Notification. Under § 3010, any person who stores, transports, disposes of or handles hazardous waste must file a notification with EPA within 90 days after regulations are promulgated (initially 19 May 1980) identifying the waste as hazardous. Anyone planning such hazardous waste activity must give EPA or the State notice before they begin. No advance reporting is required for generators of less than 100 kilograms per month and handlers of certain types of hazardous wastes which are recycled or reclaimed (40 CFR § 261.5-6).

B. Generator requirements. Generators have a duty to determine if their solid waste is hazardous. Good faith efforts will not avoid liability for erroneous determinations. In addition, generators must prepare a RCRA manifest before hazardous wastes are moved off-site and keep accurate records of hazardous waste management activities. Generator requirements are discussed in more detail in the appendix to this chapter.

1. Submission of reports. EPA requires submission of a biennial report on March 1; most states require annual reports. The report must contain the EPA ID number and other specified information for each transporter and TSD facility used during the period, and information on the hazardous wastes generated during the report period.

2. Waste Minimization. Generators must establish a program to reduce the volume and toxicity of the waste generated and record changes in waste volume and toxicity actually achieved in comparison to previous years.

C. Transporter requirements. Any transportation on a public highway will trigger RCRA transportation rules. Transporters, including generators who transport their own waste, must register as transporters with the EPA. Transporters are subject to various administrative requirements (e.g., safety equipment, vehicle marking, etc.). Transporters must report their releases of hazardous substances to the National Response Center, (800) 424-8802 or (202) 426-2675.

1. Under RCRA, transporter duties include:

a. Accepting only that hazardous waste identified on a RCRA manifest;

b. delivering the hazardous waste as prescribed in the manifest;

c. keeping a copy of each manifest for 3 years; and

d. cleaning up their accidental or intentional discharges of hazardous wastes.

2. In addition to their RCRA responsibilities, which are discussed in more detail in the appendix to this chapter, transporters must meet the requirements of the Hazardous Materials Transportation Act (HMTA). HMTA was enacted to control transportation due to the unique problems encountered with interstate transport and the various methods of transport. The Act is administered by the Department of Transportation.

2206 TREATMENT, STORAGE AND DISPOSAL (TSD). T S D requirements are the heart of the hazardous waste management program. They apply to active facilities. Facilities opened after 1980 but not currently operating are governed by CERCLA.

A. Definition of TSD Terms.

1. "Storage" means the containment of hazardous waste, for however long, short of actual disposal.

2. "Treatment" means any method, process, or activity designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or render it nonhazardous, and safe for transport, recovery, or storage.

3. "Facility" means all continuous land and structures, fixtures, and improvements on the land, used for treating, storing or disposing of hazardous waste. A facility may include several treatment, storage or disposal units.

4. "Disposal facility" is defined as a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure.

B. TSD Permits. Every owner and operator must obtain a permit. Each TSD site on an installation is a separate "facility," requiring its own permit. Construction of a new facility cannot begin until a complete permit application is submitted and approved. Public hearings must be held prior to issuance of a TSD

facility permit. The TSD facility must handle the hazardous waste in a manner consistent with the permit and the applicable regulations.

1. Regulations of general applicability. Regulations at 40 CFR § 264 include requirements relating to: waste analysis plans; security; location of units; contingency and emergency response; record keeping and reports; groundwater monitoring; training; closure/post-closure activities; and financial responsibility.

2. Interim status v. permit.

(a) Certain TSD facilities in existence in 1980 obtained "interim status" to operate until EPA acted on their permit applications. Interim status facilities also include those active facilities newly subject to regulation. Interim status facilities are governed under 40 C.F.R. Part 265; they must submit "Part A" of the application for a RCRA permit.

(b) Permit status are those operating under a RCRA permit and facilities seeking to begin operation after RCRA became effective. They are governed under 40 C.F.R. Parts 264, 267, and 270. Permitted facilities must submit "Part B" when the EPA (or the state) requests it.

3. Special requirements. Additional requirements exist for specific types of hazardous waste management units. These provisions may impose special design, construction, operating and other technical standards for tanks, surface impoundments, biological treatment facilities, etc.

4. Modification of permits. Permits are valid for a specified period of time, in most cases not more than 10 years. EPA can review and reevaluate permit conditions at any time. Generally, a permit can be modified only for specified reasons such as the alteration or expansion of a facility. If the modification is needed merely to meet requirements for a new category of hazardous waste, the permit is administratively upgraded after notice is given to the public. Major modifications require a public hearing process. In any case, when a permit is modified, only the conditions subject to modification are reopened.

5. Termination of permits. RCRA permits may be terminated for noncompliance with the terms and conditions of the permit, for failure to disclose necessary information in the permit application or when the facility's operation poses a threat to human health or the environment.

C. Closure. Closure is the period during which the facility owner or operator completes treatment, storage or disposal activities at the facility or with respect to a particular hazardous waste management unit. At the end of the closure period, no additional hazardous waste may be treated, stored, or disposed of at the facility or unit.

1. The TSD owner and operator must develop a closure plan. Among other things, the plan must describe how each HW management unit at the facility will be closed in accordance with the regulatory closure performance standards. Closure of each HW management unit must be in accordance with that plan.

2. The post-closure period is the 30-year period after closure. During that time, operators of disposal facilities must perform certain monitoring/maintenance activities.

2207 CORRECTIVE ACTION. Formerly, corrective action referred only to remedial action for ground water contamination. The term was modified in the 1984 amendments to RCRA, greatly expanding authorities for requiring a wide range of responses to releases to all media from waste management activities. The corrective action authority gives EPA, or states with approved plans, the ability to control ground water contamination, surface water contamination, soil contamination, and air pollution from volatile organic compounds and particles, fire and explosions. The key statutory authorities are §§ 3004(u), 3004(v) and 3008(h).

A. Definitions.

1. "Releases" includes any spilling, leaking, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment.

2. "Solid waste management unit" (SWMU) includes any discernable waste management unit from which hazardous constituents may migrate, irrespective of whether the unit was intended for management of solid or hazardous waste. SWMUs include: landfills, surface impoundments, waste piles, land treatment units, incinerators, injection wells, tanks (including 90-day accumulation tanks), container storage areas and transfer stations.

3. "Facility" here includes all contiguous property under control of the owner at which the units subject to permitting are located.

B. Action. Section 3004(u) requires corrective action for releases of hazardous waste or constituents from any SWMU at a TSD facility seeking or otherwise subject to a RCRA permit. Corrective action is required for all releases of hazardous waste or hazardous constituents of any solid waste, regardless of when the waste was placed in the disposal facility. Whenever EPA determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 3005(e), the Administrator may issue an order requiring corrective action or such other response measure deemed necessary to protect human health or the environment. Alternatively, EPA may bring a civil action for injunctive or other relief in the U.S. district court in the district in which the facility is located.

C. Scope. EPA opines that it can take action regardless of whether the release is from a SWMU; action will be taken against all types of HW releases within a facility.

1. The expansive reading of Section 3008(h) is based on the legislative history and the common sense notion that a facility not complying with interim status requirements should not be treated better than a facility that does. RCRA facilities which may be subject to the corrective action authority include land treatment, storage or disposal facilities regardless of whether they are continuing operations or closing.

2. Section 3004(v) authorizes corrective action beyond a facility's boundary. Corrective action must be taken beyond the facility's border where necessary to protect public health and the environment unless the facility owner or operator can demonstrate it cannot obtain permission to undertake such action from the adjacent property owner.

D. Response Measures. Corrective actions which the facility may be directed to take include:

1. Containment stabilization or removal of the source of contamination;

2. studies to assess nature and health risks of contamination;

3. identification and evaluation of the remedies;

4. design and construction of the chosen remedy;

5. implementation of the remedy; and

6. monitoring to determine the effectiveness of the remedy.

E. Corrective Action Plan

1. RCRA Facility Assessment (RFA). Analogous to a CERCLA Preliminary Assessment/Site Investigation, the RFA identifies actual and potential releases and determines whether sufficient evidence of a release exists to require the facility owner or operator to investigate further.

2. RCRA Facility Investigation (RFI). Analogous to a CERCLA remedial investigation, the RFI gathers data to characterize the nature, extent and rate of migration of releases identified in the RFA. The RFI data will determine the appropriate response actions.

3. Interim Measures. Interim measures should deal with abating immediate problems and maintaining the status quo pending the implementation of the permanent solution. They may be required at any time in the corrective action process.

4. Corrective Measures Study (CMS). The CMS is analogous to the CERCLA feasibility study. Upon completion of the RFI, the owner/operator of the facility must identify the appropriate corrective measures and recommend them to EPA or the State. EPA or the state will review the recommendations. The public will also have an opportunity to review and comment on the proposed action. The owner/operator must demonstrate that the proposed response action effectively abates threats to human health and the environment from the releases.

5. Corrective Measure Implementation (CMI). The CMI is analogous to the CERCLA remedial design/remedial action. The facility owner/operator must design and construct the selected response action.

6. Alternative Actions. Where the presence of a hazardous waste may present a substantial threat but EPA does not have sufficient information to determine that there has been a release, § 3013 empowers EPA to compel owners and operators to conduct monitoring and sampling.

7. Imminent Hazard Provision. Under § 6973, if the past or present handling, storage, treatment, transportation, or disposal of any hazardous waste presents an "imminent and substantial endangerment to health or the environment," EPA can sue anyone "who has contributed to or who is contributing to such handling," etc., to require corrective action.

a. "Imminent and substantial endangerment" means potential harm or risk of harm. Neither an actual release nor actual harm is necessary to trigger this provision.

b. Joint and several liability exists. All generators who disposed of hazardous waste at a site that now presents an imminent and substantial endangerment through actual or threatened release, as well as the site owners and operators, may be held individually liable for all clean-up costs (with a right of contribution).

c. The standard is strict liability. Due care, caution, absence of fault, and compliance with applicable laws are <u>not</u> defenses to liability for clean-up costs.

2208 PENALTIES. RCRA violations can carry stiff civil and criminal penalties. The amount of money sought in a penalty action is normally assessed

through use of a matrix that evaluates the seriousness of the violation, any mitigation of the impact, and the existence of previous violations.

A. Civil violations may result in:

1. Injunctive relief;

2. permit revocation; and/or

3. civil penalties up to $25,000 per day per violation.

B. Criminal sanctions can be imposed under § 3008(d) for specific violations. The maximum penalty is a $50,000 per day fine for each violation and/or imprisonment for two to five years, depending on the violation. Section 3008(e) establishes criminal penalties for a person who knowingly creates an "endangerment" by his activities. The maximum penalty is $250,000 per violation and 15 years in jail.

2209 CITIZEN SUIT PROVISIONS

A. Cause of Action. Section 7002 provides that any person may commence a civil action on their own behalf against any person, including the United States, who:

1. is alleged to be in violation of a permit, standard, regulation, requirement, prohibition, or order issued under RCRA; or

2. has contributed or is contributing to past or present handling, transportation, treatment, storage, or disposal of any solid or hazardous waste which "may present an imminent or substantial endangerment to health or the environment." This action may be brought against any past or present generator, transporter, or owner/operator of a TSD.

B. Procedure.

1. Notice of intent to bring suit must be given 60 to 90 days in advance of filing the complaint. Most courts view the notice period as a jurisdictional element.

2. Suit is precluded where EPA/state is diligently pursuing civil or criminal action in Federal/state court. There are no provisions that preclude suit where EPA/state are pursuing corrective action out of court.

2210 ADDITIONAL SOURCES OF HELP ON RCRA ISSUES

A. The EPA RCRA Hotline, Washington, D.C., (800) 424-9346 or (202) 382-

3000, offers publications, technical advice, etc.

B. The Hazardous Materials Technical Center, Rockville, MD, (800) 638-8958 can answer questions on hazardous materials packaging, storage, transportation, and safety procedures.

2211 APPENDIX. The appendix to this chapter discusses the following topics in greater detail:

A. Listed and Characteristic Hazardous Wastes

B. Generator Requirements

C. Transporter Requirements

D. Recycling Issues

E. Recycling in Federal Procurement

F. RCRA Management Checklist

APPENDIX

LISTED AND CHARACTERISTIC HAZARDOUS WASTES

A. The Characteristic Hazardous Wastes

1. Ignitable Wastes. When a SW has a flashpoint of less than 140 degrees Farenheit (60 Celsius), it is hazardous for ignitability and is given the HW# of D001. The flash point is the temperature at which sufficient vapors will form over a substance that can be ignited by the use of an ignition source.

2. Corrosive Wastes. When a SW has a pH of 2 or less (an acid) or 12.5 or more (a base), it is hazardous due to corrosivity and is given the HW# of D002.

3. Reactive Wastes. When a SW is unstable, capable of detonation, and/or explosive, it is hazardous due to reactivity and is given the HW# of D003.

4. Toxic Wastes. To test for toxicity, regulators attempt to recreate the conditions of a landfill, and the effects on a SW buried within it, by using a standard laboratory procedure called the Toxicity Characteristic Leaching Procedure (TCLP). If a specific amount of one of 40 hazardous "constituents" can be "leached" out of a representative sample of solid waste by that procedure, the waste will be deemed a hazardous waste for toxicity. The TCLP is a recent change (29 March 1990), replacing the old Extraction Procedure toxicity test. This new approach may triple the amount of waste regulated under RCRA because it will include waste streams that presently are unregulated. Generators had until late September 1990 to test their wastes and determine whether the new rules apply.

B. Listed Wastes. There are four lists of SW that have been predetermined to be hazardous:

1. F Listed Wastes are hazardous wastes from non-specific sources, including spent solvents, strippers, and degreasers.

2. K Listed Wastes are hazardous wastes from specific sources, e.g., sludge generated in the creation of creosote. The average base does not generate K Listed Wastes; most of these wastes are generated in the manufacturing process.

3. P & U Listed Wastes are HWs that are off-specification or discarded commercial chemical products, container residues, or spill residues. The P Listed Wastes are "acutely" hazardous wastes; U Listed Wastes are not. Most bases tend to generate U Listed Wastes rather than P Listed Wastes.

REGULATION OF GENERATORS AT A GLANCE

A. Reference: 40 CFR 261 et seq.

B. Generator types. There are three types of generators, based on their output per calendar month:

1. Conditionally exempt small quantity generators (CESQGs) are those who generate 100 kilograms (kg) or less of HW or 1 kg or less of acute HW (i.e., P Listed Wastes). If the facility qualifies as a CESQG, most RCRA provisions do not apply.

2. Small quantity generators (SQGs) are those who generate over 100 but less than 1,000 kg of HW, and 1 kg or less of acute HW. Only a few RCRA provisions are inapplicable to SQGs.

3. "Regular" generators are those who generate over 1,000 kg of HW or over 1 kg of acute HW in a calendar month. A facility's status as an SQG or regular generator can vary from month to month under the Federal rules. State rules may say once a "regular" generator, always a regular generator. Most installations are regular generators. Unless specified otherwise, the rules discussed below will be confined to those which apply to regular generators.

C. Generator Duties

1. Identification. The first duty of all generators is the duty to determine, either through testing or other means, the nature of the wastes being generated, i.e., whether they are hazardous. Once you know you are a generator of HW, notify EPA using EPA Form 8700-12. This hails your existence as a generator and states the type of generator status you are claiming and the types of HW you generate. In return you will be given an EPA identification number to be used on all documents and correspondence.

2. The ID Number. Generators must obtain an ID number for every site where HW is generated. A HW generation site is defined as the contiguous site at or on which one or more HW's are generated. An individual generation site may have one or more HW sources but is considered an "individual generation site" if the property is contiguous. Nevertheless, some states require separate ID numbers. EPA has authority to issue temporary identification numbers in emergencies or unusual situations.

3. Temporary Local Storage. Generators may accumulate HW locally before shipping it to a storage facility.

a. Satellite Accumulation Points (SAPs). Generators may establish a SAP to collect HW. This is a place at or near any point of generation, where wastes initially accumulate, and which is under the control of the operator of the process generating the waste. It doesn't take a lot to comply with the SAP standards and a SAP can be very easily established, typically in the workplace.

(1) Each HW container in storage must be labelled "hazardous waste" and show the date the HW was placed in the container. The containers must be in good condition; the waste must be compatible with the container; the containers must be kept closed during storage except when it is necessary to add or remove waste. In fact, locking the SAP area is a good management practice to prevent intentional and accidental mixture of incompatible wastes.

(2) The generator may accumulate up to 55 gallons of HW, or 1 quart of acutely HW, in containers, at a SAP for as long as it takes the waste to fill up the container. If it takes more than one year to fill up a 55 gallon barrel, you must show that your continued accumulation of HW is not a dodge to avoid properly disposing of the wastes. If a work site generates more than one type of HW, the best practice is to paint lines on the shop floor designating individual SAPs for each type of HW being accumulated, thereby avoiding the concern of some inspectors that only a total of 55 gallons of HW, regardless of type, is allowed in each SAP.

(3) Once the SAP container is full, you must mark it with the date that it became full. You must then move the container to an accumulation point or a permitted TSD facility within three days. State regulations may be more stringent than the federal regulations (e.g., in Washington D.C., SAPs are not allowed).

b. Accumulation Points (APs). An AP is a place where SAPs can store their filled HW containers for up to 90 days after the containers have become filled. If stored for more than 90 days, the generator is considered the operator of a HW storage facility and subject to regulation under Parts 264, 265, and 270. The three days a filled barrel is allowed to remain in the SAP are counted against this 90-day period.

(1) If the AP is an underground storage tank, the start date for 90-day storage is the day you put the first drop in; you should remove all of the wastes in the tank before the expiration of the 90th day. A SAP can be inside an AP, if the demarcation is clearly defined. Similarly, an AP can be inside a SAP, if the demarcation is clearly defined.

(2) In sharp contrast to a SAP, an AP takes some work to establish, given its character as a sort of "mini-storage facility." APs regulations scrupulously protect against the harm which could emanate from such a facility because, unlike a SAP, there is no limit on the amount of HW which can be

accumulated in an AP. For example, APs need to be inspected weekly and inspection logs maintained for up to three years.

c. "Orphan drums." If the contents of a barrel are completely unknown, you can keep it in an AP without putting on an accumulation date pending test results. Even though you may have a good idea of it's contents, you are only testing to confirm the exact level of the various constituents. You should label it and give it an accumulation date of the date it entered the AP. Further, prudent managers have a written "orphan drum" policy to insulate the base from skeptical inspectors who might conclude the "orphan drum" is merely sloppy HW management. Obviously, the best policy is orphan prevention. A good generator practice is to keep accurate logs of the amounts and types of HW that are placed in your SAP containers so that you don't have to constantly test the contents, and can rely on your knowledge of the HW process. Testing is very expensive. You should also keep logs on the movement of the HW from the SAP to the AP, and from the AP to the TSD facility.

d. Small quantity generators (SQGs). SQGs, as defined above, are now subject to nearly all the requirements of larger generators. The storage rules, however, differ if special safety rules under 40 C.F.R. § 261.34(d) are met. SQG's can store up to 6000 kg of hazardous waste for a period of up to 180 days before shipping to a TSD facility. If the hazardous waste is to be transported 200 miles or more, up to 6000 kg can be stored for up to 270 days prior to shipment.

e. Facilities considerations.

(1) Drums must be arranged to provide sufficient aisle space for unobstructed movement; use 2 feet as a guide in between drums. Some states require all drums be accessible from all sides of the drum, not just between aisles; some states prohibit stacking drums.

(2) Ignitable and reactive wastes must be kept 15 meters from the property line. Some states require secondary containment and roofing even though the federal requirements do not. Fire extinguishers must be the right kind for the type of fire to be encountered within the storage area. Available water must be at an adequate volume and pressure.

(3) APs need both an internal and external communication system. The internal system serves to sound the alarm, to warn others in the area that a fire, explosion, or release has occurred to keep them from being harmed. The alarm system must be capable of providing immediate emergency instruction (voice or signal) to facility personnel. To satisfy this requirement, APs may use a buddy system, so that if one is overcome by fumes, the other can sound the alarm. Alternately, the facility can buy some inexpensive compressed air horns and install them in a covered area within the AP.

(4) The external communication system requires a means of summoning outside assistance from the police, fire department, or emergency response teams. The device can be a telephone immediately available at the scene of operations or a hand held two-way radio. The best means of compliance is to install a telephone just inside the door of the nearest building; don't rely on a telephone which is located deep within a nearby building because inspectors will likely deem it to be not "immediately available." Conversely, telephones which are too close will not comply. Installing a phone right at the AP isn't normally practical (exposure to the elements) or safe (proximity to the release).

D. Training.

1. SAP Training. Although training is not specifically mandated for SAP operators, it's a good management practice to ensure that all those who use the SAP are trained. Inspectors will feel more comfortable about the integrity and safety of containers if the operators are trained for their duties and know what they are doing.

2. AP Training. APs must satisfy specific personnel training requirements and comply with many of the facility standards applicable to an interim status TSD facility. These standards include preparedness for and prevention of fire, explosion, and releases; and establishment of a HW Contingency Plan and emergency procedures.

a. No set amount of training for hazardous waste workers is specified under RCRA. At a minimum, training should include the contents of the HW Contingency Plan, hazardous waste recognition, HW handling procedures. OSHA prescribes specific amounts of training for hazardous waste operators depending on the function being performed (40 CFR Section 1910.20). Similarly, OSHA prescribes Hazard Communication Training on all of the hazards found in the workplace. OSHA is developing additional hazard training mandated by the Clean Air Act Amendments of 1990.

b. The RCRA training records for AP personnel are a fruitful inspection area for regulators because the requirements of 40 CFR Section 265.16 are very detailed. Managers should maintain records to document when the training occurred, who attended, and the actual content of the training (best shown by lesson plans). Workers should be trained initially within six months of the date of assignment, and annual training thereafter. The HW duties of each individual should be detailed to illustrate the adequacy of their training. In this regard, job descriptions and military specialties tend to be too vague from the inspector's viewpoint. Consequently, it is to our advantage to make a separate and special description.

E. Record-keeping and Reporting.

a. Generators are the primary custodian of the manifest paperwork. Generators must prepare manifests (shipping documents) for all HW's leaving the site. The generator must certify on the manifest that it has a waste minimization program per RCRA and 3002 that the treatment, storage, and/or disposal method to be used minimizes present and future health risks. The uniform manifest system precludes the requirement for separate state manifests; state manifest systems are preempted by EPA and DoT regulations.

b. Generators have a duty to ensure that the transporter meet RCRA (and HMTA) HW transporter standards when the HW is transported from the facility. Generators are responsible for packaging their waste, labelling packages, marking packages and containers with required warnings, and offering to provide the transporter with required placards.

c. The TSD facility is required to send a completed signed manifest to the generator who must retain the record for three years from the date the waste was accepted for interstate transportation by the transporter. Maintaining records for longer periods may be helpful in responding to allegations of clean-up liability. The generator must file an Exception Report with the EPA Regional Administrator when a completed and or signed manifest is not returned to the generator within 45 days after shipment. Copies of exception reports must be kept for three years.

d. Biennial Reports must be filed with the EPA Region by 1 March of each even year, addressing the generator's HW activities during the past odd year. The report also requires that minimization efforts be addressed to reduce HW volume and toxicity. Biennial Reports must be kept for three years after the due date of the report. Some states require annual reports.

REGULATION OF TRANSPORTERS AT A GLANCE

A. General. Under 40 CFR Section 263, transporters of HW must notify EPA of their existence, obtain an EPA identification number, comply with DoT regulations when transporting HW, and ensure all HW is properly manifested. Most transportation of HW in DoD is done by contractors. When personnel transport waste off-base, however, they are acting as transporters when they first drive upon public roads and must comply with RCRA.

B. Acceptance. A transporter is prohibited from accepting HW from a generator without a properly executed manifest. The transporter must ensure that the manifest stays with the shipment to its destination. The transporter must keep a copy of the manifest for three years.

C. Temporary Storage. A transporter can store HW for up to 10 days at each "transfer facility" without becoming a TSD facility. Once the 10 days have elapsed, the transporter must issue a new manifest and return to the generator its manifest. A transporter can become a generator of HW by mixing different wastes.

D. Delivery. The transporter must deliver the waste to the designated TSD facility on the manifest or to the designated alternate facility in an emergency. If delivery in accordance with the manifest is not possible, the transporter must contact the generator for instructions on how to proceed. If the transporter delivers the waste to another transporter, each new transporter must sign and date the manifest and leave a copy with the previous transporter.

E. Transporter Liability. The transporter is responsible for the cleanup of transportation related spills and discharges. For releases at TSD facilities, the transporter is strictly liable only if it selected the facility.

RECYCLING ISSUES AT A GLANCE

A. References: 40 CFR Sections 261.6, 264.1(g)(2), 265.1(c)(6), and 266.

B. Recycling is an act performed on an eligible material. There are four acts of recyling, that is, to:

1. Apply to the land in a manner constituting disposal;

2. Burn for energy recovery or use to produce a fuel;

3. Reclaim by processing to recover a usable product, e.g., regeneration of spent solvents and recovery of lead values from spent batteries; or

4. Accumulate speculatively.

C. These recycling methods can be applied to most of the materials in the following classes:

1. Spent materials;

2. Sludges listed in the F and K lists of HW;

3. Sludges having a characteristic of HW ("D" wastes);

4. By-products listed in the F and K lists of HW;

5. By-products having characteristics of HW ("D" wastes);

6. Commercial chemical products in the P and U lists of HW; and

7. Scrap metal.

D. An act of "recycling" doesn't preclude classifying the substance as SW but there are benefits. Recycling of HWs does not constitute "treatment." The recycling process itself is exempt from regulation; one does not need a TSD permit to recycle material. 40 CFR Section 261.6 requires recyclers to comply with the generator and transporter requirements, and storage requirements if you exceed your appropriate 90/180/270-day generator limit.

E. Materials are <u>not</u> SW if they are recycled by being:

1. Used as effective substitutes for commercial products;

2. Used as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or

3. Returned to the original process from which they are generated without first being reclaimed (the material must be returned as a substitute for raw material feedstock, and process must use raw materials as principal feedstocks).

F. The following materials, however, are SW, even if they are recycled:

a. Materials used in a manner constituting disposal, or used to produce products that are applied to the land;

b. Materials burned for energy recovery, used to produce a fuel, or contained in fuels;

c. Materials accumulated speculatively; or

d. Materials that are inherently waste-like (i.e., FO20, FO21, F022, F023, F026, or F028 material used or reclaimed in any manner).

G. Certain recyclable materials are not even subject to the generator, transporter, or TSD facility rules, including:

1. Reclaiming of industrial ethyl alcohol;

2. Used batteries and used battery cells returned to the manufacturer for regeneration;

3. Used oil that exhibits one or more of the characteristics of hazardous waste but is recycled in some other manner than being burned for energy recovery;

4. Scrap metal; and

5. Fuels produced from refining of oil-bearing hazardous wastes along with normal process streams at a petroleum refining facility;

H. Five types of recyclable materials are subject only to the limited requirements of 40 CFR Section 266:

1. Materials used in a manner constituting land disposal;

2. Hazardous waste burned for energy recovery;

3. Used oil burned for energy recovery;

4. Materials used for precious metal recovery; and

5. Spent lead-acid batteries being reclaimed.

RECYCLED MATERIALS IN FEDERAL PROCUREMENT

A. References: 42 U.S.C. § 6962; 40 C.F.R. Part 247, 249.

B. Overview. EPA establishes guidelines for use of recycled materials. 42 U.S.C. § 6962(e). Once the guideline is promulgated, federal agencies will procure such items composed of the highest percentage of recycled materials that is practical (in procurement of items exceeding $10,000 in cost), unless:

1. Satisfactory levels of competition cannot be maintained;

2. the items are not available in a reasonable time;

3. the items fail to meet performance standards; or

4. the items are available only at an unreasonable price.

C. Procuring agencies "shall develop an affirmative procurement program which will ensure that items composed of recovered materials will be purchased to the maximum extent practicable." 42 U.S.C. § 6962(i). Thus far, guidelines have been issued for:

1. Concrete and concrete products.

2. Tires.

3. Paper products.

4. Petroleum and lubricants.

5. Building insulation products.

D. Additional Provisions. Government plants that generate heat or mechanical or electrical energy from fossil fuel systems shall use to the maximum extent practicable any technical capability to use energy or fuels derived from solid waste. 42 U.S.C. § 6962(c)(2). Contract specifications shall not exclude use of recovered materials nor require that items be manufactured from virgin materials. 42 U.S.C. § 6962(d)(1).

RCRA MANAGEMENT CHECKLIST

_____ Are drums that contain hazardous waste properly labelled?

_____ Is the accumulation start date indicated on all drum labels?

_____ Are drums being removed within 90 days?

_____ Do environmental personnel receive adequate update training to keep current on regulatory requirements?

_____ Are training records for hazardous waste personnel current, accurate, and complete?

_____ Have training programs for operations personnel been developed to ensure they understand the necessity of complying with waste management regulations and SOPs?

_____ Is responsibility and authority for waste management practices centralized to ensure tenant commands are responsive to the installation commander in these matters?

_____ Is someone at the installation identified to keep track of new and ongoing waste-creating activities and new regulations that may bring formerly unregulated substances within RCRA?

_____ Are RCRA permits updated when mission changes add a new hazardous waste stream?

_____ Has an adequate contingency response plan been developed to deal with releases of hazardous waste?

_____ Is proper contingency response equipment maintained at hazardous waste storage areas?

_____ Are emergency notification rosters for releases of hazardous waste maintained and up-to-date?

_____ Regardless of lesser statutory requirements, are waste disposal records kept for an indefinite period (perhaps 20 years or more) to defend liability allegations which can arise at any time in the future?

_____ Are records arranged for accurate retrieval of information?

_____ Are records cross-referenced regarding the substance involved, transportation services used, means of treatment, and disposal site?

_____ Are "reportable quantity" releases being reported in a timely fashion? (See 40 C.F.R. Part 260)

_____ Are work procedures being developed to reduce generation of hazardous waste by volume and toxicity?

_____ Are procedures for proper waste handling streamlined and "user-friendly"?

CHAPTER 23

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

2301 REFERENCES

A. 42 U.S.C. §§ 9601-9674

B. Executive Order 12580, Superfund Implementation, 23 January 1987, reprinted in 42 U.S.C.A. 9615 at p. 179 (West Supp 1990).

C. 40 C.F.R. Part 300 et seq.

D. Defense Environmental Restoration Program (DERP), 10 U.S.C. 2701 et seq.

E. Resource Conservation and Recovery Act (RCRA) of 1976 as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. 6901 et seq.

F. OPNAVINST 5090.1A, Chapter 13

2302 OVERVIEW. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides remedies for releases or threatened releases of hazardous substances from a hazardous waste facility and for clean-up actions that will cure releases and prevent future releases. CERCLA was amended by the Superfund Amendments and Reauthorization Act 1986 (SARA). CERCLA and SARA are frequently referred to as "Superfund."

A. CERCLA seeks to remove or to provide remedial action for any hazardous substance or substantial danger to health or environment. While RCRA can be thought of as a "cradle to grave" program which addresses current and ongoing hazardous waste activities, CERCLA is a comprehensive response program for past hazardous waste activities. The program seeks to:

1. Identify and quickly clean up abandoned hazardous waste disposal sites that pose a threat to health or the environment;

2. negotiate with responsible parties to have them conduct the clean-up, if possible; and

3. recover the government's response costs.

B. SARA modified CERCLA by establishing new priorities and timetables, modifying affected parties' rights in litigation, and restructuring the criteria for remedy selection. SARA significantly altered federal facility compliance under CERCLA. Federal facilities are expressly subject to the provisions of CERCLA "in the same manner and the same extent, both procedural and substantively, as any non-governmental entity."

C. The National Contingency Plan (NCP) is found at 40 CFR Part 300. The NCP is the "centerpiece" for clean-ups under CERCLA. Under CERCLA § 9605(a), the NCP establishes the method for discovering, evaluating, and remedying releases of hazardous substances. The NCP also contains criteria for listing sites on the National Priorities List. The most recent revision of the NCP became effective 8 March 1990. The next revision is expected to include a Subpart K, Federal Facilities.

2303 APPLICABILITY OF CERCLA GENERALLY. CERCLA is triggered by any release or substantial threat of a release into the environment of: a "hazardous substance"; or, any "pollutant or contaminant" which presents an imminent and substantial danger to the public health or welfare. CERCLA's provisions apply to "potentially responsible parties" (PRPs). CERCLA is a federal program run by the EPA. Many states have their own programs for hazardous waste sites (mini-Superfunds). States may also use RCRA permitting authority to regulate clean-ups at facilities with current hazardous waste operations.

A. Hazardous Substances. CERCLA defines "hazardous substance" in terms of other federal environmental laws. The term includes toxic pollutants under the Clean Water Act (CWA), hazardous pollutants under the Clean Air Act (CAA), imminently hazardous chemical substances under the Toxic Substances Control Act (TSCA), and hazardous wastes under the Resource Conservation and Recovery Act (RCRA). Those substances are discussed in the pertinent chapters of this Deskbook. Further, EPA must identify additional hazardous substances which may present substantial danger to the public health or welfare or the environment when released. Petroleum and natural gas are excluded from the definition of hazardous substance, even if those products contain hazardous constituents, so long as the hazardous constituent was part of the product as sold on the market.

B. Pollutants and Contaminants. CERCLA defines a "pollutant or contaminant" with similar breadth. The term covers any substance that may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions, or physical deformations. The different definitions of "hazardous substances" and "pollutants or contaminants" distinguishes

the diminished liability of private parties under CERCLA and their narrower duty to report releases.

C. Releases. The definition of "release" under CERCLA is very broad and includes almost any act, including spilling, leaching, dumping, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, discarding of barrels or containers, and other disposing activities. Some releases are excluded from the CERCLA definition, including:

1. Work place exposures (regulated under OSHA);

2. engine exhaust from motor vehicles, vessels and other sources;

3. emissions from materials regulated under the Atomic Energy Act; and

4. certain releases under permit from another federal environmental statutes, e.g., a NPDES permit under the Clean Water Act.

D. Potentially Responsible Parties (PRPs). CERCLA applies to PRPs. While courts continue to wrestle with the term, PRPs are generally held to include:

1. The current owner and operator of the facility;

2. the owner and operator of the facility at the time of disposal of any hazardous substance;

3. any person who contracted, arranged, or made an agreement for disposal or treatment of hazardous substances (owned by any party) at any facility (owned by another party) containing those hazardous substances;

4. any person who contracted, arranged, or made an agreement for transportation for disposal or treatment of hazardous substances (owned by any party) at any facility (owned by another party) containing those hazardous substances; and

5. any person who transported any hazardous substances to the facility, where the transporter selected the facility.

E. Response Actions. Two types of "response actions" exist: removal actions and remedial actions.

1. Removal actions. Removal actions are primarily responses intended for short-term abatement of hazards presented by release. Removal actions can be undertaken regardless of whether the site is on the National Priorities List (NPL). Removal actions are generally limited to $2 million or 12 months of work, whichever first occurs. Removal actions include provision of bottled water, fencing, drum removal, etc.

2. Remedial Actions. By contrast, remedial actions address long term, permanent remedial activity at the site to restore environmental quality. Remedial actions include clay caps, soil excavation, groundwater pumping and treatment, etc.

2304 CLEAN-UP PRIORITY AND FUNDING. To some extent, the application of CERCLA to a specific site will vary depending on whether the site is on the National Priorities List (NPL).

A. National Priorities List (NPL). Using a Hazard Ranking System (HRS), EPA scores hazardous waste sites. The HRS evaluates the potential risk posed by the site based on: the quantity, toxicity, and concentration of waste at site; the potential for releases from the site; and the degree of risk to health and the environment. Specifically, the HRS examines the migration potential of contaminants in ground water, surface water, air, and the potential of exposure due to soil contamination. Evaluation of exposure pathways yields the site's "score." Sites which are scored above 28.5, an administratively determined threshold, are placed on the NPL.

1. This is an administrative function of the EPA; no hearing is required or provided. Administrative guidelines used to make NPL decisions are published at 42 C.F.R. Part 300 in the NCP. About 125 of the 400 NPL sites are on DoD installations. The NPL establishes the priority of sites for clean-up.

2. EPA revised the system in December 1990, resulting in HRS II. EPA is expected to rescore bases under HRS II. They project that scores under HRS II will be 8 to 10 points higher than under the original system. Up to 200 more federal facilities will likely make the NPL.

B. "Superfund." CERCLA created a funding mechanism for clean-up efforts to minimize expenditure of general tax revenues. This funding mechanism has come to be called the Superfund. Only sites on the NPL are eligible for Superfund money.

1. A listing on the NPL, however, does not guarantee that Superfund money will be used for the clean-up. In any event, Superfund money is not available to clean up federal facilities except in very unusual circumstances. Even if Superfund money is provided, reimbursement is required.

2. Within DoD, some CERCLA clean-up costs are funded through the Defense Environmental Restoration Account (DERA), which essentially is fenced-off O&M money. Expenditure of DERA money is within the discretion of DOD, however, and sometimes the military department must spend its own money for clean-ups. DoD balances the needs of the services and transfers an appropriate share of the DERA money to the Navy Environmental Compliance Account (NECA). NECA is used for Navy CERCLA clean-up operations.

C. NON-NPL Sites. It probably is advantageous to have our sites listed on the NPL. If a site on a federal installation is listed on the NPL, EPA has the ultimate say on how the clean up will be accomplished, after consultation with the service. Under CERCLA, EPA must select a cost-effective clean-up plan. If the site is not on the list, state agencies may control the clean-up. Clean-up actions controlled by states need not include cost-effectiveness as a selection criterion. Unfortunately, getting on the NPL is mostly a statistical matter, and there is little the installation can do to "achieve" listing, other than cooperate and ensure the EPA gets all the relevant information.

D. DERP. The Defense Environmental Restoration Program (DERP), 10 U.S.C. § 2701 et. seq., is the authority for the Secretary of Defense to carry out environmental restoration at military facilities. DERP is a DoD program but it is implemented in consultation with EPA and consistent with CERCLA § 9620.

2305 APPLICATION TO FEDERAL FACILITIES.

The Superfund Amendments and Reauthorization Act of 1986 (SARA) reauthorized CERCLA. SARA added § 9620 to CERCLA which established special procedures applicable to clean-ups at federal facilities. SARA confirms that federal entities must comply with CERCLA to the same extent as any non-governmental entity. Clean-ups at both NPL and non-NPL sites are to be consistent with National Contingency Plan (NCP). The remedial program under the NCP is divided into two phases: pre-remedial and remedial.

2306 THE PRE-REMEDIAL PHASE

A. Identification. All federal agencies are required to identify facilities with hazardous substance disposal sites. In this context, "disposal" includes places where hazardous substances have leaked or spilled.

B. The Docket. EPA puts these sites on the Federal Agency Hazardous Waste Compliance Docket. The Docket contains information on contamination from each facility. EPA studies this information to determine whether the site requires remedial action. EPA updates the Docket every 6 months.

C. Preliminary Assessment (PA). Each facility on the Docket must conduct a PA. During the PA, the Navy uses existing site records and interviews to: evaluate potential hazards at the site; identify the source and nature of a release; and identify any other PRPs. The PA does not normally include a site visit or sampling. Information from the PA is to be used to determine if facilities should be placed on the NPL. EPA uses the same criteria for listing private and federal sites. Sites which pose no threat or potential threat to public health and the environment are excluded from further consideration for remediation.

D. Site Inspection (SI). The SI is an optional step if additional information is needed to complete HRS scoring or to determine need for response action. The SI may include visual on-site inspection and sampling.

E. Technical Review Committee (TRC). As soon as the SI indicates that the process will move into the RI/FS phase, the commanding officer of the site will establish a TRC for the site. The TRC is a committee comprised of EPA, state, and local representatives, and members of the command who meet to review and comment on actions and proposed actions regarding sites in the Installation Restoration Program (IRP). While the TRC reviews and comments on IRP activities, the committee has no approval or veto authority. For non-NPL sites, the TRC provides a mechanism to ensure public and community involvement in clean-up planning. Early cooperation is valuable, especially if the site is later placed on the NPL.

F. Community Relations Program. Per EPA regulations at 40 C.F.R. § 300.67 and paragraph 13-4.9 of OPNAVINST 5090.1A, a Community Relations Program will be established at Navy installations with sites on the Docket. The program develops a community relations plan to conduct activities to ensure public participation during the installation restoration process. These activities may include holding public interviews and meetings, establishing information repositories, and developing responsive summaries to public comments.

2307 THE REMEDIAL PHASE

A. Remedial Investigation/Feasibility Study (RI/FS). Facilities on the NPL must begin an RI/FS within 6 months after being placed on the list. The RI is the detailed site evaluation and analysis process conducted to characterize the site, the nature and extent of its contamination, and the risk it presents. The RI typically

involves scoping, data collection, extensive sampling, risk assessment, and analysis of alternatives. The FS is a study to develop and evaluate remedial options for clean-up.

B. Initial Remedy Selection. Under CERCLA 9621, the remedial action selected must be consistent with its provisions and, to extent practicable, the NCP. EPA's decision should include cost-effectiveness as a consideration. This is a key distinction between decisions made under CERCLA authority and those made under RCRA authority. Permanent clean-ups which significantly reduce the volume, toxicity, or mobility of the hazardous substances are preferred over off-site transport or disposal of hazardous substances without treatment and institutional controls such as restricting use of the area.

1. Clean-ups generally must meet the standards of other state and federal environmental statutes if those statutes are "applicable or relevant and appropriate" (ARARs). A law is "applicable" if the legal standards would apply independently of the CERCLA clean-up. For example, RCRA closure requirements may be applicable if we are cleaning up an abandoned landfill. Law is "relevant and appropriate" if it makes sense at the site even though not applicable. For example, drinking water standards may be relevant and appropriate if the aquifer is a potential future source of drinking water, even if not currently used.

2. The Safe Drinking Water Act (SDWA), Clean Air Act (CAA), Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA) are specifically mentioned as sources of ARARs. In selecting the method of clean-up, ARARs may be waived in certain circumstances, e.g., where compliance with the ARAR would present a greater risk of harm than another alternative. The decision to waive an ARAR must be based on "substantial evidence." States may challenge a waiver in federal court. If the challenge fails, the state may still require compliance with the ARAR if the state agrees to pay the added cost.

C. Interagency Agreement (IAG). For NPL sites, the Navy (ASN(I&E)) and EPA must enter into an IAG for the expeditious completion of all necessary remedial action at the facility. Since all sites can not be addressed immediately, IAGs reflect a determination of which sites need to be remedied first. DoD and EPA follow a "worst first" approach, which means that the clean-up of some sites is delayed. Site priority is established by using the Defense Priority Model (DPM). The DPM yields a score of 0 to 100 reflecting the risk the site presents to human health or the environment. The IAG must be negotiated within 180 days after EPA reviews the RI/FS but an informal understanding between EPA and DoD permits IAGs to be negotiated prior to the RI/FS. To satisfy the consultation requirement and the IAG requirement at NPL Sites, DoD and EPA have agreed upon boilerplate provisions for Federal Facility Agreements under CERCLA § 9620. These agreements normally

satisfy the requirements of the IAG but should be reviewed to ensure that they do in each case. The IAG outlines the clean-up program in detail. EPA has final authority to determine what clean-up methodology will be used. At NPL sites states are offered the opportunity to participate as a signatory to the IAG. The IAG may contain:

1. A review of alternative remedial actions and selection of an action;

2. a schedule for completion of each action;

3. arrangements for long term operation and maintenance of the facility; and

4. stipulated penalties to enforce IAG deadlines.

D. Final Remedy Selection. Based on the RI/FS and public comment, a final remedial action plan is selected. Selection criteria include cost, compliance with ARARs, long and short term effectiveness, protection of health and the environment, reduction in toxicity, volume or mobility of hazardous substances, implementability, and state and community acceptance. The remedy selected is documented in a Record of Decision (ROD). The ROD is prepared by NAVFACENGCOM and signed by the commanding officer of the shore activity.

E. Remedial Design/Remedial Action (RD/RA). Once the ROD is signed, RD/RA begins. DoD has taken the position that no state permits are necessary to perform remedial actions at a site governed by CERCLA § 9620. Following remedial action, operation and maintenance activities are conducted to maintain the long-term viability of the remedial action. Substantial continuous physical on-site remedial action shall be started at each facility not later than 15 months after completion of the RI/FS. Depending on the nature of the remedial action, long term monitoring may be necessary to ensure the remedy is effective.

F. Remediation Complete. When no further response is appropriate, a site is deleted from the National Priorities List. EPA consults with the state in the delisting decision. Records must be maintained for 50 years.

2308 CLEAN-UP OF U.S. FACILITIES AT NON-NPL SITES.

Under CERCLA § 9620(a)(4), state laws concerning removal and remedial action, including enforcement and delegated RCRA authority, shall apply to actions at facilities not included on the National Priorities List.

A. The state has final say over the remedial action, and there is no requirement that the selection be "cost-effective." State agencies control the extent, pace, and cost of the clean-up. Since there is not enough money to clean up all sites at once, different states may compete to influence our clean-up priorities. Threats of sanctions may force us to spend limited funds to remediate relatively benign sites, leaving no money to address more critical problems elsewhere.

B. If there is no applicable state law, the Navy develops a clean-up plan, applying CERCLA principles and rules, after discussions with the EPA and the state (10 U.S.C. §§ 2701-2709). CERCLA is unclear as to the meaning of "state laws concerning removal and remedial action." Some contend that the term applies only to state CERCLA-type laws, not nuisance or RCRA-type laws, but this view has yet to be tested.

2309 ACCESS TO PRIVATE LAND. By section 2(d) of Executive Order 12580, the President has delegated authority to DoD to take removal and remedial action off the installation if the installation is the "sole source" of off-site contamination. This authority must be exercised consistently with CERCLA § 9620 as discussed above. The Navy might have to exercise this authority, for example, when hazardous wastes at a site on the installation migrate onto private lands. These provisions apply regardless of whether the site is on the NPL.

A. Consensual access is the preferred method. The first step is to identify the landowner. After explaining our objectives and the legal requirements, and answering any questions, we ask for a right-of-entry permission. Written permission should be obtained. If an owner is unwilling to sign a document, but orally agrees to allow access, this consent should be documented in a letter to the owner confirming the terms of the right of entry. Designating a single Navy representative for these negotiations may be the best way to secure consent and establish a point of contact for the landowner. The negotiations must be carefully documented to lay the foundation for an administrative order if consent is refused.

B. A right-of-entry may suffice where activities are temporary and physical impact on the property is minor. For more intrusive long-term activities, however, we may need to acquire a lease or easement under CERCLA § 9604(j). This may be necessary where the clean-up activity requires us to leave equipment or facilities on the property.

C. If consent is refused, the staff judge advocate should determine whether an administrative order under CERCLA § 9604(e) is appropriate. That section allows the President to issue an administrative order for entry when consent is not granted by the landowner. Executive Order 12580, Sections 2(d) and (j), delegates that

authority to the heads of executive departments where the sole source of the release is from the department's facility, but the concurrence of the Attorney General must be obtained. The Attorney General has not delegated this concurrence authority to local U.S. Attorneys. The request for the administrative order, supported by a complete administrative record and draft order, will be forwarded via the chain of command to SECNAV and ultimately to Lands Division, DoJ.

D. Although the use of administrative orders may strain relationships with adjacent landowners, we must fulfill our statutory obligations to protect human health and the environment. Close coordination with the Community Relations Program will ensure that an accurate explanation of the reason for our actions is presented to the public.

2310 RCRA/CERCLA OVERLAP. CERCLA provides that nothing in § 9620 will impair RCRA obligations, including RCRA corrective action requirements. The potential exists for states to order RCRA corrective action at facilities being cleaned up under CERCLA and the Installation Restoration Program (IRP). For example, if a facility has a hazardous waste operation that requires a RCRA permit, the state permit authority must require the owner to take corrective action to remediate any releases or threatened releases of hazardous waste from any solid waste management unit (SWMU) located anywhere on the facility. This may include the same areas on base being addressed under the IRP and CERCLA. States may try to use their RCRA permit authority to control the clean-up. The significance lies in the possible differences of opinions between state and federal officials on the questions of "How clean is clean?" and "How fast is fast?"

A. At NPL sites where RCRA also applies, CERCLA suggests that the EPA should control clean-ups. If a compromise can not be reached, EPA can override state-directed RCRA corrective action requirements once an RI/FS has been initiated. That event may be before or after the site is listed on the NPL. Although there is some support in the statute, this policy is controversial. See 42 U.S.C. § 9622(e) and EPA policy statement, 54 Fed. Reg. 10520, Mar. 13, 1989. The EPA will exercise this authority on a case-by-case basis, depending on the degree of RCRA interference with the CERCLA remediation.

B. Another possible tack is to focus on what is being cleaned up. When a SWMU is on the NPL and subject to RCRA corrective action, CERCLA standards should apply instead of the more stringent RCRA standards if the SWMU is unrelated to the activity regulated under the RCRA permit, e.g., a hazardous waste treatment, storage, or disposal facility.

C. To avoid RCRA/CERCLA conflict, EPA has proposed regulations to implement a corrective action procedure designed to be compatible with CERCLA process. 55 Fed. Reg. 30799 (July 27, 1990). For NPL sites, EPA intends to integrate RCRA and CERCLA authorities in the IAG. 55 Fed. Reg. 30858.

2311 THE NAVY AS A PRP. In contrast to cleaning up sites on federal facilities, CERCLA affects the Navy as a PRP with potential liability for clean-up of sites at which we have disposed hazardous substances. A record search may reveal that a Navy activity generated hazardous substances at a Superfund site. Typically, EPA will send the activity a demand letter notifying the activity that it is a PRP, requesting further information, and demanding the reimbursement of response costs.

A. Elements of Cost Recovery Actions. To prevail in a cost recovery action, the plaintiff must show: that there is an existing or threatened release of a hazardous substance from a vessel or a facility; that the defendant is a "responsible party"; and that the plaintiff has consequently incurred necessary "response costs." Response costs may include investigations, monitoring, testing, legal costs, and expert witness fees, as well as clean-up costs. "Release" and "hazardous substance" are defined broadly. A Navy activity that shipped hazardous substances to the site that is releasing or threatening to release is a responsible party even if the Navy's waste is not part of the threat.

B. Amount of Liability. The Navy may incur significant financial liability for clean-up costs. For most types of facilities, liability is "limited" to all response costs plus up to $50 million for damages. We may be liable for:

1. All costs of removal and remedial actions which are not inconsistent with the NCP and incurred by the state or federal government;

2. any necessary response costs, consistent with the NCP, incurred by any other person;

3. damages for damage, loss, or destruction of natural resources; and

4. costs of any health assessment or health effects study carried out under 42 U.S.C. § 9604(i).

C. Scope of Liability. Liability of responsible parties is joint and several. Liability is strict. Good faith efforts to preclude release, the absence of fault, and the exercise of due care are irrelevant.

D. Defenses. The defenses to CERCLA cost recovery actions have been interpreted as identical to the defenses available under § 311 of the Clean Water Act. Defenses will be narrowly construed and must be proven by the defendant. Recognized defenses include "Acts of God" and "Acts of War." Equitable defenses such as laches, unclean hands, etc., have been held unavailable; affirmative defenses such as res judicata and payment may be available. Two other very narrow defenses exist.

1. Act of a Third Party. This defense may apply if the defendant exercised due care with respect to the hazardous substance and the third party caused the release despite the precautions taken by the defendant against foreseeable acts and omissions of the third party. To raise this defense, the defendant can not be contractually related to the third party, either directly or indirectly. The term "contractually related" is defined at 42 U.S.C. § 9601(35) and refers broadly to legal instruments for transfers of interests in land.

2. "Innocent Buyer" Defense. A defendant who bought land which is later identified as requiring remedial action (i.e., an unwitting "owner" of a "facility") will not be a responsible party if the buyer had no reason to know that hazardous substances were deposited there. To raise this defense successfully, the buyer must have made an inquiry into the previous ownership and uses of the property consistent with customary practice, taking into account the buyer's experience or specialized knowledge, and relationship of the purchase price to the market value of the land if uncontaminated.

E. Settlement Considerations. If liability is clear the Navy frequently negotiates an allocated settlement at off-station sites. In many cases, our settlement posture can be improved by our investigative efforts. Upon receipt of an EPA demand letter or notice of pending litigation, the checklist in the appendix to this chapter may be useful.

1. Generally, CERCLA liability is negotiated. We pay our share, usually based on our percentage of the volume of waste at the site. We can participate in steering committees and shared technical expense arrangements to a limited extent. We cannot, however, join in shared counsel expense arrangements.

2. Although, liability is joint and several, responsible parties have the right to seek contribution from other responsible parties. In the past, courts have apportioned liability on volume of material at the site. However, CERCLA now provides that costs may be allocated "using such equitable factors as the court determines are appropriate." Possible factors include: the toxicity, persistence, and mobility of the various substances; the care we exercised in preventing leaks; the

length of time the waste has been stored; and the legality and reasonableness of our using the disposal site for the wastes involved.

F. Affirmative Litigation. Private activities may have resulted in the release or threatened release of hazardous substances on or near Navy property. When we take response actions in these situations, the Navy may affirmatively seek to recover response costs to the same extent as any other litigant. The Navy has exercised this right, for example, by bringing a cost recovery action against the former owners of land now a part of Naval Weapons Station, Concord, California.

2312 RELEASE REPORTING REQUIREMENTS

A. CERCLA. Under CERCLA § 9603, facilities must report releases of hazardous substances equal to or exceeding "reportable quantities," unless the release is federally permitted. Reportable quantities for hazardous substances, typically one pound, are listed at 40 CFR Part 302.4. Facilities must immediately notify the National Response Center as soon as they learn of a release ((800) 424-8802 or (202) 426-2675). The person in charge of the vessel or facility is responsible for making the report. Failure to make a required report may result in civil or criminal penalties.

B. DERP. Under the Defense Environmental Restoration Program (DERP), DoD facilities must give prompt notice of any release of a hazardous substance to the regional EPA office, state, and local authorities. There is no de minimis exception. The facility must advise them of the extent of the threat to public health and the environment and the proposed response to the release. There are no statutory penalties for failure to make required reports but check interagency agreements, such as Federal Facility Agreements, which may provide penalties to enforce this requirement.

2313 CERCLA ENFORCEMENT

A. Information Gathering. In addition to the information generated by the reports discussed above, EPA has broad authority to gather information from PRPs to identify the existence and source of a release or a threatened release. To obtain such information, EPA sends PRPs a letter of notice or demand letter. EPA may request information regarding the types of materials generated, treated, nature and extent of a threatened release.

B. Inspections. In addition to the right to get information from PRPs, EPA has the right of access to the PRP's facilities. EPA uses this authority to conduct inspections and sampling tests.

C. Administrative Orders. Under CERCLA § 9606, EPA can issue such administrative orders as may be necessary to protect public health and welfare and the environment. The threshold of danger necessary to uphold an EPA administrative order is low. Health dangers may be deemed "imminent" even if its manifestations will be in the distant future. EPA can order a private entity to take actions that will stop a release or to clean up a site. EPA needs DOJ concurrence to issue such orders to other federal agencies. Those who fail to comply with an order may be fined up to $25,000 per day of violation, plus treble "damages." If the party who received the order is not financially liable for the clean-up, they can seek reimbursement from the Superfund or contribution from other PRPs.

D. Judicial Enforcement. EPA is responsible for ensuring that removal or remedial actions are taken in response to releases of hazardous substances and pollutants or contaminants. EPA may itself take appropriate action and seek reimbursement from responsible parties under CERCLA § 9607 as discussed above. Alternatively, EPA can seek a court order or injunctive relief necessary to abate an imminent and substantial endangerment to the public health or welfare or the environment because of the actual or threatened release of a hazardous substance from a facility. EPA can seek a court order in addition to, or in lieu of, its own administrative orders.

E. Citizen's Suits. CERCLA § 9659 provides that any person may bring a civil suit against any person, including the United States, for violation of any "standard, regulation, condition, requirement or order which has become effective" under the statute. This provision specifically includes requirements imposed in interagency agreements (IAGs) under § 9620. Prevailing plaintiffs are not entitled to "damages"; the relief is enforcement of the standard and possibly civil penalties. Plaintiffs must give 60 days' notice to the EPA, the state, and the alleged violator before bringing suit. The action is not ripe if EPA has begun and is diligently pursuing a judicial action against the defendant for the alleged violation.

F. Criminal Provisions. Any person who fails to make a required CERCLA report as discussed above is subject under CERCLA § 9603 to a maximum punishment of a $250,000 fine and imprisonment for three years.

APPENDIX

PRE-SETTLEMENT ACTIVITY CHECKLIST

____ Has message traffic required by OPNAVINST 5090.1A, para. 13-5.19, been sent via chain of command to the regional environmental coordinator, OGC, CNO, NAVFACENGCOM, EFD, and NEESA?

____ Have our activity's records been collected and examined? If records have been destroyed, ask EPA for the opportunity to copy or review documents in their possession.

____ What is the Navy's involvement at the site in terms of volume and toxicity?

____ Have we responded to EPA inquiries promptly in writing?

____ Have we asked the plaintiff for a copy of all information connecting the command with the site?

____ Did the EPA/plaintiff read the records correctly?

____ Is the command listed in the evidence as having deposited waste at the site?

____ Is the waste the command is listed as having deposited a hazardous substance?

____ Do the command's records reflect use of the site?

____ What amount was deposited?

____ What type of waste was actually deposited (barrels at the site may be mislabeled)?

____ Were the wastes pretreated before disposal?

____ How good is the evidence regarding our use of the site and our relative volume?

____ Is there someone we can turn to for contribution (e.g., a transporter who took the waste to the wrong site or who mixed it with someone else's waste)?

CHAPTER 24

UNDERGROUND STORAGE TANKS

2401 REFERENCES

A. The Resource Conservation and Recovery Act (RCRA), Subchapter IX, 42 U.S.C. §§ 6991-6991i

B. 40 C.F.R. Parts 280, 281

2402 UNDERGROUND STORAGE TANK (UST) DEFINED

A. Generally, a tank is an "underground storage tank" if:

1. It is used to contain an accumulation of "regulated substances"; and

2. at least 10 percent of its volume, including the pipes, is beneath the ground.

B. "Regulated Substances" include petroleum and any "hazardous substance" as broadly defined by CERCLA 42 U.S.C. § 9601(14). "Regulated substances" does not include hazardous wastes which are regulated under subchapter III of RCRA.

C. The term UST does not include:

1. Residential tanks of 1100 gallons or less used to store motor fuel for noncommercial purposes;

2. tanks used for storing heating oil for use on the premises;

3. septic tanks;

4. wastewater treatment tanks subject to Clean Water Act Regulation.

5. tanks whose capacity does not exceed 110 gallons;

6. tanks which contain a de minimis concentration of regulated substances; and

7. other tanks excluded under 42 U.S.C. § 6991 or 40 C.F.R. § 280.10

2403 NOTIFICATION REQUIREMENTS

A. As of 8 November 1984, UST owners had 18 months to notify the state of the age, size, type, location and uses of their tanks.

B. As of 8 November 1984, an owner of a UST taken out of operation after 1 January 1974 had 18 months to notify the state of the date it was taken out of operation, its age then, size, type, location, and type and quantity of substances left stored in the tank on the date it was taken out of operation. No reporting requirement exists for USTs taken out of operation before 1 January 1974.

C. After the initial notice period, any owner who begins using a UST has 30 days to notify the state of the UST's age, size, type, location, and uses.

2404 TECHNICAL STANDARDS

A. New USTs. To prevent releases due to structural failure, corrosion, or spills and overfills, new tanks and piping systems must be properly designed and constructed. New USTs must also be corrosion proof (cathodic protection). Standards are specified in 40 C.F.R. § 280.20.

B. Existing USTs. By 22 December 1998, all existing UST systems which do not meet the standards for new USTs must be upgraded or closed. Upgrading methods in 40 C.F.R. § 280.21 include interior lining, cathodic protection, or internal lining combined with cathodic protection. Closure requirements are listed in 40 C.F.R. § 280 Subpart G. Closed USTs must also take corrective action under 40 C.F.R. § 280.21 Subpart F.

2405 RELEASES

A. Prevention. Owners and operators must ensure that spills and overfills do not occur. The regulations impose various testing and inspection requirements to ensure that releases do not occur due to corrosion. For example, the cathodic protection for steel tanks must be tested every 6 months and inspected per industry standards. USTs must be repaired as necessary to prevent releases.

B. Detection. All owners and operators of UST systems must provide a method for release detection. Owners and operators of USTs must report the discovery of a release, unusual operating conditions, or monitoring results from a release detection system indicating that a release has occurred, within 24 hours.

C. Confirmation. Unless corrective action is begun, owners and operators must immediately investigate and confirm all suspected releases within 7 days.

D. Cleanup. Owners and operators must immediately contain and clean up any spill or overfill. Corrective action, however, must be implemented for:

1. Spills or overfills of petroleum resulting in a release to the environment in excess of 25 gallons.

2. spills or overfills of hazardous substances resulting in a release to the environment in quantities reportable under CERCLA.

E. Corrective Action and Closure. Confirmed releases must be addressed per 40 C.F.R. § 280 Subpart F. These requirements include: initial response to prevent further release and abate what has been released; initiate data collection for site characterization purposes; free product removal; investigations for soil and groundwater cleanup; preparation of corrective action plan and cleanup; and public participation.

F. Temporary closure. If a UST is to be closed for less than 3 months, the owner must continue corrosion protection and leak detection. Leak detection is not required if tank is emptied. "Empty" means no more than 1 inch of residue, or 0.3% by weight of the UST's capacity, remains in the system. If the UST is to be closed for 3 to 12 months, the owner must leave vent lines open and functioning; all other lines will be capped and secured. A UST to be closed for more than 12 months must comply with the rules for permanent closure unless it meets the new tank standards or the upgrading requirements.

G. Permanent closure or change in service. Owners must give 30 days' notice before permanently closing a UST or implementing a change in service. First, the owner must empty and clean the UST, removing all liquids and accumulated sludges. Then the owner must perform a site assessment to determine whether a release has occurred. If a release is detected, corrective action must be implemented. Closure can be ordered for tanks that had been closed prior to 22 December 1988 if releases pose a current threat to the environment.

H. Reporting and Recordkeeping. Owners' and operators' reporting requirements include: notification of UST systems; reports of releases or suspected releases; corrective action planned or taken; and notification of closure. Recordkeeping requirements include: maintaining corrosion analysis reports; records of release detection inspections; and documentation of repairs.

2406 ENFORCEMENT. Under the waiver of sovereign immunity in 42 U.S.C. § 6991f, federal facilities are subject to the federal, state, and local substantive

and procedural requirements applicable to USTs in the same manner and same extent as any other person, including the payment of reasonable service charges. Nor are federal facilities immune from any process or sanction to enforce injunctive relief. No waiver of sovereign immunity exists, however, for criminal fines or civil penalties.

CHAPTER 25

TOXIC SUBSTANCES CONTROL ACT

2501 REFERENCES

A. 15 U.S.C. § 2601 et seq.

B. 40 C.F.R. Parts 700 et seq.

C. OPNAVINST 5090.1A, Chapters 9, 17

D. Navy Ships Technical Manual (NSTM), Chapter 593

E. NAVSEA Shipboard Management Guide for Polychlorinated Biphenyls (PCBs), NAVSEA S9593-A1-MAN-010

2502 **OVERVIEW.** The Toxic Substances Control Act (TSCA) controls the distribution in commerce of "toxic substances" based on the notion that certain materials pose a potentially significant threat to the environment and require special attention throughout their life. TSCA has a unique power in that it can completely ban the distribution of a material in commerce based on the risk it poses to the environment. For the Navy, the significance of TSCA lies in its regulation of polychlorinated biphenyls (PCBs) and asbestos. This chapter will examine PCB regulation; asbestos will be discussed in chapter 26 of this Deskbook.

2503 **APPLICABILITY TO FEDERAL FACILITIES.** TSCA does not contain a specific waiver of sovereign immunity and is silent on the extent to which federal facilities are obligated to comply with its terms. Certain regulatory provisions of TSCA, however, include the Federal Government under the definition of "person." The uncertain effect of these regulations has yet to be challenged. The Department of the Navy policy, consistent with Executive Order 12088, is to comply with the substantive provisions of TSCA. Further, compliance is dictated by the parallel regulation of TSCA's toxic substances as hazardous substances under CERCLA. In the context of PCB regulations, practical considerations mandate compliance given that contractors may be unwilling to accept Navy PCB waste for disposal unless it is properly manifested. Navy policy does not, however, extend to paying civil penalties or being subject to other enforcement sanctions for noncompliance with TSCA.

2504 **PCB REGULATIONS.** Polychlorinated biphenyls (PCBs) are used as an insulating fluid in electrical transformers and capacitors; they have been

banned from further production. Federally, PCB's are regulated exclusively under TSCA. States may regulate PCBs hazardous waste under their RCRA regulations. As under RCRA, EPA regulations create a system of tracking PCB wastes from cradle to grave. PCB waste is defined as those PCB's or PCB items, e.g., transformers, capacitors, etc., that contain PCBs in concentrations greater than 50 ppm that are no longer used for the purpose intended. Transporters, disposers, commercial storers, and certain generators of PCB wastes must give EPA notice of their activities and obtain identification numbers.

2505 GENERATION

A. Activities that generate PCB wastes had until 4 April 1990 to notify EPA and obtain an EPA identification number. After 4 June 1990, it is unlawful for a generator to process, store, dispose, transport, or offer for transportation PCB wastes without an ID number.

B. Generators which do not store PCB's owned by others in excess of 500 gallons and which do not operate a regulated PCB storage facility are exempt from the notification requirement. This exemption applies only to notification. These generators must still prepare TSCA manifests to ship PCB wastes. Exempt generators use the generic identification number "40 CFR Part 761" or their EPA/state RCRA ID number on manifests.

C. Shipboard labeling, handling, and storing of PCBs and items containing PCBs shall be per Navy Ships Technical Manual (NSTM), chapter 593, and the NAVSEA Shipboard Management Guide for Polychlorinated Biphenyls (PCBs), NAVSEA S9593-A1-MAN-010.

2506 TRANSPORTATION. Any person who moves PCB waste to the property of someone other than the generator is a transporter. Navy activities which transport PCB wastes to another Navy activity or to the Defense Reutilization and Marketing Office (DRMO) are not considered transporters.

A. After 4 April 1990, virtually all shipments of PCB wastes to a commercial storage or disposal facility must be accompanied by a manifest, i.e., EPA Form 8700-22 or the appropriate state form. Manifests are not required for PCB wastes being shipped to a facility owned by the generator, e.g., a Navy generator need not manifest PCB waste being shipped to DRMO or another Navy activity. Nor are manifests required for shipment of PCB wastes having an undiluted concentration of less than 50 ppm. The manifest must contain the generator's ID number. Non-exempt generators in existence prior to 5 February 1990 who made a timely application for an ID number may use the generic ID number until EPA issues them a TSCA ID number or authorizes the use of its RCRA ID number.

B. Generators may not relinquish PCB waste to any person who does not have an ID number. Generators sign the manifest, obtain the transporter's signature on the manifest, retain a copy and give the remaining copies to the transporter. Special requirements exist for water and rail shipments. Shipments of PCB waste not requiring a manifest must nonetheless be recorded by both the generator and the receiving activity on their annual document logs.

C. Dual manifests must be prepared when electrical equipment is shipped off-site for servicing. The term "generator" includes the person who performs the operation himself and the person who hires someone to perform the waste-producing operation with the understanding that the disposal of PCBs will occur. In the latter circumstance, the owner as generator must manifest the PCB containing equipment. The processor must manifest the residual PCB's generated during the servicing process. If the equipment originally manifested by the owner is still regulated after processing, the processor must continue the manifest chain of custody using the original manifest if further shipment of the equipment occurs.

D. Generators must file an exception with the regional EPA office if a signed and completed manifest is not returned from storage or disposal facilities in a timely manner. Commercial storers must respond within 35 days of shipment; disposers, within 45. If a signed copy of the manifest has not been received from the manifest destination and the applicable deadline is ten days away, the generator shall contact the receiving facility to trace the shipment or confirm receipt.

2507 STORAGE

A. All activities that store PCB's for over 30 days or operate a PCB storage facility subject to TSCA regulation were required to notify EPA of their PCB waste activity by 4 April 1990. Only one notification is required regardless of the number of storage facilities operated by the facility.

B. Beginning 5 February 1990, each owner or operator of a facility is required to maintain annual records and an annual document log of PCB waste disposal activities if they use or store:

1. At least 45 kg of PCB's in PCB containers at any time;

2. one or more PCB transformers; or

3. 50 or more large PCB capacitors.

C. Annual records must include the signed manifests for the calendar year and all Certificates of Disposal. The annual document log will contain specific inventory information for each type of PCB item as listed in the regulations. These records must be retained on site for 3 years and must be available for inspection

during normal working hours. In addition, all Navy facilities which generate, use, treat, store, or dispose of PCBs must inventory or validate all PCB items and make an annual report to the Naval Energy and Environmental Support Activity (NEESA), Port Hueneme, CA.

2508 DISPOSAL

A. The disposer must prepare a Certificate of Disposal for each manifested shipment of PCB waste. The disposer must forward the certificate to the generator within 30 days of disposal.

B. Disposal facilities are required to file a one-year exception report when they receive PCB wastes more than 9 months after the waste was removed from service. Conversely, generators are required to file exception reports after shipping PCB waste within 9 months after removal from service whenever:

1. A Certificate of Disposal is not received from the disposer within 13 months after PCB's are removed from service; or

2. the Certificate of Disposal received indicates a disposal date greater than one year after removal from service.

C. To the extent possible, Navy facilities shall use DRMO, the disposal service provided by the Defense Logistics Agency (DLA). Commanders may contract for disposal where essential to mission accomplishment.

2509 SPILL RESPONSE AND REPORTS. Because PCB's are also considered a hazardous substance under CERCLA, spills or releases in excess of reportable quantities under CERCLA § 103 (42 U.S.C. § 9603) must be reported in accordance with National Contingency Plan (40 CFR part 300) requirements. Any spill of one pound of PCBs must be reported to the National Response Center ((800) 424-8802 or (202) 426-2675). Spills which directly contaminate surface water, sewers, drinking water, or lands used for grazing or agriculture must be reported to EPA within 24 hours. States may impose more stringent requirements. Reporting requirements and cleanup standards are amplified in TSCA regulations at 40 CFR Part 761, Subpart G. Navy hazardous substance release reporting requirements are discussed in greater detail in chapter 30 of this Deskbook.

2510 ENFORCEMENT. EPA is granted broad enforcement authority under TSCA. Sections 2614, 2615, and 2616 allow for the assessment of civil penalties for a violation of the statute or regulations, as well as authority to seek injunctive relief or seize particular substances. Section 2606 grants EPA authority to address imminent hazards.

2511 RADON. As added by the 1988 amendments, the Indoor Radon Abatement section of the Toxic Substance Control Act (TSCA) requires federal agencies to conduct a study of radon levels in federal buildings. Radon is the radioactive gaseous element and its short-lived decay products produced by the disintegration of radium in the air, water, soil.

A. Testing. Navy housing and buildings occupied over four hours per day must be tested for the presence of radon gas. Based on EPA's scheduling guidelines, all structures with radon levels over four pico-curies per liter (4 pc/l) shall be mitigated.

B. EPA Report. Each federal agency will give the results of its study to EPA. EPA will provide a consolidated report on radon levels in federal buildings to Congress. Based on that input, Congress may pass additional requirements for Federal departments as part of a comprehensive radon abatement program.

2512 ADDITIONAL READING. For a detailed examination of this subject, see Captain Marc W. Trost, USAF, "The Regulation of Polychlorinated Biphenyls Under the Toxic Substances Control Act," 31 Air Force L. Rev. 117 (1989).

2513 GOOD NEWS FOR THE FUTURE? EPA has announced the discovery of a potential "miracle cure" for PCBs. A report by RMC Environmental and Analytical Labratories, under contract to EPA, revealed the discovery that the application of quicklime to PCB-bearing sludges produced an extremely hot reaction. This reaction reduced the PCB concentration from 1,000 ppm to 5 ppm. Confirmation studies are underway.

CHAPTER 26

ASBESTOS

2601 REFERENCES

A. The Toxic Substances Control Act (TSCA), 15 U.S.C. § 2605; Asbestos Hazard Emergency Response Act (AHERA) 15 U.S.C. § 2641 et seq.; 40 CFR Part 763 (schools)

B. Clean Air Act (CAA), 42 U.S.C. § 7412; 40 C.F.R. Part 61, Subpart M, §§ 61.141-61.153 (As amended by 55 Fed. Reg. 48406 (Nov. 20, 1990))

C. Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq.; 29 C.F.R. § 1910.1001 (asbestos control in the work place).

D. Construction Safety Act, 40 U.S.C. § 333; 29 C.F.R. § 1926.58 (asbestos control at construction sites).

E. OPNAVINST 5100.23B, Navy Occupational Safety and Health (NAVOSH) Program Manual, Chapter 17

F. OPNAVINST 5090.1A

2602 INTRODUCTION. Asbestos is the generic term for a family of naturally fibrous minerals, including Chrysotile, Amosite, Crocidolite, Anthophyllite, Tremolite, and Actinolite. Asbestos is regulated in various ways by federal and state statutes because of its harmful effects on human health as a cause of asbestosis, mesothelioma, and other cancers. Because of the ease with which it can get particles airborne, friable asbestos is a primary concern. As used here, "friable" means the asbestos can be crumbled, pulverized, or reduced to a powder by hand pressure. The November 1990 amendments to the 40 C.F.R. § 61 expanded coverage to nonfriable asbestos-containing material (ACM) which may become friable during handling.

2603 REGULATION. The extent of regulation as applied to federal facilities will vary with the particular asbestos activity, whether the statute is enacted by Congress or the state, whether sovereign immunity has been waived for that brand of regulation, and whether the field has been preempted by federal regulation.

A. Clean Air Act (CAA). The CAA identifies asbestos as a "hazardous air pollutant," i e , an air pollutant that may result in increased mortality or serious

irreversible illness. As such, asbestos is subject to specific controls under the National Emission Standards for Hazardous Air Pollutants (NESHAP).

1. Section 313 of the CAA contains an extremely broad waiver of sovereign immunity. Federal agencies, and their officers and agents, are subject to all federal, state, and local requirements, whether substantive or procedural; exercise of administrative authority; and any process or sanction.

2. Generally, states can develop their own air pollution program so long as it is at least as stringent as the federal program. The CAA preempts the field, however, in the areas of automobile emission standards, fuels, and aircraft. States can also administer the federal program through a State Implementation Plan (SIP) approved by EPA.

3. The extent of permissible state regulation of asbestos under the CAA depends on the method of implementation. If the state regulation is a facet of NESHAP enforcement under a SIP, the federal standard controls. If regulated as an independent program, the state can be more stringent than the federal program on asbestos. This may result in state licensing requirements and certification of federal employees but only to the extent it goes toward control and abatement of air pollution.

B. Occupational Safety and Health Act (OSHA). The provisions of OSHA are designed to protect workers handling asbestos. OSHA standards apply to military and civilian DoD employees as well as defense contractors. Federal laws preempt state action on worker safety to the extent that the state cannot apply laws that are less stringent than federal standards. States may adopt more stringent regulations to promote their legitimate interest in worker safety. These more stringent requirements will not be directly applicable to federal agencies, however, because OSHA does not waive sovereign immunity. Thus, states cannot require certification of federal employees under OSHA.

C. Toxic Substances Control Act (TSCA). As a public safety statute, TSCA controls the manufacture and distribution of hazardous chemical substances or mixtures under the commerce clause.

1. The Asbestos Hazard Emergency Response Act of 1986 (AHERA) amended TSCA. AHERA is the only asbestos statute which requires abatement. This requirement applies only to schools serving grades kindergarten through high school EPA estimates that friable asbestos exists in 31,000 schools. AHERA applies to schools on DoD installations. AHERA also established the requirement that the abatement work be performed by accredited contractors and adopted the EPA Guidebook (the "Purple Book") into law.

2. States have an interest under AHERA as the statute requires states to develop and implement accreditation programs based upon EPA model. Sovereign immunity, however, has not been waived under TSCA. Consequently, states cannot control federal employees under a general environmental health statute.

3. Other federal buildings are addressed only to the extent that EPA was directed to conduct a study and make recommendations to Congress. EPA did the study and recommended a program for asbestos abatement in public buildings similar to that for schools. At least one bill, HR 2123, has been introduced to address asbestos abatement in federal buildings but final action has yet to be taken. If Congress acts, the federal program might preempt state control.

D. Resource Conservation and Recovery Act (RCRA). RCRA controls generation, treatment, storage and disposal of hazardous waste. As discussed more fully in chapter 22 of this Deskbook, RCRA allows states to develop their own program so long as it is at least as stringent as the federal program.

1. Under RCRA's waiver of sovereign immunity, federal agencies are subject to and must comply with all federal, state, and local requirements, both substantive and procedural, respecting control and abatement of hazardous waste, to the same extent as any person. Consequently, states can regulate Federal facilities by operating an approved state program in lieu of the federal program or through operation of a parallel state program in addition to RCRA.

2. Under this authority, states could impose treatment requirements, i.e., the neutralization of hazardous materials or rendering such materials safer for transportation. In connection with asbestos, states could regulate the wetting, bagging, and mixing process as a form of treatment. Similarly, states could require certification of federal employees under RCRA but only within the confines of the subject matter of that statute, i.e., treatment, storage, or disposal of hazardous waste.

E. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA controls the cleanup of hazardous waste sites, including those contaminated by asbestos. Asbestos is a hazardous substance under CERCLA by virtue of the incorporation of hazardous air pollutants under CAA in CERCLA § 101. State regulation may exist in this arena as it may under RCRA.

2604 MANAGING ASBESTOS ABATEMENT ACTIONS.

Abatement is the term used to describe remediation of asbestos hazards by removal, airtight enclosure, or encapsulation with a sealant.

A Planning State and local requirements should be consulted before drafting contract specifications. Planners should pay particular attention to: air pollution control (notification, permits, licensed contractors, etc.), worker protection

limits; testing and sampling procedures; and disposal requirements. Carefully evaluate current exposure levels and estimate maximum exposure levels. Faulty sampling procedures or estimation techniques prior to preparing contract statements of work may result in an underestimation of asbestos exposure levels. This can be an expensive error, leading to increased work, higher contract costs and potential claims from employees exposed to excessive asbestos.

B. Notification. Under NESHAP, 40 C.F.R. § 61.146, owners and operators must notify EPA in advance of asbestos abatement activities.

1. For demolition activities, the federal threshold is 260 feet of pipe or 160 square feet of surface area. At least ten days' notice is required for demolition of facilities exceeding the threshold; 20 days' notice for facilities below the threshold. Notice should be given as soon as possible in renovation operations but at least ten days before work begins. Failure to make required notifications may result in administrative fines.

2. Asbestos abatement actions may be subject to documentation requirements under the National Environmental Policy Act (NEPA). In that connection, paragraph 5-4.2(15) of OPNAVINST 5090.1A provides for a categorical exclusion for asbestos abatement projects provided the building is neither on nor eligible for listing on the National Register of Historic Places.

C. Worker Protection. Workers must be properly trained, equipped, and medically certified. Training prescribed in 29 C.F.R. § 1926.58 includes instruction in the use of protective equipment, removal and disposal techniques, and emergency procedures.

D. Work Site Inspection. The work site should be inspected several times daily by someone with the requisite expertise to evaluate compliance with 40 C.F.R. § 61.14 and 29 C.F.R. § 1926.58. The duty to ensure work practices are being observed should rest on a single responsible expert rather than a vague set of people who may drop by. This inspector should ensure the workers are properly maintaining containment barriers or bags and wearing coveralls, respirators, and other protective equipment. Adequate worker changing and decontamination facilities must be available. The inspector should stop the abatement work immediately if any condition appears hazardous.

E. Disposal. Per 40 C.F.R. § 61.152, proper wetting, handling, transport, and disposal techniques must be employed. The asbestos is wetted down to prevent release of particles into the air during the removal process. The asbestos is bagged while wet into leak-proof bags. Bags and transport equipment must be properly labeled. Paragraph 17-5.4.2.d of OPNAVINST 5090.1A echoes these requirements for asbestos material removed during shipboard ripouts or repair actions afloat. The

November 1990 amendments to 40 C.F.R. § 61 require waste asbestos to be manifested for disposal.

F. Work Completion. There is no "substantial compliance" until the work site is clean. The work site must pass visual inspection for abatement completion and freedom from dust. In addition, the work site must pass a test for airborne asbestos, revealing less than 0.01 fibers per cubic centimeter using phase contrast microscopy (PCM).

2605 CONTRACTING FOR ASBESTOS ABATEMENT

A. Selecting a Contractor. The gravity of asbestos abatement actions dictate that we select contractors carefully. In the long term, the most cost-effective contractor may not be the low bidder. Draft precise contract specifications to ensure compliance with applicable abatement regulations. Include contract provisions requiring the contractor to comply with all notification, permit, and license requirements imposed by law. Check the contractor's references and insurance coverage. Conduct interviews and request assurances in writing. The contract should specify explicit contractor liability for fines resulting from employee violations as the CAA waiver of immunity may extend to fines. Alternatively, consider contract provisions calling for the contractor to indemnify the government for any penalties we pay.

B. Certification of Contractors. States could require any contractor operating in that state to be certified to the same extent as federal employees under state air or hazardous waste laws. By contrast, states attempting to require contractor certification under general public safety laws have exceeded their authority. Consequently, the only rub would occur when the federal agency hired an unlicensed contractor for asbestos removal in a state requiring certification in reliance on a general public safety law. We would likely win a Pyrrhic victory if challenged, recognizing the time, money, and bad publicity such litigation would generate. The state would no doubt take corrective action to bring the certification under the auspices of an air pollution or hazardous waste control law. Voluntary compliance by ignoring the technicality is probably the better course, given the enhanced visibility of compliance earned with these training dollars and the dubious long-term benefit of throwing business at a class of uncertified contractors. Certification should ensure a cleaner, safer environment.

2606 TRANSFER OF BUILDINGS CONTAINING ASBESTOS.

Under CERCLA § 107, we may be liable as a past owner of a hazardous disposal site if we sell or transfer a building which contains asbestos and that asbestos is later released to the environment. The advent of base closures could present these issues in large numbers.

A. As stated above, asbestos is a hazardous substance under CERCLA, defined here by reference to hazardous air pollutants under the CAA. Future owners are likely to seek contribution from all potentially responsible parties (PRPs) and the government tends to be an attractive defendant.

B. We may avoid or minimize liability if the transfer is not for disposal and we reasonably believe the buyer will use the building with the asbestos intact. If those circumstances exist, we must evaluate and record the buyers stated intent. The building must be transferred intact with the asbestos not friable or likely to become so during the transfer. The documents must record the decision and preserve the administrative record against potential litigation in the distant future.

2607 ASBESTOS PRODUCTS. In July 1989, EPA published regulations, to be codified at 40 C.F.R. Part 763, prohibiting the manufacture, importation, processing, and distribution in commerce of various products containing asbestos. These prohibitions become effective in stages regarding both the activity and the product type. EPA and DoD are developing an MOU to exempt asbestos containing products used for military purposes from the ban. OASN (I&E) is compiling a list of products through Navy and Marine Systems Commands. The MOU will probably be published as a regulation or an exemption to the existing regulation.

2608 ADDITIONAL INFORMATION. EPA maintains an Asbestos Information Hotline (Washington, D.C.) which may be reached at (202) 554-1404. They offer a number of useful publications which can be ordered from that number:

A. Asbestos Fact Book. EPA office of Public Affairs.

B. Guidance for Controlling Asbestos-Containing Materials in Buildings. EPA 56-/5-85-018.

C. Asbestos Waste Management Guidance. EPA 530-SW-85-007.

D. Asbestos in Buildings: Guidance for Service and Maintenance Personnel. EPA 560/5-85-018.

E. Asbestos in Buildings: National Survey of Asbestos-Containing Friable Materials. EPA 560/5-84-006.

F. Evaluation of the EPA Asbestos-in-Schools Identification and Notification Rule. EPA 560/5-84-005.

G. Friable Asbestos-Containing Materials in Schools: Identification and Notification Rule (40 C.F.R. part 763).

H. Asbestos in Buildings: Simplified Sampling Scheme for Friable Surfacing Materials. EPA 560/5-85-030a.

I. A Guide to Respiratory Protection for the Asbestos Abatement Industry. EPA-560-OPTS-86-001.

2609 GUIDE SPECIFICATIONS. Guide specifications for asbestos abatement projects may be obtained from the following sources:

A. Federal Construction Guide Specifications (FCGS): 02085. Asbestos Abatement Procedures.

B. GSA Guide Specifications PBS (PCD): 02085. Asbestos Abatement Procedures.

C. Army Corps of Engineers Pattern Guide Specification for Military Construction: OD 02080--Asbestos Removal and Disposal.

D. Association of Wall/Ceiling Industries--International, Inc., Guide Specifications for the Abatement of Asbestos Release from Spray- or Trowel-Applied Materials in Buildings and other Structures. December 1981. The Foundation of the Wall and Ceiling Industry, 25 K Street, N.E., Washington, D.C. 20002.

CHAPTER 27

OIL POLLUTION

2701 REFERENCES

A. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9601-9605

B. Clean Water Act (CWA), 33 U.S.C. § 1321

C. National Oil & Hazardous Substances Pollution Contingency Plan (NCP) 55 Fed. Reg. 8666 et seq. (Mar. 8, 1990) (codified at 40 C.F.R. Part 300).

D. Executive Order 12580, 52 Fed. Reg. 2923 (1987)

E. DoD Directive 5030.41 of 1 June 1977; Oil and Hazardous Substance Pollution Prevention and Contingency Planning (NOTAL)

F. DoD Instruction 6050.15 (Oil Pollution from Ships)

G. OPNAVINST 5090.1A, Chapters 11, 17, Appendix G

H. MCO P11000.8B, Real Property Facilities Manual (pending revision)

I. 40 C.F.R. § 110 (EPA regulations on oil discharge)

J. 40 C.F.R. § 117 (Reportable quantities of hazardous substances)

2702 NATIONAL CONTINGENCY PLAN (NCP). The Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) required the President to prepare and publish the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and assign responsibilities among the federal agencies. Executive Order 12580 assigned responsibilities and directed EPA to prepare and publish the NCP. The NCP provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants and contaminants. The NCP applies to discharges of oil in U.S. navigable waters, the contiguous zone and on the high seas in connection with certain outer continental Shelf activities, deep water port activities and ocean fisheries.

2703 NCP ORGANIZATION.

The NCP is organized in three tiers: National Response Team (NRT); Regional Response Teams (RRTs); and predesignated On-Scene Coordinators (OSCs).

A. The NRT consists of 14 federal agencies, including DoD. The team is chaired by EPA. The RRT is the response network comprised of federal and state representatives. There is an RRT for each of the ten EPA regions, one for Alaska, one for Hawaii and the Pacific territories, and one for territories in the Caribbean. The NRT and the 13 RRTs are policy-making and coordinating bodies.

B. The federally-predesignated OSCs direct response efforts and coordinate all other efforts at the scene of a release. The Coast Guard has designated the OSCs for oil spills in coastal areas; the EPA, for oil spills in inland areas. For hazardous substances releases from Navy vessels and facilities, the Navy has designated Navy OSCs or NOSCs. The fleet NOSCs are the numbered fleet commanders. Shoreside NOSCs are normally the Regional Environmental Coordinators. The OSCs must develop contingency plans to fulfill their duty to direct pollution response efforts within their area of responsibility.

2704 OIL SPILLS

A. Spill Contingency Plan. Ships are required to develop an Oil Spill Contingency Plan (SCP) consistent with the pertinent fleet SCP and per guidelines to be established by COMNAVSEASYSCOM. The ship's oil SCP may be promulgated in conjunction with the ship's hazardous substance SCP, i.e, an oil and hazardous substance (OHS) SCP. The SCP will contain procedures regarding reporting, control, containment, control, recovery, and disposal.

B. Spill Response. Shipboard personnel must be trained and prepared to take immediate action to mitigate the effects of a spill. To that end, COMNAVSEASYSCOM has developed a shipboard oil spill containment and clean-up kit for quick response first aid capability. When the spill exceeds the ship's response capability, the commanding officer will notify the Navy On-Scene Commander (NOSCDR) who will mobilize assets and direct response actions.

1. Shore-Based On-Scene Operations Teams (OSOTs). OSOTs are trained personnel with specialized equipment to contain OHS spills. Their primary function is to respond to port spills.

2. Supervisor of Salvage (SUPSALV). SUPSALV maintains spill response assets to support NOSCs in offshore spill operations. These assets are positioned throughout the United States and overseas to provide fast response and technical support. SUPSALV also fulfills the Navy duty to assist in the containment of significant non-DoD spills.

2705 SPILL REPORTING. In addition to taking appropriate actions to mitigate the effects of the spill, commanders must notify certain activities when the spill exceeds reportable quantities. For oil, the reportable quantity means enough to cause a sheen on the surface of the water, a discoloration of the water, or sludge on the shore. See 40 C.F.R. Part 110 for further guidance.

A. All Spills. The commander must notify the cognizant Navy On-Scene Coordinator (NOSC). The numbered fleet commanders are predesignated as fleet NOSCs and will be notified by message. Shoreside NOSCs will be notified by the most expeditious means, followed up by message. The message format is specified in Appendix G of OPNAVINST 5090.1A and is reproduced in the appendix to this chapter for information and downloading convenience.

1. Precedence. Oil spill messages will normally be by routine precedence provided prior telephone report has been made. If a telephone report has not been made, use priority precedence.

2. Classification or Special Handling Marking. Typically, spill reports are unclassified and do not warrant special handling markings. Avoid including classified or sensitive unclassified information to the maximum extent possible unless this information is necessary to understand and respond to the situation.

B. Contiguous Zone Spills. If the spill occurs within the 12 NM contiguous zone of the U.S. coastline, the commanding officer will also notify the National Response Center (NRC) at (800) 424-8802. Many states have notification requirements as well.

C. Spills in Foreign Waters. Consult local regulations, SOFA, etc, regarding the possible requirement to notify any country that has potential to be affected by an HM/HW spill in foreign or international waters.

D. Environmentally Significant Spills. If the spill is "environmentally significant," the initial reporting shall be made using the OPREP-3 system under OPNAVINST 3100.6E (NOTAL). An environmentally significant spill is one which: results from catastrophic events; could cause significant adverse public reaction; could have geopolitical implications; or otherwise warrants OPREP-3 special incident reporting. The OPREP-3 report will be followed up by the amplifying message report discussed above.

APPENDIX

OIL SPILL REPORT
(MESSAGE OR NAVGRAM FORMAT)

FM: NAVY ACTIVITY/SHIP (Spiller)
TO: NOSC/NOSCDR (See chapter 11 or 17 of OPNAVINST 5090.1A)
OPERATIONAL COMMANDER

INFO: CNO WASHINGTON DC//45//
NEESA PORT HUENEME CA//112//
COMNAVSEASYSCOM WASHINGTON DC//OOC//

If the oil release occurs within the United States and its 12 NM contiguous zone, add the following info addressee:

COGARD NATIONAL RESPONSE CENTER WASHINGTON DC//JJJ//

UNCLAS//NO5090//

SUBJ: OIL SPILL REPORT (REPORT SYMBOL OPNAV 5090-2)
(MIN: CONSIDERED)

MSGID/GENADMIN/ORIGINATOR//

RMKS/

1. GMT DTG RELEASE OCCURRED/DISCOVERED.

2. ACTIVITY/SHIP ORIGINATING RELEASE:

For ships, list: name, hull number, and UIC. For shore activities, list: name, UIC. For Navy releases that occurred during transportation, list: name of activity responsible for shipment. For non-Navy releases discovered by the Navy, list the name of responsible party. If from a commercial firm under contract to Navy, list the names of the firm and the contracting activity. If the source of the spill is unknown, indicate whether the spill is thought to have originated from Navy operations.

3. SPILL LOCATION:

For releases at sea, list: latitude, longitude, and distance to nearest land. For releases in port, list port name and specific location, e.g., pier,

mooring, etc. For releases ashore within the activity, specify the exact location, e.g., building number, area designation, etc. For releases during transportation, give exact location, e.g., highway and miles from nearest city or street name, number, and city.

4. AMOUNT SPILLED IN GALLONS:

This may be the best estimate. If an oil/water mixture was spilled, indicate the percentage of oil.

5. TYPE OF OIL SPILLED:

Choose one: diesel fuel marine (DFM); naval distillate; Navy special fuel oil (NSFO); jet fuels (JP-4, JP-5); aviation/automotive gasoline; automotive diesel; heating fuels (grades 1 and 2, kerosene); residual burner fuel (grades 4, 5, and 6/bunker C); lube/hydraulic oils, oil/oil mixture (including slop and waste oils); oil/water mixture (including bilge waste); other (specify); unknown (provide best estimate, if possible).

6. OPERATION UNDER WAY WHEN SPILL OCCURRED:

Choose one: fueling/defueling; internal transfer of fuel (includes transport of fuel from one storage area to another); bilge dewatering (including donut operations); salvage; other (specify); unknown.

7. SPILL CAUSE:

This section should provide a narrative description of specific spill cause. Indicate whether the principal cause was: structural failure (specify); hose failure or leak; other type equipment failure (specify); collision/ grounding/sinking; valve misalignment; monitoring error; other procedural/communications error (specify); other (specify); unknown.

8. SLICK DESCRIPTION AND MOVEMENT:

This paragraph should indicate: size (length and width); color (choose one: barely visible, silvery, faint color, bright color bands, dull brown, or dark brown); on-scene wind (direction and speed); sea state; and slick movement (direction and speed).

9. AREAS DAMAGED OR THREATENED:

This paragraph should identify: the name of the body of water affected; nature and extent of damage to property, wildlife, or other resources (if any); and areas or resources threatened.

10. TELEPHONIC REPORT TO NRC WAS/WAS NOT MADE.

11. SAMPLES WERE/WERE NOT TAKEN.

12. CONTAINMENT METHOD PLANNED/USED:

This paragraph should indicate which of the following containment equipment was or will be used: boom; ship's hull; camel; water spray; chemical agent (specify); other (specify). If none, state reason.

13. SPILL REMOVAL METHOD PLANNED/USED:

This paragraph should indicate which of the following removal equipment was or will be used: DIP 1002 skimmer; DIP 3002 skimmer; SLURP skimmer; absorbents (oil-absorbing pads, chips, or other materials); dispersants; vacuum trucks/pumps; other (specify). If none, state reason.

14. PARTIES PERFORMING SPILL REMOVAL:

This paragraph should indicate one or more of the following: Navy (specify lead organization in charge); commercial firm under contract to Navy; USCG; EPA; state or local agency; other (specify).

15. ASSISTANCE REQUIRED/ADDITIONAL COMMENTS.

16. ACTIVITY CONTACT FOR ADDITIONAL INFORMATION: //

Specify the point of contact's name, code, and Autovon and/or commercial telephone number.

CHAPTER 28

AFLOAT HAZARDOUS MATERIAL AND HAZARDOUS WASTE CONTROL

2801 REFERENCES

A. OPNAVINST 5100.19B (NOTAL)

B. Navy Ships Technical Manual (NSTM), Chapter 593

C. OPNAVINST 5090.1A, Chapter 17

D. OPNAVINST 3100.6E (NOTAL)

2802 HAZARDOUS MATERIALS/HAZARDOUS WASTE

A. Hazardous Material. Hazardous material (HM) is any material that may pose a substantial hazard to human health or the environment. This hazard may be due to the material's quantity, concentration, or physical, chemical, or infectious characteristics. The term "material," as compared with "waste," signifies that the substance has a useful purpose in its present form.

B. Hazardous Waste. Hazardous waste (HW) is any hazardous material that has been discarded. Several environmental statutes build the list of HM/HW. The Clean Water Act, for example, prohibits the discharge of harmful quantities of hazardous substances into U.S. waters within 12 nautical miles (NM) of land. The Resource Conservation and Recovery Act created a comprehensive regulatory program for hazardous substances. Similarly, the Toxic Substance Control Act regulates certain harmful substances used in the Navy, notably asbestos and polychlorinated biphenyls (PCBs). Consult chapters 21, 24, 27, and 28 of this Deskbook for detailed information on particular hazardous materials under those statutes.

C. Hazardous Substances. OPNAVINST 5090.1A and other directives use the term "hazardous substances" (HS) as a collective term for HM and HW.

2803 SHIPBOARD PROCEDURES.

The following procedures shall be followed by ships in their disposal of HM/HW.

A. U.S. Waters. Navy vessels shall not discharge untreated HM/HW into or upon navigable waters of the U.S., adjoining shorelines, or into or upon waters

of the contiguous zone (12 NM from shore). Detailed guidance for HM/HW discharges is provided in OPNAVINST 5100.19B (NOTAL) and the Navy Ships Technical Manual (NSTM) Chapter 593. Unless specifically authorized by CNO, HS collected ashore or collected from ships in port may not be discharged overboard.

B. Foreign Territorial Seas. Navy vessels operating in the territorial seas (up to 12 NM) of foreign countries shall abide by discharge regulations specified in the applicable SOFA or international agreement, e.g., stationing or base rights agreements. If the SOFA or other international agreement is silent on the subject of HM/HW discharges, Navy ships shall abide by the substantive discharge standards observed by the host country's military forces until a satisfactory agreement can be reached. Unless otherwise provided in a SOFA or international agreement, Navy vessels operating temporarily within a foreign jurisdiction are subject to that country's standards to the extent specified by the visit clearance. Where the discharge s1tandards for a foreign country are undefined, no HM/HW shall be discharged within 12 NM of land.

C. Emergency Discharge. Despite the restrictions in paragraphs A and B above, ship commanders *may* discharge HM/HW in two narrowly defined circumstances:

1. When an emergency situation exists; or

2. where failure to discharge the HM/HW would clearly endanger the health or safety of shipboard personnel.

2804 SHIP-TO-SHORE TRANSFER. When transferring HS ashore, ships shall follow the below procedures:

A. Handling. Before the HM/HW is transferred ashore, it must be properly segregated, containerized, and labeled per NSTM Chapter 593 and OPNAVINST 5100.19B, Chapters B3, C23 (surface ships), and D16 (submarines). Failure to do so may result in a charge to the fleet for laboratory analyses to identify the HW. This can cost several thousand dollars per barrel.

B. Navy Ports. When visiting Navy ports, Navy vessels shall request HW pickup by the cognizant shore activity representative, usually the Public Works Center (PWC). Person-to-person contact is required during the actual transfer of the HW to the shore activity. Ship's force shall complete DoD Form 1348-1 at the time of HW transfer.

C. Non-Navy Ports. When visiting non-Navy ports and foreign ports, Navy vessels shall offload HW only when necessary and feasible. The ship shall identify the HW to be offloaded in the Logistics Requirements (LOGREQ). If unable to find

adequate facilities at non-Navy ports, the ship shall hold the HW for offloading at a Navy port. All HW shall be properly labeled and containerized.

2805 ENTERING PRIVATE SHIPYARDS.

Paragraph 17-5.6.2d of OPNAVINST 5090.1A lists ship responsibilities before entering a private shipyard for an availability.

A. Offloading. To the maximum extent feasible, the ship should ensure that HW is offloaded at a Navy or other public facility before entering a private shipyard. HM that will not be used by ship's force during the availability shall also be offloaded.

B. Planning and Coordination. The ship must provide a point of contact (POC) to the Supervisor of Shipbuilding (SUPSHIP) responsible for the private shipyard. The POC will be the ship HW coordinator for the availability. The POC shall be given the authority and resources to ensure shipboard compliance with HW management procedures and site specific management practices established by the SUPSHIP. During preavailability planning conferences, the POC will advise the SUPSHIP of the types and amounts of HW expected to be generated by ship's force during the availability. The POC will identify, and the ship will comply with, all established HW management practices and those site specific procedures delineated by the SUPSHIP.

2806 HM/HW SPILLS

A. Spill Contingency Plan. Ships are required to develop an HM/HW Spill Contingency Plan (SCP) consistent with the pertinent fleet SCP and per guidelines to be established by COMNAVSEASYSCOM. The ship's HM/HW SCP may be promulgated in conjunction with the ship's Oil SCP. The SCP will contain procedures regarding reporting, control, containment, control, recovery, and disposal.

B. Spill Response. Shipboard personnel must be trained and prepared to take immediate action to mitigate the effects of a spill. To that end, COMNAVSEASYSCOM is developing a spill containment and clean-up kit for quick response first aid capability, akin to their kit for oil spills. When the spill exceeds the ship's response capability, the commanding officer will notify the Navy On-Scene Commander (NOSCDR) who will mobilize assets and direct response actions.

1. Shore-Based On-Scene Operations Teams (OSOTs). OSOTs are trained personnel with specialized equipment to contain OHS spills. Their primary function is to respond to port spills.

2. Supervisor of Salvage (SUPSALV). SUPSALV maintains spill response assets to support NOSCs in offshore spill operations. These assets are

positioned throughout the United States and overseas to provide fast response and technical support.

2807 SPILL REPORTING. In addition to taking appropriate actions to mitigate the effects of the spill, commanders must notify certain activities if the spill exceeds the reportable quantity, typically one pound, for that particular substance.

A. All Spills. The commander must notify the cognizant Navy On-Scene Coordinator (NOSC). The numbered fleet commanders are predesignated as fleet NOSCs and will be notified by message. Shoreside NOSCs will be notified by the most expeditious means, followed up by message. The message format is specified in Appendix H of OPNAVINST 5090.1A and is reproduced in the appendix to this chapter for information and downloading convenience.

1. Precedence. HM/HW release messages will normally be by routine precedence provided prior telephone report has been made. If a telephone report has not been made, use priority precedence.

2. Classification or Special Handling Marking. Typically, spill reports are unclassified and do not warrant special handling markings. Avoid including classified or sensitive unclassified information to the maximum extent possible unless this information is necessary to understand and respond to the situation.

B. Contiguous Zone Spills. If the spill occurs within the 12 NM contiguous zone of the U.S. coastline, the commanding officer will also notify the National Response Center (NRC) at (800) 424-8802. Many states have notification requirements as well.

C. Spills in Foreign Waters. Consult local regulations, SOFA, etc, regarding the possible requirement to notify any country that has potential to be affected by an HM/HW spill in foreign or international waters.

D. Environmentally Significant Spills. If the spill is "environmentally significant," the initial reporting shall be made using the OPREP-3 system under OPNAVINST 3100.6E (NOTAL). An environmentally significant spill is one which: results from catastrophic events; could cause significant adverse public reaction; could have geopolitical implications; or otherwise warrants OPREP-3 special incident reporting. The OPREP-3 report will be followed up by the amplifying message report discussed above.

APPENDIX

HAZARDOUS SUBSTANCE RELEASE REPORT (MESSAGE/NAVGRAM FORMAT)

FM: NAVY ACTIVITY/SHIP (spiller)
TO: NOSC/NOSCDR (see Chapter 11 or 17 of OPNAVINST 5090.1A)
OPERATIONAL COMMANDER

INFO: CNO WASHINGTON DC//45//
NEESA PORT HUENEME CA//112//
COMNAVSEASYSCOM WASHINGTON DC//OOC//

If the HM/HW release occurs in the United States and its 12 NM contiguous zone, add the following info addressee:

COGARD NATIONAL RESPONSE CENTER WASHINGTON DC//JJJ//

UNCLAS//NO5090//

SUBJ: HS RELEASE REPORT (REPORT SYMBOL OPNAV 5090-3) (MIN: CONSIDERED)

MSGID/GENADMIN/ORIGINATOR//

RMKS/

1. GMT DTG RELEASE OCCURRED/DISCOVERED.

2. ACTIVITY/SHIP ORIGINATING RELEASE:

For ships, list: name, hull number, and UIC. For shore activities, list: name, UIC. For Navy releases that occurred during transportation, list: name of activity responsible for shipment. For non-Navy releases, list the name of responsible party. If from commercial firm under contract to Navy, list the names of the firm and the contracting activity. If the source of the release is unknown, indicate whether the release is thought to have originated from Navy operations.

3. RELEASE LOCATION:

For releases at sea, list: latitude, longitude, and distance to nearest land. For releases in port, list port name and specific location, e.g., pier,

warehouse, etc. For releases ashore within the activity, specify the exact location, e.g., building number, area designation, etc. For releases during transportation, give exact location, e.g., highway and miles from nearest city or street name, number, and city.

4. TYPE OF OPERATION AT SOURCE:

Be specific, e.g., plating shop, painting shop, HW facility, truck, ship, pipeline, ship building, entomology shop, etc.

5. TYPE OF CONTAINER FROM WHICH SUBSTANCE(S) ESCAPED:

E.g., 55-gal drums, 5-lb bags, tank truck, storage tank, can, etc. Estimate number of containers damaged or dangerously exposed.

6. DESCRIPTION OF HS RELEASED:

Be concise but complete. Consider container labels and use directions, HM reference books, personal knowledge, expert's advice, etc.

If substance(s) known: give chemical and/or product names, formula, synonym(s) (if known), physical and chemical characteristics, and inherent hazards. EXAMPLE: Label on container identifies substance released as acrylonitrile. Synonyms: cyansethylene, vintleyanide. Characteristics and hazards: poisonous liquid and vapor, skin irritant, highly reactive and flammable.

If substance(s) unknown: describe appearance, physical and chemical characteristics, and the actual and potential hazards observed. EXAMPLE: Substance released is a colorless to light yellow unidentified liquid; highly irritating to eyes and nose; smells like kernels of peach pits. Is vaporizing quickly, posing ignition problem.

7. FIELD TESTINGS:

Indicate findings and conclusions (e.g., concentrations of substance(s) present, Ph, etc.), of any analyses); if none, so state.

8. ESTIMATED AMOUNT RELEASED:

Use convenient units of weight or volume (kg, lb, gallons, liters, etc.). For continuous releases, estimate rate of release and amount left in container.

9. CAUSE OF RELEASE:

Describe the specific cause of release. Account for any personnel error, equipment failure, accident, or act of God directly contributing to the release. EXAMPLE: Railing supporting 55 gal drums on a flatbed truck gave way because it was not securely fastened, causing several drums to fall and fracture.

10. RELEASE SCENE DESCRIPTION:

Describe the scene of release. Include information about: the physical characteristics; size and complexity of release; and the actual and potential danger or damage to the immediate area and the surrounding environment, including weather conditions if relevant. EXAMPLE: Solvent released formed shallow pond covering area about 30 ft by 45 ft of bare soil. Solvent is slowly running off in to floor drain leading to storm drain and is also infiltrating soil. Pond is emitting highly toxic and flammable vapors. Dark clouds threatening to rain. Wind speed about 10 miles/hour, drifting vapors northbound to residential area. Vapors form layer about 30 ft above ground.

11. NOTIFICATIONS MADE AND ASSISTANCE REQUESTED:

List all organizations informed of the release in and out of Navy jurisdiction. Include Navy, Federal, state, and local authorities, NRC response teams, fire departments, hospitals, etc. Specify the kind of assistance required from these organizations.

12. DESCRIBE CONTROL AND CONTAINMENT ACTIONS TAKEN/PLANNED:

Specify the method used to control and contain release. Identify the parties carrying out response. If none, state why. EXAMPLE: Gas barriers used to control and contain vapor emissions. Runoff contained by excavating ditch circumscribing affected area. In-house personnel and members of city of Portstown fire department carried out containment actions.

13. DESCRIBE CLEAN-UP ACTIONS TAKEN/PLANNED:

Indicate whether cleanup is made by on-site or off-site treatment, the method used, the parties involved in cleanup/removal, and the eventual disposal area. If none, state why. EXAMPLE: No clean-up action taken. Toxic vapors present, potential danger to clean-up crew. Contaminated soil will be excavated and shipped by on-base personnel to Class I HW disposal site in Portstown, CA, when conditions allow.

14. CONTACT FOR ADDITIONAL INFORMATION:

Identify the name, code, and Autovon, and/or commercial number for the point of contact.

15. ADDITIONAL COMMENTS.//

CHAPTER 29

SHIPBOARD DISCHARGES

2901 REFERENCES

A. Clean Water Act (CWA), 33 U.S.C. § 1322

B. 40 C.F.R. § 122.3

C. DoD Directive 6050.4 of 16 March 1982; Marine Sanitation Devices for Vessels Owned or Operated by the Department of Defense (NOTAL)

D. OPNAVINST 5090.1A, Chapter 17

2902 BLACKWATER AND GRAYWATER

A. Definitions

1. Sewage, or "blackwater," refers to human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes.

2. Wastewater, or "graywater," refers to water discarded from deck drains, lavatories, showers, dishwashers, laundries, and garbage grinders, as well as discarded water from shipboard medical references. Graywater does not include industrial wastes and human body wastes.

B. Discharge Restrictions

1. Sewage holding capacity on most ships is limited to several hours. Discharge of sewage is prohibited on navigable waters of the U.S. out to 3 NM from the baseline from which the territorial sea boundary is measured.

2. Discharge of graywater is permissible within 3 NM if the ship is not equipped with a Collection, Holding, and Transfer (CHT) system. Ships equipped with Type II, III-A, or III-B CHT systems must collect graywater and pump it ashore when pierside.

3. The discharge of graywater into the Great Lakes is prohibited.

4. While operating beyond navigable waters, Navy vessels may discharge all sewage and wastewater directly overboard.

2903 GARBAGE AND TRASH. The Act to Prevent Pollution from Ships, as amended by the Marine Plastic Pollution Research and Control Act of 1987, implements Annex V of MARPOL 73/78. Overboard discharge of all solid waste is restricted near coasts and discharge of plastics is prohibited worldwide.

A. Definitions

1. Solid wastes. Solid waste is a term describing a family of unwanted goods including garbage, trash, sludge, and other discarded solid materials resulting from industrial and other shipboard activities. Solid waste does not include solids or other dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial wastewater effluent, or other common water pollutants.

2. Garbage. Garbage includes foods and food wastes from any source, with or without minor paper goods included. Wrappers, containers, packaging, and disposable serving materials are excluded from the definition.

3. Trash. Trash is dry solid waste excluding ordnance and garbage.

4. Pulped/Ground Garbage or Trash. Pulped, ground, or comminuted garbage or trash is capable of passing through a screen with openings no greater than 25 millimeters (0.98 inch).

B. Garbage

1. Unpulped garbage shall not be discharged within 12 NM of the U.S. coastline. Pulped garbage shall be discharged as far from an U.S. coastline as practicable, but not within 3 NM.

2. Pulped garbage may be discharged into shipboard sewage holding tanks only when a ship is docked and the sewage tanks are discharging to pier facilities. Garbage pulpers shall not be used within 3 NM of any U.S. coastline to maximize necessary sewage holding capacity and to preclude inadvertent discharges of sewage.

C. Non-plastic Trash

1. Unpulped trash shall not be dischardged at sea within 25 NM of the U.S. coastline. Pulped trash shall not be discharged at sea within 3 NM from the U.S. coastline.

2. Plastic trash can liners shall not be used where the trash will be discharged overboard. Surface ships equipped with incinerators and/or compactors shall use such equipment to the maximum extent possible to reduce trash volume. Compacted trash shall not be discharged at sea within 25 NM of the U.S. coastline. Package all trash for negative buoyancy.

3. Submarines may discharge weighted, compacted trash beyond 12 NM of the U.S. coastline if the depth is greater than 1,000 fathoms.

D. Solid Wastes Overseas. Ships operating in foreign territorial seas, up to 12 NM, shall abide by discharge regulations specified in the applicable SOFA or international agreement. If no agreement exists, the standards maintained by the host Navy shall be followed until an agreement can be reached. Unless otherwise specified by the SOFA or other agreement, Navy ships are subject to the host Navy standards to the extent specified by the clearance for visit. In the absence of defined standards, no garbage, pulped or not, shall be discharged within 12 NM of land; no trash, treated or not, shall be discharged within 25 NM.

E. Foreign Food and Garbage

1. All fruits and vegetables purchased in foreign ports should be consumed or disposed of before coming within 12 NM of the U.S. coastline. All garbage on ships returning from foreign ports should be disposed of at sea outside the 12 NM contiguous zone. If not, foreign garbage must be segregated as garbage and dry materials for special disposal ashore.

2. Foreign foods and food wastes (garbage) or the garbage generated inside the contiguous zone by a ship returning from any foreign port must be disposed of in a U.S. port by one of the three methods approved by the Department of Agriculture: cooking, incinerating, or grinding and flushing.

F. Emergency Exception. The standards given above do not preclude discharge of any solid waste in an emergency when failure to do so would clearly endanger the health or safety of shipboard personnel.

2904 OIL AND OILY WASTE. DoD Directive 6050.15 of 14 June 1985 (NOTAL) implements the Act to Prevent Pollution From Ships by prescribing operational standards and equipment requirements for ships consistent with those of the international MARPOL 73/78 Protocol.

A. Definitions

1. Oil. The term "oil" means any petroleum-based fluid or semi-solid, including crude oil, all liquid fuels, lube oil, all waste oils, oil sludge, oil refuse, and synthetic-based lubricating and transmission products.

2. Oily Waste. The term "oily waste" refers to any liquid petroleum product mixed with wastewater and/or oil in any amounts which, if discharged overboard, would cause or show a sheen, i.e., an iridescent appearance on the surface of the water.

3. Used Oil. Used oil is oil whose characteristics have changed since being originally refined but which may be suitable for future use and is economically reclaimable. Synthetic-based lubricating and transmission products are excluded from the definition.

4. Waste oil. Waste oil is oil whose characteristics have changed so markedly since being originally refined that it has become unsuitable for further use and is not economically reclaimable.

B. Ship Configurations

1. Oil Water Separators (OWS). Many ships are constructed or being back-fitted with OWS to separate the oil fraction from oily wastes to reduce volume. The oil fraction (2-5%) is stored onboard; the water fraction (95-97%) is discharged overboard.

2. Bases and stations use "donuts" (ODR) or ship waste offload barges (SWOBs) to take oily wastes from ships without OWS. The use of donuts is being discontinued due to their inability to contain emulsified oils and toxics in the water fraction.

C. Discharge Restrictions

1. Ships with OWS will not discharge untreated oily waste anywhere. The oil content of ship discharges is limited to less than 20 ppm within 12 NM of the nearest land and to less than 100 ppm beyond 12 NM.

2. Ships without OWS should retain oily wastes for discharge ashore; if necessary for operating conditions, discharge of oily wastes is permitted beyond 50 NM of nearest the shore.

3. Discharge within 12 NM of foreign countries is governed by the pertinent SOFA or other international agreement.

D. OWWO Management Policy. Unless state or local laws require the regional environmental coordinator to specify differently, the following procedures apply.

1. Ships with OWS systems shall use them inport. Shore facilities will not normally accept bilge water from units with OWS.

2. Oily waste must be segregated from waste/used oil. They must not be mixed, either onboard or when discharged into a SWOB or donut.

3. Used oil will normally be considered to include the contents of the waste oil holding tank (WOHT), including oil from OWS, used lube oils and petroleum-based hydraulic fluids, and effluent from purifiers and coalescers. To the maximum extent feasible, petroleum-based oils should not be mixed with synthetic oils.

E. Hazardous Wastes. Generally, oily waste products from our ships as a result of normal operations should not be hazardous. If the oily waste comes in contact with a hazardous material, however, the entire byproduct may become hazardous. As the unfunded costs of disposal of contaminated OWWO climb, it becomes increasingly important that all hands be aware of the environmental compliance aspects of OWWO management.

1. Ships must minimize use of emulsifiers in bilges (AFFF, detergents, etc.). If it is necessary to put emulsifiers in the bilge, this bilge water must be segregated and disposed of as a hazardous waste. Paints or solvents should not be disposed of in the bilge.

2. If the bilge water is suspected to be contaminated with solvents, surfactants or other hazardous materials, make it known to the receiving shore facility; it needs to be isolated from other ship's bilge water to prevent contamination of an entire barge or tank.

2905 STATE AND LOCAL REGULATION. Section 313 of the Clean Water Act (CWA) subjects federal agencies to all state and local laws "respecting the control and abatement of water pollution."

A. Graywater probably constitutes a "pollutant" under the CWA. The OWS system is good only to 20 ppm of oil in the water fraction. Some states and locales have imposed tighter restrictions.

B. The CWA is ambiguous on state authority to regulate discharges from Navy ships. Our position is that NPDES permit requirements cannot be imposed on Navy vessels. Whether we must comply with water quality standards is less clear. While CNO (0P-45) works to secure an Executive Order which would specify "uniform national standards" for ships "uniquely military in nature," the current policy is to negotiate the best solution with state/local regulators on a case-by-case basis.

SHIPBOARD DISCHARGES

AREA	SEWAGE (BLACKWATER)	WASTEWATER (GRAYWATER)
0-3 NM	No discharge.	If equipped with CHT, collect and pump at pierside. If no collection capability, direct discharge is permitted.
>3 NM and MARPOL special areas	Direct discharge of blackwater and graywater is permitted.	
Foreign Countries	Within 12 NM, consult the SOFA, the Visit Clearance, and the practices of the host Navy. Otherwise, no discharge within 4 NM if sewage reception facilities are available.	No restrictions.
Remarks	Direct discharge in emergency.	Discharge prohibited on the Great Lakes. CHT: Collection, Holding and Transfer

TRASH AND GARBAGE

AREA	NONPLASTIC TRASH	FOOD WASTE GARBAGE
0-3 NM	No discharge.	No discharge.
3-12 NM	No discharge.	Pulped or comminuted garbage may be discharged if necessary.
12-25 NM	Pulped trash may be discharged. Submarines may discharge compacted trash at depths > 1000 fathoms.	May be discharged whether pulped or unpulped.
>25 NM & high seas	Pulped, unpulped, or compacted trash can be discharged.	May be discharged whether pulped or unpulped.
MARPOL Special Areas	1994: No discharge.	1994: Discharge only pulped garbage outside 12 NM.
Foreign waters	No discharge w/in 25 NM of land.	No discharge w/in 12 NM of land.
Remarks: All trash must be packaged and weighted against bouyancy.		

OILY WASTE

AREA	OILY WASTE
0-12 NM	No sheen. If equipped with OCM, discharge less than 20 ppm oil.
>12 NM & MARPOL special areas	If equipped with OCM, discharge less than 100 ppm oil. Ships with OWS systems but no OCM must process all machinery space bilge water through OWS. Ships without OWS systems must retain oily waste for shore disposal. If operation conditions compel disposal at sea, discharge is permitted beyond 50 NM from land.
Domestic Ports	Consult port regulations. State and local rules may vary.
Foreign Countries	Within foreign territorial seas, 12 NM, see the Visit Clearance, the SOFA, and standards observed by the host Navy. Otherwise, no discharge within 50 NM unless through OWS.
Remarks: On submarines, direct to WOCI, pump off bottom water phase when full. OCM: Oil Collection Monitor OWS: Oil Water Separators WOCT: Waste Oil Collection Tank	

CHAPTER 30

OCEAN DUMPING ACT

3001 REFERENCES

A. Clean Water Act (CWA), 33 U.S.C. §§ 1401-1445

B. 40 C.F.R. Parts 220-229 (EPA Ocean Dumping Regulations)

C. 33 C.F.R. Part 324 (Corps of Engineers Ocean Dumping Regulations)

D. OPNAVINST 5090.1A, Chapter 18

E. BUMEDINST 5360.1D, Chapter 8

3002 OVERVIEW The Ocean Dumping Act prohibits the transportation of any material from the United States for the purpose of dumping it into ocean waters without a permit issued by the EPA and dumping material from outside the United States within the territorial sea or contiguous zone.

3003 DEFINITIONS

A. "Dumping." Dumping means a "disposition of material." The term dumping does not include a discharge permitted under the CWA. Perhaps more importantly, the term does not include the "routine discharge of effluent incidental to the propulsion or operation of motor driven equipment on vessels," the authorized shipboard discharges discussed in chapter 30 of this Deskbook. Dumping includes the discharge of any material received from another ship or shore station.

B. "Ocean Waters." Ocean waters are the waters seaward of the line used for determining the territorial sea, i.e., beyond 3 nautical miles (NM).

C. "Material." Material is broadly defined and includes dredged material, solid waste, munitions, chemicals, biological and laboratory waste, and medical wastes. The term does not include sewage from vessels covered by the marine sanitation devices regulated under the CWA.

3004 RESTRICTIONS

A. Ocean dumping will be authorized only on a case-by-case basis by CNO. Dumping authorization requests shall be supported by an environmental assessment

(EA) per the National Environmental Policy Act (See chapter 11 of this Deskbook). If the CNO approves the request, the dumping must comply with EPA permit requirements.

B. Under 33 U.S.C. § 1412(a), dumping cannot unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. By regulation, no permits will be issued for radiological, chemical, and biological warfare agents, high-level waste, or medical waste. The Corps of Engineers runs the permit system for dredged materials, using the same standard and dump sites designated by EPA "to the extent feasible."

C. Enforcement measures include civil penalties of $50,000 per violation and criminal penalties of 1 year imprisonment and a $50,000 fine.

3005 BURIAL AT SEA. EPA has granted the Navy a general permit to transport and bury human remains at sea. Chapter 8 of BUMEDINST 5360.1D (NOTAL) governs preparation of the human remains for burial. Human remains may be buried beyond 3 NM from U.S. land and 12 NM from foreign land. If the human remains are not cremated, the burial must be conducted in waters at least 100 fathoms deep. The burial must be reported to the Fleet CINC, copy to Type Commander, within 30 days. Regional Environmental Coordinators submit annual reports to the EPA regional office by 15 January.

CHAPTER 31

MARPOL: SPECIAL AREAS AND PLASTICS

3101 REFERENCES

A. MARPOL Protocol, Int'l. Env't. Rep. (BNA) 21:2301-2400

B. Marine Plastic Pollution Research and Control Act of 1987 Pub. L. 100-220 (An Act to Prevent Pollution from Ships, 33 U.S.C. § 1901 et seq.

C. DoD Directive 6050.15 of June 14, 1985

D. OPNAVINST 5090.1A, Chapter 17

3102 BACKGROUND. In 1959 the United Nations established the International Marine Organization (IMO). The U.N. held conferences which resulted in an agreement known as the International Convention for the Prevention of Pollution from Ships, 1973. As modified in 1978, the agreement is now called the MARPOL Protocol or "MARPOL 73/78." MARPOL 73/78 has five annexes. The first two are mandatory; the last three are optional: Annex I, oil pollution; Annex II, noxious liquid substances; Annex III, harmful substances carried in package form; Annex IV, sewage; and Annex V, garbage.

3103 APPLICATION TO NAVY SHIPS. MARPOL and the mandatory annexes became effective as to the United States on 2 October 1983. Annex V entered into force for the United States on 31 December 1988. MARPOL 73/78 does not apply to warships, naval auxiliaries or sovereign ships in non-commercial service. The agreement, however, does require each party to adopt "appropriate measures" for exempt ships consistent with MARPOL so far as is reasonable and practicable.

3104 ACT TO PREVENT POLLUTION FROM SHIPS. This Act implemented MARPOL and requires federal agencies to prescribe standards to meet the MARPOL "appropriate measures" for exempt vessels. To implement the oil pollution prevention requirements of Annex I, DoD has promulgated DoD Directive 6050.15 of June 14, 1985 which prescribes standards for the discharge of oil wastes, the use of oil water separators (OWS), and the discharge of fuel tank ballast. As to

Annex V, Congress determined that it should apply to otherwise exempt vessels by 1 January 1994. If it appears the Navy cannot comply with Annex V by that date, it must report the fact to Congress by 1 January 1992.

3105 VIOLATIONS. A violation of MARPOL, the Act to Prevent Pollution from Ships, or a regulation issued thereunder is punishable by a $50,000 fine and/or 5 years imprisonment. Civil penalties may be assessed in an amount not to exceed $25,000 per day for each violation. False statements or representations carry a civil penalty not to exceed $5,000.

3106 SPECIAL AREAS. Pursuant to Annex V, certain areas may be designated as "special areas." The adoption of special mandatory methods for the prevention of sea pollution by solid waste is required in special areas because of its oceanographic and ecological condition and the particular character of its traffic. The discharge of any garbage (domestic and operational waste) in special areas is prohibited, except victual waste which must be discharged as far from land as possible, but in any case at least 12 nautical miles from the nearest land. These discharge restrictions became applicable to the Baltic Sea on 1 October 1989. When a sufficient number of party states bordering the Mediterranean Sea, the Black Sea, Red Sea and Persian Gulf notify IMO that adequate reception facilities are available ashore, the discharge restrictions applicable to these "special areas" will also become effective. The United States is proposing that the Gulf of Mexico be designated a "special area." Paragraph 17-3.7.6 of OPNAVINST 5090.1A lists the boundaries of current special areas as follows.

A. The Mediterranean Sea. The Mediterranean Sea area includes the Mediterranean Sea proper and the gulfs and seas therein, with the boundary between the Mediterranean and the Black Sea constituted by the 41° N parallel and bounded to the west by the Strait of Gibraltar and the 5° 36' W meridian.

B. The Baltic Sea. The Baltic Sea area includes the Baltic Sea proper with the Gulf of Bothnia, the Gulf of Finland, and the entrance to the Baltic Sea bounded by the parallel of The Skaw in the Skagerrak 57° 44.8' N.

C. The Black Sea. The Black Sea area includes the Black Sea proper with the boundary between the Mediterranean and the Black Sea constituted by the parallel 41° N.

D. The Red Sea. The Red Sea area includes the Red Sea proper, including the Gulfs of Suez and Aqaba bounded at the south by the rhumb line between Ras si Ane (12° 8.5' N, 43° 30.2' E) and Husn Murad (12° 40.4' N, 43° 30.2' E).

E. The Persian Gulf. The Persian Gulf area includes the sea area located northwest of the rhumb line between Ras al Hadd (22° 30' N, 59° 48' E) and Ras al Fastah (25° 04' N, 61° 25' E).

3107 PLASTICS. The provisions of Annex V dealing with marine plastics apply to Navy ships effective 31 December 1993. Violations of the statute or implementing regulations (after 1993) are punishable by 5 years of imprisonment and/or a $50,000 fine. Each day of a continuing violation is a separate violation. Informants can get up to half the fine assessed. Navy compliance policies include restrictions on disposal of plastics and development of new equipment for ships.

A. Navy Afloat Disposal Policy

1. If underway for 3 continuous days or less, retain all plastic waste on board for disposal ashore.

2. If underway for more than 3 days, retain:

   a. retain all food-contaminated plastic generated in the 3 days preceding return to port; and

   b. retain all non-food contaminated plastic waste on board for at least 20 days, longer if possible.

3. If underway for more than 20 continuous days and the ship lacks storage space for additional plastic waste, the plastic waste may be discharged as follows:

   a. The commander may approve disposal if retention of plastics would endanger health or safety, create an unacceptable nuisance, or compromise combat readiness.

   b. Ships may dispose only those plastics generated after the 20th day.

   c. The waste must be packaged properly, weighted against buoyancy and discharged more than 50 miles from land.

   d. The commander must log the disposal and report by message upon return to port.

B. Navy Ashore Policy

1. Minimize the amount of plastic sent to ships.

2. Bases provide space or facilities as necessary for segregation of plastic before it goes on the ship.

3. Local trash requirements may eventually require shoreside segregation.

3108 POINT OF CONTACT. Questions on these issues should be referred to Mr. Larry Koss, CNO (OP-45) at (202) 692-5580.

AREA	PLASTICS NON-FOOD	PLASTICS FOOD CONTAMINATED
US Internal Waters, Territorial Seas, & Contiguous Zone (0-50 NM)	No discharge.	No discharge.
>50 NM & High Seas MARPOL special Areas	Retain for 20 days; excess can be packaged weighted and discharged.	Retain last 3 days before return to port. Earlier waste can be packaged, weighted and discharged.
Remarks	Record-keeping and reporting requirements. 1994: No discharge allowed.	

CHAPTER 32

MEDICAL WASTE

3201 REFERENCES

A. United States Public Vessel Medical Waste Anti-Dumping Act of 1988, 33 U.S.C. § 2501 et seq.; implemented by CNO msg 311935Z OCT 88

B. Ocean Dumping Act, 33 U.S.C. § 1401 et seq.

C. Medical Waste Tracking Act of 1988, 42 U.S.C. § 6992 et seq.; 40 C.F.R. Part 259 (As amended by 55 Fed. Reg. 27228, July 2, 1990)

D. OPNAVINST 5090.1A, Chapter 17

3202 BACKGROUND. When it comes to conjuring up distasteful images and creating adverse public sentiment, few environmental debacles can compete with the wrongful dumping of medical waste. Regrettably, the Navy has discovered this firsthand. Three statutes are the primary regulators of this narrow field. The United States Public Vessel Medical Waste Anti-Dumping Act of 1988 and the Ocean Dumping Act, discussed in paragraphs 3203-3204 below, apply to ocean discharges. The Medical Waste Tracking Act of 1988, discussed in paragraphs 3205-3206 below, applies on the land and waters of participating states.

3203 DEFINITIONS. Essentially, two types of medical wastes are regulated: "potentially infectious medical waste" and "other medical waste."

A. Potentially Infectious Medical Waste. Under § 2502 of the United States Public Vessel Medical Waste Anti-Dumping Act, "potentially infectious medical waste" includes isolation wastes, infectious agents, human blood, pathological wastes, sharps, body parts, contaminated bedding, surgical wastes and other disposal medical material that may pose a risk to the public health or the marine environment. The Ocean Dumping Act defines the term "medical waste" in a similar manner at 33 U.S.C. § 1402. A more detailed list is provided in paragraph 17-3.7.3 of OPNAVINST 5090.1A.

B. Other Medical Waste. "Other medical waste" is best defined as disposable medical equipment and material that does not meet the definition of "potentially infectious medical waste."

3204 DUMPING RESTRICTIONS

A. General Prohibition. Except in extremely narrow circumstances, the dumping of "potentially infectious medical waste" into ocean waters is prohibited.

B. Narrow Exception. Under Ocean Dumping Act § 1412(a), permits can not be issued to discharge potentially infectious medical waste. The sole exception to the general prohibition authorizes discharge:

1. When retaining of the waste on board would endanger the health or safety of personnel, create an unacceptable nuisance condition, or compromise combat readiness; or

2. during time of war or declared national emergency.

C. Dumping Procedures. If the exception applies, the waste is sterilized with steam, properly packaged, and weighted to prevent it from coming ashore after disposal. Submarines do not have to sterilize their medical waste. The waste must be dumped more than 50 miles from land. Unfortunately, some have misinterpreted this rule to mean that dumping beyond 50 miles is permissible. The 50 mile limit is NOT a third exception; rather, it is an additional restriction which is effective when one of the two narrow exceptions applies. The command must keep administrative records of all overboard discharge of potentially infectious medical waste.

D. Sharps. "Sharps" include sharp things such as hypodermic needles, syringes, scalpel blades, Pasteur pipettes, specimen slides, cover slips, glass petri plates, and broken glass potentially contaminated with infectious material. Even if an exception applies, sharps can never be dumped. All sharps, used or unused, shall be collected in plastic autoclavable containers and disposed of ashore.

E. Discharge of "Other Medical Waste." Medical waste which is not potentially infectious can be disposed of as trash. This discharge is subject to the discharge restrictions for trash but neither steam sterilizing nor special handling is required.

F. Enforcement. While the United States Public Vessel Medical Waste Anti-Dumping Act lacks statutory enforcement teeth, § 1415 of the Ocean Dumping Act imposes stiff penalties for unlawful discharging medical waste. Violations are punishable by civil penalties of $125,000 per incident. Criminal violations carry a maximum penalty of 5 years' imprisonment and a $250,000 fine.

3205 MEDICAL WASTE TRACKING ACT. The Medical Waste Tracking Act consists of a demonstration program that will track medical wastes from "cradle to grave," much as the Resource Conservation and Recovery Act (RCRA) regulates hazardous wastes. The program currently applies in New York, New Jersey,

Connecticut, Rhode Island, Louisiana, Puerto Rico, and the District of Columbia. Other states may join by petition.

A. Medical Waste Defined. The Medical Waste Tracking Act defines medical waste more broadly than the two statutes discussed above.

1. General Definition. The term is defined by 42 U.S.C. § 6903(40) as "any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals." In addition to the types of medical wastes discussed above, the term includes any medical waste material found by EPA "to pose a threat to human health or the environment." Household wastes are excluded.

2. Mixtures. Mixtures of solid waste and regulated medical waste are regulated as medical wastes. "Hazardous wastes" under RCRA which are also medical wastes, or RCRA hazardous wastes that are mixed with medical wastes, are governed by RCRA.

B. Applicability to Federal Facilities. Federal facilities in demonstration states are fully subject to the Act, as well as any state or local requirement, procedural or substantive "respecting control or abatement of medical waste disposal and management." Navy vessels, e.g., a hospital ship, in the port of a demonstration state are subject to regulation. 40 C.F.R. § 259.50. This waiver of sovereign immunity extends to civil, criminal, and administrative penalties.

C. Enforcement. Under 42 U.S.C. § 6992e, enforcement measures include administrative orders and civil penalties up to $25,000 per day per violation. Knowing criminal violations carry a maximum penalty of a $50,000 fine and 5 years' imprisonment. Both facets of the maximum punishment are doubled for the second conviction. The "knowing endangerment" provision carries a maximum punishment of a $250,000 fine and 15 years imprisonment. The maximum fine is increased to $1 million for defendant organizations.

3206 MEDICAL WASTE TRACKING REQUIREMENTS.

A. Generators. A generator is any person whose act or process produces medical waste. Generators who treat, destroy, or dispose of medical wastes on site are exempt from regulation. Other limited exemptions exist for generators that: Generate less than 50 lbs per calendar month; ship wastes to other facilities it owns within the demonstration state; or ship wastes through the U.S. Postal Service.

1. Handling. The generator's initial responsibility is to determine if a waste is a regulated medical waste. Before wastes are shipped off site, the generator must segregate the wastes per 40 C.F.R. § 259.40, e.g., segregate sharps from other wastes. The wastes must be packaged in rigid, leak resistant, sealed,

moistureproof containers. The containers must be labeled "treated" or "untreated" waste and marked to identify the contents, the generator, the transporter, etc.

2. Storage and Shipment. If the wastes are stored before shipment, the generator must meet the storage requirements of 40 C.F.R. § 259.42. All off-site shipments for treatment or disposal must be accompanied by the medical waste tracking form. This tracking form is analogous to the RCRA hazardous waste manifest. Copies of forms and instructions for their use may be found in the Appendices to 40 C.F.R. Part 259. The generator must file an exception report if the tracking form is not returned within 35 days of initial shipment. Generators must maintain tracking forms and exception reports for a minimum of 3 years. A log must be kept of shipments between generator owned facilities.

B. On-site Incinerators. Generators who incinerate regulated medical wastes on-site must comply with the standards specified in 40 C.F.R. § 259 Subpart G which impose recordkeeping and reporting requirements.

C. Transporter Requirements. The term "transporter" includes generators who transport their own wastes. Transporters in demonstration states must identify themselves to EPA and the state. Transporter standards include ensuring the waste is properly marked before shipment and accompanied by a properly completed tracking form, i.e., making sure the generator has fulfilled its requirements. Transporters must use fully-enclosed, leak-resistant vehicles. Vehicles must be properly identified as carrying medical wastes.

D. Treatment, Destruction, and Disposal (TDD) Facilities. Facilities are subject to the requirements of 40 C.F.R. § 259 Subpart I if they receive medical wastes generated in a demonstration, even if the TDD facility is not in a demonstration state. The owner or operator of the TDD facility must complete the tracking form, giving a copy to the transporter immediately and to the generator within 15 days. The TDD facility will note any discrepancies on the tracking form, e.g., inaccurate counts, damaged packaging, tracking form missing, incomplete or unsigned. TDD facilities must keep records of waste received for a minimum of three years, including copies of discrepancy reports and a list of all generators from whom waste is received.

3207 POINT OF CONTACT. Questions on these matters may be referred to the Assistant for Medical Legal, Office of the Surgeon General at (202) 697-2312; AV 227-2312.

SUMMARY CHART

AREA	MEDICAL WASTE
US Internal Waters & Territorial Seas (0-50 NM)	Autoclave, store, and transfer ashore. No discharge. See state/local regulations.
>50 NM & high seas	If potentially infectious waste presents health hazard, autoclave, package, weight to sink, and discharge. No discharge of sharps.
Other Areas	VA Reg: Do not use autoclave in VA ports; package and transfer to shore clinic
Foreign countries	Consult SOFA.
Remarks: All sharps to be disposed of ashore. Plastic and wet materials shall not be incinerated. Other medical waste may be disposed of as trash and does not require autoclaving or special handling. The autoclave requirement does not apply to submarines.	

CHAPTER 33

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

3301 REFERENCES

A. 7 U.S.C. § 136 et seq.

B. 40 C.F.R. Parts 150-186

C. DoD Directive 4150.7 of 24 October 1983, DoD Pest Management Program

D. DoD Directive 5154.12 of 23 July 1979, Armed Forces Pest Management Board

E. OPNAVINST 5090.1A, Chapter 15

F. OPNAVINST/MCO 6250.4, Pest Management Program

3302 OVERVIEW. Environmental pollution from the use of pesticides is controlled under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA accomplishes this by establishing requirements for pesticide registration for manufacturers and applicator certification for users. Upon registration the EPA mandates that each container containing the product be labeled with instructions for use, storage and disposal. The purchase, use, or distribution of any pesticide which has not been registered with the EPA is prohibited.

3303 DEFINITIONS

A. A "pesticide" is any substance intended for destroying or preventing any pest, or is intended for use as a plant regulator, defoliant, or desiccant.

B. A "pest" is any organism harmful to human health or the environment. Pests include vertebrates, invertebrates, plants growing where unwanted, fungi, bacteria, and other organisms.

3304 REGISTRATION. FIFRA is primarily concerned with the registration procedure in registering new pesticides. The manufacturer is responsible for registration. The Navy, as a user of pesticides, has little involvement with this aspect of FIFRA.

3305 CERTIFICATION OF PESTICIDE APPLICATORS

A. Applicator Certification. Any person who uses or supervises the use of a pesticide which is classified for restricted use must obtain an applicator certification. Restricted pesticides are listed in the table at 40 C.F.R. § 152.175.

B. Testing. The certification is normally operated by state regulators under 40 C.F.R. § 171 through a testing program to ensure pesticide users are competent. Certification is made following satisfactory written and practical testing in the following areas: principles and practices of pest control and safe use of pesticides; label and labeling comprehension; safety procedures; environmental consequences of the use and misuse of pesticides; knowledge of various pesticides; equipment use; application techniques; and laws and regulations.

C. Navy Policy. Navy personnel who select or recommend pesticides for use or who supervise or apply the application of pesticides on a Navy activity shall be certified under the "Department of Defense Plan for Certification of Pesticide Applicators," as described in OPNAVINST/MCO 6250.4 (NOTAL).

3306 PROHIBITIONS.

FIFRA prohibits the use of any pesticide:

A. In a manner inconsistent with its labeling;

B. in a manner inconsistent with the terms of its experimental use permit; or

C. which has been modified, by adding or removing any substance, in a manner that may defeat the purpose of FIFRA.

3307 PESTICIDES AS HAZARDOUS WASTES.

FIFRA prohibits the sale or distribution of any pesticide which has been adulterated or misbranded. In effect, such pesticides become waste pesticides and may be hazardous wastes under other environmental laws. EPA recommends disposal procedures for pesticide wastes at 40 C.F.R. § 165.7.

3308 EMERGENCY EXEMPTION FOR U.S. AGENCIES.

EPA may exempt any federal agency from compliance with FIFRA in an emergency. FIFRA anticipates four types of emergency exemptions.

A. Specific Exemption. . This exemption permits the agency to use pesticides as necessary to avoid significant economic loss or significant risk to endangered species or the environment.

B. Quarantine Exemption. This exemption allows the agency to use pesticides to control the movement of pests not previously known or widely present within the United States or its territories.

C. Public Health Exemption. This exemption is based on the need to control a pest that will cause significant risk to human health.

D. Crisis Exemption. This catch-all exemption may be granted when a crisis exists mandating the use of pesticides under circumstances not covered by the other three exemptions.

3309 FIFRA HOTLINE. The National Pesticides Telecommunications Network operates a 24-hour hotline to answer questions on pesticide products, safety practices, health and environmental effects, and cleanup and disposal procedures. The hotline number is (800) 858-7378. In Texas, call (806) 743-3091.

CHAPTER 34

DEFENSE REUTILIZATION AND MARKETING SERVICE

3401 REFERENCES

A. Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471

B. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq.

C. 40 C.F.R. Parts 124, 260-72

D. DoD 4160.21-M, Defense Reutilization and Marketing Manual

C. DRMS-H 4160.3, Disposal Operating Procedures

D. OPNAVINST 5090.1A, Chapter 10

3402 OVERVIEW The Defense Reutilization and Marketing Service (DRMS) was established in 1972 as the primary field level activity of the Defense Logistics Agency. The mission of the DRMS includes the reutilization of serviceable excess personal property, marketing of surplus personal property and scrap, precious metals recovery, and management and disposal of hazardous waste. For our purposes, the key feature of the DRMS is its role in the disposal of hazardous waste.

3403 DRMS ORGANIZATION. The top of the DRMS pyramid is the headquarters office in Battle Creek, Michigan. The five regional offices are located in Memphis; Honolulu; Columbus; Ogden, Utah and Wiesbaden, Germany. The base is rounded out by the 170 Defense Reutilization and Marketing Offices (DRMO) in the United States and the 43 overseas.

3404 HAZARDOUS PROPERTY MANAGEMENT. Under DRMS jargon, hazardous property includes hazardous waste and hazardous material. Hazardous waste is waste regulated by the Resource Conservation and Recovery Act (RCRA) or state RCRA statutes. Hazardous material is all other hazardous property, regulated by the Occupation Health and Safety Administration (OSHA) and the Department of Transportation (DoT).

A. Exclusions. DRMS does not dispose of all DoD-generated hazardous property Each service is responsible for disposal of certain hazardous property

including: chemical warfare materials, ammunition and ordnance; controlled medical items; municipal garbage; and sludge from waste water treatment facilities. A complete list of excluded hazardous property is listed in DoD 4160.21-M, chapter IX, enclosure 8.

B. Reutilization. DRMS makes every reasonable effort to reutilize the hazardous material it receives. If reutilization within DoD cannot be accomplished, transfer or donation outside DoD is attempted. If those efforts are unsuccessful, DRMS markets the material for sale. If it cannot be sold, the material is disposed of as a hazardous waste.

C. Sale of Hazardous Material. Evolving liability concepts have required DRMS to tighten their sales practices significantly in recent years.

1. The "Tylenol Seal" Concept. DRMS will not sell hazardous material unless it is unused and unopened. The container must be free from dents and rust, properly labeled. The sale must be consistent with the product's shelf-life specifications. If any criterion is not met, the material will be disposed of as a hazardous waste.

2. The Right Buyer. DRMS checks out the buyer carefully to avoid liability as a potentially responsible party (PRP) if the buyer does not handle the material properly. Other regulatory agencies are contacted for information regarding the buyer's environmental responsibility. The buyer must provide a "statement of intent" certifying the intended use of the purchased material. Post-award inspections are made on a random basis to ensure proper handling of the hazardous material.

3. Management. Sales are coordinated by the National Sales Office in Memphis to centralize the sale of all hazardous material and to facilitate policy implementation. Hazardous material is no longer sold at local Defense Reutilization Marketing Offices (DRMOs). Records on sales are kept for 50 years. Buyers determined to be irresponsible with regard to management of hazardous materials are barred from making future purchases.

D. Disposal. The management practices specified above are reducing hazardous materials sales. Consequently, more is being disposed as hazardous waste. Disposal is expensive. As of 1 October 1991, the military services will have to pay for the disposal of our hazardous materials which cannot be sold.

3405 DRMO OPERATION

A. Responsibilities. The installation commander is the "owner" of the RCRA permit and reports to EPA and state authorities. Typically, the DRMO is the "operator" of the storage facility, reporting to the installation commander and the

DRM Region. DRMOs operating under interim status (Part A) permits or approved Part B permits comply with 40 C.F.R. § 264 or § 265 respectively.

B. Turn-in Requirements. As an operator of a permitted Temporary Storage Facility, the DRMO must operate in compliance with EPA, state and DoD regulations. To that end, DRMO requires generators to comply with requirements of 40 C.F.R. § 262 which include:

1. Hazardous waste determinations under § 262.11 (DRMS is NOT responsible for managing installation hazardous waste prior to turn-in; waste identification is the sole responsibility of the generator);

2. Proper manifesting under Subpart B;

3. Pre-transport requirements under Subpart C, relating to packaging, marking, labeling, placarding, and accumulation time; and

4. Recordkeeping and reporting under Subpart D.

C. Hazardous Waste Disposal Contracting. DRMS runs a centralized contracting system. All hazardous waste disposal contracts are awarded at DRMS headquarters in Battle Creek, Michigan. Hazardous waste disposal contracts are administered at the Regional level in Ogden, Memphis, and Columbus. Each Region has a legal office dedicated to supporting the contract administration function. When hazardous waste is turned in to the DRMO by the military services, DRMS issues a delivery order under the contract for the removal and disposal of the waste. Typically, contractors have 30 days from the date of the delivery order to remove the waste.

CHAPTER 35

THE AIR INSTALLATION COMPATIBLE USE ZONE PROGRAM

3501 REFERENCES

A. Noise Control Act, 42 U.S.C. § 4901

B. 32 C.F.R. § 256

C. OPNAVINST 11010.36A

D. Aviation Safety & Noise Abatement Act, 49 U.S.C. § 101

3502 BACKGROUND. When the Navy decides that an air station is needed, a suitable site is selected. The absence of obstructions to the future airfield and the absence of a major population center in the vicinity factor into the selection process to make sites more attractive. As soon as the air station is built, the population begins to grow. The barren landscape which originally made the airfield resemble a landlocked carrier begins to disappear. Development around the air station continues, commensurate with the population demand. This development may threaten flight operations in several ways. First, development may present obstructions to safe flight operations. Second, development may be inappropriate in a given area in light of the noise levels expected or the risk of aircraft accidents there. To protect our pilots and the public from the negative effects of incompatible development, and preserve the value of the airfield for training, the Air Installation Compatible Use Zone (AICUZ) program identifies areas around the airfield affected in various ways by takeoff and recovery operations and recommends compatible uses of that land to civilian planners.

3503 AICUZ CONTENTS. The AICUZ is concerned with three areas of overlapping concern: obstructions, accident risks, and noise.

A. Obstructions. Obstructions are natural or man-made structures or activities which present safety risks to takeoff and landing operations because they stick out into the airspace surrounding an airfield. An object may be an obstruction due to its height, e.g., a factory smokestack. Another obstruction may exist because it sends visible emissions into the surrounding airspace, e.g., a factory smokestack that is under the height limitations but emits smoke that reduces visibility. Though invisible, electronic emissions may be obstructions because they may interfere with the safe operation of, and communication with, our aircraft. Our obstruction recommendations are buttressed by similar limitations prescribed by the Federal Aviation Administration (FAA).

B. Accident Risks. DoD has conducted studies to determine the likely locations of aircraft accidents in the vicinity of the airfield. Oddly enough, they discovered that most accidents occur at the ends of the runway, with the number of accidents decreasing as one increased the distance from the airstrip. Consequently, three Accident Potential Zones (APZs) were administratively established to reflect this empirical evidence and give planners a rough feeling for the attendant risk in an area, if not a true statistical probability of an accident occurring there. Again, these statistics relate to the likely location of accidents, not the probability of an accident occurring.

1. Typically, for airfields used by fixed wing aircraft, each of the APZs is 3,000 feet wide. The Clear Zone (CZ) is the area of greatest risk and is measured from the end of the runway out 3,000 feet. Given the higher risk, most of the land within the CZ has either been purchased outright or leased by the government. Accident Potential Zone I (APZ I) is 5,000 feet long and begins at the end of the CZ. Accident Potential Zone II (APZ II) is 7,000 feet long and begins at the end of APZ I.

2. Studies show that accidents which occur within 10 nautical miles of the airfield follow in a general pattern, for example: 28% on the runway; 29% within the CZ; 8% within APZ I; 5% within APZ II; and 30% elsewhere within the 10 nm radius. The AICUZ, the dimensions of the APZs, and the accident statistics will vary with the airfield and the type of aircraft which use it. The numbers used throughout this chapter are offered solely to give the reader a flavor of the subject; specific information should be obtained from the local documents.

3. Obviously, we could avoid these risks by purchasing all the land in these zones. Sometimes we do but that tends to be an expensive solution warranted only in CZs. Under DoD Instruction 4165.57, the policy is to acquire these areas only when our efforts to secure compatible use zoning have failed and the "operational integrity of the air installation is manifestly threatened."

C. Noise. Strange as it may seem, some Americans find the "sound of freedom" irritating. The noise of airfield operations affects the local community physiologically by creating temporary shifts in hearing thresholds and sleep loss. Noise may affect behavior by interrupting human activities (e.g., work or speech). No doubt it also causes stress.

1. The first step in the noise facet of the AICUZ is data collection. Data are assembled by the base regarding a wide range of activities including the types of aircraft, number of flights, flight tracks, time of day, atmospheric conditions, and ground operations. Experts will use these data to develop noise contours to describe the amount and location of noise surrounding an airfield. The computation

is made using the Day-Night Average Sound level (Ldn) method, a technique recommended by the EPA, which corrects for the greater impact of sound at night.

2. While the Noise Control Act (NCA) by its terms is inapplicable to military aircraft, 42 U.S.C. § 4902(3)(B), NCA directs federal agencies to carry out their programs so as to further the Act's policy to "promote an environment for all Americans free from noise that jeopardizes their health or welfare." To preserve the notion that NCA neither creates a cause of action nor confers jurisdiction over AICUZ matters, our position in litigation has been that the AICUZ is not the product of the Noise Control Act; rather, AICUZ is an illustration of our efforts to be consistent with the spirit of NCA and its direction to federal agencies.

D. The Map. The final product of the AICUZ study is the Compatible Use District (CUD) map. This map blends the restrictions for obstructions, the APZs, and the noise contours into a comprehensive "footprint" for the airfield. The map forms the basis for our recommendations to local government on uses of adjacent lands which are compatible with our operations. These recommendations are based on two primary sources.

1. Enclosure (4) of DoD Instruction 4165.57 assimilates DoD data on aircraft accidents. Styled "Land Use Compatibility Guidelines for Accident Potential," this enclosure categorizes possible land uses as compatible or incompatible with the CZ, APZ I, or APZ II. Generally speaking, residential development is incompatible in the CZ or APZ I; single family dwellings may be compatible in APZ II.

2. The primary source of our recommendations respecting uses in particular noise contours is "Guidelines for Considering Noise in Land Use Planning and Control," published in the June 1980 report of the Federal Interagency Committee on Urban Noise. This publication reflects the coordination of various federal programs to encourage noise sensitive development, away from major noise sources; EPA, DoD, Department of Transportation (DOT), Department of Housing and Urban Development (HUD), and Veterans Administration (VA) are signatories. This publication lists land use compatibility guidelines for 55 through 85 Ldn sound zones. Generally, zones in excess of 65 Ldn are deemed incompatible for residential use.

3504 COOPERATION WITH LOCAL LAND PLANNERS.

The AICUZ program is implemented through the local government's powers over land use, zoning, and building codes. We give the AICUZ study to local planners and encourage them to incorporate into the overall local land use planning process and their comprehensive plan, if they have one. The publication of the AICUZ by itself has no legal effect but we, as interested landowners, are entitled to participate in the local zoning process and to attempt to persuade the local government to accept our

recommendations. De-Tom Enterprises, Inc. v. United States, 552 F.2d 337 (Ct. Cl. 1977).

A. We cannot go beyond mere participation in the zoning process, however, by taking actions intentionally to reduce adjoining property values. Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970). Our actions must be reasonable and straightforward to avoid the kind of judicial criticism leveled at the Marine Corps in Rossmoor Corp. v. United States, Ct. Cl. #396-67 (Dec. 29, 1972). In that case, the installation overstated aircraft accidents by 50% and tried to force a landowner to grant an easement in exchange for rezoning to permit construction of a retirement community.

B. Local communities have another subtle inducement to incorporate the AICUZ study into the local planning process. The Guidelines for Considering Noise in Land Use Planning and Control specify the intent of HUD and the VA to follow DoD's APZ determinations and noise contour studies. Consequently, they refuse to provide assistance (e.g., guaranteeing home mortgages) for construction in APZs and areas of high noise.

3505 JUDICIAL CHALLENGE

A. Inverse Condemnation Suits. The direct challenges to AICUZ take the form of inverse condemnation suits brought in the U.S. Court of Claims under the Tucker Act, 28 U.S.C. § 1491. The plaintiff argues that the government has so interfered with the use and enjoyment of the property that it has been "taken" for public use without just compensation under the fifth amendment.

1. Plaintiffs may also allege a regulatory taking, arguing that the zoning restrictions implementing the AICUZ are so restrictive that the property owner has been denied all reasonable and beneficial use of the land. Zoning ordinances are presumed to be valid unless the plaintiff can show them to be arbitrary, unreasonable, and lacking a substantial relationship to public health, safety, or welfare. Hadacheck v. Sebastian, 239 U.S. 394 (1915), is often cited for the proposition that if the land can be economically used for some purpose, a "taking" will not be found. These two principles gave zoning officials a relatively free hand in regulating land use.

2. The bravado of zoning boards in the wake of Hadacheck was recently diminished. In First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the Supreme Court ruled that if a taking has occurred, a plaintiff is entitled to damages from the date of the taking, not the date of judgment The Court did not amplify the definition of "taking" or develop a yardstick with which to measure damages. Prior to this case, if a taking had been found the government could simply pay the plaintiff just compensation for the property or rescind the ordinance. The local government's potential financial liability under First

English may make land use planners more wary. This may manifest itself as reluctance to incorporate the AICUZ study or later deviate from it during rezoning proposals.

3. The regulatory taking presents potential liability to the local government because they exercise the police power in connection with zoning. The AICUZ study merely recommends compatible uses for local development. Since the AICUZ standing alone has no regulatory effect, statements in the AICUZ cannot constitute a taking. Still, plaintiffs may attack the federal government for its efforts, as a landowner, to influence the zoning board. Provided there has been no overreaching or improper conduct, (e.g., denying a property owner the due process of a zoning hearing by entering an MOU with the county before the hearing takes place) these actions are generally unsuccessful. Gilliland v. United States, 228 Ct. Cl. 709 (1981); N.B.H. Land Co. v. United States, 576 F.2d 317 (Ct. Cl. 1978).

B. Physical Invasion. Plaintiffs may argue a physical invasion theory of "taking" resulting from low-flying aircraft. The Supreme Court's "substantial interference" test of Causby v. United States, 328 U.S. 256 (1946) generated a spate of litigation. The "500 foot rule" emerged as the bright line standard in such cases; no taking occurred where the overflight exceeded 500 feet above ground level (AGL). Aaron v. United States, 31 F.2d 798, 160 Ct. Cl. 295 (1963). The sole exception to the prevailing rule concerned the Field Mirror Landing Practice, performed at 600 feet AGL, at Marine Corps Air Station, Beaufort, South Carolina. Branning v. United States, 654 F.2d 88 (Ct. Cl. 1981). That case has since been limited to its peculiar facts. Hero Lands Co. v. United States, 554 F. Supp. 1262 (Ct. Cl. 1983).

1. These claims under the Tucker Act are subject to a six-year statute of limitations. Regardless of the level of the overflight, the property owner's claim will be barred if the extent of the overflights has not increased in frequency or noise level during the last six years.

2. In addition, plaintiffs may bring actions for noise and vibration damage caused by overflights. These claims are typically brought under the Military Claims Act, 10 U.S.C. § 2733, rather than the Federal Tort Claims Act, 28 U.S.C. § 1346. To prevail under the case law, which views flights within navigable airspace favorably, the plaintiff must show that the noise and vibration cause an immediate interference with the use and enjoyment of the property and the interference is so substantial as to amount to a taking. Remirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984); Katsos v. Salt Lake City Corp., 634 F. Supp. (D. Utah 1986).

3606 REGIONAL ISSUES

A. California

1. While the publication of an AICUZ plan by itself has no legal effect, California law operates to make it very powerful because state law prohibits residential construction in areas above 65 CNEL. CNEL is the California method of measuring noise and is roughly equivalent to the Day Night Average Sound level (Ldn) used in DoD.

2. In California and several other states, a plaintiff may recover damages solely for noise. Under federal law, noise alone is insufficient for a claim of inverse condemnation.

B. Florida. The Navy has presented a draft airport zoning ordinance to a few Florida communities, including Clay, Duval, Santa Rosa and Escambia Counties. With some modifications, the counties have enacted it. Since zoning is a delegated power, not all communities have the same zoning authority. Judge advocates must consult the enabling legislation in each case.

C. Hawaii. In Hawaii, prospective home buyers must be informed that a property is located in an area of 55 Ldn or higher. Therefore, the accuracy of our data becomes very important and local developers are likely to do their own sound measurements. Because of the outdoor character of life in Hawaii and similar areas, the local authorities have used the 60 LDN contour as a cut off for residential development. The Navy program permits local control of these decisions.

3507 AICUZ AND THE FUTURE.

While much of the work in the AICUZ is concerned with getting the ball rolling, the game is not over when the local land use planners incorporate the AICUZ into the comprehensive plan.

A. The AICUZ study itself should be updated every two years. Changes could have a significant effect on use restrictions. Judge advocates should be mindful of AICUZ issues during the NEPA process. AICUZ studies should be conducted in conjunction with Environmental Impact Statements (EIS) or Environmental Assessments (EA). The EIS or EA analysis may yield innovative ways to address AICUZ issues, e.g., protecting against development encroachment in an AICUZ context by protecting wetlands or threatened habitat.

B. Once the comprehensive zoning ordinance is passed, the Navy must monitor the zoning process to ensure hard-fought restrictions do not slip away. Property owners may attempt to have individual tracts rezoned to less restrictive classifications. Other landowners may seek to have property subdivided, with a view toward further development incompatible with the comprehensive plan. Comprehensive zoning may also be eroded through the granting of variances to

restrictions when their application to a particular property would cause a severe hardship. These decisions are publicized but they must be monitored. If the Navy fails to object in a timely manner, these requests will probably be granted.

C. The Navy can also be proactive. The Navy has recommended disclosure ordinances which require sellers to disclose the effects of aircraft noise and/or the location of the air station in deeds and sales contracts. The Navy has also recommended amendments to building codes to require sound attenuation. To that end, the Navy entered into a contract to obtain information regarding the sound attenuation properties of building materials in different regions of the country to assist local communities in enforcing sound attenuation requirements. In this regard, we must be mindful that all development restrictions reduce property values. If our recommendations are unreasonable, the zoning board which adopts them may be liable for a regulatory taking and consequential damages. They and neighboring governments might be reluctant to listen to us in the future.

3508 ADDITIONAL READING. For a detailed examination of this subject, see Lieutenant Colonel Bernard K. Schafer, USAF, "The Air Installation Compatible Use Zone Program: The Science and the Law," 31 Air Force L. Rev. 165 (1989).

CHAPTER 36

LAND USE MANAGEMENT AND ENCROACHMENT CONTROL

3601 REFERENCES

A. OPNAVINST 5090.1A, Chapter 20

B. NAVFACENGCOM Manual P-73, Vol. II, Navy Natural Resources Management Procedural Manual (NRMPM) (NOTAL)

C. 32 C.F.R. § 265; Natural Resources Management Program (NOTAL)

D. MCO 11011.22A; Subj: Encroachment Control of 30 Nov 87 (pending revision)

3602 POLICY. The policy of the Navy is to act responsibly in the public interest to restore, improve, preserve, and properly use natural resources on Navy administered lands. There shall be a conscious and active concern for the inherent value of natural resources in all Navy plans, actions, and programs.

A. Stewardship of natural resources shall be an important and identifiable function of all echelons of command management. Each command shall establish procedures to ensure Navy decision-makers are kept informed of the conditions of natural resources, the objectives of Natural Resource Management Plans (NRMPs), and potential conflicts between Navy actions or plans with established policies.

B. Natural resources under the jurisdiction of the Navy shall be managed to support the military mission, while practicing the principles of multiple use and sustained yield, using scientific methods and an interdisciplinary approach. The conservation of natural resources and the military mission need not and shall not be mutually exclusive. Commands shall accomplish the following when managing natural resources on Navy lands:

1. Assign specific responsibility, centralized supervision, and qualified personnel to this program; and encourage appropriate staff personnel to participate in NRM job training activities and professional meetings.

2. Protect, conserve, and manage the watersheds, wetlands, natural landscapes, soils, forests, fish and wildlife, and other natural resources, as vital elements of an optimum natural resources program.

3. Manage natural resources to provide outdoor recreation opportunities. This shall be recognized as an important objective in the conduct of all Navy NRM programs.

4. Use and care for natural resources in the combination best serving the present and future needs of the U.S. and its people.

5. Provide for the optimum development of land and water areas and access thereto while maintaining ecological integrity.

6. Increase the function and value of Navy wetlands.

3603 NATURAL RESOURCES MANAGER. Each land managing activity shall appoint in writing, an installation natural resources manager. The natural resource manager will ensure the commanding officer is informed regarding:

A. Natural resources issues;

B. Conditions of natural resources;

C. Objectives of NRM plan sections; and

D. Potential or actual conflicts between mission requirements and natural resources mandates.

3604 NATURAL RESOURCES MANAGEMENT PLAN. The NRMP is a five-year planning document that guides ecologically sound and cost effective management of natural resources to maximize benefits for the installation and neighboring community.

A. Contents. The NRMP consists of the following four sections:

1. Land management

2. Forest management

3. Fish and wildlife management

4. Outdoor recreation resources management.

B. Integration. NRMPs will assist personnel who plan and implement mission activities as well as natural resources managers. New and continuing mission activities that affect natural resources will be coordinated with appropriate natural resources managers.

C. Annual Review. All sections of the NRMP must be reviewed annually by each installation and updated as necessary. An installation may request the appropriate Engineering Field Division (EFD) to review and update sections of an installation NRM plan. Copies of the most current installation NRM plan sections shall be provided by the appropriate EFD.

D. NEPA Interface. The preparation of the NRMP shall include an environmental review (assessment or impact statement) and an opportunity for public participation as outlined in the National Environmental Policy Act (NEPA). NEPA documentation is discussed more fully in chapter 11 of this Deskbook.

3605 SPECIFIC LAND USE MANAGEMENT TOPICS.

As suggested above, land use management encompasses a vast range of subjects. The following topics are a sampler of some of the major fields of interest.

A. Air Installations Compatibility Use Zone (AICUZ). This program is used by the local governments as a guideline for compatible community growth in the vicinity of our air stations. It identifies accident and noise zones and recommends land use/zoning in adjacent areas and the requirement for acquisition of property interests. This topic is discussed in more detail in chapter 35 of this Deskbook.

B. National Environmental Policy Act (NEPA). Proposed actions, such as acquisitions, disposals, base expansion, operational changes, etc., must be planned in accordance with NEPA regulations and procedures. Chapter 11 of this Deskbook provides more detailed guidance.

C. Natural Resources. Land use must comply with existing laws and regulations that enforce the preservation of natural resources. Chapter 17 of this Deskbook discusses DoN wetlands preservation; chapters 15 and 16 examine historic and archeological resources management.

D. Conservation Programs. The Sikes Act, 16 U.S.C. § 670a–f; 10 U.S.C. § 2671(a), requires each military installation to manage natural resources so as to provide for multipurpose uses and to provide public access appropriate for those uses, unless access is inconsistent with the military mission. In addition, each military department must ensure professional services are provided which are necessary for management of fish and wildlife resources on each installation.

E. Forest Management. The natural resources manager must be familiar with timber management, forest administration, timber sales, reforestation, timber stand improvement, timber access road construction and maintenance, forest protection, and all other elements directly related to the commercial production and sale of forest products.

F. Land Management. The natural resources manager must be familiar with the management of soil conservation, erosion control, surface and subsurface water management, land restoration, noxious weed and poisonous plants control, agricultural outleasing, range management, landscaping, and grounds maintenance.

G. Off-Road Vehicle Use. Off-road vehicle use on Navy land shall be permitted only in designated areas and trails. Policies, procedures, and criteria for establishing designated off-road areas and trails are provided in the NRMPM, Chapter 5.

CHAPTER 37

OVERSEAS ENVIRONMENTAL COMPLIANCE

3701 REFERENCES

A. Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions," 4 January 1979

B. Executive Order 12088, "Federal Compliance with Pollution Control Standards," 23 January 1987

C. DoD Directive 5100.50, "Protection and Enhancement of Environmental Quality, 24 May 1973

D. DoD Directive 6050.7 of 31 March 1979 (NOTAL)

E. The National Defense Authorization Act of 1991, Pub. L. 101-510, 1990 U.S. Code Cong. & Ad. News (104 Stat.) 1537

F. OPNAVINST 5090.1A, Chapter 1, Appendix E

3702 INTRODUCTION. Section 1-801 of Executive Order 12088 requires the head of each executive agency responsible for the operation of federal facilities overseas to ensure that our activities comply with the environmental pollution control standards of general applicability in the host country. DoD Directive 5100.50 implements this policy in the armed forces and goes further, requiring the services to comply to the extent practicable with the National Environmental Policy Act and all other federal environmental laws and regulations.

A. Congress recently expanded DoD's annual environmental budget report to require inclusion of information on funding levels and personnel needs to achieve environmental compliance at overseas installations. Section 342 of the Defense Authorization Act for FY-91 tasked DoD with developing policies with regard to overseas environmental protection, restoration, and oversight. A DoD baseline guidance document is being prepared to establish standards and responsibilities where the Status of Forces Agreement (SOFA) or other international agreement is silent on environmental protection.

B This chapter focuses primarily on NEPA and other general procedural matters The substantive chapters in this Deskbook provide additional information on specific overseas applications of the various statutes and regulations.

3703 NATIONAL ENVIRONMENTAL POLICY ACT (NEPA).

Chapter 11 of this Deskbook examined the domestic application of NEPA. The applicability of this planning statute outside the United States is unclear.

A. Courts have yet to address the issue squarely. Beyond the ruling that NEPA applies to territories under exclusive U.S. control, the few cases which have considered the matter yield little precedent since the issue was conceded by the parties or circumvented by the court.

1. Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978)(Defendant conceded applicability of NEPA to construction of Pan-American highway project through Columbia in view of impact within the United States, i.e., spread of livestock disease).

2. National Org'n for Reform of Marijuana Laws v. United States, 452 F. Supp 1226 (D.D.C. 1978)(Issue of NEPA applicability to aerial spraying of Mexican marijuana fields circumvented by defendant's voluntary preparation of EIS).

3. Natural Resources Defense Council v. NRC, 647 F.2d 1345 (D.C. Cir. 1981)(NEPA did not require preparation of EIS before export of nuclear reactor to the Republic of the Philippines).

4. Greenpeace USA v. Stone, 748 F. Supp. 749 (D. HI 1990)(Dicta that NEPA might have territorial application in some circumstances but not to the transportation within Germany and later ocean shipment of chemical weapons en route to disposal).

B. Executive Order 12114 purports to be the exclusive representation of the procedural requirements under NEPA in the context of federal actions outside the United States. The constitutionality of this position, in light of NEPA's silence on extraterritorial application and the absence of a congressional delegation, has yet to be tested. The provisions of Executive Order 12114 have been implemented in the Navy in Appendix E of OPNAVINST 5090.1A.

1. Applicability. As with NEPA in the United States, these procedural requirements are triggered by a major federal action. "Major federal actions" are actions involving substantial expenditure of time, money, and resources that affect the environment on a large geographic scale or have substantial environmental effects on a more limited geographical area and one that is substantially different or a significant departure from other actions previously analyzed with respect to environmental consideration. Deployment of ships, aircraft, or other military equipment and manpower are not "major actions."

2. Foreign policy considerations require coordination with the State Department (DOS) concerning environmental agreements and other formal

arrangements. All coordination and consultation will be accomplished by Assistant Secretary of the Navy (I & E) who will in turn coordinate through the appropriate Assistant Secretary of Defense. Informal, working-level communications and arrangements are not included in this coordination requirement. Other than informal working level arrangements, no communication concerning environmental matters shall be transmitted without coordination with Deputy Chief of Naval Operations (Logistics).

3. Executive Order 12114, as implemented in DoN, provides for three types of environmental analysis depending on where the impact occurs, i.e., in the global commons, the environment of a foreign nation, or protected global resources.

3704 REQUIRED ENVIRONMENTAL ANALYSES

A. The Global Commons. The global commons are geographical areas that are outside the jurisdiction of any nation. Global commons include the oceans outside territorial limits and Antarctica, but not contiguous zones, fisheries zones or foreign nations.

1. When a major federal action would "significantly affect the environment" of the global commons, an environmental impact statement (EIS) must be prepared. The statement may be a specific statement for the particular action, or a tiered generic statement covering an entire class of similar actions. To determine whether an EIS is required, the action command shall consult with CNO (OP-04) or prepare an environmental assessment (EA) for review by CNO (OP-04).

2. No action concerning the proposal that would cause a significant affect to the environment, or limit the choice of reasonable alternatives, may be taken until these documentation requirements have been met. Where emergency circumstances make it necessary to take an action that has a significant affect on the environment without meeting the requirements of this section, the Navy command concerned shall consult with the CNO (OP-04). These emergency measures include actions that must be taken immediately to promote the national defense or security and actions necessary for the protection of life or property. Consultation does not mean prior approval.

B. Foreign Nations. An "environmental study" or environmental review" must be prepared when a major federal action would significantly affect the environment of a foreign nation that is NOT involved in the action or would introduce a product, emission, or effluent which is prohibited or strictly regulated by federal law in the United States due to its toxic effects on the environment or its serious public health risk.

1. Environmental Studies (ES). These analyses are bilateral or multilateral environmental studies of the proposed action. The ES is conducted by

the United States and one or more foreign nations or by an international organization in which the United States participates.

2. Environmental Reviews (ER). The ER is a concise review of the environmental issues involved in the action. The ER is prepared unilaterally by the United States.

3. Duplication Not Required. If an environmental document (study or review) already exists for a particular action, no new document is required.

C. Protected Global Resources. Where a major federal action would significantly affect the environment of a "protected global resource" designated by the President, an EIS, environmental study, or environmental review must be prepared. No protected global resources have yet been designated.

3705 COMPLIANCE AT OVERSEAS FACILITIES

A. U.S. Facilities Operated by the Navy. The Navy programs to repair, maintain, construct, or upgrade U.S. facilities to ensure compliance with environmental standards of general applicability in the host country or jurisdiction, as modified by any applicable SOFAs or other international agreements. In addition, all facilities outside the U.S. shall comply with the worldwide baseline standards for environmental protection, as jointly developed by the DoD services.

B. Foreign Facilities Operated by the Navy. The Navy shall observe best management practices (BMP) to comply with environmental standards of general applicability in the host country or jurisdiction. The Navy need not undertake capital improvement projects to retrofit host country-provided facilities with pollution control measures. Unless otherwise provided in the pertinent SOFA, host countries are expected to fund environmental compliance projects at facilities that they provide.

3706 SITE VISITS AND INSPECTIONS OVERSEAS.

Federal law and Executive Orders on information and physical security matters, as implemented in Navy regulations and the SOFA, shall govern access of host country environmental officials to U.S. controlled fixed facilities.

A. Access by foreign officials to propulsion plant spaces of U.S. nuclear powered ships, or to naval nuclear propulsion information, is not authorized as established in OPNAVINST 5510.1H (NOTAL) and OPNAVINST 5510.55 (NOTAL) without CNO approval (OP-06 lead).

B If there are no provisions governing access, the senior U.S. commander of U.S forces in the host country shall determine if access is in the best interest of the U.S. If access is recommended, OP-04 shall be notified at least three working days before the visit This notification shall include confirmation that the intended

access will not set an adverse precedent for other commands. Access may then be granted to host country environmental officials responsible for national pollution control matters. If access is denied, OP-04 and the U.S. ambassador to the country shall be notified immediately.

COMMON ENVIRONMENTAL ACRONYMS

AA EPA	Assistant Administrator
ACHP	Advisory Council on Historic Preservation (36 C.F.R Part 800)
ACNO	Assistant Chief of Naval Operations
ACO	Administrative Consent Order
AESO	Aircraft Environmental Support Office
AGL	Above Ground Level
AHERA	Asbestos Hazard Emergency Response Act of 1986 (see TSCA)
AHPA	Archeological & Historical Preservation Act of 1974 (16 U.S.C. §§ 469-469c)
AICUZ	Air Installation Compatible Use Zone
AIRFA	American Indian Religious Freedom Act
ALJ	Administrative Law Judge
AO	Administrative Order
APA	Acid Precipitation Act of 1980 (42 U.S.C. §§ 8901-8912) Administrative Procedure Act (5 U.S.C. §§ 551-559, 701-703)
APN	Aircraft Procurement, Navy
APZ	Accident Potential Zone
AQCR	Air Quality Control Region
AQMD	Air Quality Management District
ARAR	Applicable or Relevant and Apprpriate Requirements
ARPA	Archeological Resources Protection Act of 1979 (16 U.S.C. §§ 470aa-47011)

ASN(I&E)	Assistant Secretary of the Navy for Installations and the Environment
ATSDR	Agency for Toxic Substances & Disease Registry
BACT	Best Available Control Technology
BASH	Bird Aircraft Strike Hazard
BAT	Best Available Technology
BATAE	Best Available Technology Economically Achievable
BCP	Base Comprehensive Planning
BCT	Best Conventional Technlogy
BDAT	Best Demonstrated Available Technology
BOD	Biological Oxygen Demand
BPATT	Best Practicable Available Treatment Technology
BPCT	Best Practical Control Technology
BPCTCA	Best Practical Control Technology Currently Available
BPT	Best Practicable Technology
BUMED	U.S. Navy Bureau of Medicine and Surgery
CAA	Clean Air Act (42 U.S.C. §§ 7401-762L)
CAPA	Critical Aquifer Protection Area
CATEX	Categorical Exclusion
CCD	Coastal Consistency Determination
CEQ	Council on Environmental Quality
CERCLA	Comprehensive Environmental Response, Compensation & Liability Act of 1980 (42 U.S.C. §§ 9601-9675)
CERCLIS	Comprehensive Environmental Response, Compensation and Liability Information System

CFC	Chlorofluorocarbon
CFR	Code of Federal Regulations
CFST	Contaminated Fuel Settling Tank
CHINFO	Chief of Information
CHT	Collection, Holding & Transfer System
CINC	Commander-in-Chief
CNEL	California Noise Emission Level
CNET	Chief of Naval Education and Training
CNO	Chief of Naval Operations
CO	Carbon Monoxide (poisonous) Commanding Officer (non-poisonous)
COCO	Contractor-Owned, Contractor-Operated Facility
COD	Chemical Oxygen Demand
COE	Corps of Engineers, Army
COMNAVFACENGCOM	Commander, Naval Facilities Engineering Command
COMNAVSUPSYSCOM	Commander, Naval Sypply System Command
COMSC	Commander, Military Sealift Command
CONUS	Continental United States
COTR	Contracting Officer's Technical Representative
CRP	Community Relations Plan
CUD	Compatible Use District
CWA	Clean Water Act (see FWPCA)

CWT	Centralized Waste Treatment
CY	Calendar Year
CZ	Clear Zone
CZMA	Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451-1464)
DAF	Dilution/Attenuation Factors
DASD (E)	Deputy Assistant Secretray of Defense (Environment)
DCA	Dichloroethane
DCNO	Deputy Chief of Naval Operations
DCO	Delayed Compliance Order
DEIS	Draft Environmental Impact Statement
DERA	Defense Environmental Restoration Account
DERP	Defense Environmental Restoration Program
DESR	Defense Environmental Status Report
DFM	Diesel Fuel, Marine
DLA	Defense Logistics Agency
DMR	Discharge Monitoring Report
DMSO	Directions of Major Staff Offices
DO	Dissolved Oxygen
DOC	Department of Commerce
DOD	Department of Defense
DODDIR	Department of Defense Directive
DOE	Department of Energy
DOI	Department of Interior

DOJ	Department of Justice
DOL	Department of Labor
DON	Department of the Navy
DOT	Department of Transportation
DRMO	Defense Redistribution & Marketing Office
DRMS	Defense Redistribution & Marketing Service
DSMOA	Defense/State Memorandum of Agreement
DTRC	David Taylor Research Center
EA	Environmental Assessment; Endangerment Assessment
EC	Environmental Coordinator
ECAMP	Environmental Compliance Assessment & Management Program
ECE	Environmental Compliance Evaluation
ECRS	Environmental Compliance Reporting System
EFD	Engineering Field Division
EHM	Extremely Hazardous Material
EHS	Extremely Hazardous Substance
EIAP	Environmental Impact Analysis Process
EIS	Environmental Impact Statement
EM	Environmental Management Function
EO	Executive Order
EOD	Explosive Ordinance Disposal
EPA	Environmental Protection Agency
EPC	Environmental Protection Committee

EPCRA	Emergency Planning & Community Right-to-Know Act (42 U.S.C. §§ 11001-11050)
EPF	Environmental Planning Function
ERC	Emission Reduction Credits
ESA	Endangered Species Act (15 U.S.C. §§ 1531-1544)
ESP	Electrostatic Precipitation
ESPN	Environmental Sports Network
FEIS	Final Environmental Impact Statement
FEMA	Federal Emergency Management Agency
FFA	Federal Facilities Agreement
FFCA	Federal Facilities Compliance Agreement
FGD	Flue Gas Desulfurization
FIFRA	Federal Insecticide, Fungicide & Rodenticide Act (7 U.S.C. §§ 136-136y)
FLPMA	Federal Land Policy Management Act
FMP	Fleet Modernization Program
FOIA	Freedom of Information Act (see APA)
FONSI	Finding Of No Significant Impact
FR	Federal Register
FS	Feasibility Study
FWPCA	Federal Water Pollution Control Act (33 U.S.C. §§ 1251-1387)
FWS	Fish & Wildlife Service
Gal	Gallon
GAO	Government Accounting Office

GEP	Good Engineering Practice
GOCO	Government Owned-Contractor Operated Industrial Facility
GSA	General Services Administration
HABS	Historic American Buildings Survey
HAER	Historic American Engineering Record
HARM	Hazard Assessment Rating Methodology
HARP	Historic Archaeological Resources Protection
HAZMIN	Hazardous Waste Minimization
HC	Hydrocarbons
HCS	Hazard Communication Standard
HM	Hazardous Material (also HAZMAT)
HMIS	Hazardous Material Information System
HMTA	Hazardous Materials Transportation Act (49 U.S.C. §§ 1801-1813)
HMTID	Hazardous Material Turned into Disposal
HMTIS	Hazardous Material Turned into Store
HOC	Halogenated Organic Compounds
HRS	Hazard Ranking System
HS	Hazardous Substance
HSWA	Hazardous & Solid Waste Amendments of 1984 (see RCRA)
HUD	Housing and Urban Development
HW	Hazardous Waste
IAG	Interagency Agreement
IG	Inspector General

I/M	Inspection and Maintenance
IMO	International Maritime Organization (formerly IMCO)
IR	Installation Restoration
IRP	Installation Restoration Program
ISSA	Interservice Support Agreement
IWPP	Industrial Waste Pretreatment Process
IWTP	Industrial Wastewater Treatment Plant
JAG	Judge Advocate General
Kg	Kilogram
KVA	Kilovolt-ampere
LAER	Lowest Achievable Emission Rate
Ldn	Day Night Average Sound Level
LEPC	Local Emergency Planning Committee
LLRWPA	Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021b-j
LOGREQ	Logistics Requirements
LQG	Large Quantity Generator
LTM	Long Term Monitoring
MARPOL	International Maritime Convention for the Prevention of Pollution from Ships
MCL	Maximum Contaminant Level
MCLG	Maximum Contaminant Level Goal
MCO	Marine Corps Order
MCP	Military Construction Program

MEK	Methyl Ethyl Ketone
MEP	Maximum Extent Practicable
MESO	Marine Environmental Support Office
MILCON	Military Construction
MO	Manual of Operation
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
MPRSA	Marine Protection, Research, and Sanctuaries Act of 1972 (16 U.S.C. §§ 1431-1445; 33 U.S.C. §§ 1401-1445)
MRC	Maintenance Requirement Card
MSC	Military Sealift Command
MSD	Marine Sanitation Device
MSDS	Material Safety Data Sheet
MSW	Municipal Solid Waste
MSWLF	Municipal Solid Waste Landfill Facility
MTR	Minimum Technology Requirements
MWR	Morale, Welfare, and Recreation
NAAQS	National Ambient Air Quality Standards
NAPC	Naval Air Propulsion Center
NAVAIRSYSCOM	Naval Air Systems Command
NAVCOMPT	Comptroller of the Navy
NAVCOMPTINST	Comptroller of the Navy Instruction

NAVFACENGCOM
Naval Facilities Engineering Command

NAVFACENGCOM EFD:
Naval Facilities Engineering Command Engineering Field Division

NAVGRAM Naval telegram

NAVOSH Navy Occupational Safety and Health

NAVRESO Navy Resale System Office

NAVSEASYSCOM
Naval Sea Systems Command

NAVSPAWARSYSCOM
Naval Space and Warfare Systems Command

NAVSUPSYSCOM
Naval Supply Systems Command

NBAR Nonbinding Allocation of Responsibility

NCA Noise Control Act

NCEL Naval Civil Engineering Laboratory

NCP National Contingency Plan (40 CFR Part 300)

NECA Navy Environment Compliance Account

NECIS Navy Environmental Information System

NEESA Navy Energy and Environmental Support Activity

NEPA National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347)

NEPMG Navy Environmental Program Management Group

NEPSS Naval Environmental Protection Support Service

NESHAP National Emissions Standards for Hazardous Air Pollutants

NESO Navy Environmental Support Office

NHPA	National Historic Preservation Act
NIF	Navy Industrial Fund
NJAG	Navy Judge Advocate General
NM	Nautical Mile
NMFS	National Marine Fisheries Service
NNPI	Nuclear Propulsion Plant Information
NNPS	Nuclear Propulsion Plant Space
NOAA	National Oceanic and Atmospheric Administration
NOD	Notice of Deficiency
NOI	Notice of Intent
NON	Notice of Noncompliance
NOSC	Naval Oceans Systems Center
NOSCDR	Navy On-scene Commander
NOTAL	Not to All
NOTW	Navy Owned Treatment Works
NOV	Notice of Violation
NOx	Nitrogen Oxide
NPDES	National Pollutant Discharge Elimination System
NPDWR	National Primary Drinking Water Regulations
NPDWS	National Primary Drinking Water Standards
NPL	National Priorities List
NRC	National Response Center; Nuclear Regulatory Commission
NRM	National Resource Management

NRMPM	Natural Resources Management Procedures Manual
NRT	National Response Team
NSPS	New Source Performance Standards
NSTM	Naval Ships Technical Manual
NSWC	Naval Surface Weapons Center
NWPA	Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10101- 10270)
OASD(E)	Office of Assistant Secretary of Defense for Environment
OCM	Oil Content Monitor
OECM	Office of Enforcement and Compliance Monitoring
OERR	Office of Emergency and Remedial Response
OESO	Ordinance Environmental Support Office
OFFE	Office of Federal Facilities Enforcement
OGC	Office of General Counsel
OHS	Oil or Hazardous Substances
OJAG	Office of the Judge Advocate General
OLA	Office of Legislative Affairs
OMB	Office of Management and Budget
O & M	Operations and Maintenance
O & MN	Operations and Maintenance, Navy
OP-OON	Director, Naval Nuclear Propulsion Program
OPN	Other Procurement, Navy
OPNAV	Office of the Chief of Naval Operations
OPNAVINST	CNO Instruction

OPORDS	Operational Orders
OPREP	Operational Report
OSC	On-Scene Coorinator
OSCDR	On-Scene Commander
OSD	Office of the Secretary of Defense
OSHA	Occupational Safety & Health Act of 1970 (29 U.S.C. §§ 651-678); Occupational Safety & Health Administration
OSOT	On-Scene Operation Team
OSW	Office of Solid Waste
OSWER	Office of Solid Waste and Emergency Response
O-SWOB	Oil-Ship Waste Offload Barges
OTA	Office of Technology Assessment
OWHT	Oily Waste Holding Tank
OWS	Oil/Water Separator
PA	Preliminary Assessment; Pollution Abatement
PA/SI	Preliminary Assessment/Site Inspection
PCB	Polychlorinated Biphenyl
PCR	Pollution Control Report
PEL	Permissible Exposure Limit
PHE	Public Health Examination
PHSA	Public Health Service Act (see SDWA)
PL	Public Law
PM10	Particulate Matter less than 10 microns in diameter

POA & M	Plan of Action and Milestones
POC	Point of Contact
POL	Petroleum-Oil-Lubricant
POM	Program Objective Memorandum
POTW	Publicly-Owned Treatment Works
PPB	Parts Per Billion
PPM	Parts Per Million
PRP	Potentially Responsible Party
PSD	Prevention of Significant Deterioration
PWC	Public Works Center
PWS	Public Water System
QA/QC	Quality Assurance/Quality Control
QRP	Qualified Recycling Program
RA EPA	Regional Administrator; Remedial Action
RACT	Reasonably Available Control Technology
RAP	Remedial Action Plan
RCRA	Resource Conservation and Recovery Act (42 U.S.C. §§ 6901-6992)
RD	Remedial Design
R & D	Research and Development
RD/RA	Remedial Design/Remedial Action
RDT & E	Research, Development, Test, and Evaluation
REO	Regional Environmental Office
RESO	Regional Environment Support Office

RI	Remedial Investigation
RI/FS	Remedial Investigation/Feasibility Study
ROD	Record of Decision
RQ	Reportable Quanity
RRT	Regional Response Team
SARA	Superfund Amendments & Reauthorization Act of 1986 (see CERCLA and EPCRA)
SARA III	Superfund Amendments & Reauthorization Act Title III (Emergency Planning and Community Right-to-Know-Act)
SCN	Ship Construction, Navy
SCP	Spill Contingency Plan
SDOSS	Sewage Disposal Operation Sequencing System
SDWA	Safe Drinking Water Act (42 U.S.C. § 300f-j)
SECDEF	Secretary of Defense
SECNAV	Secretary of the Navy
SERC	State Emergency Response Commission
SESO	Ship's Environmental Support Office
SHIPALT	Ship Alteration
SHPO	State Historic Preservation Officer
SI	Site Investigation
SIC	Subject Identification Code
SINKEX	Sinking Exercise
SIP	State Implementation Plan
SMCL	Secondary MCL

SMCRA	Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §§ 1201–1328)
SMSA	Standard Metropolitain Statistical Area
SNC EPA	Significant Noncomplier
S02	Sulfur Dioxide
SOFA	Status of Forces Agreement
SOPA	Senior Officer Present Ashore (or Afloat)
SPCC	Spill Prevention Control and Countermeasure
SQG	Small Quantity Generator
STEL	Short-term Exposure Limit
SUPSALV	Supervisor of Salvage
SUPSHIPS	Supervisor of Shipbuilding
SWDA	Solid Waste Disposal Act (see RCRA)
SWMU	Solid Waste Management Unit
SWTCP	Surface Water Toxic Controls Program
SYDP	Six Year Defense Plan
TCA	Trichloroethane
TCE	Trichloroethylene (Trichloroethene)
TDD	Treatment, Destruction, and Disposal (TDD) Facilities
TCLP	Toxicity Characteristic Leaching Procedure
TPQ	Threshold Planning Quantity
TQL	Total Quality Leadership
TRC	Technical Review Committee

TSCA	Toxic Substances Control Act (15 U.S.C. §§ 2601-2671)
TSD	Treatment, Storage or Disposal
TSDF	Treatment, Storage & Disposal Facility
TSP	Total Suspended Particulates
TSS	Total Suspended Solids
UIC	Underground Injection Control
UORA	Used Oil Recovery Act
USCG	United States Coast Guard
USDA	United States Department of Agriculture
USFWS	U.S. Fish and Wildlife Service
USNPS	U.S. National Park Service
UST	Underground Storage Tank
VA	Veterans' Administration
VOC	Volatile Organic Compound
WOCT	Waste Oil Collecting Tank
WPN	Weapons Procurement, Navy
WQA	Water Quality Act of 1987 (see FWPCA)
WQMC	Water Quality Management Control
WQMP	Water Quality Management Plan
YCC	Youth Conservation Corps

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   FTS 264-1840
   States covered: NY, NJ, Puerto Rico, Virgin Islands

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   841 Chestnut Building
   Philadelphia, PN 19107
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   FTS 597-1168
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   345 Courtland St., N.E.
   Atlanta, GA 30365
   CML (404) 347-3376
   FTS 257-3776
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5. EPA REGION V (THE HEARTLAND)
   230 Dearborn St.
   Chicago, IL 60604
   CML (312) 353-2035
   FTS 353-2035
   States covered: IL, IN, MI, MN, OH, WI

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145 Ross Ave
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FTS 255-2260
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FTS 757-2823
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Program	Alabama	Alaska	Arizona
Solid Waste	205/271-7761	907/789-6751	602/257-2176
Hazardous Waste	205/271-7726	907/789-6751	602/257-2331
Superfund Remediation	205/271-7939	907/789-4877	602/257-6841
Air Quality	205/271-7861	907/465-2666	602/257-2308
Water Quality	205/271-7826	907/465-3342	602/257-2305
Coastal Zone Management	205/479-2336	907/789-3151	****
Wetlands	205/271-7984	907/789-3151	****
Oil Spills	205/260-2700	907/465-2630	602/257-2175
Public Info	205/271-7700	907/465-3341	602/257-2300

* * *

Program	California	Connecticut	D.C.
Solid Waste	916/322-3330	203/566-5847	202/382-4627
Hazardous Waste	916/324-1826	203/566-5712	202/382-4610
Superfund Remediation	916/427-4990	203/566-5486	703/920-9810
Air Quality	916/322-2990	203/566-3310	202/382-7548
Water Quality	916/322-3132	203/566-2588	202/382-5682

Program	California	Connecticut	D.C.
Coastal Zone Management	415/543-8555	203/566-7404	****
Wetlands	****	203/566-7280	202/475-7791
Oil Spills	916/322-3330	203/566-4633	202/382-2188
Public Info	916/322-6315	203/566-5599	202/382-2080

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Program	Florida	Georgia	Hawaii
Solid Waste	904/922-6104	404/656-2836	808/543-8227
Hazardous Waste	904/488-0300	404/656-7802	808/543-8226
Superfund Remediation	904/488-0900	404/656-4713	808/543-8249
Air Quality	904/488-1344	404/656-4687	808/543-8200
Water Quality	904/488-3601	404/656-4905	808/543-8309
Coastal Zone Management	904/488-6221	912/262-2350	808/543-8335
Wetlands	904/488-0130	404/557-2770	808/543-8335
Oil Spills	904/488-0190	404/656-3214	808/543-8249
Public Info	904/488-4805	404/656-4713	808/543-8304

Programs	Illinois	Louisiana	Maryland
Solid Waste	217/782-6760	504/765-0355	301/631-3304
Hazardous Waste	217/782-8700	504/765-0355	301/631-3304
Superfund Remediation	217/782-6760	504/765-0700	301/631-3437
Air Quality	217/782-7326	504/765-0219	301/631-3260
Water Quality	217/782-1654	504/765-0634	301/631-3567
Coastal Zone Management	217/782-1654	504/765-0634	301/631-3567
Wetlands	217/782-6760	504/765-0634	301/631-3609
Oil Spills	217/785-5735	504/765-0634	301/331-2950
Public Info	217/782-2829	504/765-0741	301/631-3000

* * *

Programs	Mississippi	New Jersey	New York
Solid Waste	517/373-6195	609/530-8591	518/457-6603
Hazardous Waste	517/373-2730	609/633-1408	518/457-1684
Superfund Remediation	517/373-9837	609/984-2902	518/457-5866
Air Quality	517/573-7023	609/292-6704	518/457-7230
Water Quality	517/373-1940	609/292-1637	518/457-6674
Coastal Zone Management	517/373-2730	609/292-2795	518/457-6674

Programs	Mississippi	New Jersey	New York
Wetlands	517/373-2730	609/292-1235	518/457-2224
Oil Spills	517/373-9837	609/292-2662	518/457-7469
Public Info	517/373-9937	609/292-3131	518/457-5400

* * *

Programs	N. Carolina	Pennsylvania	S. Carolina
Solid Waste	919/733-0692	215/832-6212	803/734-5200
Hazardous Waste	919/733-2178	215/832-6212	803/734-5200
Superfund Remediation	919/733-2801	215/832-6212	****
Air Quality	919/733-3340	215/832-6241	803/734-4750
Water Quality	919/733-5083	215/832-6130	803/734-5310
Coastal Zone Management	919/733-2293	****	803/734-5300
Wetlands	****	215/832-6340	803/734-5300
Oil Spills	404/347-2216	215/832-6130	803/734-5200
Public Info	704/336-5500	215/832-6000	803/734-5000

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Programs	Tennessee	Texas	Virginia
Solid Waste	615/741-3424	512/463-7760	804/225-2667
Hazardous Waste	615/741-3424	512/463-7760	804/225-2667

Programs	Tennessee	Texas	Virginia
Superfund Remediation	615/741-6287	****	804/225-2631
Air Quality	615/741-3931	512/451-5711	804/766-6035
Water Quality	615/741-2275	512/463-8028	804/367-0056
Coastal Zone Management	****	512/475-1467	804/367-0056
Wetlands	615/741-2275	512/475-1467	804/225-2667
Oil Spills	615/741-7883	512/463-6887	804/225-2667
Public Info	615/741-3657	512/463-2012	804/225-2667

* * *

Programs	Washington
Solid Waste	206/459-6322
Hazardous Waste	206/438-3000 800/633-7585
Superfund Remediation	****
Air Quality	206/459-6322
Water Quality	206/459-6835
Coastal Zone Management	206/459-6835 800/447-3330
Wetlands	206/459-6835
Oil Spills	206/753-2353
Public Info	206/459-6000

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