

LEGACY

The Newsletter of the Navy JAG Corps Environmental Law Community

"Operating in an environmentally sound manner is the Navy legacy for the 21st century. It's the Navy's way of life."
Naval Warfare Publication 4-11, "Environmental Protection"



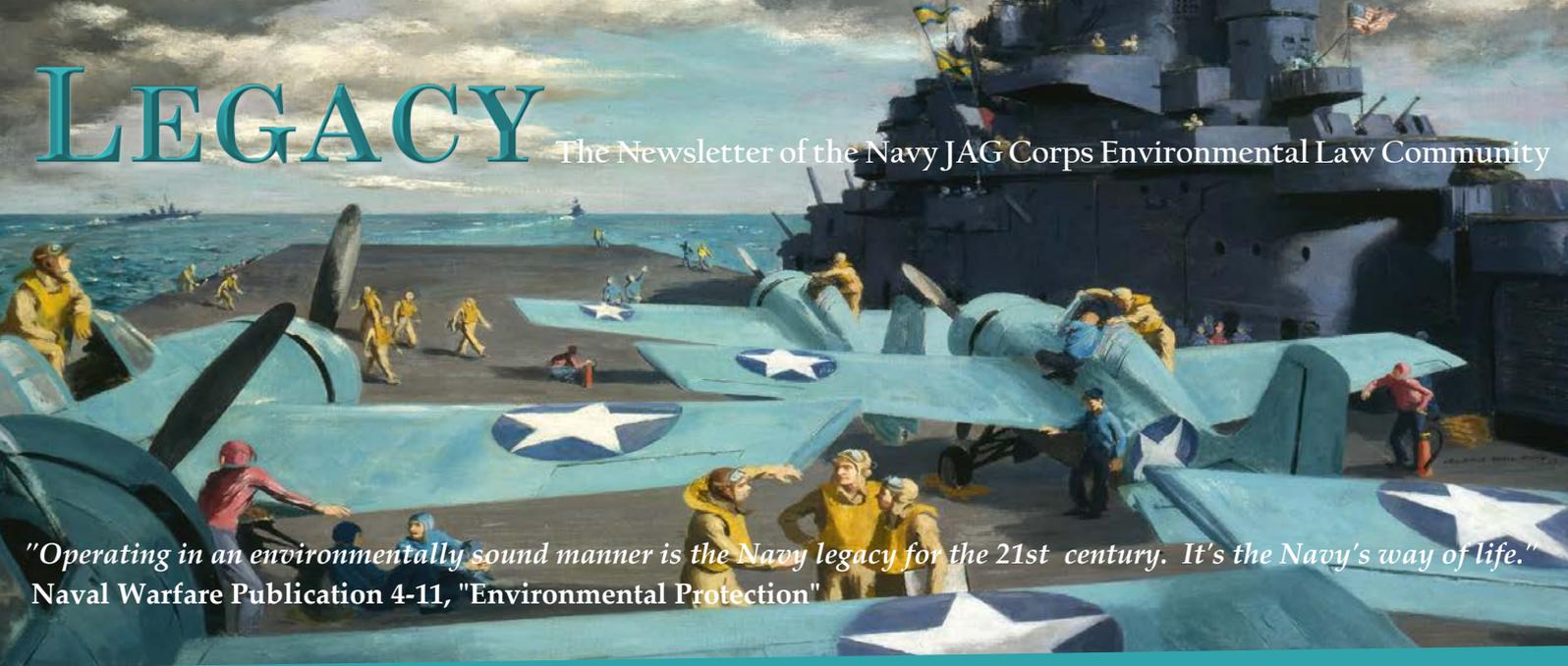
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Volume 20.1



Winter 2020

From the Director...

CAPT Meg Larrea, JAGC, USN

Happy New Year and welcome to the winter issue of LEGACY. This issue focuses on recent statutory and regulatory changes that affect our environmental practice. We also feature an article highlighting how the Navy works to help protect the Nation's natural and cultural treasures while still preserving our ability to effectively train and operate.

The end of 2019 yielded significant victories for the Navy in the environmental arena. Just before Christmas, the National Marine Fisheries Service (NMFS) issued its final rule pursuant to the Marine Mammal Protection Act allowing for the issuance of Letters of Authorization (LOAs) for the taking of marine mammals incidental to training and testing activities conducted in the Atlantic Fleet Training and Testing Study Area over the course of seven

years, extending the existing authorization from November 13, 2023, to November 13, 2025.

In September, NMFS issued a proposed rule which would similarly extend the authorization period for the Hawaii-Southern California Training and Testing Study Area from December 20, 2023, to December 20, 2025. The final rule is expected in the coming weeks.

Earlier in the fall, NMFS issued regulations to govern the taking of marine mammals incidental to the use of Surveillance Towed Array Sensor System Low Frequency Active sonar systems aboard U.S. Navy surveillance ships for training and testing activities in the western and central North Pacific Ocean and eastern Indian Ocean. The authorization is effective until August 11, 2026.

Meanwhile, the work continues on other fronts. The process for obtaining LOAs for training and testing activities in the Northwest Training and

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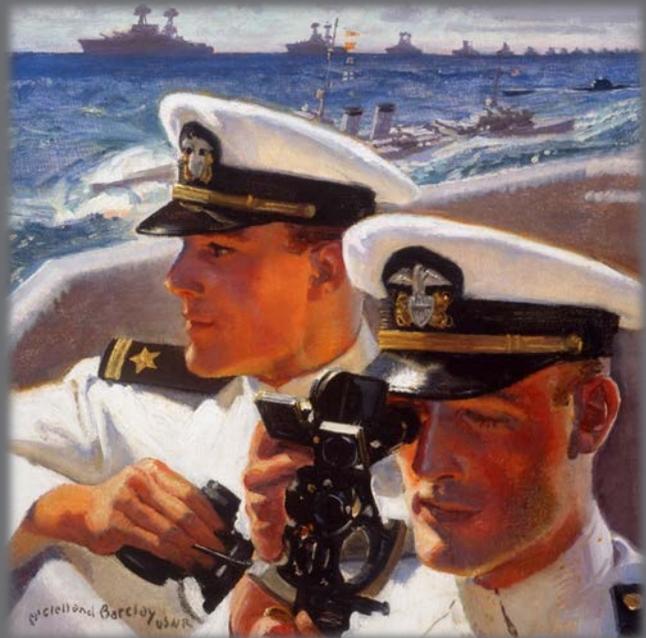


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Testing Study Area and the Mariana Islands Training and Testing Study Area is ongoing. Additionally, the Navy continues to move forward on the Northern Mariana Islands Joint Military Training Environmental Impact Statement (EIS) and the Fallon Range Training Complex Modernization EIS. Finally, Headquarters, Fleet, and Region environmental counsel are busy supporting the Navy Litigation Office and the Department of Justice in ever-present environmental litigation. It really does never end.

All of this would not be possible without the dedicated and enthusiastic efforts of our e-law team. Their work is truly a critical part of the Navy's mission to train, certify, and provide combat-ready naval forces in support of the National Defense Strategy. If you would like to be part of this exciting practice of law, please contact us at Code 12, or reach out to any e-law attorney.

As always, thank you for all you do to make our community great!



McClelland Barclay, USNR (1941) Naval History and Heritage Command

Upcoming Events

Mark your calendar for the following training opportunities:

Natural Resources Mgmt. ▪ March 23-26, 2020 ▪ Air Force Academy, CO

Adv. Environmental Law ▪ April 7-10, 2020 ▪ Washington, DC

Cultural Resource Mgmt. ▪ April 28-30, 2020 ▪ Newport, RI

Adv. Environmental Law ▪ May 5-8, 2020 ▪ San Diego, CA

For more information, visit <https://portal.secnav.navy.mil/orgs/JAG/12/training>

Header Art: Task Force Hornets, Lawrence Beall-Smith, 1943 (Naval History and Heritage Command)



CEQ Proposes Revisions to NEPA Regulations

LCDR Tim Parr, JAGC, USN

For the first time in over four decades, The Council on Environmental Quality (CEQ) is proposing a major overhaul of its regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* CEQ published a Notice of Proposed Rulemaking (NPR), “Update to the Regulations Implementing the National Environmental Policy Act,” on January 10, 2020, following its June 2018 Advanced Notice of Proposed Rulemaking which sought public input on potential ways to modernize, clarify, and streamline the NEPA review process. If implemented, the proposed changes to CEQ’s NEPA regulations, which include noteworthy reductions in the scope of and timeline for Federal environmental reviews, could significantly impact the Navy’s NEPA practice.

Congress enacted NEPA to establish a national policy for the environment, provide for the establishment of CEQ, and for other purposes. Section 101 of NEPA sets forth a national policy “to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a). Section 102 of NEPA establishes procedural requirements, applying this national policy to proposals for major Federal actions significantly affecting the quality of the human environment by requiring Federal agencies to prepare a detailed statement on: (1) the environmental impact of the proposed action; (2) any adverse effects that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action. 42 U.S.C. § 4332(2)(C). NEPA also established CEQ as an agency within the Executive Office of the President to administer Federal agency implementation of NEPA. 42 U.S.C. §§ 4342,

4344; *see also Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

CEQ promulgated its current regulations in 1978. At that time, President Carter issued Executive Order 11991 directing CEQ “[t]o reduce paperwork, to reduce delays, and at the same time to produce better decisions [that] further the national policy to protect and enhance the quality of the human environment.” 43 Fed. Register 55,978. Since then, CEQ has only substantively amended the regulations once, in 1986, to replace the “worst case” analysis requirement with a provision addressing the consideration of incomplete or unavailable information regarding reasonably foreseeable significant adverse effects. Since they were promulgated, the Supreme Court has afforded the CEQ regulations “substantial deference.” *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 374 (1989) (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)). The NEPA regulations apply to a wide range of federal actions, including permitting decisions, transportation and infrastructure development, and land management decisions.

“[A] national policy...to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”

CEQ’s current reform efforts spring from Executive Order (EO) 13807 of August 15, 2017 which established a “One Federal Decision” policy to improve agency coordination and accountability in the environmental review of infrastructure projects. The E.O. directed CEQ to “enhance and modernize the Federal environmental review and authorization process” by, among other initiatives, ensuring

“that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEQ’s authority to interpret NEPA to simplify and accelerate the NEPA review process.” Subsequently, a memorandum of understanding was signed by a dozen Federal agencies, including the Departments of Interior, Energy, Transportation, Agriculture, and Homeland Security, the Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (USACE), and the Federal Energy Regulatory Commission, to improve agency coordination and expedite major infrastructure project environmental reviews.

Streamlining efforts have also taken root in Federal agency NEPA implementing regulations, including page and time limitations for environmental impact statements (EISs) and environmental assessments (EAs) set by the Department of Interior, E.O. 13807 implementation guidance promulgated by the USACE, and various other revisions to internal regulations aimed at improving efficiency.

The proposed updates offered in the NOPR would alter central components of the existing NEPA process. Among the changes, the regulations would:

- Eliminate references to “direct,” “indirect,” and “cumulative” effects and instead place emphasis on effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action;
- Remove cumulative effects analysis entirely due to challenges in determining the geographic and temporal scope of such effects, which CEQ concluded had the effect of diverting significant attention and resources away from more important elements of the decision-making process;
- Exempt from NEPA non-Federal projects with “minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project,” although it’s unclear how this change would affect NEPA review of federal permitting and other regulatory decisions involving privately-funded projects;



Mary Neumayr, Chair, Council on Environmental Quality

- Define “reasonable alternatives” as “a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant”;
- Establish page count and time limits for EAs and EISs;
- Allow permit applicants and contractors to prepare EAs and EISs, subject to agency oversight;
- Authorize the use of prior and joint environmental review documents and decisions, and encourage Federal agencies to cooperate with State, Tribal, and local agencies to reduce duplication, while still noting that NEPA compliance does not require resolution of all conflicts with State, Tribal and local laws;
- Add “Tribal” to the phrase “State and local” throughout the regulations;
- Encourage, where practicable, a single NEPA review consistent with the One Federal Decision policy for projects that involve decisions by multiple Federal agencies;
- Permit the use of categorical exclusions adopted by other agencies as well as the utilization of a categorical exclusion even where extraordinary circumstances are present, provided that mitigating circumstances or conditions are sufficient to avoid significant effects;

- Require agencies to respond only to comments that are “substantive and timely submitted during the public comment period”;
- Requires parties to raise an issue during the public comment process in order to subsequently raise the issue in court; and,
- Clarify that harm from the failure to comply with NEPA can be remedied by compliance with NEPA’s procedural requirements and that these regulations create no presumption that a violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm.

CEQ believes the proposed regulatory changes can help reduce costs and delays in critical infrastructure projects. Environmental non-governmental organizations, however, have signaled alarm, charging that the rule will allow agencies to ignore the impacts of climate change. If finalized, these proposed changes will almost certainly be challenged in court. The proposed rule includes a severability provision that would allow the regulations to survive even if a provision is struck down.

Public comments on the proposed rule are due March 10, 2020. CEQ will host two public hearings on the proposed rule: one in Denver, CO, on February 11, 2020, and the other in Washington, DC, on February 25, 2020. Requests to extend the comment period have been submitted to CEQ, including one from members of Congress, though CEQ is under pressure to finalize the rule before it would be subject to the Congressional Review Act (CRA), 5 U.S.C. § 801 *et seq.* The CRA gives a new session of Congress a veto over regulations issued within 60 legislative days of the end of the last Congressional session. If Congress acts pursuant to the CRA, the regulation is null and void and may not be reissued in substantially the same form.

Note: A summary of the proposed revisions, on which this article relies in significant part, was published as an “Alert” by Van Ness Feldman LLP. See Jonathan D. Simon, Frances Bishop Morris, Joseph B. Nelson, *CEQ Proposes Revisions to Regulations Governing Federal Agency Implementation of NEPA*, January 10, 2020, <https://www.vnf.com/ceq-proposes-revisions-to-regulations-governing-federal-agency-implementation-of-nepa>.



Navy Updates NEPA Implementing Regulations

LCDR Scott Upright, JAGC, USN

In January 2020, the Department of the Navy (DON) promulgated changes to its internal regulations that establish the responsibilities and procedures for complying with the National Environmental Policy Act (NEPA). These changes, published in Title 32 of the Code of Federal Regulations, Chapter IV, Part 775, clarify the kinds of activities that fall under categorical exclusions (CATEXs) and which do not normally require additional NEPA analysis. This regulation took effect on January 6, 2020.

Categorical exclusions are defined in Council on Environmental Quality (CEQ) regulations as “categories of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect..., and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. § 1508.4. Under CEQ regulations, Federal agencies may determine what actions qualify as a CATEX.

Even where an activity falls within the scope of a categorical exclusion, the DON may still require further environmental analysis if “extraordinary circumstances” are present. Extraordinary circumstances are those circumstances in which an action may have significant environmental effects. 32 CFR § 775.6(e). The introductory guidance for this paragraph was substantially revised and states that determining whether a CATEX is appropriate—even if one or more extraordinary circumstances are present—requires consideration of the action’s potential effects and the environmental significance of those effects in terms of context (consideration of the affected region, interests, and resources) and intensity (severity of impacts). This language mirrors similar NEPA implementing regulations promulgated by other Federal agencies and is consistent with CEQ’s proposed rule updating its NEPA regulations.

Additionally, the changes to 32 CFR § 775.6(e) clarify two extraordinary circumstances a

decision maker must consider before applying a CATEX and add a new reporting requirement for some CATEXs. First, under 32 CFR § 775.6(e)(1)(v)(A), a decision maker must consider whether an action may “[h]ave more than insignificant or discountable effect on federally protected species under the Endangered Species Act or have impacts that would rise to the level of requiring an Incident Take Authorization under the Marine Protection Act irrespective of whether one is procured.” Second, paragraph (v)(D) of the same section was amended to require decision makers to determine if an action may have an adverse effect on archaeological resources or resources listed or eligible for listing on the National Register of Historical places when “compliance with Section 106 of the National Historic Preservation Act has not been resolved through an agreement executed between the DON and the appropriate historic preservation office and other appropriate consulting parties.”

Finally, in addition to documenting CATEXs per existing policy, 32 CFR § 775.6(e)(2) states, “[f]or actions with a documented CATEX where one or more extraordinary circumstances are present, a copy of the executed CATEX decision document must be forwarded for review to Navy Headquarters or Marine Corps Headquarters, as appropriate, before the action is implemented.” This additional reporting requirement will end on 6 January 2022, except for actions that fall under 32 CFR § 775.6(e)(1)(v)(A).

The new implementing regulations revise seven CATEXs (8, 11, 14, 22, 32, 34, and 36), combine two (14 and 15, deleting 15), and add five new categories (45-49). Below is a summary of the changes and the new CATEXs.

- CATEX 8: Added existing ranges to the list of items subject to routine repair and maintenance requirements.
- CATEX 11: Added submarines and ground assets to the list of mobile asset examples. Additionally, the term “home basing” was added along with new examples to improve the clarity of the CATEX.
- CATEX 14: Combined former CATEXs 14 and 15 into a single CATEX. The numbering was adjusted on subsequent CATEXs.

- CATEX 22 (former 23): Deletes language that contradicts DON’s changes to extraordinary circumstances criteria in this Final Rule regarding how to account for adverse effects on historic properties.

- CATEX 29 (former 32): Removed “renewals” of existing real estate grants, as renewal actions are covered by CATEX 30 (formerly 31).

- CATEX 33 (formerly 34): Revised to cover new construction that is compatible with existing land use. The test for whether this CATEX can be applied should focus on whether the proposed action generally fits within the designated land use of the proposed site.

- CATEX 35 (formerly 36): Added “modernization” and “repair” to clarify the application of the CATEX to support energy resilience, alternative energy, and renewable energy projects.

- CATEX 45 (new): Covers natural resources management actions undertaken or permitted pursuant to agreement with or subject to regulation by Federal, state, or local organizations having management responsibility and authority over the natural resources in question, including, but not limited to, prescribed burning, invasive species actions, timber harvesting, and hunting and fishing during seasons established by state authorities pursuant to their state fish and game management laws. The natural resources management actions must be consistent with the overall management approach of the property as documented in an Integrated Natural Resources Management Plan (INRMP) or other applicable natural resources management plan.

- CATEX 46 (new): Covers minor repairs in response to wildfires, floods, earthquakes, landslides, or severe weather events that threaten public health or safety, security, property, or natural and cultural resources, and that are necessary to repair or improve lands unlikely to recover to a management-approved condition (i.e., the previous state) without intervention. Covered activities must be completed within one year following the event and cannot include the construction of new permanent roads or other new permanent infrastructure. Such activities include, but are not limited to: Repair of existing essential

erosion control structures or installation of temporary erosion controls; repair of electric power transmission infrastructure; replacement or repair of storm water conveyance structures, roads, trails, fences, and minor facilities; revegetation; construction of protection fences; and removal of hazard trees, rocks, soil, and other mobile debris from, on, or along roads, trails, or streams.

- **CATEX 47 (new):** Covers modernization (upgrade) of range and training areas, systems, and associated components (including but not limited to targets, lifters, and range control systems) that support current testing and training levels and requirements. Covered actions do not include those involving a substantial change in the type or tempo of operation, or the nature of the range (i.e., creating an impact area in an area where munitions had not been previously used).

- **CATEX 48 (new):** Covers revisions or updates to INRMPs that do not involve substantially new or different land use or natural resources management activities and for which an EA or EIS was previously prepared that does not require supplementation pursuant to 40 CFR 1502.9(c)(1).

- **CATEX 49 (new):** Covers DON actions that occur on another Military Service's property where the action qualifies for a CATEX of that Service, or for actions on property designated as a Joint Base or Joint Region that would qualify for a CATEX of any of the Services included as part of the Joint Base or Joint Region. If the DON action proponent chooses to use another Service's CATEX to cover a proposed action, the DON must obtain written confirmation the other Service does not object to using its CATEX to cover the DON action. The DON official making the CATEX determination must ensure the application of the CATEX is appropriate and that the DON's proposed action was of a type contemplated when the CATEX was established by the other Service. Use of this CATEX requires preparation of a Record of CATEX or Decision Memorandum.



New Environmental Provisions in the FY2020 NDAA

CDR Holly Didawick, JAGC, USN



Negotiation and debate surrounding this year's National Defense Authorization Act (NDAA) for Fiscal Year 2020 (S. 1790/H.R. 2500) was unique — complicated by bitter partisan bickering and wide-ranging, contentious issues including border wall spending, per- and poly-fluoroalkyl substances (PFAS), the establishment of a Space Force, and military privatized housing reform, just to name a few.

Despite the political environment, Congress passed the FY20 NDAA and the President signed it into law on December 20, 2019, marking the NDAA's passage for the 59th consecutive year. The final conference report passed the House by a vote of 377-48 and the Senate by a vote of 86-8.

The following is a snapshot of several of the more contentious environmentally-focused provisions.

- **Third Party Review of Radium Testing by DON contractors.** The Secretary of the Navy (SECNAV) must now provide for an independent third-party data quality review of all radium testing by Department of the Navy (DON) contractors at Naval Weapons Industrial Reserve Plant, Bethpage, New York, and Hunters Point Naval Shipyard, San Francisco, California. The impetus for this provision was the 2012 discovery by Naval Sea Systems Command's Radiological Support Office of fraud committed by Tetra Tech EC, Inc., the DON contractor hired to conduct the radiological assessment and cleanup of Hunters Point. In 2016, the Navy put the radiological program on hold in order to conduct a comprehensive review of all radiological data produced by Tetra Tech. The following year, the Navy determined that some of the data was unreliable. The fraud allegations have led to numerous criminal,

civil, and inspector general investigations and other legal actions. The Navy instituted robust field oversight after the fraud was discovered. This oversight complements previously-existing review processes that led to the initial detection of the fraud in 2012. Enhanced safeguards during fieldwork, including third-party oversight, are already in place and functioning well.

• **Vieques Unexploded Ordnance Remediation.** SECNAV is directed to “purchase and operate a portable closed detonation chamber and water jet cutting system to be deployed at a former naval bombardment area outside the continental United States that is part of an active remediation program, using moneys made available for environmental restoration.” Though implicit, the target of this provision is the Vieques Environmental Restoration Program on the island of Vieques, Puerto Rico, and specifically the Navy’s plan to remove hazardous unexploded munitions from its former training grounds by open-air burning of dense vegetation and open-air munitions detonation. The unexploded munitions lie on 8,900 acres of former Navy land on the eastern end of the island, including 1,100 acres of what was once the live impact area. This is perhaps one of the more controversial provisions because compliance could mean a halt to munitions response work altogether.

Due to the nature and extent of the unexploded ordnance on Vieques, uncertainty about the location and size of unexploded munitions, and the risk that munitions may be obscured by, or hidden underneath, vegetation, there is great risk of accidental explosions – an operational safety risk to personnel that is far too high for site workers to conduct land clearing. Moreover, detonations are much safer than attempting to move potentially unstable ordnance to a closed detonation chamber or conducting fluid jet-cutting to remove explosives. Additionally, there are currently no U.S.-based suppliers for this technology and it would likely take several years to implement, further delaying clean-up. Operational costs would also increase significantly. DON’s position continues to be that the munitions on Vieques are not suitable for disposal by means other than thermal destruction through open-air detonation.

• **Per- and Polyfluoroalkyl Substances (PFAS).** Per- and polyfluoroalkyl substances (PFAS) are fluorinated organic chemicals that were used to make carpets, clothing, fabrics, paper packaging for food, and other materials (e.g., cookware) that are resistant to water, grease, or stains. Within DON, PFAS are most commonly found in aqueous film-forming foam (AFFF) used for firefighting at airfields and aboard ships. Some studies have shown that PFAS may interfere with the body’s natural hormones, increase cholesterol levels, affect the immune system, and increase the risk of some cancers.

The most significant obligations set forth in the NDAA will require monitoring of PFAS chemicals under the Safe Drinking Water Act, reporting requirements under the Emergency Planning and Community Right-to-Know Act’s Toxics Release Inventory, disclosures under the Toxic Substances Control Act, and increased PFAS sampling by the U.S. Geological Survey. The Department of Defense (DOD) is required to phase out use of fluorinated AFFF for firefighting on DOD installations by October 1, 2024, with the possibility of two one-year waivers. Shipboard use is exempted by the law. No funding may be obligated or expended to procure firefighting foam containing PFAS after October 1, 2023.

DOD must also undertake blood testing of firefighters exposed to AFFF and consider coordinated cleanup efforts with municipalities adjacent to contaminated DOD installations. All uncontrolled releases of AFFF, excepting for emergency response, as well as the use of AFFF in training exercises at military installations, are prohibited effective immediately. Additionally, SECNAV is directed to publish – no later than January 31, 2023 – a military specification for a fluorine-free fire-fighting agent for use at all military installations, in order to ensure such agent is available for use not later than October 1, 2023. A military specification, or MIL-SPEC, is a detailed document that describes the essential technical requirements for military-unique materiel or substantially modified commercial items. Finally, the NDAA encourages the use of cooperative agreements with states to address testing, monitoring, removal, and remedial actions relating to the contamination or suspected PFAS contamination of drinking, surface, or groundwater originating from DOD activities, and also encourages DOD to provide

uncontaminated water sources, or treatment of contaminated water sources, for agricultural purposes used to produce products destined for human consumption in areas found to be contaminated by reason of activities on a military installation.

DOD is aggressively pursuing a fluorine-free surfactant formulation with equivalent measures of fire-fighting performance and drop-in capability, meaning that the substitute formulation is equally efficient in fighting fires and can work within existing fire suppression systems. As yet, a viable alternative has not been identified, and DOD remains concerned that the statutory deadlines are impracticable. Relaxing the fire suppression performance requirements for AFFF, which could green light some existing non-fluorine formulations, would unnecessarily put personnel at risk. Accordingly, the focus is on identifying a non-fluorine alternative with equivalent effectiveness. Even after identifying a suitable substitute, field tests are needed to ensure that any replacement foam is capable of equivalent measures of performance, and those tests take time to complete. Only after a drop-in substitute is identified and thoroughly tested can a new military specification be developed, and only then can formulations consistent with that specification be produced and employed in existing fire suppression systems.

- **Aircraft Noise Modeling.** SECNAV is directed to conduct real-time sound monitoring at “no fewer than two” Navy installations and their associated outlying landing fields (OLFs) on the west coast where Navy combat-coded F/A-18, E/A-18G, or F-35 aircraft are based and operate, and where noise contours have been developed through noise modeling. The monitoring shall be conducted (1) during times of high, medium, and low activity over the course of a 12-month period, and (2) along and in the vicinity of flight paths used to approach and depart the selected installations and their OLFs. The intent of the legislation is to require sound monitoring at NAS Whidbey Island and OLF Coupeville, though the installation and OLF are not specifically identified. Notwithstanding this legislation, the DON and Federal agency approach to noise assessment is a long-established, widely-employed, federally-accepted, court-tested, and legally-defensible modeling protocol.

- **Red Hill Engagement.** At least once every quarter for the next five years, SECNAV or his designee must hold a public information meeting to provide up-to-date information about the Red Hill Bulk Fuel Storage Facility on Oahu, Hawaii. This requirement is largely duplicative, as the Navy already has a communication plan in place to regularly disseminate information to the public and stakeholders.

- **Extreme Weather Budget Line Item.** The Secretary of Defense (SECDEF) is directed to include a budget line item in the annual budget submission for adaptation to, and mitigation of, effects of extreme weather on military networks, systems, installations, and facilities. SECDEF must also estimate the anticipated adverse impacts to the readiness of the Department during the budget year of the loss of, or damage to, networks, systems, installations, facilities, training ranges, or other Department assets, as a result of extreme weather events.

- **Climate Vulnerability and Risk Assessment Tool.** SECDEF is required to determine whether an existing climate vulnerability and risk assessment tool is available or can be adapted for use to quantify the risks associated with extreme weather events.

- **Military Installation Resilience Projects.** SECDEF is directed to carry out military construction projects for military installation resilience.

Work on the Fiscal Year 2021 NDAA kicked off when the President’s Budget was released on 10 February. Thankfully, this year the Department’s legislative proposals are not stalled at OMB because of a prolonged government shutdown. Navy OLA will continue to advocate for the Navy’s proposals within DON and on the Hill. Next year’s NDAA promises to be just as contentious, with DOD land withdrawal proposals for Nellis Air Force Base and Naval Air Station Fallon as well as various resiliency proposals (think cyber, installation, 5G, electric grid, extreme weather). Stay tuned.



A Case for Balance: Marine National Monument and Sanctuary Designations

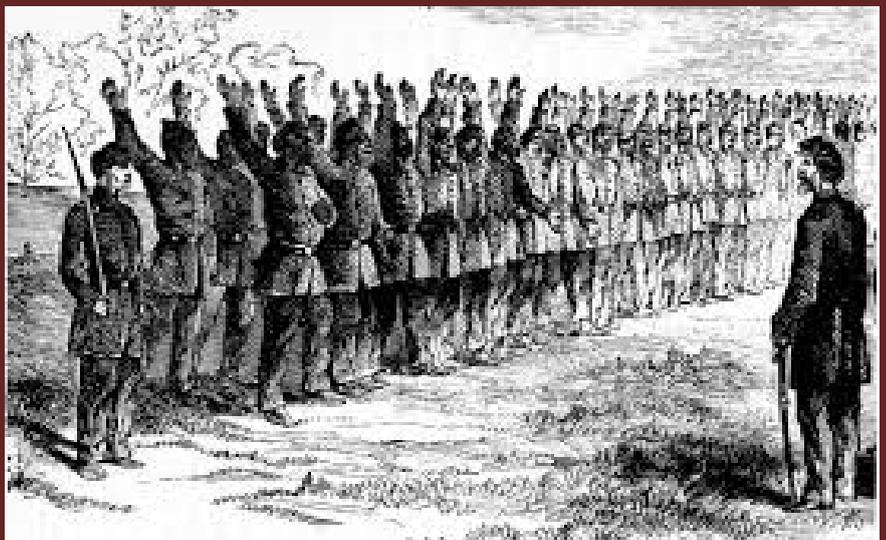
CAPT Randy Vavra, JAGC, USN

On January 12, 2017, just days before he was to leave office, President Obama designated a new national monument in Beaufort, South Carolina – established pursuant to the Antiquities Act of 1906 (54 U.S.C. § 320301) – to honor the period in American history known as the Reconstruction Era (1861-1898). Composed of several historic landmarks and objects of historic interest in the Beaufort area, the Reconstruction Era National Monument pays tribute to an era during which the United States grappled with the integration of millions of newly-freed African Americans into its social, political, and economic life. The monument includes Camp Saxton, named after U.S. Army Brigadier General Rufus Saxton, where the First South Carolina Regiment Volunteers mustered into the Union Army and trained from November 1862 to January 1863. Brigadier General Saxton, the military governor of the abandoned plantations in the Department of the South, received permission to recruit five thousand African Americans, mostly former slaves, into the Union Army. According to the Presidential Proclamation establishing the Monument, the former slaves assumed that military service would lead to rights of citizenship. Camp Saxton was also the location of historic ceremonies on January 1, 1863, to announce and celebrate the issuance of the Emancipation Proclamation, which freed all slaves in states then "in rebellion" against the United States.

Camp Saxton is located on lands

administered by the U.S. Department of the Navy at Naval Support Facility Beaufort, South Carolina. Prior to the President's Proclamation establishing the monument, naval personnel from the base, region, and headquarters staffs worked directly with the National Park Service and the President's Council on Environmental Quality to ensure the designation of the monument on Navy lands would not impact military readiness. The Navy supported the designation once it was assured there would be no impact to military readiness.

While designating a national monument under the Antiquities Act can be accomplished through a Presidential Proclamation, the same is not true of protective designations under other laws. For instance, more elaborate requirements must be followed before a national marine sanctuary can be designated pursuant to the National Marine Sanctuaries Act (16 U.S.C. § 1431 *et seq.*). Before a marine sanctuary can be designated, a notice must be published in the Federal Register, an Environmental Impact Statement must be completed in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 *et seq.*) (NEPA), a draft management plan must be developed, and regulations must be promulgated. During this process, the Navy works with the Office of National Marine Sanctuaries to ensure sanctuary proposals are



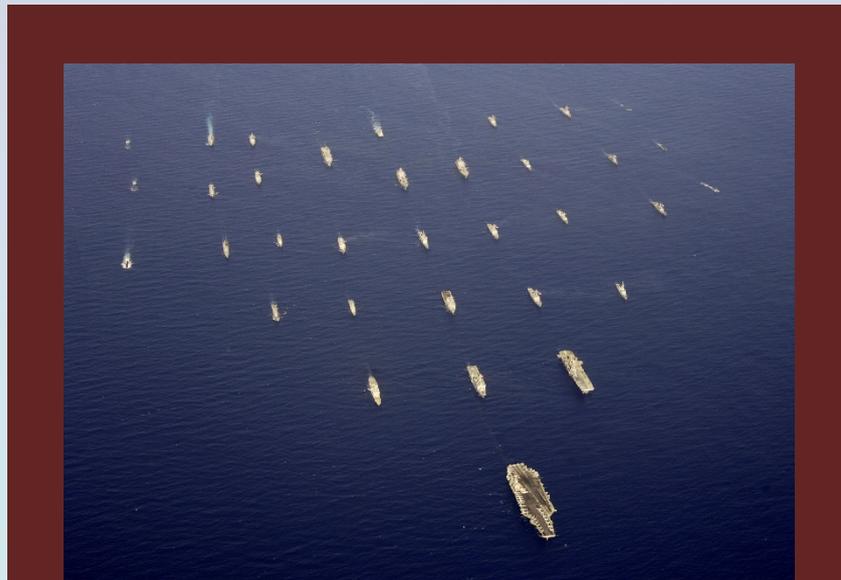
Company A, First South Carolina Regiment Volunteers

compatible with the Navy mission. One recent example of cooperative work led to the designation of the Mallow Bay-Potomac River National Marine Sanctuary. Navy personnel worked with the National Oceanic and Atmospheric Administration to ensure the terms of the sanctuary designation did not encroach upon Navy or Marine Corps activities.

Although the Navy works hard to support compatible resource protection on and near our bases and operating areas, monuments and sanctuaries can present encroachment concerns. Establishment of the Northwest Hawaiian Islands Marine National Monument (later renamed the Papahānaumokuākea Marine National Monument) in 2006, for example, illustrates the real impact on naval activities that can result from such designations.

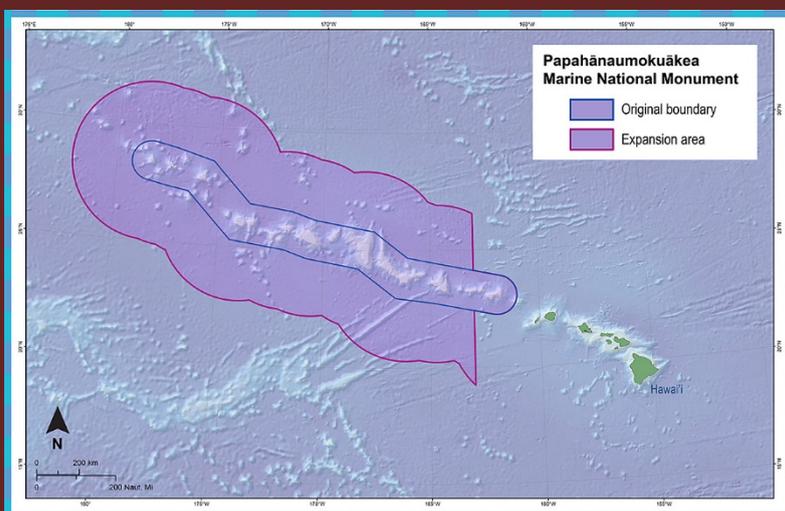
The Papahānaumokuākea Marine National Monument encompasses 582,578 square miles of the Pacific Ocean (1,508,870 square kilometers), and includes the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, the Midway National Wildlife Refuge, the Hawaiian Islands National Wildlife Refuge, and the Battle of Midway National Memorial. The monument was established in 2006 by Presidential Proclamation pursuant to the Antiquities Act, 16 U.S.C. §§ 431-433. It was expanded to its current size in 2016.

The Papahānaumokuākea Marine National Monument designation contained the following exemption for Armed Forces activities: “The prohibitions required by this proclamation



RIMPAC Battle Group 2006

shall not apply to activities and exercises of the Armed Forces (including those carried out by the United States Coast Guard) that are consistent with applicable laws.” Notwithstanding this language, on June 28, 2006, the National Resource Defense Council (NRDC) issued a press release announcing its intent to sue the Navy to halt military readiness training during the 2006 Rim of the Pacific (RIMPAC) naval exercises, including in the Papahānaumokuākea Monument, in which NRDC senior attorney Joel Reynolds remarked that “[i]t is absurd to designate a Marine National Monument one week, and then authorize the Navy to threaten endangered whales and other marine mammals in the region with high-intensity sonar the next.” NRDC subsequently filed suit, and on July 3, 2006, U.S. District Court Judge Florence-Marie Cooper (N.D. Calif.) issued a temporary



Papahānaumokuākea Marine National Monument

The Northwestern Hawaiian Islands Marine National Monument was established by Presidential Proclamation 8031 on June 15, 2006 under the authority of the Antiquities Act (16 U.S.C. §§ 431-433). It was expressly created to protect an exceptional array of natural and cultural resources. A year later, it was given its Hawaiian name, Papahānaumokuākea.

restraining order blocking the Navy’s use of mid-frequency active sonar during RIMPAC. Judge Florence-Marie Cooper based her order on NEPA, finding that the Navy should have considered holding the exercise in a less densely populated marine habitat. The Navy ultimately elected to settle the case, agreeing to limits on sonar use and the employment of additional mitigation measures. In a subsequent press release issued by NRDC on July 7, 2006, the organization boasted that the settlement “[p]revents the Navy from using sonar within the newly established Northwestern Hawaiian Islands National Monument or within a 25-nautical-mile sonar buffer zone around it.”

In 2008, NRDC again sued to stop the Navy from undertaking military readiness activities in the Papahānaumokuākea Marine National Monument. On February 6, 2008, U.S. Magistrate Judge Elizabeth Laporte (N.D. Calif.) enjoined the Navy’s use of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar in several ocean areas, including the Papahānaumokuākea Marine National Monument, based on alleged violations of the Marine Mammal Protection Act, NEPA, and the Administrative Procedures Act. The Navy once again elected to settle the case to allow critical military readiness training, including LFA sonar use, to continue. The settlement required the Navy to adhere to mitigation measures on the use of LFA sonar and avoid certain specified areas, including the Papahānaumokuākea Marine National Monument and the Hawaiian Islands Humpback Whale Marine Sanctuary. Once again, the NRDC’s press release trumpeted that under the court order the Navy “training cannot occur near ... the Papahānaumokuākea.”

National monument and sanctuary designations protect the Nation’s natural and cultural treasures for the enjoyment of all, promote historical and scientific understanding, and – in the case of marine national monuments and sanctuaries – protect marine areas of outstanding resource biodiversity and scientific, cultural, and aesthetic value, and provide for the long-term persistence of these natural and cultural legacies. Without such designations, many areas of natural and cultural significance would be in jeopardy. However, the Nation also has a compelling interest in protecting national security by ensuring military preparedness and a strong defensive capability. The Navy is committed to environmental conservation and protection and natural resource preservation. Such efforts, however, must always be carefully balanced to ensure the Navy remains a strong and agile force against our Nation’s enemies.



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If you are interested in writing for LEGACY, contact CDR David Shull at [redacted]

The Environmental Law Division (Code 12) provides legal advice, assistance, research, interpretation, representation, and training involving environmental and energy laws and policy issues as they pertain to Fleet training, testing, and naval operations, as well as environmental compliance ashore.

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