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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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From the Director . . .

CDR Brendan Burke, JAGC, USN

In June, I will turn over my role as director of the Environmental Law Division (Code 12) to Captain Randy Vavra. Welcome aboard, Captain Vavra!

Captain Vavra brings a wealth of experience and training to his new role as the leader of the Navy JAG Corps Environmental Law Community. He most recently served as Senior Counsel for Fleet and Operational Law in the Office of the Assistant Secretary of the Navy (Energy, Installations, and Environment). Previous environmental law assignments have included tours as deputy fleet environmental counsel for Commander, U.S. Pacific Fleet; legislative counsel (environment and energy portfolio) in the Navy's Office of Legislative Affairs; Force Judge Advocate at Joint Region Marianas on Guam; and legal counsel to the Deputy Chief of Naval Operations (Fleet Readiness and Logistics/OPNAV N4).

My tour as Code 12 director has been exceptionally rewarding. With your help, we launched the *LEGACY* newsletter, started a blog to share new ideas in real time, created a vast online knowledge-sharing resource, enhanced cooperation and collaboration between members of our community, and generated a tremendous amount of interest in the Navy JAG Corps for the environmental law specialty. I am certain that Captain Vavra will lead Code 12 and the Navy JAG Corps Environmental Law Community to even higher achievements, and I look forward to remaining a part of the team. See you in the fleet!

June is National Ocean Month!

For more information,
check out our recent blog post:
<https://portal.secnav.navy.mil/orgs/JAG/12/blog/Lists/Posts/Post.aspx?ID=4>

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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Uniform National Discharge Standards: Balancing Environmental Protection and Combat Readiness

Mr. John Kauffman and Mr. Mike Pletke, OPNAV N45 (Environmental Readiness Division)

Environmental protection and environmental compliance are sometimes perceived as impediments to mission success. But environmental protection and combat readiness are not mutually exclusive. In fact, they can be highly compatible objectives. The Clean Water Act's (CWA) Uniform National Discharge Standards (UNDS) program for discharges from vessels of the Armed Forces is a prime example.

The CWA, 33 U.S.C. § 1251 et seq., provides a comprehensive federal framework for regulating discharges of pollutants into the navigable waters of the United States. Navigable waters include ocean waters off the U.S. coastline that make up the territorial sea and contiguous zone.

In near-shore waters, the federal government and coastal state governments share authority to enact laws governing vessel-source pollution, including discharges into or onto the water column. In the 1990s, the Navy considered that coastal states individually exercising their regulatory authority would enact a patchwork of assorted and dissimilar discharge controls applicable to Navy ships operating along the coastline. This could preclude ships that did not meet a particular state's standard from operating in large swaths of the U.S. territorial sea, or require ship designers and builders to incorporate pollution-control equipment to achieve the most stringent standards at the expense of mission-critical weaponry and vital operational equip-

ment. Both prospects were unacceptable, so the Navy asked Congress for a uniform standard applicable to vessels of the Armed Forces in all U.S. coastal waters.

In response, Congress passed section 325 of the 1996 National Defense Authorization Act (Public Law 104-106), amending the CWA to permit the development of uniform standards to control certain discharges incidental to the normal operations of vessels of the Armed Forces. The new provision, section 312(n) of the CWA, established the UNDS program. The UNDS program allows the Navy to operate within U.S. coastal waters, subject to a single set of discharge standards, and

gives ship designers the flexibility to configure Navy ships with marine pollution-control equipment to meet uniform requirements without sacrificing mission critical equipment.

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Section 312(n) directs the Secretary of Defense (SECDEF) and the Environmental Protection Agency (EPA) Administrator to develop, in consultation with interested states, discharge standards applicable to vessels of the Armed Forces. SECDEF delegated authority under UNDS to the Navy. The Environmental Readiness Division of the Office of the Chief of Naval Operations (OPNAV N45) and Naval Sea Systems Command lead the UNDS rulemaking effort for the Department of Defense (DoD).

CWA Section 312(n) establishes three distinct phases of the UNDS program. In Phase I, EPA and DoD jointly identify discharges for which it is reasonable and practicable to require pollution controls, and those for which it is not. In Phase II, EPA and DoD jointly, and in consultation with other federal agencies,



interested states, and with the Department of Homeland Security (DHS) for purposes of application of UNDS to U.S. Coast Guard vessels, establish performance standards for pollution-control devices for those discharges for which it is reasonable and practicable to require pollution controls. Phase III involves DoD promulgation of implementing regulations in consultation with EPA and DHS.

In a joint rulemaking in 1999, the two agencies completed Phase I. EPA and DoD jointly identified 39 discharges incidental to the normal operations of vessels of the Armed Forces, twenty-five of which were determined to be reasonable and practicable to require control. Under the CWA, once that determination is made, individual U.S. states may not regulate the remaining 14 discharges determined not to be reasonable and practicable to require control. Section 312(n) prohibits states from regulating any discharge determined not to require control during Phase I.

For Phases II and III, EPA and DoD divided the 25 discharges into three separate batches in an attempt to simplify analysis and rulemaking. The three batches are presently at different points along the regulatory development timeline.



Batch One is made up of eleven discharges: aqueous film-forming foam (AFFF), chain locker effluent, distillation and reverse-osmosis brine, elevator pit effluent, gas turbine water wash, non-oily machinery wastewater, photographic laboratory drains, seawater cooling overboard discharge, seawater piping biofouling prevention, small boat engine wet exhaust, and well deck Discharges. On January 10, 2017, Phase II performance standards for these discharges were finalized and published in the Federal Register. The Navy anticipates completion of Phase III for Batch One discharges in the summer of 2018.

EPA and DoD are finalizing performance standards for 11 additional discharges comprising

UPCOMING EVENTS

Mark your calendar for the following training and other opportunities:

- Basics of the Clean Air Act • July 10, 2018 • Washington, DC, and webcast
- Hazardous Waste and Sites • July 10, 2018 • Washington, DC, and webcast
- 2018 Basic Environmental Law Course • July 30 – August 3, 2018 • Maxwell AFB, Montgomery, AL
- CECOS Basic Environmental Law Course • August 7-9, 2018 • San Diego, CA
- Sustaining Military Readiness Conference • August 13-16, 2018 • St. Louis, MO
- DON Environmental and Legal Symposium** • September 11-13, 2018 • Naval Station Norfolk, VA
- Section 106 of the National Historic Preservation Act • October 9-11, 2018 • San Diego, CA
- NEPA Compliance and Cultural Resources • October 23-24, 2018 • Minneapolis, MN
- Alaska Native Cultural, Communications and Consultation • November 6-8, 2018 • JB Elmendorf-Richardson, AK
- SERDP/ESTCP Symposium: Enhancing DoD's Mission Effectiveness • November 27-29, 2018 • Washington, DC

For more information, visit <https://portal.secnnav.navy.mil/orgs/JAG/12/training/SitePages/Home.aspx>

Batch Two: catapult water brake tank and post-launch retraction exhaust, controllable pitch propeller hydraulic fluid, deck runoff, fire main systems, graywater, hull coating leachate, motor gasoline and compensating discharge, sonar dome discharge, submarine bilge water, surface vessel bilge water (including oil-water separator effluent), and underwater ship husbandry. On October 7, 2016, EPA and DoD published draft performance standards for these discharges for public notice and comment. No public comments were submitted in response to the proposed standards, which are now in staffing at sister federal agencies and affected states pursuant to the Endangered Species Act's section 7 consultation requirement and consistency determination under section 307 of the Coastal Zone Management Act. The Navy expects to complete Phase II for Batch Two discharges in the summer of 2019.

Batch Three consists of the last three discharges: clean ballast, compensated fuel ballast, and dirty ballast. The Phase II effort for these discharges is on hold while Phase II performance standards for Batches One and Two are pursued. The Navy is optimistic that the process will resume soon.

Once final UNDS discharge standards for a particular discharge are promulgated in Phase III, states are prohibited from regulating that discharge under state law. However, states may petition the EPA and DoD to establish "no discharge zones" for any UNDS discharge after Phase III regulations have been implemented.

The U.S. Coast Guard is the primary enforcement agency for UNDS final discharge standards. The states play a secondary enforcement role. Because the standards are developed jointly with EPA, the Navy does not foresee major compliance challenges. But, as with other areas of environmental regulation, regulatory enforcement authorities could seek to inspect Navy ships for compliance—including compliance with UNDS standards. The Navy's policy and the procedures for engagement with federal and state environmental regulatory authorities who seek access to Navy ships can be found in chapter 35 of OPNAV Manual M-5090.1.



Wildlife Conservation Basics for Base SJAs

Lieutenant J. Striker Brown, JAGC, USN, Region Legal Service Office Southeast

Installation staff judge advocates (SJAs) should have a basic understanding of common environmental law issues. Knowing the issues to look for and understanding what issues present the greatest risk for the installation commanding officer allows an installation SJA to know when to consult region or fleet environmental counsel and ultimately to provide the commanding officer with accurate and comprehensive legal advice. This article discusses two environmental issues that an installation SJA may face and offers suggestions to minimize the legal risk to commanding officers: base hunting programs and federal depredation permits.



Installation Hunting Programs

Many military bases have installation hunting programs, authorized and implemented as part of DoD's effort to conserve and rehabilitate natural resources on military installations. By law, each installation must prepare and implement an integrated natural resources management plan (INRMP), unless the absence of significant natural resources on a particular installation makes preparation of such a plan inappropriate. See 16 U.S.C. § 670 *et seq.* (Sikes Act); DoD M-4715.03, *Integrated Natural Resources Management Plan (INRMP) Implementation Manual*. The INRMP provides, in part, for the sustainable multipurpose uses of resources on the installation. These uses include hunting, fishing, trapping, and non-consumptive uses. These plans ensure sustainable use of resources and allow public access when consistent with the mission and safety and security requirements. Hunting programs provide an effective way to manage certain game species populations without a significant expenditure of government resources. Hunting programs are also mandated by Executive Order 13443, *Facilitation of Hunting Heritage and Wildlife Conservation*, which directs federal agencies to manage wildlife and wildlife habitats



on public lands in a manner that expands and enhances hunting opportunities, including through the use of hunting in wildlife management planning. Section 2671 of title 10, U.S. Code details the legal requirements for such programs on military installations. Chapter 12 of OPNAV M-5090.1, *Environmental Readiness Program Manual*, provides additional information on the Navy's natural resources conservation policies and recreational hunting and fishing programs, including implementation of the Sikes Act, 10 U.S.C. § 2671, EO 13443, and DoD M-4715.03. Navy practitioners should consult with their Regional Environmental Coordinator (REC) counsel or NAVFAC environmental counsel before advising on these issues.

The benefits of installation hunting programs are most obvious on air installations, where the programs support efforts to reduce bird and other wildlife strike hazards. Since 1995 there have been over 69,000 wildlife-aircraft strikes recorded by the U.S. Air Force that killed 23 aviators, destroyed 12 aircraft, and caused more than \$400 million of equipment damage. Primary species targeted by hunting programs depend on the installation, but many include whitetail deer and feral pigs. When these animals are not appropriately managed, their populations can swell and present significant risk to airfield or other operations. Although strikes involving large animals do occur, the real risk posed by overpopulated deer or pig herds near airfields arises when these animals die from natural causes in the vicinity of an active airfield. Birds are attracted to the carcasses and pose a greater risk to aircraft than any other animal. Ninety-seven percent of all wildlife strikes reported to the FAA involved birds. Waterfowl (ducks and geese), gulls, and raptors (mainly hawks and vultures) are the bird species that cause the most damage to aircraft in the United States. White-tailed deer are

the most commonly struck non-bird species cause the most aircraft mishaps, and rank highly among causes of human fatalities and injuries.

Installation hunting programs are highly valued components of installation Bird Aircraft Strike Hazard (BASH) programs, but they also carry legal risk for installation commanding officers if not managed properly. Base SJAs should review the installation's hunting instruction to become familiar with the program. A review of Navy policy in Chapter 12 of OPNAV M-5090.1 and the CNIC BASH Program Manual is a good idea too. SJAs should also review hold-harmless agreements to ensure all hunters have one on file. Weapon use also requires close attention. Ensure the instruction clearly articulates requirements for weapon registration and confirm those requirements are consistent with the installation's local weapons accounting instruction. Because firearms are inherently dangerous, the commanding officer and the security officer should determine if restrictions are appropriate with respect to the kinds of weapons authorized for use in the hunting program. For example, an installation may prohibit all or some types of firearms, or may only allow bow hunting.

The installation should also maintain a current list of game wardens charged with ensuring hunters and other people on the installation are abiding by the rules of the program. Because hunting programs normally do not operate pursuant to a federal depredation permit (discussed below), it is important to ensure these activities are conducted consistent with state fish and wildlife regulations. These may include the requirement to obtain a valid state hunting license (in addition to an installation permit). All hunting, fishing, and

trapping on a military installation must be in accordance with the fish and game laws of the state in which the installation is located, to include licensing requirements, provided the license is issued on terms no less favorable than the terms upon which a license is issued to residents of the state. 10 U.S.C. § 2671. Per the Sikes Act and DoD policy, any nominal permitting fees collected by an installation must be used for wildlife and habitat conservation and management on the installation where collected, to include cooperative or research agreements with appropriate agencies at that particular installation. A best practice is to use the installation's Morale, Welfare and Recreation office to collect and administer these funds. Finally, the program must have clear and detailed check-in and check-out procedures for hunters. The biggest risk associated with these programs is the potential for an accident or injury while hunting. Ensuring accountability for all hunters keeps safety a top priority and mitigates legal risk in the event of personal injury.



Depredation Permits

Along with installation hunting programs, the implementation and utilization of federal depredation permits obtained from the U.S. Fish and Wildlife Service (USFWS) regional bird permit office is another way installations manage wildlife that impacts the routine activities at the installation. Federal migratory bird depredation permits authorize the capture or killing of birds to reduce damage caused by birds or to protect other interests such as human health and safety or personal property. Title 50 parts 10, 13 and 21.41 of the Code of Federal Regulations (CFR) cover applications for depredation permits. The Navy most commonly utilizes these permits in conjunction with BASH efforts on installations operating airfields to ensure safety to regarding aircraft flight. A state depredation permit may also be required for the killing of a state-protected mammalian species such as deer.

Almost all birds native to the United States are protected under the Migratory Bird Treaty Act (MBTA). Protection is not limited only to individual birds or species that migrate. This means lethal and non-lethal BASH efforts intended to keep airfields free from birds are generally prohibited except under the terms of a valid “take” permit issued pursuant to Federal regulations. “Take” includes killing birds, trapping birds, egg addling (oiling), and destruction of active nests. Capture or killing of birds cannot be the primary methods used to address depredation, and will only be authorized in conjunction with ongoing nonlethal measures. USFWS issues permits to persons or entities who are experiencing the damage, responsible for compliance with the permit, and have authority to implement nonlethal measures – usually the principal officer of the requesting agency. For Navy installations, this means the installation commanding officer. MBTA depredation permits are valid for up to one year, but may be restricted to less than one year depending on the species involved and the nature of the damage.

A copy of the permit must be carried by the individual conducting the depredation activities. As a matter of policy, a United States Department of Agriculture wildlife biologist, if assigned to the installation, will normally perform depredations

since they already have the equipment, certifications, and training required to conduct such procedures. If the installation does not have such a person assigned, the natural resources division under the public works office should provide a biologist to perform depredation activities. In general, depredation permits are issued with conditions attached. SJAs should take care to include any conditions attached to the permit in documentation delegating the permit's execution authority.

Finally, remember that when advising in these areas you are not operating in a vacuum. The Navy has teams of environmental compliance experts, including environmental legal counsel, at commands throughout the world. Be sure to coordinate all advice with your cognizant environmental counsel. It is also a good practice to cultivate a relationship with your installation environmental program director and to discuss issues with them before recommending a course of action to the installation commanding officer.



LT Striker Brown (author), working with the Louisiana Department of Wildlife and Fisheries to track and monitor the health of marine fisheries at Naval Air Station Joint Reserve Base New Orleans

EPA Begins Nationwide Campaign to Address PFAS Contamination

LCDR Carrie Greco, JAGC, USN

In May, Environmental Protection Agency (EPA) Administrator Scott Pruitt convened a National Leadership Summit to address mounting public health concerns regarding perfluoroalkyl and polyfluoroalkyl substances (PFAS), including perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). These substances are also referred to as perfluorinated compounds (PFCs). PFAS are found in food packaging, in a variety of commercial household products, and in certain consumer goods. PFOA and PFOS are used to make aqueous film forming foam (AFFF), a firefighting foam that the U.S. military has used since the 1970s to extinguish Class B (flammable liquid) fuel fires. The Navy began installing AFFF fire protection systems on its vessels after 134 sailors died in a catastrophic fire aboard the *USS Forrestal* in 1967.

PFAS persist in the environment and in the human body, which means that they accumulate over time and do not break down. PFAS have been found in soil, drinking water, and living organisms. Limited studies show PFOA and PFOS may be associated with developmental delays in fetuses and children; decreased fertility; increased cholesterol; immune system changes; increased uric acid levels; changes in liver enzymes; and prostate, kidney, and testicular cancer. Consuming contaminated food or water is thought to be the main way people are exposed to PFAS.

PFAS are currently classified as "emerging" contaminants, which have no Safe Drinking Water Act (SDWA) regulatory standards or routine water quality testing requirements. On May 19, 2016, the EPA's Office of Water issued drinking water Lifetime Health Advisories (LHA) for PFOA and PFOS. The LHA levels for PFOS and PFOA are 0.07 parts per billion (ppb), individually or as the sum of both substances. EPA's health advisories are non-regulatory and non-enforceable. Health advisory levels identify the concentration of a contaminant in drinking water above which the EPA anticipates adverse health effects will occur over specific exposure durations, providing public health officials with the information to reduce

exposure. Although advisory in nature, health advisories drive testing and clean-up processes.

The Assistant Secretary of Defense (Energy, Installations, and Environment) directed the removal and disposal of all PFOS-based AFFF in January, 2016. The Department of the Navy (DON) is removing and destroying legacy AFFF containing PFOS or PFOA and assessing all potential at-risk PFOA and PFOS release sites and areas of concern, and will prioritize future site investigations and remediation based on potential risk to human health and the environment. In June 2016, the Assistant Secretary of the Navy directed testing of all DON drinking water systems not previously tested for PFOS or PFOA. In tests of 336 Navy on-base drinking water systems, three installation drinking water systems exceeded the EPA's LHA. The Navy provided alternative sources of safe drinking water at these installations until permanent solutions could be implemented.

At the national summit, Mr. Pruitt announced a four-step action plan. First, the EPA will evaluate the need for a national maximum contaminant levels for PFAS under the SDWA, which would create a legally enforceable standard. Second, the EPA will propose designating PFAS as hazardous substances under current law, including under section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Third, the EPA will finalize groundwater cleanup recommendations for PFOA and PFOS at contaminated sites. Fourth, the EPA will collaborate with federal and state partners to develop toxicity values for replacement PFAS chemicals. In the coming weeks, EPA representatives will travel to meet directly with communities impacted by PFAS. The public input they receive will be used to develop a national PFAS management plan for release later this year.

While the EPA establishes a national cleanup standard, the DoN and sister services continue to conduct preliminary assessments and site inspections through the CERCLA process to determine the location and source of contamination and any pathways that generate unacceptable exposure risk to personnel on installations and residents in surrounding communities.