



"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 19.1, OCTOBER 2019

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# LEGACY

The Newsletter of the Navy JAG Corps Environmental Law Community

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Naval Warfare Publication 4-11, "Environmental Protection"

Volume 19.1



October 2019

## From the Director...

*CAPT Meg Larrea, JAGC, USN*

**A**fter an extended break, we would like to welcome you back to LEGACY! A lot has changed here at Code 12. CAPT Randy Vavra is now Senior Legal Counsel at OPNAV N4, and I have assumed duties as the Director of Code 12. Thank you, CAPT Vavra, for your terrific stewardship. I will serve in this position remotely from San Diego, and CDR Dave Shull remains the Deputy Director and is the face of our community in D.C. We are excited for the future of our community and will work to improve engagement, promote learning opportunities, and continue to highlight the important work environmental Judge Advocates do to support the Navy every day.

As always, the practice of environmental law in the Navy has been very busy this year. In July, the State of Washington sued the Navy, as predicted, over the expansion

of Growler operations on Whidbey Island. Navy attorneys are working with the Navy Litigation Office and the Department of Justice to defend against the suit.

Also in July, the Navy announced implementation of Uniform National Discharge Standards (UNDS) for 11 "Batch 1" discharges (NAVADMIN 160/19). These standards are Federal regulations based on the Clean Water Act that provide a single set of discharge standards for Navy vessels nationwide. Navy Regional Environmental Coordinator counsel are and will continue to be critical to ensure Navy compliance and guard against coastal state overreach.

Earlier in the year, the Navy published notification of the Northwest Training and Testing Draft Supplemental EIS/OEIS. U.S. Pacific Fleet attorneys are now working on the Final EIS and Record of Decision.

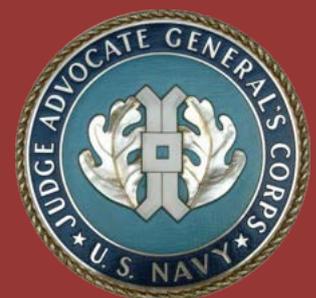
Finally, in August, the Navy published its Record of Decision and Final

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Supplemental EIS/OEIS for Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active Sonar (LFA).

We would also like to take this opportunity to welcome our newest environmental Judge Advocates to the community! Joining the team are CDR Holly Didawick (OLA), CDR Deni Baykan (PACFLT), CDR John Battisti (CNRSW), LCDR Audrey Nichols (CNRSW), LCDR Chris Reintjes (USFF), and LCDR James Carson (CNRNW). And, we have a new group starting PG school this fall: LCDR Natasha Bode (University of San Diego), LCDR Shaun Pehl (Lewis & Clark), LCDR Julie Sherman-Dumais (GWU), and LCDR Paul Thompson (Colorado). Have fun!

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



## Upcoming Events

*Mark your calendar for the following training and other opportunities:*

Basic NEPA (NWETC) • October 8-9, 2019 • Arlington, VA

Advanced NEPA (NWETC) • October 10, 2019 • Arlington, VA

Federal Environmental Symposium • October 30-31, 2019 • Bethesda, MD

Natural Resources Compliance • November 4-7, 2019 • Camp Lejeune, NC

ABA Administrative Law Conf. • November 14-15, 2019 • Washington, DC

SERDP/ESTCP Symposium • December 3-5, 2019 • Washington, DC

Advanced Historic Preservation Law • December 3-5, 2019 • Key West, FL

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



# Environmental Stewardship Front and Center at NY Fleet Week

*CAPT Joan Malik, JAGC, USN*

Every year around Memorial Day, a few Navy ships steam north from Norfolk/Hampton Roads toward New York harbor for the annual Fleet Week New York, now in its 31st year. As part of the festivities, commands from around the Navy bring exhibits, command accountrements, and informational pamphlets into the heart of New York City.

The event itself is an operation in which SJAs from not only the Region, but also the Strike Group and U.S. Fleet Forces typically conduct significant planning over the course of many months on the host of liberty, ethics, gift and incident response issues that could potentially arise.

stewardship program that provides outreach to the public on an ongoing basis apart from particular environmental planning (NEPA) project public engagement. This program began in 2013 to raise awareness of the Navy's environmental policy and initiatives, and to increase support for its training and basing activities among public, scientific and regulatory communities. Since then, the program has expanded nationally, reaching hundreds of thousands of visitors through the permanent, portable and traveling exhibits.

As Navy has moved forward with environmental planning and permitting for at-sea training and testing, there has been a need to cultivate and maintain the public's awareness of Navy activities and compliance schemes.

The average citizen sometimes has misconceptions that the Navy is immune from environmental regulation, or even exempt in some way. They may go on a private cruise ship and believe Navy systems of dealing with waste are similar, when in reality they are not. They may think Navy sonar is deafening marine mammals routinely; when it in fact based on best available science does not.

The travelling outreach exhibit is manned with Navy uniformed and civilians from USFF and other Navy commands. Most often the staff is comprised of USFF N46

(Installations and Environmental Readiness) civilian personnel; however NAVFAC Atlantic subject matter experts play a large role in providing expertise for the travelling exhibit. There is an occasional supporting reservist in uniform, whether line or staff corps, and volunteers from the enlisted ranks.

In all my years of supporting Fleet environmental projects and the numerous public meetings on some of the most controversial projects that the Navy undertakes to support Fleet mission readiness, I had not experienced the hype of Fleet Week



*Captain Joan Malik*

The purpose of Fleet Week is to increase public awareness and support for the sea services through outreach and community relations events and optimizing local and national media engagements in New York City, the largest media market in the country. Ultimately, the desired end state is to leave a lasting positive impression in New York and New Jersey, with safe return of all units, ships, and personnel.

You might wonder how an environmental counsel become involved in Fleet Week. U.S. Fleet Forces maintains an environmental

NYC or for that matter, any particular Fleet Week in “name a city” USA, until now in 2019.

For three days in late May I supported the team as one of two uniformed officers manning the “Stewards of the Sea” exhibit at Pier 88, on the west side of New York City, in the gauntlet of outreach exhibits for the public exiting the USS NEW YORK (LPD 21) before leaving the pier. Another day was spent at Rockefeller Plaza in the heart of midtown New York City. At the “Salute to Service” event in the plaza, we were pleasantly entertained with a concert throughout the day by Broadway voices and known pop stars at the famous “rink” site. Although the music made us speak louder, we tried to explain to passing by people why the Navy trains at sea, how the Navy complies with federal laws in environmental programs, and how we manage our waste and do not discard plastics into the marine environment.

A fifth day was spent crossing through the Holland Tunnel to the Garden State, my hometown state, New Jersey, to partake in Jersey City’s sponsored Memorial Day event at Liberty State Park. At times during the day, our exhibit could not compare with USFFC band performance or a USCG Search and Rescue static line demonstration in the waters next to the park. But, ultimately, children tugged the hands of their parents holding them towards our exhibit thanks in part to “Stewie”, the Navy’s turtle environmental mascot, as well as the allure of hearing marine mammal sounds. The exhibit included interactive tablets with a library of knowledge including lookout practice games, information about various environmental program related roles (including the JAGC officer) and marine species and habitat sounds.

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**“As Navy has moved forward with environmental planning and permitting for at-sea training and testing, there has been a need to cultivate and maintain the public’s awareness of Navy activities and compliance schemes.”**

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As exhausting as five 8-hour days of standing work during a holiday weekend sounds, a Fleet Week experience is one that every 1207 judge

advocate should perform. There may be Navy Week or a shorter event in another city nearby or within your Region that needs your support.



*Stewie, U.S. Navy Stewards of the Sea*

Not only does your presence lend credibility, but your participation will advance your subject matter confidence and proficiency in understanding the compliance programs in the Navy and the tools used by the Fleet. Fleet environmental counsel experience is not required. Our public affairs office provides a clear comprehensive outreach messaging playbook in advance and you can certainly rely on the expertise you have gained in other environmental jobs. The opportunity also affords you an opportunity to meet other members of the greater Navy environmental outreach program team, with whom you may someday work on particular projects.

The combined Fleet’s mantra of “One Team, One Fight” includes our legal support to environmental programs for mission readiness. I thoroughly enjoyed the camaraderie of the Stewards of Sea exhibit team and the ability to see the eyes of many New Yorkers and New Jersey citizens widen when I told them the Navy adheres to a plethora of environmental laws and policies to ensure a healthy marine environment for the future.

So I encourage every 1207 (whether in a current environmental billet or not) to volunteer to support of the Navy’s Stewards of the Sea environmental outreach program. If interested in particular volunteer opportunities, please contact Mr. Donald Turner with USFF at [donald.turner@navy.mil](mailto:donald.turner@navy.mil).



# Smokey Bear Celebrates 75th Birthday Aboard USS Eisenhower

*CDR David Shull, JAGC, USN*

The heat from the fire exploded bombs, damaging the carrier and allowing the fire to spread inside the ship. The fire killed 134 sailors and injured 161. Some 20 aircraft were destroyed.

The Forrestal fire led to several damage control improvements. One such improvement was the development and installation of aqueous film-forming foam (AFFF) to combat fuel fires. AFFF is a highly efficient fire suppressant; AFFF coats fuel with a layer of foam, which acts as a barrier to inhibit and extinguish combustion. The fluorinated surfactants used in AFFF are key to its efficiency; non-fluorinated foams cannot, as yet, achieve the same level of fire suppression performance.

August 9th marked the 75th birthday of Smokey Bear, the treasured mascot of the U.S. Forest Service's Wildfire Prevention Campaign. Smokey was born on August 9, 1944, when the Forest Service and Ad Council created the iconic symbol to educate the public about the dangers of wildfires and encourage safe practices to prevent unplanned wildfires. The campaign is the longest-running public service advertising campaign in U.S. history.

To help celebrate, sailors from USS Eisenhower (CVN 69) welcomed Smokey Bear aboard the carrier on July 30, 2019. Smokey Bear was joined by the Navy's environmental mascot, Stewie the sea turtle. Why the Ike? The ship's namesake, President Dwight D. Eisenhower, signed the Smokey Bear Act in 1952, removing Smokey Bear from the public domain and protecting the character for future use by the Department of Agriculture.

Fire prevention and protection is a critical function for the Department of the Navy, both ashore and afloat. The Navy's Fire and Emergency Services Program has as its core mission the protection of critical bases of operation through fire and injury prevention and risk management, education, and emergency response. This includes wildland firefighting to protect threatened installations and critical infrastructure.

Shipboard firefighting poses its own set of unique challenges. Firefighting conditions are very different, ship cargo can include fuel, weaponry and ammunition, and the risk to personnel and equipment is high. The 1967 fire aboard USS Forrestal (CVA 59) offers a devastating illustration of the dangers. The fire started after a rocket was accidentally fired from an F-4 Phantom jet fighter on the flight deck. The rocket struck an A-4 Skyhawk, igniting hundreds of gallons of jet fuel, which was then carried by heavy winds across the flight deck, igniting several additional planes.



*Smokey Bear and Stewie*

Today, AFFF is under increased scrutiny because of potential health risks associated with certain types of fluorosurfactants, namely perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA). Congress is considering several restrictions on the shore-based use of AFFF as part of the FY20 NDAA.

Fire prevention is an all-hands effort. On the Ike, Smokey Bear provided an important reminder to naval personnel about the importance of fire prevention and safety.

Happy Birthday Smokey Bear!



# Navy Joins U.S. Delegation at United Nations Biodiversity Conference

*CDR David Shull, JAGC, USN*



preserve the marine environment. Some states, however, view the provision as broader than Article 236 and object to sovereign immunity assertions that would interfere with provisions in the agreement that pertain to benefit sharing and transfer of marine technology. One additional consideration, for the Navy, is that the term “vessel” is not defined in Article 3 or in Article 236.

Consistent with Navy policy, the provision must be read to include deployed assets such as unmanned underwater vehicles (UUVs) and unmanned aerial vehicles (UAVs).

The third session of the United Nations’ Intergovernmental Conference (IGC) on marine biodiversity of areas beyond national jurisdiction (BBNJ) kicked off in New York on August 19th. The two-week session met to consider draft text of an agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. I was fortunate enough to join the U.S. delegation, led by the Department of State, to ensure Navy equities were considered in the text of the instrument.

The draft agreement consists of eleven parts. Part I first outlines a set of general provisions. Of note, draft Article 3 would exempt warships, naval auxiliaries, and other vessels or aircraft owned or operated by a state and used, for the time being, only on government non-commercial service, from the terms of the agreement. This important provision largely tracks Article 236 of the U.N. Convention on the Law of the Sea (UNCLOS), which pertains to requirements on states to protect and

Part II of the draft instrument addresses access to and sharing of marine genetic resources (MGR). This part establishes a benefit-sharing regime, though it remains a matter of debate whether benefit sharing will be mandatory or voluntary, and monetary or non-monetary. Non-monetary benefit sharing would include post-cruise notification as well as sample and data sharing. Monetary benefit sharing, on the other hand, is premised on the controversial idea that MGR beyond national jurisdiction are the “common heritage of mankind.”

Part III covers area-based management tools (ABMT), including marine protected areas, to safeguard identified areas beyond national jurisdiction that require additional protection because of certain characteristics such as vulnerability, uniqueness, biological diversity, or special importance. At issue in this part is how such areas are identified and what institutional arrangements ought to be established for the identification process, adoption of management measures and subsequent monitoring.



*United Nations General Assembly (UNGA)*

*In its resolution 72/249 of 24 December 2017, the General Assembly decided to convene an Intergovernmental Conference, under the auspices of the United Nations, to consider the development of an international legally binding instrument under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.*

Part IV then provides a framework for states to conduct environmental impact assessments (EIAs) to evaluate the potential effects on the marine environment of planned activities under the state's jurisdiction or control. A significant point of contention with respect to this part is whether the EIA process should be state-controlled and whether a global body should be established to review and oversee state decision-making. Also at issue is whether the EIA process should incorporate socio-economic impacts.

The draft instrument, in Part V, next turns to capacity-building (CB) and the transfer of marine technology (TMT) for peaceful purposes. The main point of contention in this part is whether the CB and TMT provisions should be mandatory or voluntary. Also at issue is whether preferential treatment should be given to developing countries, and what mechanism, if any, should exist to facilitate information sharing. Finally, Parts VI through XI address the institutional structure (i.e., the Conference of Parties, the Secretariat), funding, implementation and compliance, dispute settlement, and good-faith fulfillment of obligations assumed under the agreement.

The Conference, being the first round of negotiations on the "zero draft" text of the instrument, made little progress in moving states off of their entrenched positions and bridging gaps. Raina Lee (Singapore), President of the Conference, described the scale of the work to be done in the weeks and months ahead as "huge." The work includes the facilitation of additional intersessional consultations and the development of a new draft for review during the fourth IGC in March 2020. The President will also need to consider the proposal from various delegations to develop an article expressing general principles or approaches that would guide the agreement. States advocating for such an article support references to, *inter alia*, the precautionary principle, which provides that where there are threats of serious or irreversible environmental damage, lack of scientific certainty should not be a basis for



***Third Session, Intergovernmental Conference on Marine Biodiversity Beyond National Jurisdiction***

delaying action. The concept is controversial because the term "principle" is sometimes interpreted to impose a positive obligation to address threats of environmental damage. There remains considerable divide between states seeking to enshrine a precautionary "principle" and states that prefer to see precaution as simply an "approach" to decision-making.

States advocating for an article expressing general principles also want to see the concept of the "common heritage of mankind" enshrined in the instrument. The principle, as applied to the BBNJ instrument, would hold that international waters are a common heritage area, subject to shared management, and requiring all nations to share the benefits acquired from exploitation of resources. Needless to say, inclusion of such a conception could derail the BBNJ instrument.

Given the long road ahead, it is unlikely that a final text can be agreed to during the fourth – and last – session, though that remains the hope of the President of the Conference. The UNGA would have to decide to extend the IGC beyond its fourth session.



## Case Study: Herrera v. Wyoming

*LT Striker Brown, JAGC, USN*

**O**n May 19, 2019, the Supreme Court issued a much-anticipated opinion on the case of *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). The case involves the 1868 Treaty of Fort Laramie between the United States and the Crow Indian Tribe, 15 Stat. 649, in which the Tribe ceded much of its territory to the United States, while reserving the “right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.” The Court addressed two primary questions: (1) whether the Tribe’s treaty rights expired when Wyoming became a state; and (2) if not, whether the designation of land as national forest categorically makes the land “occupied” under the terms of the Treaty.

In January of 2014, the state of Wyoming convicted Clayvin Herrera for killing a bull elk out of season and without a state issued license. The hunt originally began when three Native American hunters followed a herd of elk off the Crow Indian Reservation and into the Bighorn National Forest. Two members of the hunting party pleaded guilty to poaching charges and paid fines. Herrera, however, pushed back against his charges, arguing that the 1868 Treaty of Fort Laramie guaranteed his tribal “right to hunt on the unoccupied lands of the United States so long as game may be found thereon.” The state of Wyoming disagreed, asserting that the Crow’s 1868 Treaty right expired upon Wyoming’s statehood, and that even if the treaty rights were valid, the Bighorn National Forest is not “unoccupied.”

The federal government intervened on behalf of Herrera with an *amicus curiae* brief arguing against both of Wyoming’s points above. In the

end, the Supreme Court found in favor of Herrera, holding that the Crow Tribe’s hunting rights under the 1868 Treaty did not expire upon Wyoming’s statehood, and that the Bighorn National Forest lands did not become categorically “occupied” within the meaning of the 1868 Treaty when the national forest was created. The reservation of land for the national forest did not, in itself, constitute occupation within the Treaty’s meaning.

However, the Court limited its decision in two significant ways. First, while the Court held that the Bighorn National Forest was not categorically “occupied,” it did not rule that all areas within the forest were unoccupied. The Court remanded the case to the Wyoming District Court for further proceedings and noted that, on remand, the State may argue that the specific site where Herrera killed the elk was used in such a way that it was “occupied” within the meaning of the Treaty. Second, the Court left open the potential for Wyoming to regulate the exercise of the 1868 Treaty right “in the interest of conservation.” On remand, Wyoming may successfully argue that the application of state regulations to Crow Tribe members exercising Treaty rights is necessary for conservation.

This case provides an interesting read for environmental law practitioners within the Department of Defense (DoD). Although the opinion largely focuses on Native American treaty rights as opposed to federal land management, it does raise questions as to the

**WRITE  
for  
US**

*If you are interested in  
writing for LEGACY,  
contact  
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at*

extent lands managed by other agencies could be deemed “unoccupied.” It also provides some framework for future land use regulations to be upheld “in the interest of conservation.”

When it comes to management of military lands, the DoD works in cooperation with the U.S. Fish and Wildlife Service (FWS) as well as state agencies to implement management strategies aimed at conserving and protecting natural resources while ensuring no net loss in the capability of an installation to support its mission. This is done through Integrated Natural Resource Management Plans (INRMPs), which are planning documents based on principles of ecosystem management that outline how each military installation with significant natural resources will manage those resources. Similar to INRMPs, Integrated Cultural Resource Management Programs (ICRMPs) identify cultural resources and develop a plan to manage and maintain those resources. ICRMPs often involve coordination with federally-recognized Indian tribes and lay out a framework for identifying and defining components of cultural resources that should be preserved and maintained. Through INRMPs and ICRMPs, the DoD works to establish relationships with multiple partners including the U.S. FWS, state agencies, and federally-recognized Indian tribes in order to make informed management decisions regarding the natural as well as cultural resources under its control.



*General William T. Sherman and Indian Peace Commissioners meet with Chiefs, Fort Laramie, 1868*

Considering the significant acreage of federal lands owned by the Department of Defense and the fact that treaties between many other tribes and the United States often included similar language to that of the Treaty of Fort Laramie, this case is certainly worth taking note of for environmental attorneys who regularly deal with land use and management at the federal and state levels.



*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.*

Director  
Captain Meg Larrea



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