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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 . . .

CAPT Randy Vavra, JAGC, USN

Fall has arrived and, like the change of seasons, change is upon us at Code 12. CAPT (Sel) Brendan Burke...thank you for all you did to better Code 12, the Navy JAGC 1207 community, and Navy environmental practice.

This issue of *LEGACY* highlights some recent changes to the environmental legal landscape. The first article features a discussion of proposed changes to the Endangered Species Act's (ESA) implementing regulations. The ESA is one of the most far-reaching and impactful environmental laws ever passed by Congress, and it certainly influences how the Navy does business. Section 4 of the ESA describes the process by which species are designated as threatened or endangered, as well as the framework for designating critical habitat for those species. Under section 7, the Navy is required to consult with ESA regulators to ensure Navy actions are not likely to jeopardize the

continued existence of any endangered or threatened species, or destroy or adversely modify critical habitat. Our bases and ranges often contain large swaths of undeveloped and underdeveloped land that are home to a variety of endangered and threatened species. Navy environmental professionals – lawyers, planners, and biologists – need to be cognizant of the regulatory proposals being considered and the probable effect of those proposals on the Navy.

This issue also features an article examining the environmental provisions contained in the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 (FY19). One of the provisions of the FY19 NDAA extends the validity of Marine Mammal Protection Act (MMPA) permits from five to seven years. This change represents a significant legislative victory, won as a result of the hard work of Navy 1207 judge advocates in drafting the legislative proposal and promoting its inclusion in this year's bill.

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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For me, the ability to influence legislation and the evolving environmental legal landscape are two of the most challenging and rewarding aspects of the 1207 practice. Enjoy this issue of *LEGACY*!



Regulatory Reform of the Endangered Species Act

LCDR Carrie Greco, JAGC, USN

In recent weeks, the agencies responsible for Endangered Species Act (ESA) implementation – the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (the Services) – proposed signification revisions to the Act’s implementing regulations, citing the need for greater clarity and regulatory efficiency. “One thing we heard over and over again,” commented USFWS Principal Deputy Director Greg Sheehan, “was that ESA implementation was not consistent and often times very confusing to navigate.”

The first set of regulatory amendments affects section 4 of the ESA, which details the procedures for listing species and designating critical habitat (areas essential to support the conservation of a species). One such proposed change relates to the criteria used in listing determinations. By law, listing determinations must be based solely upon biological criteria. The proposal would clarify that, despite this limitation, economic considerations

may be noted in the record to inform the public as to the potential costs and benefits of implementation. Critics suggest this change allows the Services to conduct economic impact analyses, notwithstanding the irrelevance of such impacts to the listing determination.

A second change seeks to clarify the meaning of “foreseeable future” as applied to threatened species under the Act. The ESA defines a threatened species as one that is likely to become in danger of extinction *within the foreseeable future*. The Services propose to make clear that “foreseeable future” extends only as far as can reasonably be determined that both the future threats and the species’ responses to those threats are probable. Thus, the “foreseeable future” is unique to the particular species and based on the best available scientific and commercial data regarding the likelihood of extinction over time, taking into account considerations such as the species’ life history characteristics, relevant threats, threat projection time frames, and environmental variability. The Services contend that this reflects a common sense application of the basic procedures and criteria, however some environmentalists claim these changes will result in fewer species qualifying for listing.

“The changes being proposed today are designed to bring additional clarity and consistency to the implementation of the Act across our agencies.”

Chris Oliver, NOAA Assistant Administrator for Fisheries

Third, while the designation of critical habitat is a valuable conservation tool in most cases, the Services outline a non-exhaustive list of circumstances in which it may not be prudent to designate critical habitat. The ESA generally requires that the Services, to the maximum extent prudent and determinable, designate critical habitat when determining that a species is either endangered or threatened. Critical habitat designations typically incorporate areas occupied

by the species that are essential to the conservation of the species and may require special management considerations or protection. Circumstances in which designation of critical habitat may not be prudent include species experiencing threats stemming from climate change – melting glaciers, sea level rise, or reduced snowpack – where the designation of critical habitat would have negligible effect in helping to conserve the species. Critics argue this limits the ESA’s usefulness to address the threats posed by climate change to listed species.



Endangered San Clemente Island loggerhead shrike

Finally, the Services seek to clarify when unoccupied areas can be designated as critical habitat. Unoccupied areas are areas uninhabited by a protected species at the time of listing but that may be essential for the conservation of the species. Under the new rule, unoccupied areas will only be designated as critical habitat when occupied areas are inadequate to ensure conservation of the species or results in less efficient conservation of the species.

The second set of regulatory amendments concerns section 7 of the ESA. Section 7 requires Federal agencies to consult with USFWS and NMFS to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of critical habitat.

First, the Services propose a stand-alone definition of ‘environmental baseline.’ The environmental baseline serves as the reference point from which environmental effects are analyzed. The draft rule defines ‘environmental baseline’ as the state of the world absent the action under review, to include the past, present and ongoing impacts of all past and ongoing Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone section 7 consultation, and the impact of State or private actions in the action area which are contemporaneous with the consultation in process. The condition of the environmental

baseline is critical to evaluating the nature and extent of the effects of the action. For example, effects of an action that in isolation would be of minor consequence may be of greater consequence when analyzed in light of the baseline conditions within the action area.

A second proposal would add “as a whole” to the phrase “destruction or adverse modification” of critical habitat. The ESA requires that Federal agencies ensure their actions are not likely to jeopardize the continued existence of endangered or threatened species *or result in the destruction or adverse modification of habitat of such species*. The change clarifies that the final destruction or adverse modification determination is made at the scale of the entire critical habitat designation. Thus, even if a particular project would cause adverse effects to a portion of critical habitat, those impacts are viewed in context to determine whether the proposed action will result in an alteration that appreciably diminishes the value of critical habitat as a whole, based on the totality of the circumstances, i.e., the overall status of the species, the baseline conditions within the action area, and any cumulative effects occurring within the action area.

The Services also propose defining ‘programmatic consultation,’ a term which describes an optional technique to streamline the consultation process. Programmatic consultations include tiered consultation, in which a Federal agency consults generally on a program, plan, or policy as a whole, and then later consults more narrowly on particular actions taken pursuant to the program



Endangered North Atlantic Right Whales

or plan, and batch consultation, in which a Federal agency consults on multiple, similar, frequently occurring, or routine actions in a particular geographic area.

In the third regulatory proposal, the USFWS separately seeks to rescind its blanket rule under section 4(d) of the ESA, which automatically conveys the same protections for endangered species to threatened species unless otherwise specified. The proposal would require the Service to determine what, if any, protective regulations are appropriate for future species that are listed as threatened. Species listed or reclassified after the effective date of the rule would have protective regulations only if the USFWS promulgates a species-specific rule. The protective regulations that currently apply to threatened species would

not change, unless the USFWS adopts a species-specific rule in the future. The change would align USFWS regulations with those adopted by NMFS for species under its purview, with the stated goal of tailoring protections to meet the needs of each threatened species. Environmentalists argue that this change could reduce the protections afforded to threatened species from habitat degradation or direct harm.

Finally, the USFWS also took action to withdraw its compensatory mitigation policy under the ESA. Compensatory mitigation, as defined in the policy, was compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures had been applied, by replacing or providing substitute resources or environments through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions. The mitigation policy was initially developed consistent with a presidential memorandum—now rescinded—that required all mitigation policies to result in a net conservation gain, essentially requiring parties to go beyond mitigating actual harm and address harms they did not cause.

In its withdrawal notice, USFWS acknowledges that its policy may not satisfy constitutional muster under the Takings Clause of the Fifth Amendment because of the insufficient nexus between the potential harm and the proposed

UPCOMING EVENTS

Mark your calendar for the following training and other opportunities:

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, D.C.

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

remedy. Additionally, since by definition compensatory mitigation does not directly avoid or minimize the anticipated harm, its application is ripe for abuse.

When the policy was initially issued, USFWS concluded that compensatory mitigation could appropriately be included as part of an action subject to consultation under section 7 of the ESA, or in reasonable and prudent alternatives to avoid the likelihood of jeopardy, in order to reduce the net adverse effect of an action on proposed or listed species or designated critical habitat, provided such compensation is otherwise consistent with regulations. The Service did so notwithstanding statutory language that only required federal agencies to *minimize* the impact of their actions on listed species. While acknowledging in its withdrawal that the “net conservation gain” policy lacked statutory authority and was no longer consistent with Executive Branch policy, the USFWS did not specifically comment on whether it was appropriate in the first instance to include compensatory mitigation as part of an action subject to consultation under section 7. Instead, as “net conservation gain” was central to the USFWS compensatory mitigation policy, and attempts to modify the policy would likely have caused confusion, the Service elected to withdraw the policy in its entirety.

For more information on the Services’ proposed revisions to the Endangered Species Act, visit https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html.

Is Offshore Oil and Gas Drilling Compatible with DoD Training, Testing, and Operations?

LT Jake Honigman, JAGC, USN

While opposition to offshore oil and gas drilling is normally the province of conservationists, it can also be related to national security interests.

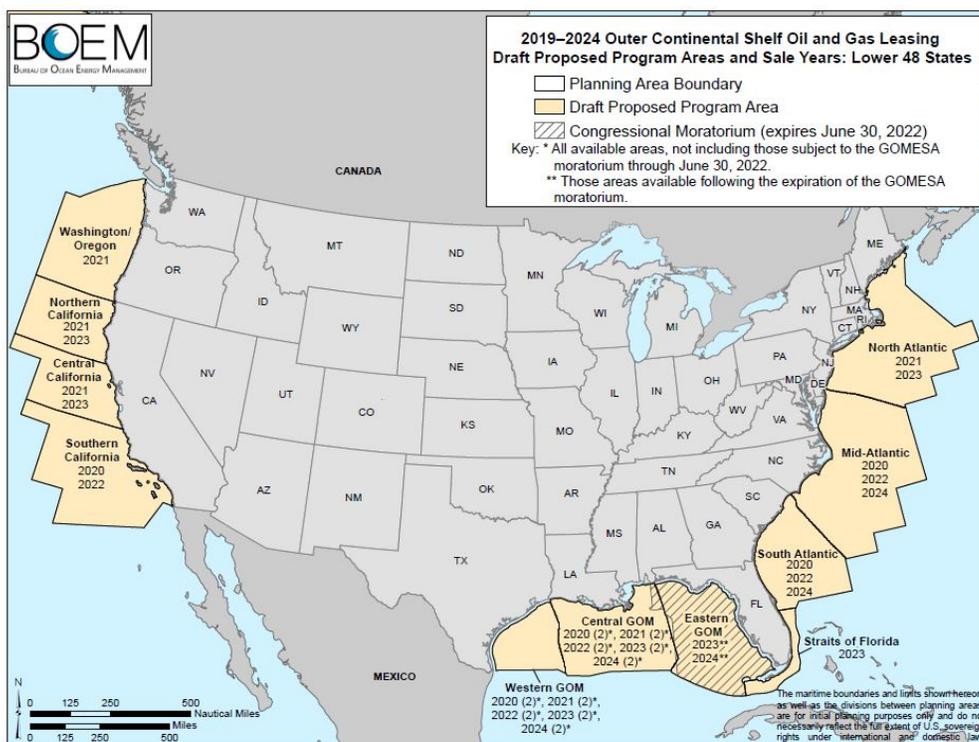
There are, of course, traditional environmentalists objecting to the plan to open the vast majority of the Outer Continental Shelf (OCS) – more than 98 percent of it – to oil and gas leasing between 2019 and 2024. In responses to preliminary notices of



its proposal to do so, the Department of the Interior’s Bureau of Ocean Energy Management (BOEM) received a staggering 78,000 comments. Comments critical of BOEM’s stated intent range from that of Democratic members of the U.S. House of Representatives Subcommittee on the Interior, Environment, and Related Agencies, who point to the “negative impacts that new fossil fuel development will have on the health of the environment and economies of our coastal states,” to those from conservation-minded citizens, like one who opines that “[n]o amount of money can replace the miraculous, spectacular, and unique beauty of the natural world.”

But perhaps most interesting is the Department of Defense’s (DoD) position. In a July 27, 2017 letter commenting on BOEM’s initial notice, the then-Acting Deputy Assistant Secretary of Defense for Force Education and Training (DASD (FE&T)) noted that DoD “conducts training, testing, and operations in offshore operating and warning areas, undersea warfare training ranges, and special use or restricted airspace on the OCS,” and that “these activities are critical to military readiness and to our national security.” In a February 1, 2018 letter commenting on BOEM’s “Draft Proposed Program” (DPP), the current DASD (FE&T) explained that the DoD had “initiated a review of areas identified in the [DPP] for compatibility of oil and gas activity with military testing, training, and operations,” and that it expects to identify “areas where DoD will request restrictions from oil and gas activity.”

The governing legal framework for offshore oil and gas drilling stems from section 18 of the Outer Continental Shelf (OCS) Lands Act (43 U.S.C. §



BOEM 2019-2024 Draft Proposed Program Areas, Lower 48 States

1344), which requires the Secretary of the Interior to develop an OCS oil and gas leasing program, and sets forth principles with which any such program must be consistent. These principles include consideration of renewable and nonrenewable resources, ecological characteristics, and marine productivity. Among the principles is a requirement that the “[t]iming and location of exploration, development, and production of oil and gas . . . shall be based on a consideration of . . . other uses of the sea and seabed.”

Recognizing that the nation’s energy security is important to national defense, but that DoD also requires the use of OCS waters for defense related activities, the Secretaries of Defense and of the Interior signed a 1983 “Memorandum of Agreement [MOA] Between [DoD and DOI] on Mutual Concerns on the [OCS],” stating that “the requirements for mineral exploration/development and defense related activities may conflict,” and pledging to “reach mutually acceptable solutions to the issues raised by these conflicting requirements.”

BOEM has indicated it will revise its OCS plans to account for military needs. The DPP, while announcing that nearly the entire OCS is under consideration for leasing, recognized that “DoD conducts training, testing, and operations . . . on

the OCS [that] are critical to military readiness and national security,” and confirmed that the Secretary of the Interior (himself a Navy veteran) is “committed to enhancing coordination and collaboration with other governmental entities . . . so that . . . critical military and other ocean uses can continue.” It also made clear that the BOEM is weighing different options for how to treat the Gulf of Mexico and the Atlantic coast, in each case specifying areas it is considering excluding from leasing to accommodate military activities.

DoD and DOI have also convened a joint working group to provide an effective interface for collaboration during the planning process. After compiling feedback from all stakeholders, BOEM expects to release the next iteration of its OCS planning process, the “Proposed Program,” this fall, and aims to finalize the program in 2019.

For more information, visit BOEM’s OCS Oil and Gas Leasing Program website: <https://www.boem.gov/National-OCS-Program>.

California Court Grants Summary Judgment in Favor of DoD in Okinawa Dugong Case

CDR David Shull, JAGC, USN

In 2003, Plaintiffs Okinawa Dugong, et al., filed suit pursuant to section 402 of the National Historic Preservation Act (NHPA), the international component of the Act, challenging DoD’s plans to construct the planned Futenma Replacement Facility (FRF) on Okinawa without first taking into account its potential adverse effects on the Okinawa dugong, an endangered sea mammal in the same family as the manatee. The International Union for Conservation of Nature lists the dugong as vulnerable to extinction

worldwide. Section 402 of the NHPA provides that “[p]rior to the approval of any undertaking outside the United States that may directly and adversely affect a property that is on the World Heritage List or on the applicable country’s equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over the undertaking shall *take into account* the effect of the undertaking on the property for purposes of avoiding or mitigating any adverse effect.” 54 U.S.C. § 307101(e) (emphasis added).



Okinawa Dugong in the waters of Henoko Bay, Okinawa, Japan

This case is significant because the narrow international exception in the NHPA to protect culturally significant property abroad was applied for the first time not to a building or statue, but to an animal. The dugong has cultural significance for various segments of Japanese society, including researchers, ritual practitioners, and island communities; the rare mammal is central to traditional Okinawan creation mythology and folklore. The court held that the Japanese law protecting cultural properties, which lists the dugong as a protected “national monument,” is equivalent to the National Register for purposes of NHPA application. While the Japanese law defines “property” for protection to include animals, and U.S. law does not, the court reasoned that section 402 did not require a foreign country’s list to be identical to the National Register, but rather that they be “counterparts.”

The case is also noteworthy in that plaintiffs chose to sue under the NHPA, rather than other U.S. laws more commonly applied to the protection of endangered animals. However, plaintiffs were limited by the presumption against extraterritorial effect that applies to most environmental legislation, to include the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA).

Also notable is the fact that FRF is being constructed pursuant to an agreement between Japan and the United States providing for the realignment of U.S. military in Okinawa. Japan was ultimately responsible for selecting the location of the FRF and for its construction,

although DoD will ultimately use the facility once it is built.

The case was originally closed in 2012 due to political uncertainty about the future of the FRF. After DoD completed its section 402 “take into account” process in 2014, the suit was revived. Because the NHPA is a procedural statute that does not create a right of action, Plaintiffs brought suit under the Administrative Procedures Act (APA). Plaintiffs argued that DoD’s finding that the FRF would have no adverse effect on the Okinawa dugong was arbitrary and capricious under the APA. On 1 Aug 18, the U.S. District Court for the Northern District of California granted DoD’s cross motion for summary judgment, holding that DoD’s efforts were sufficient to satisfy section 402’s procedural requirements, and that the DoD’s finding of no adverse impact to the dugong population was adequately explained based on available scientific evidence, and therefore not arbitrary or capricious.

A copy of the holding is available on the Code 12 Portal.

FY19 National Defense Authorization Act Analysis: Environmental Provisions

LT Anthony Couch, JAGC, USN

On August 13, 2018, the president signed the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA). The NDAA authorizes \$717 billion in appropriations during

fiscal year 2019 for military and other defense related activities. The NDAA includes a number of environmental provisions with direct impacts to military operations.

SEC. 312. ENERGY SECURITY AND RESILIENCE

Section 312 requires the Secretaries of the military departments to perform mission assurance and readiness assessments of energy power systems for mission critical assets and supporting infrastructure, applying uniform mission standards established by the Secretary of Defense (SECDEF). Additionally, Section 312 amends 10 U.S.C. § 2684a to permit the DoD to consider the maintenance or improvement of military installation resilience as a basis for an agreement between the DoD and a state or private entity that has the goal of conserving, restoring, or preserving land and natural resources, to address the use or development of real property in the vicinity of, or ecologically related to, a military installation or airspace. 10 U.S.C. § 2684a is a key component of the DoD Readiness and Environmental Protection Integration (REPI) Program.

SEC. 313. USE OF PROCEEDS FROM SALES OF GEOTHERMAL ELECTRICAL ENERGY

Proceeds from the sale of electrical energy derived from geothermal sources on military installations have historically been credited to the military department overseeing the installation. The proceeds could then be used to carry out projects in accordance with the energy performance plan developed by the Secretary of Defense. Pursuant to this authority, the Department of the Navy (DON) controls approximately \$15 million in annual revenue from the geothermal facility at Naval Air Weapons Station (NAWS) China Lake. The DON uses this revenue to fund high-priority initiatives that further the Department's energy security goals and improve readiness across the Navy and the Marine Corps.

The FY19 NDAA amends section 10 U.S.C. § 2916 to require that 50 percent of the proceeds from the sale of electrical energy derived from

geothermal sources be set aside for projects at the installation where the geothermal resource is located (e.g., NAWS China Lake).

NAWS China Lake receives geothermal revenue annually under current law. During FY 15-18, NAWS China Lake competed for and received approximately \$2 million per year to operate and maintain the geothermal facility and an additional \$2 million for other energy projects requested by the base. The change to 10 U.S.C. § 2916 will restrict the Navy's ability to close the highest priority energy security gaps across the Department. It is critical that the Department maintain flexibility to direct geothermal revenue where it will have the greatest impact on the force as a whole.

SEC. 315. STUDY OF HEALTH IMPLICATIONS OF PER- AND POLYFLUOROALKYL SUBSTANCES

Per- and polyfluoroalkyl substances (PFAS) are a group of man-made chemical compounds used for industrial applications and consumer products. These compounds include perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). In 2016, the Environmental Protection Agency (EPA) issued lifetime drinking water health advisories for PFOS and PFOA, both of which were contained in older formulations of aqueous film-forming foam (AFFF) used by the Navy and other DoD components to suppress fires.



The NDAA directs the transfer of \$10 million dollars from appropriated DoD funds to the Department of Health and Human Services to study the effects of exposure to PFAS. The DoD is required to submit a detailed report on contamination and remediation efforts within 180 days of the EPA establishing a maximum contaminant level for PFAS under section 1412 of the Safe Drinking Water Act.



SEC. 316. MARINE MAMMAL PROTECTION ACT EXTENSION FOR MILITARY READINESS ACTIVITIES

The NDAA extends the effective period of a Marine Mammal Protection Act (MMPA) incidental take letter of authorization issued by the National Marine Fisheries Service (NMFS) from five to seven years in the case of military readiness activities.

The extension will deliver some relief to the permitting cycle, affording workload and manpower efficiencies. The permitting process for letters of authorization currently takes about four years to complete, meaning that, under the five-year cycle, the process begins anew almost as soon as letters of authorization are issued.

The DoD asked for the change, submitting a legislative proposal that led to the provision in the NDAA. The Navy and NOAA have worked for several years on ways to streamline the permitting process, and this amendment represents a significant legislative victory.

SEC. 317. DOD ENVIRONMENTAL RESTORATION

The DoD Environmental Restoration Program (ERP) is comprised of the Installation Restoration

Program (IRP) and the Military Munitions Response Program (MMRP). These programs address areas impacted by contamination from hazardous substances, pollutants or contaminants, as well as areas known or suspected to contain unexploded ordnance or discarded military munitions. Historically, these sites have had significant impacts on state and local governments, which have borne the costs of environmental degradation.

The NDAA authorizes over \$1.3 billion dollars for environmental restoration and base realignment and closure (BRAC). It further directs the Armed Forces to continue to engage with local communities concerning the safety of drinking water due to environmental degradation caused by defense-related activities, as well as to seek opportunities to accelerate environmental restoration efforts where feasible. Through the end of fiscal year 2017, the DoD has achieved response complete, which occurs when cleanup activities are complete, at 86 percent of sites.

SEC. 337. WILDFIRE SUPPRESSION CAPABILITIES

In 2018 alone, California wildfires have burned over 700,000 acres of land and caused billions of dollars in damage. The NDAA recognizes the threat these wildfires pose to national security and directs the Secretary of Defense to submit a report to Congress on the wildfire suppression capabilities within the active and reserve components of the Armed Forces. This includes possible interagency cooperation with the Forest Service and the Department of the Interior.

The full text of the FY19 NDAA is available on the Code 12 Portal.



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