

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Environmental Law Note

Mitigation Measures in Analyses Under the National Environmental Policy Act (NEPA)

Military environmental law attorneys are often challenged by the complexities and nuances of compliance with the provisions of the NEPA of 1969.¹ The proper use and management of mitigation measures in NEPA analyses can be overlooked on occasion and are worthy of some discussion. This note highlights some of the issues military environmental law practitioners may face when analyzing mitigation measures in conjunction with their reviews of NEPA analyses performed by their commands. Particular emphasis is placed on the mitigation requirements found in the revised Army NEPA regulation.²

The NEPA requires federal agencies to prepare an environmental impact statement (EIS) for “major [f]ederal actions significantly affecting the quality of the human environment.”³ Federal agencies often prepare environmental assessments (EAs)⁴ to determine whether an EIS is necessary for a particular federal action. The EA process concludes with either a finding that a major federal action significantly affects the quality of the human environment necessitating the production of an EIS, or a finding of no significant impact (FNSI).⁵

Environmental analyses performed by federal agencies under NEPA often include mitigation measures. The regulations of the Council on Environmental Quality (CEQ)⁶ implementing NEPA generally define mitigation to include measures that avoid, minimize, reduce, rectify, or compensate for impacts to the physical environment resulting from federal actions.⁷

1. 42 U.S.C. §§ 4321-4370 (2000).

2. 67 Fed. Reg. 15,290 (2002) (to be codified at 32 C.F.R. pt. 651) (superceding U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988)).

3. 42 U.S.C. § 4332. This provision states that

all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and any other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be eliminated, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

4. The Code of Federal Regulations (CFR) defines *environmental assessment* as follows:

“Environmental Assessment”:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.9 (LEXIS 2002).

5. The CFR defines *finding of no significant impact* as follows:

“Finding of No Significant Impact” means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

Id. § 1508.9.

Federal agencies often use such measures in EAs to mitigate environmental impacts below the significance threshold, thus avoiding the requirement to produce an EIS (the mitigated FONSI).⁸ The manner in which federal agencies use and manage mitigation commitments made in environmental analyses performed under NEPA is critical to overall compliance with NEPA, particularly in light of the use of mitigated FNSIs.

The Army NEPA regulation⁹ covers the subject of mitigation in environmental analyses under NEPA in several places. The Army regulation defines mitigation measures substantially as

the CEQ regulations define them.¹⁰ Examples of mitigation measures cited by the Army regulation include maneuver restrictions for tracked vehicles;¹¹ aerial seeding to reduce erosion problems;¹² changing times or frequency of operations (for example, changing seasons of the year, days of the week, or times of day for various activities);¹³ and reducing the effects of construction equipment around protected trees.¹⁴

The Army regulation states that “[w]hen the analysis proceeds to an EA or EIS, mitigation measures will be clearly assessed and those selected for implementation will be identi-

6. *Id.* §§ 1500-1508.

7. Mitigation is defined as follows:

“Mitigation” includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

Id. § 1508.20.

8. Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (Mar. 23, 1981). Question 40 reads:

Q. If an environmental assessment indicates that the environmental effects of a proposal are significant, but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute, regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. [40 C.F.R. §§] 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping of EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g. where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. [*Id.* §] 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

46 Fed. Reg. 18,026.

9. 67 Fed. Reg. 15,290 (2002) (to be codified at 32 C.F.R. pt. 651).

10. *See id.* at 15,305 (to be codified at 32 C.F.R. § 651.15(a)(1)-(5)).

11. *Id.* at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(c)(1)).

12. *Id.* (to be codified at 32 C.F.R. pt. 651, app. C(c)(2)).

13. *Id.* (to be codified at 32 C.F.R. pt. 651, app. C(c)(3)).

fied in the FNSI or the [Record of Decision]. The proponent must implement those identified mitigations, because they are commitments made as part of the Army decision.”¹⁵ The Army regulation further states that “[t]he mitigation shall become a line item in the proponent’s budget or other funding document, if appropriate, or included in the legal document implementing the action (for example contracts, leases, or grants).”¹⁶ Importantly, for a mitigated FNSI, the Army regulation states that any promised mitigation measures “become legally binding and must be accomplished as the project is implemented. If any of these identified mitigation measures do not occur, so that significant adverse environmental effects could reasonably be expected to result, the proponent must publish an NOI [Notice of Intent] and prepare an EIS.”¹⁷

The Army regulation also provides guidance on determining what mitigation measures are practical in light of operational and funding constraints.¹⁸ Regarding practicality, the regulation states, “The key point concerning both the manpower and cost constraints is that, unless money is actually budgeted and manpower assigned, the mitigation does not exist.”¹⁹

Another important issue to consider is the monitoring and enforcement of mitigation measures mentioned in NEPA analyses. The CEQ regulations state that “[a] monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.”²⁰ The CEQ regulations further state that “[a]gencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases.”²¹ The Army regulation sets out those situations that constitute “important cases.”²² Included are those cases in which changed environmental conditions or activities other than those assumed in the EIS occur, resulting in predictions of adverse environmental impacts being too limited;²³ cases in which the outcome of mitigation is unknown as when new technology is employed;²⁴ cases in which major environmental controversy is associated with the selected alternative;²⁵ and cases in which failure of mitigation could result in serious harm to protected species, sites, or areas.²⁶

The Army NEPA regulation defines monitoring as either enforcement monitoring²⁷ or effectiveness monitoring.²⁸ Enforcement monitoring is basically designed to ensure that mechanisms are built into contracts and agreements with those

14. *Id.* (to be codified at 32 C.F.R. pt. 651, app. C(c)(4)).

15. *Id.* at 15,306 (to be codified at 32 C.F.R. § 651.15(b)).

16. *Id.*

17. *Id.* (to be codified at 32 C.F.R. § 651.15(c)).

18. *Id.* (to be codified at 32 C.F.R. § 651.15(d)). This section of the regulation states:

A number of factors determine what is practical, including military mission, manpower restrictions, cost, institutional barriers, technical feasibility, and public acceptance. Practicality does not necessarily ensure resolution of conflicts among these items, rather it is the degree of conflict that determines practicality. Although mission conflicts are inevitable, they are not necessarily insurmountable; and the proponent should be cautious about declaring all mitigations impractical and carefully consider any manpower requirements.

Id.

19. *Id.*

20. 40 C.F.R. § 1508.2(c) (LEXIS 2002).

21. *Id.* § 1503.

22. 67 Fed. Reg. 15,306 (2002) (to be codified at 32 C.F.R. § 651.15(h)); *id.* at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(d)).

23. *Id.* at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(1)); *id.* at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(d)(1)).

24. *Id.* at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(2)); *id.* at 15,327 (to be codified at 32 C.F.R. pt., app. C(d)(2)).

25. *Id.* at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(3)); *id.* at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(d)(3)).

26. *Id.* at 15,306 (to be codified at 32 C.F.R. § 651.15(h)(4)); *id.* at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(d)(4)). The paragraph at Appendix C states that important cases include:

(4) Failure of a mitigation measure, or other unforeseen circumstances, could result in serious harm to federal-or state-listed endangered or threatened species; important historic or archaeological sites that are either on, or meet eligibility requirements for nomination to the National Register of Historic Places; wilderness areas, wild and scenic rivers, or other public or private protected resources. Evaluation and determination of what constitutes serious harm must be made in coordination with the appropriate federal, state, or local agency responsible for each particular program.

Id.

entities that will actually perform the mitigation. An example of enforcement monitoring is a penalty clause written into a contract for the performance of mitigation measures.²⁹ This form of enforcement is important, considering that much of the Department of Defense's environmental work is actually performed by contract with private entities.

Effectiveness monitoring is a more challenging concept than enforcement monitoring in that it actually measures the effectiveness of particular mitigation measures over time. Effectiveness monitoring can be both qualitative and quantitative in nature.³⁰ It is important that the monitoring effort result in sufficient data and observations to make a meaningful analysis of the effectiveness of the mitigation.³¹ Further guidance on effectiveness monitoring can be found at Appendix C of the Army NEPA regulation.³²

One final issue for the environmental law practitioner to consider is the duration of the mitigation monitoring. The Army regulation states that if the mitigation is effective, monitoring should continue "as long as the mitigations are needed to address the impacts of the initial action."³³ Effective mitigation is the desired result and the easier case to deal with. Ineffective

mitigation, however, presents a different and more difficult issue.

If mitigation is deemed ineffective, technical personnel must be consulted to resolve any inadequacies. Resolving inadequacies in cases involving mitigated FNSIs is particularly important, since the regulation states that "[i]f ineffective mitigations are identified which were required to reduce impact below significance levels . . . , the proponent may be required to publish an NOI and prepare an EIS."³⁴ This could present a very unpleasant situation for the proponent, particularly if the action has already been initiated and possibly completed. This potentiality highlights the importance of carefully considering mitigation plans as the action is developed throughout the NEPA process. Poor planning and a mere listing of potential mitigation actions will not serve the interests of the proponent of the action if mitigation is ineffective and such ineffectiveness is recognized through the monitoring process.

In addition to the requirements of the Army NEPA regulation, some recent court decisions provide further incentive to ensure that mitigation is well thought out and executed by federal agencies. Regarding mitigation under NEPA, the Supreme Court has ruled, in the context of an EIS, that CEQ regulations

27. *Id.* (to be codified at 32 C.F.R. § 651.15(i)(1)).

28. *Id.* (to be codified at 32 C.F.R. § 651.15(i)(2)).

29. *Id.* (to be codified at 32 C.F.R. § 651.15(i)(1)).

30. *Id.* (to be codified at 32 C.F.R. § 651.15(i)(2)).

31. *Id.*

32. *Id.* at 15,327 (to be codified at 32 C.F.R. pt. 651, app. C(g)). This paragraph states:

(g) Effectiveness Monitoring. Effectiveness monitoring is often difficult to establish. The first step is to determine what must be monitored, based on criteria discussed during the establishment of the system; for example, the legal requirements, protected resources, area of controversy, known effectiveness, or changed conditions. Initially, this can be a very broad statement, such as reduction of impacts on a particular stream by a combination of replanting, erosion control devices, and range regulations. The next step is finding the expertise necessary to establish the monitoring system. The expertise may be available on-post or may be obtained from an outside source. After a source of expertise is located, the program can be established using the following criteria:

- (1) Any technical parameters used must be measurable; for example, the monitoring program must be quantitative and statistically sound.
- (2) A baseline study must be completed before the monitoring begins in order to identify the actual state of the system prior to any disturbance.
- (3) The monitoring system must have a control, so that it can isolate the effects of the mitigation procedures from effects originating outside the action.
- (4) The system's parameters and means of measuring them must be replicable.
- (5) Parameter results must be available in a timely manner so that the decision maker can take any necessary corrective action before the effects are irreversible.
- (6) Not every mitigation has to be monitored separately. The effectiveness of several mitigation actions can be determined by one measurable parameter. For example, the turbidity measurement from a stream can include the combined effectiveness of mitigation actions such as reseeding, maneuver restrictions, and erosion control devices. However, if a method combines several parameters and a crucial change is noted, each mitigation measurement must be examined to determine the problem.

Id.

33. *Id.* at 15,307 (to be codified at 32 C.F.R. § 651.15(k)).

34. *Id.*

require a federal agency to discuss possible mitigation measures in the scoping process, in discussing alternatives, in discussing consequences of the proposed action, and in explaining its ultimate decision. The Court stated, however, that “[t]here is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.”³⁵ In the context of an EA, mitigation measures may clearly be taken into account in assessing whether a significant impact exists,³⁶ and “it is clear that an agency may condition its decision not to prepare a full EIS on adoption of mitigation measures.”³⁷

In a case decided in 2001, the Court of Appeals for the Ninth Circuit stated that “[w]hile the Agency is not required to develop a complete mitigation plan detailing ‘the precise nature of the mitigation measures,’ the proposed mitigation measures must be ‘developed to a reasonable degree.’”³⁸ “A ‘‘perfunctory description,’’³⁹ or ‘‘mere listing’’ of mitigation measures, without supporting analytical data, is insufficient to support a finding of no significant impact.”⁴⁰ The Tenth Circuit has stated that “[a]s a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.”⁴¹ The cases above illustrate that courts have recently shown a heightened interest in examining mitigation issues in the context of EAs, particularly in cases resulting in mitigated FNSIs.

The CEQ regulations, the Army NEPA regulation, and recent case law all suggest that federal agencies closely analyze and plan for mitigation issues in preparing analyses under NEPA. The possibility of having to go back and prepare an EIS as a result of a poorly planned and executed mitigation plan documented in a mitigated FNSI should serve as a concrete incentive to get the mitigation right the first time. Hopefully, this note will serve to remind Army environmental law practi-

tioners of the importance of mitigation measures under NEPA and serve as a reference tool for mitigation questions that may arise. Lieutenant Colonel Tozzi.

Criminal Law Note

Army Publishes Significant Revision to AR 27-10

Introduction

The Army recently published a comprehensive revision to *Army Regulation (AR) 27-10*,⁴² ushering in significant changes to the administration of military justice. These changes, effective 14 October 2002, warrant the immediate attention of staff judge advocates, trial practitioners, and legal noncommissioned officers (NCOs). The Criminal Law Department, Office of the Judge Advocate General (OTJAG), issued an information paper on 10 September 2002, which addresses the major revisions of the updated regulation.⁴³ The purpose of this note is to further highlight and disseminate these changes, which can be grouped into three subject areas: judicial, nonjudicial, and administrative matters.

Judicial

Among the updated regulation’s many changes within the judicial arena, this note discusses five of the most significant revisions. These five changes affect special courts-martial, automatic reduction, sentencing, suspension of favorable actions, and national security crimes coordination, respectively.

Arguably, the most significant judicial change is that *AR-27-10* now authorizes special court-martial convening authorities (SPCMCA) to convene special courts-martial empowered to adjudge a bad-conduct discharge (BCD special).⁴⁴ Although not prevented by the Uniform Code of Military Justice

35. *Robertson v. Methow Valley*, 490 U.S. 332, 352 (1989).

36. *See, e.g., Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733-34 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 903 (2002).

37. *City of Auburn v. United States*, 154 F.3d 1025, 1033 (9th Cir. 1998) (citing *Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986); *Steamboaters v. Fed. Energy Regulatory Comm’n*, 759 F.2d 1382, 1394 (9th Cir. 1985)), *cert. denied*, 527 U.S. 1022 (1999).

38. *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 734 (quoting *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1121 (9th Cir. 2000)).

39. *Id.* (quoting *Okanogan Highlands Alliance v. Williams*, 226 F.3d 468, 473 (9th Cir. 2000) (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998))).

40. *Id.* (quoting *Okanogan Highlands*, 226 F.3d at 473 (quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998))).

41. *Davis v. Mineta*, 2002 U.S. App LEXIS 12285 (10th Cir. June 20, 2002).

42. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter *AR 27-10*] (superceding *Army Regulation 27-10*, dated 24 June 1996, and the electronic media edition, dated 20 August 1999).

43. Information Paper, Major Michelle E. Crawford, Criminal Law Department, Office of The Judge Advocate General, subject: Upcoming Changes to *Army Regulation (AR) 27-10, Military Justice* (10 Sept. 2002).

(UCMJ),⁴⁵ *AR 27-10* previously withheld SPCMCAs from convening such courts-martial.⁴⁶ The new *AR 27-10* no longer contains this restrictive provision.⁴⁷

Consistent with the requirements of its predecessor, paragraph 5-27 of the new *AR 27-10* requires the detailing of a military judge, representation of the accused by qualified counsel, and the preparation of a verbatim record of trial before a special court-martial can adjudge a BCD.⁴⁸ Paragraph 5-27 also introduces one additional requirement. Before a special court-martial can adjudge a BCD, servicing staff judge advocates must prepare a pretrial advice for SPCMCAs under Rule for Courts-Martial (RCM) 406(b).⁴⁹

The second major change reflected in the court-martial arena affects the automatic reduction of enlisted soldiers sentenced to confinement. Paragraph 5-28e now restricts automatic reduction to the lowest enlisted grade under Article 58a, UCMJ,⁵⁰ to cases with an approved sentence of a punitive discharge or “[c]onfinement in excess of 180 days . . . or in excess of 6 months.”⁵¹ For example, consider a staff sergeant convicted at a BCD Special of wrongful appropriation who receives an adjudged sentence of two months confinement and forfeiture of two-thirds pay per month for two months. Before the revision to *AR 27-10*, the staff sergeant would be reduced to grade E-1 automatically upon approval of the sentence, even though his adjudged sentence did not include a reduction in grade.⁵² Now,

the staff sergeant is no longer subjected to this administrative inconsistency.⁵³

A third change to the regulation clarifies the admissibility of sentencing documents during the presentencing hearing at a court-martial. In 1994, the Army Court of Military Review, now the Army Court of Criminal Appeals, held in *United States v. Weatherspoon*⁵⁴ that for purposes of RCM 1001(b)(2), “personnel records” are those contained in “the Official Military Personnel File (OMPF), the Military Personnel Records Jacket (MPRJ) and the Career Management Individual File (CMIF).”⁵⁵ In 1996, the Court of Appeals for the Armed Forces stated in *United States v. Davis*⁵⁶ that the admissibility of personnel records includes “any records made or maintained in accordance with departmental regulation that reflect . . . the history of the accused.”⁵⁷ Paragraph 5-28 of the new *AR 27-10* expressly implements the Secretarial authority of RCM 1001(b)(2) and clarifies the more expansive view of admissibility of personnel documents during sentencing.⁵⁸

A fourth change to *AR 27-10* protects absent-minded trial counsel. Paragraph 5-15b now automatically suspends favorable personnel actions upon the preferral of charges. The suspension (or FLAG) remains in place until charges are dismissed or the convening authority takes initial action.⁵⁹

44. *AR 27-10*, *supra* note 42, para. 5-27.

45. UCMJ art. 23 (2000); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 404(d), 504(b)(2) (2000) [hereinafter MCM].

46. *See* U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-25b-c (20 Aug. 1999) [hereinafter 1999 *AR 27-10*].

47. *See* *AR 27-10*, *supra* note 42, para. 5-27.

48. *Compare id.* para. 5-27a, with 1999 *AR 27-10*, *supra* note 46, para. 5-25.

49. *AR 27-10*, *supra* note 42, para. 5-27b; *see also id.* para. 5-11 (requiring the detailing of court reporters to all special courts-martial).

50. UCMJ art. 58a(a) (providing for the automatic reduction to the lowest enlisted grade of a soldier above grade E-1 sentenced by a court-martial to a punitive discharge, any term of confinement, or any term of hard labor without confinement).

51. *AR 27-10*, *supra* note 42, para. 5-28e.

52. *See* UCMJ art. 58a(a).

53. *AR 27-10*, *supra* note 42, para. 5-28e.

54. 39 M.J. 762 (A.C.M.R. 1994).

55. *Id.* at 767.

56. 44 M.J. 13 (1996).

57. *Id.* at 20.

58. *See* *AR 27-10*, *supra* note 42, para. 5-28. Rule for Courts-Martial 1001(b)(2) states, “‘Personnel records of the accused’ includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused” MCM, *supra* note 45, R.C.M. 1001(b)(2).

59. *See* *AR 27-10*, *supra* note 42, para. 5-15. *See generally* U.S. DEP’T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS) (30 Oct. 1987) [hereinafter *AR 600-8-2*].

Finally, a fifth change requires staff judge advocates to coordinate with OTJAG before preferring charges in cases that may have national security implications.⁶⁰ These cases include sedition, “giving intelligence to the enemy,” spying, espionage, “unauthorized acquisition of military technology [and] research and development information . . . on behalf of a foreign power, . . . [v]iolation of rules . . . concerning classified information, . . . [s]abotage . . . by or on behalf of a foreign power,” subversion, treason, or domestic terrorism.⁶¹

Nonjudicial Punishment

The new *AR 27-10* incorporates three major changes in the administration of nonjudicial punishment. First, appellate authorities can change filing determinations to the benefit of the appealing soldier.⁶² For example, if a battalion commander directs the filing of an Article 15 in the performance section of a soldier’s OMPF, on appeal the brigade commander may direct filing of the Article 15 in the restricted section of the soldier’s OMPF. Any change in filing determination must be noted in block nine of Department of the Army Form 2627.⁶³

Second, *AR 27-10* now allows judge advocates to attend Article 15 hearings in a representative capacity; judge advocates may be present and render advice during the hearing phase to soldiers who have accepted nonjudicial punishment. The regulation provides that judge advocates giving such advice should do so during recesses in the hearing.⁶⁴ Representing and advising a soldier during the hearing is distinct from acting as a spokesman on a soldier’s behalf. Judge advocates and civilian attorneys acting as spokesmen “do not serve in a representative capacity.”⁶⁵

Finally, *AR-27-10* now requires “[i]mposing commanders, assisted by their legal clerks,” to track the execution of punishment imposed.⁶⁶ Additionally, “[t]he Chief Legal NCO . . . or delegee [must, at a minimum, annually inspect] the execution of Article 15 forfeitures and reductions.”⁶⁷ To execute these tracking and inspection requirements properly, NCOs must pay meticulous attention to the proper flow of documents through the entire administrative system, including distribution, after Article 15s leave the imposing commander’s desk. Therefore, to ensure compliance with these requirements, Chief Legal NCOs and, more importantly, Criminal Law NCOICs must develop and maintain good working relationships with their respective personnel and finance sections. Additionally, staff judge advocates and chiefs of military justice must recognize and supervise their legal NCOs’ additional tracking requirements.

Administrative Matters

Among the significant administrative changes brought about by the new regulation include the addition of Chapter 24: Registration of Sexually Violent Military Offenders Who Are Not Confined.⁶⁸ This chapter implements 42 U.S.C. § 14071⁶⁹ and Department of Defense Instruction 1325.7⁷⁰ as the Army’s “Military Sexual Offender Program.”⁷¹

Chapter 24 contains a twofold requirement. First, “military officials [must] notify State officials upon release of soldiers [from confinement] or transfer of unconfined soldiers . . . convicted at special or general courts-martial of a qualifying offense.”⁷² For military sexual offenders in Army confinement facilities, corrections officials are responsible for ensuring registration requirements are met. Trial counsel, however, have

60. *AR 27-10*, *supra* note 42, para. 2-7 (requiring an unclassified executive summary via e-mail).

61. *Id.*

62. *See id.* para. 3-37b(1)(a).

63. *Id.*; *see also* U.S. Dep’t of Army, Form 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984).

64. *AR 27-10*, *supra* note 42, para. 3-18g(1).

65. *Id.*

66. *Id.* para. 3-39 (emphasis added).

67. *Id.*

68. *Id.* ch. 24.

69. 42 U.S.C. § 14071 (2000) (Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program).

70. U.S. DEP’T OF DEF., INSTR. 1325.7, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (17 July 2001) [hereinafter DODI 1325.7].

71. *AR 27-10*, *supra* note 42, para. 24-1.

72. *Id.* *See generally id.* para. 24-2 (listing covered UCMJ offenses (quoting DODI 1325.7, *supra* note 70, encl. 27)).

responsibilities in “cases in which the sentence in a special or general court-martial involves a finding of guilty of a covered offense without adjudged confinement.”⁷³ These responsibilities include providing notice to the offender by requiring the offender to complete a form⁷⁴ acknowledging his registration requirements and ensuring this form is filed with the allied papers of the record of trial.⁷⁵

Second, soldiers convicted of a qualifying offense or are otherwise required “[must] register with the Provost Marshal and with State and local officials.”⁷⁶ Paragraph 24-4b of *AR 27-10* mandates stringent registration requirements for soldiers with qualifying convictions. Notably, soldiers failing to meet these requirements are subject to punitive action.⁷⁷

The new *AR 27-10* also changes the agency responsible for funding certain trial defense expenses. Before 14 October 2002, convening authorities funded trial defense counsel travel and related expenses to interview witnesses related to a court-martial.⁷⁸ Paragraph 6-5a(2) now shifts to the Commander, United States Army Legal Services Agency, the burden of funding defense counsel travel “to interview the accused or any witnesses, take depositions, and investigate the case.”⁷⁹

Finally, Chapter 21 of *AR 27-10* delineates active component support to reserve component commands. Paragraph 21-12 and the new Appendix E consolidate military justice support responsibilities.⁸⁰ Chiefs of military justice receiving a call from a contemporary in the reserve component need only reach for *AR 27-10* for guidance to confront initial issues. Stateside staff judge advocates and chiefs of military justice should familiarize themselves with the geographical support areas set out in Appendix E.

This note and the OTJAG Criminal Law information paper highlight some, but not all, of the revisions contained in the new *AR 27-10*. As this note illustrates, the judicial, nonjudicial, and administrative changes made effective on 14 October 2002 are significant, wide ranging, and require immediate attention. Consequently, judge advocates and legal NCOs should read through the new regulation to gain a better understanding of the changes and, more specifically, how the changes will impact the local practice of military justice. Lieutenant Colonel Garrett.

Administrative & Civil Law Note

Army Substance Abuse Program

Last year, the Army published a revision to *Army Regulation (AR) 600-85*, effective 15 October 2001.⁸¹ The most noticeable change was the name of the program, from the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP), to the Army Substance Abuse Program (ASAP). In addition, the Army made several other changes to the program. One of these changes requires unit commanders to process for administrative separation all soldiers identified as illegal drug users. This policy change caused some confusion, as it did not comport with the policy in the enlisted separations regulations.⁸² The Department of the Army (DA) recently published a message clarifying that commanders will follow the policy outlined in the revised *AR 600-85*.⁸³

The new regulation changes Army policy on when commanders must initiate separation actions for drug abuse. The old policy did not require commanders to initiate separation for

73. *Id.* para. 24-3.

74. U.S. Dep’t of Army, Form 7439, Acknowledgment of Sex Registration Program (Sept. 2002), available at <http://www.usapa.army.mil>.

75. *AR 27-10*, *supra* note 42, para. 24-3. The record of trial form has been revised to reflect the implementation of the Military Sex Offender Program. See U.S. Dep’t of Army, Form 4430, Record of Trial (Sept. 2002) (adding blocks 11 and 12 to annotate these requirements), available at <http://www.usapa.army.mil>.

76. *AR 27-10*, *supra* note 42, para. 24-4a.

77. See *id.* para. 24-4b.

78. 1999 *AR 27-10*, *supra* note 46, para. 6-5b.

79. *AR 27-10*, *supra* note 42, para. 6-5a(2).

80. See *id.* para. 21-12, app. E. Coordinating installation responsibilities outlining active component support, including military justice, were deleted from *Army Regulation 5-9*. See U.S. DEP’T OF ARMY, REG. 5-9, AREA SUPPORT RESPONSIBILITIES (16 Oct. 1998).

81. See U.S. DEP’T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM (ASAP) (1 Oct. 2001) [hereinafter *AR 600-85*].

82. See U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED PERSONNEL paras. 14-12c, d (1 Nov. 2000) [hereinafter *AR 635-200*]; U.S. DEP’T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 12d (3 Dec. 2001) [hereinafter *AR 135-178*].

83. Message, R 161152Z SEP 02, U.S. Dep’t of Army, DAPE-MPE, subject: Clarifying Enlisted Separation Policy for Illegal Drug Abuse [hereinafter *Illegal Drug Abuse Separation Clarification Message*].

first-time drug use if the soldier was in the grade of E-1 through E-4 and had less than three years of service.⁸⁴ Under the revised regulation, however, commanders no longer have this discretion. The new policy requires commanders to initiate and process to the separation authority separation actions for misconduct on all soldiers involved in illegal possession, use, sale, trafficking, or distribution of illegal drugs. As an exception, commanders are not required to initiate separation if charges have been referred to a court-martial empowered to adjudge a punitive discharge, or if drug use is discovered through self-referral.⁸⁵ The new policy mirrors other military service policies, generally requiring commanders to initiate separation of all service members who abuse drugs.⁸⁶

Because of the confusion caused by the inconsistency between the revised *AR 600-85* and the enlisted separations regulations, commanders were advised to continue following the policy contained in the enlisted separations regulations until the proponents of these regulations agreed on a unified policy. The recent message was intended to clarify DA policy, specifically providing that commanders follow the guidance in the new *AR 600-85* requiring initiation of separation proceedings (but not mandatory discharge) on all first-time drug abusers. The message also provides that the proponent of the enlisted regulations

will amend *AR 635-200* and *AR 135-178* to be consistent with the new policy in *AR 600-85*.⁸⁷

In addition to the new policy on first-time drug users, the new regulation requires commanders to initiate separation actions for certain alcohol-related misconduct. Specifically, commanders must initiate and process to the separation authority an administrative separation action for misconduct if a soldier is involved in two serious incidents of alcohol related misconduct in a year, such as drunk on duty or operating a motor vehicle while intoxicated.⁸⁸ The old policy only required commanders to consider separating soldiers involved in serious alcohol-related misconduct.⁸⁹

The new policy also contains several other changes of interest to judge advocates. For example, the first general officer in the chain of command or the installation commander must specifically authorize alcohol consumption during duty hours at the work place.⁹⁰ Also, all Active Component soldiers must be tested for drugs at a rate of one unannounced random sample per year.⁹¹ Additionally, the regulation addresses several personnel actions during rehabilitation. Soldiers command referred to the ASAP and enrolled in the program must be flagged (effective when *AR 600-8-2*⁹² is changed to reflect this

84. See U.S. DEP'T OF ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM para. 1-11b(3) (26 Mar. 1999) (rescinded) [hereinafter *AR 600-85* (rescinded)]; *AR 635-200*, *supra* note 82, paras. 14-12c, d; *AR 135-178*, *supra* note 82, para. 12.

85. *AR 600-85*, *supra* note 81, para. 1-35b.

86. See U.S. DEP'T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 5.55.2 (10 Mar. 2000).

5.55.2.1. A member found to have abused drugs will be discharged unless the member meets all seven of the following criteria:

- [1] Drug abuse is a departure from the member's usual and customary behavior.
- [2] Drug abuse occurred as the result of drug experimentation (a drug experimenter is defined as one who has illegally or improperly used a drug for reasons of curiosity, peer pressure, or other similar reasons).
- [3] Drug abuse does not involve recurring incidents, other than drug experimentation as defined above.
- [4] The member does not desire to engage in or intend to engage in drug abuse in the future.
- [5] Drug abuse under all the circumstances is unlikely to recur.
- [6] Under the particular circumstances of the case, the member's continued presence in the Air Force is consistent with the interest of the Air Force in maintaining proper discipline, good order, leadership, and morale (Noncommissioned officers have special responsibilities by virtue of their status; fulfill an integral role in maintaining discipline; and, therefore, must exhibit high standards of personal integrity, loyalty, dedication, devotion to duty and leadership).
- [7] Drug abuse did not involve drug distribution

Id. See also U.S. DEP'T OF NAVY, SECNAVINST 5300.28C, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL para. 4.d (24 Mar. 1999) (providing that "[m]ilitary members determined to be using drugs, in violation of applicable provisions of the Uniform Code of Military Justice (UCMJ), Federal, State or local statutes, or who unlawfully engage in the trafficking of drugs or drug abuse paraphernalia, or who are diagnosed as drug dependent shall be disciplined as appropriate, and processed for administrative separation").

87. Illegal Drug Abuse Separation Clarification Message, *supra* note 83, para. 4.

88. *AR 600-85*, *supra* note 81, para. 1-34a.

89. *AR 600-85* (rescinded), *supra* note 84, para. 1-11c.

90. *AR 600-85*, *supra* note 81, para. 2-8b; see also U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 7.14h (25 Oct. 1998) (generally prohibiting service of alcoholic beverages to soldiers on duty on Army installations and authorizing the first general officer in the chain of command, with the concurrence of the installation commander or designee, to grant exceptions to this policy).

91. *AR 600-85*, *supra* note 81, para. 8-2. To the maximum extent possible, U.S. Army Reserve (USAR) and Army National Guard (ARNG) soldier test rates must mirror this rate. *Id.*; see also *id.* para. 13-9c (providing that the USAR testing rate of one random sample per Selected Reserve member annually will mirror that of the Active Component testing rate as closely as operationally possible).

provision). Further, commanders, in consultation with the ASAP clinical staff, must determine the deployment availability of soldiers under the same standards used for other medical treatment; generally, only those actually undergoing inpatient detoxification are not deployable.⁹³

Army National Guard (ARNG) and U.S. Army Reserve (USAR) judge advocates must also be familiar with the new ASAP policy, as the new policy contains specific requirements for each component. For instance, the new regulation requires commanders to process ARNG soldiers identified as illegal drug users for administrative separation within forty-five days

of receiving a verified positive drug test; USAR soldiers must be processed for separation within thirty days.⁹⁴

Judge Advocates must be familiar with the changes to the Army's ASAP policy contained in *AR 600-85*. In particular, those advising commanders must know when a commander is required to initiate separation of soldiers who are drug or alcohol abusers. Moreover, ARNG and USAR judge advocates and paralegals must be familiar with the new processing time requirements to assist commanders in meeting them. Lieutenant Colonel Stahl.

92. *AR 600-8-2*, *supra* note 59.

93. *AR 600-85*, *supra* note 81, para. 5-2. For example, soldiers are deployable even if they are enrolled in the ASAP and receiving outpatient services or participating in, or awaiting admittance to, an ASAP partial inpatient care program. *Id.*

94. *Id.* paras. 12-11a(2), 13-9a(3).