

CHAPTER 18

ENVIRONMENTAL LAW

Outline of Instruction

"The Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission"

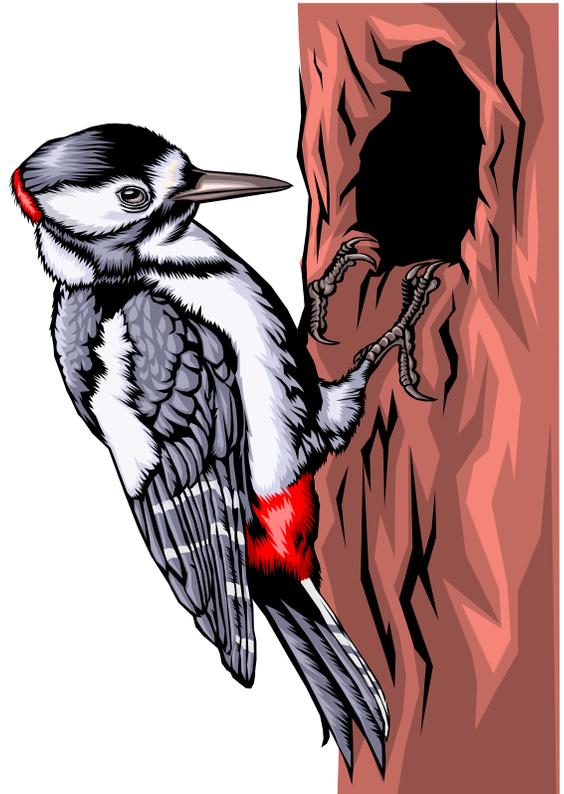
--Vision

I. INTRODUCTION.

II. FOUR PILLARS OF THE ENVIRONMENTAL PROGRAM (ARMY STRATEGY).

A. Compliance.

1. Ensure current operations comply with all laws.
2. Priority on building environmental staff.
3. Ensure adequate funding and budgeting.
4. Build relations with regulators and public.



MAJ JAMES H. ROBINETTE, II

- a. Partners in compliance.
 - b. Resolve violations quickly.
5. Explore innovative technologies; share with others.
- B. Restoration.
1. Clean up contaminated sites.
 2. Protect human health and the environment.
 3. Prioritize sites and resources.
 4. Move dirt—not paper.
- C. Prevention.
1. Minimize contamination and pollution.
 2. Analyze life cycle costs of weapons systems.
 3. Systematically eliminate hazardous materials use (unless we really need it).
 4. Instill pollution prevention ethic.
- D. Conservation.
1. Conserve, protect, and enhance environmental, natural, and cultural resources for future generations.
 2. Instill conservation stewardship ethic.
 3. Balance mission with land and natural resources.

III. ENVIRONMENTAL LAW—BASIC PRINCIPLES.

- A. Sovereign immunity has largely been eliminated. Stateside federal facilities are now largely treated like any other part of the regulated community.
- B. States have authority over federal activities.
- C. Strict liability is the guiding principle.
- D. No automatic national defense exemptions. Exemptions are available, but they usually require a Presidential or Secretary of Defense finding of necessity, and are rarely invoked.
- E. Traditional legal defenses have been abolished.
- F. No direct application of U.S. laws to overseas operations. DoD has, however, decided to apply many U.S. standards via **DoD Instruction 4715.5**, Management of Environmental Compliance at Overseas Installations, 22 Apr 96 (replaces DoD Directive 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, 20 Sep 91).
 - 1. Applies to all DoD components including the Unified Combatant Commands.
 - 2. Explicitly does not apply to:
 - a. the operations of U.S. military vessels or aircraft.
 - b. off-installation operational and training deployments.
 - c. determination or conduct of remedial or cleanup actions necessary to correct environmental problems arising from past DoD activities.
 - 3. DoD establishes an overseas “baseline” document. The baseline will consist of standards applicable to similar operations conducted in the U.S. and all U.S. environmental laws with extraterritorial effect.

4. Once developed, the baseline will be compared with existing host nation law to develop country-specific environmental standards (i.e., Final Governing Standards (FGS)). After consultation with the U.S. Diplomatic Mission in the host country, the “Executive Agent” will determine whether to apply baseline standards or host nation standards. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS.
5. Disposal of hazardous wastes in the host country will be limited to instances where:
 - a. disposal complies with either the baseline guidance or FGS and is in accordance with any applicable international agreements; or,
 - b. disposal complies with either the baseline guidance or FGS and host nation authorities have concurred with disposal in their country.
6. Waivers from applicable standards can be obtained from the Environmental Executive Agent where “compliance with the standards at particular installations or facilities would seriously impair their actions, adversely affect relations with the host nation or would require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or . . . realignment . . .” Consultation with the Diplomatic Mission must occur before compliance with a host nation standard is waived.

IV. ARMY POLICY.

A. References.

1. Army Regulation 200-1, Environmental Protection and Enhancement, 21 February 1997 (an overview of environmental protection programs).
2. Army NEPA Regulation, 32 CFR Part 651, March 29, 2002, replaces Army Regulation 200-2, Environmental Impacts of Army Actions, 23 December 1988 (implementation of the National Environmental Policy Act (NEPA)).

3. Army Regulation 200-3, Natural Resources - Land, Forest and Wildlife Management, 28 February 1995 (sets forth policy and guidance for the management and maintenance of all lands under Army control).
4. Army Regulation 200-4, Cultural Resources Management, 1 October 1998 (sets forth policy and guidance for the management of cultural resources located on lands under Army control).
5. Army Regulation 420-47, Solid and Hazardous Waste Management, 1 December 1984.

B. Environmental Compliance.

1. The installation commander:
 - a. must ensure compliance with federal, state, and local environmental laws and regulations.
 - b. must cooperate with federal, state, and local officials in addressing environmental problems.
 - c. must allow civilian authorities access to the installation to monitor compliance.
2. Key installation personnel.
 - a. Environmental Coordinator: usually a GS employee in the DPW shop.
 - b. JAG: the Environmental Law Specialist (ELS) should be consulted before undertaking any major activities in order to allow him or her an opportunity to spot environmental issues in advance.
 - c. PAO: should be aware of and actively involved in the planning process for all environmentally sensitive activities.

V. AREAS OF ENVIRONMENTAL CONCERN.

A. Environmental Impacts of Federal Actions.

1. Reference. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d.
2. Enforcement authority: the EPA to some extent, but mostly citizen groups and federal courts.
3. Approach: mandatory decision-making procedure, frequently involving public participation.
4. Concerns addressed.
 - a. Efficient use of natural and cultural resources.
 - b. Protection of endangered plant and animal species.
 - c. Protection of historic, scientific, and cultural resources.
 - d. Consideration of unquantifiable environmental values.
5. Typical NEPA issues.
 - a. Failure to consider environmental impacts prior to undertaking major federal actions.
 - b. Failure to consider alternatives to major actions impacting the environment.
 - c. Inadequate compliance with NEPA's procedural requirements.

B. Air.

1. Reference. Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q.
2. Enforcement authority: state and local governments, usually by permits to operate pollution facilities.
3. Types of pollution controlled.
 - a. Fossil fuel combustion by-products.
 - b. Chemicals in smokestack gases.
 - c. Hazardous substances (e.g, asbestos dust).
 - d. Haze, particles, and smoke.
 - e. Chemicals that emit volatile organic compounds (VOCs).
4. Sources of pollution.
 - a. Vehicles.
 - b. Heating plants.
 - c. Industrial operations.
 - d. Building demolition and renovation.
 - e. Surface coating operations.
 - f. Smoke-generating equipment.
 - g. Fueling operations.

5. Typical air issues.
 - a. Solvent degreasers releasing VOCs.
 - b. CFC/Halons. Lack of proper recovery systems/trained personnel to service refrigerant systems containing CFC/Halons.
 - c. Asbestos releases during building demolition or renovation operations.

C. Surface Water.

1. Reference. Federal Water Pollution Control Act (Clean Water Act [CWA]) 33 U.S.C. §§ 1251-1387.
2. Enforcement authority: mostly state government, with some federal involvement, through mandatory permits for all effluent discharges.
3. Types of pollution controlled.
 - a. Discharges into surface waters.
 - b. Waste products.
 - (1) Chemicals.
 - (2) Heat.
 - c. Stormwater discharges.
4. Sources of pollution.
 - a. Sewage treatment plants.
 - b. Waste streams from industrial operations.

- c. Accidental spills.
- d. Runoff from parking lots.
- e. Portable bath and laundry equipment.

5. Typical water issues.

- a. Improper discharges into sewer systems.
- b. Cleaning vehicles at other than designated washracks.
- c. Absence of Spill Prevention Control and Countermeasure (SPCC) Plan.
- d. Runoff from parking areas, field training sites.

D. Hazardous Waste.

- 1. Reference. Resource Conservation and Recovery Act, (RCRA), 42 U.S.C. §§ 6901-6992k.
- 2. Enforcement authority: federal, state, and local governments, through registration of waste-generating operations and permit requirements.
- 3. Types of pollution controlled: over 700 chemical compounds, plus waste streams from specified industrial processes.
 - a. Solvents.
 - b. Paint.
 - c. Batteries.

- d. Waste streams with chemical components.
 - e. Used POL.
4. Sources of pollution.
- a. Industrial production.
 - b. Vehicle maintenance operations.
 - c. Equipment operations.
 - d. Building maintenance.
5. Control scheme.
- a. Regulate generators.
 - (1) Register with the EPA.
 - (2) Encourage reduction of waste volume.
 - (3) Maintain records of hazardous waste produced.
 - (4) Label all hazardous waste.
 - (5) Transport and dispose of waste properly.
 - (6) Remove hazardous waste from the premises within 90 days of generation.
 - (7) Report irregularities in transportation or disposal.

- b. Regulate transporters.
 - (1) Register with the EPA.
 - (2) Mandatory safety equipment.
 - (3) Deliver only to authorized facilities.
 - (4) Maintain records.
 - (5) Report and clean up spills.

- c. Regulate treatment, storage, and disposal facilities.
 - (1) Obtain a permit from the EPA or the state.
 - (2) Comply with strict technological requirements.
 - (3) Maintain records.
 - (4) Pay for clean-up costs if materials are ever released into the environment.

- d. Typical RCRA related problems to look for at installations.
 - (1) Failure to label drums that contain hazardous waste.
 - (2) Failure to include the accumulation start date on drum labels.
 - (3) Failure to remove the drums within 90 days.
 - (4) Failure to update training records for hazardous waste personnel.

- (5) Failure to update RCRA permits when mission changes add a new hazardous waste stream.
 - (6) Failure to develop an adequate contingency response plan to deal with releases of hazardous waste.
 - (7) Failure to maintain proper contingency response equipment at hazardous waste storage areas.
 - (8) Failure to maintain up-to-date emergency notification rosters for releases of hazardous waste.
- e. Abandoned waste site clean-up.
- (1) Identify abandoned sites that threaten to release hazardous substances into the environment.
 - (2) Identify generators who contributed waste to these sites.
 - (3) Bill the generators for the cleanup costs on a pro rata basis.

E. Protection of Wildlife.

- 1. Reference. Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544.
- 2. Enforcement authority: the EPA, US Fish & Wildlife Service, but mostly citizen groups and federal courts.
- 3. Approach: mandatory protection of "endangered and threatened" species and their critical habitat.

4. Typical ESA issues.
 - a. Taking of species through construction or training activities.
 - b. Destruction of critical habitat through construction or training activities.
 - c. Failure to take adequate measures to conserve endangered species.

F. Historic and Cultural Resources.

1. References.
 - a. National Historic Preservation Act (NHPA), 16 U.S.C. § 470.
 - b. Archeological and Historic Preservation Act (AHPA) of 1974, 16 U.S.C. §§ 469-469c-2.
 - c. Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa-mm.
 - d. Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013.
 - e. American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996.
2. Enforcement authority: Native American Indians, citizen groups, and federal courts.
3. Approach: mandatory consultation and protection requirements under NHPA and AHPA regarding actions that will adversely affect historic properties; affirmative duties under ARPA to protect archeological artifacts; affirmative duties under NAGPRA to protect and return burial objects and human remains to Native Americans; and consideration and accommodation of Native American Indian religious beliefs under AIRFA.

4. Typical issues.
 - a. Failure to identify historic properties located on federal lands.
 - b. Failure to coordinate with State Historic Preservation Officers and/or the Advisory Council on Historic Preservation regarding the adverse or potentially adverse impact of federal actions on historic properties located on federal lands.
 - c. Failure to protect archeological artifacts located on federal lands.
 - d. Failure to protect Native American artifacts, burial objects, or remains, or make good faith efforts to return Native American remains to tribal members or lineal descendants.
 - e. Failure to reasonably accommodate Native American Indian religious practices.

VI. THE CONSEQUENCES OF NONCOMPLIANCE.

- A. Injunctions.
 1. They can delay, and even prevent, mission accomplishment.
 2. Citizen suit provisions—anyone can sue the Army for environmental violations.
- B. Monetary Costs.
 1. Cleanup costs are expensive—Approximately \$1.6 billion budgeted for DOD during FY03, of which the Army received approximately \$396 million for the remediation of active sites and \$212 million for formerly used defense sites (FUDS).

2. The command may be required to pay fines and forfeitures to state agencies.
 - a. Passage of the Federal Facilities Act has dramatically increased the number of fines and penalties paid to the states.
 - b. Fines and penalties generally must be paid from OMA.

C. Personal Liability.

1. The Department of Justice is actively pursuing enforcement of environmental laws through criminal prosecution.
2. Basis for supervisory responsibility.
 - a. Knowledge of the violation.
 - (1) Actual knowledge, or
 - (2) “Constructive knowledge”: should have known but failed or refused to find out.
 - b. Authority and responsibility to take corrective action. Note how this matches Army doctrine on an installation commander’s role in the environmental arena.
3. Issues.
 - a. Who represents the federal official?
 - (1) Federal prosecution: the official must provide his or her own legal defense at his or her own expense.
 - (2) State prosecution: representation by Department of Justice is possible, depending on the facts of the case.

b. Is there any attorney client privilege with your JAG on environmental matters? (Note, however, that the initial communication between a service member and a legal assistance or trial defense service attorney is privileged; but further representation is not available).

(1) As to federal prosecutions: NO!

(2) As to state prosecutions: maybe.

c. Is there any official immunity?

(1) Federal prosecution: no.

(2) State prosecution: maybe, if:

(a) acting in good faith compliance with federal law;
and,

(b) state law unduly interferes with federal function.

D. Public Relations.

1. People care about pollution.

2. An opportunity as well as a challenge. Good compliance and public relations programs can enhance the command's image.

3. Failure to gain public confidence may result in denial of access to needed resources, and ultimately decreased training flexibility and readiness.

VII. PRACTICAL APPLICATIONS FOR COMMANDERS.

- A. Determine your command's state of environmental compliance. Initial questions to ask.
 - 1. Has the command:
 - a. been named as a defendant in a lawsuit based on environmental problems?
 - b. received any administrative compliance orders?
 - c. received any notices of violation (NOVs)?
 - 2. What is the nature of the relationship between installation personnel and state and federal environmental regulators?
 - 3. When were the installation's hazardous waste generating and handling operations last comprehensively reviewed for compliance and possible waste reduction efforts?
 - 4. How active has the PAO been in managing the installation's public image on environmental matters?
- B. Exercise effective environmental management techniques.
 - 1. Promote the Environmental Quality Control Committee (EQCC).
 - a. Formation at every installation (except satellites) is required by AR 200-1, para. 15-11.
 - b. Purpose of the EQCC is to advise the installation commander on environmental priorities, policies, strategies, and programs.
 - c. EQCC should normally meet **monthly**.

- d. Membership on the EQCC is **mandatory** for all major staff sections, directorates, and tenant activities.
 - e. The installation commander, or his designated representative, **must** chair the EQCC. It is important that any delegate also be given authority to assign coordination responsibilities to resolve problems that are identified.
2. Identify environmental problem areas through use of internal and external audits. Require subordinates to fully support implementation of the **Environmental Performance Assessment System (EPAS)**.
- a. This program is more than just an inspection. In addition to finding problems, the audit team will help formulate solutions.
 - b. There is a direct correlation between the effectiveness of the audit and the cooperation of the installation personnel involved.
3. Insist on a vigorous environmental training program for installation personnel.
- a. Require technical and legal personnel to develop user-friendly rules tailored to your mission and installation that make compliance reasonably understandable.
 - b. Use available training resources.
 - c. The **Army Logistics Management College (ALMC)** currently offers eight courses in general environmental compliance and hazardous waste management. These courses are taught in the resident, onsite, correspondence, accredited off-campus instructor, learning center, and satellite education program modes. **Call DSN 687-2323/4774 or (804) 734-2323/4774 for more information.**

4. Promote efforts to reduce waste generation.
 - Ask the simple question: “Is there something else that we can use which will not become a RCRA regulated hazardous waste?”
5. Build bridges. Consider giving a briefing concerning your installation’s environmental program to state and federal environmental regulators responsible for overseeing installation compliance. Don’t be in the position where you are meeting them for the first time when discussing a NOV!
6. Budget for Environmental Cleanup and Compliance.
 - a. Funding for environmental compliance and cleanup comes primarily from three sources:
 - (1) Defense Environmental Restoration Account (DERA).
 - (2) Operations and Maintenance (Army).
 - (3) Military Construction Account.
 - b. Budgeting for major environmental compliance projects is accomplished pursuant to the A-106 process (Environmental Program Requirements Report (EPR), formerly the Environmental Pollution Prevention, Control, and Abatement at DoD Facilities Report (RCS 1383)). AR 200-1, para. 13-5.
 - c. Commanders must insure that they identify **all** pollution control projects and programs needed to achieve and maintain environmental compliance for the next five years. Items identified (to include training) are divided into three categories:
 - (1) Category I is for “must fund” requirements. Included within Category I are items necessary to resolve NOV’s; items necessary to meet promulgated standards whose implementation deadline has already passed or will pass in a current budget cycle; and items needed to support a signed compliance agreement.

- (2) Category II is for items necessary to meet established standards whose compliance date falls in a future budget cycle.
- (3) Category III is for items needed to demonstrate leadership or which will require replacement in the future because of physical or technological obsolescence.

VIII. CONCLUSION.

APPENDIX

RESOURCE CONSERVATION AND RECOVERY ACT

WASTE ACCUMULATION RULES

SATELLITE ACCUMULATION POINT

1. At or near point of generation.
2. Single chemical.
3. Less than 55 gallons.
4. Indefinite storage time.
5. Accumulation start date is day it reaches 55 gallons. (90 days starts to run)
6. 3 days to move to accumulation point after it reaches 55 gallons.

ACCUMULATION POINT

1. Centrally located.
2. Multiple chemicals.
3. Any amount.
4. 90 days storage.

