

## CHAPTER 24

### SOLO ENVIRONMENTAL LAW ELECTIVE

#### I. SECRETS OF A SUCCESSFUL ENVIRONMENTAL PROGRAM

- A. U.S. Army Material Command Video
  - 1. Leadership and Management Lessons
    - a. Working-Level Environmental Quality Control Committee
    - b. Employee Environmental Training
    - c. Vigilant Self Auditing
  - 2. Despite Complex Problems, Progress Made over *Time*
- B. Focus on Hazardous Materials and Hazardous Waste Management
  - 1. Prevalent at both Unit and Installation Levels
  - 2. Easy to Spot Violations
  - 3. Individual Responsibility and Exposure (Case Illustrations)
  - 4. Statistically, the Source of Most Army Violations
    - a. 124 out of 228 Fines Assessed to Date against Army Installations Involve Resource Conservation and Recovery Act (RCRA) Violations (FY 93 through 3rd Qtr FY 01)

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7. Munitions managed IAW DOD and DOT regulations are conditionally exempt from RCRA
8. Action on munitions at closed, transferred and transferring ranges postponed while DOD prepares Range Rule
9. Munitions Rule upheld by Court of Appeals for D.C. Circuit 30 Jun 98
10. States must adopt to be effective (AL, AK, AZ, GA, HI, ID, IA, NV, OR, PR, MS, OK), process ongoing

B. Range Rule

1. Proposed Rule published 26 Sep 97, 62 Fed. Reg. 50830
2. Voluminous comments by regulatory agencies and public
3. Major issues are CERCLA basis and risk model (see article)
4. Range Rule withdrawn by DoD Nov 00, but expect to see as DoD guidance (DoDI/DoDD).
5. More challenging to get regulator acceptance

C. Activist Efforts

1. Challenged Munitions Rule
2. Will certainly challenge any interpretation of the range rule by regulators as obviating Army compliance with other hazardous substance or waste requirements.
3. Will continually use litigation/lobbying to increase regulatory control over ranges

### **III. ENDANGERED SPECIES ACT**

- A. Continues to be the area most able to affect operations
  
- B. Recent activities
  - 1. Impacts related to water usage form a basis for challenge to ongoing operations
  - 2. Focus on large range and training areas, land withdrawals
  - 3. Willingness of FWS to look at measures beyond the fence line as mitigation
  - 4. Less deference by regulators towards military mission
  - 5. Decentralized USFWS structure highlights local issues over national issues
  
- C. Trends
  - 1. Very contentious issue in Congress
  - 2. Strong lobbying for reform by industry and private interests
  - 3. Substantial support for maintaining current strong statute, supported by activist groups
  - 4. Unlikely any major revisions will pass

#### **IV. LEAD BASED PAINT ISSUES**

#### **V. ENVIRONMENTAL LAW OVERSEAS AND IN MILITARY OPERATIONS**

##### **A. References**

##### **1. Primary.**

- a. DOD Instruction 4715.8, Environmental Remediation for DoD Activities Overseas, 2 Feb. 1998.
- b. 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).
- c. Department of Defense Overseas Environmental Baseline Guidance Document, Oct 92 (pending revision).
- d. Country-Specific Standards.
  - (1) Final Governing Standards for Belgium, Mar 96.
  - (2) Final Governing Standards for Germany, Mar 96; Supplementary Agreement to NATO SOFA—effective 29 March 1998 (see below).
  - (3) Final Governing Standards for the Netherlands, Mar 96.

##### **2. Secondary.**

- a. Executive Order, 12114, Environmental Effects Abroad of Major Federal Actions, 4 Jan 79.

- b. Executive Order 12088, Federal Compliance with Pollution Standards, 13 Oct 78.
- c. DOD Directive 4715.1, Environmental Security, 24 Feb 96.
- d. DOD Instruction 4715.4, Pollution Prevention, 18 Jun 96.
- e. DOD Directive 5530.3, International Agreements, 11 Jun 87.
- f. DOD Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions, 31 Mar 79.
- g. AR 200-2, Environmental Effects of Army Actions, 23 Dec 88 (chapter 8 and appendices G and H deal with environmental effects of major Army actions abroad).

B. Background and general policies.

1. Background.

- a. DOD is committed to the protection of human health and the environment at DOD installations in foreign countries.
- b. Most U.S. environmental laws do not apply extraterritorially.
- c. The FY 91 National Defense Authorization Act mandated that DOD develop environmental compliance standards for installations located abroad.
  - (1) Overseas Environmental Baseline Guidance Document (OEBGD).
  - (2) Final Governing Standards (FGS)

2. General Policies.

- a. Hazardous Wastes. DOD Components will not dispose of hazardous wastes (as defined under either United States law or host nation standards) overseas without concurrence of the nation where the disposal takes place.
  - (1) Hazardous waste disposal in foreign countries must comply with either the OEBGD or FGS, as appropriate.
  - (2) Disposal must also be accomplished in accordance with any applicable international agreements.
  - (3) Absent an international agreement that grants disposal authority, appropriate authorities of the nation where the disposal takes place must explicitly or implicitly concur with the disposal.
- b. Pollution Prevention. Prevention is the preferred means for attaining environmental compliance, where economically advantageous and consistent with mission requirements.
- c. Cooperation. DOD Components will use cooperative solutions for environmental facilities or services, where economically advantageous and consistent with mission requirements.
- d. Commercially Proven Solutions. DOD Components should use commercially proven solutions, where possible, to achieve, maintain, and monitor compliance.
- e. Environmental Assessments. DOD Components shall establish and conduct a program for regular assessment of environmental compliance at installations overseas.

C. Overseas Environmental Baseline Guidance Document (OEBGD).

- 1. Prepared by the DOD Overseas Environmental Task Force.

2. Designed to achieve the broad policy mandate of protecting human health and the environment by establishing objective criteria and management practices for environmental compliance at overseas installations.
  - a. Reflects consideration of current, generally accepted environmental standards applicable to similar DOD installations, facilities, and actions in the United States.
  - b. Contains extracts of all pertinent U.S. environmental laws and regulations.
  - c. Incorporates requirements of U.S. law that have extraterritorial application to DOD.
  - d. Includes DOD guidance for overseas commanders.
3. Used in developing country-specific FGS. Contains procedures for use in establishing FGS for a particular geographic area and provides standards for environmental compliance where no FGS have been established.
4. Review and Updating.
  - a. The OEBGD is supposed to be reviewed as needed, but at least biennially to ensure it reflects consideration of current standards.
  - b. The Air Force (Center for Environmental Excellence) is in charge of the OEBGD review process and chairs a multidisciplinary committee consisting of, at a minimum, representatives of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the Defense Logistics Agency. Field comments are solicited during the review process.
  - c. The 1992 OEBGD revised 15 March 2000

D. Applicability of OEBGD

1. The OEBGD applies to all DOD installations located outside the United States, its territories, and possessions.
2. The OEBGD does not apply to:
  - a. Operations of U.S. military vessels and aircraft. (Except support functions for such vessels and aircraft; e.g., management or disposal of off-loaded waste or material.)
  - b. Off-installation operational and training deployments.
  - c. Facilities and activities covered under the Naval Nuclear Propulsion Program.
  - d. Restoration/remediation projects.
3. Unless inconsistent with applicable host nation law, base rights and/or Status of Forces Agreements, or other international agreements or practices established pursuant to such agreements, the OEBGD shall be applied by DOD Components stationed in foreign countries when:
  - a. Host nation environmental standards do not exist;
  - b. Host nation environmental standards are not applicable; or
  - c. Host nation environmental standards provide less protection to human health and the natural environment than the baseline guidance.

E. Contents of OEBGD

1. Air Emissions - Chapter 2.

2. Drinking Water - Chapter 3.
3. Wastewater - Chapter 4.
4. Hazardous Materials - Chapter 5.
5. Hazardous Waste - Chapter 6.
6. Solid Waste - Chapter 7.
7. Medical Waste Management - Chapter 8.
8. Petroleum, Oil, and Lubricants - Chapter 9.
9. Noise - Chapter 10.
10. Pesticides - Chapter 11.
11. Historic and Cultural Resources - Chapter 12.
12. Endangered Species and Natural Resources - Chapter 13.
13. Polychlorinated Biphenyls - Chapter 14.
14. Asbestos - Chapter 15.
15. Radon - Chapter 16.
16. Lead Based Paint - Chapter 17.
17. Spill Prevention and Response Planning - Chapter 18.

18. Underground Storage Tanks - Chapter 19.
19. Appendix A - Characteristics of Hazardous Wastes and Lists of Hazardous Wastes and Hazardous Materials.

## **VI. FINAL GOVERNING STANDARDS (FGS).**

- A. Defined.

A comprehensive set of country-specific substantive provisions, typically technical limitations on effluent, discharges, etc., or a specific management practice with which DOD installations in the host nation concerned must comply.

- B. FGS reconcile the requirements of applicable international agreements, applicable host-nation environmental standards, and the OEBGD.

- C. Procedure for Establishing FGS.

1. The Deputy Under Secretary of Defense for Environmental Security (DUSD(ES)) designates a DOD Component as the DOD Environmental Executive Agent for environmental matters in foreign countries where DOD installations are located and where the DUSD(ES) determines that the level of DOD presence justifies establishment of FGS (see attached list). Current designations include:

- a. CINCUSAREUR - Germany, Belgium, and the Netherlands.

- b. CINCUSAFE - United Kingdom and Turkey.

- c. CINUSNAVEUR - Italy, Spain, and Greece.

2. The DOD Executive Agent then identifies applicable host nation environmental standards. In identifying these standards, the Executive Agent must:

- a. Identify published host nation law and applicable international agreements for the protection of human health and the environment within the host nation. Note that local laws are not included unless they implement national laws that delegate authority to, or recognize the authority of, the local governments in the environmental arena.
  - b. Determine the extent to which the host nation environmental standards are adequately defined and generally in effect and enforced against host nation and private sector activities.
3. Next, the Executive Agent will determine the FGS. Essentially, this is accomplished by comparing the OEBGD with applicable host nation environmental standards identified as described above.
- a. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS. If a specific international agreement with the host nation establishes a standard applicable to U.S. installations, however, the Executive Agent will use that standard to establish the FGS.
  - b. The OEBGD will not be used to establish FGS if it is inconsistent with applicable host nation law or standards established under applicable international agreements, and such laws or standards provide more protection to human health and the environment.
  - c. If an individual standard is best analyzed as part of a comprehensive regulatory scheme, the Executive Agent should compare the overall regulatory scheme in the OEBGD with the corresponding scheme under host nation law or applicable international agreements. Ordinarily, the more protective scheme will then be used to establish the FGS.
  - d. If a particular issue is not addressed in the OEBGD but is regulated by host nation law or international agreement, the Executive Agent will consider the standards established by such law or agreement in developing the FGS. Until the Executive Agent establishes the FGS, the provisions of host nation law or the applicable international agreement apply.

- e. The Executive Agent must coordinate the FGS with other DOD Components operating in the country, the Unified Combatant Commander, and the U.S. Diplomatic Mission.
- f. Once established, the Executive Agent is supposed to revalidate and update the FGS “on a periodic basis,” but at least every two years.

D. Compliance and Waivers.

- 1. DOD Components operating in a country for which FGS have been established must comply with the FGS for that country. If operating in a country for which no FGS have been established, such Components must comply with applicable international agreements, applicable host nation laws, and the OEBGD. In case of inconsistency, the most stringent standard applies.
- 2. Waivers.
  - a. DOD Components may request a waiver of FGS (or other applicable standards if not FGS have been established) only if:
    - (1) Compliance with the standards at particular installations or facilities would seriously impair their actions;
    - (2) Adversely affect relations with the host nation; or
    - (3) Require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or a realignment that would remove the requirement.
  - b. Waivers will not be granted if noncompliance would result in violation of any U.S. environmental law with extraterritorial application or constitute a breach of any applicable international agreement.

- c. The Executive Agent approves or disapproves waiver requests. Pending action by the Executive Agent, Unified Combatant Commanders may authorize temporary emergency waivers in limited cases (i.e., the waiver is essential to the accomplishment of an operational mission directed by the National Command Authority).

E. Goals and Impact of New Supplementary Agreement with Germany

- 1. FRG's Goal: Greater German Control over Foreign Forces in Germany by Applying German Law
- 2. USAREUR Goals:
  - a. No degradation of training or readiness
  - b. No degradation of quality of life
  - c. No increased costs to government or personnel
- 3. ***Upshot is Uncertainty: FRG Will Force Maximum Compliance with German Law, especially***
  - a. Environmental (NATO SOFA Claims Procedures May Apply [75/25 Cost Split]; Pay Hazardous Substance Contamination Costs If We Did It, As Soon As Funds Are Available)
  - b. Permit requirements (construction; operate landfills; operate firing ranges; obtain water rights; transport hazardous cargo; store hazardous material; vehicle disposal (junk car) issues; perform activities with potentially dangerous effects on people or the environment)—if permit is denied, "consult" and find alternative.
  - c. Traffic and Transportation (expanded Hazardous Cargo Drivers Training [from 19 to 40 hours]; Hazardous Cargo Advisor Requirements [full implementation by 1 Jan, 2000]; operating waivers procedure/Bundeswehr Issues).

## **VII. OVERSEAS COMPLIANCE ASSESSMENTS.**

- A. DOD Instruction 4715.5 requires the heads of DOD Components to establish and implement an environmental compliance assessment program for overseas installations.
- B. The overseas compliance assessment program must include both internal and external audits.
  - 1. Internal assessments must be conducted annually, except in years when external audits are conducted.
  - 2. External assessments will be conducted once every three years or when directed by the Unified Combatant Commander.
- C. The protocol manuals used for assessment of installations located in the United States are not used overseas. Compliance is measured against standards established in the OEBGD, FGS , or applicable host nation laws or international agreements.

## **VIII. OVERSEAS “NEPA.”**

- A. Executive Order, 12114 creates “NEPA-like” rules for certain overseas operations; i.e., major actions that have significant effects on the environment. “Major actions” are those activities that:
  - 1. Involve substantial expenditures of time, money, and resources;
  - 2. Affect the environment on a large geographic scale or have substantial or concentrated environmental effects on a more limited area; or
  - 3. Are significantly different from other actions previously analyzed with respect to the environment.

B. Analysis and Documentation.

1. Generally, the Order requires analysis and documentation whenever a “major action” significantly affects the environment of any of the following:
  - a. The global commons;
  - b. A foreign nation not involved in or participating with the United States in the action;
  - c. A foreign nation which, during the action, receives a product that is prohibited or strictly regulated in the U.S. because of its toxic or radioactive nature (e.g., asbestos, vinyl chloride, PCBs); or
  - d. Any area with natural or ecological resources of global importance.
2. The type of analysis and documentation required will differ depending on which of the four “environments” set forth at paragraph VI.B.1 above are affected.
  - a. Global commons - Environmental Impact Statement (EIS).
  - b. Foreign nations and areas with natural or ecological resources of global importance - Environmental Study (ES) or Environmental Review (ER).

C. Exemptions.

1. No environmental analysis or documentation is required if one or more of the following exemptions apply:
  - a. Actions that DOD determines do not do significant harm to the environment outside the U.S..

- b. Actions taken by the President.
  - c. Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict.
  - d. Actions taken by or pursuant to the direction of the President or a cabinet official when the national security or national interest is involved.
  - e. The activities of certain intelligence components utilized by the Secretary of Defense.
  - f. The decisions and actions of certain DOD organizations with respect to arms transfers to foreign nations.
  - g. Votes and other actions in international conferences and organizations.
  - h. Disaster and emergency relief actions.
  - i. Actions involving export licenses, export permits, or export approvals, other than those relating to nuclear activities.
  - j. Actions relating to nuclear activities, except those involving production, utilization, or waste management facilities.
  - k. **Any additional exemptions established by the Secretary of Defense.**
2. DOD is also authorized to establish categorical exclusions. If an action is covered by a categorical exclusion, no environmental analysis or documentation is required.

## **IX. CONTINGENCY OPERATIONS AND ENVIRONMENTAL CONSIDERATIONS.**

### **A. Host Nation Law.**

#### **1. Immunity.**

- a. Granted by agreement.
- b. Combat - Foreign troops enter a nation by force (Law of the Flag).
- c. U.N.-sanctioned security enforcement mission.

#### **2. Noncombat, human rights missions?**

### **B. Environmental Protection Treaties.**

#### **1. 1925 Geneva Gas Protocols.**

#### **2. 1993 Chemical Weapons Convention.**

#### **3. Environmental Modification Convention**

### **C. Traditional Law of War.**

#### **1. Hague Regulations.**

#### **2. Geneva Convention IV.**

#### **3. 1977 Protocols Additional to the Geneva Conventions.**