

NATIONAL DEFENSE AND THE ENVIRONMENT¹REVIEWED BY MAJOR JOHN B. JONES, JR.²

*Defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine concerns.*³

—Defense Secretary Dick Cheney

Mr. Stephen Dycus explains the purpose behind *National Defense and the Environment* in his preface: “This book is intended to provide a thoroughgoing introduction to the relationship between defense and environmental issues. It is meant to inform and provoke further inquiry.”⁴ For the most part, the author delivers on his promise by providing a well-written introduction to the complex world of environmental law.

The book’s strength lies in informing the reader of the environmental concerns facing the nation, explaining the regulatory frameworks designed to address these concerns, and examining the Department of Defense’s (DOD) ability and effectiveness in complying with these environmental statutes. Mr. Dycus capably analyzes the myriad issues which are the result of environmental regulations interacting with defense realities. To assist the reader’s understanding of the often complex issues involved in this area, Mr. Dycus logically lays out the contents of the book. The first and last chapters focus on the author’s “thought-provoking themes”; he questions whether, in the struggle between national defense and the environment, we “can have it both ways.”⁵ The intervening chapters address the “nuts and bolts” of our national environmental concerns. In each of these chapters Mr. Dycus reveals the origin of the various regulatory schemes, explains how they operate, and then examines how they affect the DOD.⁶

1. Stephen Dycus, *NATIONAL DEFENSE AND THE ENVIRONMENT* (1996), 286 pages (soft-cover).

2. Judge Advocate General’s Corps, United States Army. Written while assigned as a student, 45th Graduate Course, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia.

3. Dycus, *supra* note 1, at 2 (quoting Defense Secretary Dick Cheney).

4. *Id.* at xiv.

5. *Id.* at 1, 183.

In spite of addressing an area that many might consider dull—especially when describing the statutory frameworks—Mr. Dycus is able to make the material more meaningful through a series of “case studies.” After laying out the applicable statute, the author helps to make it more meaningful by examining actual incidents in which the DOD has had to cope with the legislation. Among the many case studies, the author relates how the United States Army has struggled with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation Recovery Act (RCRA) interface at Basin F at Rocky Mountain Arsenal, Colorado;⁷ he describes how the United States Air Force attempted to comply with the Clean Air Act (CAA) and National Environmental Policy Act (NEPA) in performing its cleanup at Pease Air Force Base, New Hampshire;⁸ and he examines the ongoing controversy concerning the destruction of chemical weapons at Tooele Army Depot, Utah, and Johnston Atoll in the Pacific.⁹ These case studies illustrate the complexities involved in complying with the wide range of environmental

6. Chapter Two, “Environmental Planning for National Defense,” explains how the environmental statutes apply to national security objectives and provides excellent summaries of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). Chapter Three, “Environmental Regulation of the Defense Establishment,” examines those statutes designed to eliminate pollution at its source (such as the Resource Conservation Recovery Act (RCRA), the Clean Water Act (CWA), the Clean Air Act (CAA) and the Safe Drinking Water Act (SDWA)) and how they affect the DOD. Chapter Four, “Dangerous Legacy: Cleaning Up After the Cold War,” looks at the DOD’s efforts in complying with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and RCRA after World War Two in cleaning up America’s installations and focuses on the enormous costs involved. Chapter Five, “Military Base Closures and Reassignments,” addresses the variety of environmental issues facing commanders when installations shut down. Chapter Six, “Environmental Protection During Wartime,” examines the devastating effect that war can have on the environment and outlines the limitations that international agreements place on wartime destruction. Chapter Seven, “Environmental Protection in Courts,” examines court decisions in which the DOD and the environment collide; the decisions cover a broad spectrum, from allowing broad deference to the military in this arena to granting injunctive relief. Chapter Eight, “Liability for Environmental Damages,” acts as a refresher course for anyone who has served in the claims arena and provides a succinct history on federal sovereign immunity, the Tucker Act, the Federal Torts Claims Act and the *Feres* doctrine.

Evident from these chapters is the broad range of issues that the DOD must confront when dealing with national environmental law. This point becomes particularly salient for the military practitioners at the installation level who have to address these myriad complex problems.

7. *Id.* at 91-93.

8. *Id.* at 131-32.

9. *Id.* at 66-68.

concerns and hint at future problems that the military is likely to encounter.¹⁰

The book also serves as an excellent resource, especially for those unfamiliar with, or just starting out in the area of environmental law (in other words, this book is ideal for many military practitioners). Mr. Dycus has taken the complex and often overlapping realm of environmental regulation and made it understandable. Before launching into the ramifications that a particular law may hold for the DOD, the author concisely explains the statute's inner workings, defines terms, and explains concepts. Although they typically fail to shed additional light on the text, the endnotes are numerous and could serve as an outstanding starting point for further research. Mr. Dycus relies on a variety of sources, ranging from DOD directives to House Committee hearings to law review articles and legal journals. Of particular note to military practitioners is the number of military legal periodicals that the author relies on as authority; Mr. Dycus cites twenty-one *Air Force Law Review* articles, nine *Military Law Review* articles, three *Naval Law Review* articles, and four articles from *The Army Lawyer*.¹¹

The book contains three highly informative appendices. Appendix A¹² lists the major federal environmental statutes (such as the NEPA, RCRA, CERCLA) and then provides a series of DOD cases under each identified statute. A short parenthetical describing the issue involved accompanies each citation. Appendix B lists the addresses of government-

10. To further underscore the enormity of the environmental problem facing the nation, the author scatters chilling statistical evidence throughout the book. As of 1994, there were 19,694 contaminated sites at 1722 DOD facilities nationwide. *Id.* at 80. The cost of cleanup at all DOD sites is estimated at \$42 billion and projected to take thirty years. *Id.* Cleanup is costly in terms of both time and expense. For example, the production of ammunition between World War Two and the Vietnam War at the Army's Twin Cities Army Ammunition Plant (TCAP) in Minnesota resulted in trichloroethylene leaching into the drinking water of surrounding towns. In treating this problem, the Army:

treated more than 3 billion gallons of groundwater to remove 320,000 pounds of volatile organic compounds, and it has excavated 1,100 cubic yards of soil containing PCBs. Yet of 19 contaminated sites at the base, only one has been completely cleaned up, and restoration of the entire facility is not expected before the year 2000, at a cost now estimated at \$154 million.

Id. at 94.

The Army describes TCAP as "one of its success stories." *Id.* The DOD is a big player in the environmental arena: the Pentagon directly controls some 25 million acres of land in the United States and more than 250 military installations in the United States operate public water systems regulated under the SDWA. *Id.* at 5, 7.

tal agencies associated with national defense and the environment,¹³ while Appendix C lists the addresses and phone numbers of public interest organizations.¹⁴

The author also examines how environmental regulations apply to the Department of Energy (DOE). Concerning the current state of cleanup regarding nuclear material, Mr. Dycus paints a bleak picture: "We have more than 1.4 million drums of buried or stored waste If you just take the stored waste and start piling those drums on a football field, it literally would go six miles high. That's just the stored waste we already have."¹⁵

In shifting its focus from weapons production to environmental restoration, the DOE faces formidable challenges. To begin with, the costs are staggering. Cleaning up the entire weapons complex is estimated at \$200 billion.¹⁶ Unfortunately, "[t]he technology needed to clean up some of the most dangerous wastes has not even been invented. Critical cleanup standards do not yet exist to measure DOE's progress."¹⁷ Finally, attempting to dispose of hundreds of tons of radioactive material in light of the EPA regulations and the RCRA and CERCLA restrictions is especially difficult¹⁸ when "much of the nuclear waste was dumped into unlined ditches and pits, many containers holding waste are now leaking into the open environment, and much of the radioactive waste is 'mixed' with nonradioactive waste, creating problems in storage, treatment, and disposal."¹⁹

11. Environmental issues continue to be a hot topic in the military. In addition to the aforementioned military law review articles cited by the author, recent articles exploring the interplay between the DOD and federal environmental statutes include: Major David N. Diner, *The Army and the Endangered Species Act: Who's Endangering Whom?*, 143 MIL. L. REV. 161 (1994); Lieutenant Colonel Warren G. Foote, *The Chemical Demilitarization Program—Will It Destroy the Nation's Stockpile of Chemical Weapons by December 31, 2004?*, 146 MIL. L. REV. 1 (1994); Major Stuart W. Risch, *The National Environmental Committee: A Proposal to Relieve Regulatory Gridlock at Federal Facility Superfund Sites*, 151 MIL. L. REV. 1 (1996).

12. See DYCUS, *supra* note 1, at 195-213.

13. *Id.* at 214-15. This listing includes the Environmental Protection Agency, the Defense Environmental Restoration Program, and the assistant Deputy Under Secretary of Defense for Environmental Security/Cleanup.

14. *Id.* at 216-17. These organizations include the Environmental Defense Fund, Sierra Club, and Greenpeace.

15. *Id.* at 104.

16. *Id.*

17. *Id.* at 103.

18. *Id.* at 104.

19. *Id.*

Mr. Dycus approaches the DOD's response to environmental issues evenhandedly and, for the most part, favorably. Although he criticizes the United States Air Force (as part of the coalition forces) in the Persian Gulf War for damaging the environment,²⁰ Mr. Dycus cites numerous examples of how the DOD has aggressively pursued a policy of compliance with environmental regulations. As evidence of this "new environmental ethic," "[the DOD is] working hard to come into compliance . . . [and] the Army reports that 96 percent of RCRA violations at its facilities can be cured by administrative or procedural corrections, and that such violations are being reduced by increased staffing and improved training."²¹ Furthermore,

Under its Army Environmental Training Master Plan, all soldier and civilian employees are to receive some environmental instruction at various stages in their military careers. The Navy and the Air Force have similar programs. All three service branches have created special environmental leadership courses for high-ranking officers, as well as programs aimed at particular compliance issues, such as the 1990 Clean Air Act amendments.²²

In facing the environmental challenge, Mr. Dycus senses a new attitude among the military, where base commanders "are becoming more sensitive to the environmental impacts of their maintenance and training activities"²³ and "all military services are learning to centralize responsibility to environmental matters."²⁴

National Defense and the Environment serves as an excellent reference tool for the military practitioner. Mr. Dycus explains how the broad range of federal environmental statutes impacts the military and capably describes the DOD's response. Care of the environment continues to be a

20. The coalition sorties contributed to the destruction of the atmosphere by purging their fuel tanks with halon, a fire retardant gas that destroys stratospheric ozone while the bombing of Iraqi oil fields contributed to the black smoke. *Id.* at 139. Additionally, both Kuwait and Iraq remain strewn with tons of unexploded ordnance. *Id.*

21. *Id.* at 78.

22. *Id.* As part of their initial training at The Judge Advocate General's School, United States Army, newly appointed judge advocates receive five hours of environmental law instruction during their basic course. At the graduate level advanced course, The Judge Advocate General's School, United States Army, provides more experienced judge advocates (captains and majors attending from *all* services) 19 hours of environmental law instruction.

23. *Id.* at 6.

top priority for the military and it will take a concerted effort by the military, Congress, state and local governments, and the general public for real improvement to occur. With this effort and understanding, perhaps one day we may realize the dual goal of “steady improvement with the regulatory laws, even as we maintain our military preparedness in a dangerous world.”²⁵

24. *Id.* An underlying theme to his work is that the United States can and should hold itself out as a world leader in the environmental arena, with the military as the vanguard. Specifically, Mr. Dycus maintains that our environmental laws should apply abroad and govern in times of war as well as in peace. The author recommends that the DOD consider a reduced form of environmental assessment in the planning stages of combat operations, especially when there is an opportunity for advanced planning. However, the United States Armed Forces does not conduct overseas operations in an environmental vacuum. Executive Order 12,114, Environmental Effects Abroad of Major Federal Actions, requires federal agencies, prior to undertaking actions that have significant effects on the environment outside the United States geographical borders, to prepare documents such as environmental impact statements or environmental assessments. *See* Exec. Order No. 12,114, 3 C.F.R. § 356 (1980), *reprinted in* 42 U.S.C. § 4321 (1988). The Army receives further guidance in this area through U.S. DEP’T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF MAJOR DEPARTMENT OF DEFENSE ACTIONS (23 Dec. 1988) and U.S. DEP’T OF DEFENSE, DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS (31 Mar. 1979) (which essentially reproduce Executive Order 12,114).

25. DYCUS, *supra* note 1, at 79.