Environmental Planning on Federal Facilities

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Introduction

In a familiar scene, the post engineer scowls as he listens to the inexperienced environmental law attorney explain why the engineer cannot order the bulldozers into action. The nervous attorney tries to explain the National Environmental Policy Act (NEPA)[1] and the National Historic Preservation Act (NHPA),[2] but these environmental provisions do not make much sense to the engineer. The project is ready to begin, and the post commander wanted it done yesterday. For the engineer, the environmental law attorney is the only obstacle.

This avoidable scenario can happen frequently on military installations and other federal facilities across the nation. Proper planning of actions and projects that affect the environment is difficult to master, and it is often completely nonexistent. A comprehensive understanding of how to apply the intricate planning requirements imposed by the NEPA and the NHPA is fundamental to maintaining an effective environmental planning program. A public works project that is enjoined for improper environmental planning can be extremely costly. It can result in contract claims, and it can cancel a project or a training event.

Early coordination between trainers, post engineers, environmental staff, and legal staff is critical to an effective environmental planning program. If proper coordination of proposed projects and actions that affect cultural and natural resources is not accomplished, an unproductive relationship will result among environmental staff, legal staff, public works engineers, and military trainers. A coherent environmental planning and review process can greatly reduce the miscommunication and misunderstanding that can result from a lack of coordination. If the environmental staff and legal staff carefully execute environmental requirements early in the planning process, they can establish a cohesive relationship with post engineers and military trainers, create a smoother planning process, and minimize the risk of delay due to legal action.

This article provides the reader with a broad road map through the environmental planning regulations and provides some basic familiarity with common issues that may arise during planning of an action or project. This article is not intended as a primer or exclusive tool for environmental attorneys. Rather, it provides the new environmental attorneys with an overview of environmental rules and regulations, thus enabling them to spot issues and begin their research of those issues. First, this article presents the basic requirements of natural resource laws and regulations, including a broad overview of NEPA,[3] the Endangered Species Act,[4] and wetlands regulations. Second, the article touches on the cultural resources regulations, including the NHPA,[5] the Native American Graves Protection and Repatriation Act,[6] and the Archeological Resources Protection Act.[7] Third, the article provides a general overview of the environmental planning requirement to make an air conformity determination. Finally, the article suggests environmental planning processes and styles that installations have used to manage environmental planning effectively.

Environmental Planning Requirements: The National Environmental Policy Act

The main environmental planning statute, and arguably the most significant of all environmental statutes, is the NEPA. The NEPA requires that federal agencies consider the impact of an action on the environment when taking any "major [f]ederal action significantly affecting the quality of the human environment."[8] The implementing regulations, which were developed by the Council on Environmental Quality (CEQ), establish an

1. 42 U.S.C.A. §§ 4321-4370a (West 1998).

2. 16 U.S.C.A. § 470 (West 1998).

3. 42 U.S.C.A. §§ 4321-4370a.

4. 16 U.S.C.A. §§ 1531-1544.

5. *Id.* § 470.

6. 25 U.S.C.A. §§ 3001-3013 (West 1998).

7. 16 U.S.C.A. §§ 470aa - 470*ll*.

8. 42 U.S.C.A. § 4332(2)(C).

intricate set of rules for conducting the type of environmental analysis that is required for a given action or project.[9] The Army and other federal agencies have further elaborated on those requirements in their own regulations.[10]

Types of NEPA Documentation

An agency must prepare different types of NEPA documentation depending on the level of environmental impact that is possible. If an action or project definitely will not have an effect on the environment, no NEPA documentation or only minimal NEPA documentation will be required.[11] If an action or project could possibly cause significant environmental impacts, the agency must do an environmental assessment (EA).[12] An EA will determine whether significant environmental impacts would occur as a result of the action or project.[13] The EA can assist the agency in determining whether to conduct an environmental impact statement (EIS), but an EA is not a prerequisite to an EIS.[14] If an agency action or project will significantly affect the quality of the environment, the agency must conduct an EIS.[15]

Categorical Exclusions

Each federal agency has a number of "categorical exclusions" for which NEPA environmental documentation is not required. These categorical exclusions consist of routine actions, such as maintenance and road repair, that the participating agencies have determined do not affect the environment either as an individual project or when considered in light of other projects. Under the CEQ regulations, use of such categorical exclusions is encouraged.[16]

In determining whether a categorical exclusion applies to an action or project, attorneys must look at the "screening criteria" described in *Army Regulation* (*AR*) *200-2*, appendix A.[17] If a proposed action affects sites that are eligible for the National Register of Historic Places, for instance, a categorical exclusion may not be used, even if it would otherwise apply.[18] An EA is appropriate if a categorical exclusion does not apply to a proposed action or project and some minor environmental damage could occur. The environmental attorney should keep in mind that in some cases, including use of categorical exclusions, the Army proponent must prepare a "record of environmental consideration" to explain why additional environmental documentation is not required for a project.[19]

When is NEPA Documentation Required?

Environmental attorneys are sometimes asked if a particular operation requires NEPA documentation. To answer this question, the environmental attorney must receive guidance that explains what impacts are expected. Without this information, environmental attorneys should remind the requester that, under the Army regulation, at least an EA is required when the proposed project has the potential for any of the following: "(a) Cumulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration; (b) Release of harmful radiation or hazardous/toxic chemicals into the environment; (c) Violation of pollution abatement standards; (d) Some harm to culturally or ecologically sensitive areas."[20] If the action or project is not expected to cause one of these conditions (for example, it is too insignificant to have such an impact), NEPA documentation is probably not necessary. Whether one of the conditions exists, however, is not a legal decision. Environmental attorneys are not normally qualified to determine the extent of a project's environmental impact. As additional guidance, *AR 200-2* describes several types of actions and projects that normally

9. 40 C.F.R. pts. 1500-1508 (1998).

10. U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) [hereinafter AR 200-2].

11. *Id.* para. 5.1. *See* 40 C.F.R. § 1508.9.

12. AR 200-2, *supra* note 10, paras. 5-2 to 5-3.

13. *Id.* para. 5-2.

14. 40 C.F.R. § 1501.3.

15. 42 U.S.C.A. § 4332(2)(C) (West 1998).

16. 40 C.F.R. § 1500.4(p).

17. AR 200-2, *supra* note 10, app. A.

18. *Id.*

19. *Id.* para. 3-1a.

20. *Id.* para. 5-2.

require an EA.[21] Whenever an environmental law attorney faces questions about the level of NEPA documentation required for an action or project, the attorney should consult with other environmental law specialists[22] to ensure that he considers all the factors that weigh into the decision.

If an EA is completed and it results in a "finding of no significant impact," no further environmental documentation is required. If the proposed action would cause significant environmental impact, however, the agency must conduct an EIS, which is the highest level of environmental analysis.[23] In addition, an agency can complete a higher level of analysis on a project than is required. Conducting an EIS allows the military to prepare and to present matters regarding controversial proposals. In a few select circumstances, an agency may also determine that, although completing an EIS would not be legally necessary, it would be prudent to conduct the EIS for strategic purposes, such as to garner public support for a proposed action.[24]

Major federal actions that will have an affect on the environment require NEPA documentation.[25] Which projects constitute "major federal actions" that will have an affect on the "environment," however, can be a matter of contention. "Major federal actions" can include rule-making or licensing decisions that can affect the environment indirectly.[26] These actions would also include transferring ownership of property. Under *AR 200-2*, new management and operational concepts, research and development activities, and materiel development or acquisition activities are considered to be major federal actions and must be evaluated for environmental impacts.[27]

Whether a proposed project or action requires an EIS is not always obvious. Projects that affect the environment have included a proposed low-income housing project on Manhattan's Upper West Side[28] and a proposed jail adjacent to the federal courthouse in New York City.[29] In considering an environmental challenge to the proposed federal jail in New York City, the U.S. Court of Appeals for the Second Circuit determined that a federal agency should consider at least two factors when analyzing the environmental impacts of a proposed action:

> (1) [t]he extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.[30]

For questions of whether a project or action on an Army installation requires an EIS, the environmental attorney should consult *AR 200-2*, which identifies conditions that require an

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21. *Id.* para. 5-3.

22. The environmental law attorney should consult with his technical chain from the installation through corps and major command environmental law specialists to the Environmental Law Division.

23. 40 C.F.R. § 1501.4(c) (1998).

24. Before making such a decision, however, the proponent should coordinate with higher headquarters to ensure support for such an expensive process.

25. *See generally* AR 200-2, *supra* note 10, paras. 2-2, 5-1 to 5-3.

26. Culvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

27. AR 200-2, *supra* note 10, para. 2-2.

28. *See* Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980).

29. *See* Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

30. Hanly v. Kleindienst, 471 F.2d 823, 830-31 (2d Cir. 1972).

EIS[31] and several types of actions that normally require an EIS.[32]

Is the Environmental Review Sufficient?

Judging whether an EA or an EIS is sufficient is very subjective. To ensure that the documents in either the EA or the EIS are adequate, the environmental attorney should review each document and determine whether it meets the requirements of the CEQ regulations. For instance, the document must always present an analysis of all reasonable alternatives, including a "no action" alternative, not just the proposed action.[33] The document must indicate that the agency proponent considered the issue of environmental justice—that is, whether minority or low-income populations disproportionately suffer negative effects as a result of the proposed action.[34]

Beyond the rudimentary requirements, the better and more complete the EA or EIS is, the more likely it is that the agency will prevail in a court challenge. Agencies must apply a "rule of reason" to determine what factors to analyze. Mere speculation or "worst case" analysis is not required.[35] The purpose of the process is to ensure that agencies consider the environmental effects of their planned projects and actions. Agencies must "give serious weight to environmental factors" when making project decisions.[36] If the reviewing environmental attorney notices a deficiency in an EA or EIS, someone else could notice the deficiency too.

The environmental attorney's role in reviewing the EA or the EIS is a significant preventive measure against future legal action. An "affected party" who notices a defect or deficiency in an EA or an EIS may have a legal cause of action. The Supreme Court has recognized that the NEPA creates a right of action to sue by "affected parties" to enforce federal agency obligations to consider environmental impacts of their actions.[37] As a result, the NEPA is a ripe area for litigation against the government, and the environmental attorney's review is the first line of defense.

Segmentation, Piecemealing, and Tiering of Environmental Reviews

During the planning and review of an EA or an EIS, the environmental attorney should be wary of project proponents who attempt "segmentation" or "piecemealing," which is the practice of dividing a single action "into component parts, each involving actions with less significant environmental effects."[38] "Segmentation" or "piecemealing" would occur if an agency

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31. AR 200-2, *supra* note 10, para. 6-2. These include actions that would:

> a. Significantly affect environmental quality or public health or safety.
> b. Significantly affect historic or archaeological resources, public parks and recreation areas, wildlife refuge or wilderness areas, wild and scenic rivers, or aquifers.
> c. Have significant adverse effect on properties listed or meeting the criteria for listing in the National Register of Historic Places, or in the National Registry of Natural Landmarks . . . .
> d. Cause a significant impact to prime and unique farm lands, wetlands, floodplains, coastal zones, or ecologically or culturally important areas or other areas of unique or critical environmental concern.
> e. Result in potentially significant and uncertain environmental effects or unique or unknown environmental risks.
> f. Significantly affect a species or habitat listed or proposed for listing on the Federal list of endangered or threatened species.
> g. Either establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects.
> h. Adversely interact with other actions with individually insignificant effects so that cumulatively significant environmental effects result.
> i. Involve the production, storage, transportation, use, treatment, and disposal of hazardous or toxic materials that may have significant environmental impact.

Id.

32. *Id.* para. 6-3. An EIS is normally required in situations that include expansions of facilities, construction where the project would affect "wetlands, coastal zones, or other areas of critical environmental concern," disposal of hazardous, toxic or nuclear materials that could cause an environmental impact, development of new weapons systems that require substantial facilities construction, real estate transactions that may lead to significant changes in land use, stationing of brigade or larger units during peacetime if "significant biophysical environmental impact" would result, significant training exercises conducted off the installation, and major changes in missions of facilities that cause significant environmental impacts. *Id.*

33. *Id.* para. 5-4a(3).

34. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

35. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

36. Town of Huntington v. Marsh, 859 F.2d 1134 (2d Cir. 1988). *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

37. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 289 (1973).

38. *See Town of Huntington*, 859 F.2d at 1134.

analyzed different phases of a single project as separate projects in separate EAs to avoid conducting an EIS on the total project.

Separately analyzing a separate and distinct project, however, is legal and proper. In addition, "tiering" is also proper and encouraged in the CEQ regulations.[39] When some or most of the aspects of a proposed action have already been discussed in an earlier EIS, it is permissible to tier off that earlier document with a more succinct environmental analysis to avoid "repetitive discussions" of the same issues.[40] An EIS can also incorporate by reference information from other documents.[41] If an agency chooses to produce an EIS for a proposal, however, it need not be tiered off another EIS, because an EIS, by definition and practice, is a complete analysis of an action.

The agency must apply the NEPA during the planning process prior to making any project decisions.[42] If an agency makes a decision prior to applying the NEPA and uses an EA or an EIS for a post hoc rationalization of its decision, the agency's action is illegal and vulnerable to a lawsuit. Under the CEQ regulations, an agency cannot take action on a project that will "limit the choice of reasonable alternatives."[43] Thus, any action on a project that would predispose an agency toward a particular decision, such as awarding a contract to begin preparation work, is illegal.

In general, environmental attorneys should ensure that environmental planning documents related to plans and specifications are internally consistent. In the event that the agency's proposed action is challenged, related documents will be discoverable and will constitute part of the administrative record. As much as possible, environmental attorneys should avoid speculating about the relative risk of litigation over proposed actions; NEPA litigation can be unpredictable. An interest group could challenge a project that appears to be non-controversial because the group is disturbed over another government initiative and intends to use the NEPA case as a bargaining chip. Ensuring that proper environmental documentation is developed on each and every action and project is the only way to protect against an unexpected challenge.

Environmental Planning Requirements: Endangered Species Act

Endangered Species Act (ESA)[44] compliance should occur in concert with the NEPA process. Section 7 of the ESA requires that federal agencies consult with the U.S. Fish and Wildlife Service[45] to determine whether an activity will subject any threatened or endangered species or its critical habitat to "jeopardy."[46] An agency that proposes "major construction"[47] (or other activities having a similar impact on the environment) in an area where listed species are present must prepare "biological assessment".[48] The U.S. Fish and Wildlife Service will prepare a "biological opinion" that details whether a threatened or endangered species (or critical habitat) is subjected to jeopardy.[49] The Service determines whether the proposed action will jeopardize any threatened or endangered species (or result

39. 40 C.F.R. § 1502.20 (1998).

40. *Id.*

41. *Id.* § 1502.21.

42. *Id.* § 1501.2.

43. *Id.* § 1506.1.

44. 16 U.S.C.A. §§ 1531-1544 (West 1998).

45. Agencies may consult with the U.S. Fish and Wildlife Service regarding land based species and habitat or the U.S. Marine and Fisheries Service regarding marine based species and habitat.

46. *Id.* § 1536. "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). "Endangered species" means a species that "is in danger of extinction over all or a significant portion of its range" other than insects determined to be pests. *Id.* § 1532(6). "Critical habitat" means the geographical area occupied by the species at the time it is listed or areas outside that geographical area that are "essential for the conservation of the species." *Id.* § 1532(5). A "jeopardy" determination will result if it is determined that an action would "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . ." *Id.* § 1536(2).

47. "Major construction" is a "construction project or similar activity on a scale that would trigger the requirement for an Environmental Impact Statement by significantly affecting the quality of the human environment." 50 C.F.R. § 402.02 (1998).

48. A "biological assessment" is "information prepared by or under the direction of the [f]ederal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation [of] potential effects of the action on such species and habitat." 50 C.F.R. § 402.02 (1998).

49. 16 U.S.C.A. § 1536. A "biological opinion" states the opinion of the U.S. Fish and Wildlife Service "as to whether or not the [f]ederal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02. Although technically required only when major construction (or similar activity) is involved, biological assessments should be prepared whenever possible. Doing so satisfies the agency's obligation to use the best scientific and commercial data in fulfilling its Section 7 consultation responsibilities.

in the destruction or adverse modification of critical habitat) or whether any "incidental take"[50] of an endangered species will jeopardize the species.[51] The Service will issue an opinion that describes the impacts to the species, describes reasonable measures to minimize harm to the species, and sets forth terms with which the proponent agency must comply to implement its proposed action.[52] If, after consultation, however, the Service determines that the action will "jeopardize" the species, a "jeopardy opinion" will result.[53]

Although there is a process for obtaining an exemption from endangered species requirements for an agency action,[54] a finding by the U.S. Fish and Wildlife Service that an agency action would place a listed species in jeopardy will usually terminate the action. In *Tennessee Valley Authority v. Hill*,[55] a tiny minnow-like fish, the snail darter, shut down the massive Tellico Dam project. In the Court's opinion, Justice Burger wrote, "It may be curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million."[56] Yet, the provisions of the ESA required just that.[57]

Environmental Planning Requirements: Wetlands

Wetlands compliance[58] should occur in concert with the NEPA process. Compliance generally requires the agency proponent to coordinate with the U.S. Army Corps of Engineers or to request special permits. Wetlands compliance is a controversial and difficult area of environmental law. At first glance, the law in this area may appear to be straightforward. In reality, the law is not so simple. Because of the legal complexity of wetlands compliance issues, practcioners must consult with more experienced attorneys when they are faced with an issue in this area. The following information provides practicioners with a broad overview of wetlands planning requirements.

A permit from the U.S. Corps of Engineers (or a state with permitting authority) is required under Section 404 of the Clean Water Act (CWA) for all discharges of dredged or fill material into "waters of the United States."[59] "Waters of the United States" include wetlands that are adjacent to or tributary to other waters of the United States.[60] Although it remains a matter of controversy, some courts have found nonadjacent wetlands to be waters of the United States based on their use by migratory waterfowl or interstate travelers, which constitutes a nexus to interstate commerce sufficient to establish federal jurisdiction.[61]

"Wetlands" are areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and normally do support, vegetation that is typically adapted for life in saturated soil conditions, including swamps, marshes, bogs, and similar areas.[62] An area does not need to be saturated all year long to be classified as a "wetland."[63]

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50. This refers to damage to a species or its critical habitat "that result[s] from, but [is] not the purpose of, carrying out an otherwise lawful activity conducted by the [f]ederal agency or applicant." 50 C.F.R. § 402.2. "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C.A. § 1532(20).

51. 16 U.S.C.A. § 1536.

52. *Id.* § 1536(b)(4).

53. *Id.* § 1536(a)2.

54. *Id.* § 1536(h).

55. 437 U.S. 153 (1978).

56. *Id.* at 172-73.

57. *Id.*

58. 33 U.S.C.A. § 1344 (West 1998).

59. *Id.*

60. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

61. *See, e.g.*, Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978). *But see* Tabb Lakes Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) (viewing this approach with disfavor).

62. 40 C.F.R. § 122.2 (1998). When the United States Supreme Court decided *Tennessee Valley*, the ESA did not contain an exemption process as set forth in 16 U.S.C.A. § 1536(h). In fact, the Court's decision in *Tennessee Valley* caused congress to extensively amend the ESA. Among the changes, Congress established the complex exemption process.

63. *Id.*

The concept of discharge of dredged or fill material can be interpreted extremely broadly. Proposed activities that affect a small creek bed or western arroyo, for instance, could require a Section 404 permit. The dredging or filling of a wetland, however, is not the only wetland activity that requires a permit.[64] The incidental discharge into a wetland by bulldozers or tracked vehicles, for instance, could trigger the requirement for a Section 404 permit. In those circumstances, the agency should consult with the U.S. Army Corps of Engineers to determine whether a Section 404 permit is required.[65] Such consultation may even be required in desert environments such as Fort Bliss, Texas; Fort Huachuca, Arizona; or Fort Irwin, California.

Environmental Planning Requirements: Cultural Resources

Another source of potential problems in environmental planning for federal agencies comes from Section 106 of the NHPA.[66] Under Section 106, any federal "undertaking"[67] triggers a requirement to consult with the federal government's Advisory Council on Historic Preservation (ACHP) regarding the fate of districts, sites, buildings, structures, and objects that are in or are eligible for the National Register of Historic Places.[68] These areas include archeological sites as well as historic structures. [69] Ordinarily, properties that are newer than fifty years old will not be considered to be eligible for the National Register.[70] As previously noted, any proposal that would harm a site that is eligible for the National Register is not eligible for a categorical exclusion under the Army's environmental planning regulation.[71]

Under the ACHP's regulations, when a federal agency determines that a proposed action falls within the NHPA definition[72] of an undertaking, the agency must consult with the state historic preservation officer (SHPO).[73] The agency must also solicit the views of public and private organizations, Native Americans, local governments, and other groups that are likely to have knowledge of or concerns with the Historic Register eligible properties.[74]

The agency may proceed with the proposed project or action if: the agency determines that the project or action will have "no effect" on Historic Register eligible properties,[75] the SHPO agrees with that determination, and there are no objections raised within fifteen days.[76] If the agency determines that there is an effect but that it is not adverse and the SHPO agrees, the agency may make a "no adverse effect" determination and advise the ACHP.

If there will be an adverse effect on historic properties, the agency must notify the ACHP and enter negotiations with the

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64. 33 U.S.C.A. § 1344.

65. *Id.*

66. 16 U.S.C.A. § 470f (West 1998). In addition to Section 106, Section 110 of the NHPA requires that federal agencies use their historic properties "to the maximum extent possible" rather than acquire or construct new properties. *Id.* § 470h-2. Section 110 of the NHPA also requires that federal agencies locate agency owned historic properties and nominate those properties to the National Register of Historic Places. *Id.* § 470h-2.

67. "Undertaking" includes:

> [A]ny project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a [f]ederal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

6 C.F.R. § 800.2(o) (1998)

68. 16 U.S.C.A. § 470f.

69. For instance, archeologists estimate that Fort Bliss has more than 15,000 archeological sites within its boundaries. Interview with James Bowman, Chief Archeologist, at Fort Bliss, Tex. (Nov. 12, 1997).

70. 36 C.F.R. § 60.4 (1998).

71. AR 200-2, *supra* note 10, app. A, §. 2.

72. 16 U.S.C.A. § 470w(7). *See* 36 C.F.R. § 800.2(o).

73. 36 C.F.R. § 800.4(a).

74. *Id.* § 800.2(e).

75. This provision also applies to projects that will have no effect on the "area of potential effects," which is defined as the geographic area or areas within which the undertaking may cause changes in the character or use of historic properties. *Id.* § 800.2(c).

76. *Id.* § 800.5(b).

SHPO on a memorandum of agreement (MOA) to avoid or to mitigate the adverse effect.[77] The ACHP may enter this consultation process with or without a request from either the agency or the SHPO.[78] If the agency and the SHPO (and sometimes the ACHP) cannot reach an agreement, only the head of the federal agency (for example, the secretary of the Army) may overrule the SHPO and the ACHP. The agency head may not delegate this responsibility.[79]

Federal agencies must follow Section 106 requirements when they directly undertake federal activities and when they are involved indirectly through funding, approving, permitting, or licensing.[80] In its regulations, the ACHP includes in its definition of a federal undertaking "any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects."[81] Courts have interpreted "undertaking" to include a wide variety of actions, including military operations,[82] building leases,[83] land exchange agreements,[84] and revision of agency regulations.[85]

In addition to the NHPA, the Native American Graves Protection and Repatriation Act (NAGPRA)[86] and the Archeological Resources Protection Act (ARPA)[87] can play important roles in the environmental planning process. The NAGPRA requires that all federal agencies (and museums) that possess "Native American human remains and associated funerary objects"[88] compile an inventory and notify tribes that may have a cultural link to the remains and associated objects.[89] If the tribe desires, the agency must return the remains and associated objects to the tribe.[90] The agency must also provide a summary listing of "unassociated funerary objects, sacred objects, and cultural patrimony."[91] Because newly discovered remains or tribal objects would fall under the possession and control of the federal agency that discovers them, the federal agency would be required to provide similar notification to the tribes and give the tribes an opportunity for consultation and repatriation. Environmental planning in areas with a widespread historic presence of Native Americans must consider the potential effects of discovering Native American remains or tribal objects. Failure to comply with these Acts can cause problems with various interests groups; a new environmental attorney must thoroughly consult with archaeologists and environmental law experts prior to presenting any legal opinions or providing any legal advice concerning these ARPA and NAGPRA.

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77. *Id.* § 800.5(e).

78. *Id.*

79. 16 U.S.C.A. § 470h (West 1998).

80. *Id.* § 470w(7).

81. 36 C.F.R. § 800.2(o).

82. *See, e.g.*, Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979).

83. Birmingham Realty Co. v. General Serv. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980).

84. Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994).

85. Illinois Interstate Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988).

86. 25 U.S.C.A. §§ 3001-3013 (West 1998).

87. 16 U.S.C.A. § 470aa-470ll (West 1998).

88. "Native American" means of or related to a "tribe, people, or culture that is indigenous to the United States." 25 U.S.C.A. § 3001(9). "Associated funerary objects" mean objects that were a part of the "death rite or ceremony of a culture" and were placed with the body at the time of burial or later. *Id.* § 3001(3)(A).

89. *Id.* § 3003.

90. *Id.* § 3005.

91. "Unassociated funerary objects" include objects that are not presently under the control of the federal agency. *Id.* § 3001(3)(B). "Sacred objects" are specific ceremonial objects for the practice of Native American religions. *Id.* § 3001(3)(C). "Cultural patrimony" includes objects that have cultural significance to an entire tribe, rather than to an individual member of the tribe. *Id.* § 3001(3)(D).

The ARPA provides requirements for the protection of archeological sites. If archeological resources[92] are discovered during the course of a federal activity, and if they must be excavated, the proponent must seek approval for the excavation.[93] Unauthorized excavation is prohibited under the ARPA.[94] In addition, the incidental discovery of an archeological site will trigger the requirements of Section 106 of the NHPA.

By appointing an experienced, knowledgeable, and well-organized historic preservation officer, an installation can considerably enhance its ability to accomplish cultural resources requirements. For example, Section 106 consultation can slow down a project considerably if it is not entered into early in the planning process. Section 106 and the NAGPRA requirements must be started as early as possible because these consultations can take substantially longer than the NEPA process, and the consultation must be complete "prior to the approval of the expenditure of funds."[95] A historic preservation officer should have the education, experience, and skills to ensure compliance with these requirements.

Environmental Planning Requirements: Air Conformity Determinations

Section 176(c) of the Clean Air Act (CAA),[96] which was adopted with the 1990 amendments to the CAA, requires that all federal actions conform to any applicable state implementation plan (SIP).[97] Thus, installations that are located in air pollution non-attainment[98] and maintenance areas[99] must ensure that any proposed action will conform to the SIP. Under the Environmental Protection Agency's (EPA) implementing regulations, a federal action means "any activity engaged in by a department, agency, or instrumentality of the [f]ederal government, or any activity that a department, agency, or instrumentality of the [f]ederal government supports in any way, provides financial assistance for, licenses, permits, or approves . . . ."[100]

The air conformity rule of the Code of Federal Regulations sets standards for maximum emissions limits allowed for various air pollutants in non-attainment and maintenance areas.[101] For actions that exceed those limits, the proponent federal agency must show that the action conforms to the SIP.[102] The federal agency can demonstrate conformity by indicating that the action is already accounted for in the SIP, that the emissions are offset by emission reductions elsewhere within the non-attainment or maintenance area, or that the action does not contribute to or increase the frequency of air standards violations.[103]

When making its conformity determination, a federal agency "must consider comments from any interested parties."[104] The EPA regulations require a thirty-day notice and comment period.[105] The proponent federal agency must also

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92. 16 U.S.C.A. § 470bb(1).

> Archeological resource [means] any material remains of past human life or activities which are or archeological interest . . . [including] pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal remains, or any portion or piece of any of the foregoing items.

Id. It also includes "paleontological specimens, or any portion or piece thereof." *Id.*

93. *Id.* § 470cc. The proponent must seek approval from the federal land manager, which means the secretary of the department "having primary management authority over such lands." *Id.* § 470bb(2).

94. *Id.* § 470ee. In addition, information about the sites must be kept confidential. *Id.* § 470hh.

95. *Id.* § 470f.

96. 42 U.S.C.A. § 7506(c) (West 1998).

97. *Id.* A "SIP" is a state's source-specific plan for "implementation, maintenance, and enforcement" of air quality standards. *Id.*

98. "Nonattainment areas" are areas that do not meet national ambient air quality standards (NAAQS) for a particular pollutant. 40 C.F.R. pt. 50 (1998).

99. A "maintenance area" is an area that does not exceed the NAAQS but has a maintenance plan for keeping its emissions in line with air quality standards. 40 C.F.R. § 51.852.

100. *Id.*

101. *Id.* § 51.853(b)(1).

102. *Id.* § 51.

103. *Id.* § 51.858.

104. *Id.* § 51.854.

105. *Id.* § 51.856(b).

notify the EPA regional offices and state and local air quality agencies of the project or action.[106]

Although the EPA promulgated the final air conformity rule in November 1993,[107] many agencies do not know of its requirements, or ignore those requirements. Therefore, an environmental attorney should ensure that the conformity analysis is done whenever it is required. A new environmental attorney should always consult with more experienced attorneys to ensure they are aware of when a conformity analysis is required. The conformity analysis will normally be done in conjunction with the NEPA process because it is required prior to taking any action and because it has a public notice requirement similar to NEPA's requirement. In its comments to the air conformity rule, the EPA noted that "[f]ederal agencies should consider meeting the conformity public participation requirements at the same time as the NEPA requirements."[108]

In addition to the requirements addressed above, the Army has specific requirements that are independent of the Code of Federal Regulations. In a memorandum, the Director of Environmental Programs outlined several requirements that apply specifically to conformity determinations prepared by Army attorneys.[109] Environmental attorneys must ensure that these requirements are met; consulting with an experienced environmental attorney should be the first step to ensure that these air conformity requirements are met.

Effective Management of Environmental Planning

Even with extensive preparation, research, and education, no system for environmental planning is foolproof. Nevertheless, some models used within the Army are quite effective methods to ensure that all of the required environmental planning processes are followed. No matter what system is in place, however, environmental attorneys should stress the need to coordinate proposed actions with installation environmental offices early in the process. Although checklists and oversight systems are helpful, they cannot replace early, frequent, and clear communication between environmental professionals and project proponents. Further, because environmental law is always changing, environmental attorneys in the field must continually educate themselves and routinely consult with the military's experts in environmental law, such as the attorneys at Litigation Division (Environmental Law Division) or The Judge Advocate General's School.

For an environmental planning system to be effective, it must force proponents to describe their proposed activities accurately and completely. Fort Bliss, for instance, has a system under which training proponents must file a range and maneuver area request form. The form, which is required for use of any Fort Bliss training areas, requires the proponent of the training to identify the type of unit involved, the dates and times of training, the range or maneuver areas requested, the weapons to be used, and the number of people involved.[110] The form also allows trainers to make remarks regarding use of targets, including "aerial targets, special target requirements, area,[and] time of target presentation." The form also specifically requests information regarding any pyrotechnics that will be used.[111]

Often, trainers do not recognize aspects of their training plans that would have environmental significance until the time that the training activity is scheduled to begin. It then becomes the responsibility of installation environmental staff independently to gather information about the proposed activity, and it becomes difficult to provide a meaningful environmental review. More complete information at an earlier stage can eliminate some of the last-minute analysis that sometimes takes place. Fort Huachuca, for example, has developed a checklist for environmental coordination that requires unit information, activity locations, dates, times, and descriptions of the proposed activities.[112] In addition, the proponent is required to check and to describe briefly any "ancillary activities" that will be required from a list of likely activities, including vehicle maintenance, military kitchens, personal sanitation, power generation, fuel storage, hazardous waste generation, temporary structures, field training, flight operations, off-road maneuvers, excavation, smoke or obscurant use, or other activities. This type of specificity could reduce the likelihood of overlooking an environmentally significant aspect of an activity.

Another necessity for an effective environmental planning system is a single point of contact within the installation's environmental office or directorate. At Fort Bliss, one individual is responsible for all environmental coordination. Whether the

106. *Id.* § 51.855(a).

107. 58 Fed. Reg. 63,214 (1993).

108. *Id.* at 63,234.

109. Memorandum, Director of Environmental Programs, Headquarters, Department of the Army, subject: General Conformity under the Clean Air Act (27 June 1995) (copy on file with the author).

110. Headquarters, Fort Bliss, Fort Bliss Form 88, Range and Maneuver Area Request (1995) (available at the Fort Bliss Directorate of Environment).

111. *Id.*

112. *See* Sample Memorandum, United States Army Intelligence Center and Fort Huachuca, Fort Huachuca, Ariz. subject: Request for Environmental Coordination IAW AR 200-2, (1995).

proposed activity involves construction, renovation or demolition by the engineers, or training by line units, the environmental coordinator ensures that all interested parties within the environmental directorate review it. These parties often include archeologists, historic architects, wildlife biologists, hazardous waste managers, and other specialists. The environmental coordinator should develop a checklist that includes each of the key elements of the environmental directorate, so that he can track the action. In addition, the environmental coordinator should host a weekly conference at which the status of all NEPA actions is reviewed. Because of the large responsibility of the environmental coordinator, it is critical that the installations employ a responsible individual with a thorough understanding of the NEPA.

Conclusion

Environmental and legal offices do not need to have an adversarial relationship with public works engineers and trainers. With an effective environmental planning program, research, education, and consultations with experts, the kinds of miscues that cause delays in training or public works projects can normally be avoided. In addition, an effective environmental planning program on an Army installation can be critical to successful training and infrastructure development. Careful coordination is required to ensure that all relevant environmental aspects are taken into consideration. Environmental attorneys must clearly understand the complicated requirements of such acts as the NEPA and the NHPA. Every installation should have some form of a checklist for coordination that will ensure that all potentially relevant environmental effects are considered. In addition, face-to-face meetings between project proponents and environmental reviewers can be tremendously valuable. With an effective program in place, staffed by quality environmental personnel, environmental planning can be smooth and effective, rather than a painful, last minute effort as it can be without an effective program.