

**ENVIRONMENTAL COMPLIANCE IN CONTINGENCY  
OPERATIONS:  
IN SEARCH OF A STANDARD?**

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Environmental threats do not heed national borders and can pose long-term dangers to our security and well being . . . . Decisions today regarding the environment and natural resources can affect our security for generations; consequently, our national security planning is incorporating environmental analysis as never before.

—President Clinton's National Security Strategy<sup>2</sup>

Environmental responsibility involves all of us. The environmental ethic must be part of how we live and how we train . . . .

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2. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES (1997) [hereinafter NATIONAL SECURITY STRATEGY OF THE UNITED STATES]. This document is located on the internet at <http://www.dtic.mil>.

By working together, we can forge a premiere Environmental Stewardship Program. Protection of the environment is key to ensuring we can continue to conduct tough, realistic training and keep the Army trained and ready in the future.

—General Dennis Reimer<sup>3</sup>  
Chief of Staff, U.S. Army

## I. Introduction

In November 1992, the secretary and the chief of staff of the Army signed the *United States Army Environmental Strategy into the 21st Century*.<sup>4</sup> The strategy states: “Leadership is the key to success . . . Each of you in the chain of command is responsible for ensuring that the U.S. Army strategy is implemented and that environmental stewardship is an integral part of everything you do.”<sup>5</sup> The strategy also directs the Army leadership to instill an environmental ethic—in addition to the warfighting ethic—throughout the force.<sup>6</sup> In the context of multilateral peace operations<sup>7</sup> that are evolving in the current complex international and political world stage, this is a demanding mandate for today’s armed forces.

The United Nations Security Council authorized more peacekeeping operations after 1988 than in the preceding forty years.<sup>8</sup> Consequently, since 1990, the National Command Authorities (NCA)<sup>9</sup> have deployed military forces in over twenty-five operations worldwide.<sup>10</sup> The protec-

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3. U.S. DEP’T OF ARMY, WHITE PAPER, INTEGRATING U.S. ARMY ENVIRONMENTAL STRATEGY INTO OPERATIONAL DOCTRINE (25 June 1996) [hereinafter INTEGRATING U.S. ARMY ENVIRONMENTAL STRATEGY] (copy on file with author). This document is located on the internet at <[http://www.wood.army.mil/DTLE/ENVIRON/wp2\\_cont.htm](http://www.wood.army.mil/DTLE/ENVIRON/wp2_cont.htm)>.

4. U.S. DEP’T OF ARMY, UNITED STATES ARMY ENVIRONMENTAL STRATEGY INTO THE 21ST CENTURY (1992) [hereinafter U.S. ARMY ENVIRONMENTAL STRATEGY]. See Brigadier General Joseph G. Garrett III, *The Army and the Environment: Environmental Considerations During Army Operations*, 69 U.S. NAVAL WAR C. INT’L L. STUD. 42, 51-52 (1996) (discussing the integration of the Army’s environmental strategy to assure mission accomplishment across the spectrum of operations from war to operations other than war).

5. Garrett, *supra* note 4, 51-52.

6. See *id.*

7. See U.S. DEP’T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS 111 (30 Dec. 1994) [hereinafter FM 100-23]. The current field manual defines peace operations as “[a]n umbrella term that encompasses three types of activities; activities with predominantly diplomatic lead (preventive diplomacy, peacemaking, peace building) and two complementary, predominantly military activities (peace-keeping and peace-enforcement).” *Id.* at 111.

tion of the natural environment during the planning and execution phases of these varied contingency operations must reflect the national security strategy and the Army leadership's vision of environmental stewardship. Despite the best efforts of military planners in the planning and execution of contingency operations, the media microscope can transform an otherwise successful operation into a political failure absent vigilant oversight of the impact of military operations on the environment.<sup>11</sup> Proper staff planning for environmental considerations during contingency operations, accompanied by a standardized environmental package for every military unit that deploys to a world "hot spot" will assist in the successful accomplishment of the operation and will insulate commanders from negative media publicity.

The balance between successfully completing a contingency operation, such as a United Nations sanctioned Chapter VI or Chapter VII multinational force mission, and protecting the environment has become increasingly more demanding since 1992.<sup>12</sup> The failure to navigate successfully through the maze of international law and treaties, domestic statutes, Department of Defense directives, and other assorted service-level regulations can impede the mission, damage international relations, generate negative media coverage, and produce costly environmental claims. A deploying unit's failure to comprehend fully the environmental maze of

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8. See Richard Ziegler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 NAVAL L. REV. 1, 3 (1996), citing Jeffrey I. Sands, *Blue Hulls: Multinational Naval Cooperation & The United Nations*, CNA RES. MEMORANDUM 93-40 (Center for Naval Analyses, Alexandria, Va., 1993).

9. The National Command Authorities (NCA) are composed of the President and the secretary of defense. The NCA exercise their power through the chairman of the Joint Chiefs of Staff to the combatant commanders.

10. See COLONEL DAVID L. CARR, U.S. DEP'T OF THE ARMY, WHITE PAPER, CONSIDERATIONS FOR THE DEVELOPMENT OF A DOD ENVIRONMENTAL POLICY FOR OPERATIONS OTHER THAN WAR 14 (30 May 1997). Colonel Carr's report presents the first phase of an environmental policy development project. The project, which is being conducted by the Army Environmental Policy Division, has a threefold purpose: to assess the requirement for a Department of Defense (DOD) environmental policy for MOOTW; to identify key issues involved with this policy initiative; and to provide recommendations for policy development to the deputy assistant secretary of the Army and the deputy undersecretary of defense for environmental security. *Id.*

11. See FM 100-23, *supra* note 7, at 47. The Army field manual on peace operations reminds commanders that "[p]eace operations are carried out under the full glare of public scrutiny . . . . Because reports of peace operations are widely visible to national and international publics, [public affairs] is critical in peace operations. News media reports contribute to the legitimacy of an operation and the achievement of political, diplomatic goals." *Id.*

obligations may result in the commander's personal criminal and/or civil liability.<sup>13</sup> Despite these potential negative consequences and the increased emphasis on environmental protection, there is "no strategic environmental policy, either at the joint or service level, which applies specifically to overseas contingency operations."<sup>14</sup> There are myriad existing environmental laws for peacetime military operations worldwide. Most of these peacetime laws, however, are either inapplicable or are inappropriate for application during overseas military operations other than war (MOOTW).<sup>15</sup>

In light of existing environmental doctrine and guidance, this article analyzes the continuum of recent contingency operations and demonstrates that current doctrine is incomplete, vague, and disjointed. This article then offers proposed solutions to address the legal void for environmental considerations during MOOTW. Part II of this article examines the current legal structure and the analysis that applies to environmental considerations in overseas contingency operations. Part III describes the fluctuating environmental doctrine in recent MOOTW and the current legal void in this area. Part IV focuses on the imminent changes in the area of environmental considerations during MOOTW and how these changes will impact on the combatant commander's discretion and force a new approach to environmental considerations during MOOTW. The final section, Part V, anticipates the impact of these changes on legal

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12. United Nations member states conduct peace operations under Chapters VI and VII of the United Nations Charter. See U.N. CHARTER chs. VI, VII. As to United States involvement in these operations:

The United States reserves the right to conduct operations unilaterally in conformance with appropriate international law. In such cases, the United States would organize, equip, and employ its forces consistent with the unique aspects of [chapter VI or VII] of the U.N. Charter. Normally, traditional peacekeeping (PK) involving high levels of consent and strict impartiality are operations authorized under the provisions of Chapter VI of the UN Charter, which discusses the peaceful settlement of disputes . . . . Peace operations with low levels of consent and questionable impartiality are conducted under mandates governed by Chapter VII of the UN Charter. Chapter VII operations are frequently referred to collectively as PE (peace enforcement).

FM 100-23, *supra* note 7, at 1-2.

13. See INTERNATIONAL & OP. L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, 1997 OPERATIONAL LAW HANDBOOK 5-1 (1997) [hereinafter JA 422].

14. CARR, *supra* note 10, at 10.

15. See *id.*

advisors in the field and on the initiatives that the chairman of the Joint Chiefs of Staff and service-level operators and planners must pursue to integrate environmental considerations into the contingency operation planning and execution processes.

## II. Current Framework of Environmental Standards Applicable During Overseas MOOTW<sup>16</sup>

Recent contingency operations, such as Operation Joint Endeavor in Bosnia, illustrate the major role that environmental issues can play.<sup>17</sup> Such issues may take even the most seasoned legal advisors by surprise. Many people might mistakenly assume that domestic environmental statutes have no applicability in foreign countries or that military necessity negates or mitigates compliance with environmental law.<sup>18</sup> The critical job for

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16. Deployments for military operations outside the United States are conducted for a wide range of activities. These activities include MOOTW, which focus on deterring war and promoting peace. Overseas MOOTW may include protection of humanitarian assistance, establishment of order and stability, enforcement of sanctions, guarantee and denial of movement, establishment of protected zones, forcible separation of belligerents, disaster relief, nation assistance, and peacekeeping/peacemaking operations pursuant to United Nations security resolutions. Although some military operations are conducted for one purpose, others might have multiple purposes, such as the 1992-1993 Operation Restore Hope deployment in Somalia that escalated from humanitarian assistance to peacekeeping operations and finally culminated in combat operations that resulted in American casualties. *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR (16 June 1995) [hereinafter JOINT PUB. 3-07]; THE JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS (16 June 1997) [hereinafter JTF HANDBOOK]. The *JTF Handbook*, a relatively recent publication, reflects experience gained in recent peace operations and data provided in current joint doctrine. It is designed as a resource for senior commanders who have been designated or are about to be named as the joint task force commander for peace operations. *Id.* *See* FM 100-23, *supra* note 7, at iv (incorporating lessons learned from recent peace operations and existing doctrine to provide a framework for doctrinal development in the conduct of peace operations).

17. These issues include, for example: (1) the requirement for the United States to negotiate transit agreements among the European countries in the Bosnian theater to allow the passage of hazardous waste across national borders; (2) the requirement for the United States to pay environmental claims during Operation Joint Endeavor in Bosnia for fuel spills that affect groundwater aquifers; (3) the requirement for the United States, during Operation Joint Endeavor, to pay claims to European farmers for the destruction that track vehicles caused to five to ten years worth of crops due to the inability to understand soil composition adequately. *See generally* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, AFTER ACTION REPORT, OPERATION JOINT ENDEAVOR [hereinafter JOINT ENDEAVOR AAR] (undated and unpublished transcript on file with the Center for Law and Military Operations).

deployed judge advocates is determining which international laws, domestic statutes, Department of Defense directives, service regulations, and host nation laws and policies apply and which do not.<sup>19</sup> An elaborate and complicated statutory and regulatory scheme exists to ensure that the combatant commander, at the very minimum, considers the environmental consequences of contingency operations.

#### A. Executive Order 12,114

Although the National Environmental Policy Act<sup>20</sup> (NEPA) presumptively does not apply extraterritorially,<sup>21</sup> Executive Order (EO) 12,114, *Environmental Effects Abroad of Major Federal Actions*,<sup>22</sup> mandates that the armed forces comply with the spirit and intent of the NEPA during major overseas operations.<sup>23</sup> Executive Order 12,114 requires extensive

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18. See Anne L. Burman and Teresa K. Hollingsworth, *JAGs Deployed: Environmental Law Issues*, 42 A.F.L. REV. 19 (1996) (providing an excellent overview of the Air Force judge advocate's role in anticipating and preparing for environmental law issues during contingency operations).

19. See *id.*

20. 42 U.S.C.A. §§ 4321-4370a (West 1998).

21. The National Environmental Policy Act (NEPA) applies to major federal actions located outside the United States that have significant environmental impacts inside the United States. *Id.* The NEPA is a procedural statute that creates documentation requirements to ensure that agency decisionmakers consider the environmental impact of federal actions. The NEPA requires the identification and analysis of potential environmental effects of certain proposed federal actions before those actions are initiated. *Id.* Specifically, it requires that for every legislative proposal or other federal action, federal agencies use a systematic, interdisciplinary approach that evaluates the potential environmental consequences associated with the proposed action and considers alternative courses of actions. *Id.* The required documents are environmental assessments (EAs), environmental impact statements (EISs), or both. These lengthy documents can cause substantial delays in a planned major federal action. To date, no MOOTW has triggered the NEPA. See NEPA Coalition of Japan v. Defense Department, 837 F. Supp. 466 (D.D.C. 1993) (refusing to apply the NEPA overseas due to the strong presumption against extraterritorial application of domestic statutes and the possible adverse effect on treaty relations and U.S. foreign policy). Courts have consistently been unwilling to pierce the sovereignty of other nations with the extraterritorial application of the NEPA. See E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (citing *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) (holding that, lacking the affirmative intention of Congress clearly expressed in the statute, the court must presume that it is primarily concerned with domestic concerns). See also *Smith v. United States*, 507 U.S. 197 (1993) (holding that waiver of sovereign immunity must be clearly expressed in statute for the Federal Tort Claims Act to apply extraterritorially).

22. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), reprinted in 42 U.S.C. § 4321 (1982) [hereinafter EO 12,114].

23. See generally *id.*

environmental analysis for major federal actions that have significant effects on the environment outside the United States and its territories and possessions.<sup>24</sup>

#### B. Department of Defense Directive 6050.7

*Department of Defense (DOD) Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions*,<sup>25</sup> imposes NEPA-like requirements with respect to major DOD actions that may adversely affect the environment of a foreign nation, a protected natural or ecological resource of global importance, or the global commons.<sup>26</sup> Specifically, the directive establishes environmental compliance procedures, as well as exemptions and categorical exclusions to the compliance requirements.<sup>27</sup> The individual services have supplemented this guidance with specific rules that define the environmental documents required, levels of review for actions in the global commons, and requirements for envi-

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24. See *id.* paras. 2-3, 2-4.

25. U.S. DEP'T OF DEFENSE, DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DOD ACTIONS (31 Mar. 1979) [hereinafter DOD DIR. 6050.7]. It is anticipated that the Office of the Secretary of Defense will *replace DOD Directive 6050.7* with updated guidance. Telephone Interview with J. Phil Huber, Special Assistant, Office of the Assistant Secretary of the Army for Pollution Prevention and Conservation, Installation, Logistics, and the Environment (Feb. 6, 1998) [hereinafter Huber Interview]. See U.S. DEP'T OF DEFENSE, DRAFT INSTR. 4715.XX, ANALYZING DEFENSE ACTIONS WITH THE POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL IMPACTS OUTSIDE THE UNITED STATES (undated) [hereinafter DRAFT INSTR. 4715.XX] (draft copy on file with author).

26. See DOD DIR. 6050.7, *supra* note 25. Executive Order 12,114 refers to "global commons" as geographical areas located outside the jurisdiction of any nation, including ocean areas outside territorial limits and the continent of Antarctica. See EO 12,114, *supra* note 22. Global commons do not include contiguous zones and fisheries zones of foreign nations. In 1993, however, the U.S. Court of Appeals for the D.C. Circuit ruled that the NEPA applies to National Science Foundation activities in Antarctica. See *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (holding that the NEPA applies to the National Science Foundation's decision to burn food wastes in Antarctica). The Clinton administration chose not to appeal the decision.

*Massey* represents the exception, not the rule. The *Massey* decision is based on the absence of a sovereign within Antarctica and the fact that all agency decision-making occurred within the United States. *Id.* *Massey* represents a dangerous precedent because almost all decisionmaking for U.S. actions abroad occurs within the United States, and many of the DOD's current operations take place in countries that are effectively devoid of a sovereign (for example, Somalia, Haiti, and Bosnia).

ronmental considerations that affect foreign nations and protected global resources.<sup>28</sup>

### C. Analytical Approach—The Two Prong Analysis

A two-prong analysis determines whether EO 12,114's review requirement is triggered.<sup>29</sup> The first prong is whether a major federal action is involved. Major federal actions include: operations that involve substantial expenditures of time, money, and resources; operations that affect the environment on a large geographic scale, or have substantial environmental effects on a more limited area; and, actions that are significantly different from other actions that were previously analyzed and

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27. See DOD DIR. 6050.7, *supra* note 25. *Department of Defense Directive 6050.7* applies to overseas MOOTW, whereas *DOD Instruction 4715.5* applies to environmental compliance at overseas installations. See U.S. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996) [hereinafter DOD INSTR. 4715.5]. This instruction implements overseas environmental baseline guidance documentation (OEBGD) for environmental compliance at overseas DOD installations. *Id.* para. 4.1. The OEBGD is a document that reflects the minimum environmental protection standards applicable to DOD installations overseas and is based on generally accepted environmental standards that are applicable to DOD facilities in the United States. *Id.* para. 6.2.2. The instruction designates DOD executive agents (EAs) for nations in which the DOD has a significant presence. *Id.* para. 6.1.1. Under the instruction, the EA is responsible for establishing final governing standards (FGS) by comparing the OEBGD and host nation environmental standards of general applicability to determine the more stringent standard for the protection of the environment. *Id.* para. 6.3.3.1. The FGS become the governing environmental protection standards for overseas DOD installations. *Id.* para. 6.3.4. The OEBGD and FGS environmental standards do not apply to the operations of naval vessels or military aircraft and are not applicable to contingency operations. *Id.* para. 2.1.4.

28. See, e.g., U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS, apps. G, H (23 Dec. 1988) [hereinafter AR 200-2]; U.S. DEP'T OF AIR FORCE, POLICY DIR. 32-70, ENVIRONMENTAL QUALITY (20 July 1994). The "four pillars" of environmental compliance for Army actions are compliance, restoration, prevention, and conservation. See generally U.S. ARMY ENVIRONMENTAL STRATEGY, *supra* note 4.

29. See EO 12,114, *supra* note 22, para. 3-1. Unlike the NEPA, the EO is based solely on Presidential authority and does not create a cause of action subject to judicial review. *Id.*

approved.<sup>30</sup> From a practical perspective, virtually all overseas MOOTW will meet the test for a “major federal action.”

The second prong of the analysis is whether the MOOTW will significantly harm the environment. Significant environmental harm is damage to: the global commons (for example, oceans or Antarctica); a foreign nation that is not participating with the United States in the action (commonly referred to as the “participating nation” exception); a foreign nation that receives from the United States, during the federal action, a generated product, emission, or effluent that is prohibited or strictly regulated by U.S. federal law; or, any area outside the United States with natural or ecological resources of global importance.<sup>31</sup> The combatant commander decides whether the “participating nation” exception applies, and, if so, the exception allows the deploying unit to avoid cumbersome documentation requirements.<sup>32</sup> Specifically, no environmental reviews or documentation is required with respect to federal actions outside the United States that affect only the environment of a “participating nation.”<sup>33</sup>

Executive Order 12,114 exempts other specific major federal actions from the review requirement.<sup>34</sup> The exemptions most commonly asserted by the armed forces are actions taken following the President’s direction during an armed conflict<sup>35</sup> and actions taken following the direction of the President when national security interests are involved.<sup>36</sup> Unlike the “participating nation” exception, which is simply approved by the combatant commander as part of the operational plan, these exemptions require commanders to seek affirmatively from the secretary of defense (through chan-

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30. *Id.* para. 2-3; DOD DIR. 6050.7, *supra* note 25, para. C(5). The routine deployment of ships, aircraft, or other mobile military equipment, however, is not considered to be a major federal action. *Id.*

31. EO 12,114, *supra* note 22, para. 2-3; DOD DIR. 6050.7, *supra* note 25, encls. 1-2.

32. *See* DOD DIR. 6050.7, *supra* note 25.

33. *See* U.S. ARMY CORPS OF ENG’RS, FINAL DRAFT, ENVIRONMENTAL IMPACT ANALYSIS FOR OFF-POST TRAINING AND DEPLOYMENTS 3-10 (Jan. 1998) [hereinafter FINAL DRAFT] (copy on file with author).

34. *See* EO 12,114, *supra* note 22, para. 2-5. The EO specifically provides for the following exemptions: (1) actions not having significant effect on the environment; (2) actions taken by the President; (3) actions taken pursuant to the direction of the President (or cabinet members) when national security interests are at stake or during an armed conflict; (4) intelligence activities or foreign arms transfer; (5) actions taken with respect to membership in international organizations; (6) disaster and emergency relief actions; and (7) export licenses, approvals, or action relating to certain nuclear activities. *Id.* The secretary of defense has the authority to approve additional exemptions. *See* DOD DIR. 6050.7, *supra* note 25, encl. 2, para. C.3.

nels) variance from formal documentation requirements.<sup>37</sup> Executive Order 12,114 also allows the secretary of defense to designate as categorical exclusions (CXs) actions that “normally do not, individually, or cumulatively” result in significant harm to the environment.<sup>38</sup> If a CX provision covers the environmental action, the agency is relieved of any documentation requirements.<sup>39</sup> The individual services have supplemented *DOD Directive 6050.7* by providing a list of example CXs.<sup>40</sup>

#### D. The Onerous Documentation Requirements

Absent an authorized exemption or CX, a time-consuming, complicated review and documentation process is required.<sup>41</sup> Department of Defense activities that would result in significant harm to the global commons require preparation of an environmental impact statement (EIS).<sup>42</sup> For DOD actions that would cause significant harm to the environment of a foreign nation that is not participating in the action, or for an action that affects natural or ecological resources of global importance, two other

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35. Executive Order 12,114 defines “armed conflict” as:

hostilities for which Congress has declared or enacted a specific authorization for the use of armed forces; hostilities or situations for which a report is required by the War Powers Resolution, 50 U.S.C. § 1543 (a)(1); and other actions by the armed forces that involve defensive use or introduction of weapons in situations where hostilities occur or are expected.

EO 12,114, *supra* note 22, para. 2-5(a)iii. See AR 200-2, *supra* note 28, app. H. The exemption applies as long as the armed conflict continues. *Id.*

36. EO 12,114, *supra* note 22, para. 2-5(a)iii.

37. See DOD DIR. 6050.7, *supra* note 25, encl. 2, para. C(3)a.

38. See EO 12,114, *supra* note 22, para. 2-5(c); DOD DIR. 6050.7, *supra* note 25, encl. 1, para. C(8).

39. See EO 12,114, *supra* note 22, para. 2-5(c); DOD DIR. 6050.7, *supra* note 25, encl. 1, para. C(8).

40. See, e.g., AR 200-2, *supra* note 28, app. A, § I. For example, CX A-19 allows for the deployment of military units on a temporary basis, provided that existing facilities are used and that activities to be performed will have no significant effects on the environment. *Id.*

41. This type of complicated documentation cuts against the exigency of military operational missions. To require a commander to halt his military mission to complete an onerous documentation process is absurd. Studies show that, depending on the complexity of the action, “the documentation process can take 3 to 24 months.” FINAL DRAFT, *supra* note 33, at 5-1.

types of environmental documents are required: environmental studies (ESs) or environmental reviews (ERs).<sup>43</sup> The ES documents bilateral or multilateral studies of actions that are relevant or related to the United States and foreign nations.<sup>44</sup> An ER is a concise review of the actions that affect the environment of a nation that is not involved in the operation and is prepared by the United States unilaterally.<sup>45</sup>

#### E. Treaties

It is important to determine whether the nations that are involved in a contingency operation are parties to a bilateral or multilateral treaty. If so, the treaty may have a substantial impact on the operation. Although the treaty may not specifically apply to the environment, the terms may be sufficiently broad to encompass environmental considerations. An increasing number of treaties deal directly with environmental protection.<sup>46</sup> Treaties can affect contingency operations as implemented by domestic statutes or as incorporated in DOD standards. Although the United States may not have ratified a specific treaty, some treaties are binding on the United States as a matter of customary international law.<sup>47</sup> Accordingly, legal advisors in a contingency operation who study all applicable treaties to

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42. See EO 12,114, *supra* note 22, para. 2-4(a); DOD DIR. 6050.7, *supra* note 25, encl. 2, para. C.1.; AR 200-2, *supra* note 28, app G. The development of an EIS is a time consuming process, and actually completing one is a major undertaking. For example, depending on the complexity of the proposed action, the time required to complete and to process an EIS can range from 12 to 24 months or more.

The process begins with the publication of a notice of intent (NOI), published in the *Federal Register*. The NOI initiates the public scoping period (typically 30 to 90 days in length). Although not required, at this stage, a public affairs plan is strongly recommended. During the scoping period, meetings are held to which agencies and the general public are invited to learn more about the proposal and to express their views on the process. The documents are then forwarded to the major command (MACOM). From the MACOM, the documents are forwarded to Headquarters, Department of the Army (HQDA) for a review that lasts 30 to 40 days. The documents must then be made available to the public for comment for no less than 45 days. The documents are again forwarded to HQDA for final review and approval. The document must then be submitted to the Environmental Protection Agency (EPA) for review and filing. After a 30-day public review period, the process concludes with a record of decision (ROD).

To develop a successful EIS the following 11 components are required: (1) cover sheet; (2) summary; (3) table of contents; (4) purpose and need for the proposed action; (5) alternatives considered, including the proposed action; (6) affected environment; (7) environmental and socioeconomic consequences; (8) list of preparers; (9) distribution list; (10) index; and (11) appendices. See FINAL DRAFT, *supra* note 33, at 7-1 through 7-9.

ascertain whether the provisions indeed apply to the operation will contribute to the operation's success. Knowledge of the peculiarities of treaty law

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43. See EO 12,114, *supra* note 22, para. 2-4; DOD DIR. 6050.7, *supra* note 25, encls. 2-3; AR 200-2, *supra* note 28, app. H.

An [ES] is an analysis of the likely environmental consequences of the action that is to be considered in the decision-making process. The ES includes a review of the affected environment, significant actions taken to avoid environmental harm or otherwise to better the environment, and significant environmental considerations and actions by other participating nations.

DOD DIR. 6050.7, *supra* note 25, para. D.1. At the very minimum, the ES must include:

(1) a general review of the affected environment; (2) the predicted effect of the action on the environment; (3) significant known actions taken by governmental entities with respect to the proposed action to protect or [to] improve the environment; and, (4) if no actions are being taken to protect or [to] enhance the environment, whether the decision not to do so was made by the affected foreign government or international organization.

*Id.* para. D.4.

An ER is a less extensive process than an ES. "An [ER] is a survey of the important environmental issues involved. It includes identification of these issues and a review of what, if any, consideration has been or can be given to the environmental aspects by the United States and by any foreign government involved in taking the action." *Id.* para. E.1. To the extent practical, the ER should include:

(1) a statement of the action to be taken, including its timetable, physical features, general operating plan, and other similar broad-gauge descriptive factors; (2) identification of the important environmental issues involved; (3) the aspects of the actions taken or to be taken by the DOD component that ameliorate or minimize the impact of the environment; and, (4) the actions known to have been taken or planned by the government of any participating and affected foreign nations that will affect environmental considerations.

*Id.* para. E.4.

44. *Id.*

45. See EO 12,114, *supra* note 22, para. 2-4. A flow chart that details the requirements of the EO, the DOD Directive, and AR 200-2 is at Appendix 1. The chart is adapted and modified from an attachment to a U.S. Army Environmental Law Division review of draft *DOD Instruction 4715.XX*. See Memorandum from Mr. Steven A. Nixon, DAJA-EL, to Director of Environmental Programs, subject: Review of Draft Department of Defense (DOD) Instruction 4715.XX (3 Mar. 1997).

before a deployment can serve as a force multiplier for the combatant commander during a MOOTW.

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46. See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261. Although the United States has not ratified this treaty, the United States accepts as binding a majority of the treaty that relates to traditional uses of the ocean, including provisions concerning the preservation of the environment of coastal states. See also Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3, 12 I.L.M. 1319 (The United States has ratified this treaty, which restricts the discharge of oil, noxious substances, sewage, and solid wastes incidental to the operation of a ship.); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 [hereinafter London Convention] (The United States has ratified this treaty, which restricts disposal into the ocean from ships and aircraft.); The United Nations Educational, Scientific, and Cultural Organ (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention] (The United States has ratified this treaty, which protects a broad range of objects and sites that are important to the cultural and natural heritage of man.); Convention on Environmental Impact and Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800 [hereinafter Transboundary Convention] (The United States has signed, but not ratified this treaty, which provides neighboring party states with the opportunity to participate in environmental analysis for particular actions that are likely to cause significant adverse transboundary impact.); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, U.N. Doc. UNEP/WG.190/4, UNEP/IG.80/3 (1989), 28 I.L.M. 657 [hereinafter Basel Convention] (The United States has signed, but not ratified this treaty, which restricts disposal of hazardous wastes by shipping them to less developed nations for disposal.); OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP'T OF NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 1.2 (1997).

47. See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1987) (identifying customary international law as the source for a state's obligations regarding international environmental damage). The general principle of state responsibility for environmental damage first surfaced in the 1941 *Trail Smelter Case*, which involved sulfur dioxide emissions from a smelter plant in British Columbia. See *Trail Smelter Case* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941). The smelter plant caused personal injuries to the Washington state population. In the absence of any international judicial decisions directly on point, the Special Arbitral Tribunal examined numerous decisions of the United States Supreme Court and created the following principle:

No State has the right to use or permit the use of its territory in such a manner in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

*Id.* at 1965. See Anthony Leibler, *Deliberate Wartime Environmental Damage: New Challenges for International Law*, 23 CAL. W. INT'L L.J. 67, 69 (1992) (citing *Trail Smelter Case*, 3 R. Int'l Arb. Awards at 1965).

#### F. International Agreements & Status of Forces Agreements (SOFAs)

In a contingency operation, it is also important to find out whether the nations that are involved in the operation are parties to any international agreements that are binding on the United States as a matter of either binding customary international law or as host nation law. The responsible unified command or Department of State representative for the regional area of the operation can provide information on the relevant international agreements. As with treaties, international agreements may not specifically apply to the environment or to military operations; however, the terms may be sufficiently broad to encompass both of these considerations.

A special type of international agreement, known as a status of forces agreement (SOFA), may also govern the deployment of forces overseas.<sup>48</sup> A SOFA usually includes a basic agreement and a number of supplemental agreements that deal with specific countries or specific issues in countries.<sup>49</sup> Status of forces agreements or supplemental agreements that have been negotiated since 1990 are likely to contain specific environmental provisions concerning transboundary impacts.<sup>50</sup> For example, under the 1993 revisions to the German Supplementary Agreement, "the United States will, for the first time be obligated to bear costs arising in connection

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48. The United States currently has formal SOFAs with 81 countries. See JA 422, *supra* note 13, at 3-3.

49. See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA]; Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248 [hereinafter Japanese SOFA].

50. Most existing SOFAs were negotiated shortly after World War II, before the onset of modern environmental awareness. Consequently, they rarely deal with environmental issues, but, in the future, they will more than likely be supplemented to contain environmental provisions. See NAVAL JUSTICE SCHOOL, U.S. NAVY, CONSOLIDATED ENVIRONMENTAL LAW DESKBOOK 36-9 (May 1994) [hereinafter ENVIRONMENTAL LAW DESKBOOK].

with the assessment, evaluation, and remedying of hazardous substance contamination caused” by U.S. forces in Germany.<sup>51</sup>

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51. Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 82 (1996). See also Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, Mar. 18, 1993 [hereinafter Supplemental Agreement to FRG SOFA]. This document is located on the internet at <<<http://www.aeim.hqusaer.army.mil/library/MIS/NATOSOFA/NATOSOFA-1.htm>>>. The supplemental agreement to the Germany SOFA is drafted broadly to encompass a wide range of claims for damage to land that is caused by U.S. forces. Specifically, Article 41 provides for settlement of claims for damages to German land. See *id.* art. 41. This provision could encompass environmental claims based on, for example, fuel spills, damage to deepwater aquifers, and damage to historical landmarks. Additionally, Article 54a, a new provision to the SOFA, places an obligation on the sending states to “recognize and acknowledge the importance of environmental protection in the context of all the activities of their forces within the Federal Republic.” *Id.* art. 54a. This provision places an obligation on the sending state to “identify, analyze and evaluate potential effects of environmentally significant projects on persons, animals, plants, soil, water, air, climate and landscape, including interactions among them, as well as on cultural and other property.” *Id.* Furthermore, Article 54b, another new provision to the SOFA, places the burden on the sending state to “ensure that only fuels, lubricants, and additives that are low-pollutant in accordance with German environmental laws are used in the operation of aircraft, vessels, and motor vehicles.” *Id.* art. 54b.

## II. An Analysis of the Continuum of Recent Contingency Operations— The Legal Void in Environmental Law

### A. The Legal Void

Executive Order 12,114 and supplementing DOD directives are of little or no practical value to a combatant commander who is responsible for developing an environmental posture level in a MOOTW theater of operations.<sup>52</sup> A clear, concise legal basis for environmental doctrine during MOOTW does not presently exist. At one end of the legal spectrum, domestic environmental laws have limited applicability during overseas contingency operations and, generally, do not apply extraterritorially.<sup>53</sup> At the other end, the DOD law of war program mandates that U.S. armed forces “apply law of war principles during all operations that are categorized as [MOOTW].”<sup>54</sup> Furthermore, the standard for environmental compliance during warfare due to military necessity and allowable collateral damage is much less restrictive than the compliance that may be necessary during peace operations.<sup>55</sup> Applying the law of war by analogy to MOOTW, therefore, does not provide a legal framework for the protection

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52. In this regard, scholars who have studied the application of the current DOD environmental framework to MOOTW agree with this somewhat radical view. *See, e.g.*, CARR, *supra* note 10, at 20 (asserting that “environmental doctrine during [M]OOTW remains elusive for operational commanders”); STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 151 (1996) (noting that there currently exists serious disagreement over the circumstances that require waiver for the documentation requirements under EO 12,114).

53. *See* National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370a (West 1998). *See also* EO 12,114, *supra* note 22; *supra* notes 20-24 and accompanying text (discussing the concept of extraterritoriality).

54. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.02, STANDING RULES OF ENGAGEMENT (1 Oct. 1994). *See* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996); U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979). *Chairman, Joint Chiefs of Staff Instruction 5810.01* states, “U.S. armed forces will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and, unless otherwise directed by competent authorities, will apply law of war principles during all operations” that are categorized as MOOTW. *See* JOINT PUB. 3-07, *supra* note 16.

55. *See* Harry H. Almond, Jr., *Strategies for Protecting the Environment: The Process of Coercion*, 23 U. TOL. L. REV. 295, 338 (postulating that the general principle of military necessity and the various law of war rules relating to the principles of minimizing collateral damage during targeting analysis are applicable to the protection of the environment during warfare).

of the environment during a contingency operation that delineates a clear environmental standard adequate to meet the needs of the operation.<sup>56</sup>

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56. A well-known scholar in this area articulates the view that the law of war “furnishes an incomplete and unpredictable bulwark against excessive environmental damage even in times of actual war or armed conflict.” *Id.* (citation omitted). During the aftermath of Desert Shield/Desert Storm in 1991, Saddam Hussein’s intentional release of oil into the ocean and torching of Kuwaiti oil fields brought to the forefront of the international community the concern for the environment during warfare. See Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 (1992). See also Adam Roberts, *Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War*, 69 U.S. NAVAL WAR C. INT’L L. STUD. 222, 260 (1996). The protection of the environment during warfare was covered only in a general manner before 1970. See Hague Convention No. IV Respecting the Law and Customs of War on Land, 36 Stat. 2277, 75 U.N.T.S. 287, reprinted in U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) (establishing principles of limitation which prohibit unnecessary destruction of property not required by military necessity); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (prohibiting destruction of real property except where rendered absolutely necessary by military operations); Geneva Convention for Amelioration of the Condition of the Wounded and Sick of Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (prohibiting, and designating as a grave breach, extensive destruction of property when it is not justified by military necessity).

The word “environment” did not appear in any law of war treaty before 1977. Since 1977, however, specific treaties codify provisions that address problems raised by the vulnerability of the environment during warfare. See 1977 Protocols Additional to the Geneva Conventions of 1949, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter 1977 Protocols]. See also U.S. DEP’T OF ARMY, PAM. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1979). Certain provisions of Protocol I specifically protect the environment. For example, Article 35(3) of Protocol I prohibits employing methods or means of warfare that are intended or expected to cause widespread, long-term and severe damage to the natural environment. 1977 Protocols, *supra*, art. 35(3). Article 55 of Protocol I provides an affirmative duty to protect the environment against widespread, long-term severe damage. *Id.* art. 55. The United States has not ratified Protocol I, but specifically recognizes some portions as binding as a matter of customary international law. The United States specifically does not support Articles 35 and 55 of Protocol I; the United States views these provisions as too broad and ambiguous. See Memorandum from Major P. A. Seymour, U.S. Marine Corps, subject: Additional Protocol I as Expressions of Customary International Law (undated) (copy on file with author). The other treaty to address the environment since 1977 is the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977. See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151, 16 I.L.M. 88 [hereinafter 1977 ENMOD Convention]. The United States ratified this convention on 17 January 1980. Generally, the convention prohibits techniques that modify the environment with widespread, long-lasting or severe effects. *Id.* Protocol I deals directly with the dangers that modern warfare represent for the natural environment. See 1977 Protocols, *supra*.

The void in environmental law results in the currently employed ad hoc and piecemeal approach to each contingency operation. The burden falls on combatant commanders to extend domestic laws subjectively in an effort to establish the “legal basis for their theater’s [sic] environmental protection policy.”<sup>57</sup> “This method of determining environmental doctrine for MOOTW is often ineffective and legally unsound . . . and results in doctrine that is incomplete, inconsistent, and confusing.”<sup>58</sup> An analysis of recent contingency operations illustrates the problems associated with the current ad hoc, piecemeal approach and the lack of clarity in the area of environmental law.

## B. The Continuum of Recent Contingency Operations

### 1. *Operation Restore Hope (Somalia)*

In December 1992, the United States deployed forces to Somalia for Operation Restore Hope, under the authority of United Nations Security Council Resolution 794.<sup>59</sup> During this operation, the combatant commander could not use the “participating nation” exception because Somalia lacked a stable government that was capable of enforcing host nation law.<sup>60</sup> Accordingly, the United States could either accept formal DOD obligations to conduct an ES or an ER, or seek an exemption. The combatant commander sought and received an exemption from the DOD.<sup>61</sup> Due to the nature of the operation and the existing level of destruction in the theater, environmental considerations were admittedly a “low priority.”<sup>62</sup> In addition, the absence of any local government or regulatory system left a void of host nation environmental controls. Consequently, legal advisors advised the United Nations Task Force (UNITAF) commander that operations must comply with U.S. environmental laws if such compli-

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57. CARR, *supra* note 10, at 20.

58. *Id.*

59. See S.C. Res. 794, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/794 (1992) (authorizing military enforcement action to create a secure environment for humanitarian relief operations). See also WALTER GARY SHARP, SR., U.N. PEACE OPERATIONS: A COLLECTION OF PRIMARY DOCUMENTS AND READINGS GOVERNING THE CONDUCT OF MULTILATERAL PEACE OPERATIONS 353 (1995) (providing a case study on Operation Restore Hope and other documents relating to the background of this operation); Karen V. Fair, *The Rules of Engagement in Somalia—A Judge Advocate’s Primer*, 8 SMALL WARS AND INSURGENCIES 107, 108 (1997) (describing the destruction and deplorable conditions in Somalia during Operation Restore Hope).

ance did not interfere with mission accomplishment.<sup>63</sup> Although U.S. forces received an exemption from the review and documentation requirements, the command, nonetheless, prepared an environmental audit.<sup>64</sup>

During Operation Restore Hope, the environmental annex was neglected. Operation Restore Hope demonstrates that environmental issues in a poor, third world country that is devoid of an effective government or legal system receive little, if any, attention during fast-paced oper-

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60. During the drafting of this article, the author was exposed to a potential criticism of the article's proposals. This criticism is based on a premise that it is unnecessary for the United States armed forces to incorporate stringent environmental standards in a poverty stricken country, such as Somalia.

[I]n a political environment such as existed in Somalia that tolerated the starvation of children, considerations about where to dispose of motor oil [could actually] be meaningless. When the resources barely exist to provide humanitarian assistance and the host country could care less about environmental stewardship . . . there may not be a convincing need to implement stringent environmental law programs.

Memorandum from Lieutenant Colonel John M. German, Professor, Admin. & Civ. L. Dep't, The Judge Advocate General's School, to Major Karen V. Fair, subject: The Judge Advocate General's Corps Professional Writing Program Grading Worksheet (undated) (copy on file with author). In response to this type of overall criticism to the author's proposal, the armed forces have a need for a standardized environmental package and standardized training for every deployment, regardless of the world "hot spot" involved. Consider, for example, the following hypothetical scenario: the 1st Cavalry Division of III Corps and Fort Hood, Fort Hood, Texas, is tasked to deploy maneuver brigades simultaneously to Africa, Haiti, and to Southwest Asia. The training and the planning for environmental considerations must be a standardized packet for each of these deployments, regardless of whether the deployment is in a poor, underdeveloped country (for example, Somalia) or in the wealthier European theater (for example, Bosnia). The author expresses her gratitude to LTC German for his expert assistance in the final draft of this paper.

61. See Major Richard L. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., July 1997, at 21 (citing Memorandum, Director, Joint Staff, to the Under Secretary of Defense for Acquisition and Technology, subject: Exemption from Environmental Review (17 Oct. 1994) (transmitting the request from the combatant commander to the DOD for variance from documentation requirements)).

62. See OFFICE OF THE STAFF JUDGE ADVOCATE, UNIFIED TASK FORCE SOMALIA, AFTER ACTION REPORT AND LESSONS LEARNED 34 (undated) (on file with author) [hereinafter RESTORE HOPE AAR]. One documented issue, however, concerned the dumping of confiscated weapons and ammunition into the ocean. In this instance, judge advocates advised that this dumping violated the London Convention. *Id.* See also London Convention, *supra* note 46.

63. Frederic L. Borch, Judge Advocates in Africa: Operation Restore Hope and UNOSOM II 1992-1994, ch. 9 (unpublished draft history of the U.S. Army JAG Corps in MOOTW, draft excerpt copy on file with author).

ations. Due to the absence of a legal system, the United States did not have any host nation laws to follow. Consequently, the United States did not plan for, or follow, a systematic approach to environmental considerations. At the close of UNITAF operations in May 1993, the UNITAF staff judge advocate advised that advance planning for an environmental annex would prove critical for future contingency operations.<sup>65</sup> Furthermore, he suggested the need for a standardized environmental annex that is integrated into the tactical standard operating procedure.<sup>66</sup>

## 2. Operation Uphold Democracy (Haiti)

In the wake of United Nations Security Council Resolution 940<sup>67</sup>, U.S. forces deployed to Haiti in a semi-permissive entry labeled Operation Uphold Democracy.<sup>68</sup> The nature of this operation immediately raised questions concerning Haiti's status as a participating nation for environmental compliance purposes.<sup>69</sup> President Clinton initially announced that the United States "would use military force to oust the Cedras regime from power."<sup>70</sup> In an effort to avoid an invasion and to prevent bloodshed, he dispatched to Haiti a diplomatic team consisting of former President Jimmy Carter, General Colin L. Powell, and Senator Sam Nunn.<sup>71</sup> On 18

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64. See RESTORE HOPE AAR, *supra* note 62, at 34. On the continuum of documentation requirements, the EA is less extensive than an EIS, ER, or ES. See *supra* notes 41-45 and accompanying text. An environmental audit (EA) is a concise public opinion document with the following functions: (1) briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) aids an agency's compliance with the NEPA-like requirements under EO 12,114, when an EIS is not required (in other words, helps to identify alternative courses of action and mitigation measures); and (3) facilitates preparation of an EIS when one is necessary. See FINAL DRAFT, *supra* note 33, app. C-25. Unlike an EIS, since the EA is a concise document, it should not contain long descriptions or detailed data that the agency may have gathered. *Id.* Rather, it should contain a brief discussion of the need for the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. *Id.* In comparison to the EIS process, the EA process is streamlined and less time-consuming. The process usually begins independently without any formal public notification. *Id.* at 7-2. The process does not require public review and comment. Additionally, there is no requirement for Headquarters, Department of the Army or the Environmental Protection Agency to review the EA. *Id.*

65. See RESTORE HOPE AAR, *supra* note 62, at 34.

66. See *id.*

67. See S.C. Res. 940, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/940 (1994) (authorizing "all necessary means" to remove the military leadership, to maintain a secure environment, and to enforce the Governor's Island agreement during Operation Uphold Democracy).

September 1994, at the precise hour that paratroopers from the 82nd Airborne Division were flying to drop zones in Haiti for a forced entry, the Cedras regime agreed to relinquish control.<sup>72</sup> At that moment, the U.S. operation suddenly became a semi-permissive entry. Haitian officials then

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68. *See generally* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, OPERATION UPHOLD DEMOCRACY (11 Dec. 1995) [hereinafter UPHOLD DEMOCRACY AAR] (copy on file with the Center for Law and Military Operations). Similar to the environmental destruction observed in Somalia, one-third of the Haitian landscape had suffered serious soil erosion due to generations of indifference to ecological problems. *Id.* at 13. This observation was critical in Haiti and will prove critical in future operations. Combatant commanders and their staffs must take the necessary precautions to document existing environmental degradation to ensure that fraudulent environmental claims are not lodged against the United States government during MOOTW.

69. At least one commentator has devised a technique for discerning the "participating nation" exception by considering the nature of the United States entrance into a host nation. Generally, there are three different forms of entry by U.S. forces into a foreign nation: "(1) a forced entry; (2) a semi-permissive entry, or (3) permissive entry." *See*, Whitaker, *supra* note 61, at 21. A permissive entry infers host nation cooperation, thereby allowing use of the participating nation exception. *Id.* On the other end of the spectrum, a forced entry would rarely infer a participating nation. *Id.* The middle of the spectrum, a semi-permissive entry, however, presents the more complex scenario.

In this case, the [legal advisor] must look to the actual conduct of the host nation. If the host nation has signed a stationing or status of forces agreement, or has in a less formal way agreed to the terms of the United States deployment within the host nation's borders, the host nation is probably participating with the United States (at a minimum, in an indirect manner). If the host nation expressly agrees to the United States entry and agrees to cooperate with the military forces of the United States, the case for participating nation status is even stronger. Finally, if the host nation agrees to work with the United States on conducting a bilateral environmental review, the case is stronger still.

*Id.*

70. UPHOLD DEMOCRACY AAR, *supra* note 70, at 12.

71. *Id.*

72. *Id.* at 13.

agreed to work with the United States on conducting a bilateral environmental audit.<sup>73</sup>

In Operation Uphold Democracy, the J4-Engineer Section and the staff judge advocate facilitated the use of the “participating nation” exception. During the operation, these staff members also “disseminated the environmental guidelines and standards adopted in the joint operational plan.”<sup>74</sup> Despite the success of the Haitian operation, environmental planning lacked focus.<sup>75</sup> At the close of Operation Uphold Democracy, military planners were voicing the same frustrations that planners and operators expressed after Operation Restore Hope. The primary criticism was that environmental management lacked proper prior planning.<sup>76</sup> For example, units deployed without certain necessary equipment, such as sufficient fifty-five gallon drums for hazardous waste disposal, vehicle drip pans, spill response equipment, and sufficient field latrines. The critical player in the oversight of environmental considerations, the joint task force engineer, was a last minute addition to the deployment. Earlier involvement of this staff officer may have prevented most of the shortfalls.<sup>77</sup>

During the Haiti operation, no plan existed for the systematic requisition and cross-leveling of environmental materials.<sup>78</sup> A joint service review of the Haiti deployment recommended that the joint task force engineer office receive necessary environmental assets, including an inspection team, subject matter experts, and a periodic command forum for discussing environmental problems and solutions.<sup>79</sup> Based on the joint service assessment that no environmental plan existed for the operation,

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73. See Memorandum, Major Mike A. Moore, United States Atlantic Command J4-Engineer, subject: Environmental Concerns of MNF (Jan. 24, 1995) (copy on file with the Center for Law and Military Operations) (concluding that EO 12,114 did not apply to Operation Uphold Democracy due to the “participating nation” exception and that U.S. forces on the ground in Haiti should coordinate with Haitian authorities to conduct a bilateral environmental audit).

74. Whitaker, *supra* note 61, at 21.

75. JOINT CHIEFS OF STAFF, UPHOLD DEMOCRACY; REAL WORLD OPS; DEPLOYMENT; HAITI; JOINT PLANNING ANNEX, JOPES: JTF ORDERS/GUIDANCE, JOINT UNIVERSAL LESSONS LEARNED SYSTEM (JULLS) No.: 02835-43293 (Sept. 19, 1994) [hereinafter JULLS REPORT] (copy on file with author).

76. See *id.*

77. See *id.* See also JOINT CHIEFS OF STAFF, JOINT PUB. 4-04, JOINT DOCTRINE FOR CIVIL ENGINEERING SUPPORT, at II-7, II-8 (22 Feb. 1995) [hereinafter JOINT PUB. 4-04]. Under current joint doctrine, the civil engineer is responsible for oversight of the impact that military operations have on the environment. *Id.*

78. JULLS REPORT, *supra* note 75.

79. *Id.*

the assessment recommended specific system improvements for future deployments: deploy units with the requisite level of education to identify and to solve environmental problems; equip units with necessary environmental supplies; add an environmental engineer to the joint task force staff; and include critical environmental planning in the crisis action procedures in the joint operation planning and execution system (JOPES).<sup>80</sup>

### 3. Operation Joint Endeavor (Bosnia)

On 19 December 1995, the United States armed forces joined a multinational military implementation force in Bosnia during Operation Joint Endeavor.<sup>81</sup> From the outset, environmental considerations played a major role in mission accomplishment. Unlike the Somalian and Haitian operations, where host nation law was either sparse or nonexistent, the Bosnian operation required the European Command staff judge advocate to understand and to apply host nation laws and to negotiate various international agreements concerning environmental factors.<sup>82</sup> Due to the lack of proactive planning for environmental operations, the time invested in the early stages of the operation researching the applicable international and host nation environmental laws, understanding SOFA provisions, and negotiating the requisite transit agreements to allow for the transboundary shipment of hazardous wastes initially impeded the Operation Joint Endeavor mission.

At the beginning of Operation Joint Endeavor, the European Theater commander served as the environmental executive agent (EEA).<sup>83</sup> The EEA rapidly developed and coordinated environmental standards and procedures for all U.S. forces in the theater.<sup>84</sup> Based on the intense focus on environmental considerations during the operation, U.S. Army Europe requested the authority to use the Brown & Root Logistics Civil Augmen-

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80. *Id.* See 2 JOINT CHIEFS OF STAFF, MANUAL 3122.03, JOINT OPERATION PLANNING AND EXECUTION PLANNING AND EXECUTION SYSTEM (JOPES) (1 June 1996) [hereinafter JCS MANUAL 3122.03] (mandating use of the JOPES). The *JOPES Manual* governs the development of operation plans submitted for review to the chairman of the Joint Chiefs of Staff.

81. See S.C. Res. 1031, U.N. SCOR, 52nd Sess., U.N. Doc. S/RES/1031 (1995) (authorizing "all necessary measures" to protect the United Nations Protection Force (UNPROFOR) and implementation of the multinational implementation force (IFOR) during Operation Joint Endeavor). This force consisted of approximately 60,000 troops in ground, air, and maritime units from over 25 NATO and non-NATO nations. See American Forces Press Service, *9539 Main Body Deployed for NATO Operation Joint Endeavor*, <<http://www.dtic.mil/afps/>>.

tation Program (LOGCAP) contract to provide environmental services for all U.S. personnel located at thirty different bases in Bosnia, Hungary, and Croatia.<sup>85</sup> The LOGCAP scope of work included: “environmental baseline surveys; hazardous waste management program; hazardous materials emergency spill response program; bio-medical waste management program; solid waste management program; water and wastewater (sewage) transfer and treatment systems.”<sup>86</sup>

The use of the LOGCAP contract and host nation contractors<sup>87</sup> was necessary because of the President’s ceiling on the number of troops authorized in Bosnia, the initial lack of host nation support agreements, and the desire to maintain a relatively low United States presence in this politically charged theater of operations.<sup>88</sup> Activating the LOGCAP contract to per-

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82. Judge advocates at all operational levels were involved in the negotiation and implementation of international agreements during Operation Joint Endeavor. The environmental provisions are included as part of the transit agreements concerning a wide range of issues, including the status of NATO personnel, establishment of mail and telecommunication services, use of facilities for the preparation and execution of the operation, and claims procedures. Interview with Major John Miller, Center for Law & Military Operations, The Judge Advocate General’s School, at Charlottesville, Va. (Mar. 17, 1998) [hereinafter Miller Interview]. See generally Agreement with Bosnia-Herzegovina Concerning the Status of NATO and its Personnel, Nov. 23, 1995, 35 I.L.M. 102; Agreement Between the Federal Republic of Yugoslavia and the North Atlantic Treaty Organization (NATO) Concerning Transit Arrangements for Peace Plan Operations, Nov. 23, 1995, 35 I.L.M. 106 [hereinafter Yugoslavian Transit Agreement]; Agreement Between The North Atlantic Treaty Organization (NATO) and the Government of the Republic of Hungary Regarding the Transit and Temporary Stationing of IFOR, Dec. 6, 1995 [hereinafter Hungary Transit Agreement]; Agreement Between the North Atlantic Treaty Organization (NATO) and the Government of the Republic of Slovenia Regarding Transit Agreements, Dec. 22, 1995 [hereinafter Slovenian Transit Agreement]; Agreement Between the Republic of Croatia and the North Atlantic Treaty Organization (NATO) Concerning the Status of NATO and its Personnel, Nov. 23, 1995, 35 I.L.M. 104 [hereinafter Croatian Transit Agreement] (copies of all transit agreements on file with the Center for Law and Military Operations).

83. See CARR, *supra* note 10, at 31. See also DOD INSTR. 4715.5, *supra* note 27, para. 6.1.2. The under secretary of defense for environmental security designates environmental executive agents for environmental matters in foreign countries where DOD installations are located. *Id.* For the purposes of Operation Joint Endeavor, the European Command delegated this authority to U.S. Army Europe. CARR, *supra* note 10, at 31.

84. See CARR, *supra* note 10, at 31. This type of proactive environmental oversight did not occur in either the Somalia or Haiti operation because this high level of environmental scrutiny and planning was not a prerequisite for completing the military mission in those impoverished nations, where effective governments were lacking.

85. See *id.* See also GENERAL ACCOUNTING OFFICE, REPORT ON CONTINGENCY OPERATIONS, REPORT No. GAO/NSIAD-97-63 (1997) [hereinafter GAO REPORT] (copy on file with author).

86. CARR, *supra* note 10, at 31. See GAO REPORT, *supra* note 85, at 7.

form these essential environmental services also allowed the limited number of uniformed forces in the theater to focus on the peace enforcement mission.

Operation Joint Endeavor raised additional environmental concerns because of its proximity to the borders of other countries. For example, transporting hazardous wastes out of Bosnia and Croatia to other European countries was particularly problematic.<sup>89</sup> The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal regulates transboundary shipments of hazardous wastes.<sup>90</sup> Ninety-seven of the world's 185 countries have ratified the Basel Convention's restrictions on the transboundary movement of hazardous waste, including Croatia, Hungary, and Austria.<sup>91</sup> The United States signed, but has not yet ratified, the Convention and is not obligated to comply with its

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87. During the early stages of Operation Joint Endeavor, the Defense Logistics Agency (DLA) was tasked with the waste management and disposal mission, and the DLA delegated the mission to the Defense Reutilization and Marketing Region Europe (DRMR-E). The DRMR-E offered contracts to local European contractors for the disposal of waste. This was possible because Hungary had existing waste facilities that could be used for disposing of DOD waste in accordance with United States law, host nation law, and the Basel Convention. Two separate fixed-fee contracts were awarded to a German firm: one for the disposal operations in Hungary and the other for disposal of waste generated in Croatia and Bosnia. *See* CARR, *supra* note 10, at 34.

88. *See* GAO REPORT, *supra* note 85, at 6-8.

89. *See* Burman and Hollingsworth, *supra* note 18, at 33.

90. *See* Basel Convention, *supra* note 46. Professors Anthony D'Amato and Kirsten Engel provide a descriptive overview of the Basel Convention:

The regime established by the Basel Convention is based on the following principles: the generation of hazardous wastes must be reduced to a minimum; where it is unavoidable, the wastes must be disposed of as close as possible to the source of generation. In a number of instances, export of hazardous wastes is prohibited absolutely: hazardous wastes may not be exported to Antarctica, or to States which are not parties to either the Basel Convention or a treaty establishing equivalent standards [e.g., Bamako Convention], or to parties which have banned all imports of such wastes. In all other cases, transboundary waste movements must conform to the provisions of the Convention: they are permissible only if they present the best solution from an environmental viewpoint, if the principles of environmentally sound management and disposal are observed, and if they take place in conformity with the regulatory system established by the Convention.

terms. During Operation Joint Endeavor, however, U.S. forces complied with the Convention's mandates in an effort to establish and to maintain a healthy relationship with the international community and to avoid a potential international incident.<sup>92</sup>

The U.S. LOGCAP contractors required a method of moving U.S.-generated waste products from Bosnia across the borders into Hungary, Croatia, and Germany for their treatment or disposal.<sup>93</sup> The Basel Convention, however, encourages the disposal of hazardous wastes in the generating nation to improve and to protect the environment and to ensure the sound management of hazardous wastes during transport.<sup>94</sup> Pursuant to certain agreements and with notification and approval, parties to the Convention may send hazardous waste to other parties to the Convention for disposal or receive such waste from other parties to the Convention.<sup>95</sup> The Convention prohibits parties from sending hazardous waste to, or receiving hazardous waste from, non-parties without bilateral, multilateral, or regional arrangements, and such arrangements must not run counter to the Convention.<sup>96</sup> Accordingly, the Convention prohibits the transport of "hazardous wastes from a non-member nation—for example, Bosnia-Herzegovina—to a member nation (such as Croatia) unless a special agreement has been negotiated."<sup>97</sup>

After a complicated and time-consuming negotiation process with European Command, the North Atlantic Treaty Organization, and several U.S. embassies, the Croatian government approved the "transit agreement" to allow U.S. government contractors passage across the Croatian border.<sup>98</sup> Between June 1996 and February 1997, Croatia prohibited U.S. contractors from transporting hazardous waste from Bosnia across the Croatian border. During this period, uniformed military transporters moved the hazardous wastes across international borders, thereby diverting them from the primary peace enforcement mission.<sup>99</sup> Before the con-

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91. See *Multilateral Treaties Deposited with the Secretary-General*, U.N. Doc. ST/LEG/SER.E/14/1996 (citing Basel Convention, *supra* note 46). This document can also be located on the internet at <<http://www.treaty.un.org>>.

92. See *supra* note 82 and accompanying text.

93. Burman and Hollingsworth, *supra* note 18, at 33 (citation omitted).

94. Basel Convention, *supra* note 46, preamble.

95. *Id.* art. 4.

96. *Id.* art. 11.

97. Burman and Hollingsworth, *supra* note 18, at 34. See Basel Convention, *supra* note 46, art. 11.

98. See Croatian Transit Agreement, *supra* note 82. See CARR, *supra* note 10, at 35.

tractors were allowed to transport hazardous waste across international borders, Croatia demanded the negotiation of transit agreements with the transit countries, such as Hungary and Austria, and then with Germany, the final destination country.<sup>100</sup> Croatia also demanded that transit agreements contain a specific provision that transit wastes would not be impeded.<sup>101</sup> Finally, in February 1997, the parties agreed to the transit agreements, and the LOGCAP contractor could begin the shipment of hazardous wastes.<sup>102</sup>

This complicated and lengthy hazardous waste transport problem illustrates the need to anticipate the environmental restrictions that can impede the operation's mission. At the very minimum, legal advisors must identify the requisite international agreements and applicable host nation law before an overseas contingency operation. Prior planning will ensure that the operational plan addresses the impact of international law on all nations that are in the close proximity of a geographic "hot spot" that is identified for the contingency operation.<sup>103</sup> The successful completion of the operation may very well depend on this type of preventive law practice

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99. The countries involved in the Dayton Peace Accords negotiations agreed to an alternative to the Basel Convention for the Bosnian operation. *See* Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, Bosn.-Herz., 35 I.L.M. 75. The agreement allowed U.S. uniformed personnel to transport their cargo, including hazardous waste, across international borders. *Id.* The Dayton Accords, however, did not provide for this same freedom of movement of hazardous waste by U.S. contractors and did not include a specific provision for the transport of hazardous waste. CARR, *supra* note 10, at 40.

100. *See* Burman and Hollingsworth, *supra* note 18, at 34.

101. *See id.* *See also* Croatian Transit Agreement, *supra* note 82, para. 9. Paragraph 9 of the Croatian transit agreement provides that "NATO personnel shall enjoy, together with their vehicles, vessels, aircraft and equipment, free and unrestricted passage and unimpeded access throughout Croatia including Croatian airspace and territorial waters." *Id.* The Croatians argued that this agreement did not have the language necessary to encompass U.S. contractors. *See* Burman and Hollingsworth, *supra* note 18, at 34. Consequently, the Croatians insisted upon a modification to the agreement. *Id.*

102. *See* Burman and Hollingsworth, *supra* note 18, at 34. United States uniformed personnel have transportation assets capable of moving hazardous wastes during contingency operations; however, this course of action is not cost-effective when the government is also paying contractors to perform this task. The LOGCAP contractors provide their own transportation assets for the task, and it is duplicative effort to task military vehicles to perform the same task. Additionally, this waste of resources diverts the uniformed personnel from their primary tactical mission. If it becomes necessary for uniformed personnel to perform this task, only drivers with the required training and skills in handling hazardous materials should be used. CARR, *supra* note 10, at 40.

and international law savvy.<sup>104</sup> This practice is also critical for insulating the commander from potential criminal prosecution.<sup>105</sup>

#### 4. Operation Joint Guard (Bosnia)

On 17 December 1996, alliance officials signed activation orders for the second phase of the Bosnian peace mission, Operation Joint Guard, an operation that continues even today.<sup>106</sup> The stabilization force is operating under the most detailed and comprehensive environmental operational plan in the history of peace operations.<sup>107</sup> Due to extensive media coverage, and in a constant effort to maintain amicable international relations, such planning is necessary to ensure the political and operational success of this prolonged deployment.

Operation Joint Guard's environmental operational plan does an excellent job of integrating environmental requirements under SOFAs, host nation laws, and Army regulations. Noticeably absent, however, is any reference to the complicated framework of *DOD Directive 6050.7*, EO

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103. See Burman and Hollingsworth, *supra* note 18, at 34 n.109 (citing Organization of African Unity: Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management, Jan. 29, 1991, 30 I.L.M., reprinted in ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 90, at 23). As more African nations ratify the Bamako Convention, which is similar to the Basel Convention, it will further complicate operational deployments to African nations by restricting the movement of hazardous wastes across the borders of other African countries.

104. The legal advisor's role is to research, to understand, and to apply international law and also to serve in the negotiation and implementation of international agreements during contingency operations. To accomplish this mission, the legal advisor must rely on the Department of State to delegate the power to negotiate international agreements. Accordingly, the requirement to negotiate an international agreement for a contingency operation mandates that, prior to deployment, the legal advisor proactively raise the matter through command channels to the appropriate DOD and Department of State officials responsible for the specific regional area. Telephone Interview with Lieutenant Colonel (Retired) Walter Gary Sharp, Sr., Director, AEGIS Center for Legal Analysis, formerly Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff (Mar. 29, 1998) [hereinafter Sharp Interview]. See U.S. DEP'T OF ARMY, REG. 550-51, FOREIGN COUNTRIES AND NATIONAL AUTHORITY AND RESPONSIBILITY FOR NEGOTIATION, CONCLUDING, FORWARDING, AND DEPOSITING OF INTERNATIONAL AGREEMENTS (1 May 1985); U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS (2 Feb. 1995).

105. See Burman and Hollingsworth, *supra* note 18, at 34. Under the Basel Convention, illegal trafficking of hazardous waste is a criminal act. Basel Convention, *supra* note 46, art. 4 (3).

106. The stabilization force consisted of about 31,000 multinational troops, including about 8500 U.S. troops. See American Forces Press Service, *supra* note 81.

12,114, or relevant Joint Chiefs of Staff publications. The environmental operational plan covers a broad spectrum of environmental issues and attempts to set forth balanced guidance.

The operational plan begins with a detailed analysis of the current situation's framework, including the legal, financial, political, and public relations consequences of the failure to adhere to environmental standards.<sup>108</sup> It also sets forth coherent and understandable operational guidance in the specific areas of hazardous waste clean-up and disposal,<sup>109</sup> hazardous waste management and transport,<sup>110</sup> site remediation,<sup>111</sup> spill prevention and control,<sup>112</sup> flora and fauna protection,<sup>113</sup> and archaeological and historical preservation.<sup>114</sup> Additionally, it includes as annexes an environmental out-processing checklist, an environmental out-processing report, hazardous waste shipment notification forms, environmental reporting guidelines, an environmental request for support worksheet, and applicable standards for the determination of spill amount and treatment

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107. See HEADQUARTERS SFOR [STABILIZATION FORCE], SARAJEVO, BOSNIA, AND HERZEGOVINA, CAMPAIGN DIR. NO. 24 (CD 24) to OPLAN 31406, COMSFOR'S ENVIRONMENTAL POLICY (July 1997) [hereinafter OPERATION JOINT GUARD ENVIRONMENTAL ANNEX]. The Operation Joint Guard environmental annex specifically cites the need for U.S. forces to "retain a good name [as environmental stewards], even after the mission is complete." *Id.* at 1. The annex also cautions U.S. land forces in Bosnia-Herzegovina and Croatia that they are "under the close scrutiny of the civilian population in a campaign where perceptions are often times the most important element." *Id.* This annex allows U.S. forces to "improve their position" in regards to environmental compliance. *Id.* The issue of compliance is a constant process that requires vigilant oversight, attention to detail, and modification. The concept of "constantly improving the [environmental] position" is adapted from Major Geoffrey Corn, Professor, International & Operational Law Division, The Judge Advocate General's School, U.S. Army. Major Corn instructs students that they must constantly ensure that the commander monitors and improves his environmental posture level during MOOTW to avoid adverse media publicity.

108. See *id.* paras. 1-5 (providing an overview of the current situation, the aim of the environmental procedures, the policy of weighing military necessity against the effect that operations will have on the environment, and legal and financial considerations).

109. *Id.* para. 6b(3) (defining the term hazardous waste and detailing the precise procedures for hazardous waste clean-up and disposal).

110. *Id.* para. 6b(4)-(5) (providing a detailed overview of hazardous waste management considerations and delineating procedures for the transport of hazardous waste).

111. *Id.* para. 6c (providing an overview of the hazardous waste management system, including contaminated site remediation).

112. *Id.* para. 6c(4) (setting forth the procedures for petroleum oil and lubricant (POL) spills).

113. *Id.* para. 6c(7) (providing an overview for flora and fauna protection).

114. *Id.* para. 6c(8) (providing the procedures for archaeological and historical preservation).

standards.<sup>115</sup> The operational plan designates the engineer staff section as the point of contact for major environmental incident reporting and places the responsibility for environmental policy development and coordination on the chief engineer.<sup>116</sup> The operational plan also integrates, to some extent, guidance for civilian contractors who perform environmental tasks.<sup>117</sup>

The operational plan's environmental protection requirements are "weighed against the military necessity of the mission."<sup>118</sup> It advises the deploying force that, "[w]hile the requirements of [Operation Joint Guard's] missions will take precedence, the potential dangers and high media profile of environmental issues requires thorough consideration and awareness of the potential environmental impacts of [Operation Joint Guard's] operations."<sup>119</sup> This statement imparts the overarching importance that environmental considerations are playing in the highly political Operation Joint Guard mission. Although the military mission is not subordinate to environmental considerations, it does appear that the successful completion of the military mission is partially dependent on the competent execution of the environmental mission.

### C. The Continuum of Contingency Operations—An Application of the Concept of Environmental Justice to Overseas Operations

The continuum of contingency operations that have occurred since 1992 illustrates the increasing levels of U.S. environmental awareness. At one end of the spectrum is the Somalian operation, which demonstrates the low priority that environmental considerations played in a deployment to an impoverished country that was devoid of a sovereign government. At the center of the spectrum is the Haitian deployment, where there existed some evidence of planning for environmental considerations; yet, the environmental plan lacked focus and was poorly executed. Finally, at the other

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115. *Id.* annexes A through F.

116. *Id.* para. 6b(4). See JCS PUB. 4-04, *supra* note 77. Joint doctrine mandates that civil engineering planning is an integral part of the joint operation planning process conducted under the JOPES. Joint civil engineering operations are planned and conducted with consideration of how they affect the environment, in accordance with applicable host nation agreements, U.S. environmental statutes, regulations, and policies. *Id.* at II-7.

117. See OPERATION JOINT GUARD ENVIRONMENTAL ANNEX, *supra* note 107, annexes A through F.

118. *Id.* para. 3.

119. *Id.*

end of the spectrum is the Bosnian deployment, which demonstrates that U.S. environmental planning is actually driven by adherence to international environmental obligations, standards, and political considerations, and is given high priority when compliance is essential to executing the military mission. Environmental planning in Bosnia is assuming a high command priority and is integrated into every aspect of the operation because of the location of the operation in a wealthy European theater, the involvement of other European nations, and the close scrutiny of this operation by the civilian populace and the media.

This continuum contradicts the notion of environmental stewardship articulated in the *United States Army Environmental Strategy into the 21st Century*.<sup>120</sup> It illustrates a discretionary environmental stewardship program where the level of environmental planning and execution is often driven by the military mission and the accompanying public affairs threat level. This continuum also highlights the continued need to apply the domestic concept of environmental justice to DOD activities in the international community. The definition of “environmental justice,”<sup>121</sup> in the domestic context, is achieving “equal protection from environmental and health hazards for all people regardless of race, income, culture, or social class.”<sup>122</sup>

During the last decade, environmental justice evolved from being applicable strictly to domestic based issues to being applicable in the international context.<sup>123</sup> For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal reflects the emerging concept of environmental justice in an international

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120. See generally U.S. ARMY ENVIRONMENTAL STRATEGY, *supra* note 4.

121. Generally, the emerging concept of environmental justice is a hot environmental issue in the White House and the Environmental Protection Agency. See Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). President Clinton issued EO 12,898 on 11 February 1994. The measure requires federal agencies to identify and to address disproportionately high and adverse human health and environmental effects of federal programs, policies, and activities on minority and low-income populations. *Id.* See Steven A. Herman, *Enforcement Helps Realize EPA's Commitment to Environmental Justice to Improve People's Lives*, 12 NAAG NAT'L ENVTL. ENFORCEMENT J. 9 (1997) (describing the impact of EO 12,898 on environmental programs).

122. Kelly Hill and Linda Murakami-Sikkema, *Environmental Justice: A Matter of Perspective*, 12 NAAG NAT'L ENVTL. ENFORCEMENT J. 3 (1997). See generally Steven Light and Kathryn Rand, *Is Title VIA Magic Bullet? Environmental Racism in the Political-Economic Processes and Imperatives*, 2 MICH. J. RACE & L. 1 (1996) (describing the overarching principles of the environmental justice movement).

context.<sup>124</sup> The underlying basis for the Basel Convention is the international community's concern that modern, developed countries are avoiding the high cost of environmentally sound hazardous waste treatment and disposal methods by shipping their wastes to poorer, underdeveloped countries for disposal under environmentally damaging conditions.<sup>125</sup>

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123. See ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 90, at 432. According to professors D'Amato and Engel, in today's modern world, the lesser-developed countries are increasingly stressing their sovereign independence and insisting that the developed states "acknowledge a duty to reduce the material disparities of their wealth." *Id.* In the environmental arena, lesser-developed countries are demanding corrective justice for environmental damage.

India . . . demand[ed] that the developed nations compensate her \$2 billion as a precondition of signing the Montreal Protocol [concerning ozone depletion] on the grounds "that since it is the Western nations that caused the ozone depletion, it is their moral responsibility to transfer technology for CFC [chlorofluorocarbons] substitution." The developed countries are to blame, they should pay what it costs to clean it up.

*Id.* at 433.

124. See Basel Convention, *supra* note 46. The negotiations leading to the Basel Convention were difficult and controversial. This was due to the political sensitivity of the issue between developed nations and underdeveloped nations. Professors D'Amato and Engel aptly describe this sensitivity:

During the mid-1980's the political discussion of the issue of international transports of hazardous wastes in general, and that of illegal transboundary traffic in such wastes in particular, had gathered momentum, reaching its culmination with widely publicized media reports on incidents involving the illegal dumping of toxic wastes from industrialized nations in the Third World countries in 1988. These issues prompted an international outcry against such practices and led to increasing awareness of the issue on the national and international level. . . . The elaboration of the Basel Convention was seen by many primarily as an opportunity to put a stop to illegal international waste traffic from North to South. A substantial number of developing countries, led by member states of the Organization of African Unity (OAU), regarded the deliberations as an opportunity to demonstrate their solidarity in refusing to tolerate the use of their territories as dumping grounds for toxic wastes from the rich States of the industrialized world. . . . On the other hand, many industrialized states, focusing on the option of controlled waste traffic, were not prepared to agree with the proposed measures which would put too many restrictions on the trade in wastes and recyclable materials among industrialized States. Disagreement between developed and undeveloped countries also arose on other key issues.

ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 90, at 154.

Operation Joint Endeavor aptly demonstrates the Basel Convention's impact on military forces<sup>126</sup> by prohibiting the transit of U.S. generated hazardous waste across the borders of many European countries in the region.<sup>127</sup>

### III. Current Changes Afoot in Environmental Standards Applicable During Overseas MOOTW

The environmental justice concept is driving the White House to tighten environmental standards and to increase environmental documentation requirements that apply to DOD actions during overseas contingency operations. An examination of the current changes afoot in this area is valuable in assessing the DOD's future planning in this arena. The ongoing changes that affect DOD environmental considerations during contingency operations are directly related to the 1993 District of Columbia Circuit Court decision in *Environmental Defense Fund v. Massey*,<sup>128</sup> which applied the NEPA extraterritorially to the global commons of Antarctica.<sup>129</sup> After the Clinton administration chose not to appeal the court's decision in *Massey*, the President directed a review of the policy concerning federal actions that have environmental impact overseas. The review is documented in Policy Review Directive (PRD) 23.<sup>130</sup>

During the process leading to PRD 23, the National Security Council led an interagency effort to make recommendations to Congress on whether the NEPA should be applied overseas, whether EO 12,114 should be retained, or whether a mixed approach should be adopted.<sup>131</sup> One anticipated outcome of the PRD 23 process is a possible modification of EO 12,114. The modification would require the onerous NEPA-like environmental analysis documentation for all major federal actions overseas.<sup>132</sup> This process could potentially strip the combatant commander of his dis-

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125. See ENVIRONMENTAL LAW DESKBOOK, *supra* note 50, at 36-15.

126. See *supra* Section III.B.3.

127. The proposed Transboundary Environmental Impact Assessment Agreement (TEIA) among the governments of Canada, Mexico, and the United States also demonstrates this trend of applying the environmental justice concept in the international arena. The agreement includes provisions that commit the parties to reach bilateral agreements concerning the environmental impact of proposed projects that are subject to decisions by each government and are likely to cause significant adverse transboundary effects.

128. 986 F.2d 528 (D.C. Cir. 1993).

129. *Id.*

cretion in applying the "participating nation" exception to overseas contingency operations.<sup>133</sup>

In an effort to avoid the expansion of EO 12,114, the chairman of the Joint Chiefs of Staff is actively involved in negotiating and drafting an instruction to replace *DOD Directive 6050.7*.<sup>134</sup> The desire to preserve the combatant commander's discretion regarding the participating nation exception and to preserve the procedures that are currently defined by EO 12,114 fuels the efforts of the Joint Chiefs of Staff.<sup>135</sup> The President's Council on Environmental Quality (CEQ) recently rejected the draft instruction because of the broad range of actions that would be delegated to the combatant commander.<sup>136</sup> The CEQ's rejection could pave the way for a new executive order that would limit the DOD's ability to avail itself

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130. Presidential Review Directive/NSC-23, United States Policy on Extraterritorial Application of the National Environmental Policy Act (NEPA) (8 Apr. 1993) [hereinafter PRD 23]. The goal of PRD 23 was to review whether, as a matter of policy, the NEPA should have global applicability. Although the PRD 23 process is not officially completed, the review process is temporarily on hold pending a decision on the TEIA. See *supra* note 127 and accompanying text. Implementation of the TEIA could significantly impact environmental documentation requirements for federal actions with transboundary effects on Canada and Mexico. Within the Joint Chiefs of Staff, there is some speculation that the President's Council on Environmental Quality (CEQ) is using the TEIA process to impact the PRD 23 process, resulting in the extraterritorial application of the NEPA either through legislative amendment to the NEPA or as implemented by revisions to EO 12,114. Telephone Interview with Commander Jonathan P. Edwards, U.S. Navy Maritime and Environmental Policy, Joint Staff, J-5 (Feb. 26, 1998) [hereinafter Edwards Interview].

131. Edwards Interview, *supra* note 130.

132. See Phelps, *supra* note 51, at 85.

133. See Memorandum from Commander in Chief, U.S. Atlantic Command, Captain Stephen A. Rose, subject: Draft Comments to DOD Instruction 4715.XX (3 May 1996) [hereinafter Rose Memorandum] (on file with author). In his memorandum, Captain Rose explains that one intent of Draft DOD Instruction 4715.XX is to provide a measure for the DOD to ward off a new, more restrictive executive order to replace EO 12,114.

134. See DRAFT INSTR. 4715.XX, *supra* note 25.

135. Telephone Interview with Major Thomas Ayres, U.S. Army Environmental Law Division, Office of the Judge Advocate General (Jan. 9, 1998) [hereinafter Ayres Interview]. See Edwards Interview, *supra* note 130. The Joint Chiefs of Staff rejected the current Draft Instruction 4715.XX because it eliminates the participating nation exception. The new provision may have a serious impact on DOD activities during contingency operations, as well as on bilateral military relationships with countries in the respective combatant commander's area of responsibility. In fact, the new provisions may be interpreted by other nations as piercing their sovereignty based on the extraterritorial application of the NEPA. The negotiations over this matter represent a delicate balancing act by the DOD and the Joint Chiefs of Staff due to a threat by the CEQ that the President may impose the onerous burdens of the NEPA across the full spectrum of federal actions overseas, including overseas contingency operations. See Rose Memorandum, *supra* note 133, para. 3.

of categorical exclusions, exemptions, and exceptions, specifically the “participating nation” exception. Alternatively, the CEQ’s rejection could simply signal that the current White House administration has placed this issue on hold until considerations are ripe for a political decision in this environmental arena.

#### IV. The Impact of Change on Environmental Considerations During Contingency Operations—A Proposal for True Environmental Stewardship

The impact of PRD 23 and the threat of a more restrictive executive order represent far-reaching and negative implications for regional combatant commanders. This is primarily due to the severe reduction in the combatant commander’s discretion, which is currently preserved under EO 12,114 and *DOD Directive 6050.7*.<sup>137</sup> To avoid this result, the armed forces must integrate environmental doctrine into training exercises. Further, the military must integrate a standardized environmental plan into all phases of MOOTW and ensure execution in accordance with the plan. This process translates into a standardized environmental packet for each contingency operation, regardless of whether the operation occurs in a third world nation, like Somalia, or in a wealthier European theater of operations. A self-imposed, sound environmental packet during contingency operations may temper the President’s perceived need to impose stricter environmental standards in the form of a new executive order.

##### A. A Crying Need for Joint Doctrine—The Missing Link

Joint operations are the conceptual heart of future operations at all levels involving war and MOOTW. With the renewed emphasis on joint

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136. Ayres Interview, *supra* note 135. See Edwards Interview, *supra* note 130. The CEQ works directly for the Executive Office of the President of the United States. The CEQ has not historically been empowered to make unilateral determinations concerning the federal government’s assessment of environmental impacts outside the United States. Since 1979, however, the executive branch’s policy has been codified in executive orders, not CEQ guidance. In terms of implementation oversight, EO 12,114 assigns this responsibility jointly to the CEQ and the Department of State, making it clear that the CEQ does not have unilateral authority. See generally EO 12,114, *supra* note 22. See also Memorandum from General Counsel, Executive Office of the President, Council on Environmental Quality, Dinah Bear, subject: CEQ’s Response to Letter from State Department Acting Legal Adviser to CEQ Guidance (1 July 1997) [hereinafter Bear Memorandum] (on file with author).

operations required by the Goldwater-Nichols Reorganization Act of 1986,<sup>138</sup> only those “aspects of operations that require coordination among the services or that provide guidance to joint and unified commands” have driven joint doctrine.<sup>139</sup> In furtherance of the Goldwater-Nichols Act, “Joint Vision 2010” embodies the joint operations concept and projects a “holistic” perspective of integrating the separate services for achieving full spectrum dominance across the range of military operations.<sup>140</sup> Joint operational planning involving all of the services drove the recent deployments to Somalia, Haiti, and Bosnia. Accordingly, joint doctrine<sup>141</sup> must drive environmental planning and execution, with supplemental guidance from the respective services. Traditionally, individual service components handle overseas environmental matters. Consequently, in the past, there was little perceived need at the Joint Chiefs of Staff level to incorporate environmental guidance in joint publications.<sup>142</sup>

The new generation of contingency operations, however, calls for full-spectrum Joint Chiefs of Staff level environmental doctrine. Currently, one small section of a joint publication addresses environmental issues and places responsibility for all environmental issues on the civil engineer section.<sup>143</sup> At least one commentator has observed that current

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137. Draft Instruction 4715.XX represents a significant erosion of the combatant commander's discretion from previous environmental requirements under EO 12,114 and *DOD Directive 6050.7*. For example, the most significant change requires DOD components to approach host nations for major combined activities short of armed conflict (for example, exercises and MOOTW) that do not qualify for a national security exemption. The DOD component must also: (1) determine if the host nation is conducting an environmental analysis; (2) obtain the host nation's procedures and apply them to DOD activities; (3) offer to assist in an analysis if the host nation does not have an analysis regime; and (4) if the host nation refuses to cooperate, the DOD component may decide to proceed only after considering the consequences of proceeding on the basis of whatever environmental information is readily available. See *DRAFT INSTR. 4715.XX*, *supra* note 25. Executive Order 12,114 does not currently require this procedure. The EO allows a “participating nation” to determine what environmental review, if any, it will apply to combined DOD activities in its territory. See *Rose Memorandum*, *supra* note 133, para. 3. Draft Instruction 4715.XX also drastically limits the combatant commander's discretion by: (1) delegating approval authority for certain actions to the environmental executive agent, rather than leaving this issue solely to the discretion of the combatant commander; (2) requiring the combatant commander to consult with the EEA on several actions; (3) requiring the combatant commander to offer to assist a participating nation with environmental analysis, rather than allowing the combatant commander to make the determination that, under certain circumstances and in certain nations, this offer may not be appropriate. *Id.* encl. 1.

138. 10 U.S.C.A. § 151 (West 1998).

139. JOSEPH C. CONRAD, U.S. DEP'T OF ARMY, WHITE PAPER, ENVIRONMENTAL CONSIDERATIONS IN ARMY OPERATIONAL DOCTRINE 4-2 (1995).

environmental doctrine is “woefully lacking in content, making it inadequate for use as the definitive source of joint guidance for environmental policy during MOOTW.”<sup>144</sup> Even more disturbing, a recent study indicates that “current joint doctrine does not adequately reflect the full spectrum of roles, responsibilities, and capabilities of engineers during joint and combined operations.”<sup>145</sup> The study reports that “there is no clearly defined program of engineer doctrine in the joint publication hierarchy, [and] what doctrine does exist is incomplete and at times contradictory.”<sup>146</sup> The report concludes that “sufficient engineer resources to satisfy all requirements will probably not be available in all contingencies.”<sup>147</sup>

The delegation of environmental issues to a single joint staff section, the engineer section, that is not adequately equipped or manned to deal with its own doctrinal mission further highlights the overwhelming need for the Joint Chiefs of Staff to increase the emphasis on environmental issues. Accordingly, new joint doctrine must assign the responsibility for environmental concerns across all staff sections and assign the primary responsibility for environmental execution to the J-3 (operations) section. The J-3 delegation will ensure that environmental planning is integrated

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140. See Colonel John Clauer, *Future Warfare—Preparing for the 21st Century*, at 6-7 (undated) (unpublished manuscript, on file with the Int'l & Op. L. Dep't, The Judge Advocate General's School, U.S. Army). Joint Vision 2010 provides a vision statement for how joint operations and joint forces will be conducted in the year 2010. The vision builds on the strengths of each of the separate services by “integrating new and emerging technologies with operational concepts that will provide significant improvements” in joint warfighting capabilities. *Id.* at 6.

The J-7 (Operational Plans and Interoperability) is the Joint Staff proponent for JV 2010 implementation. The JWFC [joint warfighting center] is the primary action agency for program management, for developing related joint concepts, and for oversight of the implementation process. A Chairman Joint Chiefs of Staff Instruction (CJCSI) 3010.01, “Chairman's Joint Vision 2010 Implementation Policy,” will provide the policy and procedures associated with this process.

*Id.* at 11. See Chairman of the Joint Chiefs of Staff, *Concept for Future Joint Operations: Expanding Joint Vision 2010*, <<http://www.dtic.mil/doctrine/jv2010/cfjoprn.1.pdf>> [hereinafter *Concept for Future Joint Operations*].

141. Doctrine is the military's statement of how it intends to conduct war and MOOTW. It establishes a shared approach to operations and serves as a vehicle for organizational and physical change. Guidance, including tactics, techniques, and procedures, flows from the doctrine. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS (9 Sept. 1993) [hereinafter JOINT PUB. 3-0].

142. See CONRAD, *supra* note 139, at 4-2.

throughout the entire spectrum of the operational planning process. At the very minimum, other staff sections that must be included in this process

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143. See JOINT PUB. 4-04, *supra* note 77, at II-7, II-8. The current doctrine provides the following scant guidance:

4. Environment.

a. Joint civil engineering operations should be planned and conducted with appropriate considerations of their effect on the environment in accordance with applicable US and HN [host nation] agreements, environmental laws, policies, and regulations.

b. All joint civil engineering operations planned and conducted within the United States and US territories and possessions will be conducted in compliance with all applicable federal, state, or local environmental laws and standards. This includes the preparation of adequate environmental documentation and coordination with the federal and state environmental, natural resources, and historic preservation agencies.

c. Early planning is essential to ensure that all appropriate environmental reviews have been completed in accordance with DODD 6050.7, "Environmental Affects Abroad of Major Department of Defense Actions," and the Overseas Environmental Baseline Guidance and applicable Final Governing Standards, and that no [HN] environmental restrictions are required by the status-of-forces agreements or other international agreements. Additionally, a separate annex or appendix for ensuring that proper attention is given to environmental considerations should be included in each OPORD [operation order] and OPLAN [operational plan] under which units will deploy. The annex or appendix should include, but not be limited to, the major sections shown in Figure II-4.

*Id.* at II-8. Assuming that this current minimal joint doctrine is inadequate, there is inadequate Army environmental doctrine that applies to MOOTW. For example, *Field Manual 100-23*, the Army's manual on peace operations is devoid of a discussion on environmental considerations during MOOTW. See generally FM 100-23, *supra* note 7. The Army, however, is taking a step in this direction by incorporating environmental issues into Army doctrine. See CARR, *supra* note 10, at 26 (listing field manuals that will include some minimal guidance on environmental issues).

144. CARR, *supra* note 10, at 22.

145. *Id.* at 21 (citing CONTINGENCY ENGINEERING DOCTRINE SUBGROUP, A WHITEPAPER FROM THE JOINT ENGINEER COMMUNITY ON THE NEED FOR JOINT CONTINGENCY ENGINEERING DOCTRINE (1996) [hereinafter ENGINEERING DOCTRINE]).

146. ENGINEERING DOCTRINE, *supra* note 145.

147. CARR, *supra* note 10, at 21 (citing ENGINEERING DOCTRINE, *supra* note 145 (referring to a broad range of engineer support and operations including environmental management and oversight)).

include: preventive medicine, safety, comptroller, logistics, legal, and medical.<sup>148</sup>

Although *Joint Publication 4-04*<sup>149</sup> is inadequate for environmental planning and execution, there are two provisions that must be preserved for

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148. See INTEGRATING U.S. ARMY ENVIRONMENTAL STRATEGY, *supra* note 3, app. B. When the entire functional staff includes environmental considerations in planning and execution, they will be able to deal efficiently with environmental considerations and environmental compliance, similar to protections afforded to civilians and other noncombatants. True environmental planning, execution, and compliance can no longer be the “show” of one staff section. At least one scholar in this area offers suggested examples of environmental functions for each member of the functional staff. The author has tailored these functions slightly to meet the requirements of the MOOTW mission:

Operations Officer (J-3/G-3/S-3): Primarily responsible for orchestrating the environmental contingency plan. Prepare recommendations for adjusting plans to prevent the destruction of critical environmental resources in specific geographic areas. Prepare recommendations as to the probability and significance of damaging natural and cultural resources.

Intelligence Officer (J-2/G-2/S-2): Coordinates with the civil affairs officer, the engineer, and the medical officer to identify critical environmental vulnerabilities of the area and the population. Includes environmental vulnerabilities in the “intelligence preparation of the battlefield” process to prevent costly environmental claims.

Logistics Officer (J-4/G-4/S-4): Monitors the use of hazardous materials. Plans for the appropriate disposal of solid and hazardous waste. Ensures spill plans for extended operations are prepared as appropriate.

Personnel Officer (J-1/G-1/S-1): Coordinates with the public affairs officer and with the operations officer for educating all military personnel concerning individual environmental responsibilities. Ensures the necessary level of environmental expertise is assigned to the command.

Civil Affairs Officer (J-5/G-5/S-5): With the assistance of host nation civil authorities, determines the location of critical environmental resources, assets, and facilities to prevent environmental degradation and to ensure proper disposal of solid and hazardous wastes. Recommends to the commander those resources that should be afforded special considerations for protection because of value to the mission, public health concerns, danger of regional or global contamination, environmental claims, post-conflict clean-up costs, or economic viability of the area.

Legal Officer: Researches and pinpoints the legal requirements for environmental actions in the theater, to include treaties, international agreements, and host nation laws. Advises the commander in advance of deployment of the peculiar aspects of environmental compliance during MOOTW.

Staff Engineer: Provides technical advice to the commander and staff concerning issues of public health effects of planned courses of action, water and wastewater treatment, disposal of solid and hazardous waste.

Medical Officer: Provides commander and the staff with technical advice concerning host nation population and military personnel health issues. Provides advice on the health implications of water and wastewater treatment, hazardous and solid waste disposal, and medical waste treatment and disposal.

149. See generally *JOINT PUB. 4-04*, *supra* note 77.

future joint environmental doctrine.<sup>150</sup> The first provision requires a separate environmental annex in each operational plan.<sup>151</sup> Integrating the annex into all phases of operational planning ensures the planners' attention to environmental considerations during contingency operations. The joint staff has made some progress in developing a standardized environmental annex, Annex L,<sup>152</sup> of the JOPES. The JOPES then incorporates Annex L as a planning document.<sup>153</sup> Unfortunately, at the time of this writing, there is no evidence of Annex L's incorporation into the operational planning for either Operation Joint Endeavor or the current Bosnian operation, Operation Joint Guard.<sup>154</sup> This is more than likely due to the current lack of joint environmental doctrine and the infancy of Annex L.<sup>155</sup> The annex, however, is no more than an undeveloped, bare bones sketch of environmental considerations.<sup>156</sup> At the joint staff level, there is a need to

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150. See CARR, *supra* note 10, at 22.

151. See JOINT PUB. 4-04, *supra* note 77, at II-7.

152. See JCS MANUAL 3122.03, *supra* note 80, annex L.

153. See *id.*

154. See generally Operation Joint Guard Environmental Annex, *supra* note 107.

155. The Judge Advocate General of the U.S. Navy, Rear Admiral John D. Hutson, recently commented: "We [the United States] are at the stage in environmental considerations during contingency operations where we were ten to fifteen years ago in operational law. We, as judge advocates, must do more to educate our leaders and to catch up." Rear Admiral John D. Hutson, U.S. Navy, Address at the Leadership and Management Lecture Series to the 46th Graduate Course, The Judge Advocate General's School, U.S. Army (Mar. 20, 1998).

156. See JCS MANUAL 3122.03, *supra* note 80, annex L. Annex L is basically devoid of any substantive environmental guidance. For example, Annex L, para. 3a, "Concept of the Operation," does not address potential treaty obligations, transport of hazardous wastes across international borders, or the preparation necessary to ensure that units deploy with the requisite environmental equipment, such as hazardous waste disposal containers, spill containment, clean up kits, and materials to cover the potential release of hazardous materials during transport. The annex is also devoid of guidance for documenting entry and exit environmental conditions to prevent fraudulent claims by the host nation or procedures for incident reporting. Additionally, Annex L does not factor into the environmental plan the use of United States and host nation government contractors. The foregoing are all substantive environmental areas that should be covered in every MOOTW environmental annex, regardless of the plan's operational level.

integrate environmental considerations into every aspect of MOOTW planning.

The section of *Joint Publication 4-04* that identifies the elements of environmental planning also must remain part of joint doctrine. These elements include:

- Policies and responsibilities to protect and preserve the environment during the deployment;
- Certification of local water sources by appropriate field units; and
- Solid and liquid waste management:
  - Open dumping;
  - Open burning;
  - Disposal of gray water;
  - Disposal of pesticides;
  - Disposal of human waste;
  - Disposal of hazardous waste;
  - Hazardous materials management including the potential use of pesticides;
  - Flora and fauna protection;
  - Archeological and historical preservation; and
  - Base field spill plan.<sup>157</sup>

These factors, however, should not be confined to a single environmental annex. Integrating the environmental elements throughout the entire operational plan is essential for developing a sound environmental posture level for a theater of operations. To address environmental planning elements thoroughly throughout the entire operations spectrum, the JOPES must incorporate environmental issues in the broad range of annexes, including operations; logistics; and planning guidance for personnel, public affairs, oceanographic operations, and medical services. Environmental planning considerations pervade all aspects of a contingency operation; therefore, operators must incorporate environmental planning into all portions of the operational plan.<sup>158</sup>

#### B. The Critical Need for Detailed Off-the-Shelf Operational Plans

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157. JOINT PUB. 4-04, *supra* note 77, at II-8.

Operational law attorneys must be sensitive to environmental planning in their review of operational plans. Development of off-the-shelf environmental annexes, which are similar to off-the-shelf operational plans for contingencies worldwide, is essential. The plans must incorporate applicable international agreements, SOFAs, and host nation laws for specific areas of the world.<sup>159</sup> This type of operational plan development, prior to an actual contingency operation, ensures that planners do not overlook or neglect environmental planning and stewardship, as the operational

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158. Currently, the chairman of the Joint Chiefs of Staff is revising *Joint Publication 4-04*. Message, 082052Z Nov 96, Joint Staff, J7, subject: Minutes of the Joint Doctrine Working Party—Program Directive for Joint Publications 3-34, Engineer Doctrine for Joint Operations (8 Nov. 1996). The revision will not attempt to address the entire spectrum of environmental issues; it will address only those issues that relate to civil engineering operations. Also, the chairman of the Joint Chiefs of Staff is creating *Joint Publication 3-34* and has assigned the task to the Army as the lead agent. *Joint Publication 3-34* will include operational planning, environmental stewardship, mitigation and restoration, and waste disposal. See Electronic Mail Message, Joint Doctrine Web Site (doctrine@netcom.com) subject: Question on Joint Publication 3-34, Engineer Doctrine for Joint Operations (Mar. 10, 1998) (on file with author); Edwards Interview, *supra* note 130. *Joint Publication 3-34* will also create the Joint Environmental Management Board (JEMB). The JEMB is intended to integrate all environmental protection programs of all service components under a single authority. This should provide the requisite command and control of environmental protection in overseas MOOTW. The JEMB will: participate in the operational planning process by providing environmental intelligence reports, assessments, and environmental management requirements to the joint task force commander; establish combatant commander and joint task force commander environmental policies, procedures, and priorities; and provide much needed oversight of environmental protection standards and compliance. See CARR, *supra* note 10, at 22.

159. Although the overseas environmental baseline guidance documentation (OEBGD) and final governing standards (FGS) apply only to DOD installations and facilities overseas and do not specifically apply to operational deployments, such guidelines can be used as a basis for developing the operational plan for a specific regional area. See DOD INSTR. 4715.5, *supra* note 27. A proposed solution is for the DOD to contract out for the preparation of off-the-shelf environmental annexes for possible hot spots in the world where deployments are expected to occur. Additionally, in the event that the President replaces EO 12,114 with a new executive order that eliminates the “participating nation” exception, thereby increasing documentation requirements, the DOD could also contract out for the preparation of such documentation (such as EIS, ER, ES, and EA). Similar to the LOGCAP contract employed by the DOD during MOOTW for tailor-made packages for base operations worldwide, this contract would ensure that tailored off-the-shelf plans and, if necessary, documentation requirements, are prepared well before a deployment. Further, the contract would ensure that the plans incorporate current treaty law and the peculiarities of specific host nation laws concerning the environment. In the era of the drawdown of uniformed forces, the use of contractors will act as a force multiplier by allowing uniformed personnel to focus on the primary MOOTW mission.

lessons learned from Somalia and Haiti indicate they have done previously. This also ensures that proper environmental planning and execution is incorporated into training exercises. This educational process is necessary for integrating environmental considerations into MOOTW. All soldiers must appreciate and practice environmental stewardship during training exercises so that environmental execution actually occurs during a deployment.<sup>160</sup>

An excellent example of environmental planning is draft Annex L to Headquarters, U.S. European Command (EUCOM), Plan 4000-98.<sup>161</sup> Plan 4000-98 uses Annex L of the JOPES format for structure. Unlike Annex L, however, Plan 4000-98 covers myriad environmental guidance and regulations, such as EO 12,114, *Joint Publication 4-04*, and *DOD Directive 6050.7*. Additionally, the plan incorporates the full spectrum of environmental legal issues—provisions for applicable treaties, international agreements, SOFAs, host nation environmental restrictions, and service regulations. The plan also integrates other staff sections—preventive medicine, surgeon, safety, legal, logistics, personnel, civil affairs, and the engineer section—into environmental planning and execution.<sup>162</sup>

Building on the experiences of Operation Joint Endeavor concerning the transit of hazardous wastes, the draft plan also includes guidance that the authority to transit hazardous wastes will be negotiated prior to the deployment of U.S. forces.<sup>163</sup> This plan goes far beyond the environmen-

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160. See FM 100-23, *supra* note 7, at 1. The individual soldier must have an understanding of the importance of complying with environmental standards to ensure not only the operational success, but also the media success, of every peace operation.

Because peace operations are usually conducted in the full glare of worldwide media attention, the strategic context of a peace operation must be communicated and understood by all involved in the operation. Soldiers must understand that they can encounter situations where the decisions they make at the tactical level have immediate strategic and political implications . . . Failure to fully understand the mission and operational environment can quickly lead to incidents and misunderstandings that will reduce legitimacy and consent and result in actions that are inconsistent with the overall political objective.

*Id.*

161. United States European Command, Standard Plan 4000-98 (6 Oct. 1997) (on file with author) [hereinafter Plan 4000-98]. See Burman and Hollingsworth, *supra* note 18, at 27.

162. See generally Plan 4000-98, *supra* note 161.

163. *Id.* at 2.

tal planning elements in current joint doctrine and incorporates a broader range of specific environmental issues, including: formats for documenting initial environmental conditions to avoid fraudulent claims; plans for local host nation contracts for disposal; incident report procedures; and environmental procedures for the exit and redeployment of troops from the theater of operations.<sup>164</sup>

### C. The Need for Joint and Service Doctrine that Fully and Competently Integrates Civilian Contractors into the Environmental Plan

In today's era of budget and personnel cuts, uniformed forces increasingly rely on civilian contractors to serve as a force multiplier in performing military missions.<sup>165</sup> Presidential and congressional caps on troops during peace operations increase the need for civilian contractors. Troop caps significantly affect the environmental support mission.<sup>166</sup> Accordingly, the Joint Chiefs of Staff and the respective services must create doctrine that focuses on incorporating the civilian contractor into the execution of the environmental mission.

In 1985, the Army initiated the LOGCAP program to provide off-the-shelf advance planning for the use of civilian contractors during MOOTW and to coordinate sources of available civilian logistics assets in the United States and overseas.<sup>167</sup> During Operations Joint Endeavor and Joint Guard, the DOD used the LOGCAP contract to augment military forces in the area of environmental support services such as latrine services; sewage and solid waste removal and disposal; and water production, storage, and distribution.<sup>168</sup>

Despite this increasing use of civilian contractors, the U.S. General Accounting Office (GAO) recently concluded, in a report concerning the Bosnian mission, that "little doctrine on how to manage contractor

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164. *Id.* A proposed synthesis for a sound and balanced environmental annex that extracts and summarizes the concepts found in *Joint Publication 4-04*, Plan 4000-98, the Operation Joint Endeavor Environmental Annex, and the JOPES Annex L is located at Appendix 2 of this article. This annex constitutes a concrete vision of what an excellent, well-balanced, and thorough environmental annex should include.

165. The use of civilian contractors to augment U.S. forces during military operations is not a new method for force multiplication. The U.S. Army has traditionally employed civilian contractors in noncombat roles to augment military forces. For example, civilian contractors were used extensively in the Korean and Vietnam Wars to augment logistical support provided to U.S. forces. See GAO REPORT, *supra* note 85, at 1-2.

resources and effectively integrate them with force structure units exists.”<sup>169</sup> The report further concluded that the DOD did not provide EUCOM officials with adequate contract planning guidance, adequate information on contractor capabilities, sufficient contract management and integration strategies, or adequate oversight methods and responsibili-

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166. There are three key planning considerations for using civilian contractors during MOOTW: (1) the ability to respond rapidly to major regional conflicts; (2) the political sensitivity of activating guard and reserve forces to respond to these regional conflicts; (3) the lack of host nation support agreements in the underdeveloped countries in which MOOTW traditionally occur; and (4) the NCA’s desire to maintain a relatively low United States presence in MOOTW. *See generally id.*; RESTORE HOPE AAR, *supra* note 62; UPHOLD DEMOCRACY AAR, *supra* note 70; JOINT ENDEAVOR AAR, *supra* note 17. For example, during Operation Joint Endeavor, the Joint Chiefs of Staff told U.S. Army Europe not to expect authorization for more than 25,000 troops: 20,000 in Bosnia and 5000 in Croatia. Additionally, U.S. Army Europe had a ceiling on the reserve forces it could use. For Bosnia, the President authorized the call-up of 4300 reservists for all the services, 3888 of whom the DOD allocated to the Army. Once the Army used its allocation to activate key support capabilities for civil affairs and psychological operations units, there was little opportunity to call up other types of support units. *See* GAO REPORT, *supra* note 85, at 8; JOINT ENDEAVOR AAR, *supra* note 17. *See also* 10 U.S.C.A. § 12304 (West 1998) (authorizing the President to call up to 200,000 selected reservists for up to 270 days without a national emergency). On 8 December 1995, the President signed Executive Order 12,982 to authorize the activation of reserve forces. *See* Exec. Order No. 12,892, 60 Fed. Reg. 63,895 (1995). In the age of increasing draw down of the active force and shrinking budget for military operations worldwide, the armed forces may come to depend on environmental support packages that are provided by specialized reserve units designed specifically for providing the requisite environmental expertise.

167. *See generally* GAO REPORT, *supra* note 85. *See also* U.S. DEP’T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION (LOGCAP), para. 1-1 (16 Dec. 1985) (describing the use of civilian contractors in a theater of operations, thereby freeing uniformed armed forces for other missions). This 1985 regulation is outdated and focuses primarily on combat operations. It does not adequately address the current expanded use of civilian contractors during MOOTW.

168. *See supra* Section II.B.3 (detailing the scope of work encompassed by the LOGCAP contract); GAO REPORT, *supra* note 85, at 7.

169. GAO REPORT, *supra* note 85, at 4-5.

ties.<sup>170</sup> Additionally, financial reporting and contract monitoring systems were inadequate.<sup>171</sup>

Although the Corps of Engineers (COE) was responsible for managing LOGCAP, the COE did not have a system to educate properly the key personnel who were tasked with the contract administration mission in the theater of operations. For example, deployed personnel did not have sufficient information to track the cost of the operation, to report on how LOGCAP funds were spent, or to monitor contractor performance.<sup>172</sup> Without adequate information and proper systems, combatant commanders were unable to determine whether the contractor was “adequately controlling costs, if alternative support approaches were cost-effective, if changes in the level of service being provided were warranted, or whether work was performed in accordance with contract provisions.”<sup>173</sup> Consequently, theater personnel used ad hoc, piecemeal procedures and systems to ensure that they were effectively managing LOGCAP.<sup>174</sup>

The DOD publishes little or no doctrine or guidance to assist a combatant commander on the management of the LOGCAP contract, on the integration of the contract into the theater’s force structure, or on the

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170. *Id.*

171. *Id.* The legal advisors who were responsible for coordinating the LOGCAP contract during Operation Joint Endeavor support the GAO findings. For example, one deployed contracting attorney commented: “So my first issue or really a problem was the lack of knowledge. I didn’t know anything about the LOGCAP contract and it was a painful experience learning it in the middle of the deployment. I didn’t have the contract. I didn’t know what the contract said . . . .” JOINT ENDEAVOR AAR, *supra* note 17, at 236.

172. The LOGCAP contract is a type of cost reimbursement contract referred to as a cost-plus-award-fee (CPAF) contract. Under a CPAF contract, there are no pre-established prices and services. Instead, there are “estimated” and “target” costs, but the government is obligated to pay the contractor for all costs incurred that are reasonable, allowable, and allocable to the contract. Under all cost reimbursement contracts, the government assumes the majority of the risk related to the cost of performance. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 16.405-2 (Apr. 1, 1984) (describing a cost plus award fee contract). *See also* United States Army Corps of Engineers (USACE), Transatlantic Division, Logistics Civil Augmentation Program (LOGCAP), A USACE Guide for Commanders, at 5 (4 Dec. 1994) [hereinafter LOGCAP Commander’s Guide]. Although this type of contract is more costly than a traditional “fixed-fee” contract, it is necessary for operations during MOOTW due to frequent and unexpected changes that occur during these types of operations. The contract’s scope of work allows greater flexibility for changes without requiring out of scope changes and renegotiation of the contract. *Id.* at 5. As of 6 December 1995, the GAO estimated contract costs for the Bosnian mission at about \$461.5 million dollars. *See* GAO REPORT, *supra* note 85, at 4.

173. GAO REPORT, *supra* note 85, at 5.

administration of contractually performed environmental services.<sup>175</sup> Establishing joint and supplemental service component doctrine is essential for the effective and economic management of the LOGCAP contract. Additionally, planners must create a mechanism for integrating the civilian contractor into the commander's environmental operational planning process. Legal advisors who are likely to deploy to a MOOTW theater must receive proper education and information on the LOGCAP contract prior to deployment. The system of oversight required for LOGCAP relies on "vigilant [legal advisors] who have detailed knowledge of the [LOGCAP's] contractual terms."<sup>176</sup> This knowledge will arm the legal advisor with the expertise necessary for the combatant commander's contract oversight, which is directly linked to cost control.<sup>177</sup> At the very minimum, the legal advisor must have access to a copy of the entire LOGCAP contract in order to perform the mission competently.<sup>178</sup> Furthermore, the legal advisor must have sufficient training and experience to assess envi-

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174. Similar criticisms were raised regarding LOGCAP implementation in Somalia and Haiti. *See id.* at 20. The cost reimbursement pricing structure of the LOGCAP contract awards fees based on the quality, responsiveness, and cost control by the contractor. Under the terms of the contract, the evaluations of contractor performance must be reported to the Award Fee Determination Board. Accordingly, there must be a plan to evaluate contractor performance, to communicate the evaluations of performance to the Award Fee Determination Board, and a mechanism available for providing a true assessment of contractor performance. *See UPHOLD DEMOCRACY AAR, supra* note 70, at 134-35. For example, during Operation Uphold Democracy there was initially no plan to evaluate contractor performance or to communicate these evaluations to the Award Fee Determination Board. *See Memorandum, Lieutenant Colonel Arthur L. Passar, AMSMI-GC-AL-D, to Staff Judge Advocate, U.S. Army Materiel Command, subject: After Action Report, Legal Support to Joint Logistics Support Command (JLSC), Joint Task Force (JTF) 190, Haiti, Operation Uphold Democracy, September 1994-March 1995, para. 6b(i) (11 May 1995) [hereinafter Passar AAR].* During a change of personnel, Lieutenant Colonel Passar, the new staff judge advocate for the Joint Logistics Support Command (JLSC), Joint Task Force 190, started from scratch in developing an award fee assessment plan. This new plan included worksheets that detailed areas for the JLSC staff to evaluate the contractor's performance for award fee purposes. *Id.* para. 6b(i)(a).

175. According to Army contracting officials during Operation Joint Endeavor, doctrine and guidance on the use of LOGCAP are critical, because using a contractor to support a deploying force represents a significant change from the experiences of most Army personnel. *See GAO REPORT, supra* note 85. Typically, Army practice has been to make the force self-sustaining for the first 30 days in a contingency theater. One Army general likened the "employment of LOGCAP without doctrine and guidance to giving the Army a new weapon system without instructions on how to use it." *Id.* at 17.

176. UPHOLD DEMOCRACY AAR, *supra* note 70, at 135.

ronmental contract performance and associated costs and to provide the required feedback to the award fee determination board.<sup>179</sup>

#### D. The Competent Practice of Environmental Law During Contingency Operations

As part of general operational law practice when participating in an overseas contingency operation, the legal advisor must be intimately familiar with the details of the operational plan. This practice ensures that the legal advisor is trained and prepared to provide competent advice on environmental matters, thereby acting as a force multiplier for the command. The legal advisor must also be closely linked to the operational tempo of the contingency operation. This involves monitoring message traffic, analyzing changes to the operational plan and mission statement

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177. Military commanders during Operation Joint Endeavor were unaware of the cost ramifications of their decisions. For example, a command decision to accelerate the camp construction schedule required the contractor to fly plywood from the United States into the area of operations because sufficient stores were not available in Europe. The contractor reported that the cost for a sheet of plywood flown in from the United States increased from \$14.06 per sheet to \$85.98 per sheet. According to a U.S. Army official, "his commander 'was shocked' to find the contractor was flying plywood from the U.S." GAO REPORT, *supra* note 85, at 18. "The cost reimbursement pricing structure of the LOGCAP is necessary to provide the flexibility and responsiveness required to support military contingency operations, but the corresponding absence of an established price and service schedule demands intensive monitoring and oversight of contractor costs." UPHOLD DEMOCRACY AAR, *supra* note 70, at 135.

178. At first glance, this proposition may seem so basic that it is not worth mentioning. During Operation Joint Endeavor, however, the deploying contract attorney did not have the benefit of a copy of the LOGCAP contract and also did not have the LOGCAP Corps of Engineers points of contact necessary to establish a liaison with the stateside officials who were administering the contract. JOINT ENDEAVOR AAR, *supra* note 17, at 236.

179. For example, during Operation Restore Hope, there was no system available for operational commanders to monitor expenditures, verify expenditures, and tie those expenditures to specific tasks. GAO REPORT, *supra* note 85, at 20. This resulted in great difficulty for commanders in responding to DOD and congressional inquiries about LOGCAP costs. *Id.* In response to many of the criticisms concerning the lack of knowledge in administering the LOGCAP contract, the Department of the Army recently released a three page memorandum concerning contractors on the battlefield. The memorandum is expressly applicable to MOOTW. See U.S. Dep't of Army, Policy Memorandum, subject: Contractors on the Battlefield (12 Dec. 1997). The memorandum is a bare bones description of basic contracting principles and does not adequately address the intricacies of administering the LOGCAP during MOOTW. More must be done to educate military planners, operators, and legal advisors on this issue.

from higher headquarters, and being sensitive to any peculiar host nation law or international treaty applicable to the theater of operations.<sup>180</sup>

Legal advisors must also be knowledgeable on all aspects of environmental compliance in a given regional area, including spill prevention and control, protection of natural resources, and protection of historic and cultural resources. This aspect of the practice includes providing advice to investigating officers on potential violations of host nation environmental laws, international treaties, and regulatory provisions.<sup>181</sup> This effort will also include preparing for the adjudication of environmental claims and practicing preventive law by precluding fraudulent environmental claims. This preventive practice can be accomplished by photographing and documenting the environmental conditions upon arriving in and exiting from the theater of operations.<sup>182</sup>

As an additional proactive measure, once an overseas deployment is announced, the legal advisor should immediately coordinate with the

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180. See, e.g., Plan 4000-98, *supra* note 161, para. 1a(3). This provision states that early attempts will be made to obtain readily available information on applicable host environmental laws and regulations. Additionally, the plan provides that “transit agreements” will be negotiated with all required countries adjacent to the theater of operations in advance of the deployment of U.S. forces. *Id.* para. 1a(5). See Burman and Hollingsworth, *supra* note 18, at 31.

181. See Burman and Hollingsworth, *supra* note 18, at 31. For example, environmental damage could result in host nation real estate damages or claims under the Foreign Claims Act or the International Agreement Claims Act. See Foreign Claims Act, 10 U.S.C.A. § 2734 (West 1998); International Agreement Claims Act, 10 U.S.C.A. § 2734a. See also U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS, ch. 10 (1 Dec. 1997). As one deployed attorney observed during Operation Joint Endeavor, “[the] U.S. has an obligation [under host nation law, and] from both a fiscal and public affairs perspective, to act in an environmentally responsible manner. Environmental damage could result in real estate damages or Foreign Claims Act claims.” See Electronic Mail Message, from Major Sharon Riley, to Major Stephen Castlen, subject: Environmental Law in Bosnia (Mar. 1, 1998) [hereinafter Riley Message] (copy on file with the Center for Law and Military Operations).

182. For example, during Operation Joint Endeavor, the 1st Armored Division legal advisor faced environmental claims. When a spill of approximately 10,000 gallons of JP8 fuel occurred at Lucavac, a coal processing plant, the 1st Armor Division contracted for an assessment and removal of fuel to avoid damage to a shallow groundwater aquifer. The claim was settled with the landowner, and the United States paid damages under the lease agreement. This claim demonstrates the importance of assessing leased property in the host nation in order to defend against future claims for environmental damage. “[E]ven a surface review documenting the condition of the property and snapping some photos could help . . . defend against a variety of types of claims.” Riley Message, *supra* note 180. The engineers in Bosnia executed this function and it proved valuable to an effective claims program in the theater of operations. See *id.*

responsible overseas Army command or unified combatant command to determine whether environmental documentation already exists. This documentation could range from prepared EAs or EISs (possibly required under EO 12,114 and *DOD Directive 6050.7*) to information on peculiar host nation laws or applicable arcane international treaties. The legal advisor should also be aware that formal communication with foreign governments concerning environmental agreements and other formal arrangements with foreign governments requires coordination with the Department of State.<sup>183</sup>

The proactive step of contacting other commands prior to the deployment will ensure that the deploying command does not needlessly “reinvent the wheel” and prepare environmental documentation and analysis that is otherwise an electronic mail or facsimile transmission away. In planning for and anticipating environmental issues, a legal advisor should consult with attorneys who have previously deployed to a contingency operation. In this regard, the legal advisor should also review, study, and analyze the environmental lessons learned from prior overseas contingency operations such as Somalia, Haiti, and Bosnia.

#### V. Conclusion—The United States Armed Forces as a Model of Environmental Stewardship During Contingency Operations

Is the United States really serious about the concept of environmental leadership into the 21st century? Is it just lip service to an environmental ethos that is driven by fluctuating standards of environmental compliance based on whether U.S. armed forces are located in an impoverished third world nation or located in a wealthier European theater of operations? The failure to apply “environmental justice” in contingency operations may cause the United States armed forces to lose valuable international and coalition support for specific operations.

The nature of security for the United States has dramatically changed since the fall of the Berlin Wall. In this post-cold war era, national security is no longer defined in a purely military dimension. The political, eco-

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183. See AR 200-2, *supra* note 28, para. 8-3(b). Legal advisors must anticipate potential geographic “hot spots” for troop deployments and should communicate with the respective Department of State personnel. As a practical matter, this translates into discussions with the appropriate member of the “country team” or contacting the combatant commander’s staff or the chairman of the Joint Chiefs of Staff to gain access to appropriate Department of State personnel. See JA 422, *supra* note 13, at 5-4.

conomic, and cultural aspects of security have gained prominence. Within that larger context, conditions in many developing world countries spawn complicated problems that ultimately impact the security of the United States. The military is adapting to deal with these new threats through changes in missions, organizations, and training. Recent operations such as Somalia, Haiti, and the current Bosnian operation all reflect the United States military's mission transition from warfare to responding to myriad peace operations across the spectrum of conflict under the close scrutiny of the media's microscope.

Joint Vision 2010 calls for the United States armed forces to achieve full spectrum dominance across a broad and varied range of military operations from warfare to MOOTW.<sup>184</sup> During this decade, environmental issues have become a significant factor in United States foreign policy and will continue to play a significant role. For example, the nature of environmental problems increasingly involves cross-border transboundary impacts, which are emerging as new constraints on the DOD during overseas contingency operations. The President's 1997 national security strategy emphasizes the importance of environmental factors in protecting the nation.<sup>185</sup> To achieve the mandate of this strategy, there is a vast need to educate, to train, and to integrate environmental considerations into the contingency operation package. This mandate, however, lacks the foundation of developed doctrine and guidance in the environmental arena across the spectrum of conflict.

This article analyzed the continuum of recent contingency operations and provided sufficient evidence in theory and in practice that existing doctrine and guidance during MOOTW does not adequately address necessary environmental issues. The conclusions drawn from this analysis reveal an ad hoc, piecemeal approach from operation to operation. This approach lacks a systematic, integrated approach to the goal of environmental stewardship. This article offers some proposed solutions to the legal advisor in the theater of operations and to the military planner and operator in addressing this problem. Implementing these solutions across the full spectrum of operational planning, by involving all members of the

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184. See *Concept for Future Joint Operations*, *supra* note 140.

185. See generally NATIONAL SECURITY STRATEGY OF THE UNITED STATES, *supra* note 2.

function staff, will ensure that the United States armed forces serve as a model of environmental stewardship into the 21st century.



## UNUNCLASSIFIED

HEADQUARTERS, US COMMAND  
UNIT XXXXX, BOX XXX  
APO AE 09XXX

ANNEX L TO OPLAN (U)  
ENVIRONMENTAL CONSIDERATIONS (U)

(U) REFERENCES:

- a. Executive Order 12,114, Environmental Effects Abroad of Major Federal Actions, 4 Jan. 79.
- b. DOD Directive 6050.7, Environmental Effects Abroad of Major DOD Actions, 31 Mar. 79.
- c. Joint Pub. 4-04, Joint Doctrine for Civil Engineering Support, 29 Sept. 95.
- d. DODI 4715.5, Management of Environmental Compliance at Overseas Installations, 22 Apr. 96.
- e. DOD Overseas Environmental Baseline Guidance Document (OEBGD).
- f. Applicable Country-Specific Final Governing Standards (FGS).
- g. AR 200-2, Environmental Effects of Army Actions, 23 Dec. 88.
- h. Reserved for Applicable Treaty Law.
- i. Reserved for Applicable International Agreements/Transit Agreements/Status of Forces Agreements.

1. (U) General.

a. (U) Situation.

(1) (U) The combatant commander is ultimately responsible and liable for environmental protection. Troop units must retain a good name, even after the mission is complete. Land forces in the host nation are under the close scrutiny of the civilian population in a campaign where perceptions are often times the most important element. In addition to its forces, U.S. forces bring values that it seeks to impart on all communities. One of these values is respect for the environment and for the people who live in

it. The U.S. forces will be a model of environmental stewardship throughout this operation.

(2) (U) Neither NATO nor HQ, USAREUR can impose procedures or standards on the nations in the logistics or administrative field. However, it is clearly in the interest of all concerned if all nations adopt a common standard of behavior and practice with respect to environmental protection. Site clean-up is a national responsibility. As troop units depart the theater of operations, the conditions of occupied real estate may become a financial issue for units, as well as a public relations issue.

b. (U) Assumptions.

(1) (U) A Joint Task Force (JTF) will be established under a single lead service agent. A dedicated environmental engineer function will be established within the JTF Engineer function.

(2) (U) Environmental analysis will be done in accordance with references a, b, and g. Appendix 1 will be used as a model for this analysis.

(a) (U) The requirements of references a, c, and g may not apply to this operation. The specific determination for a categorical exclusion or exemption from an environmental assessment for the supported operation shall be provided in writing.

(b) (U) If an environmental analysis is required, the lead service agent will ensure that it is prepared in accordance with references a and c, in conjunction with the JTF Commander and his functional staff, and in conjunction with all other combatant command planning activities. If the environmental analysis at Appendix 1 applies, any mitigating actions and other environmental requirements must be included in writing.

(3) (U) The JTF Environmental Engineer, lead service agent, JTF Surgeon, and Preventive Medicine will be involved to the maximum extent possible in the planning for siting of U.S. forces, to include participation on pre-deployment site visits, in locating and evaluating suitable water sources, and in the siting decision of quarters, industrial facilities, work centers, and waste handling facilities. Prior to deployment, information

will be obtained on applicable host nation environmental laws and regulations.

(4) (U) Authority to transit hazardous wastes will be negotiated prior to the deployment of U.S. forces. Status of Forces Agreements (SOFAs) or Transit Agreements will specifically provide for the movement of U.S. generated hazardous waste as a result of participation in the operation using JTF, LOGCAP contractors, host nation contractors, or other transportation assets necessary to affect timely disposal in an environmentally sound manner.

(5) (U) If operationally possible, the Defense Logistics Agency (DLA) will establish support within or near the AO to perform proper disposition of hazardous waste, subject to appropriate and applicable force protection and/or security concerns. All U.S.-generated hazardous waste will be disposed of through the support provided by the DLA. If DLA support is not possible, the unit generating the waste will be responsible for managing the waste in accordance with this OPLAN and the guidance provided by the JTF Environmental Engineer, Surgeon, and Preventive Medicine.

(6) (U) All excess hazardous materials will be returned to home station as hazardous material, unless directed otherwise by the JTF Environmental Engineer.

(7) (U) U.S. forces are responsible only for environmental damage caused by their units. Units are responsible for repair, cleanup, and all related expenses associated with environmental remediation efforts. This should be their most important incentive to plan ahead and to take the right precautions prior to and during their occupation of a site and prior to their eventual redeployment from that site. Efforts must be made to document environmental conditions upon entering and exiting the AO through written description and by photographs.

(8) (U) Some claims resulting from environmental damage by U.S. forces will be valid and require compensation. If individual units, however, respond to environmental claims in an arbitrary manner that is inconsistent with the general policies of other nations, this could lead to an increased number (and monetary amount) of claims within the AO. Disputed claims will be forwarded to designated claims commissions for further action. Unless all nations adopt a common approach to handling

environmental claims, some nations may form the impression that they are suffering inequitable financial costs for their participation in the operation.

c. (U) Limiting Factors.

(1) (U) Existing security conditions, preparation time (e.g., for transit and/or international agreements/SOFAs, supporting environmental contracts), and access by environmental personnel during the initial stage of deployment are limiting factors.

(2) (U) Operational imperatives, including force protection and the non-availability of required logistical support, may limit the ability of deployed forces to comply with the environmental protection requirements reflected herein during the course of the deployment.

(3) (U) After redeployment of units, there may be environmental actions or projects (e.g., on-site treatment of POL-contaminated soils) that are required after transfer of U.S. facilities (sites and base camps).

2. (U) Mission. To provide guidance to protect the health and welfare of U.S. personnel, to minimize adverse environmental impacts during the conduct of operations resulting from implementation of this plan, and to provide an analysis of the impact of the execution of this plan on the environment.

3. (U) Execution.

a. (U) Concept of Operations. This Annex describes in broad terms the conduct of JTF forces during the operation. In every case, however,

obligations are subject to existing conditions, force protection, and mission accomplishment.

(1) (U) General Operating Concepts.

(a) (U) The best practical and feasible environmental engineering practices for the protection of human health and welfare and the environment shall be applied.

(b) (U) U.S. forces will comply with treaty obligations and respect for the sovereignty of other nations.

(c) (U) Measures will be taken to prevent pollution and to minimize adverse environmental impacts during all aspects of the operations.

(d) (U) U.S. forces will take appropriate actions to ensure that wastes generated during the operation are managed in an environmentally sound manner.

(e) (U) Failure to include environmental considerations in all aspects of the operations may expose U.S. forces to unnecessary health risks, cause unnecessary harm to the environment, and subject the United States to unfavorable publicity and future claims for damages.

(2) (U) Preparation and Initial Deployment.

(a) (U) Unit Environmental Coordinators. Deploying forces shall appoint an officer or senior NCO to coordinate and to control unit level environmental procedures. A summary list of appointments shall be provided to the JTF Environmental Engineer upon deployment to the AO.

(b) (U) Pre-Deployment Training. Units shall provide training to ensure familiarity with this Annex, supporting environmental annexes, unit level plans, and environmental procedures.

(c) (U) Manuals. Forces shall deploy with appropriate environmental reference manuals, SOPs, and unit spill response plans. Unit coordinators will contact the J-3 and the JTF Environmental Engineer for additional references specially designed for the operation.

(d) (U) Containers. Forces shall deploy with sufficient quantity and proper, compatible type of hazardous waste disposal containers and over-

packs for use during initial phases of the deployment. Units will plan for resupply of spill containment and cleanup materials sufficient to sustain them for the duration of the operation.

(3) (U) Operations. Operations shall be conducted in a manner that exhibits a model of environmental stewardship. For operations occurring in countries where FGS (Reference f) have been developed, environmental standards will be established in consultation with the respective DOD EEA. In countries where no FGSs have been established, the OEBGD (Reference e) may be used as a source for additional environmental standards, as deemed appropriate by the lead service agent, in coordination with the JTF Commander and his functional staff. U.S. forces shall, at a minimum, comply with the environmental standards and mitigating measures listed below.

(a) (U) Documentation of Initial Environmental Conditions. As soon as practicable after a facility is identified for occupancy by U.S. forces, the JTF Commander will ensure that the initial environmental condition is documented using in-house or contracted environmental professionals. Documentation (e.g., an environmental baseline survey) should describe the condition of water sources, soil, natural resources, cultural and historical properties, air quality, environmental contamination, and other environmental conditions.

(b) (U) Potable Water. Potable water sources will be provided by JTF Logistics and Engineering personnel. Certification of these sources will be accomplished by JTF Preventive Medicine personnel.

(c) (U) Gray Water. Mess, bath, and laundry operations will use existing sewage lines where available or constructed soakage pits and

ponds. Location of soakage pits will be coordinated with Preventive Medicine personnel.

(d) (U) Wastewater/Human Waste (Sanitary Sewage). Sanitary sewage will be disposed of using the method most protective of human health and the environment under existing operational conditions.

(e) (U) Solid Waste. Solid waste will be managed using the method most protective of human health and the environment under existing operational conditions.

(f) (U) Infectious Waste. Infectious waste will be segregated at the point of origin. Mixtures of solid waste and infectious waste will be minimized and will be handled as infectious waste.

(g) (U) Hazardous Materials. Effort should be made to minimize the use and storage of hazardous materials. Such effort will result in the reduction of hazardous waste produced. All excess U.S. hazardous material should be reissued by the supply support activity in theater, if possible. Excess hazardous material not reissued shall be returned to home station as hazardous material, unless impractical. Hazardous materials that cannot be returned to home station shall be disposed of as a hazardous waste.

(h) (U) Hazardous Wastes. The principle of minimizing the use of hazardous materials will be used whenever possible in an effort to minimize the production of hazardous wastes. The DLA, if possible, will establish support within or near the AOR to perform proper disposition of hazardous waste, subject to appropriate and applicable force protection and/or security concerns. All U.S. generated hazardous waste shall be disposed of through the support provided by the DLA. The DLA will develop and distribute guidance on turn-in procedures for hazardous waste. If the DLA is not available, the generator of the hazardous waste shall be responsible for managing the waste in accordance with guidance provided by the J-3 and the JTF Environmental Engineer.

(i) (U) Air Quality. Equipment and facilities will be operated such that adverse health and environmental impacts are minimized. The quality of ambient air will be considered in siting U.S. forces. Problems arising

from air quality will be raised to the J-3, Surgeon, and the JTF Environmental Engineer.

(j) (U) Petroleum, Oil, and Lubricants (POL). POL facilities must be designed and installed with attention to leak detection, prevention, and spill containment requirements, as threat conditions allow. Spill response and cleanup is a unit responsibility. Waste POL shall be disposed of in accordance with alternatives identified for hazardous wastes.

(k) (U) Spill Prevention and Control. Each camp will develop a spill prevention/control plan. Special care will be taken to protect surface waters and groundwater aquifers from contamination. Units will identify and train spill response teams. Units will use drip pans and ensure that adequate types and quantities of containment and cleanup equipment (e.g., dry sweep) are available at hazardous material storage locations and on all transportation assets.

(l) (U) Natural Resources. The J-2 and the JTF Environmental Engineer will pursue available documentation and intelligence assets to identify environmentally sensitive areas. The J-5 will serve as the liaison with host nation environmental authorities and local experts, in consultation with the EEA, during the planning for the construction and/or leasing of major base camps or sites to be occupied by U.S. forces. The JTF Commander will develop appropriate guidance and practices to minimize unnecessary clearing, soil erosion, degradation of air and water quality, and habitat destruction to protect identified environmentally sensitive areas.

(m) (U) Historic and Cultural Resources. The J-2 and the JTF Environmental Engineer will pursue available documentation and intelligence assets to identify historic and cultural areas. To the extent practicable, and consistent with operational conditions, commanders will consider protection of historic and cultural resources and avoid or minimize adverse impacts. The J-5 will serve as the liaison with host nation environmental authorities and local experts, in consultation with the EEA, during the planning for and construction of major base camps or sites to be occupied by U.S. forces. The JTF Commander will develop appropriate guidance and practices to minimize disturbance to historically and culturally significant areas.

(n) (U) Flora and Fauna Protection. Destruction of flora and fauna for clearing fields of fire; for basing needs; and for health, welfare, and

safety is permitted to the minimum extent necessary for these purposes. The destruction and/or clearing of large areas, as well as methods employed for such clearing operations, must be approved and coordinated through operational and engineer channels.

(o) (U) Environmental Evaluations. Unit level officers or senior NCOs will conduct regular evaluations of activities that pose a potential for environmental problems (e.g., motorpools, hazardous waste storage areas, and vehicle maintenance areas).

(p) (U) Incident Reporting. Any significant environmental incident or accident shall be reported in accordance with the Administration and Logistics section of this Annex.

(4) (U) Exit/Redeployment.

(a) (U) Hazardous Wastes/Materials. The DLA will establish on-site support within or near the AO to perform proper disposition of hazardous waste, subject to appropriate force protection and/or security concerns.

(b) (U) POL. Cleanup or document POL spills. Empty POL tanks at fuel point and maintenance areas. Pump out excess POL product from sumps and oil/water separators. Waste POL and contaminated solids shall be disposed of in accordance with alternatives identified above for hazardous wastes.

(c) (U) Camp Closure Plan. The appropriate base operations commander will develop a closure plan. The plan will include, at a minimum, acceptable procedures for the turn-in and accountability of hazardous waste and excess hazardous materials; the cleanup or documentation of POL spills; the emptying of POL tanks and separators; and turn-in of waste POL.

(d) (U) Site Remediation. U.S. forces will take prompt action to remediate known imminent and substantial endangerment to deployed forces. Site remediation shall address fuel and lubricant storage and dispensing; ammunition and explosive storage; vehicle parking and maintenance areas; wastes; hazardous material storage; medical storage or disposal; human waste problems; closure of grease or soakage pits; and

stagnant or standing water removal. If possible, provide photographic documentation of all remediation measures.

(e) (U) Documentation of Final Environmental Conditions. As close as practicable to the redeployment of U.S. forces from a site, the JTF Commander will ensure that the final environmental condition is documented. For consistency, the in-house or contracted environmental professionals who conducted the initial environmental conditions report should be used, if possible. The reports on final environmental condition will serve as documentation in the event of claims or other legal challenges.

b. (U) Tasks/Responsibilities.

(1) Lead Service Agent. A single service agent will be designated as the lead for all U.S. environmental policy. The agent will be involved in planning of U.S. forces siting to include participation on predeployment site visits and review of leases and will ensure the preparation of any required analysis in accordance with references a and b.

(2) JTF Commander. Overall responsibility for implementation and compliance with this Annex and with policies, standards, and procedures established by the lead service agent. Will ensure that the initial and final environmental conditions of U.S. facilities are documented and that detailed guidance is developed for the closure of these same facilities. The JTF Commander is responsible for the delegation of appropriate authority and duties to the functional staff to ensure successful implementation of and compliance with Annex L.

(3) J-3 (Operations). Primarily responsible for orchestrating the environmental contingency plan. Prepare recommendations for adjusting plans to prevent the destruction of critical environmental resources in specific geographic areas. Prepare recommendations as to the probability and significance of damaging natural and cultural resources.

(4) J-2 (Intelligence). Coordinates with the J-5, the JTF Engineer, the JTF Environmental Engineer, and the Preventive Medicine section to identify critical environmental vulnerabilities of the area and the population. Includes environmental vulnerabilities in the Intelligence Preparation of the Battlefield (IPB) process to prevent costly environmental claims.

(5) J-4 (Logistics). Monitors the use of hazardous materials. Responsible for all aspects of hazardous materials management to include

minimizing use, storage, transportation, disposition, and return to home station of excess materials. Plans for the appropriate disposal of solid and hazardous waste. Ensures that spill plans for extended operations are prepared as appropriate. In conjunction with the JTF Engineer, will provide potable water sources.

(6) J-1 (Personnel). Coordinates with the J-3 and the Public Affairs Officer for educating all military personnel concerning individual environmental responsibilities. Ensures the necessary level of environmental expertise is assigned to the command.

(7) J-5 (Civil Affairs Officer). With the assistance of host nation civil authorities, determines the location of critical environmental resources, assets, and facilities to prevent environmental degradation and to ensure proper disposal of solid and hazardous wastes. Recommends to the commander those resources that should be afforded special considerations for protection because of value to the mission, public health concerns, danger of regional or global contamination, environmental claims, post-conflict clean-up costs, or economic viability of the area.

(8) JTF SJA. Researches and pinpoints the legal requirements for environmental actions in the theater to include treaties, international agreements, and host nation laws. Advises the commander in advance of deployment of the peculiar aspects of environmental compliance during MOOTW in the host nation. Responsible for coordinating legal issues with SJAs senior in the chain of command.

(9) JTF Engineer. Responsible to the JTF Commander for the operational support of Annex L and staffing of an environmental office that will be responsive to the JTF Commander. In coordination with the lead service agent and the JTF SJA, and in consultation with the EEA, will establish a plan for coordinating with the host nation, other foreign nations, non-governmental organizations (NGOs), and other activities on applicable environmental matters. Provides technical advice to the commander and staff, in conjunction with the JTF J-4, on issues of public health effects of planned courses of action, water and wastewater treatment, and potable water sources. Will develop appropriate guidance and practices to minimize unnecessary clearing, soil erosion, degradation of air and water quality, and unnecessary disturbance to historic and culturally significant areas. Ensures detailed guidance is developed for the closure of U.S. facilities. Will identify those site conditions or existing legal or real estate agreements that define environmental actions or projects that must continue

after transfer of the site and will initiate appropriate action to complete the cleanups.

(10) JTF Environmental Engineer. Proponent for the environmental section of Annex L and heads the environmental office. Responsible for developing more detailed environmental services guidance and standards incorporating references b, c, d, e, and f, as appropriate, in coordination with the lead service agent. Responsible for coordinating with the JTF Surgeon, the JTF Safety Officer, and the JTF SJA, as appropriate. Pursues available documentation and, in coordination with the J-2, uses intelligence assets to identify environmentally sensitive areas. Responsible for consulting with the respective EEA on applicable host nation country-specific issues. Coordinates, where practicable, spill response plans with civilian fire departments and other host nation authorities. Develops detailed camp closure guidance in regards to the responsibilities of unit commanders, base camp commanders, and support contractors. Retains copies of initial and final environmental condition reports.

(11) JTF Surgeon. Responsible for medical (e.g., preventive medicine) support to Annex L. Provides commander and the staff with technical advice concerning host nation population and military personnel health issues. Provides advice on the health implications of water and wastewater treatment, hazardous and solid waste disposal, air quality, health risk assessments, vector control to protect human health and welfare, and medical waste treatment and disposal.

(12) Preventive Medicine Personnel. Participate in planning for siting of U.S. forces, perform or oversee sampling, analysis, and monitoring to protect health and safety of deployed personnel and the surrounding community. Conduct periodic environmental health risk assessments of activities that pose potential environmental or health problems. Report any significant findings to the unit commander and unit level environmental point of contact. Report any findings that cannot be corrected immediately to the JTF Environmental Engineer and the JTF Surgeon.

(13) JTF Safety Officer. Responsible for safety matters in support of Annex L. Coordinates activities with the JTF Environmental Engineer, the JTF Surgeon, and the lead service agent, as appropriate.

(14) Environmental Executive Agents (EEAs). Responsible for providing agreed-upon support to the JTF Engineer and the Environmental Engineer on environmental matters within host nations for which FGS

have been established, especially as it relates to consultations with host-nation authorities during predeployment planning, the initial stages of deployment, and redeployment.

4. (U) Administration and Logistics.

a. (U) General Incident Reporting Requirements. Any significant environmental incidents or accidents shall be reported in accordance with specific incident reporting instructions developed by the JTF Environmental Engineer. The JTF Environmental Engineer, the JTF Commander, the JTF Surgeon, the lead service agent, and the EEA shall be notified within 24 hours of major incidents; accidents; and spills of hazardous materials, wastes, and POL. Records of spills, discovery of contaminated sites, etc., will be maintained for later use in documenting final environmental conditions of the AO.

b. (U) Environmental Reports. Copies of initial and final environmental conditions reports and final camp closure plan for a facility occupied by U.S. forces shall be provided through engineer channels to the JTF Environmental Engineer, the real estate office, and the EEA.

c. (U) Records Retention. Initial and final environmental condition reports, camp closure plans, records and documents deemed important for later use in resolving potential environmental claims against the U.S. government, and other records and documents required to establish "lessons learned" shall be archived by the lead service agent for 3 years following the operation, or as determined by the Single Service Claims Responsibility. As soon as practical after completion of the operation, the lead service agent will forward a list of archived records and documents to the appro-

priate real estate and claims offices, the combatant command, and the EEA.

General  
Commanding

Appendices:

1. Environmental Analyses/Assessments (Exemptions/Categorical Exclusions)
2. Environmental Out-Processing Checklist
3. Environmental Out-Processing Report
4. Notification—Hazardous Waste Shipment
5. Environmental Reporting
6. Environmental Request for Support
7. Determination of the Amount Spilled & Treatment Standards