

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), U.S. Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCnet, which readers can access online at <http://www.jagcnet.army.mil>.

“Excuse Me, Sir, Do You Have a Permit for That Bomb?”

*Thou wast not born for death, immortal Bird!*¹

The U.S. District Court for the District of Columbia sent a shock wave through military installations nationwide recently when it held that the Migratory Bird Treaty Act (MBTA)² prohibits federal agencies from conducting activities that may result in the indirect, unintentional death of migratory birds. In *Center for Biological Diversity v. Pirie*,³ the court reviewed a request to declare the Navy’s bombing of a small, uninhabited island in the western Pacific Ocean illegal, and to issue an injunction barring further training activities on the island until the Navy obtains a permit from the U.S. Fish and Wildlife Ser-

vice (FWS). The court granted the request, and it ultimately issued an order preliminarily enjoining further training activities with the potential to wound or kill migratory birds.⁴

Since the early 1990s, two important questions about the MBTA’s impact on federal agencies have been unresolved: (1) whether the MBTA applies to federal agencies;⁵ and (2) if so, whether its prohibition on the unpermitted “take” of migratory birds⁶ extends to indirect, unintentional killing resulting from otherwise lawful activities.⁷ In *Humane Society v. Glickman*,⁸ the Court of Appeals for the District of Columbia squarely resolved the first issue, establishing that federal agencies are subject to the MBTA’s prohibition on “takes” and can be subject to suit under the Administrative Procedure Act (APA)⁹ for MBTA violations.¹⁰ The reach of *Glickman*, however, was unclear. *Glickman* concerned a federal agency’s proposal to purposefully and intentionally kill migratory Canadian geese to control depredation. This was different from an agency proposing to conduct an otherwise lawful activity, such as a timber sale, that would result in the indirect or “unintentional take” of migratory birds. Indeed, the D.C. Circuit noted in *Glickman* that the issue of unintentional take remained unresolved.¹¹

In *Pirie I*, the D.C. District Court resolved this issue by holding that the MBTA applies to federal agencies with regard to

1. John Keats, *Ode to a Nightingale*, in *THE OXFORD BOOK OF ENGLISH VERSE* (Arthur T. Quiller-Couch ed., 1919).

2. 16 U.S.C. §§ 701-712 (2000).

3. 191 F. Supp. 2d 161 (D.D.C. March 13, 2002) [hereinafter *Pirie I*].

4. *Id.* at 178.

5. See Major Jeanette Stone, *Migratory Bird Treaty Act May Now Apply to Federal Agencies*, *ARMY LAW.*, Nov. 1999, at 40-41 (discussing the split in the circuits regarding applicability of the MBTA to federal agencies); see also Scott Belfit & Scott M. Farley, *Court Decisions on Migratory Bird Treaty Act Raise Questions*, U.S. Army Environmental Center, Office of Command Counsel (Spring 1998), at <http://aec.army.mil/usaec/publicaffairs/update/spr98/mbta.htm>.

6. See 16 U.S.C. § 703 (as implemented by 50 C.F.R. pt. 10, § 21.11 (2002)) (prohibiting the killing of migratory birds without a valid permit or compliance with an applicable regulation published by the FWS).

7. *Pirie I* cited authority that the MBTA had been applied equally to intentional and unintentional takes by private parties, but no such authority as applied to federal agencies. *Pirie I*, 191 F. Supp. 2d at 174 (citing *United States v. Corrow*, 119 F.3d 796 (D.D.C. 1997); *United States v. Boyton*, 63 F.3d 270, 273 (7th Cir. 1994); *United States v. Smith*, 29 F.3d 270 (7th Cir. 1994); *United States v. Engler*, 806 F.2d 425, 431 (3rd Cir. 1986)).

8. 217 F.3d 882 (D.C. Cir. 2000).

9. 5 U.S.C. §§ 501-559, 701-706 (2000).

10. *Glickman*, 217 F.3d at 888. In response to *Glickman*, the FWS reversed a 1997 policy and issued a Director’s Order on 20 December 2000. The Director’s Order stated, “[I]t is our position that the take of migratory birds by federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA.” Jamie R. Clark, U.S. Fish and Wildlife Service, Director’s Order (Dec. 20, 2000), available at <http://policy.fws.gov/do131.html>. See also Transmittal Letter from Jamie R. Clark, Director, U.S. Fish and Wildlife Service, to L. Peter Boice, Director of Conservation, Office of the Deputy Undersecretary of Defense for Environmental Security (Dec. 2000) (“[t]hrough issuance of the Director’s Order we have notified all Service employees that, in light of [*Glickman*], the prohibitions of the MBTA apply to federal agencies”).

11. *Glickman*, 217 F.3d at 888 (citing *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302 (8th Cir. 1991) (holding that Section 703 of the Endangered Species Act (ESA) did not prohibit “conduct, such as timber harvesting, that indirectly results in the death of migratory birds”).

both intentional and unintentional takes.¹² *Pirie I* concerned Navy training activities on the remote, uninhabited island of Farallon de Medinilla in the western Pacific Ocean. The Center for Biological Diversity (CBD), an environmental group, brought the suit in Washington, D.C., seeking a declaratory judgment that the Navy had violated the APA and MBTA by conducting live-fire training activities without an MBTA permit.¹³ The following facts were undisputed:

(1) Farallon de Medinilla (FDM), a small island within the Commonwealth of the Northern Mariana Islands, serves as an important nesting and roosting site for a diverse group of migratory seabirds;

(2) The United States has used FDM for live fire training exercises since 1971, and these exercises are critically important to maintaining the readiness of Navy and Marine forces;

(3) Live fire training activities include air-to-surface gunnery with missiles, bombs and machine guns and the firing of 5-inch deck-mounted guns using high explosive point-detonating rounds; and

(4) Live fire training activities on FDM kill migratory birds.¹⁴

The Navy, aware of the adverse environmental impacts on FDM, engaged in an aggressive environmental planning, review, and compliance effort. The Navy prepared an environmental impact statement (EIS) to consider the impact on migratory birds, consulted with the FWS under Section 7 of the Endangered Species Act¹⁵ to assess the effects on the protected Micronesian megapode, and identified and implemented mitigation measures to avoid and minimize adverse impacts.¹⁶ The Navy even applied to the FWS to obtain an MBTA “depredation permit.” The FWS denied the permit application, stating that “there are no provisions for the service to issue permits authorizing UNINTENDED conduct on the part of a permittee.”¹⁷ The Navy could either cease live-fire activities or proceed without an MBTA permit. Given the importance of FDM to military readiness, the Navy continued training exercises.¹⁸

On 21 December 2001, the plaintiffs filed suit seeking a declaration that the Navy’s activities violated the MBTA and the APA, as well as a permanent injunction barring the Navy’s use of the island until it obtained a proper MBTA permit.¹⁹ After finding that the plaintiff had standing,²⁰ the court addressed the most pressing issue—whether the MBTA prohibited the “unintentional take” of migratory birds. The court first reiterated *Glickman*’s holding that the MBTA’s prohibition on the take of protected species applies to federal agencies.²¹ The court also found that the Navy was killing migratory birds, that its activities would continue to do so, and that such activities “are unlawful unless they are somehow authorized by the regulations promulgated pursuant to the authority granted in the MBTA. Defendants can find no such authority”²² Despite

12. 191 F. Supp. 2d at 178.

13. *Id.* at 163.

14. *Id.* at 165-66. Starting in 1978, the Commonwealth of the Northern Mariana Islands granted the Navy a fifty-year lease for several of its islands, including FDM, for use as an aircraft and ship ordnance impact target area. *Id.* at 165. According to the Navy’s brief, FDM contains the only U.S.-controlled live-fire range in the Western Pacific where sailors and Marines can engage in the kind of realistic, integrated training exercises critical to maintaining the Navy’s readiness. *Id.* at 169.

15. 16 U.S.C. §§ 1531-1544 (2000).

16. *Pirie I*, 191 F. Supp. 2d at 168. The Navy attempted to limit training during nesting seasons, to relocate targets away from dense nesting populations of birds, and to chase birds away from target areas before conducting training activities. *Id.*

17. *Id.* at 167.

18. *Id.* at 168.

19. *Id.* at 170.

20. *Id.* at 171. The Navy argued that the plaintiff had not suffered a concrete injury in fact, an essential element of demonstrating the existence of a case or controversy under Article III of the Constitution. *Id.* (citing *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The CBD represented Mr. Ralph Frew, a CBD member and avid bird watcher who regularly viewed birds that nested on FDM and migrated to other local islands. *Id.* at 171-72. While Mr. Frew could not visit FDM itself, the CBD argued that the Navy’s take of birds on FDM impacted Mr. Frew’s ability to view birds. *Id.* The court found that this diminished ability to view birds on adjacent islands was sufficient to establish a concrete and particularized injury in light of existing case law. *Id.* at 173 (citing *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221 (1986) (holding that injury sufficient when “whale watching and studying of members . . . [is] adversely affected by continued whale harvesting by Japan”); *Hill v. Norton*, 275 F.3d 98 (D.C. Cir. 2001) (agreeing that plaintiff had standing to sue under MBTA when diminished presence of mute swans near her property reduced aesthetic enjoyment)).

21. *Pirie I*, 191 F. Supp. 2d at 173 (citing *Humane Soc’y v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000)).

22. *Id.* at 172.

the Navy's effort to obtain a permit from the FWS, the court concluded that "[b]ecause they continue to kill these birds without complying with the statutory and regulatory provisions for a permit, [Navy personnel are] violating the MBTA."²³

The court curtly dismissed the Navy's assertions that its killing of migratory birds was unintentional and therefore not prohibited.²⁴ It found the distinction between intentional and unintentional take immaterial. Citing a long line of cases, the court flatly concluded that the MBTA prohibits both intentional and unintentional take without regard to intent or knowledge.²⁵

The only remaining issue was whether the Navy's MBTA violation was also a violation of the APA bar to agency action that is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."²⁶ The district court, again relying on *Glickman*, found that "the law of [the D.C.] Circuit is clear: a plaintiff may sue a federal agency under the APA for violations of the MBTA."²⁷ The court emphatically concluded: "Congress and the President together passed the MBTA and made [the Navy's] activity a crime, and together have given the citizens of this country the right to sue their federal government civilly when it violates the law. That is the beginning and end of this court's inquiry."²⁸

Having found that the Navy had violated both the MBTA and APA, the court then considered CBD's request that it enjoin further training at FDM until the Navy received a take permit from the FWS. The court deferred its decision until the parties

presented additional briefs and oral argument on thirteen specific questions set forth in its initial memorandum opinion and order.²⁹ After the hearing on 1 May 2002, the court enjoined any training activities with the potential to kill or wound migratory birds and ordered the Navy to obtain a permit from the FWS before any future take of migratory birds.³⁰ The Navy, however, appealed to the D.C. Court of Appeals for a stay of the district court's injunction pending appeal. The higher court granted the stay and expedited the appeal.³¹

Pirie I and *Pirie II* could carry significant implications for the Army, depending on the outcome of the pending appeal. The Army conducts many activities that may result in the unintentional take of migratory birds. These activities range from military training exercises to land management actions (for example, timber harvesting and prescribed burns).

Present Army policy draws a sharp distinction between "intentional take" and "unintentional take" of migratory birds. For intentional takes, the current policy is to apply for an appropriate MBTA permit. For unintentional takes, however, the policy directs installations to consider and, if possible, minimize impacts to migratory birds through the National Environmental Policy Act and the Integrated Natural Resource Management Planning process.³² By implication, it is not Army policy to apply for an MBTA permit when an unintentional take is anticipated. This Army guidance is now inconsistent with the current state of the law, as stated in *Pirie I*.

23. *Id.* at 176-77.

24. *Id.* at 177. The court was skeptical of the Navy's characterization of its take as unintentional, noting that "[t]his description is misleading. Defendants' own documents amply establish that defendants are knowingly engaged in activities that have the direct consequence of killing and harming migratory birds." *Id.* at 175. The court found it "baffling" that the Navy should suggest that it was not "knowingly" killing migratory birds in light of the wealth of information in the administrative record (for example, the 1996 EIS and MBTA permit application) demonstrating the Navy was "engaged in activities that have the direct consequence of killing and harming migratory birds." *Id.* at 174 n.7.

25. *Id.* at 174. The court explained that other "[c]ourts have consistently refused to read a scienter requirement into the MBTA." *Id.* (citing *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997); *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995); *United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986); *United States v. Manning*, 787 F.2d 431, 435 n.4 (8th Cir. 1986); *United States v. Catlett*, 747 F.2d 1102, 1105 (6th Cir. 1984); *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971)).

26. *Id.* at 175 (quoting the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000)).

27. *Id.* at 177 (citing *Humane Society v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000)).

28. *Id.* The district court observed that in cases like this, in which the FWS has exercised its discretion not to enforce a statute, "[w]ithout plaintiff acting as a 'private attorney general,' no one would prevent these violations from occurring." *Id.*

29. *Id.* at 178.

30. *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (D.D.C. May 1, 2002) [hereinafter *Pirie II*]. In his opinion, Judge Sullivan struggled with the scope of the court's authority to issue equitable relief. The court first determined that, while equitable relief is not available under the MBTA, it is provided for in the APA. *Id.* at 119. The court considered the range of available remedies directly aimed at securing compliance with the statute being violated. *Id.* at 120 (citing *Weinberger v. Romero Barcelo*, 456 U.S. 305 (1982); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001)). Because all Navy training on FDM could kill or injure birds, the court saw two options: (1) ordering the Navy to obtain a permit; and (2) enjoining all such training activities. The court decided that requiring the Navy to obtain a permit would not sufficiently assure compliance with the law, and concluded that an injunction was necessary. *Id.* In weighing the equities, the court refused to consider harm to the Navy associated with cessation of training at FDM. *Id.* at 122 ("[T]he court can not and will not read into the MBTA a [national security] exception that Congress has not included in the statute.").

31. *Center for Biological Diversity v. England*, 2002 U.S. App. LEXIS 11493 (D.C. Cir. June 5, 2002). Several members of Congress have since entered the suit on the Navy's side as amici curiae. *Center for Biological Diversity v. England*, 2002 U.S. App. LEXIS 16073 (D.C. Cir. Aug. 8, 2002).

Environmental law specialists should encourage installation staff (for example operational, environmental, forest management, and Integrated Training Area Management representatives) to apply to the FWS for “special purpose” permits, in accordance with 50 C.F.R. section 21.27, unless and until new legislation, regulatory relief, or judicial relief changes the current state of the law. Doing so will reduce the risk of litigation and help avoid disruption of mission-critical activities. Scott M. Farley.

Criminal Liability for Killing a Snake? How One Soldier Learned About Environmental Crimes the Hard Way

The average soldier probably does not realize that the Endangered Species Act (ESA)³³ provides for criminal sanctions,³⁴ that states have their own versions of the ESA, or that state and federal endangered species lists are maintained separately.³⁵ Recently, a soldier got a first-hand look at how criminal liability operates under New York’s version of the ESA.³⁶ The soldier has since consented to the telling of his story so that others may learn from it.

Soldier X and several other soldiers were in the woods of New York, participating in a field training exercise (FTX). Suddenly, Soldier X realized that a rattlesnake was crawling past him, causing him and some of the other soldiers to jump to their feet. The alarmed snake then turned toward the soldiers, and it struck at Soldier X’s foot. Soldier Y threw Soldier X a shovel, which Soldier X used to kill the snake.

At the conclusion of the FTX, Soldier X reported the incident to his chain of command, which in turn reported the incident to the post environmental office. The environmental office determined that the snake was a timber rattlesnake, a threatened species under New York’s ESA.³⁷

A representative from the state’s environmental office questioned Soldier X about the snake incident a few days after the FTX. The soldier explained what had happened without realizing that he was incriminating himself. The environmental officer then told Soldier X that he intended to cite him for an offense and impose a \$75 fine. Soldier X protested that he had done nothing wrong. The officer suggested settling the matter for a \$50 fine, but Soldier X still proclaimed his innocence. The officer left without actually issuing the citation, but his office later contacted the installation environmental law specialist (ELS). At that point, Soldier X saw a legal assistance attorney, and the parties worked out an agreement that permitted Soldier X to teach a class to his company in lieu of any citation or fine.

This story teaches some important lessons. First, states have their own listings of endangered and threatened species, separate from the listings under the federal ESA.³⁸ Killing a member of a threatened species can result in state criminal liability. Specifically, killing a timber rattlesnake in New York is a misdemeanor under state law.³⁹ Second, ELSs should learn which species on their installations are protected by state and federal ESAs. On installations with protected species, the legal and environmental offices should coordinate their efforts to resolve ESA issues. Environmental law specialists must assure that soldiers on their installations know of those ESA protections and the penalties for violating them. Third, ordinary notions of self-defense may not carry any weight with the state environmental regulator.

Finally, Soldier X and his chain of command resolved the situation favorably because both the soldier and the command notified the appropriate authorities promptly. Soldier X’s story illustrates the importance of understanding local regulations and prosecution guidelines. This allows the ELS to work proactively and serve the operational needs of the unit better.⁴⁰ The wise ELS should also review the installation Newcomer’s Inbrief to ensure it adequately addresses relevant ESA issues.

32. Memorandum, Colonel Richard Hoefert, Director, Environmental Programs, Headquarters, Department of the Army, subject: Army Policy Guidance on Migratory Birds (Aug. 17, 2001).

33. 16 U.S.C. §§ 1531-1543 (2000).

34. *Id.* § 1540(b).

35. *Id.* § 1531 (a)(5) (providing for states to enact their own conservation programs to protect species at risk).

36. N.Y. ENVTL. CONSERV. LAW § 11-0535 (Consol. 2002).

37. N.Y. COMP. CODES R. & REGS. tit. 6, § 182.6(b)(5)(v) (2002); *see also* State v. Sour Mountain Realty, 714 N.Y.S.2d 78, 82 (App. Div. 2000) (discussing the status of the timber rattlesnake as a threatened species, as opposed to an endangered species, in New York).

38. *See, e.g., Sour Mountain Realty*, 714 N.Y.S.2d at 82 (noting that the legislative history of the New York ESA states that it is intended to compliment the federal ESA).

39. N.Y. ENVTL. CONSERV. LAW §§ 11-0535, 71-0921(1)(f).

40. In a 1996 speech, New York’s Attorney General cited two primary reasons for prosecuting environmental crimes—deterrence and the prevention of unfair competition. Dennis C. Vacco, Address at Fordham University Law School, Environmental Law Symposium (1996), *in* 7 FORDHAM ENVTL. L.J. 573 (1996). Soldier X’s story illustrates how environmental crimes have resulted in ideological tension between the emphasis on deterrence and the principle that punishment is unjustified in the absence of moral culpability. Enforcement agencies may argue for a diminished mens rea when the harm from an ESA violation is irremediable.

CX Changes in the Final Rule

If environmental enforcement authorities attempt to question anyone at an installation for alleged environmental crimes, the ELS should report the facts to the Environmental Law Division. This reporting requirement is not new; it is already specified in *Army Regulation 200-1*.⁴¹ Major Arnold.

Categorical Exclusions Under 32 CFR Part 651: A Guide to the Changes

Introduction

On 29 March 2002, the Office of the Deputy Assistant Secretary of the Army published Volume 32, Code of Federal Regulations (CFR), part 651, Environmental Analysis of Army Actions; Final Rule (hereinafter Final Rule), in the *Federal Register*. The Final Rule is a revision of policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA)⁴² and Council on Environmental Quality regulations.⁴³ It supersedes the guidance found in *Army Regulation (AR) 200-2*.⁴⁴ The Army is currently revising *AR 200-2* based on the new Final Rule.⁴⁵

The Final Rule's myriad changes to the Categorical Exclusions (CXs) are particularly important to environmental law practitioners. Previously found in *AR 200-2*, Appendix A, the CXs are now located in Appendix B of the Final Rule.⁴⁶ They have been reorganized according to the type of activity (for example, administration/operation, construction/demolition, and repair and maintenance), and the old alphanumeric system has been adjusted accordingly.⁴⁷ The new system may be disconcerting initially, but once one becomes familiar with it, it is easier to use than its alphanumeric predecessors.

To help the reader pinpoint the changes in the regulation, this article discusses the revisions using the older, revised regulation's numbering system:

A-1. Personnel and administrative activities. Renumbered as Section II(b)(5). No change; the text is taken verbatim from the previous version.⁴⁸

A-2. Law and order activities. Renumbered as Section II(b)(1), and with only minor changes. The word "routine" now qualifies "law and order activities," and the phrase "military police" has finally been changed to the always-intended "military police."⁴⁹ With the addition of a slash mark, it now appears that military personnel other than military police can perform such law and order activities.⁵⁰ More substantively, the umbrella of this CX now includes civilian natural resources and environmental law officers. Finally, the phrase "excluding formulation and/or enforcement of hunting and fishing policies or regulations that differ substantively from those in effect on surrounding non-Army lands" has been stricken from this CX, but can now be found in Section II(d)(3) of the Final Rule, "Implementation of hunting and fishing policies consistent with state and local regulations."⁵¹

A-3. Recreation and welfare activities. Renumbered as Section II(b)(6), with few significant changes, except that "routinely conducted" now qualifies "recreation and welfare activities."⁵²

A-4. Commissary and Post Exchange operations. Omitted from the Final Rule. Section II(b)(4), "Activities and opera-

41. See U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT para. 15-7(a) (21 Feb. 1997) ("Commanders will immediately forward criminal indictments or information against Army and civilian personnel for violations of environmental laws through command channels. Criminal actions involving Civil Works activities or personnel will be reported to the Director of Civil Works. Other criminal actions will be reported to the DEP [Department of Environmental Protection] or ELD [Environmental Law Division]."); see also U.S. DEP'T OF ARMY, PAM. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT para. 15-16 (Jan. 17, 2002).

42. 42 U.S.C. §§ 4321-4370 (2000).

43. 40 C.F.R. §§ 1500-1508 (2002).

44. U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1998) (superceded).

45. See 32 C.F.R. pt. 651 (2002) (discussing intent to change *AR 200-2* in the introductory section); see also 65 Fed. Reg. 54,347-92 (Sept. 7, 2000) (publishing draft rule for public comment).

46. 32 C.F.R. pt. 651, app. B.

47. See *id.*

48. See *id.* app. B, § II(b)(5).

49. *Id.* app. B, § II(b)(1).

50. See *id.*

51. *Id.* app. B, § II(b)(1), (d)(3).

52. *Id.* app. B, § II(b)(6).

tions to be conducted in existing non-historic structures,” however, appears to cover such activities.⁵³

A-5. Repair and maintenance of buildings. Renumbered as Section II(g)(1) for buildings, airfields, grounds, equipment, and other facilities. Section II(g)(2), in turn, covers roads, including trails and firebreaks. The language excluding hazardous or contaminated materials has been removed from this CX.⁵⁴ For guidance on such materials, see Section II(h), “Hazardous materials/hazardous waste management and operations.”⁵⁵ The revision of this CX has also been expanded to specifically include the removal and disposal of asbestos-containing material and lead-based paint. Note, though, undertaking either requires a record of environmental exclusion (REC); any repair or maintenance conducted on a historic structure also requires a REC. Removal of dead, diseased, or damaged trees is also now covered under this CX. Finally, the list of repair and maintenance activities covered specifically indicates that it is not exhaustive.⁵⁶

A-6. Procurement of goods and services. Renumbered as Section II(e)(1). With the addition of a parenthetical regarding “green” procurement, this CX has become more voluminous, but its content has not changed significantly.⁵⁷

A-7. Construction. Construction activities are now found in Section II(c). The changes here are significant; for example, the previously vague “[c]onstruction that does not significantly alter land use” has been supplanted by highly specific guidance permitting construction of additions to existing structures seemingly without limitation, except as to the facility’s use for solid, medical, or hazardous waste.⁵⁸ Even more significantly, new construction that does not involve the surface disturbance of more than five cumulative acres also is now categorically excluded under Section II(c)(1), provided that the facility’s use does not involve solid, medical, or hazardous waste. Note, though, that this CX cannot be used if the proposed action

would affect wetlands, sensitive habitat, or in other special circumstances. This CX requires a REC.⁵⁹

A-8. Simulated exercises without troops. Renumbered as Section II(i)(1). It has been expanded to include not only simulated war games, but also on-post tactical and logistical exercises involving up to battalion-sized units, so long as no tracked vehicles are used. A REC is required, however, “to demonstrate coordination with installation range control and environmental office.”⁶⁰

A-9. Administrative and classroom training. Renumbered as Section II(i)(2), but otherwise unchanged.⁶¹

A-10. Storage of materials other than hazardous. Omitted from the Final Rule. Section II(b)(4), “Activities and operations to be conducted in existing non-historic structures,” may cover such activities.⁶² This CX requires a REC.⁶³

A-11. Operations by established laboratories. Renumbered as Section II(h)(5). The language of this CX has been substantially revised, to include the addition of research and testing, and the omission of the qualifier “laboratories.” The change makes this CX generally applicable to any research, testing, or operations conducted at an existing facility, provided that the facility is enclosed. Although the caveat regarding the necessity of compliance with federal, state, and local standards (a slight change from the previous reference to “laws and regulations”) remains in place, the prohibition against using captured animals from the wild as research subjects has been removed. Finally, although this CX no longer specifically requires a REC, if a given operation within an existing facility “will substantially increase the extent of potential environmental impacts or is controversial,” then an EA (and, potentially, an EIS) is required unless one already exists.⁶⁴

53. *See id.* app. B, § II(b)(4).

54. *Id.* app. B, § II(g).

55. *Id.* app. B, § II(h).

56. *Id.* app. B, § II(g).

57. *See id.* app. B, § II(e)(1).

58. *Id.* app. B, § II(c); *see also id.* app. B, § II(h).

59. *See id.* § 651.29.

60. *Id.* pt. 651, app. B, § II(i)(1).

61. *Id.* app. B, § II(i)(2).

62. *See id.* app. B, § II(b)(4).

63. *Id.*

64. *Id.* app. B, § II(h)(5).

A-12. Developmental and operational testing on a military reservation. Omitted from the Final Rule. To the extent that this CX had a purpose (limited, as it was, by the caveat, “provided that the training and maintenance activities have been adequately assessed . . . in other Army environmental documents”), an element of what it excluded—the testing of a commercially available item—may be found in Section II(e)(5), “Procurement, testing, use, and/or conversion of a commercially available product,” or Section II(e)(7), “Modification and adaptation of commercially available items and products for military application.”⁶⁵

A-13. Routine movement of personnel/routine handling of non-hazardous and hazardous materials. Renumbered as found, in part, in Section II(h)(4). The preliminary “routine movement of personnel”—never further expounded upon after the semi-colon that followed it in the last version—has been omitted from the new section of the Final Rule, and the CX now focuses exclusively on the handling, transportation, and disposal of wastes, including asbestos, PCBs, lead-based paint, unexploded ordnance, and hazardous waste that otherwise complies with regulatory agency requirements. In a cross-reference to Section II(c)(1), “Construction of an addition to an existing structure/new construction if no more than 5.0 cumulative acres,” Section II(h)(4) indicates that it is specifically not applicable to construction of new facilities.⁶⁶

A-14. Reduction and realignment of civilian and/or military personnel. Renumbered as Section II(b)(12). A seemingly small but actually significant change was made to the language of this CX, in that “reduction and realignment of civilian and/or military personnel that fall below the thresholds for reportable actions as prescribed by statute *or AR 5-10*” has been revised to strike the italicized portion.⁶⁷ That regulatory reference created difficulties in the stationing of military units because it effectively limited the use of a REC to stationing decisions involving less than 200 military personnel or fifty civilian employees—a wholly arbitrary line inadvertently cre-

ated by the last update of *Army Regulation (AR) 5-10, Stationing*, in March 2001.⁶⁸

The new CX also states that Section (b)(12) *cannot* be used for related activities such as construction, renovation, or demolition activities that would otherwise require an EA or EIS—but may be used for reorganizations and reassignments with no changes in force structure, unit redesignations, and routine administrative reorganizations and consolidations.⁶⁹ With the elimination of the problematic regulatory reference, the addition of more specific language, and a parenthetical reference to the statute governing Base Realignment and Closure, this CX is much clearer and more useful than its predecessor. The CX still requires a REC.⁷⁰

A-15. Conversion of commercial activities. Renumbered as Section II(e)(3). The reference to Department of Defense Directive 4100.15⁷¹ has been updated, and *AR 5-20*⁷² is now the authority cited for the contracting of services. The CX is now somewhat more limited, though, by the addition of qualifying language indicating that only those actions that do not change the actions or the missions of the organization or alter the existing land-use patterns can be categorically excluded.⁷³

A-16. Preparation of regulations, procedures, manuals, and other guidance. Renumbered as Section II(b)(3). The text is taken nearly verbatim from the old version, except for the addition of an explanatory parenthetical indicating that “environmentally evaluated” means “subject to previous NEPA review,” and the correction of a typographical error (“an” to “and”) from the prior regulation.⁷⁴

A-17. Acquisition, installation, and operation of utility and communication systems. Renumbered as Section II(e)(2). The new CX contains little change from a textual perspective (for example, the addition of “mobile antennas,” a few much-needed commas, and the disjunctive “or”), but the CX now requires a REC.⁷⁵

65. *See id.* app. B, § II(e)(5), (7).

66. *Id.* app. B, § II(h)(4).

67. *See id.* app. B, § II(b)(12).

68. U.S. DEP’T OF ARMY, REG. 5-10, STATIONING (1 Mar. 2001).

69. 32 C.F.R. pt. 651, app. B, § II(b)(12).

70. *Id.*

71. U.S. DEP’T OF DEFENSE, DIR. 4100.15, COMMERCIAL ACTIVITIES PROGRAM (10 Mar. 1989).

72. U.S. DEP’T OF ARMY, REG. 5-20, COMMERCIAL ACTIVITIES PROGRAM (1 Oct. 1997).

73. 32 C.F.R. pt. 651, app. B, § II(e)(3).

74. *Id.* app. B, § II(b)(3).

75. *See id.* app. B, § II(e)(2).

A-18. Activities that identify the state of the environment. This CX has been so thoroughly revised as to appear initially as having been removed. The essence of what it was meant to exclude, though, can partially be found in Section II(d)(4) of the Final Rule, which covers “studies, data collection, monitoring and information gathering that do not involve major surface disturbance.”⁷⁶ After providing certain examples of its inclusiveness (specifically, topographic surveys, bird counts, wetland mapping, and other resource inventories), it adds the requirement of a REC to use it.⁷⁷

Wild animals suffered another loss under the Final Rule, as the language prohibiting their capture was again omitted from the new CX. Section II(h)(3), “Sampling, surveying, well drilling and installation, analytical testing, site preparation, and intrusive testing to determine if hazardous wastes, contaminants, pollutants, or special hazards are present,” could potentially be used in place of A-18. As with Section II(d)(4), however, reliance upon this CX requires a REC.⁷⁸

A-19. Deployment of military units. Renumbered as Section II(b)(7). Some change; specifically, a clarification that this exclusion can be used only when the existing facilities will be used “for their intended purposes consistent with the scope and size of [the] existing mission.”⁷⁹ More significantly, this CX no longer requires a REC.⁸⁰

A-20. Grants of easements for existing rights-of-way. The dramatic alteration of “real estate activity” exclusions makes a side-by-side comparison impossible. Some of the exclusions have been subsumed by broader successors, while others have simply disappeared. At first, the Final Rule appears to omit A-20—except that easements generally have been incorporated into Section II(f)(1), “Grants or acquisitions of leases, licenses, easements, and permits.” This CX corresponds somewhat to A-21, covering the use of real property and facilities where there is no significant change in land or facility use. Section II(f)(1)

includes a non-exhaustive list of examples. This CX still requires a REC.⁸¹

A-21. Grants of leases, licenses, and permits. This exclusion correlates most closely to Section II(f)(1). Section II(f)(1) is broader, however, in that it covers more than the use of existing Army-controlled property for non-Army activities. Instead, its parameters extend to the leasing of civilian property, so long as no significant change in the land or facility use occurs. Further, Section II(f)(1) does not require that the land at issue be the subject of an existing and environmentally assessed land-use plan. Section II(f)(1) still requires a REC.⁸²

A-22. Grants of consent agreements to use a Government-owned easement. The disposal of excess easement areas to the underlying fee owner can be found in Section II(f)(2); the granting of agreements to use an easement was subsumed under Section II(f)(1), as discussed above.⁸³ Section II(f)(2) also requires a REC.⁸⁴

A-23. Grants of licenses for the operation of public utilities. Renumbered as Section II(f)(4). Although the title is completely reworded—it is now “Transfer of active installation utilities to a commercial or governmental utility provider”—conceptually, the CX is the same and its revision only clarifies its meaning.⁸⁵ This CX requires a REC.⁸⁶

A-24. Transfer of real property within the Army or to another agency. Renumbered as Section II(f)(3), this CX changed significantly. The language regarding “leases, licenses, permits, and easements” of excess and surplus property has been replaced with the far more concise and meaningful “reporting of property as excess and surplus to the GSA for disposal.”⁸⁷ This CX still requires a REC.⁸⁸

A-25. Disposal of uncontaminated buildings and other improvements for removal off-site. Section II(f)(6) arguably

76. *Id.* app. B, § II(d)(4).

77. *Id.*

78. *See id.* app. B, § II(h)(3).

79. *Id.* app. B, § II(b)(7).

80. *See id.*

81. *See id.* app. B, § II(f)(1).

82. *See id.*

83. *See id.* app. B, § II(f)(1)-(2).

84. *See id.* app. B, § II(f)(2).

85. *See id.* app. B, § II(f)(1).

86. *Id.*

87. *See id.* app. B, § II(f)(3).

covers this exclusion, but the new exclusion is so much broader than the old one that the two are nearly unrelated.⁸⁹ The new CX covers the disposal of *all* real property, including facilities, so long as the reasonably foreseeable use will not change significantly. This CX requires a REC.⁹⁰

A-26. Studies that involve no resources other than manpower. Omitted from the new rule. The new Section II(b)(8), “Preparation of administrative or personnel-related studies, reports, or investigations,” appears to be the closest match, although this section does not specifically mention manpower.⁹¹

A-27. Study and test activities within the procurement program for commercial items. Renumbered as further broken down into three CXs: Section II(e)(5), “Procurement, testing, use, and/or conversion of a commercially available product;” Section II(e)(7), “Modification and adaptation of commercially available items and products for military application;” and Section II(e)(8), “Adaptation of non-lethal munitions and restraints from law enforcement suppliers and industry.” Section II(e)(5), unlike A-27, has no REC requirement, but Sections II(e)(7) and (e)(8) require a REC.⁹²

A-28. Development of table organization and equipment documents. Omitted from the Final Rule. The closest corresponding CX is now Section II(b)(3), “Preparation of regulations, procedures, manuals, and other guidance documents.”⁹³

A-29. Grants of leases, licenses, and permits to use DA property. This was subsumed by Section II(f)(1), “Grants or acquisitions of leases, licenses, easements, and permits for use of real property or facilities.”⁹⁴ This CX requires a REC.⁹⁵

New CXs

Many of the CXs in the Final Rule are completely new. The following is a brief listing of those CXs not mentioned above.

88. *See id.*

89. *See id.* app. B, § II(f)(6).

90. *Id.*

91. *See id.* app. B, § II(b)(8).

92. *See id.* app. B, § II(e)(5), (7)-(8).

93. *See id.* app. B, § II(b)(3).

94. *See id.* app. B, § II(f)(1).

95. *Id.*

Section II(b), Administration/operation activities:

(b)(2). Emergency or disaster assistance provided to federal, state, or local entities (requires a REC);

(b)(9). Approval of asbestos or lead-based paint management plans (requires a REC);

(b)(10). Non-construction activities in support of other agencies/organizations involving community participation projects and law enforcement activities;

(b)(11). Ceremonies, funerals, and concerts;

(b)(13). Actions affecting Army property that fall under another federal agency’s list of categorical exclusions (requires a REC); and

(b)(14). Relocation of personnel into existing federally-owned or commercially-leased space (requires a REC).

Section II(c), Construction and demolition:

(c)(2). Demolition of non-historic buildings, structures, and disposal of debris therefrom, including asbestos, PCBs, lead-based paint, and other special hazard items (requires a REC); and

(c)(3). Road or trail construction and repair.

Section II(d), Cultural and natural resource management activities:

(d)(1). Land regeneration activities using only native trees and vegetation, not including forestry operations (requires a REC);

(d)(2). Routine maintenance of streams and ditches or other rainwater conveyance structures (requires a REC); and

(d)(5). Maintenance of archeological, historical, and endangered/threatened species avoidance markers, fencing, and signs.

Section II(e), Procurement and contract activities:

(e)(4). Modification, product improvement, or design change that does not change the original impact of the material, structure, or item on the environment (requires a REC); and

(e)(6). Acquisition or contracting for spares and spare parts.

Section II(f), Real estate activities:

(f)(5). Acquisition of real property where the land use will not change substantially, or where the land acquired will not exceed 40 acres, and where the use will be similar to Army activities on adjacent land (requires a REC).

Section II(g), Repair and maintenance activities:

(g)(3). Routine repair and maintenance of equipment and vehicles, other than depot or unique military equipment maintenance.

Section II(h), Hazardous materials/hazardous waste management and operations:

(h)(1). Use of gauging devices, analytical instruments, and other devices containing sealed radiological sources (requires a REC);

(h)(2). Immediate responses in accordance with emergency response plans; and

(h)(6). Reutilization, marketing, distribution, donation, and resale of items, equipment, or materiel.

Section II(i), Training and testing:

(i)(3). Intermittent on-post training activities that involve no live fire or vehicles off established roads or trails.

Section II(j), Aircraft and airfield activities:

(j)(1). Infrequent, temporary increases in air operations up to 50% of the typical installation aircraft operation rate (requires a REC);

(j)(2). Flying activities in compliance with Federal Aviation Administration Regulations and normal flight patterns and elevations;

(j)(3). Installation, repair, or upgrade of airfield equipment; and

(j)(4). Army participation in established air shows.⁹⁶

Screening Criteria

Although screening criteria are no longer found in the same appendix as the CXs, the use of any CX remains contingent upon meeting relevant screening criteria. Those criteria have been greatly expanded and are now found at 32 CFR section 651.29 (2002), "Determining when to use a CX (screening criteria)." The new criteria may be summarized as follows:

(1) The action has not been segmented;

(2) No exceptional circumstances exist (the regulation specifies fourteen such circumstances); and

(3) At least one CX encompasses the proposed action.⁹⁷

In addition to the three criteria listed above, another layer of regulation protects "environmentally sensitive" resources.⁹⁸ These resources include listed, threatened, or endangered species, properties listed or eligible for listing on the National Register of Historic Places, wetlands, sole-source aquifers, coastal zones, cultural resources, and a dozen others, including the catch-all, "areas of critical environmental concern or other areas of high environmental sensitivity."⁹⁹ Where a proposed action would otherwise adversely affect "environmentally sensitive" resources, a CX still cannot be used unless the impact has been resolved through other environmental law processes.¹⁰⁰

96. *Id.* app. B, § II(b)-(j).

97. *Id.* § 651.29.

98. *Id.*

99. *Id.*

100. *Id.*

The same general considerations found in the old *AR 200-2* have long been factors in the environmental assessment process. The expansion of the screening criteria, therefore, might appear at first glance to be merely semantic. In fact, the four-

teen listed exceptional circumstances in the Final Rule constitute a significant addition to the screening criteria. Major Jeanette Stone.