

NEPA Like Analysis for Research and Other Actions Abroad

A project officer comes to you about an opportunity to piggyback on some research being done in the UK. Your command is going to pay for some additional testing or data from a foreign country that would help with ongoing Army research projects. That doesn't raise any environmental policy issues, right? Not necessarily.

The Department of Defense (DoD) Office of General Counsel (OGC) recently wrote an opinion on the Air Force managed Czech Republic Chemical Defense Data Collection Program. The opinion was the result of a message to the Secretary of State sent by the U.S Ambassador to the Czech Republic expressing concern about the potential for serious public and foreign relations implications if it appeared that the program had been conducted in the Czech Republic in order to circumvent US law. While the opinion was specifically related to the Chemical Defense program, it has potential impacts for all Research and Development (R&D) and production contracts conducted overseas on behalf of the United States.

The OGC opinion looked at three major areas of the law, compliance with the Chemical Weapons Convention, NEPA, and Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, with the majority of the opinion focused upon EO12114. The opinion makes it clear that while NEPA does not apply to federal actions abroad, care must be given to ensure compliance with EO 12114.

EO 12114, as implemented by Department of Defense Directive (DODD) 6050.7 and Chapter 8 of AR 200-2, requires that an environmental study or review be performed for major federal actions significantly affecting the environment in either: 1) the global commons outside the jurisdiction of any nation;¹ (2) the environment of a foreign nation not participating with the United States and not otherwise involved in the action;² or, (3) the environment of a foreign nation by providing a product or physical project producing a principal product or an emission or effluent which is prohibited or strictly regulated in the U.S. because its toxic effects on the environment create a serious public health risk.³

The two-prong analysis anticipated by DODD 6050.7 begins with a determination of whether the proposed action is a "major action", which is defined as:

an action of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale or has substantial environmental effects on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this directive.

The second step in this two-prong analysis is to determine whether the major action fits into one of the three specified in the EO as requiring environmental review. The question raised by this opinion is level of specificity required by law or regulation in order to qualify as "prohibited or strictly regulated in the U.S."

¹ E.O. 12114, Sec. 2-3(a).

² E.O. 12114, Sec. 2-3(b).

³ E.O. 12114, Sec. 2-3(c).

According to Enclosure E of DODD 6050.7: asbestos, vinyl chloride, acrylonitrile, isocyanates, polychlorinated biphenyls, mercury, beryllium, arsenic, cadmium, and benzene⁴ are "prohibited or strictly regulated". But this list may no longer be exhaustive.

The third issue raised by the OGC opinion relates to a failure to coordinate with the Department of State or the Office of the Secretary of Defense on a matter that ultimately had a potential foreign relations impact for the United States.

A key issue not discussed in the OGC opinion is whether the action was exempt from the EO 12114 requirements because it was an action with respect to "arms transfers" to foreign nations. The EO specifically defines the term "arms transfers" as "grant, loan, lease, exchange, or sale of defense articles or defense services to foreign government or international organization, and the extension or guarantees of credit in connection with these transactions." What is unclear is whether "arms transfer" impliedly must include an action carried out abroad under an international cooperative research and development agreement.

What impact does this opinion have for AMC R&D and procurement programs abroad? First, consideration of the applicability of EO12114 should be made in writing and concurred with by legal staff for all programs that involve work overseas. Second, if it is determined that an action is a major action, then the effluents and emissions from carrying out that action should be carefully reviewed to determine whether they are strictly regulated in the United States. And third, since the concerns raised by the Ambassador are more related to perception than to actual environmental consequences, additional consideration should be given to initiating consultation with HQDA (DAMO-SSM) in accordance with AR-200-2, paragraph 8-4 even when an action does not reach the level of a "major action".

Does this mean that environmental studies are going to be needed for any action that would have required at least an Environmental Assessment in the United States? Probably not, the Air Force when they completed their review after receipt of the OGC opinion determined that open air testing of decontamination processes and products with chemical agent did not "produce a toxic effect on the environment creating a public health risk", therefor no further analysis was needed.

⁴ DoDD6050.7, Enclosure 2, E2.2.1.2. 44FR 18722, includes all of the above list as well as pesticides. The complete list was part of the CEQ Publication of Implementing Documents and agreed to between the CEQ and the Import -Export Bank.