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***Storage and Disposal of Non-Department of Defense
(DoD) Toxic and Hazardous Materials- MAJ Allison Polchek***

Section 343 of the National Defense Authorization Act for Fiscal Year 1998¹ provided welcome news for installations facing the problem of non-DoD entities wishing to store or dispose of toxic or hazardous materials on DoD installations. This provision amended 10 U.S.C. § 2692 that generally forbade the storage or disposal of such materials.²

Initially, section 343 amended 10 U.S.C. § 2692(a) to permit storage or disposal of materials which are owned by the DoD or by a member of the armed forces or dependent family members assigned to installation housing.³ In effect, this amendment now allows soldiers and their families to legally possess toxic and hazardous materials such as pesticides and household cleaning supplies.

In addition, section 343 greatly expanded the number of exceptions to the general prohibition against storage or disposal of non-DOD toxic or hazardous materials. Under the previous authority of 10 U.S.C § 2692, non-DoD entities could store or dispose of toxic or hazardous materials only under extremely limited circumstances. In particular, this statute provided hardships for Base Realignment and Closure (BRAC) installations, as local reuse authorities seeking to redevelop the property could not obtain the needed exemptions to store the materials of potential lessees pending conveyance.

One of the more important changes to the exemptions in the statute is that which permits storage when the Secretary of the Army determines that the "material is required or generated in connection with the authorized and compatible use of a facility of the DoD"⁴ This situation will encompass the BRAC situation, allowing reuse authorities more flexibility in marketing property to potential lessees. A second exception will allow installations to assist federal, state or local law enforcement agencies temporarily store explosives.⁵ Another significant exception will permit

¹ National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 343 (Nov. 11, 1997)[hereinafter Authorization Act].

² 10 U.S.C. § 2692 (1997).

³ Authorization Act § 343(a).

⁴ Authorization Act § 343(d). The amendment also authorizes the Secretary to permit treatment and disposal of non-DoD materials in more limited circumstances. Authorization Act § 343(e).

⁵ Authorization Act § 343(c). The statute previously only permitted such assistance to federal law enforcement agencies. 10 U.S.C. § 2692(b)(3).

storage, treatment, or disposal of materials used in connection with a service or activity performed on an installation for the benefit of the DoD.⁶

It is important to note that many of these exceptions require Secretary of the Army approval, but efforts are underway to delegate this approval authority to lower levels of command. This office is assisting in the development of guidance on this issue, and information will be provided as it becomes available.

**THE SIKES ACT IMPROVEMENT ACT OF 1997 -
Mr. Scott M. Farley and LTC Richard A. Jaynes**

INTRODUCTION

Since 1960, the principles of the Sikes Act⁷ have been held dear primarily by hunters and fishers because they served to facilitate access to 25 million acres of land managed by the Department of Defense (DoD).⁸ On 18 November 1997, President Clinton signed the Sikes Act Improvement Act (SAIA) into law as Title XXIX to the National Defense Authorization Act for Fiscal Year 1998.⁹ In many ways the SAIA simply codifies present DoD and Army practice. In other ways, however, the SAIA fundamentally changes the dynamic by which DoD manages its land and natural resources. Most notably, what was once done according to guidance must now be accomplished according to statutory requirement. The Sikes Act is not just for hunters and fishers anymore: DoD's installation trainers, range managers, natural resource managers, and attorneys should take note.

That Was Then

The Sikes Act, as it existed prior to the SAIA,¹⁰ authorized much but mandated little. The Act primarily focused on empowering DoD and its component services to enter into partnerships with the Department of the Interior (DoI), State fish and wildlife agencies, and even private entities to provide for the sound management of natural resources on military installations. The intended management framework revolved around the authority for installations to enter into "cooperative plans" that were "mutually agreed upon" by the military installation, DoI and the State wildlife agency.¹¹ Cooperative planning allowed installations to develop sustainable fish and game

⁶ Authorization Act § 343(b)(2).

⁷ 16 U.S.C. § 670a-f (1997). The Sikes Act, its roots stemming back to 1949, was first enacted in 1960, authorizing DoD to manage fish and wildlife resources in cooperation with State fish and game agencies, and to retain hunting and fishing fees on installations to help finance conservation programs. Pub. L. No. 86-797, 74 Stat. 1052 (1960). Subsequent amendments substantially expanded the Act to provide authority for cooperative plans with both government and non-governmental entities, and encouraged planning for sustained multiple-use management of a broad range of natural resources.

⁸ RAND NATIONAL DEFENSE RESEARCH INSTITUTE, MORE THAN 25 MILLION ACRES? DO D AS A FEDERAL, NATURAL, AND CULTURAL RESOURCE MANAGER, 4 (1996). The Army manages approximately 12.5 million acres, while the Air Force and Navy (including the Marine Corps) manage 9.0 and 3.5 million acres, respectively.

⁹ Sikes Act Improvement Act of 1997, Title XXIX, Sec. 2901-2914, National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85 (1997).

¹⁰ The last time the Act was significantly amended was in 1986. Pub. L. No. 99-561, 100 Stat. 3149 (1986).

¹¹ If an installation chose to develop a "cooperative plan," the Act established minimum content requirements that must be met (e.g., range rehabilitation, and habitat improvement projects). See 16 U.S.C. § 670a (1997).

programs by generating revenue for conservation projects,¹² establishing management partnerships, and facilitating enforcement. Formal natural resource planning under the Act, however, remained entirely discretionary.

Although there was no statutory planning mandate in the Sikes Act prior to 1986, Congress amended the Act in 1986¹³ to direct each military department to manage the natural resources at its installations to provide for “sustained multiple purpose uses” and public access “necessary or appropriate for those uses.”¹⁴ Where natural resource management goals conflicted with the military mission, Congress made clear that the mission must prevail.¹⁵ Rather than legislate how this mandate should be carried out, Congress committed this judgment to the discretion of each military department, effectively precluding judicial review of DoD natural resource planning and management.

To more uniformly manage its natural resources, and despite the lack of a statutory mandate, DoD adopted a policy in 1996 that required formal integrated natural resource management plans (INRMPs).¹⁶ The Army further implemented that policy in early 1997 by establishing guidance and a timeframe for completing installation INRMPs.¹⁷

THIS IS NOW

The SAIA continues the baseline requirement for DoD to manage installation natural resources on a sustained multiple-use basis, and adopts DoD’s self-imposed INRMP requirement as a Congressional directive.¹⁸ Most DoD installations are required, by 18 November 2001, to prepare and begin implementing INRMPs.¹⁹ Congress included in its INRMP policy that each INRMP must reflect the “mutual agreement” of the U.S. Fish and Wildlife Service (FWS) and State fish and wildlife agency with regard to certain aspects of the plan,²⁰ address specified areas,²¹ and solicit public comments.²² In short, natural resource planning and management must now occur through

¹² The Sikes Act’s most important financial provisions allow DoD to retain funds collected from the operation of any cooperative plans and agreements and restrict their spending to the purposes of those plans and agreements. *Id.* § 670d.

¹³ The Act did contain other minor mandates such as the requirement to use, “to the extent feasible,” professionally trained DoD personnel for fish and wildlife management and enforcement. *See id.* § 670a-1(b).

¹⁴ *Id.* § 670a-1(a).

¹⁵ *Id.* Management for multipurpose uses and public access was required, but only “to the extent that those uses and that access are not inconsistent with the military mission of the reservation.”

¹⁶ Department of Defense Instruction No. 4715.3, Environmental Conservation Program (May 3, 1996).

¹⁷ *See* Memorandum from Major General Randolph W. House, Army Assistant Chief of Staff for Installation Management to Army Major Commands, Subject: Army Goals and Implementing Guidance for Natural Resources Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP) 13 (Mar. 21, 1997) (on file with authors). *See also* Thomas Ayres, *Integrated Natural Resources Management Plan (INRMP) Guidance Released*, ARMY LAW. Jun., at 57, DA-PAM 27-50-295 (1997). This article provides legal advice for meeting NEPA aspects of INRMPs.

¹⁸ Sikes Act Improvement Act of 1997, Title XXIX, Sec. 2901-2914, National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85 (1997). This also imposes substantial reporting requirements. DoD must report to Congress by 18 November 1998, describing all installations for which INRMPs will be prepared, and must explain its reasons for excluding installations from the INRMP requirement. Thereafter, DoD must report annually as to the status of INRMP preparation and implementation for those installations for which the INRMP requirement applies.

¹⁹ *Id.* Sec. 2905(c). Reporting requirements apply to installations with sufficient resources to warrant INRMPs.

²⁰ *Id.* Sec. 2904(a). These provisions tend to favor fish and wildlife interests over other natural resource interests such as outdoor recreation, livestock grazing, and timber harvesting.

²¹ *Id.* Sec. 2904(c).

²² *Id.* Sec. 2905(d).

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statutorily mandated process that establishes time lines, prescribes necessary elements, and requires open and coordinated preparation.

Equally important to military commanders, the SAIA contains language clarifying the intent of Congress to ensure military installations remain focused upon the conduct of military training and operations. Three statements particularly signal the Congressional intent to protect the primary purpose for military installations. First, Congress recognized and unequivocally declared that military departments have the use of "installations to ensure the preparedness of the Armed Forces."²³ Second, Congress mandated that every INRMP must be "consistent with" that primary use for installation lands.²⁴ Third, Congress required that each INRMP to ensure that there is "no net loss in the capability of military installation lands to support the military mission of the installation."²⁵ The Conference Report addressing the SAIA further establishes that the clear Congressional intent of the Sikes Act reauthorization effort was to give military installation commanders a better tool to conduct military operations and training activities while conserving natural resources.²⁶

PRACTICE NOTES

Several important implementation issues warrant careful attention by installation environmental law specialists (ELS):

The Scope of FWS and State Involvement. For two years the Sikes Act reauthorization effort foundered because DoD would not accede to FWS and State control over portions of the INRMPs not addressing fish and wildlife.²⁷ Congress made clear in the SAIA that only those portions of the INRMP that concern "conservation, protection, and management of fish and wildlife resources" are subject to the "mutual agreement" of the FWS and State fish and game

²³ *Id.* Sec. 2904(a). It should also be noted that significantly Congress did not choose to use the words "necessary for reasons of national security" when dictating the level of consideration for military activities as it has done with many other environmental statutes. *See, e.g.,* Endangered Species Act of 1973, 16 U.S.C. § 1536(j) (1997). While the term "national security" denotes a high standard that can only be invoked when overall military readiness is threatened, the use of the term "military preparedness" denotes a much lower standard that ensures INRMPs do not interfere with military operations and training activities that contribute to military or unit readiness. The SAIA emphasis on "preparedness" strengthens the "purpose" statement that had been in the Sikes Act previously. *See supra* note 9 (prior statutory text).

²⁴ Pub. L. No. 105-85, Sec. 2904(c) (1997).

²⁵ *Id.*

²⁶ H.R. CONF. REP. NO. 105-340, at H9435 (1997), states in part:

"The conferees note that the reauthorization of the Sikes Act would directly affect the nearly 25 million acres managed by the Department of Defense. The conferees agree that reauthorization of the Sikes Act is not intended to expand the management authority of the U.S. Fish and Wildlife Service or the State fish and wildlife agencies in relation to military lands. Moreover, it is expected that integrated natural resources management plans shall be prepared to facilitate installation commanders' conservation and rehabilitation efforts that support the use of military lands for readiness and training of the armed forces.

The conferees note that the military departments will have completed approximately 60 percent of the required integrated natural resources management plans by October 1, 1997. The conferees understand that most of these plans have been prepared consistent with the criteria established under this provision. In addition, the conferees note the significant investment made by the military departments in the completion of current integrated natural resources management plans. The conferees intend that **the plans that meet the criteria established under this provision should not be subject to renegotiation and reaccomplishment** [Emphasis added.]

²⁷ *Sikes Act Agreement in Jeopardy after Military Services' Objections*, DEFENSE ENVIRONMENTAL ALERT, June 12, 1996, at 3.

agencies.²⁸ While the FWS and States are significant stakeholders entitled to close coordination in INRMP development, the Act clearly states that nothing in the Act “enlarges or diminishes the responsibility and authority of any State for the protection and management of fish and resident wildlife.”²⁹ If the INRMP is to be used as a valuable tool by military installations, it must address military training and land use planning areas beyond fish and wildlife. When an INRMP does so, the language of the SAIA clarifies that Congress agreed with DoD and excluded the need for DoD to reach mutual agreement with FWS and the State on issues beyond their expertise.

Existing INRMPs. The conference committee report indicates it intended to “grandfather” existing “cooperative plans” that could be modified to meet the new legislation.³⁰ Nevertheless, the SAIA directs installations with existing cooperative plans to “complete negotiations with the [FWS] and [State] regarding changes in the plan” necessary for the plan to meet the requirements for an INRMP.³¹ While the term “negotiation” is left undefined, installations with existing INRMPs may want to point out during those negotiations the Congressional intent to grandfather existing INRMPs.

Prepare Record for Possible Litigation. The SAIA’s elevation of the INRMP to mandatory agency action has significant administrative law consequences. Preparation of an INRMP may be subject to the judicial review provisions of the Administrative Procedure Act (APA).³² This empowers the Federal judiciary, at the request of an aggrieved party, to set aside agency action that is taken without adherence to all procedures required by law. Thus it is possible for a State fish and wildlife agency to seek judicial review of an INRMP in which the State did not concur. It is also a possibility that potential litigants could challenge natural resource management activities designed to enhance military training (e.g., prescribed burning) but which are not part of an INRMP.

Ensure INRMPs Are Coordinated with Other Planning Statutes. The legal procedures associated with development of an INRMP will transcend those set forth in the SAIA. In particular, installations should consider necessary levels of supporting National Environmental Policy Act (NEPA)³³ documentation, Section 7 of the Endangered Species Act (ESA)³⁴ consultation, and Section 106 of the National Historic Preservation Act (NHPA)³⁵ consultation. The INRMP development process must be tailored to coordinate and integrate these processes.³⁶ But most importantly, installations must document the decision making process in a detailed, thorough administrative record.³⁷ This process would also prove helpful for Army

²⁸ Pub. L. No. 105-85, Sec. 2904(a) (1997).

²⁹ *Id.*

³⁰ *See supra* note 20.

³¹ *Id.* Sec. 2905(c).

³² 5 U.S.C. §§ 701-706 (1997). The APA provides that “a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.* § 702.

Besides describing this private right of action, § 704 describes actions judicially reviewable, and § 706 articulates the scope of review to include actions that are: “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

³³ National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1997).

³⁴ Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1997). See also implementing regulations: Interagency Cooperation - Endangered Species Act of 1973, as amended, 50 C.F.R. Part 402 (1997).

³⁵ National Historic Preservation Act, 16 U.S.C. § 470f (1997).

³⁶ The ELS should also give close consideration to how an INRMP addresses impacts from testing, training, and other mission related activities. Challenge to an INRMP could provide a forum for indirectly attacking such activities.

³⁷ The Army INRMP Implementing Guidance (*see supra* note 11) states that all installation INRMPs must undergo NEPA analysis in accordance with Army Regulation 200-2, Environmental Effects of Army Actions (1988). In

Secretariat review and override of a nonconcurrency by the FWS or State fish and game agency to an INRMP.

Develop Compliance Strategy. The Army's existing natural resource management policy and guidance will need much amendment to implement many provisions of the SAIA. In the meantime, the ELS can serve an important function by reviewing the state of the existing natural resource program on post,³⁸ establishing communications with the FWS and relevant State agencies, and working closely with the installation natural resource professionals to establish a compliance strategy. The compliance strategy should project time lines, funding, and procurement mechanisms necessary to ensure completion of planning level surveys, integration of all legal processes (SAIA, NEPA, ESA, and NHPA), and coordination with all major stakeholders prior to the 18 November 2001 deadline.

Develop a Baseline for Non-Mission Use of Lands. Each installation's natural resource managers and range and training officers should coordinate and document existing non-mission uses of installation land and natural resources. This is an essential task that should be completed either as part of the INRMP process, or as a separate activity. This effort may ultimately be used to give effect to the assurances in the SAIA that lands are to be used to ensure the preparedness of military units, and that there must be no net loss in the use of those lands for intended purposes, namely military operations and training. At the same time, the installation should develop a baseline of documented military use and the need for training flexibility on the installation's range and training lands. This will entail doing more than just cataloging numbers of training days that ranges were used. It should include such details as the necessity and use of weapons safety buffer zones, requirements for flexibility (to accommodate preparations for deployments, visiting units, reserve units or expanding missions), and the requirement to "rest and rotate" training areas for both natural resource renewal and to keep soldiers from knowing terrain too well.

***EPA's New Guidance on the Use of RCRA's Imminent
Endangerment Authority - Major Lisa Anderson-Lloyd***

On 20 October 1997, EPA sent its regional offices new enforcement guidance on using Resource Conservation and Recovery Act's (RCRA) Section 7003,³⁹ the imminent and substantial

most cases, because INRMPs are derived to maintain and sustain natural resources, production of an environmental assessment (EA) accompanied by a Finding of No Significant Impact (FONSI) should satisfy the requirements of AR 200-2 and NEPA. If, however, implementation of the INRMP will significantly impact the environment, then the installation must produce an Environmental Impact Statement (EIS). When complying with AR 200-2, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a range of reasonable alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP (e.g., perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency).

³⁸ Review should initially be focused on existing cooperative plans, Endangered Species Management Plans, ESA Biological Assessments and Opinions, and NEPA documents addressing impacts to natural resources. Many installations have also prepared draft INRMPs in anticipation of SAIA enactment. These should be reviewed for consistency with the new mandates.

³⁹ 42 U.S.C. § 6973 (West 1997).

endangerment authority.⁴⁰ The guidance emphasizes the power of Section 7003 as a broad enforcement tool that can be used to address circumstances that may present an imminent and substantial endangerment to health or the environment. This document takes the place of previous guidance issued in 1984 that dealt exclusively with how to issue administrative orders pursuant to Section 7003. The new guidance also discusses procedures for taking judicial action and updates policy in line with new case law and revised enforcement priorities. EPA provides an explanation of imminent substantial endangerment, case-screening factors, the relationship of Section 7003 to other authorities, and the legal requirements for initiating action under Section 7003.

EPA cites the many benefits of Section 7003, chiefly the effectiveness in furthering risk-based enforcement and addressing the worst RCRA sites first. The guidance also points out the availability of Section 7003 as an enforcement tool for sites and facilities that are not subject to RCRA or other environmental regulation. In addition, Section 7003 can also be used to address endangerment at facilities that are in compliance with a RCRA permit. In this instance, however, the guidance directs the regions to consider requiring necessary actions under the permit authorities rather than Section 7003. Another benefit noted by the document is that administrative remedies do not have to be exhausted before using the imminent and substantial endangerment authority.

In deciding whether to take action under Section 7003, the regions were urged to give the highest priority to sites that pose serious risks to health or the environment. In addition, the guidance cautions that special consideration should be given to sites that pose environmental justice concerns. Another screening factor regions are directed to consider is the technical difficulty of performing the necessary activities and the likelihood that the responsible party will be capable of the required performance.

EPA cited case law in which courts have interpreted Section 7003 authority broadly in describing what constitutes an “imminent and substantial endangerment.” EPA emphasized that the endangerment “may” occur in the future, and that there need not be proof of harm only a risk of potential harm. The guidance states that for the “substantial” component to be satisfied, the risk does not have to be quantified, as long as there is a reasonable cause for concern about potential harm.

The guidance gives the circumstances under which the use of RCRA Section 7003 is preferred over the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authority.⁴¹ Regions are advised to consider using RCRA if the materials posing the risk of harm meet RCRA’s statutory definition of hazardous waste but do not qualify as hazardous substances under CERCLA. Section 7003 may also be advantageous to address potential endangerment caused by petroleum because petroleum is not a hazardous substance under CERCLA. In addition, RCRA Section 7003 authority is preferred in the circumstance when a region is seeking an administrative order requiring long-term cleanup. Under CERCLA⁴² remedial action must be in the form of a judicial consent decree.

⁴⁰ Guidance on the Use of Section 7003 of RCRA, issued by EPA Assistant Administrator for Enforcement Steven Herman, October 20, 1997.

⁴¹ 42 U.S.C. §§9601-75 (West 1997).

⁴² Id. §9622(d)(1)(A).

It will be of interest whether the new guidance will result in an increase in Section 7003 enforcement actions or just a heightened awareness of the breadth of the authority. EPA has proposed the most expansive reading of the Section 7003 enforcement authority using the language of the statute and recent case law.

Fines and Penalties Update - MAJ Silas DeRoma

At the close of the first quarter of FY 1998, four new fines had been assessed against Army installations. Of the 160 fines assessed against Army installations since FY 1993, the majority are RCRA fines (89), followed by the Clean Air Act (40), the Clean Water Act (22), the Safe Drinking Water Act (6), and, finally, the Comprehensive Environmental Response and Compensation and Liability Act (3).

Of particular note in the latest reporting quarter was the first fine assessed against an Army installation under the amended Safe Drinking Water Act. The fine was based on allegations by EPA, Region IV, that an Army installation failed to collect samples of coliform bacteria, exceeded maximum contaminant levels (MCL) for coliform bacteria, failed to properly maintain a disinfectant residual throughout the drinking water distribution system, failed to implement an adequate main flushing system, failed to operate and maintain properly storage tanks and reservoirs, and failed to provide timely public notice of MCL violations. EPA, Region IV, has proposed a \$600,000 fine due to the allegations, and negotiations are underway.

Environmental practitioners will recall that the Safe Drinking Water Amendments of 1996, effective 6 August 1996, significantly expanded Federal liability to include injunctive relief, civil and administrative fines and penalties, administrative orders, and reasonable service charges assessed in connection with permits, plans, inspections or monitoring of drinking water facilities, as well as any other nondiscriminatory charges respecting the protection of wellhead areas or public water systems or underground injection. Under the amendments, EPA may issue penalties against Federal agencies that can range as high as \$25,000 per day per violation. Installation Environmental Law Specialists (ELs) are reminded that payment of fines and penalties by Army installations is governed by, *inter alia*, the Supreme Court decision of *Dep't of Energy v. Ohio*, 503 U.S. 607 (1992). Additionally, by regulation, the Environmental Law Division "review[s] all draft environmental orders, consent agreements, and settlements with Federal, state, or local regulatory officials *before* signature." Dep't of Army, Reg. 200-1, Environmental Protection and Enhancement, para. 17d (21 Feb. 1997) (emphasis added).
