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THE RESERVE COMPONENT COMMANDER'S
ENVIRONMENTAL RESPONSIBILITIES

BY

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THE RESERVE COMPONENT COMMANDER'S
ENVIRONMENTAL RESPONSIBILITIES (U)

AN INDIVIDUAL STUDY PROJECT

by

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ABSTRACT

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Environmental issues within the National Guard have recently been elevated in priority. Along with this internal increased attention to the environment has come an intense demand by environmental regulatory organizations and local citizens that military organizations comply with environmental laws and regulations. This paper informs the National Guard unit commander that he is not exempt from environmental compliance and the paper discusses environmental issues and potential liabilities facing National Guard unit commanders. It recommends fundamental tenants of a commander's environmental compliance program. The study concludes that the commander's environmental compliance program must be a comprehensive effort directed toward improving environmental education, ensuring pollution prevention and enforcing regulatory requirements. Finally, the paper addresses the consequences should the commander not adopt such a proactive approach; he may be prosecuted for breaking the law.

INTRODUCTION

As the unit commander, what does environmental compliance mean to me?

I know it's important. But I just don't have the time for additional administrative burdens. My priority is training. Let higher headquarters and somebody else worry about it. If I don't ask about it, I won't know about it. And if I don't know about it, I don't have to worry about it.

What are my potential liabilities?

I know there are a number of laws concerning all aspects of the environment. But since this is a National Guard Armory, it's owned by the State. So we're exempt from compliance. And since we train at local federal facilities, we're safe again, because they too are exempt. Liabilities? I don't think I have any environmental liabilities. My business is to recruit and train a combat ready National Guard Unit. Higher headquarters takes care of our environmental regulatory compliance.

This fictional scenario conveys grossly inaccurate information. Yet it represents typical ignorance of unit commanders. Too many do not understand their responsibilities and potential liabilities concerning environmental degradation.

Unfortunately, this scenario may represent the opinion of an alarming number of commanders, realistically showing their lack of knowledge concerning the National Guard Bureau's Environmental Compliance Program and, as unit commanders, their Environmental Liabilities.

"I want every Command to be an environmental standard by which federal agencies are judged".¹

Richard B. Cheney,
Secretary of Defense
October 10, 1989

With these words, the Secretary of Defense formally committed all services to an all-out effort to achieve environmental compliance and to restore past environmental degradation.

"My goal is to make the National Guard the recognized leader in this unprecedented drive toward total environmental compliance... We Guardmembers must continue to work toward making environmental compliance and protection of our natural resources a command priority at all levels."²

John B. Conaway
Lieutenant General
Chief National Guard Bureau

In the spring of 1990, by direction of the LTG John B. Conaway, Chief of the National Guard Bureau, the National Guard implemented an intense environmental compliance program. This implementation clearly established the National Guard's environmental program as a command function. Specifically, LTG Conaway's guidance directed:

- * The National Guard will comply 100% with all environmental compliance requirements.
- * Required resources to address environmental issues will be considered as the "cost of doing business".
- * Commanders are "Responsible and Accountable" for environmental actions at their respective level.
- * Environmental compliance is a readiness enhancer.³

Clearly implementing these directives will not be as simple

as their announcement. They came at a time when there was unprecedented public concern about the environment in general and hazardous waste in particular. They also came just as Congress was threatening legislation that would mandate and direct the Army's environmental program. Further complicating their implementation is a growing awareness by the states of the expanded environmental law enforcement powers bestowed upon them by the Congress of the United States and their own legislative bodies.

Environmental issues have struck a vibrant emotional chord among federal, state and local governments. More importantly, concern for the global environment pressures everyone to make fresh approaches to this issue. Public opinion indicates that support for environmental protection efforts is at an all-time high. And this popular concern for the environment continues both in intensity and with its numerical support.

The purpose of this paper is to discuss the environmental issues and potential liabilities facing unit commanders. It will recommend fundamental tenets of a commander's environmental compliance program.

AN EXAMPLE

The current attempt to ensure federal environmental compliance may best be demonstrated by a brief discussion of what has been referred to as the "Aberdeen Proving Ground Case". This landmark case resulted in the indictment and conviction of three Federal employees for criminal violation of the Resource

Conservation and Recovery Act (RCRA).⁴

The three Federal employees worked at the US Army Chemical Research, Development, and Engineering Center (CRDEC) at Aberdeen Proving Ground. All were highly respected professionals. Late in the afternoon of a typical workday, a small leak was detected in a 1,000-gallon tank where sulfuric acid was stored. A plastic bucket was used to contain the leak until further action could be taken the following day. Overnight, the trickle grew. Finally 200 gallons of acid had escaped, uncontained by an improperly maintained dike surrounding the tank. It flowed into a nearby creek, killing a large number of fish. Local residents were soon aware of a serious problem.

Investigations of the military facility by Maryland State regulators discovered questionable handling and storage of many hazardous chemicals - chemicals considered useful by the engineers responsible for them, but judged by the state as being handled in violation of RCRA standards. After jurisdictional questions arose, the case was referred to the US Attorney's office. Then the Federal Bureau of Investigation became involved. Following three years of investigations, indictments, and trial by jury the three highly respected professionals were convicted of felony charges in February 1989. In closing this landmark case, the Judge stated, "This case has demonstrated throughout the country that everybody must obey the environmental laws of the United States. The buck stops with the person who has responsibility for the handling and storing of hazardous materials and waste." ⁵ Assuredly this

statement should capture the attention of every unit commander in the military.

The criminal convictions of the three individuals have recently (4 Sept 1990) been upheld by the United States Court of Appeals. The court rejected the defendants' argument that they were immune from the criminal provisions of the RCRA because of their status as federal employees. The court also held that the government did not need to prove that the defendants "knew that violation of the RCRA was a crime".⁶

PUBLIC CONCERN

Public concern about the state of the environment is surely increasing. A particularly striking example of the increase in support for environmental protection during the last few years was disclosed in a poll conducted by the New York Times/CBS News. In the survey interviewers asked a national sample of Americans whether they agreed or disagreed with the following statement:

"Protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost."⁷

Given the strongly pro-environmental wording of the statement, the fact that in 1989 a plurality of 80 percent said they agreed with it provides strong evidence of public support for environmental protection. Other indicators reveal that the American public continues to voice concerns about environmental issues. According to the April 1990 Gallup Poll, almost 66 percent of Americans said

they worry "a great deal" about contamination of soil by toxic wastes. That same poll showed that a vast majority of Americans are willing to pay the economic price associated with pollution control and abatement.⁸

The global scale of pollution and the interdependence of air, land, and water resources have captured the attention of the world. We in the military have contributed to the degradation of the world's environment. Our arrogant practices since the industrial revolution and their negative effects must be reversed. Because of the nations increasing awareness of this pollution damage, environmental protection and restoration of past degradation are now the law of the land. Today, all organizations - private, state, and federal- are required to comply with the new environmental rules and regulations. These same organizations are now as well equally responsible for restoring past degradation to ensure that future generations enjoy the heritage of the environment.

THE BASIC ISSUE

Looking back for a moment, we see what has been often overlooked: more than twelve years ago, Congress and the President sent the message that federal agencies (including the National Guard) should comply with environmental laws.⁹ Traditionally, the environmental strategy of federal agencies (particularly military organizations) has been based upon the misconception of exemption because of sovereign immunity status. Likewise the military has

traditionally assumed the priority of defense issues over compliance. Now the consequences of these misconceptions could be serious. Federal and state statutory penalties associated with environmental degradation are severe. Commanders are vulnerable to prosecution. They may in fact incur lawsuits against themselves and the National Guard for violating environmental laws.

Commanders are responsible not only for their own environmental actions (or inactions) but also for the environmental actions of their subordinates. The phrase "Take care of it - I don't want to know anything" not only could cost the commander thousands of dollars but also quite possibly could result in his or her imprisonment.

We may indeed be prosecuted for blatant disregard of environmental concerns. Last year the National Guard Bureau published an All States Letter announcing that the Justice Department will press criminal charges on individual commanders if necessary. Further, the letter specifies:

"It is the policy of the National Guard that environmental compliance is mandatory. Failure to comply with environmental protection may result in loss of mission capacity, penalties and criminal prosecution of our personnel".

In a recent article in the National Guard the National Guard Bureau's legal advisor for environmental compliance, Major Allen Curlee, offered the following advice to commanders:

"A commander must understand that his mission includes environmental compliance. He can go to jail if a certain permit is needed and he never got it. Imagine a kind of solvent that is labeled hazardous waste. It's easy to pour down the drain. If the commander was aware of this he can be as liable as the guy pouring it down the drain."

WHO'S WATCHING

For over three decades, Americans have been expressing deep concern about how we have polluted our environment and what must be done to decontaminate it. The environmental issue was a major campaign theme during the 1990 elections. The President and most of Congress promised Americans that the federal government would focus more effort on programs to clean up our pollution problems.

The EPA has been given the legal tools to force organizations -including the National Guard- to pay for cleanup costs of hazardous waste which they have created. Polluters are subject to fines three times the cost if they refuse to pay for initial cleanup. In addition, they may be fined up to \$20,000 per day until cleanup is completed.

EPA fully intends to exercise its authority to enforce compliance. In 1989 the Agency for the first time brought in more than \$1 billion in fine settlements. "We have got to get more money for cleanup from the polluters, because (otherwise) the money isn't going to be there... to do an adequate job," said EPA administrator William K Reilly, former head of the Conservation Foundation and the World Wildlife Fund, the first professional conservationist to hold the EPA job. ¹²

EPA is preparing itself for increased enforcement. With the support of both Congress and the Administration, the EPA expanded its ranks by 18 percent in 1989.¹³ In FY 90-91, the EPA is expected to add another 2,000 people, many of whom will work in the area of enforcement. ¹⁴

Federal facilities are of particular interest to the EPA. The EPA has established a Federal Facilities Compliance Strategy. This is considered a comprehensive and proactive approach to achieving and maintaining high rates of compliance at Federal facilities. The strategy provides the basic framework for EPA's programs to follow in ensuring that Federal facilities are fully integrated into Federal and State compliance monitoring and enforcement activities.⁵

Perhaps the most significant part of the strategy is the clear direction of equal compliance, which EPA is strongly advocating. The EPA strategy clarifies that Federal agencies must comply with environmental laws in the same manner and degree as non - Federal entities. It promises that EPA will utilize the full range of its available enforcement mechanisms to ensure compliance by federal facilities.

EDUCATION

Since more environmental laws are passed each year and enforcement efforts are expanding in many jurisdictions, U.S. judges are facing increased dockets of environmental cases. New felony clauses in the laws and stiffer federal sentencing guidelines have led to heavier fines and longer sentences. In many cases, prosecutors are charging the senior leadership (corporate executives) for crimes their organizations commit --further evidence of an emerging get-tough attitude toward environmental crime. To assist judges make sense out of this growing class of

litigation, the Environmental Law Institute in Washington, D.C., the Massachusetts Executive Office of Environmental Affairs, and the Flaschner Judicial Institute in Boston have developed an innovative environmental law education program exclusively for judges.⁶

Likewise, the Government's concern for environmental education was recently demonstrated when President Bush signed into law S.3176 (P.L.101-69), the National Environmental Education Act. The Act empowers the EPA to support and coordinate various educational laws and regulatory programs. "While our environmental laws and regulatory programs are achieving their ends, this is no longer a sufficient approach, given the magnitude and nature of the environmental problems we face," President Bush said as he signed the law.⁷

The goal of the legislation is to establish a nonprofit environmental Education Foundation within the EPA but privately funded. The law thus seeks to assist in educating the public about environmental issues and to inform them of what they may do to help in environmental efforts.

Military commanders would thus be well advised to educate themselves environmentally. One of this Administration's most recent efforts in the fight against pollution was the overwhelming support behind passage of the Clean Air Act Amendments, now P.L. 101-549. President Bush signed this bill into law 15 November 1990. Some provisions of the law will surely get the attention of environmental activists. The law authorizes the EPA administrator

to pay a reward (some have referred to this as a "bounty"), not to exceed \$10,000, to any person who furnishes information or service that leads to criminal conviction for any violation of provisions regarding attainment and maintenance of national air quality standards, control of hazardous air pollution, required permits or acid deposition control.

The Clean Air Act Amendments authorizes EPA to issue subpoenas in support of enforcement activities. It further authorizes citizens to file suits against parties that have violated the Clean Air Act two or more times in the past. These citizen plaintiffs would be authorized to seek civil penalties in citizen suits for past violations. Courts would be permitted to award up to \$100,000 to projects that would enhance protection of public health or environment. Finally, citizens could sue EPA if the Administration unreasonably delayed performing any non-discretionary actions.¹⁹ In short, the law has declared open season on persons or organizations that disregard scrupulous environmental responsibilities.

STATES' CONCERNS

Enforcement of environmental issues at the state level has also received increased attention. The nations governors and state attorneys general are calling on Congress and the President to clean up pollution problems at federal facilities. Both the National Governors Association and the National Association of Attorneys General have released a report focusing on five critical

areas:

- * Improving environmental compliance.
- * Ensuring better oversight at federal facilities.
- * Establishing a national agenda and time-frame for cleanup and compliance activities.
- * Providing adequate funding for compliance and cleanup work.
- * Ensuring development of comprehensive waste management plans.

The governors and state attorneys general, citing "serious environmental problems" at federal facilities, demand a get-tough approach to these problems. They argue that EPA has not imposed a "credible enforcement presence" at federal facilities. Congress, the report says, should enact legislation to strengthen EPA's ability to deal with federal facilities⁹

Today's National Guard is located in more than 3,000 communities across the United States. Additionally, the Guard trains at hundreds of training facilities throughout the world. Military readiness requires realistic training--training which enhances soldiers' abilities to perform their mission in all conditions. This training requires facilities that enable the Guard to adequately exercise and maintain their immense inventory of equipment. National Guard Armories or Reserve Centers house most Guard units. However, the Guard also depends on adequate state and federal facilities to carry out day-to-day operations.

RECOMMENDED ACTIONS

Pragmatically, commanders must ascertain that their maintenance and training activities are conducted in strict compliance with environmental regulations. In these functional areas, the commander must establish a definite compliance strategy to ensure his unit conforms with environmental laws. An excellent place to begin is with a unit environmental awareness program.

Environmental compliance will require command emphasis. We in the military enjoy the advantage of a proven clear line of authority. We must capitalize on this chain of command to make it absolutely clear to subordinates that we are committed to full compliance with the spirit as well as the letter of environmental laws. This commitment may best be demonstrated by first educating subordinates about the issues and holding them accountable for performance in this area. Attainment of full environmental compliance must be perceived as an essential part of the mission, not as an impediment to mission accomplishment. Commanders must demonstrate the same degree of awareness, involvement, and personal interest in environmental compliance that they reveal toward combat readiness. Commanders must also ensure this same adherence to an environmental ethic is maintained within the organization.

Some immediate steps commanders can implement to help achieve a sound environmental compliance program are as follows:

- * Appoint a unit environmental compliance team. Assist them in getting smart on the issues. Provide them the resources to learn federal, state and local environmental requirements.

* Ensure that environmental issues are incorporated into training plans and unit operations. This will require an in depth review of AR 200-1 (Environmental Protection and Enhancement).

Prior to their unit's next major field exercise, commanders should require an evaluation of the potential environmental damage that their unit's training may cause. This environmental evaluation is similar in theory to a risk analysis in the safety arena. According to Hogie Greene, Deputy Chief of the National Guard Bureau's Environmental Resource Division, the estimate is required by law. The correct title of this requirement is Record of Environmental Considerations (REC). It is required by NEPA and AR 200-1.²² Exercises that include river crossings or involve tracked vehicles and engineer equipment should raise immediate questions. In short, commanders must ask these questions. What are the consequences to the environment if I conduct this training as planned? Is there a better way -- one that will minimize the negative impact on the environment? Questions such as these will develop good habits and minimize disruption to training plans and operations.

* What are the potential environmental impacts from this unit's activities?

* Have you considered the possibilities of noise, air, water, and soil pollution?

* Have you considered the effect of your activities to endangered species, wildlife, plant life, and natural resources?

* Learn what your organization generates in hazardous waste. Know where it comes from and where it ends up. Ensure it is handled and stored properly.

Understanding how a unit generates hazardous waste may be the commander's first step towards compliance with state and federal environmental laws. A few minutes devoted to learning the basic characteristics and types of hazardous wastes will help keep you within the rules and regulations established by the Environmental Protection Agency and AR 200-1.

What is a hazardous waste? A hazardous waste is any solid, liquid or contained gaseous material that you no longer use. You either recycle it, throw it away, or store it until you have enough to treat or dispose of.

In the military we must recognize that we generate waste that can cause serious problems if not handled and disposed of properly. Such wastes can cause injury or death and damage. They can pollute land, air, and water. These wastes are considered hazardous and are currently regulated by Federal and State public health environmental safety laws.²

The Resource Conservation and Recovery Act (RCRA) has identified over 400 hazardous wastes. A complete listing is available within each state's National Guard Environmental Specialist's office or in the State's Department of Environmental Protection .

Another way to identify hazardous wastes is through their characteristics. A waste is considered hazardous if it has one or

more of the following characteristics:

- * It is easily combustible or flammable. This is called an ignitable waste. Examples are paint wastes, certain degreasers, or other solvents.

- * It dissolves metals and other materials or burns the skin. This is called corrosive waste. Examples are waste rust removers, waste acid, cleaning fluids, and waste battery acid.

- * It is unstable or undergoes rapid or violent chemical reaction with water or other materials. This is called a reactive waste. Examples are waste bleaches, and other waste oxidizers.

- * Wastes that contain high concentrations of heavy metals such as mercury, cadmium, lead and certain pesticides are considered toxic.

One aspect of good hazardous waste management can be thought of simply as using "good housekeeping" practices such as:

- * Using and reusing materials as much as possible.
- * Recycling or reclaiming waste.
- * Reducing the amount of waste you generate by using a non-hazardous substitute.

Another aspect of "good housekeeping" is to conduct frequent inspections of your organization's facilities. Areas of concern must include emergency procedures to implement should your organization experience a spill or potentially dangerous hazardous waste situation. Installation spill control plans are required if there is a potential for a "reportable" spill. All spills of oil, petroleum or hazardous materials must be properly cleaned. Spills

of reportable quantities must be reported by your State Headquarters to EPA and NGB within 24 hours. In most cases you may obtain prepared environmental compliance check lists from your State Environmental Specialist.

What are my Liabilities?

Earlier in this paper I stated, "You may be prosecuted for blatant disregard of environmental concerns". The consequences of prosecution are severe. Statutory penalties associated with environmental prosecution laws are significant. They are expensive for the individual and more so for the installation (See Figure 1.).

<u>Regulation</u>	<u>Penalty</u>
Clean Air Act	\$25,000 Fine/ 1 Year Prison
Clean Water Act	\$1 Million Fine - Installation \$250,000 Fine/3 Years Prison - Individuals
RCRA (Hazardous Waste)	\$1 Million Fine - Installation \$250,000 Fine/15 Years Prison - Individuals
CERCLA (Superfund)	\$50,000 Fine/5 Years Prison
Toxic Substance Control Act	\$1 Million Fine
Safe Drinking Water Act	\$1 Million Fine - Installation \$250,000 Fine/3 Years Prison - Individuals

Figure 1. Environmental Regulations and Maximum Penalties.

CONCLUSION

Considering the intense environmental interest demonstrated throughout our country, the newly enacted environmental laws, and the recently issued policy directives from the Secretary of Defense and the Chief of the National Guard Bureau, commanders would be wise to get with the "environmental compliance program".

Military property is contaminated by hundreds of pollutants and hazardous wastes, including chemicals used to wash airplanes, gasoline dumped on the ground, and sewage. Even the thousands of white-painted rocks that line the driveways and walks on Army posts, training facilities, and armories are considered hazardous waste because of their lead-based paint.²²

We must now pursue total environmental compliance. Commanders at every level must ensure this effort in every functional area of command. As commanders of complex military organizations, we must continually remind our subordinate commanders just where that "buck" does stop.

Succinctly stated, the commander's environmental compliance program must be a comprehensive effort directed toward improving environmental education, ensuring pollution prevention, and enforcing regulatory requirements. These actions will minimize the consequences that military activities have on the environment. The requirements are complex. Nevertheless, the reality is that compliance in the long run will save commanders time and money.

Perhaps the following statement made by a general counsel within the Directorate of Environmental Management at a military

installation could best serve to rebut environmental nonbelievers, both up and down the chain of command:

"It is vital that all involved understand that compliance with environmental laws is simply not optional. It is required. Noncompliers are made liable through the administrative and permitting process, injunction and contempt proceedings, bounty hunter rewards, citizen suits, civil or criminal penalties, and tort liability. These enforcement tools generate a mix of pragmatic and legal liability. The consequences of not delivering, receiving, understanding and complying with the message are very serious."²³

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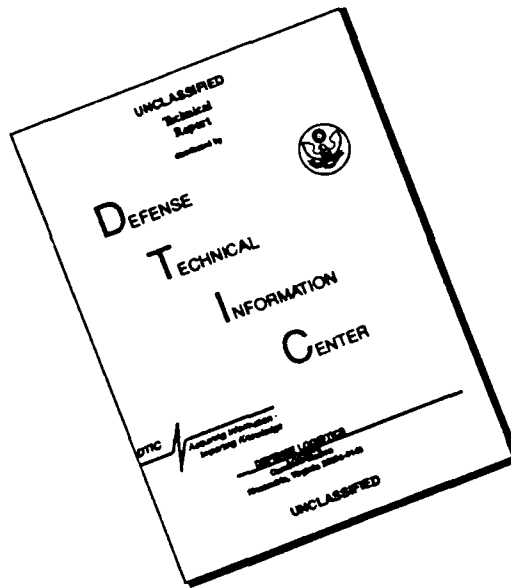
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