Department of Defense Environmental Policy in Afghanistan During Operation Enduring Freedom

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ABSTRACT

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Since the September 11, 2001 terror attacks on the Pentagon and the World Trade Center, the United States has conducted military operations in Afghanistan, a nation whose environment has been ravaged by decades of conflict and governmental instability. Afghanistan's fragile environment justifies scrutiny of the policies developed by the U.S. Department of Defense (DoD) for its Afghan operations, especially in light of DoD's lackluster environmental record during the Cold War. This thesis examines the general inapplicability of domestic U.S. environmental law to DoD's overseas contingency operations, the discretion afforded DoD in developing environmental policies for such operations, the contours of the policies that have been developed for operations in Afghanistan, and the potential impact of Afghanistan's 2007 Environmental Law. The thesis finds that DoD's Afghan environmental policies are protective of the environment, and that DoD will eventually have to take Afghan law into account when managing environmental matters in Afghanistan.

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The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

I. Introduction

On September 11, 2001, terrorists slammed commercial airliners into the Pentagon and New York City's World Trade Center. Osama Bin Laden's al-Qaeda network, the guest of Afghanistan's Taliban government, was quickly identified as the perpetrator of the attack. In November 2001, just two months after the twin towers fell, U.S. Military forces had seized control of the major northern Afghan cities, including Kabul, the nation's capital.[1]

While the early stages of the War on Terror progressed more rapidly than expected,[2] the conflict has since become a protracted, back-and-forth struggle. Recent reports from Afghanistan portray the conflict as a stalemate at worst,[3] and gradual regional progress at best.[4] In fact, some have compared the Afghan war to the Cold War, an epic struggle to be measured by decades rather than years. Like the Cold War, the War on Terror is likely to be lengthy "because the enemy in the war on terror is not a state or individual but an ideology. States can be defeated and overthrown, individuals killed or captured, but ideologies must be outlasted and discredited. This was true during the Cold War, and it remains true today."[5]

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[1] *See* SEAN M. MALONEY, ENDURING THE FREEDOM: A ROGUE HISTORIAN IN AFGHANISTAN 50-51 (2005).

[2] *See id.*

[3] *See* James Kitfield, *The Neglected Front*, THE NATIONAL JOURNAL, Feb. 9, 2008.

[4] Ann Marlowe, *A Counterinsurgency Grows in Khost; An unheralded U.S. success in Afghanistan*, THE WEEKLY STANDARD, May 19, 2008 (describing recent success by U.S. commanders in eastern Afghan provinces, especially Khowst).

[5] *See* Kitfield, *supra* note 3.

Another parallel has been drawn between the War on Terror and the Cold War: the risk of extreme environmental damage in the name of national defense.[6] The environmental mess left in the wake of the Cold War has been described as follows:

> For almost a half-century of the Cold War, the United States prepared for a hot war. During that period, the Department of Defense (DoD) manufactured or bought weapons and equipment, and trained relentlessly. In the process, DoD and its contractors generated an immense quantity of dangerous wastes. Some of these wastes spilled into the environment when pipelines leaked or storage tanks ruptured. Some were deliberately dumped in unlined pits or landfills, injected into wells, burned in the open air, or left in containers that are now corroded and leaking. The environmental impact of these actions, perfectly legal throughout the period, is enormous. So is the cost of cleaning up after them.[7]

During the Cold War, the lack of significant environmental laws gave DoD the discretion to engage in as much (or as little) environmental protection as it wanted to. Since most United States environmental laws, regulations, and executive orders don't apply to overseas contingency operations, DoD retains a significant amount of discretion during the War on Terror.

While much of the Cold War's environmental damage occurred on the United States' home soil, most of the War on Terror is fought overseas, and particularly in Afghanistan, where the environment is has suffered severe damage from decades of conflict and instability. If DoD were to exercise its discretion in an environmentally reckless manner during this war, the consequences would be disastrous for Afghanistan and its people.

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[6] *See* Nancye L. Bethurem, *Environmental Destruction in the Name of National Defense: Will the Old Paradigm Return in the Wake of September 11?* 8 HASTINGS W.-N.W. J. ENV. L. & POL'Y 109, 111 (2002)

[7] STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 94 (1996).

This thesis examines Afghanistan's fragile environment, the extent of DoD's discretion over environmental matters during overseas contingency operations, the environmental policies that DoD components have adopted for their Afghan operations, and the potential impact of Afghanistan's budding environmental law.[8] Section II examines environmental conditions in Afghanistan as reported by a study performed in 2002 by the United Nations Environmental Programme (UNEP). Section III examines U.S. environmental statutes, presidential executive orders, and DoD regulations to demonstrate the extent of DoD's discretion over environmental matters during overseas contingencies. Section IV evaluates the policies DoD has developed to govern its environmental affairs in Afghanistan. Section VI addresses the applicability of international law to the United States' Afghan operations. Section VII addresses the impact Afghanistan's 2007 environmental statute might have on U.S. environmental policy in Afghanistan.

II. UNEP's Assessment of Afghanistan's Fragile Environment

In 2003, the United Nations Environmental Programme (UNEP) released a "Post Conflict Environmental Assessment" for Afghanistan.[9] This report followed a month-long UNEP mission consisting of 20 Afghan and international scientists, who visited 38

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[8] This thesis does not focus on environmental damage caused by munitions or chemical releases from bombed targets in great detail. Neither does it focus on questions of environmental damage caused by combat operations as potential violations of the law of war. It focuses instead on the environmental policies governing the day-to-day operations of military installations.

[9] *See* United Nations Environmental Programme, *Afghanistan: Post-conflict Environmental Assessment* (2003) [hereinafter UNEP PCA]. Given the continuing armed conflict between the United States and NATO forces against insurgent groups, the "post-conflict" characterization of the report may have been overly optimistic. The U.S. and its allies have continued to engage Taliban forces through the spring of 2008. *See* Michael Evans, *British guide US Marines on raids to disrupt main Taliban supply routes*, TIMES (LONDON), May 12, 2008, at 32; Marlowe, *supra* note 4.

urban sites in four cities and 35 sites in rural areas in September 2002.[10] The UNEP team collected air, soil, and water samples to test current conditions, and used satellite imaging to evaluate deforestation, desertification, and wetland degradation.[11] The timing of the UNEP PCA makes it ideal for considering the potential impact of the U.S. military in Afghanistan, since the UNEP visit occurred less than a year after the United States entered the country in October 2001.[12]

The UNEP study's findings painted a gloomy picture of environmental conditions throughout Afghanistan. "Decades of conflict and violence coupled with drought and earthquakes have had devastating impacts not only the people of Afghanistan, but also on its natural environment," wrote UNEP Executive Director and UN Under-Secretary General Klaus Töpfer in the report's foreword.[13] Dr. Ahmad Yusuf Nuristani, the Afghan Minister of Irrigation, Water Resources and Environment, added: "Since 1973, Afghanistan has changed regimes frequently, and has been led by eight different leaders. Instability and war has caused widespread devastation, insecurity, displacement, poverty and severe environmental degradation."[14]

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[10] *See* UNEP PCA *supra* note 9, at 8. The report noted that not all areas of the country could be tested because of ongoing fighting and the presence of unexploded ordinance (UXO) and landmines in some areas. *See id.*

[11] *See id.*

[12] By the end of October 2001, the United States had already inserted a small contingent of its personnel to coordinate air strikes and to assist the Northern Alliance, an anti-Taliban rebel group. *See* John Diamond and Tim Jones, *U.S. inserts troops to aid rebels; Target spotters and liaisons number fewer than 100; A larger deployment is 'not ruled out,'* CHICAGO TRIBUNE, October 31, 2001, 1. An even smaller CIA team, codenamed JAWBREAKER, had been inserted by the end of September 2001. *See* MALONEY, *supra* note 1, at 40.

[13] *See* UNEP PCA, *supra* note 9, at 4.

[14] *See id.* at 5.

The instability that marks Afghanistan's recent history caused the UNEP team to deviate from the approach usually employed during a post-conflict assessment, which normally focuses on chemical releases from bombed targets.[15] "The picture in Afghanistan is different. The most serious issue in Afghanistan is the long term environmental degradation caused, in part, by a complete collapse of local and national forms of governance."[16] The UNEP report identified significant soil, water, and air pollution problems in urban areas, as well as natural resource degradation in rural areas. The report also studied the condition of protected areas such as wetlands, game preserves, and historic sites. While the UNEP report does not focus on damage directly caused by military operations, this thesis includes a brief discussion of such damage as well.

A. Pollution in Afghanistan's Urban Areas

The UNEP team surveyed environmental conditions at four Afghan cities: Herat, Kandahar, Mazar-e-Sharif, and Kabul, the nation's capital.[17] Since environmental records were almost nonexistent,[18] UNEP relied on "information provided verbally by city officials and members of the public,"[19] as well as samples gathered during its tour.[20]

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[15] *See id.* at 10.

[16] *Id.*

[17] *See id.* at 28.

[18] *See id.* at 28. "The environmental information available to UNEP was extremely limited and often outdated. Many records were destroyed during the period of conflict, and in many cases data have never been collected systematically." *See id.*

[19] *See id.* at 28-29.

[20] *See id.* at 29.

UNEP identified concerns with solid waste management practices, wastewater treatment, industrial sites, and air quality.

1. Solid waste management

UNEP found that despite "low levels of production and consumption, weak management of solid waste is already one of the country's most glaring environmental problems."[21] Household trash is mixed with medical, industrial, and hazardous waste "without regard to safety considerations or collection efficiency."[22] The UNEP PCA's description of waste collection in Kabul is almost post-apocalyptic:

> In some areas of Kabul…waste is piling up in the community's narrow streets and is being contaminated by human excrement from the open sewer. Due to a lack of adequate incineration facilities at Kabul hospital, medical wastes are also improperly disposed of on city streets. This is putting people at risk of exposure to bacteria, viruses, toxic materials and other hazards.[23]

The lack of adequate vehicles for waste collection and removal compound the problem. Kandahar, which UNEP states has one of the better waste collection systems, relies on wheelbarrows to transport household waste from homes to collection points, where trash is loaded onto trucks and hauled to a landfill.[24]

Problems continue even after the waste arrives at landfills, which are often sited and managed improperly. "Afghanistan has no proper sanitary landfills, and is currently relying on unmanaged dumpsites for waste storage."[25] The dumpsites for Kandahar and

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 29-30.

[24] *See id.*

[25] *Id.* at 30.

Herat are located in dry riverbeds and valleys above the cities, which will likely result in bringing waste back into the city during periods of heavy rain.[26] In Kabul, the dumpsite is "extremely close to a drinking water well field that may soon be expanded to meet the city's growing demand for water," creating a significant risk for contaminating the city's water supply.[27]

The risk from locating the dumpsites near water resources is heightened by primitive management practices. "The groundwater system that feeds wells near Kabul's Kampani landfill, for example, is not protected from contamination due to toxic leachate."[28] In Kandahar, the municipality has begun burning plastic waste, releasing dioxins and furans into its already-polluted air.[29] Children and elderly men are allowed to enter the Herat dumpsite, where they gather recyclable materials from trash mixed indiscriminately with clinical and animal waste.[30] In most dumpsites servicing Afghan cities, medical waste "is treated like ordinary municipal waste—collected by municipal workers and carted to the city's unprotected landfill."[31]

2. Wastewater treatment

Like its solid waste management practices, Afghanistan's wastewater treatment and water supply are underdeveloped and a source of environmental concern.

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[26] *See id.*

[27] *See id.*

[28] *Id.*

[29] *See id.* at 30-31.

[30] *See id.* at 31.

[31] *See id.*

"Wastewater collection barely exists in cities, often spewing into open gutters and canals— places where children gather to play…. On several occasions, UNEP witnessed sewer water being used to wash crops and for drinking."[32] In some districts of Kabul, sewage runs from open ditches into the Kabul River, which runs through other areas of the city where it is used for drinking and washing clothes.[33] The consequences of such practices revealed themselves in UNEP's water sampling, which detected high levels of coliform bacteria.[34] While Kabul does have a wastewater treatment facility, it only serves two districts and fails to remove *E. coli* and other coliforms from its effluent.[35]

3. Industrial Contamination

The UNEP report also addresses the environmental impact from industrial sites like oil refineries and factories, which are generally operated without regard for environmental values. "Pollution of the soil is very high around the refineries. Crude oil spilt near all the boilers, and spillage of refined oil products generally and particularly in areas where barrels are stored are prime causes."[36] Soil samples taken at refineries and petroleum storage facilities found high levels of hydrocarbons, "indicating severe oil pollution" and "highlighting the obvious and significant pollution risk to the area's groundwater supplies."[37]

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[32] *Id.* at 32.

[33] *See id.*

[34] *See id.* at 33.

[35] *See id.* at 33-34.

[36] *Id.* at 41.

[37] *Id.* at 41-42.

A troubling lack of environmental protection was also evident at factories visited by the UNEP team, which included a shoe factory operating in the basement of a block Kabul apartments. "Noxious fumes from the process undoubtedly permeate the residential quarters nearby. In addition, chemical waste from the facility is dumped into a hole in the ground adjacent to the factory site, a practice sure to be severely degrading groundwater sources."[38] The shoe factory relies heavily on children for labor, who are provided no protection from chemicals and often sleep in the factory itself, "a rest from the hardship of work but not from its toxic environment."[39]

UNEP also visited an automotive battery plant near Herat. While some environmental practices had been instituted at this factory, high levels of lead, oxides, and arsenic were found in dust collected from the room where used batteries were disassemble to recover the lead.[40] A nearby lead smelter operates without scrubbers, "allowing lead-contaminated emissions to escape into the atmosphere."[41]

4. Afghanistan's Air Quality

Industrial activities contribute to poor air quality in Afghanistan's urban areas. "Afghanistan's brick factories, of which there are many in and around cities, pump a great deal of air pollution into an urban atmosphere already heavily polluted by traffic-related emissions."[42] Sludge from oil refineries, sold as fuel for the brick factories and for

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[38] *Id.* at 43.

[39] *Id.* at 43-44.

[40] *Id.* at 45.

[41] *Id.*

[42] *Id.* at 45.

domestic heating, produces a thick black smoke when burned.[43] UNEP testing revealed that the sludge contained significant amounts of sulfur, and that burning the sludge emits sulfur dioxide and hydrocarbons, which contribute to respiratory illness.[44]

A state-owned asphalt plant near Herat also contributed to air pollution:

> On the day UNEP visited the plant, dense smoke was pouring into the atmosphere, coming primarily from the heaters of the asphalt binder. Smoke was also being emitted from the mixing unit. The chimney smoke and general smell of oil products in the area made it clear that the plant was contributing a heavy load of pollution into the atmosphere. The wind was blowing the emissions in the direction of neighboring settlements.[45]

Plant managers admitted that they were not using the best available technology, and that workers at the plant suffered health problems because of their exposure to the smoke.[46]

Emissions from vehicles and domestic heating are also significant problems. UNEP estimated that in 2002, there were 500,000 cars, 30,000 buses, and 50,000 trucks on Afghan roads, most of which ran on low grade diesel and were causing evident air pollution problems.[47] Air quality worsens in late autumn and winter due to increased use of ovens, stoves, and open fires, which often use toxin-emitting packaging materials as fuel because of firewood shortages.[48]

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[43] *See Id.* at 41, 44.

[44] *See id.*

[45] *Id.* at 46.

[46] *See id.*

[47] *See id.* at 47.

[48] *See id.*

B. Degradation of Afghanistan's Natural Resources

In addition to pollution, Afghanistan also suffers from gradual degradation of its natural resources caused by "military activities, refugee movements, over-exploitation, and a lack of management and institutional capacity," exacerbated by persistent drought.[49] Since more than 80 percent of the population "relies directly on the natural resource base to meet their daily needs, widespread environmental degradation poses and immense threat to future livelihoods."[50] This degradation is manifest in Afghanistan's water resources and wetlands, forests, and even its protected areas such as national parks and preserves.

1. Disappearing Water Resources and Wetlands

The UNEP team focused on two of Afghanistan's major river systems: the Helmand and the Amu Darya.[51] While the flow of the Helmand River has been erratic in recent years,[52] its flow in 2001 was only 48 million cubic meters, "98 percent below its annual average."[53] The Amu Darya, which forms the border between Afghanistan, Tajikistan, Uzbekistan, and Turkmenistan,[54] has likewise diminished in recent years.

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[49] *See id.* at 48.

[50] *See id.* "Afghanistan is an essentially agrarian country, with around 80 percent of the population involved in farming or herding, or both." *Id.* at 15.

[51] *See id.* at 49.

[52] The flow of the Helmand fluctuated dramatically during the 1990s, dropping from just over 2200 million cubic meters in 1991 to just under 530 million cubic meters in 1993. The Helmand rose gradually for a few years, spiking almost to 2200 million cubic meters again in 1997, but plummeted to 258 million cubic meters in 1998. *See id.* at 51 (citing United Nations, *United Nations Inter-agency Assessment Report on the Extreme Drought in the Islamic Republic of Iran* (2001)).

[53] *See UNEP PCA, supra* note 9, at 51.

[54] *See id.* at 59.

"Less than 20 years ago the course of the river ran for 1,200 km before emptying into the Aral Sea. Today, the river dries up before reaching the Aral Sea due to excessive extraction of its waters for cotton and hydroelectric production...."[55]

The loss of reliable river flows has severely impacted important wetlands, particularly in the Helmand River Basin. UNEP found that most reed beds in the Sistan wetlands had completely dried up, and satellite imaging verified that 99 percent of the wetland had dried since 1998.[56] Unmanaged diversion of irrigation water from the Helmand River and uncoordinated deep well drilling have also impacted wetlands and water supplies.[57] Increased erosion from the loss of vegetation[58] and pesticide residues from agriculture and insect control[59] add to the environmental damage found in both the Helmand and Amu Darya river basins.

2. Dwindling Forests

Afghanistan's forests are also threatened by the drought, mismanagement and over-exploitation. "The mixed oak and coniferous forests of the east have potential to be managed as sources of timber, but are now being logged illegally, severely reducing the

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[55] *Id.*

[56] *See id.* at 51. The Sistan wetland has recovered from droughts in the past. In 1987 approximately 73 percent of the wetland had dried up, but had almost completely recovered by 1998. *See id.* at 51-52. The damage reported by UNEP in 2003 was even more severe, however. *See id.* at 51.

[57] *See id.* at 57.

[58] *See id.* at 52, 61.

[59] *See id.* at 58-60.

country's natural resource base."[60] Cedar trees are the primary coniferous trees being harvested, especially for export to Pakistan.[61] "During Mujahedeen and Taliban times, local government officers reported that up to 200 timber trucks could be observed per day on the main road in Kunar province.... Although the Transitional Authority has issued a timber ban to stop the uncontrolled logging of the resource, an average of 20 to 50 trucks can still be seen per day on the main Kunar roads."[62]

In other areas, pistachio and almond trees "are valuable sources of nuts for subsistence and export, but have been increasingly cut for firewood."[63] While forest management regulations were enacted by central and local governments in the 1970s to protect pistachio trees, the system broke down after 1979, "leaving a management void and an opportunity for uncontrolled exploitation."[64]

3. Unprotected National Parks and Preserves

Various Afghan regimes have attempted to protect some of Afghanistan's remarkable landscape, designating one national park, three waterfowl sanctuaries, and two wildlife reserves. [65] Legislation for establishing and managing protected areas has never emerged, however, making the current legal status of such areas unclear.[66] Of all the protected areas, Band-e-Amir National Park has been least affected by the turmoil

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[60] *Id.* at 63.

[61] *See id.* at 71.

[62] *See id.* at 71-72.

[63] *Id.*

[64] *See id.* at 69.

[65] *See id.* at 73.

[66] *See id.*

marring Afghanistan's recent history; water levels and water quality in the park's six lakes remain high.[67] While the legal status of Band-e-Amir is uncertain,[68] the park is recognized "as containing a unique combination of characteristics that meet formal criteria for acceptance as a UNESCO World Heritage Natural Site."[69] Other sites have not fared as well under governmental regimes unable to, or disinterested in, protecting these areas of outstanding natural beauty.

C. Spoils of War: Damage from Military Operations

Since the UNEP team found that most of Afghanistan's environmental woes have resulted from governmental weakness and instability rather than combat operations, the UNEP PCA only briefly mentions the direct effects of military operations through 2002. For example, the UNEP PCA notes that military commanders who seized control of local water supply systems damaged downstream water supplies because they lacked an understanding of "traditional distribution rights or water infrastructure needs."[70]Military operations following the Soviet occupation also contributed to deforestation as trees were cut for firewood and to deny opposing forces opportunities to cover in and conduct ambushes from the forests.[71] Hunting in or near Band-e-Amir for ibex and urial by

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[67] *See id.* at 75.

[68] *See id.* In 1973, Band-e-Amir was declared a national park in response to a petition from the Afghan Tourist Organization (ATO), but the declaration was never published in the official government gazette. Technically, the park has no legal status. *See id.*

[69] *See id.*

[70] *See id.* at 57.

[71] *See id.* at 65-66.

"military men" was another war-related environmental impact mentioned in the report.[72] Finally, the UNEP PCA expressed concern that "western aid workers and soldiers" purchasing snow leopard skins from Kabul street vendors could further "increase the snow leopard hunt, driving the species closer to extinction in Afghanistan."[73]

While not mentioned in the UNEP PCA, landmines and unexploded ordinance (UXO) from U.S. cluster bombs dropped early in Operation ENDURING FREEDOM have also been identified as environmental problems. The decades of fighting in Afghanistan have left behind 10 to 14 million landmines, making Afghanistan the most heavily mined country in the world in 2001.[74] "During the Soviet occupation, vast quantities of cluster and unitary munitions as well as landmines were used against the Afghan freedom fighters."[75] Early in OEF, the U.S. also used cluster munitions, dropping approximately 244,420 cluster bomblets,[76] with an estimated "dud rate" of 10 percent.[77] The rumored use of depleted uranium munitions by the U.S. military in Afghanistan has also been discussed as a potential environmental problem.[78]

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[72] *See id.* at 77.

[73] *See id.* at 89.

[74] *See* Tim Friend, *Millions of land mines hinder Afghan recovery*, USA TODAY, Nov. 28, 2001, at 1A.

[75] Press Release, U.S. Department of State, Fact Sheets: Putting the Impact of Cluster Munitions In Context with the Effects of All Explosive Remnants of War (Feb. 15, 2008) (available at www.lexis.com, News, All (English, Full Text) database).

[76] *See* Robert M. Augst, *Environmental Damage Resulting from Operation Enduring Freedom: Violations of International Law?* 33 ENVTL. L. REP. 10,668, 10,6670-71 (citing Thomas M. McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 54 (2002).

[77] *See* Augst, *supra* note 76, at 10,6670 (citing Elizabeth Neuffer, *Fighting Terror After the Battle/Civilian Casualties*, BOSTON GLOBE, Jan. 20, 2002, at A23).

[78] *See* Augst, *supra* note 76, at 10,677 (citing Dan Fahey, *The Use of Depleted Uranium in Afghanistan*, Dec. 22, 2002, at http://www.antenna.nl/wise/uranium/dissafdf.html (last visited June 11, 2003)). Mr.

The United States has already taken steps to address both landmines and UXO in Afghanistan. The United States began its humanitarian demining activities in Afghanistan in 1988, and has spent $28 million on Afghan demining operations since then.[79] The United States has also contributed to demining in Afghanistan through the U.N. Office of Coordination of Humanitarian Assistance to Afghanistan (UNOCHA) and the Hazardous Area Life Support Organization (HALO) Trust, a British non-governmental organization.[80] Demining efforts had reduced the number of monthly mine-related casualties by 50 percent by 2001.[81]

To address UXO, the U.S. spent $3.1 million in 2002 on additional operations to remove unexploded cluster bomblets.[82] This dedicated cleanup effort focused on "all known sites with unexploded allied cluster munitions" and was completed in 2002.[83] Landmines remain a larger problem than unexploded cluster munitions. In 2006, the UN reported 16 known casualties from cluster munitions out of 796 casualties from all types of explosive remnants of war (ERW).[84] For the same year, the International Committee of

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Augst admits that the reports of depleted uranium munitions in Afghanistan he cited are "circumstantial evidence" and "mere speculation." *See id.* Afghan Public Health Minister Sayed Mohammed Amin Fatemi described reports about the use of depleted uranium by U.S. forces, and birth defects caused by such use, as "absolutely baseless." *See BBC Monitoring South Asia: Afghan minister says reports of uranium use baseless* (text of privately-owned Afghan "Aina TV" television broadcast Apr. 22, 2008)(available at http://www.lexis.com).

[79] *See* Lincoln Bloomfield, Assistant Secretary of State for Political-Military Affairs, Foreign press center briefing (Dec. 18, 2001).

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See* Press Release, U.S. Department of State, *supra* note 75.

[84] *See id.*

the Red Cross reported that only 22 of 784 total ERW casualties were caused by unexploded cluster bomblets.[85]

III. DoD's Discretion over Establishing Contingency Environmental Policy

Even though the scope of United States environmental law has steadily increased since the 1970s, DoD still retains a great deal of discretion over its environmental practices during overseas contingency operations like Operation ENDURING FREEDOM. This discretion arises because such operations "slip through the cracks" between the requirements of U.S. Environmental statutes, presidential executive orders, and DoD regulations that govern non-contingency overseas activities. This section first explains why contingency operations are generally exempt from most environmental statutes, as well as executive orders and DoD regulations that apply to non-contingency operations.

A. Domestic U.S. Environmental Statutes

Most U.S. environmental statutes have been interpreted not to apply extraterritorially because "the legislation of Congress is presumed to 'apply only within the territorial jurisdiction of the United States; unless the 'language in the relevant Act gives [an] indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'"[86] While the D.C. Circuit Court of Appeals held in *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) that the presumption against extraterritorial

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[85] *See id.*

[86] Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 50 (quoting *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949))).

application of NEPA does apply to federal activities in Antarctica, it expressly stated that was not deciding "how NEPA might apply to actions in a case involving an actual foreign sovereign."[87]

While *Massey* left unresolved the question of NEPA's application to activities occurring within a foreign country, the D.C. Circuit's reasoning suggests that the presumption against extraterritorial application would apply. The *Massey* court applied two factors to determine whether the presumption against extraterritorial application applies. First, it considered "whether the statute seeks to regulate conduct in the United States or in another sovereign country."[88] Next, it examined "whether NEPA would create a potential for 'clashes between our laws and those of other nations.'"[89] The Court noted that NEPA did not raise extraterritoriality concerns because NEPA is designed to control the decision-making process rather than the substance of agency decisions, and because of Antarctica's unique, non-sovereign status.[90] Finally, the *Massey* court recognized that the United States had already exerted control over the continent: "[T]o the extent that there is any assertion of governmental authority in Antarctica, it appears to be predominantly that of the United States."[91] Since the factors considered by the *Massey*

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[87] *See Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 537-38 (D.C. Cir. 1993).

[88] *See id.* at 532.

[89] *See id.*

[90] *See id.* at 532-34. The court stated there were "at least" three places where extraterritorial application of NEPA would not conflict with foreign laws: the high seas, outer space, and Antarctica. *See id.* at 534. While the court left open the possibility of additional places to which its holding would apply, it is difficult to imagine any sovereign-less place.

[91] *See id.* at 534 (quoting Beattie v. United States, 756 F.2d 91, 99 (D.C. Cir. 1984).

court are unlikely to be satisfied for federal activities in foreign countries, NEPA would not apply extraterritorially under the *Massey* test.[92]

The extraterritorial application of most other U.S. environmental statutes is also unlikely. For example, the Clean Water Act's permit requirements would not apply to discharges into foreign lakes and rivers because the statute regulates discharges into a "water of the United States."[93] The Clean Air Act, while not expressing an intent to be applied extraterritorially, does provide procedures for abating "air pollutants emitted in the United States" which cause or contribute to air pollution in a foreign country.[94]

The extraterritoriality of the Endangered Species Act (ESA)[95] has not been clearly resolved. In *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), the Eighth Circuit held that the ESA applied extraterritorially, relying in part on language in the statute requiring the Secretary of the Interior take into account actions taken by foreign countries to protect a species, as well as designation as an endangered species by a foreign country,

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[92] In fact, the D.C. District Court has since refused to apply NEPA to U.S. military activities in Japan because the legal status of bases in Japan is not analogous to the United States' Antarctic research station. The Court also expressed concerns with disrupting the treaty-based relationship between the U.S. and Japan and interfering with foreign policy. *See NEPA Coalition v. Aspin*, 837 F.Supp. 466, 467 (1993). *See also* Richard M. Whitaker, *Environmental Aspects of Overseas Operations*, 1995 ARMY LAW. 27, 28.

[93] Section 301 of the Clean Water Act makes unlawful "the discharge of a pollutant" unless in compliance with other sections of the Act, including the National Pollution Discharge Elimination System permit program authorized in Section 402. *See* 33 U.S.C §§ 1311, 1342 (200). Section 502(12)(A) defines "discharge of a pollutant" as "an any addition of any pollutant to navigable waters from any point source." See 33 U.S.C. § 1362(12)(A) (2000). Section 502(7) defines "navigable waters" and "the waters of the United States, including the territorial seas." See 33 U.S.C. § 1362(7) (2000). The only extraterritorial discharges theoretically regulated by the Clean Water Act would be discharges "to the waters of the *contiguous zone* or the *ocean* from any point source other than a vessel or other floating craft." *See* 33 U.S.C. § 1362(12)(B) (2000)(emphasis added).

[94] *See* RICHARD A. PHELPS, ENVIRONMENTAL LAW FOR DEPARTMENT OF DEFENSE INSTALLATIONS OVERSEAS 4, n. 17 (4th ed. 1998)(quoting 42 U.S.C § 7415).

[95] 16 U.S.C. §§ 1531-1544 (2000).

when determining whether a species is endangered.[96] The Supreme Court reversed for lack of standing rather than reaching the substantive issues decided by the Eighth Circuit.[97] While some, including Justice Stevens,[98] argue that the result would have been the same on the merits of the case,[99] a majority of the Supreme Court has not squarely addressed the issue.

One U.S. environmental statute, the National Historic Preservation Act (NHPA),[100] has been held to apply to overseas activities, but only because the NHPA was amended to expressly provide for extraterritorial application in order to comply with the Convention Concerning the Protection of the World Cultural and National Heritage.[101] In that case, the District Court for the Northern District of California ruled that DoD had failed to "take into account" the effect of building a military air station near Okinawa on the Okinawa dugong, a manatee-like marine mammal of cultural and historical

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[96] *See id.* at 123.

[97] *See Defenders of Wildlife, Friends of Animals v. Lujan*, 504 U.S. 555, 578 (1992).

[98] Justice Stevens filed a concurring opinion arguing that while he would have found sufficient standing, he concurred in the judgment because he believed the ESA's consultation requirements did not apply to activities in foreign countries. *See id.* at 585-87 (Stevens, J., concurring).

[99] *See* Whitaker, *supra* note 92, at 28 (citing David A. Mayfield, The Endangered Species Act and Its Applicability to Deployment of U.S. Forces Overseas, 5-8 (Dec. 1994) (on file with the Center for Law and Military Operations & International and Operational Law Division, The Judge Advocate General's School, United States Army, Charlottesville, Virginia)).

[100] 16 U.S.C. §§ 470-470x-6 (2000).

[101] *See Dugong v. Gates*, 2008 U.S. Dist. LEXIS 5234, 17. NHPA Section 402 states: "Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects." 16 U.S.C. § 470a-2 (2000).

significance to the Japanese people.[102] The Department of Defense would still be afforded considerable discretion when complying with this NHPA provision, since "take into account" essentially means "to consider and weigh."[103]

B. Executive Orders and DoD Implementing Regulations

While U.S. environmental statutes generally do not apply to overseas activities of federal agencies, requiring those agencies to consider and limit their environmental impact overseas is undeniably good policy. President Jimmy Carter signed Executive Order 12,088[104] and Executive Order 12,114[105] within a few months of each other in an effort to impose environmental controls on overseas federal activities.[106] While DoD has issued directives to implement these executive orders, overseas contingency operations like ENDURING FREEDOM have been exempted from the executive orders and directives. These exemptions considerably broaden DoD's discretion for dealing with its environmental planning and pollution control practices in Afghanistan.

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[102] *See Dugong*, *supra* note 101, at 90-91. The Dugong was dismissed as a plaintiff, however, because Congress had not authorized suits filed in the name of an animal in the Administrative Procedures Act. *See id.* at 32-33 (citing Cetacean Community v. Bush, 386 F.3d 1169, 1178 (9th Cir. 2004).

[103] *See Dugong*, *supra* note 101, at 79. The *Dugong* court set forth the following outline of how to comply with NHPA Section 402: "DOD must determine whether the available information is sufficient, and if not, what additional information must be gathered or produced. DOD must examine that information, whether it is generated by the Government of Japan, by the DOD itself, or by outside experts and organizations. Based on that information, DOD must determine whether there will be adverse effects or no adverse effects. If there are adverse effects, DOD must consider and evaluate options to mitigate or avoid those effects." *See id.* at 79-80.

[104] *See* Executive Order No. 12,088, 3 C.F.R. 243 (1978).

[105] *See* Executive Order No. 12,114, 3 C.F.R. 356 (1979).

[106] Executive orders had addressed environmental concerns on domestic installations as early as 1948, but Executive Order 12,088 was the first to show "a similar level of presidential interest" to environmental protection at overseas installations. *See* Phelps, *supra* note 86, at 52. Executive Order 12,088 was signed on October 13, 1978, and Executive Order 12,114 was signed on January 4, 1979.

1. Executive Order 12,114: Environmental Planning

Executive Order 12,114, Environmental Effects Abroad of Major Federal Actions, focuses on environmental planning rather than pollution prevention. This order "establishes requirements for the conduct of environmental studies for activities conducted overseas, somewhat similar to the environmental analysis requirements regarding operations conducted within the United States mandated by the National Environmental Policy Act (NEPA)."[107]

The stated purpose of Executive Order 12,144 is to "enable responsible officials of Federal agencies…to be informed of pertinent environmental considerations and to take such considerations into account with other pertinent considerations of national policy, in making decisions regarding such actions."[108] To accomplish this purpose, Executive Order 12,114 requires an agency conducting a major federal action outside of the U.S. that significantly affects the environment to prepare a document analyzing such effects.[109] The documentation required might be an environmental impact statement (EIS), "bilateral or unilateral environmental studies," or "concise reviews of the environmental issues involved, including environmental analyses or other appropriate documents," depending on the type of action the agency is contemplating.[110]

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[107] Joint Pub. 4-04, *Joint Doctrine for Civil Engineering Support* (2001), at VI-3.

[108] *See* Exec. Order 12,144, Sec. 1-1. While expressly not a creation of NEPA and other domestic environmental statutes, Executive Order 12,114 "furthers the purpose" of such statutes "consistent with the foreign policy and national security policy of the United States." *Id.*

[109] *See id.*, Sec. 2-3.

[110] *Id.* at Sec 2-4. Section 2-3 of Executive Order 12,114 creates four categories of major federal actions: 1) actions affecting the environment of a global commons such as Antarctica; 2) actions affecting the environment of a foreign nation not participating with the U.S.; 3) actions affecting the environment of a foreign nation that provide that nation with a product or project that produces toxic pollutants or radioactive

Executive Order 12,114 gave federal agencies eight months to develop procedures implementing the order.[111] The Department of Defense complied with this mandate within three months by releasing DoD Directive 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions* on March 31, 1979.[112] This directive "defines key terms, establishes review procedures, and describes documentation requirements" for DoD's overseas activities.[113]

Obviously, conducting a NEPA-like review of environmental impacts before initiating a contingency military operation would be detrimental to national security. If an EIS were required before initiating operations in Afghanistan after the September 11 attacks, for example, national security would be jeopardized by an inability to use rapid counterstrikes deter future attacks. Executive Order 12,114 anticipates the need for immediate action in such situations, and expressly exempts "actions taken pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict."[114] DoD Directive 6050.7 echoes this exemption, and further states that the exemption applies "as long as the armed conflict continues."[115]

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waste; and 4) actions outside the United States that significantly affect natural resources of global importance designated for protection. *See id.* at Sec. 2-3.

[111] *Id.* at Sec. 2-1.

[112] *See* DoDD 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions*, March 31, 1979. *See also* Phelps, *supra* note 86, at 54.

[113] *See* Phelps, *supra* note 86, at 54.

[114] *See* Executive Order 12,114, at Sec. 2-5(a)(ii).

[115] *See* DoDD 6050.7, para. E2.3.3.1.3. "Armed conflict" is defined to include hostilities for which Congress has "declared war or enacted a specific authorization for the use of armed forces"; hostilities for

Because of these exemptions, neither Executive Order 12,114 nor its implementing DoD directive apply to contingency operations like ENDURING FREEDOM.[116] This lack of significant environmental planning requirements during deployments[117] broadens DoD's discretion in conducting its operations in Afghanistan, even though past wars have left its environment in a fragile state.

2. Executive Order 12,088 Overseas Environmental Compliance

Executive Order 12,088, *Federal Compliance with Pollution Control Standards*, required federal agencies to go beyond environmental planning and requires compliance with environmental standards. This order states that the head of each Executive agency is responsible for all necessary pollution prevention, control, and abatement actions on federal facilities, and for compliance with pollution control standards set forth in federal environmental statutes.[118]

Executive Order 12,088 applies chiefly to domestic installations, but also imposes an additional obligation for overseas facilities:

> The head of each Executive agency that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution

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which a report is required pursuant to the War Powers Resolution, 50 U.S.C. § 1543 (Supp. 1978); and "other actions by the Armed Forces that involve…introduction of weapons in situations where hostilities occur or are expected." *See id.*

[116] Similarly, all U.S. activities in Southwest Asia during Operations DESERT SHIELD and DESERT STORM were exempt from Executive Order 12,114. *See* Whitaker, *supra*, note 92, at 30, n. 26.

[117] While the Overseas Baseline Guidance Document (OEBGD), DoD 4715.05-G (discussed below in greater detail), virtually duplicates the environmental planning requirements of DoDD 6050.7, the OEBGD does not apply to contingency operations like ENDURING FREEDOM. *See* Phelps, *supra* note 86, at 66, 69-70.

[118] *See* Executive Order No. 12,088, §§ 1-101, 1-102.

> control standards of general applicability in the host country or jurisdiction.[119]

This provision essentially requires federal agencies to comply with host nation environmental standards, provided such standards are generally applied to other entities within the jurisdiction.[120] The "general applicability" language frees federal agencies from complying with host nation environmental laws "created to unfairly or prejudicially single out defense facilities, nor would compliance be necessary where environmental laws are not generally enforced or disregarded."[121]

Since E.O. 12,088 states that agency heads "shall ensure" compliance, the Pentagon was required to take action to implement the order's mandate throughout DoD operations.[122] Even though Executive Order 12,088 was signed before Executive Order 12,114, it took much longer for DoD to issue an implementing directive, "and consequently the order was not uniformly reflected in the operations of DoD installations and facilities overseas."[123]

Three factors led to this delay. First, unlike Executive Order 12,114, Executive Order 12,088 lacked a built-in deadline for implementation.[124] Second, most of the intervening decade spanned the Reagan administration, which was not known for its

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[119] *See id.* at § 1-801.

[120] *See* Phelps, *supra* note 86, at 53.

[121] *See* James E. Landis, *Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies*, 49 NAVAL L. REV. 99, 116 (2002).

[122] *See* Phelps, *supra* note 86, at 53.

[123] *Id.*

[124] *See id.* at 54.

environmental activism.[125] Finally, Executive Order 12,088 was a more daunting task because it went beyond environmental planning for future activities, and actually required DoD to comply with environmental standards, taking into account host nation law in overseas locations. Eventually, DoD developed a regulatory system to satisfy Executive Order 12,088's mandate.

a. DoD Directive 6050.16

All told, it took more than a decade, two audits by the General Accounting Office (GAO),[126] and a congressional mandate for DoD to implement an overseas environmental compliance policy.[127] The National Defense Authorization Act for FY 1991 required DoD to "develop a policy for determining applicable environmental requirements for military installations located outside the United States."[128] On September 20, 1991, DoD Directive 6050.16, *DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations*, was issued to comply with the Authorization Act.[129] While not specifically referring to Executive Order 12,088, DoD Directive 6050.16 "had

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[125] Environmental activist group Friends of the Earth released a report at the end of the Reagan administration entitled "Goodbye and Good Riddance: The End of the Reagan Environmental Nightmare." *See* Cass Peterson, *Bidding Reagan a Bitter Farewell; Consumer and Environmental Activists Decry President's Lagacy*, Washington Post, Jan. 18, 1989, at A21.

[126] *See* Phelps, *supra* note 86, at 54 (citing GAO/C-NSIAD-86-24, Hazardous Waste Management Problems at DoD Overseas Installations (Sept. 1986); GAO/NSIAD-91-231, Hazardous Waste Management Problems Continue at Overseas Military Bases (Aug. 1991)). *See also* Landis, *supra* note 121, at 117.

[127] *See id.* (citing National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Sec. 342, para. (b)(1), 104 Stat. 1485, 1537-38 (1990)). *See also* Landis, *supra* note 121, at 117.

[128] *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Sec. 342, para. (b)(1), 104 Stat. 1485, 1537-38 (1990).

[129] DoDD 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, Sept. 20, 1991.

the practical effect of implementing the executive order's mandate to comply with the host country's 'pollution control standards of general applicability.'"[130]

Under the directive, environmental standards applicable to installations within the United States formed the starting point for the environmental standards established for overseas installations. The directive required DoD to maintain a "baseline guidance document" to protect the environment on such installations, which guidance "shall consider generally accepted environmental standards for similar installations, facilities, and operations in the United States and requirements of U.S. law that have extraterritorial application."[131] The standards in the baseline guidance document would control unless inconsistent with or less protective than host-nation standards, or agreements between the host nation and the United States.[132] The responsibility to identify and evaluate standards from host-nation law and international agreements for a given country was assigned to a "DoD Executive Agent."[133]

The directive also included provisions governing the disposal of hazardous wastes. First, it required DoD Components to ensure hazardous wastes were not disposed of in the host nation, unless such disposal complied with the baseline guidance document and in accordance with applicable international agreements.[134] If disposal in the host nation was not possible, the directive required the waste to be disposed of in the United

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[130] *See* Phelps, *supra* note 86, at 55 (quoting Executive Order 12,088, §1-801).

[131] *See* DoDD 6050.16, para. 3.1.1.

[132] *See id.* at para. 3.1.2.

[133] *See id.* at paras. 3.2, 4.1.2.

[134] *See id.* at para. 3.4.

States or another foreign country, "unless other disposal arrangements are approved by the Department of Defense."[135]

b. The OEBGD

The baseline guidance required by DoD Directive 6050.16 was compiled in the Overseas Environmental Baseline Guidance Document (OEBGD), which was published in October, 1992.[136] The OEBGD has since been republished twice, once in 2000[137] and again in 2007.[138] The current version is divided into 19 chapters and provides standards for essentially every type of environmental concern regulated by U.S. law.[139] One author highlights the comprehensive nature of the OEBGD:

> Lest anyone think that little time or effort has gone into compiling and assessing the applicability of U.S. environmental law, the OEBGD is 230 pages long, covering 22 ostensibly military compliance references which in turn incorporate virtually every U.S. environmental regulation. Topics cover air emissions, water purification and quality, hazardous material handling, waste management, several specific classes of material hazards, spill response and planning, protection of cultural resources, and protection of natural resources and endangered species. Coverage appears to adequately address major issues of domestic environmental law.[140]

The OEBGD is not, however, a compilation of all U.S. environmental laws and regulations, but rather minimum standards of environmental protection DoD will apply to

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[135] *See id.* at paras. 3.4.1, 3.4.2.

[136] *See* DEPT. OF DEFENSE ENVTL. OVERSEAS TASK FORCE, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (1992). *See also* Phelps, *supra* note 86, at 67.

[137] *See* DoD 4715.05-G, Overseas Environmental Baseline Guidance Document, March 15, 2000.

[138] *See* DoD 4715.05-G, Overseas Environmental Baseline Guidance Document, May 1, 2007.

[139] *See id*, at 3-5, Table of Contents.

[140] *See* Landis, *supra* note 121, at 118 (referring to the OEGBD issued in 2000).

overseas activities.[141] Domestic U.S. standards are considered in the development of the OEBGD, but not directly incorporated.[142]

While perhaps not as stringent as domestic U.S. environmental standards, the OEBGD provides meaningful environmental protection for overseas installations, and arguably more protection than Executive Order 12,088 and federal law require.[143]

> Construed narrowly, the specific mandate could have been satisfied merely by identifying and complying with environmental requirements applicable at US military installations in foreign countries. These would include any applicable requirements of international law, host nation law, and US law having extraterritorial effect. Instead, [the Office of the Secretary of Defense] went much further by developing, as a matter of policy, a comprehensive and detailed set of environmental controls.[144]

By going beyond the minimum requirements, the standards set forth in the OEBGD indicate that DoD, at least by 1992, had begun to take its environmental responsibilities seriously.

c. DoD Instruction 4715.5

DoD Directive 6050.16 was eventually replaced in 1996 with DoD Instruction 4715.5, *Management of Environmental Compliance at Overseas Installations*, which adopted essentially the same approach, with several significant modifications.[145] First, the

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[141] *See* Phelps, *supra* note 86, at 67.

[142] *See* Yusun Woo, Note, *Environmental Problems on the U.S. Military Bases in the Republic of Korea: Who Is Responsible for the Cleanup Expenses and Whose Environmental Standards Will Apply?* 15 SOUTHEASTERN ENVTL L. J. 577, 594 (2007).

[143] John P. Quinn, et al., *United States Navy Development of Operational-Environmental Doctrine*, in THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES 156, 167-68 (Jay E. Austin & Carl E. Bruch eds., 2000)(noting environmental provisions unrelated to pollution, such as protection for endangered species).

[144] *See id.* at 168.

[145] *See* DODI 4715.5, *Management of Environmental Compliance at Overseas Installations*, Apr. 22, 1996.

instruction required an at least biennial review of the OEBGD, conducted by the U.S. Air Force.[146] Second, the process for comparing the OEBGD to host-nation standards was changed slightly, and the resulting rules were to be called "Final Governing Standards" (FGS)[147], a "unique combination of U.S. and host country law" that applies the more restrictive regime when the OEBGD and host-nation standards conflict.[148] The instruction also expressly states that the instruction is intended to implement Executive Order 12,088.[149]

Next, DoD Instruction 4715.5 explicitly exempts "off-installation operational deployments,"[150] an exemption echoed in the current version of the OEBGD.[151] Since DoDI 4715.5 and the OEBGD provide no specific guidance for applying host-nation standards to overseas contingency operations, DoD's implementation of Executive Order 12,088 is arguably too vague to be complete. This approach increases DoD's discretion for setting environmental standards for contingency operations, and arguably creates a partial exemption of Executive Order 12,088's requirements for apply host-nation standards, even though the order itself provides for no such exemption.[152] In spite of the exemption, the OEBGD can still influence environmental standards created for

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[146] *See id.* at para. 6.2.2, 6.2.3.

[147] *See id.* at para. 6.3.

[148] *See* Landis, *supra* note 121, at 118.

[149] *See* DoDI 4715.5, at para. 6.3.8.

[150] *See id.* at para. 2.1.4. "Off-installation operational deployments include cases of hostilities, contingency operations in hazardous areas, and when U.S. Forces are operating as part of a multi-national force not under full control of the United States." *See id.*

[151] *See* DoD 4715.05-G, at para. C1.3.3.

[152] *See* Executive Order No. 12,088, at § 1-801.

contingency operations because they "provide valuable information for environmental planning and can aid the conduct of joint operations."[153] As will be discussed below, the policies governing operations in Afghanistan incorporate several standards directly from the OEBGD.

At the time of this writing, a new draft instruction, designated DoD Instruction 4715.05, was routing through DoD components and staff for approval.[154] In its proposed form, the instruction addresses overseas deployments, including exercises, hostilities and contingencies.[155] The draft also expressly requires the inclusion of an environmental annex to all operation plans, and the consideration of OEBGD standards within mission requirements.[156] The draft also requires environmental annexes to OPLANs to be reviewed and updated at least annually, taking into account changes in the environmental situation as operations progress.[157] These changes would still afford DoD units and commanders significant discretion, but would finally provide specific guidance for establishing environmental standards for overseas contingency operations. The draft instruction is still in the comment stage and may undergo significant changes before becoming final.

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[153] *See* Joint Publication 4-04, *Joint Doctrine for Civil Engineering Support*, 27 Sept. 2001, at VI-5-VI-6.

[154] *See* DODI 4715.05, Overseas Environmental Compliance (undated draft).

[155] *See id.*

[156] *See id.*

[157] *See id.*

3. Remediation at Overseas Locations

Environmental remediation at overseas installations has proven to be problematic, partly because no special funding has been provided by congress for cleaning up overseas installations.[158] Remediation is governed by DoD Instruction 4715.8, *Environmental Remediation for DoD Activities Overseas*.[159] This instruction takes a different approach to installations that are "designated for return" to the host nation and those "not designated for return." [160] For both kinds of installations, DoD components are required to take "prompt action to remedy known imminent and substantial endangerments to human health and safety that are due to environmental contamination that was caused by DoD operations and that is located on or emanating from" the installation.[161] For installations that will remain open, additional remediation may be authorized if "the commander determines the additional remedial measures are required to maintain operations or protect human health and safety."[162]

DoD Instruction 4715.8 also states that it does not apply to "operations connected with actual or threatened hostilities, security assistance programs, peacekeeping missions,

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[158] *See* Landis, *supra* note 121, at 119-120.

[159] DoDI 4715.8, *Environmental Remediation for DoD Activities Overseas*, Feb. 2, 1998. The instruction, which treats this potentially complex topic in only nine pages, is a "far cry" from the joint and several, strict, retroactive liability imposed for cleanups within the U.S. pursuant to the Comprehensive Environmental Response Conservation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. *See* Landis, *supra* note 121, at 121.

[160] *See* DODI 4715.8, at paras. 5.1, 5.2.

[161] *See id.* at paras. 5.2.1, 5.1.1.

[162] *See id.* at para. 5.1.2.

or relief operations."[163] The instruction also states that it does not apply to "[a]ctions to remedy environmental contamination that are covered by requirements in environmental annexes in operation orders and similar directives."[164] The effect of these provisions is to exempt contingency operations, which should presumably be governed by provisions in operation plans (OPLANs).[165]

At the time of this writing, a new draft instruction, designated DoD Instruction 4715.08, was informally routing through DoD components and staff for comment.[166] In its latest form, the draft instruction would apply to the full range of military base operations, exercises, and military operations outside the United States, including operations involving hostilities.[167] The draft instruction is still in the informal comment stage, and may undergo significant changes before becoming final.

4. The Role of Operation Plans

While DoD Instruction 4715.5 exempts itself from overseas contingency operations like Operation ENDURING FREEDOM, it does address what rules do apply: "Such excepted operations and deployments shall be conducted in accordance with applicable international agreements, other DoD Directives and Instructions and environmental annexes incorporated into operation plans or operation orders."[168] While

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[163] *See* DoDI 4715.8, at para. 2.1.3.

[164] *See id.* at para. 2.2.1.

[165] *See id.*

[166] *See* DODI 4715.08, Overseas Environmental Remediation (undated draft).

[167] *See id.*

[168] *See* DoDI 4715.5, at para. 2.1.4. A similar statement is again included in the OEBGD. *See* DoD 4715.05-G, at para C1.3.3.

explaining what rules apply to contingency operations, this provision stops short of actually requiring DoD organizations to develop specific environmental rules for deployments.[169] This approach further highlights the discretion afforded DoD and its subordinate organizations in setting environmental policy standards during contingency operations.

Most DoD operations are now undertaken jointly, that is, with participation from two or more of the several armed services. The Joint Chiefs of Staff have developed doctrine to guide environmental practices during joint operations.[170] Pursuant to this doctrine, commanders "should establish guidance in the OPLAN and/or OPORD that will protect force health, limit adverse public health impacts, consider the US liability, and be consistent with mission goals."[171] OPLANs (operation plans) "are documents developed normally at the combatant command level to detail how operations will be conducted. They can be standard plans that are later tailored for a specific scenario, or deliberate plans developed originally for a particular operation."[172]

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[169] For example, DoD Instruction 4715.5 states that operations would have to comply with an environmental annex to an operation plan, but does not actually require an environmental annex to be included in the plan. *See id.*

[170] *See* Joint Publication 4-04, *Joint Doctrine for Civil Engineering Support*, 27 Sept. 2001.

[171] *See id.* at VI-4.

[172] *See* Anne L. Burman and Teresa K. Hollingsworth, *JAGs Deployed: Environmental Law Issues*, 42 A.F. L. REV. 19, 25 (1997).

The Joint Operation Planning and Execution System (JOPES) provides guidance for developing joint OPLANs.[173] Plans developed under JOPES include an annex governing environmental issues:

> Under JOPES, "Annex L" to a given OPLAN should address environmental considerations. The stated purpose of Annex L is to prescribe environmental planning guidance and define responsibility to support operational planning. The Annex should describe, in sufficient detail, environmental considerations that affect the OPLAN during all phases of the operation.[174]

OPLANs should include sections governing disposal of solid waste, grey water, pesticides, human waste, and hazardous waste.[175] OPLANs should also address flora and fauna protection, archaeological and historical preservation, and a base spill plan.[176]

IV. The Influence of International Law

While DoD is afforded great discretion under United States domestic law, executive orders, and its own regulations in establishing its environmental policy for its operations in Afghanistan, the United States must comply with its obligations under international law. Sources of international law include bilateral agreements between the United States and Afghanistan, multilateral environmental treaties, such as the Basel Convention and the UNESCO Convention, and principles of customary international environmental law. This section discusses these sources of international law and evaluates their impact on the U.S. military's environmental policy in Afghanistan.

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[173] *See id.* at 26 (citing CJCSM 3122.03, *Joint Operation Planning and Execution System Volume II, Planning Formats and Guidance* (1 June 1996) [hereinafter CJCSM 3122.03]).

[174] *Id.* (citing CJCSM 3122.03, at C-457).

[175] *See id.* at 27.

[176] *See id.*

A. Bilateral Agreements Between Host and Guest Nation

While military forces stationed within a foreign nation generally have an implied authority to "exercise those rights and powers that are necessary for its effective operation," the "uncertainty in the breadth of these implied powers" makes agreements between the countries involved desirable.[177] Such agreements are generally known as "status of forces agreements," or SOFAs.[178] SOFAs can vary in format and length, and range from the very complex to a simple exchange of diplomatic notes.[179] Basing agreements between the visiting and host nation might also contain provisions that have environmental implications. In Afghanistan, however, neither the diplomatic note nor the basing agreement for Bagram Airfield, the largest U.S. installation in the country, impose meaningful environmental obligations on the United States military.

1. The U.S.-Afghanistan Diplomatic Note

While a SOFA between the United States and a host nation will not typically include specific environmental provisions, it will include other obligations sufficiently broad to include environmental issues.[180] The diplomatic notes between the United States and Afghanistan, however, are almost entirely devoid of provisions that even obliquely address environmental matters.

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[177] *See* Walter Gary Sharp, Sr., SYMPOSIUM: THE UNITED NATIONS, REGIONAL ORGANIZATIONS, AND MILITARY OPERATIONS: ARTICLE: PROTECTING THE AVATARS OF INTERNATIONAL PEACE AND SECURITY, 7 Duke J. Comp. & Int'l Law 93, 116 (1996).

[178] *See id.*

[179] *See* THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK 383 (2006).

[180] *See* Phelps, *supra* note 86, at 57.

The exchange of diplomatic notes between the United States and the "Transitional Islamic Government of Afghanistan" began on September 26, 2002.[181] On that date, the United States submitted a note "regarding issues related to United States military and civilian personnel of the United States Department of Defense who may be present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities."[182] On December 12, 2002, the Transitional Government accepted the terms of the United States' note without revision.[183] The note entered into force on May 28, 2003.[184]

The diplomatic note's terms are very favorable to the United States, presumably because the fledgling transitional government owed its very existence to the United States' overthrow of the Taliban. Generally, the note allows the United States to bring its vehicles and aircraft into Afghanistan free of any fee, toll, or inspection.[185] The note also exempts the "Government of the United Sates, its military and civilian personnel, contractors and contractors [sic] personnel" from "any kind of tax or other similar fees assessed within Afghanistan,"[186] including taxes on the acquisition of material and

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[181] Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, U.S.-Afg., May 28, 2003, State Dept. No. 03-67, 2002 U.S.T. LEXIS 100 [hereinafter Afghan Diplomatic Note], at 1.

[182] *Id.*

[183] *Id.* at 5-6.

[184] *See id.* at 1.

[185] *Id.* at 8.

[186] *See id*

services by the United States.[187] The note also states that Afghanistan will have no criminal jurisdiction over U.S. personnel without express consent of the United States government.[188] The note also gives U.S. military personnel the same status as "administrative and technical staff of the United States Embassy" under the Vienna Convention on Diplomatic Relations of April 18, 1961.[189] This provision is significant because it grants all DoD personnel diplomatic privileges and immunities, such as immunity from Afghan criminal jurisdiction[190] and freedom from "any form of arrest or detention."[191]

While the diplomatic note with Afghanistan does not expressly address environmental matters, it does include a waiver of all claims, except for contractual claims:

> Finally, the Embassy proposes that, other than contractual claims, the parties waive any and all claims against each other for damage to, or loss or destruction of, property owned by each party, or death or injury to any military or civilian personnel of the armed forces of either party, arising out of activities in Afghanistan under this agreement.[192]

This waiver is written broadly enough to include claims by the Afghan government for any environmental damage caused by the United States' military operations. This

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[187] *See id.* at 9.

[188] *See Id.*

[189] *Id.*

[190] *See* Vienna Convention on Diplomatic Relations art. 29, April 18, 1961, 500 U.N.T.S. 95.

[191] *See id.* at art. 31.

[192] *See* Afghan Diplomatic Note, *supra* note 181, at 5.

provision would not, however, bar claims brought by Afghan citizens for damage caused to their private property.[193]

2. The Bagram Basing Agreement

The U.S. military's largest installation in Afghanistan is Bagram Airfield, a Soviet-era base north of Kabul. The United States' use of Bagram is governed by a document known as the Accommodation Consignment Agreement (ACA). The first version of the ACA was executed on September 17, 2003. [194] A superseding ACA was executed on February 9, 2005.[195]

The ACA favors the United States in almost every respect. Through it, Afghanistan consigned to the United States "all government-owned property currently occupied or to be occupied by United States and Coalition Forces for military purposes."[196] The United States has the right to assign the ACA to a successor nation or organization.[197] Under the ACA, the United States' control over Bagram continues until the "United States or its successors determines that the Premises are no longer required

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[193] Such claims could presumably be brought pursuant to the Foreign Claims Act (FCA), which authorizes the armed forces to adjudicate and pay claims for property damage, property loss, and personal injury or death of "any inhabitant of a foreign country" that occurs outside the United States incident to noncombat activities. *See* 10 U.S.C. § 2734(a) (2000). The settlement (or denial) of such claims is "final and conclusive." *See* 10 U.S.C. § 2735 (2000). The finality provision of the FCA generally precludes federal courts from reviewing the military's decision on a claim. *See, e.g., Hata v. United States*, 23 F.3d 230, 233 (9th Cir. 1994).

[194] *See* Accommodation Consignment Agreement: Bagram Air Base, U.S.-Afg., September 17, 2003, No. SAS-OEF-2650 [hereinafter 2003 ACA].

[195] *See* Accommodation Consignment Agreement: Bagram Air Base, U.S.-Afg., Feb. 9, 2005, DACA-AED-5-05-376 [hereinafter 2005 ACA].

[196] *See id.* at 1.

[197] *See id.*

for its use."[198] The ACA gives Bagram to the United States "without rental or any consideration for use of the Premises."[199]

The ACA also allows the United States to "make alterations and additions" to Bagram.[200] Any improvements built during the United States remain U.S. property, and the U.S. may remove them or leave them behind when (or if) it ever turns the base back over to the Afghan government.[201] If the U.S. decides to leave improvements in place upon exiting Bagram, the ACA states there is no obligation to restore the premises to its previous condition.[202] This last provision arguably relieves the United States of any contractual obligation to remediate environmental conditions left behind in buildings or other improvements. This does not mean that no remediation would take place, however, since at least some minimal remediation is required by DoD regulations and policies developed specifically for Afghanistan.[203]

The ACA also raises the possibility of claims for environmental damage on Bagram that could be brought by private landowners. The ACA provides that private landowners who can demonstrate that they own land that has been incorporated into Bagram Airfield may be paid an equitable rent for the use of their land.[204] Since some of

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[198] *See id.* at 2.

[199] *See id.*

[200] *See id.*

[201] *See id.*

[202] *See id.*

[203] *See infra* at 64-67 (Section V.E.).

[204] *See id.* The clause states: "**NOTE**: In the event, any person brings a claim for possession of land, encompassed by the **Premises**, verifiable documents must be presented. The specific property will be measured by the **United States** and a fair and equitable rental agreement will be completed with said owner

the land within Bagram Airfield may belong to private Afghan citizens, contamination to such land may be a source of claims in the future.

B. Multilateral Environmental Treaties.

While bilateral agreements between the United States and Afghanistan include few meaningful environmental provisions, the United States must comply with several multilateral environmental treaties during contingency operations overseas. Two of these include the Basel Convention[205] and the UNESCO World Heritage Convention.[206]

1. The Basel Convention

The Basel Convention, which imposes restrictions on moving hazardous wastes across national borders for disposal, has "substantially impacted the waste disposal industry, including the disposal of hazardous waste generated by DoD's overseas activities—both at installations and during deployments."[207]

The goal of the Basel Convention is "to protect human health and the environment against the adverse effects resulting from the generation, management, transboundary movements and disposal of hazardous and other wastes."[208] Parties to the convention may allow the transboundary movement of hazardous wastes only after the

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by the **United States**, if appropriate. **The measurement by the United States will take precedent over any documents**." *Id.* (emphasis in original).

[205] Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, march 22, 1989, 28 I.L.M. 649 [hereinafter Basel Convention].

[206] Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 [hereinafter UNESCO Heritage Convention].

[207] *See* Phelps, *supra* note 86, at 72.

[208] *See* Basel Convention Secretariat Official Website, http://www.basel.int (last visited May 20, 2008).

importing nation is given notice of the shipment and consents to receiving the waste.[209] The state exporting the waste cannot allow the generator to export the waste unless the importing state consents and the entity that will dispose of the waste uses environmentally sound practices.[210] Party states through which the waste must pass on its way to the importing state also have an opportunity to deny permission or impose conditions on the shipment.[211] Parties may not allow the import of hazardous waste by non-parties[212] unless they enter into "bilateral, multilateral, or regional agreements or arrangements" that do not "derogate from the environmentally sound management of hazardous wastes" as required by the convention.[213]

While the United States was one of the original signatories to the Basel Convention, it has not ratified the convention and is not a party.[214] The United States' failure to ratify does not, however, make it free to disregard the Basel Convention because the Vienna Convention on the Law of Treaties requires a non-ratifying signatory to "refrain from acts which would defeat the object and purpose of a treaty" unless it makes "its intention clear not to become a party to the treaty."[215] The Vienna Convention

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[209] *See* Basel Convention, *supra* note , at Art. 6.1, 6.2.

[210] *See id.* at Art. 6.3.

[211] *See id.* at Art. 6.4.

[212] *See id.* at Art 4.5.

[213] *See id.* at Art. 11.1.

[214] *See* Phelps, *supra* note 86, at 72.

[215] *See* Article 18 of The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; Phelps, *supra* note 86, at 72-73; Takako Morita, *N.I.M.B.Y. Syndrome and the Ticking Time Bomb: Disputes over the Dismantling of Naval Obsolete Vessels*, 17 GEO. INT'L. ENV. L. REV. 723 (2005).

therefore imposes upon the United States a certain degree of compliance with the Basel Convention.[216]

The United States' non-party status also limits its ability to move hazardous waste internationally for disposal, unless it has an "agreement or arrangement" with a country that is a party to the convention.[217] Hazardous waste issues are given special attention in policies developed for Afghanistan to ensure the United States complies with its obligation not to defeat the purpose of the Basel Convention while still allowing it to dispose of its hazardous waste.

2. The UNESCO World Heritage Convention

The purpose of this convention is to ensure that the world's cultural and natural heritage are identified, protected, conserved, presented, and transmitted to future generations.[218] Under the UNESCO Convention, sites qualify as "heritage" if they are monuments, buildings, sites, or natural features with "outstanding universal value" from a historic, artistic, scientific, aesthetic, ethnologic, or anthropologic point of view.[219] A

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[216] While the United States has not yet ratified the Vienna Convention, it has taken the position that the Vienna Convention is "generally recognized as the authoritative guide to current treaty law and practice" and "a primary source for determining…the customary principles of treaty law." *See* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L. L. 431 (2004)(citing Secretary of State Rogers' Report to the President, Oct. 18, 1971, 65 Dep't St. Bull. 684, 685 (1971)); *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 AM. SOC'Y INT'L L. 277, 278 (1984) (remarks by Robert E. Dalton)).

[217] *See id.* at 73.

[218] *See* UNESCO Heritage Convention, *supra* note 206, at Art. 4.

[219] *See id.* at Arts. 1, 2.

country can nominate sites within its territory for inclusion on the "World Heritage List."[220]

Parties to the convention have an obligation to take affirmative steps protect and preserve cultural and natural heritage by adopting policies, setting up services or agencies, and taking other legal, scientific, technical, administrative, and financial measures.[221] Parties to the convention are also required to make a financial contribution to a "World Heritage Fund" every two years.[222] There are 185 parties to the convention, including the United States and Afghanistan.

Afghanistan has two sites on the World Heritage List: the Archeological Remains of the Bamiyan Valley and the Minaret and Archeological Remains of Jam.[223] The Bamiyan Valley was the site of towering statues of Buddha carved into a cliff face, until the Taliban destroyed the statutes by artillery fire in 2001.[224] The Minaret of Jam is a 65 meter spire nestled in a river valley that dates back to the 12th century.[225] Three sites have also been placed on the Convention's tentative list: the City of Herat, the City of

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[220] *See id.* at Art. 11.1.

[221] *See id.* at Art. 5.

[222] *See id.* at Art. 16.

[223] *See* UNESCO World Heritage-Afghanistan, http://whc.unesco.org/en/statesparties/af (last visited May 20, 2008).

[224] *See* Cultural Landscape and Architectural Remains of the Bamiyan Valley, http://whc.unesco.org/en/list/208 (last visited May 20, 2008).

[225] *See* Minaret and Archaeological Remains of Jam, http://whc.unesco.org/en/list/211 (last visited May 20, 2008).

Balkh (antique Bactria), and Band-E-Mir.[226] Policies developed for operations in Afghanistan address the preservation of these and other protected sites.

C. Customary International Environmental Law

The United States clearly has a duty to abide by the international agreements to which it is a party or signatory. The duty to comply with customary international law is less apparent, however, perhaps because many find the concept of customary law "mystifying."[227] In spite of its somewhat amorphous nature, the United States must reckon with customary law during its activities in Afghanistan, including principles of customary international environmental law.

1. Identifying Principles of Customary International Law

Simply stated, a principle of customary international law develops when several countries follow a practice because they believe they are legally bound to do so. "The content of customary international law is found in widespread and consistent state practices, followed because the states believe the practices are legally required."[228] The belief in legal obligation is the key to distinguishing customary law from other types of practices:

> Not all state practice forms customary international law. State acts engaged in because they are convenient or polite do not give rise to

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[226] *See id.*

[227] *See* Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995)(citing ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 4 (1971)("The questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic."); G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 85 (1983); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW xiii (2d rev. ed. 1993)("[I]nternational custom and customary law still raise the greatest number of doubts and controversies" of any type of international law.)).

[228] ALEXANDRE KISS AND DINAH L. SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW 8 (2007).

> custom, because the sense of legal obligation is absent. Instead, states must have a conviction that the rule is obligatory, referred to as *opino juris*. Such *opino juris* may be implied if state practice is general and consistent over a lengthy time.[229]

Custom has developed in the environmental arena to the point that principles of customary international environmental law are broadly recognized.

One of the most recognized of these principles is a state's obligation not to cause environmental damage outside of its own borders. This obligation was first expressed in the *Trail Smelter* arbitration, which involved the operation of a lead and zinc smelter in Trail, British Columbia, Canada. The smelter's high sulfur dioxide emissions damaged crops in the United States beginning in 1896.[230] The smelter initially compensated individual farmers, but an "association of injured persons" was formed shortly after the smelter added additional exhaust stacks in 1925.[231] In 1927 the U. S. government presented a claim to the Canadian government, and in 1935 the two governments entered into a convention agreeing to resolve the matter through arbitration.[232]

In ruling in favor of the United States, the arbitral tribunal ruled that a state had a legal obligation not to pollute its neighbors:

> [U]nder the principle of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[233]

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[229] *Id.*

[230] *See* ALEXANDRE KISS AND DINAH L. SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 182 (3d ed. 2004).

[231] *See id.* at 182-83.

[232] *See id.* at 183.

[233] 3 U.N. RIAA 1938, 1965 (1941).

The significance of this principle is "difficult to overestimate" because it recognizes that a state may be liable for merely not enacting laws to regulate pollution, and because it "affirms the existence of a rule of international law forbidding transfrontier pollution."[234]

This principle was "most famously" expressed[235] in Principle 21 of the Stockholm Declaration:

> States have…the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[236]

This principle not only requires states to regulate activities that happen within their borders, but also other places where they exercise "control," including foreign countries where their military is stationed.[237] Pursuant to Principle 21, therefore, the United States would arguably have an obligation under international customary law to regulate its operations in Afghanistan to avoid damaging the Afghan environment.

Other principles of customary international environmental law have developed as well. One of these is the so-called "polluter pays" principle, which seeks to impose the costs of environmental damage on the party responsible for the contamination.[238] Another tenet is the precautionary principle, which exhorts states not to use a "lack of full

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[234] *See* KISS AND SHELTON, INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 230, at 185.

[235] *See* KISS AND SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 228, at 90.

[236] Stockholm Declaration on the Human Environment, U.N. Doc. A/Conf. 48/14/Rev.1 (1973) [hereinafter Stockholm Declaration].

[237] *See* KISS AND SHELTON, GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 228, at 189-90.

[238] *See id.* at 95.

scientific certainty" as a reason to postpone taking actions to prevent environmental degradation where serious or irreversible damage is threatened.[239]

In addition to these "substantive principles"[240] of customary law, scholars have identified certain "process principles" and "equitable principles" have developed as well.[241] Process principles include: 1) the "duty to know" the extent of an activity's environmental impact through monitoring and inspection; 2) the "duty to inform" potentially affected states of possible environmental effects and to consult with such nations; and the duty to allow potentially affected populations participate in the decision-making process.[242] Equitable principles include intergenerational equity, common but differentiated responsibilities, and the equitable utilization of shared resources.[243] The duties to give special consideration to endangered species and to preserve properties of natural heritage have also been identified as emerging principles of customary international environmental law. [244]

While searching for common legal structures in international agreements and other texts may be the most convenient way to identify potential principles of customary law, it may not be the most accurate way to identify principles that states actually take

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[239] *See id.* at 94 (quoting Principle 15 of the Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/26/Vol.1 (1992).

[240] *Id.* at 90.

[241] *See id.* at 98-109.

[242] *See id.* at 98-104.

[243] *See id.* at 104-109.

[244] *See* Bruce A. Harlow and Michael E. McGregor, *International Environmental Law Considerations During Military Operations Other Than War, in* INTERNATIONAL LAW STUDIES 1996: PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT 319, 327 (Richard J. Grunawalt et al. eds. 1996).

seriously. Craig L. Carr and Gary L. Scott have written that while it may be tempting to assert that multilateral treaties automatically create customary law binding even on non-parties, very few such treaties should be considered true customary law.[245]

Searching for principles of customary laws in texts like treaties and decisions of arbitral panels has also been criticized. While this approach to discovering customary law purports to be a study of state "practice," a state's verbal claims and actual environmental behavior often diverge.[246] Since there is no central authority to require compliance with customary law, individual countries may underperform their obligations with impunity:

> States acknowledge a duty to prevent significant transboundary harm, but continue to cause such harm; they accept resolutions recommending assessments and notification, but seldom act accordingly. Consequently, studying verbal practice appears to be a misguided methodology for discovering behavioral regularities.[247]

The difficulty in "discovering behavioral regularities" makes it equally difficult to distinguish between legal theories and actual principles of law that states must follow. Finding actual evidence that nations believe a practice is obligatory is especially perplexing, and even with "a more relaxed view of what that test may entail, the body of customary law simply lacks the horsepower to deal with many of the great problems."[248] The difficulties in identifying which principles actually qualify as law also make it more

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[245] *See* Craig L. Carr and Gary L. Scott, *Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law*, 27 Den. J. Int'l. L. & Pol'y 313 (1999). Carr and Scott posit that customary law is created by a treaty only if a three part test is satisfied: 1) a sufficient number of states accept the treaty; 2) a significant number of those states have interests that will be affected by the treaty; and 3) the treaty does not allow reservations. *See id.* at 314. After applying this test to the 41 "global multilateral treaties," Carr and Scott identified only eight treaties that qualified.

[246] *See* Bodansky, *supra* note 227, at 115.

[247] *See id.*

[248] *See* Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 A.J.I.L. 259, 266 (1992).

difficult to determine the extent to which the United States must follow customary law during its operations in Afghanistan.

2. Applying Customary Law to the United States

Having identified several principles that might be considered customary international environmental law, the next question is to what extent the United States is bound to apply those principles to its own activities. The United States' obligation to comply with customary international law in general was addressed by the U.S. Supreme Court in *The Paquete Habana*, 175 U.S. 677 (1899), a case that arose from the Spanish-American War.

Two ships, the Lola and the Paquete Habana, were seized while they were fishing off the coast of Cuba in 1898.[249] The United States brought an action to condemn the vessels as prizes of war on April 27, 1898.[250] The court entered a final decree of condemnation on May 30, 1898, "the court not being satisfied that as a matter of law, without any ordinance, treaty or proclamation, fishing vessels of this class are exempt from seizure."[251] After the court awarded its final decree, the ships were sold at auction for a total of $1290.[252]

After addressing a threshold jurisdictional issue, the Court turned to the question of whether "the fishing smacks were subject to capture by the armed vessels of the

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[249] *See The Paquete Habana*, 177 U.S. 677, 678-690 (1899).

[250] *See id.* at 679.

[251] *See id.*

[252] *See id.*

United States during the recent war with Spain."[253] The Court began its analysis by acknowledging the time-honored custom that granted special status to fishing vessels:

> By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.[254]

The Court then embarked on a detailed history of the custom, tracing it from its "earliest accessible sources" to "what we may now justly consider as its final establishment in our own country and generally throughout the civilized world."[255]

After examining this history, the Court concluded that United States courts were bound to follow international law, even if grounded only in custom:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations....[256]

While the Court's reasoning in *The Paquete Habana* would logically extend to the application of customary international environmental law, the case has had virtually no impact in the environmental arena. There are several explanations that the potential environmental implications of the case have not yet come to fruition.

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[253] *See id.* at 686.

[254] *Id.*

[255] *Id.* The Court's exhaustive discussion on the origins of the custom begins with a 15th Century treaty between England and France for the safety of fishermen, and ends with a Japanese ordinance promulgated in 1894 at the beginning of the Sino-Japanese War exempting coastal fishing boats from detention. *See id.* at 687-700.

[256] *Id.* at 700.

First, the factual and procedural dissimilarities between *The Paquete Habana* and likely international environmental cases are too great. The underlying question in *The Paquete Habana* was whether the United States has a right to seize the fishing boats as prizes of war. Applying customary international law to resolve what was essentially a property dispute is easier to conceptualize that applying customary international law to impose environmental policies on the federal government. It is difficult to conceive of a case that could be brought against the United States for some failure to apply a principle of customary international environmental law, for example, failing to sufficiently incorporate the "polluter pays" principle into its operations in Afghanistan.

Second, since NEPA and most other environmental statutes do not apply extraterritorially, and Executive Orders 12,088 and 12,114 do not confer a cause of action, it would be difficult for any case to survive long in court.[257] This was not a problem in the prize case because the United State has already brought the ship owners into court in order to condemn the vessels. The difficulties in bringing a suit are especially important because the Court's analysis in *The Paquete Habana* focused on whether federal courts had to apply customary international law, rather than whether the United States had affirmative duties under customary international law.

Next, the Court in *The Paquete Habana* built a limitation into the federal courts' requirement to follow customary international law. Under the Court's analysis, federal courts would only "resort" to customary international law "where there is no treaty, and

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[257] *See generally* Wynne P. Kelly, Comment, *Citizens Cannot Stand for it Anymore: How the United States' Environmental Actions in Afghanistan and Iraq Go Unchecked by Individuals and Non-governmental Organizations*, 28 FORDHAM INT'L L. J. 193 (2004)(discussing obstacles to suing the U.S. Government for environmental practices during military deployments to Iraq and Afghanistan).

no controlling executive or legislative act or judicial decision."[258] In other words, the obligation to follow customary international law is subordinate to any judicial decision, treaty, statute, executive order or regulation that addresses the same issue.[259] If the United States develops policies for regulating the environmental impact of its operations overseas (and it has), it has arguably done enough to preempt any customary principles of international environmental law. The vague and general nature of such principles makes it possible for states to "do what they like and argue that their actions are consistent with customary international law."[260]

In other words, even though the Supreme Court has held that the United States must follow customary international law, translating the general principles of customary international environmental law into meaningful, concrete controls is difficult and impractical. As Geoffrey Palmer wrote:

> While customary international law must not be underestimated or ignored, it cannot be said to have sufficient strength to cope with the problems of the global environment.... But, even on the most optimistic view, customary international law can hardly be said to have sufficient scope or content to prevent damage and provide sufficient sanctions to be directed against the perpetrators of the damage when it occurs. Above all, customary international law is not a regulatory system and cannot be turned into one. Yet a regulatory system is required.[261]

Given its inherent limitations, the role of customary international environmental law seems restricted to giving states a sense that it should work to protect the environment,

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[258] *Id.*

[259] *See, e.g.*, *Wang v. Ashcroft*, 320 F.3d 130, 142 n. 18 (2d Cir. 2003)(declining to address whether deporting Chinese national to China impinged upon any norms of customary international law because the issue was governed by "the treaties and legislative and regulatory enactments of the United States").

[260] *See* Bodansky, *supra* note 227, at 118.

[261] *See* Palmer, *supra* note 248, at 266.

without telling the states specifically what their policies must contain or how stringent their practices should be.

V. Policies Created for Managing Environmental Issues in Afghanistan

Having explored the limitations of domestic U.S. and international law, this thesis now turns to the policies developed for DoD's operations in Afghanistan. The discretion afforded DoD in making environmental policy for its operations in Afghanistan merits scrutiny because of DoD's environmental record during and following the Cold War, when environmental destruction "was an accepted price to be paid for a strong national defense."[262] That price, whether measured in environmental damage or taxpayer dollars, would prove very high indeed:

> Through widespread mishandling and mismanagement of radioactive waste, spent fuels, oils, solvents, paints, acids, heavy metals, and other hazardous materials, the Departments of Defense (DoD) and Energy (DoE) have "cast a chemical plague over our country," creating a toxic legacy for the next several generations.[263]

The Cold War's environmental fallout, "depending on what cleanup standards are applied, will cost U.S. taxpayers between $330 and $430 billion to clean up between now and 2070."[264]

The extreme environmental cost of the Cold War resulted, at least in part, from the paucity of United States environmental protection laws at the time. In the absence of legal requirements, DoD's disposal of hazardous waste during the cold war was governed

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[262] *See* Bethurem, *supra* note 6, at 110 (2002) (citing DYCUS, *supra* note 7, at 80-142).

[263] Kyle Bettigole, Comment, *Defending Against Defense: Civil Resistance, Necessity, and the United States Military's Toxic Legacy*, 21 B.C. ENVTL. AFF. L. REV. 667, 667-68 (1994) (quoting from National Toxic Campaign Fund, *The U.S. Military's Toxic Legacy I* ([1991]).

[264] ROBERT F. DURANT, THE GREENING OF THE U.S. MILITARY 1 (2007).

only by the agency's discretion,[265] which led to 19,694 contaminated sites at 1,722 active installations across the United States.[266]

In spite of this troubling track record, DoD is still afforded significant discretion in setting its environmental policy for overseas contingency operations like Operation ENDURING FREEDOM. While DoD made significant progress in improving its environmental practices since the Cold War ended in 1989, the resurgence of patriotism and heightened focus on national defense that followed the September 11 attacks might result in a return of the Cold War paradigm under which the environment was "sacrificed" in the name of national defense.[267]

After a brief description of the documents containing DoD's environmental policy for Afghanistan, this section evaluates the policies against four of the concerns raised in the UNEP post conflict assessment of Afghanistan's environment: general pollution control and prevention, disposal of hazardous wastes, the preservation of natural and cultural resources, and remediation. Finally, this section will address the extent to which these policies are compatible with principles of customary international environmental law.

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[265] *See Aragon v. United States*, 146 F.3d 819, 823-26 (1998) (claim against United States for groundwater contamination caused by use of trichloroethylene solvents to wash aircraft at Walker Air Force Base, New Mexico, during the Cold War dismissed under discretionary function exception to the Federal Tort Claims Act). For a detailed discussion of the discretionary function doctrine, see David S. Fishback and Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dahelite to Varig to Berkovitz*, 25 IDAHO L. REV. 291 (1988-89).

[266] *See* Dycus, *supra* note 7, at 80.

[267] *See* Bethurem, *supra* note 6, at 111.

A. Sources of the Afghanistan Environmental Policy

The policies that apply to U.S. operations in Afghanistan can be found in four key documents: U.S. Central Command (CENTCOM) Regulation 200-1,[268] Annex L to the OPLAN for Operation ENDURING FREEDOM,[269] U.S. Army Central Command (ARCENT) Environmental Standard Operating Procedure,[270] and the Combined/Joint Task Force (CJTF) 82 Environmental Standard Operating Procedure.[271]

1. The CENTCOM Regulation.

The Deputy Under Secretary of Defense (Installations and Environment) has appointed the commander of United States Central Command (CENTCOM) as Executive Agent for all DoD environmental matters[272] in the CENTCOM area of responsibility (AOR).[273] In 2005, CENTCOM issued a new version of its regulation governing environmental issues within its AOR.[274]

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[268] USCENTCOM Regulation 200-1, *Environmental Quality: Protection and Enhancement of Environmental Assets*, Aug. 19, 2005, at para. 4.b(1) [hereinafter CENTCOM Regulation].

[269] United States Central Command Operation ENDURING FREEDOM Plan, Annex L [hereinafter OEF OPLAN]. The OEF OPLAN is classified, and the author was unable to obtain access while writing this thesis. All information included herein relating to the OEF OPLAN was obtained from unclassified sources.

[270] United States Army Central Command, Environmental Standard Operating Procedure (undated) [hereinafter ARCENT SOP].

[271] Combined/Joint Task Force 82 Environmental Standard Operating Procedure (undated) [hereinafter CJTF-82 SOP]. While "joint" operations are those involving more than one armed service, "combined" operations are those involving armed services from more than one nation.

[272] *See id.* at para. 4.b(1) [hereinafter CENTCOM Regulation].

[273] The CENTCOM AOR includes eastern Africa, the Middle East, and Central Asia, stretching from Kenya to Kazakhstan. Afghanistan falls within the CENTCOM AOR. *See* United States Central Command-Countries, http://www.centcom.mil/en/aor-countries/2.html (last visited May 20, 2008).

[274] The prior version, dated July 28, 1997, predated the United States' current era of concentrated activity in the Middle East. *See* CENTCOM Regulation, *supra* note268, at 1.

The CENTCOM Regulation sets forth three general guidelines for U.S. forces operating under its command. First, the regulation directs CENTCOM forces to comply "with the spirit as well as the letter of applicable international, federal, and HN (host nation) environmental laws, executive orders, directives, instructions, and regulations."[275] Second, CENTCOM forces are to "[d]emonstrate leadership in pollution control prevention initiatives and controls."[276] Finally, the regulation directs units to address environmental concerns "in a manner consistent with mission accomplishment as well as US national priorities and interests."[277]

While the CENTCOM Commander is ultimately responsible for carrying out this policy, the responsibility for developing policies for specific countries is delegated to a "lead service component," based on which service component maintains a majority of the U.S. military presence within each country.[278] The lead service component for Afghanistan is United States Army Central Command (ARCENT), which commands the land component of all forces assigned to CENTCOM.[279]

2. The OEF OPLAN.

The CENTCOM Regulation requires all OPLANs to include an environmental annex, designated as Annex L and developed in accordance with JOPES.[280] The

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[275] *See id.* at para. 5.a(1).

[276] *See id.* at para. 5.a(2).

[277] *See id.* at 5.a(3).

[278] *See id.* at 4.b(3).

[279] *See id.* at Appendix A.

[280] *See id.* at paras. 5.b, 5.b(3).

CENTCOM Regulation also requires Annex L to include specific guidance "for protecting and preserving the environment," including pollution control, waste disposal, and cultural preservation.[281]

In addition to such "very descriptive information and requirements"[282] for environmental matters during OEF, the OPLAN also provided guidance on how to balance mission accomplishment with environmental protection:

> This annex provided the groundwork for resolving situations where real or perceived conflict existed between environmental protection and mission accomplishment. The annex directed that preservation of the natural environment should not be ignored in the execution of orders but that environmental considerations would always be subordinate to the preservation of human life and force protection.[283]

Annex L was not published by ARCENT until three months after the initial deployment of U.S. forces into Afghanistan.[284] This delay caused some difficulties in disseminating timely information about environmental requirements to soldiers stationed in Afghanistan.[285] This delay also contributed to some inappropriate environmental practices at Bagram Airfield early in OEF.[286]

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[281] *See id.* at 5.b(4).

[282] *See* Robert J. Chartier, *Environmental Issues Associated with Operation Enduring Freedom*, ENGINEER: THE PROFESSIONAL BULLETIN OF ARMY ENGINEERS, Oct.-Dec. 2003, at 24, 26.

[283] *Id.* at 25-26.

[284] *See id.*

[285] *See id.*

[286] *See id.*

3. The ARCENT Standard Operating Procedure

The ARCENT Standard Operating Procedure (SOP) applies to all forces assigned to ARCENT operations in the CENTCOM AOR, and was developed to ensure that ARCENT units "take all possible and reasonable actions to protect human health and preserve the environment, without regard to location or operations."[287] The SOP recognizes that "[e]nvironmental stewardship is a critical mission" the command.[288] The SOP provides guidance that varies depending on the intensity of the conflict, an approach that gives commanders flexibility during peacetime, wartime, and stabilization operations.[289]

The SOP also includes the following description of what it intends to accomplish:

> Upon deployment to the USCENTCOM AOR, 3rd US Army/ARCENT forces will actively prevent pollution, respect the natural resources of host nations, comply with the spirit as well as the letter of applicable US and host nation environmental regulations as modified by International Agreements and Status of Forces Agreement (SOFA), and clean-up hazardous and POL spills and other environmental contamination that directly endanger the health and safety of US and coalition forces and local nationals.[290]

4. The CJTF-82 Standard Operating Procedure

Combined/Joint Task Force 82 (CJTF-82) is the organization currently assigned to conduct military missions in Afghanistan. The CJTF-82 SOP sets forth specific guidance for U.S. military forces and operations within Afghanistan and applies to "main

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[287] *See* ARCENT SOP, *supra* note 270, page marked "PURPOSE."

[288] *See id.*

[289] *See id.* at Chapter 1, paras. 2, 4; Chapters 5-7.

[290] *See id.* at Chapter 1, para 1.a.

base camps, forward operating bases (FOBs) and provisional reconstruction team (PRT) sites."[291] As such, it is the only policy developed specifically use within Afghanistan. The SOP states that "[e]nvironmental stewardship is a critical mission" for the task force, and takes responsibility "to ensure the resources of our Host Nation are respected and protected."[292] The procedures and standards in the CJTF-82 SOP are based on Annex L to the OEF OPLAN, the OEBGD, and the ARCENT SOP.[293]

The CJTF-82 SOP's references to the OEBGD are substantial. The SOP incorporates standards and practices from the OEBGD to regulate several aspects of its environmental issues. For example, the SOP imposes OEBGD standards to spill prevention and response, secondary confinement for hazardous materials, hazardous waste management plans, solid waste landfills, air emissions from solid waste incinerators, medical waste, used petroleum and anti-freeze recycling, handling asbestos-containing materials, and threatened or endangered species.[294] This frequent application of OEBGD standards is significant because it means that DoD will handle many environmental matters in Afghanistan in the same manner those issues would be addressed at permanent overseas installations, even though such treatment is not specifically required by DoDI 4715.5 and the OEBGD.[295]

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[291] *See* CJTF-82 SOP, *supra* note 271, at 1. The SOP refers to Afghanistan as the "Combined/Joint operations area" or "CJOA." *See id.*

[292] *See id.*

[293] *See id.*

[294] *See id.* at paras. 9.a(4), 9.c(2), 9.c(9), 10.a, 11.a, 12.b, 12.d, 13.a, 14.b(3)(b), 20.d(1), 22.a.

[295] *See* DoDI 4715.5, para. 2.1.4; DoD 4715.5-G, para. C1.3.3.

B. Pollution Control and Prevention Policies

A commitment to environmental stewardship is a recurring theme in the environmental policies that apply to the United States' activities in Afghanistan, beginning with the CENTCOM Regulation and trickling down to the CJTF-82 SOP. The CENTCOM Regulation sets the tone and explains one of the reasons for taking a proactive approach to environmental management: "Environmental stewardship is vital to gaining and maintaining cooperative [host nation] relations as well as access to air, land, and water needed to accomplish the mission."[296] Both the ARCENT and CJTF-82 SOPs echo the same concept, identifying environmental stewardship as part of their mission.[297]

To carry out this commitment, pollution prevention is addressed by each level of the command. The CENTCOM Regulation states that all U.S. forces in its AOR will "[d]emonstrate leadership in pollution prevention and controls."[298] The CENTCOM regulation also requires specific guidance in all CENTCOM OPLANs for protecting and preserving the environment, including standards for managing all types of waste.[299] The CENTCOM also requires subordinate units to conduct initial environmental baseline surveys within three months of arrival, as well as annual reports on environmental conditions at their installations.[300]

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[296] CENTCOM Regulation, *supra* note 268, at para. 5.a.

[297] *See* ARCENT SOP, *supra* note 270, page marked "PURPOSE"; CJTF-82 SOP, *supra* note 271, at 1.

[298] *See* CENTCOM Regulation, *supra* note 268, at para. 5.a(3).

[299] *See id.*, at 5.b(4).

[300] *See id.* at paras.5.c; 7.a, 7.b.

To help subordinate Units comply with the broad objectives and environmental standards of the CENTCOM Regulation, the ARCENT SOP directs units to create a Unit Environmental Management Program with a designated Unit Environment Coordinator.[301] The ARCENT SOP also requires its subordinate units to develop their own environmental SOP addressing the unit's programs for training, waste management, hazardous waste transport and disposal, and spill response procedures.[302] The ARCENT SOP also requires subordinate units to apply the OEGBD and any applicable Final Governing Standard during peacetime, theater buildup, and stabilization operations, [303] even though following such documents is not strictly required by DoDI 4715.5.[304]

At the CJTF-82 level, the SOP includes annexes containing various tools for managing the environmental program, such as report formats, solid waste management plans, water treatment standards, air emission standards, pollution prevention and waste minimization plans, and compliance checklists.[305] The air emission and water treatment standards published in the annexes set empirical requirements for controlling and measuring air and water pollution.[306] The SOP also requires the appointment of unit-level environmental coordinators, the development of a training program, the preparation of reports required by the CENTCOM Regulation, and many other specific requirements.[307]

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[301] *See* ARCENT SOP, *supra* note 270, at chapter 4, para. 1.c.

[302] *See id.* at chapter 4, para d.

[303] *See id.* at chapter 5, para. 1; chapter 7, paras. 5.1, 7.2; chapter 8 para. 1.

[304] *See* DoD 4715.05-G, at para. C.1.3.3.

[305] *See* CJTF-82 SOP, *supra* note 271, at 5-7.

[306] *See id. at* Annex W and Annex X.

[307] *See id.* at paras. 6.a., 7.a., 8.a., and 8.b.

C. Hazardous Waste Management

As noted above, DoD's policy in Afghanistan must include measures to comply with the Basel Convention's restrictions on the movement of hazardous waste. The CENTCOM Regulation, ARCENT SOP and CJTF-82 SOP each include provisions to address these restrictions.

The CENTCOM Regulation recognizes that "[t]rans-boundary shipment of HAZWASTE, without Basel Agreement amendments from the shipping, receiving, and transport countries, is a violation of the Basel Convention."[308] Given the potential for high-visibility international incidents for Basel Convention violations, the authority to arrange for disposal of all DoD-generated hazardous waste is highly centralized. The Defense Reutilization Management Service (DRMS) is "the only DoD agency with authority to contract and conduct trans-boundary movements of HAZWASTE in the USCENTCOM AOR."[309] The CENTCOM Regulation also requires the use of DRMS-managed disposal contract, when available.[310] Any request for disposing of hazardous waste using local facilities must be coordinated through DRMS and the USCENTCOM engineering staff.[311]

At the ARCENT level, the policy focuses on ensuring hazardous wastes are handled appropriately until disposal occurs. The ARCENT SOP requires the establishment of hazardous waste accumulation points (HWAPs) in places where such

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[308] *See* CENTCOM Regulation, supra note 268, at 6.f(3).

[309] *See id.*

[310] *See id.* at 6.c(6)(c).

[311] *See id.*

waste is generated.[312] These accumulation points are temporary stopping points for limited amounts of hazardous wastes until they are sent to hazardous waste storage areas (HWSAs).[313] HWSAs are locations for storing waste until it can be shipped for proper treatment or disposal.[314] The ARCENT SOP also requires personnel to be trained on how to safely handle hazardous wastes and clean them up if they are spilled.[315] The CJTF-82 SOP includes provisions similar to those set forth in ARCENT SOP, and also includes more specific training requirements to place HWSAs and HWAPs on specific U.S. installations in Afghanistan.[316] The CJTF-82 SOP also includes an outright prohibition on disposing of hazardous waste in landfills.[317]

D. Natural and Cultural Resource Preservation

The CENTCOM, ARCENT and CJTF policies also each address preserving important natural and cultural resource preservation, presumably to comply with obligations under the UNESCO Convention.[318] The CENTCOM Regulation requires CENTCOM components to "[i]dentify, respect, and protect historic and cultural sites, structures, objects, paleontological, and archeological areas, as well as nature parks, preserves, wetlands, and other similar HN resources."[319] The ARCENT SOP states that

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[312] *See* ARCENT SOP, *supra* note 270, at chapter 5, para. 7.a.

[313] *See id.*

[314] *See id.* at chapter 5, para. 8.a.

[315] *See id.* at chapter 4, para. 2.b.

[316] *See* CJTF-82 SOP, *supra* note 271, at paras. 10.d., 10.e.

[317] *See id.* at 12.b.

[318] *See* UNESCO Heritage Convention, *supra* note 206.

[319] *See* CENTCOM Regulation, *supra* note 268, at para. 6.c(2)(c).

its forces have a standing duty to avoid damaging to protect to cultural and historic sites. Personnel are required to immediately report damage to such sites.[320] This obligation also extends to wartime operations, regardless of the tactical situation.[321] The CJTF-82 SOP repeats these obligations, and specific sites in Afghanistan are listed in Annex R and Annex S.[322] The Annexes include most of the sites mentioned in UNEP's Afghanistan Post Conflict Assessment, and some additional sites as well.[323]

E. Remediation

As noted above, DoD-level regulations provide little or no guidance for remediation during contingencies like Operation ENDURING FREEDOM. Similarly, the CENTCOM, ARCENT and CJTF-82 policies include only a few provisions governing remediation. First, the CENTCOM Regulation requires all CENTCOM OPLANs, including OEF, to include spill planning and response measures.[324] CENTCOM components are also required to budget for their environmental responsibilities, including remediation.[325] The ARCENT SOP states that ARCENT forces will "clean up hazardous and POL spills and other environmental contamination that directly endanger the health and safety of U.S. and coalition forces and local nationals.[326] The SOP also discusses developing spill response plans and training for spill response teams.[327]

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[320] *See* ARCENT SOP, *supra* note 270, at chapter 5, para. 16.

[321] *See id.* at chapter 6, para. 2.

[322] *See* CJTF-82 SOP, *supra* note 271, at para. 21, Annex R, and Annex S.

[323] *See* UNEP PCA, *supra* note 9, at 73-83.

[324] *See* CENTCOM Regulation, *supra* note 268, at para. 5.b(4)(k).

[325] *See id.* at para. 6.c(1)(a).

[326] *See* ARCENT SOP, *supra* note 270, at chapter 1, para. 1(a).

The CJTF-82 SOP also addresses remediation in the context of spills, requiring the development of a spill, prevention, control and countermeasure (SPCC) plan that complies with the standards set forth in Chapter 18 of the OEBGD.[328] Annex N to the CJTF-82 SOP sets forth further "supplementary guidance" for spill response in Afghanistan.[329]

The OEBGD and Annex N include provisions intended to unsure that environmental damage from spills is quickly and effectively remediated. The OEBGD requires that the plan be certified by a "licensed or certified technical authority" to ensure the plan "considers applicable industry standards for spill prevention and environmental protection," is consistent with "good engineering practice," and is adequate for the facility.[330] The OEBGD and Annex N also require the plan to include a prevention section, a spill control section, and a reporting section. If a spill occurs outside of a DoD installation, or if a spill on the installation threatens the local host nation water source, the in-theater commander and host nation authorities must be notified immediately.[331]

Annex N also includes forms for spill reports, checklists for spill responses, and specific instructions for cleaning up caustic, acidic, and flammable liquids. Annex N directs personnel to follow the Army's unimaginatively but appropriately entitled "You

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[327] *See id.* at chapter 4, para. 1.d, 2.b.

[328] *See* CJTF-82 SOP, *supra* note 271, at para. 11.a.

[329] *See id.* at Annex N, para. I.1.

[330] *See* DoD 4715.05-G, at para. C18.3.1..2.

[331] *See id.* at paras. C18.3.4.4, C18.3.4.5.

Spill, You Dig" handbooks when cleaning up spills.[332] The handbooks require contaminated soil and materials to be collected, containerized, and delivered to hazardous waste collection points for disposal.[333] Removing the contaminated soil helps prevent persistent groundwater contamination. Units are directed to clean up small spills (less than 25 gallons) themselves, but to use the chain of command to make sure "properly trained individuals" remediate larger spills.[334]

Remediation is also addressed in the procedures established for closing installations. "When a CJOA site or facility is scheduled for closure or turn-over, the departing unit must ensure that all environmental issues are resolved to the best of the commander's ability before departure."[335] The specific procedure is set forth in Annex F to the CJTF-82 SOP, which requires units to maintain sufficient personnel and equipment to perform any required cleanup, and the unit will not be released (i.e., allowed to leave) until the site is properly closed.[336] Annex F also uses lofty language to describe the cleanup policy in general:

> The 3rd US Army/ARCENT goal is to have a positive environmental impact wherever we conduct operations in the USCENTCOM AOR. Every unit, regardless of size or mission, must police its operations to

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[332] *See* CJTF-82 SOP, *supra* note 271, at para. 11.c(1); U.S. Army Corps of Engineers, Europe District, You Spill, You Dig: An Environmental Handbook for Deployment (undated); U.S. Army Corps of Engineers, Europe District, You Spill, You Dig II: An Environmental Handbook for Sustained Deployment Operations (undated) [hereafter You Spill, You Dig II]. Units headed to Afghanistan are required to deploy with copies of these handbooks. *See* CJTF-82 SOP, *supra* note 271, at para. 6.c.

[333] *See* You Spill, You Dig II, *supra* note 332, at 72.

[334] *See id.*

[335] *See* CJTF-82 SOP, *supra* note , at para. 8.d.

[336] *See id.* at Annex F, paras. 2.b, 2.c.

> ensure minimal impact on the environment. As we depart a site or facility we will leave it 'clean and green'.[337]

Pursuant to Annex F, The Unit must begin planning the closure 60 days before its scheduled departure, and complete a preliminary "Environmental Site Closure Survey" (ESCS) 30 days before closure.[338] After the preliminary survey, the unit makes sure arrangements have been made for properly disposing of hazardous waste and works to resolve any issued identified in the survey.[339] Twenty-four hours before departure, a final ESCS is performed; any "last-minute" concerns must be resolved before the unit is cleared to depart.[340] Annex F also provides guidance to address the "how clean is clean" question. Generally, cleanup must be performed to OEBGD standards, but additional guidance is provided for dealing with hazardous waste, aircraft wash racks, latrines, and fuel bladders.[341]

In spite of the lofty "clean and green" goals set forth in Annex F[342], the 60-day timeline for planning and executing a base closure would probably prove inadequate for large installations or those with serious environmental problems. The requirement to resolve all issues before going home, if strictly enforced, would presumably create incentives to quickly perform the required cleanup. It would also provide incentives to clean up problems as they occur, rather than letting contamination gradually spread and

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[337] *See id.* at Annex F, para. 1.a.

[338] *See id.* at Annex F, paras. 3.a.1.a, 3.a.1.b.1.

[339] *See id.* at Annex F, paras. 3.a.1.b.2, 3.a.1.b.3.

[340] *See id.* at Annex F, paras. 3.a.1.c.1, 3.a.1.c.2.

[341] *See id.* at Annex F, para. 4.

[342] *See id.* at Annex F, para. 1.a.

create pollution problems similar to those caused by military operations within the U.S. during the Cold War.

F. Customary International Environmental Law

As noted above, the CENTCOM regulation directs its components to comply "with the spirit as well as the letter of applicable international…environmental laws."[343] While the perplexing question of whether the United States must apply customary international environmental law to its overseas military operations is unsettled,[344] this general reference to international law raises the question of whether CENTCOM intended to subject itself to customary international environmental law as well as international agreements.

The CENTCOM Regulation's subsequent references to international law suggest that CENTCOM may have intended to consider customary international law to some unspecified degree. The CENTCOM regulation, for example, directs the lead service component to consider "principles of international law" when "determining the applicability of particular [host nation] environmental standards."[345] The ARCENT SOP also makes its Staff Judge Advocate responsible for "[e]nsuring that all environmental regulations and guidance are in compliance with international law and Status of Forces Agreements." Since both of these references to general international law are linked to the United States' relationship with its host nation, CENTCOM may have intended to use principles of international law to ascertain its obligation to follow host nation law.

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[343] *See* CENTCOM Regulation, *supra* note 268, at para. 5.a(1).

[344] *See* discussion *supra*, at 44-53.

[345] *See* CENTCOM Regulation, *supra* note 268, at para. 6.b(2).

Even if the CENTCOM regulation falls short of requiring the direct application of customary international environmental law to its operations, the policies developed for Afghanistan arguably address some principles of customary law. For example, the CJTF-82 SOP's standards regulating wastewater treatment, solid waste disposal, hazardous waste management, and air emissions address the United States' obligation to avoid or prevent environmental damage outside of its borders. The SOP's requirements for remediation by responding to spills and resolving environmental issues before closing an installation are arguably grounded in the "polluter pays" principle. The "duty to know" principle finds expression in the CENTCOM Regulation's requirement to prepare environmental assessments and annual reports. The CJTF-82 SOP's requirement to contact the host nation is a chemical spill threatens local water supplies recognizes the "duty to inform" principle. Finally, the duty to follow host nation law set forth in the CENTCOM Regulation and ARCENT SOP is arguably a nod to allowing the potentially affected nation to participate in the decision-making process. The policies' provisions for preserving protected areas and endangered species address other the emerging principle of preserving natural heritage. The implicit recognition of these principles in the policies developed for operations in Afghanistan demonstrate that DoD has exercised its discretion in a manner aimed at achieving a reasonable degree of environmental protection.

VI. The Potential Impact of Afghanistan's Environmental Law

While the environmental policies established by DoD components for U.S. military operations in Afghanistan address the types of environmental damage reported in the UNEP Post Conflict Assessment, those policies have not yet caught up with recent

developments in Afghan law. This section describes the environmental law regime enacted by Afghanistan in 2007,[346] and the extent to which the new statute might impact DoD's Afghan environmental policy.

A. An Overview of Afghanistan's New Environmental Law

When the United States began its military operations in Afghanistan, the landscape of the country's environmental law was as barren as the jagged peaks of the Hindu Kush. This vacuum has thus far allowed the United States to develop its own environmental practices in Afghanistan with little or no influence from its host nation. The January 2007 enactment of a native Afghan environmental law regime will require the U.S. military to address the extent to which domestic environmental law will impact its continuing presence in the country.

Historically, Afghanistan developed a unique, indigenous legal system because of a relative lack of European colonialism.[347] The Afghan legal system and judicial institutions continued to develop from the 1950s to the 1970s, but the Soviet Union's 1979 invasion kicked off a quarter century of conflict that derailed progress in Afghanistan.[348] After the Taliban's fall in 2001, the war-torn country began a new period of legal development.[349] As of 2003, however, more than a year after OEF began, Afghan

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[346] *See* Islamic Republic of Afghanistan Environment Law (Official Gazette No. 912, 2007) (Afg.) (Unofficial English Translation) [hereinafter Afghan EL].

[347] Jim Phipps, et al., *Middle Eastern Law: International Legal Developments In Review*, 38 INT'L LAW 703, 704 (2003).

[348] *See id.*

[349] *See id.*

law still did not contain any "modern provisions for environmental management."[350] The only laws identified by the then-transitional government as containing any environmental provisions mainly addressed water use, forestry management, hunting and wildlife protection, range management, and agricultural development.[351]

Environmental protection quickly became part of the new government's agenda. When the *Loya Jirga*[352] convened in 2002, it created the first ministerial-level environmental management and conservation body in Afghanistan's history.[353] The Ministry of Irrigation and Water Resources was given environmental responsibilities and redesignated the Ministry of Irrigation and Water Resources and Environment (MIWRE).[354] This agency was eventually renamed the National Environmental Protection Agency (NEPA).[355]

The United Nations Environmental Programme (UNEP) helped the fledgling Afghan government carry out a comprehensive assessment of the environmental conditions resulting from Afghanistan's 25 years of military conflict.[356] While UN post-conflict assessments usually focus on contamination from munitions, the report on Afghan conditions identified "the long-term environmental degradation caused, in part,

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[350] *See* United Nations Envtl. Programme, *Afghanistan: A Post-conflict Plan for People and their Natural Resources* 96 (2003) [hereinafter UNEP Post-conflict Plan].

[351] *See id.*

[352] Loosely translated as "grand council." *See* UNEP PCA, *supra* note 9, at 2, n.1.

[353] *See Id.* at 2.

[354] *See* UNEP PCA, supra note 9, at 92.

[355] *See* UNEP Post-conflict Plan, supra note 350, at 2.

[356] *See Id.*

by a complete collapse of local and national forms of governance" as the country's "most serious issue."[357] In other words, the UNEP team believed the lack of structured governmental supervision was the chief cause for Afghanistan's environmental woes.

NEPA also began developing Afghanistan's domestic environmental law and policy, again with legal support from UNEP.[358] The final version of Afghanistan's Environment Law (Afghan EL) was passed by Afghanistan's National Assembly on January 25, 2007.[359] The Afghan EL is a fairly complex regime, covering the creation of the Afghanistan National Environmental Protection Agency (ANEPA), environmental planning, pollution control, water resource conservation and management, biodiversity conservation and management, and enforcement.[360]

1. Environmental Planning

Chapter 3 of the Afghan EL sets forth Afghanistan's environmental planning program, which ostensibly casts a broad net to capture many types of activities. Article 13 establishes the scope of the program: "No person my undertake an activity or implement a project, plan or policy that is likely to have a significant adverse effect on the environment unless the provisions of Article 16 of this Act have been complied with."[361] Since Article 16 sets forth the Afghan EL's permitting process, any activity

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[357] *See id.* at 10.

[358] *See Id.* at 3.

[359] *See* Afghan EL, *supra* note 346.

[360] *See id.*

[361] *Id.* at Art. 13. Under the Afghan EL, "adverse effect" means "any actual or potential effect on the environment that may in the present or future harm the environment or human health or that may lead to an impairment of the ability of the people and communities to provide for their health, safety, and cultural and economic well-being." *Id.* at Art. 4.1.

likely to have "a significant adverse effect" on the environment requires a permit. The term "person" is defined to include both "natural and legal persons," a definition broad enough to include DoD personnel individually, and arguably DoD itself.[362]

Article 14 describes the kind of information a person must submit to ANEPA so it can determine any "potential adverse affects" of the proposed "project, plan, policy or activity."[363] If ANEPA determines that the environmental impact are "unlikely to be significant," the activity may be authorized.[364] If ANEPA determines that the "potential adverse affects of the environment are likely to be significant," the proponent of the project is required to prepare and submit an environmental impact statement or a "comprehensive mitigation plan."[365]

The scope of Article 14 likewise appears to be extremely broad, since the requirement to provide information is not "triggered" by a likelihood of "significant adverse environmental impact" like Article 13. Instead, Article 14 on its face requires *any* person proposing *any* activity, project, plan, or policy to submit this information to ANEPA, which would then determine whether significant adverse effects are likely.[366] The finding of a likelihood of adverse effects then triggers the Article 13 permit

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[362] *See id.* at Art. 4.30. While the question of whether a government agency is considered a "legal person," like a corporation, may be open for debate, Article 13 written broadly enough to capture "policies" as well as activities. *See id.* at Art. 13. Since governmental agencies, foreign and domestic, carry out policies, the Afghan EL arguably applies to them as well.

[363] *See id.* at Art. 14.1.

[364] *See id.* at Art. 14.2.

[365] *See id.*

[366] *See id.* at Art. 14.1.

requirement, as well as the requirement for an environmental impact statement or a comprehensive mitigation plan.[367]

Article 16 provides a permitting procedure for proposed activities that are likely to impact the environment. If ANEPA determines that the environmental impact statement adequately addresses the potential environmental impacts, it "shall grant a permit."[368] If ANEPA determines that the proposed action "would bring about unacceptable significant adverse effects or that mitigation measures may be inadequate," ANEPA denies the permit and provides written reasons for the refusal.[369] if a permit is granted, ANEPA may withdraw it if the permit holder does not comply with its conditions.[370]

The Afghan EL also provides for public participation in the permitting process, and requires proponents to demonstrate that affected individuals have had "meaningful opportunities, through independent consultation and participation in public hearings" to express their opinions.[371] ANEPA cannot grant a permit unless the applicant can document that the public participation has taken place.[372]

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[367] *See id.* at Art. 13, Art. 14.2.

[368] *See id.* at Art. 16.1.

[369] *See id.* at Art. 16.2.

[370] *See id.* at Art. 16.3.

[371] *See id.* at Art. 19.1.

[372] *See id.* at Art. 19.3.

2. Pollution Control

In addition to environmental planning, the Afghan EL also includes a permit-based pollution control program. Chapter 4 of the EL, "Integrated Pollution Control," provides for three types of pollution permits: pollution control licenses, waste management licenses, and hazardous waste management licenses.

a. Pollution Control Licenses

Generally, the Afghan EL prohibits discharging pollutants into the environment "whether land, air, or water" if the discharge "causes or is likely to cause a significant adverse effect on the environment or human health" without obtaining a pollution control license.[373] Persons who discharge pollutants are also required to take "all reasonable measures to ensure that the best practicable environmental option is adopted."[374] Chapter 4 also anticipates imposing additional requirements on polluters in the future, since the granting of a license "does not affect the applicant's duty to obtain any other authorization required in order to undertake the activity or implement the project concerned, whether in terms of this Act or any other legislation."[375]

Article 28 of Chapter 4 sets forth the procedure for granting pollution licenses. ANEPA evaluates each application and grants a license if the discharge will not have "significant adverse effects," or if the likely adverse effects "have been adequately mitigated."[376] The maximum term of a pollution license is five years.[377] If ANEPA denies

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[373] *Id.* at Art. 27.1.

[374] *Id.* at Art. 27.3.

[375] *Id.* at Art. 27.2.

[376] *See id.* at Art. 28.1(1).

a license, it is required to provide the reasons for denial in writing.[378] As long as all necessary and relevant information is included in the application, ANEPA is required to make a final decision within 30 days of the application date.[379] Chapter 4 also authorizes ANEPA to amend, revoke, or impose new conditions on a license once it has been granted if there are reasonable grounds for doing so.[380]

Article 29 of Chapter 4 also requires polluters to immediately report to ANEPA discharges that are unlawful or likely to cause a significant adverse effect on human health and the environment.[381] The person responsible for the discharge is also required to contain the discharge and "mitigate and remedy" the adverse effects of the discharge to ANEPA's satisfaction.[382] Article 29 also requires any other person who learns of unlawful or harmful discharges to immediately notify ANEPA.

b. Solid Waste Management Licenses

The Afghan EL regulates both those who generate solid waste and those who operate solid waste disposal facilities. Generally, no person may "collect, transport, store, dispose of, or otherwise manage" waste in a manner that results in a significant adverse impact, and to take "all reasonable measures" prevent adverse impacts.[383] Owners and occupiers of premises where waste is produced are required to separate hazardous waste

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[377] *See id.* at Art. 28.4.

[378] *See id.* at Art. 28.1(2).

[379] *See id.* at Art 28.2.

[380] *See id.* at Art 28.3.

[381] *See id.* at Art. 29.1.

[382] *See id.*

[383] *Id.* at Art. 30.1-30.2.

from other waste, and to store hazardous waste in separate containers until it is disposed of.[384] Disposing of waste in a matter that it becomes litter or is likely to become litter is also prohibited.[385]

The EL also requires any person who constructs, own, or operates a landfill, waste incinerator, or any other facility for permanently disposing of waste to obtain a waste management license.[386] ANEPA will grant a license only if satisfied that the applicant "has sufficient expertise" to operate the facility in lawfully and in a manner that will not have significant adverse effects.[387] The EL gives ANEPA authority to amend, revoke, or impose new conditions on an existing waste management license if there are reasonable grounds to do so and the reasons are provided to the licensee in writing.[388]

c. Hazardous Waste Management Licenses

The EL requires the owner or occupier of any land or premises where hazardous waste is kept, treated, or disposed of to apply for a hazardous waste management license.[389] The applicant is required to disclose the anticipated volume and chemical properties of its waste, the industrial process that creates the waste, the proposed method for treating or disposing of the waste, and the precautions that will be taken to avoid adverse effects to

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[384] *Id.* at Art. 30.3.

[385] *See id.* at Art. 30.4.

[386] *See id.* at Art. 31.1.

[387] *See id.* at Art. 31.2(1).

[388] *See id.* at Art. 31.4.

[389] *See id.* at Art. 32.1. "Hazardous waste" is defined as "chemical waste" and waste containing "hazardous substances," which in turn are defined as "any pesticide, herbicide or other biocide, radioactive substance, chemical or other substance that alone or in combination with any other thing, is harmful to the health of living organisms." *See id.* at Art. 4.16-4.17. Inexplicably, no provision of the EL makes generating hazardous waste without a permit unlawful.

the environment.[390] ANEPA grants the license if it is satisfied that the proposed method for managing the waste will not cause adverse effects on the environment.[391] ANEPA is authorized to amend, revoke, or impose additional conditions on the license if it considers the changes necessary to avoid or mitigate adverse effects.[392] Hazardous waste management licenses are valid for a maximum of five years, as long as the licensee notifies ANEPA of any "significant change" in the volume or nature of the waste.[393]

3. Compliance and Enforcement Provisions

The compliance and enforcement scheme for the Afghan EL, set forth in Chapter 8, provides for an inspection program, the issuance of administrative abatement and compliance orders, and criminal and civil judicial enforcement. Each aspect of the enforcement program is addressed in turn.

a. Inspections

ANEPA is authorized to appoint inspectors to insure compliance with the EL. Such inspectors would have authority to enter premises, stop vehicles believed to be discharging pollutants or otherwise violating the Afghan EL, and to take samples, photographs, and collect other information needed to perform the inspections.[394] Inspectors would also have authority to require the production of documents, to seize documents that may constitute evidence of committing an offense under the EL, and to

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[390] *See id.* at Art 32.1(1)-32.1(4).

[391] *See id.* at Art 32.2(1).

[392] *See id.* at Art 32.4.

[393] *See id.* at Art 32.5.

[394] *See id.* at Art. 67.2(1)-67.2(3).

make reasonable inquiries "of any person."[395] Inspectors also have authority "to require any person to afford the inspector such facilities and assistance to enable the inspector to exercise any of the powers conferred on the inspector" by the EL.[396]

b. Abatement Orders

Where an activity not authorized under the Afghan EL may result in a significant adverse effect, ANEPA has authority to "order abatement" of the activity by serving a signed abatement order on the person "causing or permitting" the activity.[397] The abatement order must address, at a minimum the nature of the activity in question, a deadline for abatement, and the "remedial and environmental restoration action required."[398]

c. Compliance Orders

When ANEPA believes the terms of an issued license or permit has been breached, it may serve a compliance order on the suspected wrongdoer.[399] The order may require the person to remedy the breach by a certain date, or immediately suspend the license if "considered necessary to prevent or mitigate an immediate risk of significant adverse effects to the environment or human health."[400] If the person does not comply with the order, ANEPA has four options. First, it may take necessary steps to remedy the

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[395] *See id.* at Art 67.2(4)-67.2(6).

[396] *See id.* at Art 67.2(7).

[397] *See id.* at Art. 68.1.

[398] *See id.* at Art. 68.2.

[399] *See id.* at Art 69.1.

[400] *See id.* at Art. 69.1(1)-69.1(2).

breach and recover the cost from the licensee or permit holder.[401] Second, it may alter the conditions of the permit or license.[402] Third, it may revoke the license or permit.[403] Finally, it may refer the case to "the relevant authority" for prosecution.[404]

d. Judicial Enforcement

The Afghan EL also contains provisions for enforcement in criminal and civil legal proceedings. Permit holders can be prosecuted for breaching the conditions of their permit or license, failing to comply with an abatement or compliance order issued by ANEPA, or making a false statement for the purpose of obtaining a permit.[405] Violations can be punished by fines or imprisonment, which are set at fixed amounts by the statute for certain offenses. For example, a person who violates a compliance order "shall be sentenced to a six month imprisonment" or a cash fine "equivalent to the damage caused." [406] Making a false statement is punishable by a three-month prison term or a 10,000 Afghani fine, or both.[407] If any of these offenses are committed by a corporation, every director or officer of the corporation is liable and subject to fines and imprisonment.[408]

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[401] *See id.* at Art. 69.2(1).

[402] *See id.* at Art. 69.2(2).

[403] *See id.* at Art. 69.2(3).

[404] *See id.* at Art. 69.2(4).

[405] *See id.* at Art. 70.1.

[406] *See id.* at Art. 70.1(2).

[407] *See id.* at Art. 70.1(3). The Afghani is Afghanistan's currency.

[408] *See id.* at Art. 72.

Civil judicial enforcement under the Afghan EL is governed by Article 71, which allow any person "affected by damage" or "threatened by potential harm" to natural resources or the environment, or by violations of the statute, to bring legal action.[409] Article 71 also states that any person who intentionally or negligently "commits any act or is responsible for an omission which damages, degrades, or threatens natural resources or the environment shall be liable for the costs of restoration and remediation."[410]

B. Implications of the Afghan EL for DoD Operations

As discussed above, Executive Order 12,088 requires the head of a federal agency to ensure that the operation of overseas federal facilities "complies with the environmental pollution control standards of general applicability in the host country or jurisdiction."[411] The Department of Defense eventually implemented the executive order by issuing DoDI 4715.5, which requires DoD to develop final governing standards if host nation standards are more stringent than the Overseas Environmental Baseline Guidance Document (OEBGD).[412] DoD expressly exempted overseas contingency operations from the requirement to comply with host nation law, even though Executive Order 12,088 does not authorize any exemptions.[413]

Despite this exemption, CENTCOM's environmental policy arguably creates an obligation to comply with host nation environmental law. The CENTCOM Regulation

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[409] *See id.* at Art. 71.1.

[410] *Id.* at Art. 71.2.

[411] *See* Executive Order 12,088, at § 1-801.

[412] *See* DoDI 4715.5, at para. 6.3.

[413] *See id.* at para.2.1.4.

states: "All US forces operating in the USCENTCOM AOR" will "[c]omply with the spirit as well as the letter of applicable international, federal, and [host nation] environmental laws, executive orders, directives, instructions, and regulations."[414] The CENTCOM Regulation provides no exceptions to this policy for contingency operations, which on its face is to apply to "all US forces" in the CENTCOM AOR.

Based on this inclusive language, the CENTCOM Regulation mandates a determination of how the new Afghanistan environmental statute might affect U.S. military operations in Afghanistan. Under the CENTCOM Regulation, lead service components are charged with determining what host nation laws should be incorporated into the environmental policy for the countries under its responsibility.[415] The lead service component develops a final governing standard (FGS) "for each country in the AOR where there is a main operating base, a forward operating site, a cooperative security location, or a periodically significant presence."[416]

The lead service component for Afghanistan is U.S. Army Central Command (ARCENT),[417] which also states in its Standard Operating Procedure that its policy is to comply with host nation law: "Upon deployment to the USCENTCOM AOR…forces will actively prevent pollution, respect the natural resources of host nations, comply with the spirit as well as the letter of applicable US and host nation regulations…."[418]

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[414] *See* CENTCOM Regulation, *supra* note 268, at para 5.a(1).

[415] *See id.* at para. 6.b.

[416] *See id.* at 6.b(1).

[417] *See id.* at Appendix A.

[418] *See* ARCENT SOP, *supra* note 270, at chapter 1, para. 1.a.

In spite of the host nation provisions in the CENTCOM Regulation and the ARCENT SOP, no final governing standard (FGS) or similar document has been issued to address the applicability of Afghanistan's new environmental statute to date.[419] One explanation for this inaction is that while the Afghan EL establishes a permitting process and a framework for environmental protection, it does not promulgate numerical standards for clean air, water, and soil. Since Executive Order 12,088 only requires compliance with "pollution control standards of general applicability"[420] two things must occur before DoD will have an obligation to comply with the Afghan EL. First, Afghanistan's NEPA must promulgate actual pollution control standards. Second, the Afghan government will have to enforce those standards against the general regulated community. Since the Afghan EL was enacted so recently, Afghanistan's fledgling environmental protection agency may take a significant amount of time before standards are in place and are generally enforced.

The structure of the CENTCOM Regulation may create a procedural obstacle for applying Afghan environmental standards to the United States' activities once those standards are developed and generally enforced. While the CENTCOM Regulation provides no exemption to applying host nation standards to contingency operations, the process for considering the effect of host nation law is tied to developing final governing

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[419] Final Governing Standards have been published for Kuwait, Qatar, United Arab Emirates, Egypt, Saudi Arabia, Oman, and Bahrain, Kenya. *See id.* at 7 ("References" page); USCENTAF A7 Environmental Program Branch Publications and References, https://wwwmil.centaf.af.mil/a7/Library/Environmental/References.htm (last visited May 20, 2008).

[420] *See* Executive Order no. 12,088, at § 1-801.

standards (FGS).[421] This approach is problematic because no FGS is required for contingency operations,[422] and the CENTCOM Regulation sets forth no specific procedure for incorporating host nation law without preparing a formal FGS. To resolve this problem, the CENTOM Regulation would need to be revised to either expressly exempt contingency operations, or to provide guidance on how host nation environmental standards would be considered for incorporation into its policies.

While the U.S. military may not need to worry about complying with Afghanistan's new environmental statute immediately, chances are the issue will need to be addressed eventually. While the Pentagon denies that there are current plans for permanent installations in Afghanistan,[423] several factors suggest the United States will have a military presence there indefinitely. First, Afghan President Hamid Karzai has requested permanent bases,[424] and his government still leans on the U.S. for support.[425]

Second, the U.S. has invested heavily in its Afghan installations, especially Bagram Airfield.[426] So far, the United States has spent millions improving the Soviet-era base, including a new $68 million runway able to support any aircraft in DoD's

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[421] *See* CENTCOM Regulation, *supra* note 268, at para. 6.b; DoDI 4715.5, paras. 6.3.2, 6.3.3.

[422] *See* DoDI 4715.5, para. 2.1.4; DoD 4715.05-G, para. C1.3.3.

[423] *See* Richard Sisk, *Rummy Duck's Afghan's Base Plea*, DAILY NEWS (NEW YORK), April 14, 2005; Thom Shanker, *Afghan Leader to Propose Strategic Ties With the US*, THE NEW YORK TIMES, April 14, 2005, at A12; Billy House, *McCain Scrambles to Clarify; Remark on Afghan Bases at Issue*, THE ARIZONA REPUBLIC, Feb. 23, 2005, at 16A.

[424] *See id.*

[425] *See* Amin Saikal, *Kabul Must Say No to U.S. Bases*, The Globe and Mail (Canada), May 24, 2005, at A15.

[426] *See Jason Straziuso, Six Years Later, US Expands Afghan Base*, ASSOCIATED PRESS, Oct. 7, 2007.

inventory[427] and a $50 million air traffic control tower.[428] The U.S. also plans to spend $60 million on a new 40-acre detention facility on Bagram.[429] Further development is also more likely because the United States' basing agreement with Afghanistan[430] allows the U.S. to stay rent free indefinitely at Bagram, a prime location for any long-term strategy involving Iran and other Asian countries.

Finally, while both major candidates for the Democrat Party's nomination for the 2008 presidential election promised to withdraw from Iraq quickly if they were elected, regardless of the advice given by military commanders,[431] there has been virtually no serious political debate about discontinuing U.S. operations in Afghanistan. In fact, Democrat presidential candidate Senator Barack Obama has discussed focusing on Afghanistan rather than Iraq as part of his "comprehensive strategy",[432] and Republican candidate Senator John McCain has said that permanent installations in Afghanistan would be desirable.[433]

All of these factors indicate that the U.S. will remain in Afghanistan, at least at Bagram Airfield, for a long time to come. Since it appears the U.S. will remain in

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[427] *See* Joseph Kapinos, Bagram Airfield opens $68 million runway, https://www.bagram.afnews..af.mil, Dec. 21, 2007.

[428] *See* Skyline expands at Bagram Air Base, https://www.airforcetimes.com, March 4, 2008.

[429] *See* Eric Schmitt and Tim Golden, *U.S. Set to Build Big New Prison in Afghanistan*, The New York Times, May 17, 2008.

[430] *See* Bagram ACA, *supra* note 195, at para. 3.

[431] *See* Adam Nagourney and Jeff Zeleny, *In Tense Debate, Clinton Employs Sharp Attacks*, THE NEW YORK TIMES, April 17, 2008, at 1.

[432] *See* Anne Davies, *Obama Says He Would Strike Inside Pakistan,* SYDNEY MORNING HERALD (AUSTRALIA), Aug. 3, 2007, at 13.

[433] *See* House, *supra* note 423, at 16A.

Afghanistan long enough for the Afghan NEPA to promulgate pollution standards, and perhaps may maintain Bagram as a permanent installation, Afghanistan's new environmental law will likely impact U.S. operations eventually. In the meantime, CENTCOM components must at least monitor the ongoing developments in Afghan environmental law.[434]

VII. Conclusion

Given Afghanistan's war-torn past, environmental protection is critical for Afghanistan's future. Given DoD's own environmental history, its operations within Afghanistan's fragile environment are a potential source of doubt and concern. If the Department of Defense, which enjoys considerable discretion in setting environmental practices during overseas contingency operations, were to take a Cold-War approach to environmental matters during OEF, Afghanistan would be at even greater risk for even greater environmental damage.

Fortunately, times (and philosophies) have changed at DoD since the Cold War. In 1990, then-Secretary of Defense Dick Cheney unveiled his "Defense and the Environment Initiative," which was aimed at improving DoD's environmental practices during the post-Cold War era. Introducing this program, Cheney said:

> Defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns. The real choice is whether we are going to build a new environmental ethic into the daily business of defense – make good environmental actions a part of our working concerns, from planning to acquisition to management. Recently, President Bush affirmed this commitment when he said global stewardship is our shared responsibility and our shared opportunity. Environmental responsibility sustains life on earth, enriches society and the conditions of life and

[434] *See* CENTCOM Regulation, *supra* note 268, at paras. 6.b(4), 6.b(6).

> expands opportunities for the future. Within the federal government, I want the Defense Department to be the federal leader in agency environmental compliance and protection.[435]

While the question of whether DoD has actually become the federal leader in "environmental compliance and protection" may be the subject of debate, the environmental policies developed for DoD's operations in Afghanistan highlight how far DoD has come. While DoD still enjoys considerable discretion over contingency operations like OEF, it has exercised its considerable discretion to develop a policy of environmental stewardship that includes specific pollution control standards. These policies proactively seek to prevent contamination and remediate accidents when they occur, rather than employing the "pollute now, clean up later" approach employed during the Cold War. These standards also demonstrate that an "environmental ethic" has been built into "daily business of defense" in the manner Cheney envisioned.[436]

That is not to say that DoD can rest on its laurels while its presence in Afghanistan continues, especially given the likelihood of a long-term U.S. presence there. DoD will need to continue to develop its policies as Afghanistan builds a regulatory scheme onto the foundation laid by its own new environmental statute, giving the agency an opportunity to show not only how far it has come in the environmental arena, but how far it is willing to go.

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[435] Dick Cheney, Secretary, Department of Defense, Remarks to the Forum on the Defense Environment Initiative (Sep. 6, 1990).

[436] *See id.*