



DEPARTMENT OF THE NAVY
OFFICE OF THE CHIEF OF NAVAL OPERATIONS
2000 NAVY PENTAGON
WASHINGTON, D.C. 20350-2000

IN REPLY REFER TO
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23 Jan 02

ADM James D. Watkins
Chairman
U.S. Commission on Ocean Policy
1120 20th Street, NW
Suite 200 North
Washington, DC 20036

Dear Admiral Watkins,

Thank you for your letter of 12 December 2001 requesting amplifying information on issues of concern to the Department of Defense. The answers to the eight questions you posed to the DoD Task Force are attached.

We look forward to continued interaction with the Ocean Commission as you formulate ocean policy recommendations. Please do not hesitate to contact us if we can provide additional information.

Our points of contact are CAPT Kathy Shield, CNO(N962) at (202) 762-0272 and CDR Dave Grogan, Ocean Policy/NAC at (703) 697-6671.

M. F. LOHR
Rear Admiral, U.S. Navy
DoD Representative for
Ocean Policy Affairs

A handwritten signature in black ink, appearing to read "E. D. West".

E. D. WEST
Rear Admiral, U.S. Navy
Oceanographer of the Navy

Copy to:
DoD Task Force

1. When can we hope to have an indication from the Department of Defense on its position on the Law of the Sea?

The Department of Defense is giving the Convention its careful attention and will coordinate closely within the Administration regarding any action on the Convention.

2. Is there any policy on the record that covers Defense's view of maritime operations in MPS, MMA, and other restricted regimes?

It is Department of Defense (DoD) policy to comply with applicable legal requirements protecting maritime natural resources, including the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA), during test and training activities conducted in U.S. waters and on the high seas. Navy policy, clarifying requirements of the ESA and the MMPA applicable to test and training activities at sea, is set forth in OPNAVINST 5090.1B and a memorandum from the Undersecretary of the Navy dated December 28, 2000. Additionally, Navy doctrine for environmental protection considerations during naval operations at sea throughout the spectrum of conflict is provided in Naval Warfare Publication 4-11 "Environmental Protection" dated September of 1998.

DoD, however, is increasingly concerned over the ability to sustain readiness to operate in the maritime environment. In the December 2000 readiness report to Congress, the Senior Readiness Oversight Committee (comprised of the service Vice Chiefs) identified maritime sustainability as one of the critical challenges to DoD sustained readiness. Maritime sustainability is affected by maritime resource protection laws, executive orders, and federal and state regulations relating to the maritime environment. To carry out its responsibilities as DoD's executive agent for maritime sustainability, Navy has created the Maritime Sustainability Steering Committee (MSSC). The MSSC coordinates Service efforts to ensure consistent compliance policies and to facilitate proactive initiatives that better balance national security with environmental stewardship, ensuring DoD maritime ranges and operating areas are fully capable of supporting current and future readiness requirements.

3. Do current permitting processes that affect Navy R&D, operations, testing, or training affect Navy's ability to safely ensure it can carry out its mission?

The Department of Defense (DOD) must provide credible, combat-ready naval forces capable of sailing anywhere, at anytime. These forces must be ready to influence, directly and decisively, events ashore by projecting power from the sea. The ability to accomplish this mission is inextricably tied to training; there is a direct relationship between training and successful performance in combat. Most of the Navy's at-sea training is accomplished in the waters off the East and West Coast and in the Caribbean Sea.

The current consultation and permitting process, which is time consuming and often arbitrary, is impractical given the relatively short-fused timeframe associated with most naval training exercises. Often the Navy has no choice but to adopt onerous mitigation (ostensibly to avoid “disturbing” marine mammals) to obtain approval from the regulatory agency. These mitigation measures, for example, often disallow training at night. Such training is essential for honing the combat skills of our men and women, who depend on the technological advantage of “owning the night” as a fundamental combat capability.

A senior Navy uniformed official recently testified before a subcommittee of the House Resources Committee that these “trends toward increasing regulation and litigation (over consultations and permitting issues) put at risk our ability to maintain the readiness our citizens expect from their Navy.”

The Office of Naval Research (ONR) has canceled underwater sound propagation tests involving U.S. and foreign navy ships because the regulatory agency determined that formal vice informal consultations were required. Formal consultations invariably take six months or more. Because of changing fleet schedules, ONR was unable to identify the location of the tests until just 30 to 60 days prior to their execution. By requiring formal consultations to obtain regulatory concurrence, ONR had no choice but to cancel the events.

LFA is a perfect example of a critical sensor system presently used by Russia and France, but unavailable to our Navy due to time-consuming and inefficient permitting processes. Despite the completion of a \$10 million scientific research program conducted by independent scientists from Cornell University and Woods Hole Oceanographic Institution, which concluded that the Navy’s planned use of LFA would not adversely affect marine mammals, the regulatory agency has yet to issue a take permit.

Additionally, current actions at the State level with respect to submarine cables could be exploited by other nations at the expense of DoD operations overseas. Under customary international law and various treaties to which the United States is a party, all nations enjoy the right to install and maintain undersea cables on the high seas and the continental shelf beyond the territorial sea of another coastal nation. Under the provisions of these treaties, coastal state authority to regulate offshore cable activities is limited to two areas. First, a coastal state may establish conditions for cables entering its territory or territorial sea. Second, a coastal state has jurisdiction over cables constructed or used in connection with the exploration of the continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction. Unless one of these two situations applies, all nations enjoy the freedom to lay submarine cables on another nation’s continental shelf beyond the territorial sea. State regulations that are inconsistent with these principles may lead foreign nations to attempt to impose similar restrictions on U.S. cables overseas, thus harming U.S. national security interests worldwide.

4. Can we design and implement a more robust data archive and distribution system than the one currently in place in the U.S.?

Yes, and the key to achieving this necessary improvement lies in increasing and enhancing the collaboration and cooperation among agencies and other stakeholders involved in ocean observing and data services. Central to such an improvement is the recently created interagency program office for ocean observations, Ocean.US, created under the auspices of the National Oceanographic Partnership Program. Ocean.US has as its charter over the coming decade, the implementation and maintenance of a sustained and integrated coastal and open ocean observing system that will make ocean data, tools and knowledge available to the broadest audience – a charter that demands substantive improvements in our data archival and dissemination capabilities. The Navy strongly supports the goals of NOPP and Ocean.US and is supporting the latter through financial contributions and by assigning a Navy Captain to serve as the Director of the Office. The reasons for this focused Navy support are clear: the need for rapid and assured access to global and coastal real-time and historical ocean data as described by Nowlin and Malone (1999) and Frosch (2000) is critical for both civil and national security missions, now more than ever.

Many common technological and operational issues make for an attractive opportunity for the Navy to participate with other government and civilian agencies to create a robust national system. The Naval Meteorology and Oceanography Command (NAVMETOCCOM) participation would bring expertise in data standardization/management of large, diverse data holdings and consumer communities, systems integration, global 24x7 operational support systems, global distribution capabilities and requirements input as a major user of a new national system.

Within this construct of increased interagency cooperation in ocean data observing, dissemination and archival, the specific capabilities Navy can bring to bear on this issue are formidable. Leveraging the ongoing explosive growth in hardware, software and communications technologies, NAVMETOCCOM is well positioned to join in leading the design and implementation of an exceedingly robust and capable oceanographic data archive and distribution system. Building upon the NAVMETOCCOM's already robust system for supporting national security users, the Oceanographer of the Navy's Operational Concept is committed to further improvements in information management that can simultaneously address other critical national needs.

Successful implementation of and sustained improvement to a national oceanographic data archival and distribution capability will require that the new or enhanced system be implemented within the framework of a systems integration approach. NAVMETOCCOM is the DoD meteorological and oceanographic data functional manager, coordinating and standardizing across all services logical data models, attributes, databases, etc. Scientific integrity of the data and responsiveness to all

users will be achieved through requirements elicitation. Moreover, the design and implementation needs to be the result of careful systems engineering and integration and DoD can fill a vital collaborative role in this area.

The issue of ocean data archive and distribution of non-military survey data is one that strongly resonates with the Navy METOC community. Together, NAVOCEANO and FLENUMMETOCEN offer significant infrastructure and expertise for advancing the overall national capability in this area. A more detailed discussion of capabilities of the Navy's METOC production centers is provided in the following attachments:

Attachment 1: Examples of Naval METOC Data Holdings

Attachment 2: Current Naval METOC Data Archive and Distribution Capabilities

References available at www.ocean.us.net:

Nowlin/Malone Report - An Integrated Ocean Observation Plan (April, 1999). See section 3.1.2.

The Frosch Report - An Integrated Ocean Observing System: A Strategy for Implementing the First Steps of a U.S. Plan (Spring, 2000). See section on Systems Structure/Key Functions.

5. What does the Department of Defense find are the pros and cons regarding the United Nations Convention on the Law of the Sea?

The Department of Defense has always accepted and acted in accordance with the balance of interests in the Convention relating to the traditional uses of the oceans—such as navigation and overflight. In particular, the Convention codifies core navigational rights through foreign territorial seas, international straits and archipelagic waters and preserves critical high seas freedoms of navigation and overflight seaward of the territorial sea, including the exclusive economic zone (EEZ). In addition, the Convention limits the width of coastal states' territorial seas to 12 nautical miles, limits coastal state jurisdiction in the EEZ primarily to resource-related issues, and preserves the sovereign immune status of warships and other public vessels and aircraft. Because these provisions, inter alia, assure the U.S. military's access to the world's oceans as a matter of international legal right, they serve U.S. national security interests. We note, however, that such rights are already provided under customary international law, and that the Convention serves primarily as a useful codification of such principles. The Department must, however, consider the Convention as a whole in determining how its interests are best served.

6. Does the Department have recommendations on the specific topic of balancing competing interests in multiple concurrent ocean resource use?

The Navy has historically balanced its use of water space with other competing interests. However, over the last several years this balance has tipped in favor of those other interests at the expense of Navy training.

The Navy has coexisted successfully with fishing, recreational, and environmental interests in numerous areas of the country for many years. For example, the southern California operational area, specifically around San Clemente Island, is a major training/exercise area for the Navy. The Navy uses that area at specific times of the year on a regular basis. When Navy training is not taking place, the entire area is open to fisherman, recreational divers, and boaters. On the East Coast, the areas surrounding Vieques, Puerto Rico are used for major training exercises approximately four times a year. Prior to May 1999, when protesters occupied the Vieques range, Navy beaches—which continue to be the most pristine on the island—were open to the public when training was not occurring. Fisherman, divers, and recreational boaters also use adjacent waters. These examples show that there can and are multiple-concurrent use of ocean resources.

The Navy's successful stewardship program has undermined its efforts to balance training needs with environmental protection obligations. Successful stewardship has led to increased populations of protected species on Navy ranges and a recognition by many that areas controlled by the Navy are often immune to the kind of exploitation that occurs on private, commercial and even other publicly held areas. Recognizing this, environmental groups and regulatory agencies have relied on the Navy to carry the lion's share of the burden and responsibility for protecting natural resources located on or near its ranges and facilities. This is accomplished by expanding marine sanctuaries into areas historically used for training and imposing redundant "terms and conditions" upon training itself.

On Vieques, for example, the Navy has released in excess of 10,000 sea turtle hatchlings into the ocean environment. However, when the Navy requested a "take" permit for turtles, the regulatory agency issued a Biological Opinion requiring suspension of carrier battle group training if more than a single sea turtle was taken. At Naval Amphibious Base Coronado, which contains critical habitat for the Western Snowy Plover, the Navy's stewardship program has resulted in a significant increase in the species and its nests over the last several years. However, the effect of this successful stewardship program has been the loss of 40-50% of training areas to the increased numbers of plovers.

Specific recommendations for addressing the multiple uses of oceans are addressed in the response to question eight.

7. The Commission needs the attention of the Army Corps of Engineers in the deliberation process. How can we establish this relationship?

The Army Corps of Engineers is part of the DoD Task force supporting the Ocean Commission. The Corps representative is Barry Holliday, CECW-OD, www.barry.w.holliday@usace.army.mil, (202) 761-4741. The Corps stands ready to support the needs of the Ocean Commission.

8. Regarding the encroachment issue which you mentioned in your presentation, are there ways to work out these problems so that we can meet double objectives?

DoD endeavors to balance environmental stewardship and military readiness -- two issues of paramount concern to our nation. As noted in the response to question 6, certain regulatory requirements have disturbed the balance and will, if left uncorrected, adversely affect military readiness. Mindful of our dual obligations under Title 10 of the U.S. Code to maintain ready forces and other Federal laws setting forth environmental protection obligations, the following suggestions are offered to facilitate "meet[ing] the double objectives" of stewardship and readiness:

A. Short-Term

1. Regulatory agencies should avoid application of the precautionary principle in the context of military training absent a clear expression from Congress to do so or the availability of convincing evidence that the training activity will significantly affect the environment. The precautionary principle presumes that in the absence of scientific certainty, the proposed activity (training) is presumed to harm the environment.

2. Department of Commerce and Department of the Interior should make reasonable proposals for legislative changes to the definition of harassment (as opposed to harm or injury) under the MMPA consistent with those proposed by the National Research Council (NRC). Relying on the current definition of harassment, the Marine Mammal Commission (MMC) and other groups have contended that any action causing any slight, momentary change in behavior of a marine mammal is harassment (MMC ltr of March 30, 2000). According to the NRC, if this current interpretation of Level B harassment (detectable changes in behavior) were applied to commercial shipping and recreational boating as strenuously as it is applied to scientific and *naval* activities, the result would be crippling regulation of nearly every motorized vessel operating in U.S. waters.¹ NRC advocates instead a definition of harassment that focuses on significant adverse biological effects in marine mammal stocks.² These changes should seek to ensure protection of marine mammals while allowing sufficient flexibility to conduct training and other operations essential to national security.

B. Long-term

1. Areas traditionally used for training should not be re-designated to protect certain species at the expense of training. DoD should be allowed to continue to use these areas absent a showing of significant impact on the environment by DoD.

¹ National Research Council, *Marine Mammals and Low Frequency Sound: Progress Since 1994* (National Academy Press 2000).

² *Ibid.*

2. In the event that conflicting interpretations of ambiguous environmental laws and regulations cannot be resolved between the services and regulators, DoD and the appropriate regulatory agency should jointly pursue legislative or regulatory clarification of the provisions in question as they apply to military training and operations. This effort should also include coordination with the Executive Branch on those Executive Orders that have the potential to affect maritime sustainability.

a. As clarified, environmental requirements should allow military forces to train effectively (e.g., training that has sufficient fidelity to combat conditions and with sufficient frequency) and to test military weapons and sensors while protecting human health and the environment. Such requirements should not halt training and testing for extended periods because scientific knowledge of the environment is less than complete.

b. Where scientific knowledge of the environment is less than complete, environmental requirements should allow military training or weapons testing to proceed provided the applicable military service and regulatory agencies assess the potential impact of any incomplete information and agree upon measures to obtain the information. If this would unreasonably delay training or testing, the applicable military service and regulatory agencies should provide for monitoring the effects of the training or testing to resolve questions over its impact.

c. Regulatory agencies should consider, along with environmental factors, the impact that proposed regulations applicable to military activities might have on national defense and should be required to consult with DoD before finalizing such regulations. In such consultation, the regulatory agency should defer to DoD on the necessity for or military value of training or testing, and should carefully consider DoD's assessment of the impact that restricting or modifying training or testing to comply with the proposed regulation would have on national defense and DoD training, testing and readiness. The regulatory agencies should also strive to achieve environmental benefits without impairing DoD's ability to provide for necessary training, testing, and readiness.