Appendix A

The Legal Environment for Environmentally Compliant Ship Breaking/Recycling In the United States

Report No. MA-ENV-820-96003-A
Contract No. DTMA91-93-C-00004

U.S. Department of Transportation

Maritime Administration

July 1997

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

LIST OF TABLES

TABLE OF CASES

This Page Intentionally Left Blank

1.0 INTRODUCTION

This report defines the impacts of U.S. environmental, safety and health regulations on the processes and technologies used to recycle obsolete seagoing ships from the Maritime Administration's National Defense Reserve Fleet (NDRF).

The materials used in ships are no different from those used in many modern construction projects. For example, the same steels and paints serve in strong, long-lasting bridges; the same plastics and rubber products are in electric power lines, automobiles, and washing machines; and the same lubricants are used in trucks and aircraft. Many of these materials are themselves the subject of environmental, safety, or health statutes and regulations. For example, polychlorinated biphenyls (PCBs) are extensively regulated under the Toxic Substances Control Act (TSCA), are regulated as a toxic air pollutant under the Clean Air Act, and are subject to the corrective action requirements of the Resource Conservation and Recovery Act (RCRA). Emissions of lead and asbestos into the ambient air are regulated as toxic air pollutants under the Clean Air Act. Such emissions into the indoor air of the workplace are regulated under the Occupational Safety and Health Act.

Shipyards or other facilities used to recycle ships are also subject to the same environmental statutes and regulations as other comparable facilities. If those facilities emit a regulated quantity of air pollutant, some form of preconstruction and operating approval under the Clean Air Act will doubtless be required. If they are a point source of water pollution, a permit under the Clean Water Act will be required if the discharge is into the waters of the United States. If, however, the discharge is not directly into the waters of the United States but into publicly owned treatment works, a permit may not be required, but the discharge will have to satisfy the U.S. Environmental Protection Agency's (EPA's) pretreatment standards. Construction activities in the waters of the United States, including adjacent wetlands, will probably require the approval of the U. S. Army Corps of Engineers under § 404 of the Clean Water Act.

In addition, the process by which necessary environmental and other permits and approvals are obtained may trigger further, procedural environmental requirements. If at any point in the process there is a major federal action significantly affecting the quality of the human environment, an environmental impact statement (EIS) will be required under the National Environmental Policy Act (NEPA). Less significant federal actions or those of unknown significance may trigger less imposing requirements pursuant to the regulations the Council on Environmental Quality (CEQ) has promulgated in implementing NEPA.

In some instances, Congress has provided very little specificity in the statutes, and the agencies have provided the details. The permitting process for the discharge of dredged and fill material under § 404 of the Clean Water Act is a good example. Through expansive regulations — which perforce have been preceded or followed by favorable judicial opinions — the Corps of Engineers administers a process that regulates far more than water pollution.[1]

In other instances, Congress itself has imposed detailed requirements on regulated industries. The Clean Air Act is a good example. There, Congress, dismayed with the pace of EPA's regulation of toxic air pollutants, listed 189 substances as toxic air pollutants and defined what sources are "major sources."

In still other instances, it has been left to the courts to determine what the regulatory scheme will be. The scope and meaning of subsection 102(2)(C) of NEPA, requiring an EIS, were determined largely by Courts of Appeals and the U.S. Supreme Court. The state of mind necessary for commission of a crime, under a number of federal environmental, safety, and health statutes, is routinely decided by courts.

Thus, regulations themselves are not always the most reliable source of the minutiae of environmental compliance. Indeed, even when regulations would appear to be promulgated for the traditional purpose of filling in the gaps left in the statute, frequently it is not the regulatory text, but rather the preamble to the proposed and final rulemaking, that explains what the regulation actually does.

This report analyzes the environmental, safety, and health requirements applicable to ship breaking/recycling without being project or site specific. To this end, the report analyzes agency regulations and decisions, as well as statutory provisions and judicial decisions that provide the additional level of regulatory detail not provided in the earlier survey of federal statutes contained in the MARAD report entitled, "Substantive Law on Environmentally Compliant Ship Breaking/Recycling in the United States" (see Reference 1).

Many states have assumed the primary responsibility of implementing federal environmental programs, such as under the Clean Air Act and Clean Water Act. In general, the state's rules must be at least as strict as federal rules and may be more so. A case in point is the California air program. Seeking new source construction approval under the Clean Air Act in California will almost assuredly take more time and cost more money than even the most prudent planner can anticipate. The process of bargaining with the State Air Resources Board in California is challenging.

The programs that the states have created in response to local concerns can also affect ship breaking/recycling. California, for example, aggressively regulates activities in its coastal zone. The rigor of these regulations far exceeds the stringency required by the Coastal Zone Management Act. The states' regulatory schemes can significantly affect ship breaking/recycling operations and even preclude ship breaking/recycling in some states.

NOTES CHAPTER 1.0

1. Whether this process amounts to unwarranted federal intrusion into state and local land use planning has been debated for about 20 years, has been the subject of Congressional hearings, and will not be resolved here. For well-articulated views on both sides, see Sanderson, "§ 404: Federal Interference with State and Local Land Use", *Natural Resources & Environment*, Vol. 7, 1 at 6 (1992) and Wood, "Federal Wetland Regulation Is Essential", *Natural Resources & Environment*, Vol. 7, 1 at 7 (1992).

This Page Intentionally Left Blank

2.0 PROCEDURES TRIGGERED BY FEDERAL AGENCY ACTION

Some regulatory procedures are triggered by federal action: consultation requirements[1] under the Endangered Species Act and the National Historic Preservation Act, and an EIS and other environmental documentation under NEPA and the CEQ regulations. Strictly speaking, these are not permitting requirements imposed on ship recyclers. Some of these procedures, however, can be a significant obstacle to a ship breaking/recycling facility obtaining necessary federal permits.

A. National Environmental Policy Act

A ship breaking/recycling facility is subject to a host of environmental, safety, health, and other laws. Many of these laws require that prior to commencing operations, a recycling facility obtain federal approvals. It is these approvals that may trigger the need for an EIS under NEPA.

Section 102(2)(C) of NEPA requires an EIS to be prepared for "major federal actions significantly affecting the quality of the human environment."[2] The Council on Environmental Quality has issued regulations implementing this requirement.[3]

An EIS is not required where the major federal action is not "significant" within the meaning of NEPA.[4] Whether an agency's action will have a significant effect on the environment is an issue that has traditionally been left to the informed discretion of the agency.[5]

An agency's determination that an EIS is not necessary for a particular project will not be reversed unless that decision is unreasonable.[6] The courts will ensure that in deciding this substantive issue, the agency complies with the procedural duties imposed by NEPA;[7] once an agency has made a decision subject to NEPA's procedural requirements, however, the only role for a court is to ensure that the agency has considered the environmental consequences of the action it proposes.[8]

Social and economic impacts alone will not trigger the requirement for an EIS.[9] Nonetheless, if an EIS is otherwise required, social and economic effects should be discussed. NEPA has been applied to federal agency action outside the United States.[10]

The statute speaks solely in terms of proposed actions. NEPA does not require an agency to consider the possible environmental impacts of less imminent actions, such as those that are merely contemplated.[11] If federal action authorizes private activity and the private activity significantly affects the quality of the human environment, an EIS will be required.[12] The requirement for federal action is satisfied if a federal agency will influence or control the outcome of the activity in some material way.[13]

In determining whether a proposed action would be sufficiently major and significantly affect the environment to warrant an EIS, a federal agency must consider the cumulative effect of its actions or decisions. Typically, an agency will prepare an environmental assessment (EA) to

determine whether a proposed action requires an EIS. Agencies may also create "categorical exclusions" for those categories of actions that the agency has found do not individually or cumulatively have a significant effect on the human environment. For these categories of actions neither an EA nor an EIS is necessary.[14]

Congress has created statutory exceptions to the EIS requirement.[15] Courts have held that EPA is not required to prepare an EIS when the action that it is taking is the functional equivalent of an EIS.[16] The Supreme Court has held that agencies do not have to restructure their administrative procedures to accommodate NEPA.[17]

An EIS is evidence that an agency has considered the reasonably foreseeable environmental effects of a proposed major action before making a decision to take that action. An EIS should contain a thorough discussion of significant aspects of the probable environmental consequences of the proposed action.[18] The EIS must include a discussion of: the environmental impact of the proposed action; adverse impacts that cannot be avoided should the proposal be implemented; alternatives to the proposed action; the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and any irreversible and irretrievable commitment of resources involved if the proposed action is implemented.

The EIS must accompany the agency proposal through the agency's review process. The agency must consult with other federal agencies having jurisdiction over or special expertise with regard to the project's environmental impacts. The EIS should be distributed to federal, state, and local officials with environmental enforcement responsibilities and made available to the public.

B. The Endangered Species Act

Section 7 of the Endangered Species Act (ESA) requires all federal agencies to ensure that any action funded, authorized, or carried out by them will not jeopardize the continued existence of an endangered or threatened species or the adverse modification of designated critical habitat. Ospreys and other protected species are routinely found in mothballed ships. Consequently, any action affecting such ships could affect a listed species and even critical habitat.

If an agency action may affect a listed species, consultation to evaluate the impacts[19] is required between the agency involved and either the Fish and Wildlife Service or the National Marine Fisheries Service, depending on the species.[20] A biological opinion emerges from this process. The agency taking the action is obliged to consider this opinion.

The consultation process can be lengthy and expensive. Moreover, the process can be "reinitiated" in light of changed circumstances.[21] Furthermore, some federal permits contain reopener provisions that allow reinitiation even years after the permit is issued.

Federal agency action is necessary to trigger these consultation requirements. The agency action, however, must be of a type that could affect threatened or endangered species or designated critical habitat.[22] Authorizations by federal agencies, e.g., Corps of Engineers § 404 permits, can require ESA consultation if they could have such an effect.[23]

C. The National Historic Preservation Act

Under § 106 of this Act, the head of any federal agency must take into account the effect of an "undertaking" by that agency on any site, object, district, building, or structure included in or eligible for inclusion in the National Register. Thus, if an agency of the United States wished to scrap a ship that had been designated for inclusion or was eligible for inclusion in the National Register, that agency would have to first consult with the Advisory Council on Historic Preservation.

NOTES CHAPTER 2.0

1. There are hundreds of consultation requirements imposed on federal agencies by statute, regulation, executive order, memoranda of understanding, and otherwise. These requirements are understood and carried out routinely by federal agencies and will not be discussed in this report. Only the more daunting consultation requirements that could significantly delay or even prevent issuance of a federal permit are described herein.

2. 42 U.S.C. § 4332(2)(C).

3. 40 CFR Part 1500. CEQ's regulations purportedly describe all phases of the EIS process and provide key definitions. The regulations, however, are of little practical assistance in determining the meaning of "major federal actions" (40 CFR § 1508.18) "significantly" (40 CFR § 1508.27) affecting the quality of the human environment, and in deciding when an EIS is required (40 CFR § 1501.4).

4. *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

5. *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983).

6. See *The Steamboaters v. FERC*, 759 F.2d 1382, 1392 (9th Cir. 1985); *Foundation for North Am. Wild Sheep v. United States Dept. of Agr.*, 681 F.2d 1172, 1177 (9th Cir. 1982).

7. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

8. *Stryker's Bay Neighborhood v. Karlen*, 444 U.S. 223 (1980).

9. *Breckinridge v. Rumsfield*, 537 F.2d 864 (6th Cir. 1976).

10. *EDF v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (Applied to a National Science Foundation proposal to build a waste disposal incinerator in Antarctica).

11. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

12. See Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

13. See *Almond Hill School v. United States Dep't of Agr.*, 768 F.2d 1030 (9th Cir. 1985) (No federal action where indirect federal funding "seem[ed] marginal at most" and where federal officials had no decision-making role).

14. 40 CFR § 1507.3.

15. See, e.g., 33 U.S.C. § 1371(c)(1) (many of the actions taken by EPA under the Clean Water Act); 15 U.S.C. § 793(c)(1) (EPA actions taken under the Clean Air Act).

16. "Functional equivalence" has been found to exist in EPA's implementation of the Clean Air Act (prior to the statutory exemption being enacted), *Portland Cement Assn v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); the Federal Insecticide, Fungicide and Rodenticide Act, *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975); see also, *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986); the Ocean Dumping Act of 1972, *Maryland v. Train*, 415 F. Supp. 116 (D. Md. 1976); the Toxic Substances Control Act, *Warren County v. North Carolina*, 528 F. Supp. 276 (E.D.N.C. 1981); and the Federal Water Pollution Control Act, *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978); see also, *Town of Orangetown v. Gorsuch*, 718 F.2d 29 (2d Cir. 1983) (EPA did not act unlawfully in failing to prepare an environmental impact statement before providing funds for expansion of county sewage treatment system).

17. *Vermont Yankee Nuclear Power Corporation v. NRDC*, 435 U.S. 519 (1978).

18. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

19. 50 CFR § 402.14(a).

20. There is an exemption procedure, but it is not widely available.

21. 50 CFR § 420.16.

22. 50 CFR § 402.14.

23. See *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

This Page Intentionally Left Blank