October 31, 2006

Craig Czarnecki
U.S. Fish and Wildlife Service
Department of the Interior
2651 Coolidge Road, Suite 101
East Lansing, MI 48823

Dear Craig,

Below is the summary of research of the Sea Grant Law Center regarding the question you posed over the phone on October 31, 2006 about the Coast Guard's Great Lakes safety zones. As I understood our conversation, you are interested in the statutes and regulations that the Coast Guard is currently relying on to exempt its establishment of safety zones from public notice and comment and environmental laws. The following information is intended as advisory research only and does not constitute legal representation of the Fish and Wildlife Service by the Sea Grant Law Center. It represents our interpretations of the relevant laws and cases.

As you know, on August 1, 2006, the Coast Guard (CG) issued a notice of proposed rulemaking announcing its intention to establish safety zones throughout the Great Lakes to restrict vessels during live fire gun exercises. Although the CG is accepting public comments, the agency stated that it was not obligated to do so. The Administrative Procedure Act (APA), which provides the basic framework for agency rulemaking, contains a military affairs exception. The APA exempts from agencies from providing public notice and comment when the rulemaking involves "a military or foreign affairs function of the United States."[1] In a case involving safety zones for military exercises, the First Circuit held that "a rule designed to render safe and feasible the performance of a military function by preventing interference on the part of civilians necessarily serves a military function as well as a civilian one. Specifying a security zone seems to us no less directly related to military action than identifying targets or establishing the time for artillery exercises."[2] The Coast Guard's establishment of safety zones in the Great Lakes, therefore, likely falls within the APA's military affairs exemption.

This exemption, however, does not extend to other statutes. Although several environmental statutes contain exemptions for military training exercises, most must be granted on a case-by-case basis and limited to activities in "the paramount interest" of the U.S., primarily national security.[3] In general, the CG must abide by the procedural requirements in other statutes, such as the National Environmental Policy Act, the Endangered Species Act, the Migratory Bird Treaty Act, and the Clean Water Act.

In its notice of proposed rulemaking, the CG acknowledged that federal agencies must comply with NEPA. The CG, however, has made the "preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion" pursuant to Commandant Instruction M16475.1D.[4]

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[1] 5 U.S.C. § 553(a)(1).
[2] *U.S. v. Ventura-Melendez*, 321 F.3d 230, 233 (1st Cir. 2003).
[3] See Congressional Research Service, Exemptions from Environmental Law for the Department of Defense: An Overview of Congressional Action (July 11, 2006) available at http://www.fas.org/sgp/crs/natsec/RS22149.pdf .
[4] The Commandant Instruction guides the CG in complying with NEPA and is available at http://www.uscg.mil/ccs/cit/cim/directives/cim/cim%5F16475%5F1d.pdf .

To reduce the paperwork burden on federal agencies, the Council on Environmental Quality (CEQ) in its NEPA regulations created the "categorical exclusion":

> "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."[5]

The CEQ requires agencies to develop procedures for implementing NEPA which must include specific criteria for and identification of those typical classes of actions "which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§ 1508.4))."[6] Figure 2-1, paragraph (34)(g), of the Commandant Instruction states that "regulations establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones" are categorically excluded from further analysis and documentation requirements under NEPA. It must be noted, however, that the use of categorical exclusion under NEPA does not absolve federal agencies from complying with requirements of other laws.

My research did not result in the discovery of any blanket military exemption which would apply to the CG safety zone rulemaking. Except for the new Department of Defense (DOD) exemption to the Migratory Bird Treaty Act (MBTA), most of the existing exemptions do not appear applicable.

The Clean Water Act contains a narrow national security exemption. The CWA authorizes the president to exempt "any effluent source of any department, agency, or instrumentality in the executive branch from compliance with [a CWA requirement] if he determines it to be in the paramount interest of the United States."[7] Such exemptions may last for no more than one year, although the president may make additional one-year exemptions upon new findings of necessity.

Both the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provide for renewable, one-year presidential waivers on national security grounds.[8] These exemptions, however, are almost never invoked.[9]

In 2002, Congress passed the 2003 National Defense Authorization Act. Section 315 of the Authorization Act requires the Secretary of the Interior to prescribe regulations exempting the Armed Forces for the incidental taking of migratory birds during military readiness

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[5] 40 C.F.R. § 1508.4.
[6] *Id.* §1507.3(b).
[7] 33 U.S.C. 1323(a).
[8] Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 49 (2005).
[9] The CERCLA exemption has never been used and the RCRA exemption has been used only twice, in 1980 and 1995. *See id*.

activities authorized by the Secretary of Defense or the Secretary of the military department concerned. Military readiness activities include all training and operations related to combat and testing of military equipment for combat use. The Fish and Wildlife Service proposed regulations for issuing incidental take permits to the DOD in June 2004,[10] but final rules have yet to be published.

I hope this helps. Even if the military exercises the CG is contemplating will have minor environmental impacts (thereby falling outside NEPA), the agency must still abide by the requirements of the Clean Water Act, the hazardous waste statutes, and other environmental laws. If you would like more detailed information about any of the statutes mentioned above, please let me know. I would be happy to provide further analysis.

Sincerely,

Stephanie Showalter
Director, National Sea Grant Law Center

[10] 69 Federal Register 31074 (June 2, 2004).