



Office of Command Counsel Newsletter

February 2000, Volume 2000-1

CLE 2000: We Are Planning

The AMC Command Counsel Continuing Legal Education (CLE) Program will be held at the Grosvenor Hotel 22-26 May 2000.

The theme of this year's CLE is "**AMC ATTORNEYS: Providing Solutions to Support the Army's Vision**".

The Planning Committee for CLE 2000 has solicited the input from the AMC Chief Counsels and the AMC legal community. The design of the program is proceeding and we expect to have an educational and interesting workshop. Thanks to **Mike Futch** (TYAD), **George Worman** (ANAD), **Bob Lingo** (HQ AMC), **Verlyn Richards** (TACOM-W), **Will Rathbun** (AMCOM), and **Kay Krewer** (TACOM-Rock Island) for their suggestions.

We are very pleased that the AMC Commander, **General John Coburn** has agreed to participate with an address to the AMC attorneys.

Additionally, we are pleased that the General Counsel of the Army **Charles A. Blanchard** will speak to us. Likewise, we are happy to announce that **BG Bob Barnes**, the Assistant Judge Advocate General for Civil Law & Litigation will address the legal community.

We will have approximately 15 electives, and legal focus sessions on acquisition, employment, environmental and intellectual property.

We are also planning to tour NASA at Cape Canaveral, which will be an unforgettable experience for all attendees.

If our plans work out the Friday morning enrichment program will focus on dealing with our clients.

The planning committee is chaired by **Steve Klatsky** and includes **Nick Femino**, **COL Demmon Canner**, **Bill Medsger**, **Vera Meza**, **Cassandra Johnson**, **Ed**

Stolarun, **Bob Lingo**, and **Holly Saunders**.

Members of the Planning Committee and coordinators of the legal focus sessions will be contacting AMC counsel to seek their active participation in the CLE. With your assistance CLE 2000 is sure to be a success.

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OFFICE OF COMMAND COUNSEL PRIORITIES 2nd Quarter FY 2000

The Office of Command Counsel adopts a list of projects, programs or issues as a focus of attention. We do this on a quarterly fiscal year basis and the list is posted in our front office. We use the list in a variety of ways: as part of orientation briefings conducted for senior officials from DA, HQ AMC and AMC field organizations. We also use the list in our periodic update sessions with our senior leadership.

Our Top 10 priorities for second quarter FY 2000:

CLE 2000 AGENDA	DOD ETHICS TRAINING
MAV ACQUISITION	CEO SESSION
MANAGEMENT OFF-SITE	PROTOCOL PROGRAM 2000
PARTNERING MEETING	ETHICS HANDBOOK FOR SUPPORT KTRS
WATERVLIT SOLUTIONS	AUTOMATION 2000

**You are invited to submit your
similar "Top" Priorities for
publication in future Newsletters**

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Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to sklatsky@hqamc.army.mil

Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

QUI TAM Case Reported

United States of America ex rel. Roby v. The Boeing Company, USDC, SD Ohio, NO. C-1-95-375 dated November 2, 1999.

In a nutshell the case, brought under the False Claims Act, involves the delivery aircraft transmission gears which Boeing knew had problems. As part of its claim for damages, the United States is seeking the cost of a helicopter that crashed and was totally destroyed and about \$1,000,000 in damages to another helicopter that crashed.

One of Boeing's defenses to this claim is that the "Limitation of Liability—High Value Items" clause, FAR 52.246-34 (HVIC), precludes liability for these damages under the Act.

The HVIC provides that the contractor is not liable for loss or damage to Government property, including the supplies delivered under the contract, that occurs after Government acceptance and results from defects or deficiencies in the supplies. This limitation of liability does not apply when the defect or deficiency in the supplies or the Government's acceptance results from the willful misconduct or lack of good faith on the part of the contractor's

managerial personnel. Another exception to this limitation of liability is if the contractor purchased insurance or established a reserve for self-insurance covering this type of loss.

The Government's position was that the HVIC, a product of regulation, cannot be construed to preclude liability, limit damages, or be permitted to engraft additional elements or requirements on to an Act of Congress, the False Claims Act.

The court held as a matter of law that the HVIC provides no defense to the Government's and Relator's claims against Boeing for violations of the False Claims Act. The court held that the clause's application extends to contractual remedies.

Even though the HVIC has existed since 1971, this was an issue of first impression. Boeing places great import on this decision and wants the issue certified to allow it to file an interlocutory appeal to the 6th Circuit.

Procurement Fraud Advisors, in particular, should read this case. The decision is somewhat lengthy, 37 pages.

POC is AMCOM's **Bob Gafield**, DSN 897-2820. Call Bob for a copy.

List of Enclosures

1. **GAO Protest: Sole Source--Lessons Learned**
2. **Take the Money... and Keep It!**
3. **Practice Pointers: Successfully Defending Protests**
4. **The Market Research Conundrum**
5. **ADR: ASBCA Contract Claim--Mini-Trial**
6. **ADR--Confidential? More or Less**
7. **Environmental Law Bulletin: Nov 99**
8. **Environmental Law Bulletin: Dec 99**
9. **Ethics Advisory #00-01: Misuse of Govt Resources**
10. **ABA Ethics Publication: Ethical Standards in the Public Sector.**

Protest Report: Sole Source Decision & Lessons

TACOM-Rock Island counsel **Joe Picchiotti**, DSN 793-8435, reports on a recent GAO protest decision concerning sole source. HQ AMC counsel **Jeff Kessler**, DSN 767-8045 worked with Joe on the defense of the protest.

On December 20, 1999 the GAO denied Parmatic Filter Corporation's protest of TACOM-Rock Island's award to Hunter Manufacturing Company for 1,800 each 200 CFM Gas Particulate filters for \$1.2 million. The award was made under a sole-source urgency justification and was added on to Hunter's existing production contract. Parmatic alleged that it had the ability to meet the Government requirements.

The GAO found that the Contracting Officer reasonably determined that the sole source award was necessary to meet urgent requirements where Parmatic would have had to pass first article testing requirements and establish a production line under severe time constraints. The GAO also noted that the Contracting Officer reasonably considered Parmatic's pro-

duction problems on a similar item.

There was concern that the protest might be sustained for several reasons:

First, there was a concern that a statement in the J&A that "no other sources had expressed an interest in writing," would be perceived as disingenuous or misleading since the PCO was aware of Parmatic's general interest in producing the item at the time the J&A was executed.

Second, there was a concern that urgent delivery schedule agreed to under contract was greater than the delivery schedule contemplated in the J&A, which Parmatic claimed refuted the urgent requirement.

Third, there was a concern that the procurement activity could not adequately identify the genesis of the urgent requirement and demonstrate that the requirement was not the result of a lack of planning.

The full report is provided. It contains discussion and lessons learned on each of these three issue areas (Encl 1).

Take the Money...and Keep it!

These days numerous AMC organizations are studying ways to bring in more dollars, realizing that growth is the only alternative to the death-of-a-thousand-cuts management style. However, even if you find an organization willing to fund your work, you may find it difficult to keep the money with which it pays you. The intent of this note is to point out some pitfalls as well as some of the ways these pitfalls may be avoided.

The Problem

The difficulty in the use of outside funds stems the conjunction of two Congressional statutes with a legal doctrine promulgated by the Comptroller General. The **Purpose Statute** (31 USC 1301(a)) and the **Miscellaneous Receipts Statute** (31 USC 3302(b))

ARL's **Robert Chase**, DSN 290-1599, provides an article that addresses the interface between the two statutes, and suggests solutions might be found through an analysis of the Economy Act, 31 USC 1535, the law of warranties, testing services under 15 USC 3710a(d)(1), patent license agreements, CRADAs or other transactions (Encl 2).

Practice Pointers: Successfully Defending Protests

IOC A-76 Studies "Down Scoped" & Proceeding Smoothly

The "down scoping" of the IOC depot A76 studies has resulted in a reduction to three remaining studies. The removal of the ammunition demilitarization mission as part of those studies leaves only base operations type activities for review. The result places these A76 studies on more familiar ground. Base operations have long been subjects of such studies and appear more clearly to be the type of activity envisioned for A-76 study.

After commencing the depot studies, it soon became apparent that the ammunition demilitarization mission presented particular problems. Workload was less than predictable; often what was predictable was not adequate to support offering to a private contractor. Because of the workload problems, demilitarization personnel at the depots often wear more than one hat; demilitarization is only one of several jobs performed. The possibility of privatization also endangered

the requirement to maintain in-house safety demilitarization skills.

IOC is currently in the process of putting the depot A76 packages on the street. There is no reason to anticipate that these studies will not proceed smoothly. Similarly, the IOC arsenal A76 studies are being modified to limit them to base operations activities, as well. Much the same difficulties have been found with regard to arsenal manufacturing operations. Projecting workload for purposes of bidding is very problematic. It is expected now that the Arsenal studies are in fact modified to include only base operations activities, they will proceed with equal speed and smoothness.

Questions regarding the above may be addressed to **Samuel J. Walker**, Attorney/Advisor, Industrial Operations Command at DSN 793-8421/ commercial (309) 782-8421 or email walkers@ioc.army.mil.

The AMC Protest VTC of 1 February 200, conducted by the AMCCC Protest Litigation Branch, included an outstanding presentation by **Rick Castiglia**, from McKenna & Cuneo. The subject: Practice Pointers for Successfully Defending Protests: The Perspective of Intervenor's Counsel.

The outline used is presented for your information (Encl 3).

The paper highlights that a Debriefing is an excellent means for preventing protests. It identifies the minimum amount of information that may be disclosed, as well as additional information that may be disclosed. There is a section "Do not disclose..."

There is also a paragraph on strategy tips concerning debriefings.

Lastly there is a section entitled "Preparing the Agency Report."

The Market Research Conundrum

Since the advent of Acquisition Reform as legislated by Public Law (PL) 103-355, The Federal Acquisition Streamlining Act of 1994 (FASA) and PL 104-106, The Federal Acquisition Reform Act/Information Technology Management Reform Act (FARA/ITMRA) of 1996 (also known as the Clinger-Cohen Act), the Federal acquisition workforce has become increasingly familiar with the term "market research."

This workforce has received extensive amounts of literature and instruction describing what market research is, why and when it is required, who should be doing the research, the various methods of data collection and the techniques that can be used to conduct market research.

A case can be made that given the breadth of personnel who continuously remain involved in some form of market research in order to effectively perform their assigned job responsibilities, a significant portion of

the Acquisition workforce can claim expertise in particular market sectors.

Given the legislation, literature, training and experience over the last 6 years, can there be any more mysteries associated with performing market research?

The heightened awareness of the need to learn which firms are capable of meeting the Government's requirements for a particular acquisition had its roots in PL 98-369, The Competition in Contracting Act of 1984 (CICA).

As the justification format to certify that only one firm has the capability to meet the Government's requirements evolved, it became clear that it was necessary to corroborate that conclusion. Waiting until the solicitation synopsis to advertise a sole source requirement was not a viable method of corroboration.

Therefore, the then newly devised Justification and Approval (J&A) document contained a section on

Market Surveys (now titled Market Research), essentially to affirm industry's agreement that there was, in fact, only one responsible source.

The POCs in the CECOM Legal Office are **Theodore F. Chupein**, CECOM Special Advocate for Competition, DSN 992-5056 and **Garrett E. Nee**, DSN 992-1361. The full paper is provided (Encl 4).

ADR on ASBCA Claim

RRAD counsel **Garland Yarber**, DSN 829-3258, reports on the use of a mini-trial as an ADR process before the ASBCA, in a case in which the contractor sought to recover \$103,494 for an alleged 4,429 labor hours in excess of its estimate for the project, and also sought a refund of liquidated damages collected by the Government for nine days of delay in completing the contract.

The contractor alleged that the government caused the delay by imposing an escort requirement (Encl 5).

FLRA Issues ULP Case Confidential?: Handling Manual-- More or Comprehensive Less Guidance

The General Counsel of the Federal Labor Relations Authority has issued a new Unfair Labor Practice Case Handling Manual (Manual) which provides comprehensive guidance to Regional Agents in processing, resolving, and investigating unfair labor practice charges.

The Manual incorporates and references the changes to the General Counsel's regulations set forth at Subpart A of Part 2423 of the FLRA's Regulations. See 63 Fed. Reg. 65638-65645 (Nov. 30, 1998), which includes the codification of the Office of the General Counsel's (OGC) policies on Facilitation, Intervention, Training and Education (FITE); Quality; Scope; Injunctions; Prosecutorial Discretion; Settlement; and Ap-

peals. Where appropriate, the Manual references relevant case law.

As it pertains to various case processing matters, the Manual provides for uniformity and best practices among the Regions; provides criteria and principles that govern Regional discretion and judgment; and also provides Model and Sample Forms and Letters.

The Manual is available in PDF format on the FLRA Web Site, www.flra.gov

<<http://www.flra.gov/index.html>> or at

<<http://www.flra.gov/gc/manuals/ulp/ch-manual.html>>. The Manual is also offered for sale by the Superintendent of Documents, Government Printing Office.

"The ADR field has a tendency to make large claims in many things, an inevitable result of mixing a great deal of social commitment, a dash of professional insecurity, and lots of lawyers whose ebullience would be worthy of Teddy Roosevelt.

One of those claims is to keep what parties say in confidence. Does this particular claim measure up, in logic, practice or the reasonable expectations of the parties and the public? "

This article by **Christopher Honeyman**, first appeared in the January 1999 ABA Dispute Resolution Magazine, and addresses a very important issue in ADR: the scope and limits of the confidentiality of ADR proceedings, such as mediation.

ADR proceedings are impacted by how the parties to the dispute view the statements/comments on confidentiality that a third-party neutral makes.

The entire article is provided for your information (Encl 6).

REDS: What's Required--Mandatory Elements (Flexibility the Key)

There have been several questions raised from AMC REDS Team members regarding the scope of flexibility they have in designing their local REDS program.

REDS was created consistent with the philosophy that governs ADR: be flexible, let the parties design their own program.

Accordingly, REDS has very few "mandatory" components. And, even when described as mandatory, there is flexibility within.

Steve Klatsky, DSN 767-2304, prepared a list of mandatory items, which was forwarded to each REDS Team Chief through the HQ AMC Office of Equal Opportunity.

1. Decision to offer REDS

The decision to offer REDS must be the product of the REDS team (EEO, Legal, CPAC) and not a decision by one organizational element or by an EEO Counselor (the specific process used to reach that decision is a flexible item for you to design).

2. REDS Voluntary for Employees

Use of REDS, when offered, for employees is voluntary. Once the REDS team, acting for management, makes the REDS offer, participation by managers is mandatory (the specific process to identify those management officials who will be involved is a flexible item for you to design).

3. REDS Intake Form

A REDS Intake Form (a model is at Appendix A of the AMC REDS Action Plan -- or you may create your own).

4. ADR Agreement Form

ADR Agreement Forms (models are at Appendices B, C, D of the AMC REDS Action Plan -- or you may create your own). A separate form may be needed for each ADR process you adopt.

5. Evaluation Form

An Evaluation Form (a model is at Appendix I of the REDS Action Plan--or you may create your own).

6. Reporting Form

Use of the Reporting Form at Tab 8 of your REDS Training Deskbook (use as is please). This reporting form does not add a burden to the field, in that it adds a column or two to the existing EEO reporting requirements.

7. Union: Obligations & Role

Involve your Union(s)--the specifics depend on your local collective bargaining unit and local labor-management environment.

MSPB Chair Steps Down

Ben L. Erdreich, MSPB Chair since 1993 is departing for the private practice of law in Alabama. Vice Chair **Beth Slavet**, will be taking over as acting chair.

ADR: Helping to Resolve Environmental Disputes

AMC & Environmental Partnering

Alternate dispute resolution (ADR) can be a valuable tool to avoid or resolve environmental disputes. AMC has used facilitated partnering to improve the environmental cleanups at several installations and used mediation to assist us in resolving at two environmental enforcement actions.

The Federal Facilities Environmental Journal (Autumn 1999) has a good article outlining the basic principles of ADR and how it can be used to resolve environmental disputes.

One very interesting section of the article addresses the issue:

When to consider ADR.

A number of factors come into play in making this determination. Generally, the more of the following factors that exist, the more likely it is that the collaborative approach of ADR could yield benefits:

1. It's not all about money.

2. The likely outcome of litigation is or could be undesirable.

3. There are one or more identifiable issues.

4. Parties have worked together in the past.

5. Parties are identifiable and limited in number.

6. Reaching a mutually agreeable solution is better for all parties than not reaching one.

7. All parties accept the ADR process.

8. Parties seek a solution that can not be court-ordered.

9. Sufficient time, money, and other resources are available to support the process.

10. Parties have the ability to either help or hurt one another.

11. Parties will work together in the future.

You can obtain a copy of the article at the following website: available at: http://www.denix.osd.mil/denix/DOD/News/Pubs/FFEJ/Autumn99/10_heath.html or by contacting Stan Citron (DSN 767-8043).

The Army Central Regional Environmental Office (CREO) Newsletter (Winter 2000) includes an article prepared by IOC Attorney, **Bill Bradley**, DSN 793-8418, on a successful partnering effort in New Mexico.

This program involves a partnership between the State EPA and various federal agencies located in New Mexico. One of the main goals of the partnership is developing the best, most cost effective means of protecting the environmental.

The article (including a photograph of Bill Bradley addressing the partnership) will be available at the CREO website - <http://aec.army.mil>.

ELD Bulletins

Environmental Law Division Bulletins for November 1999 (Encl 7) and December 1999 (Encl 8) are provided) for those who have not received an electronic version from ELD or who have a general interest in Environmental Law.

Misuse of Government Resources

The HQ AMC Ethics Team, chaired by **Mike Wentink**, DSN 767-8003, recently issued Ethics Advisory #00-01, titled Misuse of Government Resources (Encl 9).

The "Standards of Ethical Conduct" requires employees to "protect and conserve Government property" and "not use such property, or allow its use, for other than authorized purposes." (5 C.F.R. Sec. 2635.704).

The DoD "Joint Ethics Regulation (JER)," DoD 5500.7-R, helps to define "authorized purposes." (JER 2-301). In addition to official use, "authorized purposes" can include some occasional, incidental, and intermittent personal use of reasonable duration if it does not interfere with mission or official duties and does not result in significant additional cost, when authorized by the "agency designee."

Personal Use

The CG has authorized AMC employees some occasional, incidental, and intermittent personal use of reasonable duration of their

computers, communications systems and other resources.

This authorization, and its limitations and restrictions, are set out in AMCIO-T Policy Memorandum #97-08, dated 4 Sep 97, as revised in Change 1, dated 23 Feb 99 (attached to this Advisory).

Misuse Case

In "The Washington Post" business section of January 3, 2000, there is a report about five Army employees of the Military District of Washington (MDW) caught allegedly misusing their Government computers, e-mail accounts and internet access. According to the report, they used their Government computers and internet access to download software from a commercial website (AllAdvantage) and install it on their computers.

Apparently, one of the MDW employees being solicited to join by a fellow employee, talked to a reporter. When the reporter contacted MDW, the spokesman knew nothing about this scheme. However, it was quickly uncovered, and five Army employees are implicated.

Authorized use of the telephone, computers, e-mail, etc., will never include use for commercial purposes. In addition, we need to be extremely careful about business dealings with fellow-employees. The general rule is "no solicitation" in the office. Previous Ethics Advisories related to this issue are:

ETHICS ADVISORY 98-03 - Appropriate Use of E-Mail.
ETHICS ADVISORY 98-14 - Solicitations in the Federal Workplace

ABA Ethics Pub

Enclosed is an announcement of a recent ABA publication: Ethical Standards in the Public Sector A Guide for Government Lawyers, Clients and Public Officials

This new book is a compilation of essays, articles, and research intended to help government lawyers, their clients, and other public officials focus on some of the ethical considerations that arise in the practice of law in the public sector (Encl 10).

AMC Legal Office Profile

Army Research Laboratory, Adelphi, Maryland

The U.S. Army Research Laboratory (ARL) is the Army's primary source of fundamental and applied research. Its mission is to provide the Army with the key technologies and analytical support necessary to ensure supremacy in future land warfare. ARL—with its state-of-the-art facilities and workforce—constitutes the largest source of integrated science and technology services in the Army.

The lab occupies two major sites, both in Maryland: the Adelphi Laboratory Center (ALC) and the Aberdeen Proving Ground (APG). It operates unique outdoor facilities at the White Sands Missile Range (WSMR) in New Mexico.

The lab also has two research elements that are collocated with National Aeronautics and Space Administration (NASA) activities in Cleveland, OH, and Hampton, VA.

ARL also receives considerable benefit from its newly realigned site in Research Triangle Park, NC (formerly the Army Research Office).

OFFICE STRUCTURE

The ARL Office of Chief Counsel is composed of three branches and a satellite office under the leadership of Chief Counsel, **COL Steven B. Lundberg**. The satellite office is located at the Research Triangle Park, NC, site.

Business Law Branch

In addition to reviewing traditional FAR-controlled contract actions, advises on matters such as cooperative agreements, international transactions, the sale of services to industry and other transactions.

Employees

Robert R. Chase, Deputy Chief Counsel and Team Leader; **Alvin E. Prather** and **Patrick J. Emery**, attorneys.

Administrative Law/ Litigation Branch

Handles a wide variety of issues, from personnel law and contract litigation to information and environmental law.

Employees

Timothy W. Connolly, Team Leader; **Sam W. Shelton, III**, and **Kenneth J. Spitz**, attorneys; **Angee K. Acton**, Paralegal; and **Tina D. Shaner**, Legal Assistant.

Intellectual Property Law Branch

Supports technology transfer under cooperative research and development agreements (CRDAs), deals directly with ARL's scientists and engineers in patenting inventions, and advises on issues relating to copyright and trademark law.

Employees

Paul S. Clohan, Jr., Team Leader; **Mark D. Kelly** and **U. John Biffoni**, attorneys; and **Carolyn P. Bourget**, Patent Technician.

SATELLITE OFFICE

Mark Rutter serves as counsel to employees at the Research Triangle Park, NC, site. The site awards the preponderance of research grants for the AMC community, and has a high level of expertise in this area.

Faces In The Firm

Longevity

HQ AMC

Mike Wentink completed 30 years of Federal service on January 9, 2000.

Steve Klatsky completed his 25th year (consecutive) at HQ AMC on 18 December.

Promotions & Awards

Phil Hunter, SBCCOM, was recently promoted to GS-15.

Peter Taucher, Chief Intellectual Property Law Division at TACOM-Wrn and

Kay Krewer, Chief, TACOM-Rock Island Legal Group received special recognition from the TACOM CG at the Town Hall Briefing held on 5 Jan 00. Both individuals were recognized for their diligent work and significant contributions in their respective areas. Pete for his legal advice and counsel on several international agreements and Kay for writing a user friendly guide on workloading the depots and arsenals.

Hello/Goodbye

WSMR

MAJ Brad Byrnes, Deputy SJA PCSd to The JAG School Graduate Course. His replacement is **CPT Justin Tade** coming from the Trial Defense Service, Schofield Barracks, Hawaii.

CPT Van Hardenberg, Legal Assistance Attorney, PCSd to Ft. Lee, Virginia. His replacement is **1LT Brent Robinson** coming from The Judge Advocate General's Basic Course. 1LT Robinson will be promoted to Captain in February 2000.

Stephen Phillips, Contract Law Attorney, White Sands Missile Range retired in January 2000 after 30 years of federal service.

AMCOM

1LT John L. Faris, III has joined the Office of Staff Judge Advocate after completing the Officer Basic Course.

IOC

Mary Lou Massa, Legal Assistant, General Law/Installation Support, will be retiring the end of February. Mary Lou has been a delight and a true asset to our office. We're gonna miss her! She'll have all that time for gardening, grandkids, the piano . . . everything and anything! Our best wishes to you, Mary Lou!

Birth

IOC

Captain Marc Howze and Gma celebrated the birth of their new daughter, Nia Marie, on 6 December 1999. Nia weighed in at 7 pounds, 11 ounces. What a beautiful sunny day it was! Her proud parents brought Nia home to a brother and two sisters. Congratulations to the entire family - she's a keeper!

On December 20, 1999 the GAO denied Parmatic Filter Corporation's protest of TACOM-Rock Island's award to Hunter Manufacturing Company for 1,800 each 200 CFM Gas Particulate filters for \$1.2 million. The award was made under a sole-source urgency justification and was added on to Hunter's existing production contract. Parmatic alleged that it had the ability to meet the Government requirements. The GAO found that the Contracting Officer reasonably determined that the sole source award was necessary to meet urgent requirements where Parmatic would have had to pass first article testing requirements and establish a production line under severe time constraints. The GAO also noted that the Contracting Officer reasonably considered Parmatic's production problems on a similar item.

There was concern that the protest might be sustained for several reasons:

First, there was a concern that a statement in the J&A that "no other sources had expressed an interest in writing," would be perceived as disingenuous or misleading since the PCO was aware of Parmatic's general interest in producing the item at the time the J&A was executed. At the hearing, the GAO touched upon this issue. However, in informal ADR sessions the GAO hearing attorney would not indicate whether the protest would be sustained on this basis. The decision ultimately stated in a footnote that the J&A "could have more fully discussed the contracting officer's consideration of Parmatic as a potential source, and the reasons for concluding that Parmatic could not meet the urgent requirements." Lesson learned: The J&A should discuss all relevant issues material to the approval authority's decision, including facts about known competitors and why they are unable to meet a particular requirement.

Second, there was a concern that urgent delivery schedule agreed to under contract was greater than the delivery schedule contemplated in the J&A, which Parmatic claimed refuted the urgent requirement. The PCO explained that the schedule under contract was a mistake and that Hunter was actually meeting the schedule contained in the J&A. The GAO concluded that the mistake was genuine. The lesson learned: to error is human, but come clean once you do.

Third, there was a concern that the procurement activity could not adequately identify the genesis of the urgent requirement and demonstrate that the requirement was not the result of a lack of planning. Government records demonstrated a monthly calculation of stock on hand and forecasts for requirements, but there was some internal concern about whether the forecasts were accurate or current. There was also a concern about whether the procurement activity adequately monitored forecasts and demand to prepare for competitive acquisitions. While the decision did not address this issue in depth, a lesson learned would be to keep on top of demands and forecasts to avoid attacks against lack of planning arguments.

Take the Money...and Keep it!

These days numerous AMC organizations are studying ways to bring in more dollars, realizing that growth is the only alternative to the death-of-a-thousand-cuts management style that has been forced on us from on high. However, even if you find an organization willing to fund your work, you may find it difficult to keep the money with which it pays you. The intent of this note is to point out some pitfalls as well as some of the ways these pitfalls may be avoided.

The Problem

The difficulty in the use of outside funds stems from the conjunction of two Congressional statutes with a legal doctrine promulgated by the Comptroller General. The **Purpose Statute** (31 USC 1301(a)) prohibits using one appropriation to pay costs associated with the purposes of another appropriation. When this statute is violated, the Comptroller General says that there has been an **Augmentation of Appropriation** with regard to the second appropriation. The reason this is forbidden goes all the way back to the Constitution. Congress' "power of the purse" derives directly from Article I Section 9. The rationale is that Congress gives you exactly the amount of funding it wants you to have and you are not supposed to get more.

Suppose, however, that the money comes, not from another Government agency but from an outside source such as a business or university. Although this avoids the Purpose Statute problem, we still have an Augmentation of Appropriation. As a result, under the **Miscellaneous Receipts Statute** (31 USC 3302(b)) such outside funds must be deposited with the Treasury.

A Few Solutions

Fortunately, there are several exceptions to this general rule. The one in most general use is the **Economy Act** (31 USC 1535) which allows Government agencies to place orders for goods and services with other Government agencies. The restrictions on use of the Economy Act need not concern us here, since they are the responsibility of the ordering agency. However, there are other issues which are our concern. For example, suppose you run a 6.1 R&D activity and you receive an order for the type of research you do backed by OMA funds coded for real property maintenance. It would appear that your use of these funds would violate the Purpose Statute. Ordering organizations may then object that these "are the only funds they have." The proper answer would seem to be that in that case, absent some sort of reprogramming, it would appear that Congress is saying that organization is not supposed to do or fund R&D.

Sometimes it is not obvious whether a given organization is a Government agency which may properly use the Economy Act. The ARL Legal Office has had to make such determinations regarding the Postal Service (we concluded that it was part of the Federal Government) and various DOE labs. Some of the latter cases have been particularly difficult. DOE runs its laboratories as GOCOs, Government Owned, Contractor Operated facilities. This means that Argonne, for example, is not a single entity. It is

owned by the Government, but run by a contractor. However, so much day to day responsibility has been given to contractors that, in my experience, they often forget that they are not the Government. We will often want to cooperate with such entities but we will not be able to accept checks from the contractor; it will be necessary for the ordering agency's contracting officer to have a MIPR or similar document sent to us.

Now consider the case where the funds are to come from what is clearly a non-Government organization. There are a limited number of specific exceptions to the Miscellaneous Receipts Statute that allow us to keep the money in-house.

Warranties. Recently, IOC wondered if it could keep refunds paid by Toshiba for defects in laptop computers as part of a class action settlement. The answer, from Matt Reres, "fiscal guru at OTJAG, DA" was that the funds did not have to go to the Treasury "because a refund received under a warranty clause may be considered an adjustment in the contract price, and therefore credited to the appropriation originally charged under the contract."

Testing Services. 10 USC 2539b gives DoD organizations the authority to "make available to any person or entity, the services of any government laboratory, center, range, or other testing facility for the testing of materials, equipment, models, computer software, and other items." Fees "not to exceed...the direct and indirect costs involved" are to be established. When collected, they "may be credited to the appropriations or other funds of the activity making such services available."

Cooperative Research and Development Agreements (CRADAs) are agreements between a Federal laboratory and a non-Federal party to conduct specified R&D consistent with the lab's mission (15 USC 3710a(d)(1)). The main purpose of the law is to encourage the transfer of commercially useful technologies from Federal labs to the private sector. Resources provided by the lab may be reimbursed by the non-Federal party and credited to the account initially charged for the expenditure.

Under a **Patent License Agreement**, inventions made by Federal employees may be licensed to the private sector for a fee. (See 35 USC 207-209). The money is divided up between the inventor and the lab director according to a specified formula. Recently, \$50,000 was deposited to an ARL account as the result of such a license. By 2004, if the licensed company is as successful as it believes it will be, royalty payments will be in the millions.

Other Transactions 10 USC 2371 provides for "transactions (other than contracts, cooperative agreements, and grants)...in carrying out basic, applied, and advanced research projects." Such a transaction may include a clause requiring a private sector partner to pay for receiving support. This payment may then be credited to a support account which may then be used for further support. Note that "other transactions" are to be

used only when it is not appropriate or feasible to use grants, cooperative agreements, or contracts. Use of this authority permits tailoring of certain requirements, as in the area of cost principles or data rights, which have in the past discouraged some firms from dealing with the Government.

This does not claim to be a comprehensive list of all authorities allowing us to retain outside funding. Others exist for various non-AMC organizations. (See for example, 33 USC 2323, with regard to Corps of Engineers labs.) Moreover, I am sure that others exist which *are* applicable to AMC major subordinate commands, but which I have not discovered. Therefore, I invite my readers to send me (rrchase@arl.mil) their own list of relevant authorities. If I receive enough, there will be a follow-on article. Given all the improper methods by which our clients attempt to take in outside funds, it is important to be aware of every legal means of doing so.

PRACTICE POINTERS FOR SUCCESSFULLY DEFENDING PROTESTS:

The Perspective of Intervenor's Counsel

- I. Introduction
- II. Preventing Protests in the First Place – Debriefings
 - A. FAR § 15.506: Identifies the minimum amount of information that may be disclosed during a debriefing:
 - 1. Significant weaknesses or deficiencies in debriefed offeror's proposal
 - 2. Past performance information concerning debriefed offeror
 - 3. Overall evaluated cost or price of successful offeror and debriefed offeror
 - 4. Overall technical rating of successful offeror and debriefed offeror
 - 5. Overall ranking of all offerors if such a ranking was developed during the source selection
 - 6. Summary of the rationale for award (e.g., while you submitted a strong proposal, the awardee scored slightly higher under the Technical and Past Performance factors)
 - B. Additional information that may be disclosed to debriefed offerors:
 - 1. Rankings (e.g., adjectival, color, point scores) for the debriefed offeror and the awardee for all evaluation factors and subfactors
 - 2. Any weaknesses in debriefed offeror's proposal (but explain that such weaknesses were not considered significant and did not play any role in the source selection)
 - 3. Redacted copy of the source selection decision document

- C. Do not disclose the following information:
1. Discussion of the specific features of the awardee's proposal that the agency found to be most advantageous (e.g., the awardee received a higher score than you under the Technical factor because it offered X, Y, and Z).
 2. Point-by-point comparison of the debriefed offeror's proposal with that of the awardee (e.g., you proposed X but the awardee proposed Y).
 3. Financial, technical, or past performance information concerning the awardee
- D. Strategy Tips:
1. Encourage awardee to seek a debriefing, and
 2. Debrief the awardee first
 - a. Dress rehearsal for unsuccessful offeror debriefings
 - b. Resolve disclosure issues before purportedly sensitive information is released to unsuccessful offerors

III. Preparing the Agency Report

- A. Immediate summary dismissal requests (even if partial)
1. Put protester on the defensive from the onset
 2. Potential areas:
 - a. Timeliness
 - b. Not an interested party
 - c. Affirmative responsibility determination
 - d. Speculative (SAIC)
 - e. No jurisdiction (e.g., delivery orders under ID/IQ contract)

- B. Limited document production – only produce relevant documents, not entire contract file
 - 1. Substantially reduces the likelihood of supplemental protests
 - 2. GAO does not care if you conducted a “perfect” procurement
- C. Intervenor’s counsel – a potentially key resource (especially in cases where there is a protective order)
 - 1. Very experienced
 - 2. Part of protest defense team
 - 3. Especially helpful in providing factual basis for responding to challenges concerning awardee’s proposal
- D. Produce all relevant documents in their entirety
- E. Early document production

THE MARKET RESEARCH CONUNDRUM

Since the advent of Acquisition Reform as legislated by Public Law (PL) 103-355, The Federal Acquisition Streamlining Act of 1994 (FASA) and PL 104-106, The Federal Acquisition Reform Act /Information Technology Management Reform Act (FARA/ITMRA) of 1996 (also known as the Clinger-Cohen Act), the Federal acquisition workforce has become increasingly familiar with the term "market research." This workforce has received extensive amounts of literature and instruction describing what market research is, why and when it is required, who should be doing the research, the various methods of data collection and the techniques that can be used to conduct market research. A case can be made that given the breadth of personnel who continuously remain involved in some form of market research in order to effectively perform their assigned job responsibilities, a significant portion of the Acquisition workforce can claim expertise in particular market sectors. Given the legislation, literature, training and experience over the last 6 years, can there be any more mysteries associated with performing market research?

The heightened awareness of the need to learn which firms are capable of meeting the Government's requirements for a particular acquisition had its roots in PL 98-369, The Competition in Contracting Act of 1984 (CICA). As the justification format to certify that only one firm has the capability to meet the Government's requirements evolved, it became clear that it was necessary to corroborate that conclusion. Waiting until the solicitation synopsis to advertise a sole source requirement was not a viable method of corroboration. Therefore, the then newly devised Justification and Approval (J&A) document contained a section on Market Surveys (now titled Market Research), essentially to affirm industry's agreement that there was, in fact, only one responsible source. Acquisition reform progressed and FAR 15.201, Exchanges with industry before receipt of proposals, was written. The revised procedures enabled and encouraged a much freer exchange of information between Government and industry. This development not only gave industry a better understanding of the Government's requirements but also resulted in the Government acquiring increased knowledge and understanding of the marketplace and the capabilities of individual firms. As the swift pace of technological advancement swept through the commercial world, it became more essential that the Government keep abreast of industry's rapidly expanding capabilities. FAR Part 12, Acquisition of Commercial Items, established as a matter of policy the Government's preference for commercial and non-developmental items (CI and NDI). This policy recognized the fact that private industry, through competition, was constantly improving and perfecting its products, services and capabilities and that many of these could meet Government requirements and be provided at a lower cost. Government personnel are expected to be aware of where to go to acquire required goods and services. This awareness is obtained through market research which FAR 2.101 defines as "collecting and analyzing information about capabilities within the market to meet agency needs."

FAR Part 10, Market Research, requires that market research be performed as appropriate to the circumstances. Of course, the circumstances will vary depending on the history of the item, its technological complexity and the availability of data. The success of the research will depend on the knowledge, perseverance and initiative of the group conducting the research. Responsibility for conducting market research falls upon the Program Management Office's technical requirements personnel. Although seemingly straightforward, the relatively simple requirement for market research can generate discord between the requiring activity and the market that seeks to serve it. When industry claims that it has the capacity to meet the Government's requirements and the market research team has concluded that there is only one responsible source, there is a conflict that must be resolved. Further, industry may question whether the market research, as conducted by the requiring activity, was appropriate based on the contention that the team sought too narrow a solution to meet its requirements. For example, if the Government obtained a solution that exceeded its basic requirements through a competitive award utilizing performance specifications, must it retreat to its original requirements baseline when it does research for a follow-on competition or can it insist its current requirements are for solutions equal to or greater than the capabilities it is currently being provided? Some in industry argue that the latter approach unnecessarily restricts competition by giving the incumbent an unfair competitive advantage.

Clearly, as you plan for conducting market research you must first understand your requirements baseline and the question posed in the above example must be resolved prior to initiating your research. Another example, which points out the challenges in performing market research, pertains to the FAR Part 12 policy regarding CI and NDI solutions. FAR Part 12.201 establishes that agencies shall conduct market research to determine if there are CI or NDI that meet the Government's requirements. If there are, then the Government is to acquire the CI or NDI. How should you do market research if you know there is *one* NDI solution? Should you limit your market research to just CI or NDI solutions based on the FAR Part 12.201 provision? Should you do this even if you know or strongly suspect that there are several firms with the capability to *develop* a solution that meets the requirement? What about competition? If you limit your market research to just CI or NDI and there is only one vendor with a NDI solution, is your basis for sole source that FAR Part 12 required it as a function of policy?

Questions, issues and challenges regarding performing market research abound, even after legislation, literature, training and several years of experience. As the Government addresses questions like those cited above, it will continue its Acquisition Reform journey and further improve its ability to obtain quality goods and services from industry at a fair and reasonable cost.

The POCs in the Legal Office for this subject are Theodore F. Chupein, CECOM Special Advocate for Competition, x25056 and Garrett E. Nee, x21361.

APPEAL DISMISSED - Stan Elliott Incorporated, a construction contractor that performed a heating, ventilation, and air conditioning (HVAC) renovation project (DAAC79-96-C-0010) at RRAD had its claim for an equitable adjustment dismissed by the the Armed Services Board of Contract Appeals (ASBCA). The contractor sought to recover \$103,494 for an alleged 4,429 labor hours in excess of its estimate for the project, and also sought a refund of liquidated damages collected by the Government for nine days of delay in completing the contract. The HVAC renovation performed by the contractor was undertaken in a secure building in the restricted area at RRAD. While performing the renovation work, the contractor's employees were escorted due to the secure nature of the work normally performed in the building. The contractor alleged that the imposition of the escort requirement by the Government hindered and interfered with its performance of the contract and caused it to incur additional labor hours. The contractor alleged that it was never put on notice that it would be escorted and that the Government did not provide a sufficient number of escorts once the requirement was imposed. Also, the contractor claimed that the Government delayed its performance and completion of the contract by requiring the escorts.

After the claim was filed at the ASBCA, the parties agreed to binding Alternative Dispute Resolution (ADR) in the form of a mini-trial before the Board. Upon hearing the matter, the Presiding Judge found that the evidence did not support the claim of Government delay. The Judge found that the Government was obliged to furnish escorts for the contractor's work in secure areas and that the contractor failed to show that Government action caused it to incur extra labor hours. POC is **Garland E. Yarber**, AMSTA-RR-L, DSN 829-3258.

Confidential, more or less

by Christopher Honeyman

This article was first published in the ABA's Dispute Resolution Magazine, January 1999.

The ADR field has a tendency to make large claims in many things, an inevitable result of mixing a great deal of social commitment, a dash of professional insecurity, and lots of lawyers whose ebullience would be worthy of Teddy Roosevelt.

One of those claims is to keep what parties say in confidence. Does this particular claim measure up, in logic, practice or the reasonable expectations of the parties and the public? This short article will discuss some practical facets of the problem. Call it a reality check, if you like.

Keeping it from the other side

Confidentiality involves two quite different sets of concerns, depending on whom the information is to be kept confidential from. The first is when the confidential information is the property of one party that wishes it kept from the other. When we speak of keeping things in confidence, this is probably what most negotiators think of most of the time.

I have no methodologically rigorous way to be sure, but I get the impression that programs and individual mediators may often use a broad brush in describing this feature of mediation - some phraseology like "I will keep everything you tell me in confidence, unless you tell me it can be disclosed." In practice, I believe, we have no way actually to follow through on this and still do our jobs. While mediators may be able to keep from disclosing many specifics, there are inherent hints in anything the mediator says than make the hermetic concept of confidentiality untenable.

Mediators cannot avoid giving off certain verbal and nonverbal cues every time we change caucuses. The other party, especially if competently represented, doesn't ignore these. For example, as soon as we start to ask about specifics, we betray the probability if not the details of the other party's interest in that particular line of questioning.

Also, any competent negotiator will draw inferences from "the dog that did not bark," such as proposals, arguments or questions that were anticipated from the opponent, but that don't seem to be arriving through the mediator. The inadvertent signals become stronger as the mediator takes on more of a role in the formulation of proposals.

For example, the innocent question "If they did X, could you do Y?" is the soul and core of much mediation deal-making. But while ostensibly it reveals nothing about the opponent's confidential position, in fact it is fraught with implications - starting with the reasonable presumption that the mediator is not there to waste time, and therefore not only that Y is seen as important by the

other side and that X may now be on the table for the first time as a real possibility, but that by implication, Z may be less firmly desired by the opposing party than had been thought.

At some level, parties already know this, and in my experience, use this feature of mediation deliberately to explore ideas without committing to them. This kind of half-disclosure is, arguably, one of the key features of assisted negotiation, and one of the reasons parties who distrust each other may be willing to work together through a mediator. Yet to claim that "everything you have told me is kept confidential" under these circumstances is to claim too much. Perhaps we should coin a word that describes what we can actually offer, vis-a-vis the other party, rather than confidentiality; something like "nonattributability."

A similar problem arises with documents. Often, a term of a written mediation agreement, or even a statute or court rule, runs something like this: "Any statements made or documents produced for the mediation are not admissible at trial, unless the information can be discovered through some means other than the mediation itself."

This sounds, on its face, like a fairly strong protection. But at a minimum, if the case does not settle, an opposing attorney is likely to have newly noticed either the existence, or a possible different interpretation, of certain documentation. Add lawyerly creativity into the mix, and the exception can easily come to overwhelm the rule, as the attorney thinks up some quite unrelated reason why the document simply has to be admissible.

Keeping it in the room

The second set of concerns arises when someone wants information kept confidential from anyone outside the negotiations.

I don't propose to discuss the "usual and customary" exceptions: threats of violence, of serious harm to third parties, and other well-rehearsed limitations on promises of confidentiality will get attention by other authors here. But well short of these obviously important problems, we may not, in fact, be able to deliver on claims of keeping things secret. And - surprise - sometimes, it may not matter!

There are at least three types of circumstances under which it seems unlikely that confidences will be kept to the degree the parties are routinely led to expect. In two the result is presumptively benign, or even in parties' long-term interest. In the third, the public interest is - rightly or wrongly - cited as the reason behind the disclosure.

The first is advice-seeking. In mediator work groups, it is common for a "mediator with a problem" to turn to another for a bit of advice. The parties may not be told this occurs. Yet reasonable expectations of the parties might, in fact, dictate this as a form of professionalism. It has a logical analogy to customary practice in older professions, such as medicine. Just about everybody who has ever stood in a hospital corridor knows that the standard claim of

confidentiality in the doctor-patient relationship is subject, de facto, to such advice-seeking. Its value to the patient is obvious, and nobody objects as long as it doesn't go further.

The second set of circumstances in which promises of confidentiality can be overblown deals with study, evaluation and research. I was present once when a prominent mediator gave a blow-by-blow account of a complex case to a roomful of practitioner and academic colleagues, as grounding for discussion of some problems and principles. The mediator, requesting that those in the room keep the specifics to themselves, admitted that the usual promises of confidentiality had been given during the case, and that permission had not been sought from the numerous parties for this specific use of the case data.

We've all heard the adage that a secret can be kept by three people, if one of them is dead. Here, 30 people were let in on the story (to be fair, not the most sensitive details). Yet the purpose was benign, and the result probably innocuous for the parties. I would go further, and submit that disclosure in that instance led to a rich discussion of a kind that offers great benefit for parties generally, in the long run.

But would the parties have agreed to the disclosure? While we badly need more research into many aspects of our field, and more collaboration between researchers and practitioners - exactly the result of the mediator's disclosure in this instance - it is clear that we run a risk with the parties by such data-sharing. The risk can be reduced by perversely refusing to be involved in research and evaluation - hardly, one would think, in the parties' interest - or it can be reduced by appropriate rewording of what we promise in the first place.

Drawing the Line

Even those mediators and programs inclined toward the most generous offers of confidentiality draw the line somewhere. Often the line is drawn by statute or court rule. But the third set of circumstances of concern here has to do with the role of "external influences" in leading mediators to disclose information. No one, to my knowledge, has attempted a comprehensive study of influence-based or "force majeure" disclosures. A worrying note, however, was struck in a simulation which Charles Pou and I recently ran.

The setting was a day-long continuing legal education course on ethics in dispute resolution, held at the University of Texas Law School last summer. In one role play, a publicly-employed "collateral duty" mediator - i.e. one who mediates as an add-on to another job - achieved a settlement in a case in which a former employee alleged that he had been fired by a truck driver training school for being too zealous about standards, and that the school's approach to training drivers was lax. Everybody congratulated the mediator, who returned to her "office."

Then from the center of the audience, a "ringer" actor literally rang her on a cell phone. "This is Billy Bob Boudreaux," he said in stentorian tones, reminding her and the audience that as chair of the Texas State Legislature's Joint Committee on Highway Safety, truck driving training firms

came under his jurisdiction, and there was a public interest in finding out anything that threatened the safety on Our State's Great Highways. He said he would like to know what had come out in that mediation, and would like that information right quick.

Freeze action. Query audience. A private mediator spoke first: No way. Confidentiality of process; not one of the standard exceptions. Besides, there were lots of other ways for the legislator to satisfy an entirely proper curiosity without impinging on Our Field's credibility.

But several other mediators, who mostly seemed to be employed in state agencies and other public programs, said they would turn the information right over. Some said there was clearly a public safety issue involved, which trumped the confidentiality principle in the same way as incipient violence. One was even more forthright. "I don't know where you work," she said, "but when a legislator calls someone in my agency, everything . . . just . . . stops."

Lest this be interpreted as a slam on publicly-employed mediators, let me be quick to postulate a private-practice equivalent: The Big Client. Is it reasonable for One-Time Co. to worry that when Repeat Player Corp. - the backbone of Settlements-R-Us' mediation practice - wants to know a little something about what happened in One-Time's case, at least a hint or two might be forthcoming? "Of course not," says Settlements, "we have Chinese walls for that problem and we maintain them inviolate. Anyway, we'd soon have no clients if we did that sort of thing." Well, I can't prove otherwise. But the consistency of application of such internal controls has been a source of continuing concern in some other fields, such as finance.

What's to be done?

Disclosure of arguably confidential material is something that few programs or mediators are likely to advertise. The extent of the problem is therefore murky. But on a general level, better-elaborated principles of ethics for the field are a matter of strong current interest, in the CPR/Georgetown Ethics Commission and other groups, and may provide improved guidance to mediators caught between powerful forces.

On a less complex level, we should recognize that we are in the business fundamentally of improving communication, not bottling it up. I believe sophisticated parties know "in their bones" most or all of the problems discussed here. The steady increase of "repeat use" of mediation over the past 20 years demonstrates better than any argument that the overselling of confidentiality should not be seen as necessary to attract customers. We should have enough self-confidence to describe what we do accurately, and the parties should recognize that as care and candor.

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COURT FINDS ZERO LIABILITY FOR CERCLA PRPs

Carrie Greco

The First Circuit Court of Appeals recently held that where a Potentially Responsible Party's (PRP's) pollution at a site is negligible, its equitable share of response costs is zero. In Acushnet Co. v. Mohasco Corp.,¹ the plaintiff, Acushnet Company, and other PRPs brought a CERCLA contribution claim against several PRPs for the clean up of a once pristine and picturesque area called Sullivan's Ledge in New Bedford, Massachusetts. The defendants included New England Telephone and Telegraph Company (NETT) for disposing telephone poles that contained some polycyclic aromatic hydrocarbons (PAHs); American Flexible Conduit (AFC) for disposing scrap cable containing lead, copper and zinc; New Bedford Rayon for its predecessor, Mohasco's disposal of rayon filament thread that contained sodium hydroxide, copper, and sulfuric acid; and Ottaway Newspapers, Inc. for its predecessor, New Bedford Standard Times' (NBST) disposal of ink sludge bursting with sulfuric acid, nitric acids, and various metals.²

The federal District Court granted NETT's summary judgment motion because the level of PAHs from the telephone poles could not have reached levels above the existing background levels of PAHs in the surrounding region and other sources contributed an overwhelming proportion of PAHs at the site. Regarding the other three defendants, the District Court ruled that the evidence was insufficient for "the calculus of appropriate proportional shares of liability" for response costs to be made.³ The Plaintiffs appealed this decision to the Circuit Court of Appeals.

The Circuit Court began its review by emphasizing that equitable allocation, not causation, remains the appropriate standard in determining the liability of a PRP.⁴ The First Circuit Court recognized that CERCLA liability is joint and several, but agreed with the Second Circuit's finding that where environmental harms are divisible, a defendant may be held responsible only for his proportional share of response costs.⁵ A PRP may escape liability for response costs, however, when the contaminant level from the PRP's substances is lower

¹ Acushnet Co. v. Mohasco Corp., 49 ERC 1136 (1st Cir., Sept 1999).

² Id. at 1138.

³ AFC was responsible for only one in 500,000th share, or \$100, an amount so low it was kept out. Mohasco's substances at the site were far smaller than the Plaintiffs' and chemical reactions with other materials could keep the substances from reaching the site. The case against the NBST was weaker than the other defendants, and the as to these other PRPs. Id. at 1138-39.

⁴ Id. at 1141.

⁵ Id. at 1142 (Citing United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993) which reaffirmed the Restatement (Second) of Torts).

than background levels of the surrounding area, and remain lower than those background levels even if the PRP's contaminants become concentrated with other chemicals. The judge has the discretion to decide when the PRP may reduce or escape liability.⁶ The First Circuit Court opinion cautioned that not all de minimis PRPs will elude liability, and that a PRP's liability must be justified by the record.⁷

The Circuit Court then looked to the record provided in the District Court's opinion. Regarding NETT's liability, the Circuit Court found that the District Court properly granted NETT's motion for summary judgment because the Plaintiffs failed to prove an issue of fact as to whether NETT's pollution at the Site was substantial enough to require a payment of response costs.⁸ Regarding the remaining three defendants, "the evidence was inadequate to permit a rational fact finder to make a quantifiable allocation of response costs to [the defendants]."⁹ The Court of Appeals concluded that the lower court's opinion clearly shows that the judge sufficiently analyzed the equitable factors and used these factors as the basis of his decision.¹⁰

The Plaintiffs argued that the lower court's holding that Plaintiffs failed to bring evidence to challenge the Defendant's stated allocable share brings too great of a burden on them.¹¹ Plaintiffs implied that the Consent Decree created a presumption of guilt and that they were placed in a position to prove their innocence. The court disagreed.¹² The judge found that all parties began the case on equal ground and that no one party had any special burdens and no adverse inferences were drawn from the existence of a Consent Decree. The Plaintiffs, nonetheless, still had the burden to prove their contribution claims. The court then dismissed the Plaintiffs' request for remand to be heard before a full and fair hearing.¹³

This case illustrates that small parties need not succumb to the settlement demands of state or federal regulators or PRP groups merely because of the threat of joint and several liability. Although one may argue that this decision discourages the PRPs who carry a larger share of potential liability from settling with government agencies with the intent to recoup money from the PRPs who carry a smaller share of liability, this case gives the PRPs with a smaller share of liability a means to fight back by taking the case to court to limit or avoid liability. (Ms. Greco/LIT)

National Trust for Historic Preservation v. Blanck

MAJ Michele B. Shields

In National Trust for Historic Preservation v. Blanck,¹⁴ the plaintiffs sought declaratory and injunctive relief to compel the Army to preserve the National Park Seminary Historic District, a community of buildings on the National Register of Historic Places, at Forest Glen, an annex of Walter Reed Army Medical Center. Both parties moved for summary judgment

⁶ Id.

⁷ Id.

⁸ Id. at 1143-44.

⁹ Id. at 1144.

¹⁰ Id.

¹¹ Id.

¹² Id. at 1145-46.

¹³ Id. at 1146.

¹⁴ 938 F. Supp. 908 (D.D.C. 1996).

and the plaintiffs subsequently filed a motion for a preliminary injunction.¹⁵ In a well-known opinion throughout Army environmental and historic preservation circles, the district court detailed several findings of fact and granted the Army's motion for summary judgment.¹⁶ This opinion was and still is considered an important case discussing Army compliance requirements under the National Historic Preservation Act (NHPA).

In June 1999, the plaintiffs filed an appeal in the United States Court of Appeals for the District Court of Columbia.¹⁷ The two issues plaintiffs raised on appeal were: 1) whether the district court's finding that the Army adopted a Cultural Resources Management Plan (CRMP) in 1992 as its Historic Preservation Plan (HPP) was arbitrary, capricious, and without support in its administrative record; and 2) whether the district court erred in holding that it lacked authority to enjoin the Army's "neglect" of the Historic District.¹⁸

During oral arguments, the three-judge panel focused its questioning on the first issue. The main thrust of the plaintiffs' argument, both in their brief and during oral argument, was that the administrative record did not contain any evidence to prove that the CRMP was ever approved or finalized by the Army "through command channels" in accordance with Army regulations, therefore, the district court erred in finding that the CRMP was the HPP and thereby satisfied the requirements of the NHPA.¹⁹ First, the Army argued that the appellants have no legal right to compel Army compliance with its own internal regulations.²⁰ Additionally, the Army responded that appellants' argument that the Army's failure to comply with internal regulatory routing requirements indicated a lack of finality of the CRMP was equally meritless.²¹ During oral arguments, the Army conceded that the administrative record contained no specific documents detailing command approval but argued that that issue was irrelevant since other documents included in the administrative record supported the Army's adoption of a final CRMP. For example, the Army's administrative record included memoranda sent outside the Army to other agencies, such as the Maryland Historical Trust, that documented the CRMP as a final plan adopted by the Army for preservation of the National Seminary Historic District.²² For all of the aforementioned reasons, the Army argued that the district court's decision was not arbitrary and capricious.

The United States Court of Appeals for the District Court of Columbia recently issued their opinion in National Trust for Historic Preservation v. Blanck.²³ In a one-page opinion, the Court of Appeals for the D.C. Circuit affirmed the district court's decision.²⁴ The Court of Appeals based their opinion on "the district court's conclusion that the Army's Cultural Resources Management Plan ("CRMP") was in fact the Army's Historic Preservation Plan ("HPP") and that it [the CRMP] satisfies Section 110 of the NHPA, 16 U.S.C. 470h-2, and the Secretary of the Interior's Section 110 guidelines, 52 Fed. Reg. 4727 (1988)."²⁵ The Court of Appeals briefly addressed the "command channels" process:

Although we find no basis for concluding that the Army satisfied its own internal procedures in adopting the CRMP as its HPP, *contra id.* at 923 & n. 17; see Army Reg. 420-40, ch. 2, 2-2g, 2-2h(1984), we do not reach the question whether the Army's failure to comply with its internal regulations

¹⁵ Id. at 909.

¹⁶ Id. at 908.

¹⁷ Brief of Appellants, *NTHP v. Blanck*, 398 F. Supp. 908 (D. D.C. 1996) (No. 97-5101).

¹⁸ Id. at 4.

¹⁹ Id. at 16, 19-23.

²⁰ Brief of Appellees at 19, *NTHP v. Blanck*, 398 F. Supp. 908 (D. D.C. 1996) (No. 97-5101).

²¹ Id. at 21.

²² Id.

²³ No. 97-5101, 1999 U.S. App. LEXIS 29703 (D.C. Cir. Oct. 22, 1999).

²⁴ Id.

²⁵ Id.

affects the propriety of its use of the CMRP as its HPP because appellants do not contend that such failure is an independent ground for reversal.²⁶

With this opinion, National Trust for Historic Preservation v. Blanck continues to be “good news” for the Army! As those in the environmental arena are aware, however, the plaintiffs will continue to fight for their causes despite the outcome of this case. In order to avoid additional and unnecessary litigation, historic preservation officers and environmental law specialists should continue to be meticulous when preparing and finalizing CRMPs as required by the new Army Regulation 200-4.²⁷ (MAJ Shields/LIT)

Clean Air Act Fines Update

Major Robert Cotell

As reported in the July 1999 ELD Bulletin,²⁸ on 22 July 1999 the U.S. Court of Appeals for the Sixth Circuit issued a bizarre decision on the issue of whether states can impose fines against federal facilities under the Clean Air Act (CAA). The court did not decide the case by interpreting the federal facilities section, but instead held that the savings clause of the citizen suits provision contained an independent waiver of sovereign immunity. Immediately following the adverse opinion the Department of Justice (DoJ) sought an en banc appeal of the ruling by the Sixth Circuit justices, but that request for was denied. Given DoJ’s reluctance to pursue a Writ of Certiorari in the absence of a split among the circuits, the Sixth Circuit’s decision will stand in the meantime. This issue is currently pending resolution within the Ninth Circuit, where the State of California appealed a district court decision holding that the CAA’s federal facilities’ section does not waive sovereign immunity for punitive fines.²⁹ Should the Ninth Circuit’s decision create a split of authority among circuits, this could prompt a Supreme Court review of the matter.

In the meantime, installations within the Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee) receiving CAA violations in the future are subject to state-imposed CAA fines for violations. All factual and legal defenses ordinarily available may be invoked in state administrative procedures, but the issue of federal sovereign immunity from state CAA fines has been settled within this jurisdiction. For installations outside the Sixth Circuit, the legal position of the United States has remains unchanged despite the Sixth Circuit decision. Installations receiving notices of violations in all jurisdictions other than the Sixth Circuit should remind regulators of the immunity and decline to pay any fines. A sample letter reminding regulators of sovereign immunity is contained in the March 1999 ELD Bulletin. (MAJ Cotell/CPL).

Section 8149 Update

Major Robert Cotell

On 23 November 1999 Gary D. Vest, Principal Assistant Deputy Under Secretary of Defense (Environmental Security) issued DoD guidance on the implementation of Section 8149 of the FY 2000 Defense Authorization Act. The Section requires DoD to request authorization from Congress before use of FY 2000 funds to pay fines or Supplemental Environmental Projects. The complete guidance letter is available at the following website: <http://www.denix.osd.mil/denix/Public/ES-Programs/Compliance/Memos/Section8149/note6.html>. In addition, Army ELD has published supplementary guidance to Army installations regarding

²⁶ Id.

²⁷ U.S. Dep’t of Army, Reg. 200-4, Cultural Resources Management (1 Oct 1998).

²⁸ Mike Lewis, *Court of Appeals Renders Bizarre Decision on CAA Fines*, Environmental Law Division Bulletin, July 1999, at 11.

²⁹ SMAQMD v. United States, 29 F. Supp. 2d 652 (E.D. Cal. 1998).

implementation of Section 8149. The complete text of the Army guidance is reprinted below, and includes the DoD guidance noted above. (MAJ Cotell/CPL).

DAJA-EL (27)

3 December 1999

MEMORANDUM FOR U.S. Army Staff Judge Advocates

SUBJECT: Approval of Environmental Consent Agreements under the Defense Appropriations Bill for Fiscal Year 2000

1. This memorandum supplements guidance from Gary D. Vest, Acting Deputy Under Secretary of Defense (Environmental Security), dated 23 November 1999, Subject: Implementation of Section 8149 of the FY 2000 Defense Appropriations Act (Enclosure 1).
2. On 25 October 1999 the President signed the Defense Appropriations Bill for Fiscal Year 2000. Section 8149 of the Bill provides:

None of the funds appropriated in this Act may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law. For purposes of this section, expenditure of funds to carry out a supplemental environmental project that is required to be carried out as a part of such penalty shall be considered to be a payment of the penalty.
3. The above legislation will change the Army approval process for environmental consent agreements arising during FY 2000. In addition, it will affect consent agreements negotiated in previous years that require the expenditure of FY 2000 funds for completion.
4. This legislation does not alter installation commanders' basic authority to enter into consent agreements with federal, state or local environmental regulators to settle alleged deficiencies involving the assessment of fines. Likewise, authority to negotiate the provisions of environmental consent agreements with federal and state regulators will remain with installation environmental law specialists. Funds for the payment of such fines will continue to come from installation operations and maintenance accounts. Also remaining unchanged is the requirement (per paragraph 15-8, AR 200-1) that environmental agreements must be forwarded through command channels to ELD for review prior to signature.
5. In accordance with the above DOD guidance, all consent agreements negotiated in FY 2000 must now include the following provision:

None of the funds appropriated by Congress under P.L. Public Law 106-79 (FY 2000 Defense Appropriations Bill) may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by Congress. Under P.L. Public Law 106-79, expenditure of funds to carry out a supplemental environmental project that is required as part of a settlement of an enforcement action is considered to be payment of a penalty. **[name of installation]** agrees to request that the Department of Defense seek Congressional authorization of any payment or obligation under this consent agreement. In accordance with P.L. 106-79, however, **[name of installation]** will not make any payment with FY 2000 funds of a fine or obligation of funding for supplemental environmental projects pursuant to this agreement until such payment or obligation is first approved by Congress.

6. In light of the statutory requirement for Congress to approve payment for all fines and supplemental environmental projects, each consent agreement will require additional staff

coordination at HQDA before ELD will approve it for signature. To expedite this process, and to better ensure approval, installation environmental law specialists are now required to forward a settlement memorandum along with each draft agreement. The memorandum should conform to the format specified at Enclosure 2.

7. Upon receipt of the (unsigned) consent agreement and settlement memorandum, ELD will review and either recommend changes or approve signature by the installation commander, after coordinating the action within HQDA. If signature is approved the installation will be notified to sign the agreement and have the regulator sign. A copy of the signed version should then be provided to ELD expeditiously. The signed consent agreement and settlement memorandum will be forwarded by ELD, with a legislative proposal, to the Assistant Secretary of the Army, Installations and Environment (ASA(I&E)) for request to the Deputy Under Secretary of Defense Environmental Security (DUSD-ES) for a budget authorization request to Congress.

8. Please be advised that recent congressional inquiries have indicated that Congress will strictly scrutinize consent agreements in which installations have settled for amounts in excess of the original fines. Accordingly, review at both the ELD and ASA (I&E) level will focus on the advisability of such settlements. Justification for such settlements should be clearly specified in the settlement memorandum.

9. In addition to consent agreements that will be negotiated in FY 2000, some installations may have signed agreements in previous years which require the use of FY 2000 funds to complete supplemental environmental projects. Installations having such projects have already been contacted by ELD and an approval process similar to that specified above will be tailored to the circumstances of each case.

10. Questions regarding this matter may be directed to Major Robert J. Cotell, Compliance Branch at (703) 696-1593.

/S/

LAWRENCE E. ROUSE
COL, JA
Chief, Environmental Law Division

2 Enclosures
1-2. as

Enclosure 1

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

ACQUISITION AND
TECHNOLOGY
23 1999

NOV

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT & SAFETY)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DIRECTOR, DEFENSE LOGISTICS AGENCY, DLA-CAAE

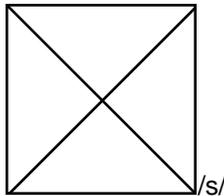
SUBJECT: Implementation of Section 8149 of the FY 2000 Defense Appropriations Act

The Defense Appropriations Act includes a provision that requires the Department to request and receive statutory authorization before use of FY 2000 funds to pay for fines and penalties, including Supplemental Environmental Projects (SEPs) **Error! Bookmark not defined.** The President has directed the Department to seek this authorization **Error! Bookmark not defined.** This provision does not change the Department's requirement to comply with environmental statutes and regulations.

Implementation of this provision will be as follows:

- If an installation receives a proposed fine or penalty they must negotiate with the regulator in good faith in an attempt to reach an administrative settlement.
- Final administrative agreements shall include a clause stating that the installation cannot pay the final fine or penalty nor execute an SEP with FY 2000 funds unless specifically approved by Congress.
- DoD Components shall submit legislative proposals to this office within two weeks of final agreement between the installation and the regulator quantifying the fine, penalty, or SEP.
- This office will consolidate the submittals and present them to Congress according to Department policy on such proposals.

The provision does not prohibit nor inhibit negotiations with regulators, not does it eliminate the Department's liability for fines and penalties. The provision only adds a step between settlement and payment - Congressional authorization - and we are committed to requesting Congressional authorization as quickly and efficiently as possible. Furthermore, we remain committed to achieving administrative settlement of proposed fines and penalties whenever possible. If your staff has questions about this policy, my point of contact is Ms. Maureen Sullivan, 604-0519.



Gary D. Vest
Acting Deputy Under Secretary of Defense
(Environmental Security)

2 Attachments:
as stated

Attachment 1

Making Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 2000 and For Other Purposes, 106-371

Section 8149

None of the funds appropriated in this Act may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department

arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law. For purposes of this section, expenditure of funds to carry out a supplemental environmental project that is required to be carried out as part of such a penalty shall be considered to be a payment of the penalty.

Attachment 2

November 4, 1999

STATEMENT BY THE PRESIDENT

THE WHITE HOUSE

Office of the Press Secretary

(Hartford, Connecticut)

For Immediate Release

November 4, 1999

STATEMENT BY THE PRESIDENT

I have signed into law H.R. 2561, the "Department of Defense Appropriations Act, 2000." The bill approves funds to cover the Department's most critical needs, consistent with my request that reflected my strong commitment to our Nation's security.

The bill provides funding for all critical Defense activities - pay and other quality of life programs, readiness, and weapons modernization. In particular, the bill fully funds the key elements of the compensation initiatives I proposed and that were enacted in the FY 2000 Defense Authorization Act, including military retirement reform, pay table reform, and a significant pay increase. It also fully funds my request for training, spare parts, equipment maintenance, and base operations - all items essential to military readiness. I am pleased that the bill restores partial funding for the F-22 fighter aircraft, which is essential to guaranteeing early air dominance in any future conflict.

Regrettably, the bill goes beyond what is necessary, providing funding for a host of unrequested programs at the expense of other core government activities. It provides \$267.4 billion in discretionary budget authority, a funding level that is \$4.5 billion above my request. As testified to by our military chiefs, my budget request correctly addressed our most important FY 2000 military needs. Unfortunately, H.R. 2561 resorts to a number of funding techniques and gimmicks to meet the Appropriations Subcommittee allocation. These include: designating \$7.2 billion of standard operation and maintenance funding as a contingent emergency; deferring payments to contractors until FY 2001; and incrementally funding a Navy ship (LHD-8).

Furthermore, the bill contains several objectionable language provisions. I am concerned about section 8074, which contains certain reporting requirements that could materially interfere with or impede this country's ability to provide necessary support to another nation or international organization in connection with peacekeeping or humanitarian assistance activities otherwise authorized by law. I will interpret this provision consistent with my constitutional authority to conduct the foreign relations of the United States and my responsibilities as Commander in Chief.

While I am troubled by a provision requiring the Department of Defense to seek

specific authorization for the payment of fines or penalties for environmental violations, I will direct the Department to seek such authorization on any fine or penalty it receives, ensuring full accountability for all such violations.

Furthermore, while the provision in section 8174 of the bill prohibits the Department from contributing funds to the American Heritage Rivers initiative, I will direct the Department, within existing laws and authorities, to continue to support and undertake community-oriented service or environmental projects on rivers I have recognized as part of the initiative.

Finally, the bill provides only about one-quarter of the funding level requested for construction of Forward Operating Locations that would reestablish regional drug interdiction capabilities in Latin America. This amount will not adequately support our vital drug interdiction efforts in the Western Hemisphere.

I have signed this bill because, on balance, it demonstrates our commitment to the military, meets our obligations to the troops, maintains readiness, and funds modernization efforts that will ensure our technological edge into the 21st century.

WILLIAM J. CLINTON

THE WHITE HOUSE, November 4, 1999.

Enclosure 2

CONTENTS OF CONSENT AGREEMENT SETTLEMENT MEMORANDUMS FOR SUBMISSION WITH REQUESTS FOR SECTION 8149 APPROVAL

Part I – Identifying Data

- (a) – Specify the date of the notice of violation (NOV)
- (b) – Identify the regulatory agency: EPA Region # or state regulator
- (c) – Statute alleged to have been violated (e.g., RCRA, SDWA)
- (d) – Single sentence summary of the general nature of the allegations
- (e) – Amount of fines assessed
- (f) – Status: Indicate the progress of the case in the administrative litigation process prior to reaching the settlement (e.g., complaint filed, answer filed, information exchange complete, case awaiting motions date by EPA Administrative Law Judge (ALJ)).

Part II – Factual Allegations and Defenses

Provide a complete statement of the facts alleged by the regulator to support its enforcement action, and indicate whether the installation has admitted or denied the allegations in its answer or other correspondence. Corresponding to each allegation, state specific defenses that would apply and identify the evidentiary strengths and weaknesses to proving these defenses.

Part III – Legal Analysis

List issues related to liability, citing the specific provisions of controlling law. Use subparagraphs with descriptive headings as appropriate. Address jurisdictional issues such as the authority of the regulator to impose fines, equitable defenses, or improper overfiling of state regulatory actions by EPA. With regard to each issue identified, discuss the extent to which the issues have been negotiated, briefed to ALJs, or argued. Provide an estimate of the likelihood of success on the merits if the case is contested at an administrative hearing.

Part IV – Penalty Calculation

Discuss the calculation of the penalty assessed by the regulator. If the regulator is the EPA, indicate the penalty policy used and state the determinations made by the regulator regarding, potential for harm, extent of deviation from requirements, gravity-based penalties, and use of multi-day penalties. Also discuss the calculation of any adjustment factors and whether the regulator has attempted to include recovery of economic benefits of noncompliance and whether the fine has been increased based on the size-of-violator factor. Indicate whether the regulator provided a formal written penalty calculation. If the regulator did not provide a written calculation, indicate any verbal calculations communicated. If the regulators provided no calculation at all, indicate what the installation believes would be an appropriate calculation. Provide an estimate of the likely penalty amount if the case is contested at an administrative hearing.

Part V – Supplemental Environmental Projects

Discuss any Supplemental Environmental Project (SEP) proposed to settle the case. Indicate the degree of offsetting credit the regulator is giving for the value of any SEPs. If the regulator is the EPA, indicate whether each of the SEP criteria has been met and whether the EPA has allowed any substantial deviation from the criteria. Thoroughly discuss the funding for the project. Indicate whether the project was commenced or completed before the NOV, after the NOV, after the NOV but before the consent agreement, or whether it will be initiated only after the consent agreement.

Part VI – Settlement Negotiations

Discuss negotiations and offers of settlement made to the regulators. Indicate any factors or issues affecting the regulator's negotiating position (e.g., history of installation noncompliance, status for public relations, demands for a minimum amount of a cash fine).

Part VII – Recommendation

State the reasons the consent agreement should be approved. Specific justification is necessary in all cases where the combined value of cash payments and SEPs exceeds the initial demand for fines. Identify how the installation benefits from the settlement and why settlement is preferable to contesting the case at an administrative hearing. If avoidance of the costs of administrative litigation and/or the avoidance of a potential penalty in an administrative hearing is part of the justification for settlement, indicate what the potential costs or penalties would be.

THE ENVIRONMENTAL LAW DIVISION BULLETIN

December 1999

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Compiling an Administrative Record

MAJ Michele B. Shields

If an Army installation is involved in litigation that challenges an Army decision in the environmental arena, that installation will normally be required to compile an administrative record. An administrative record, i.e., "admin record" or "record", is the paper trail that documents the Army's decision-making process, the basis for the Army's decision, and the final decision. You, the environmental law specialist (ELS), will be called upon to assist and provide legal advice while the admin record is being compiled. Recently, the Department of Justice (DOJ) released a memorandum providing guidance to federal agencies on how to compile an administrative record of agency decisions.¹ This article will summarize the DOJ's guidance.

Generally, the Administrative Procedures Act (APA) governs judicial review of a challenged agency decision. A court will review the Army's action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA. 5 U.S.C. 706(2)(A). The court will evaluate the Army's entire administrative record in making this determination. It is important to note that several other statutes and regulations may specify what documents and materials constitute the administrative record.² Therefore, before your installation begins compiling their admin record, you should determine whether the APA is the only statute and/or regulation that applies in your case.

One installation employee should be designated as the "certifying officer" in charge of compiling the administrative record. This individual should keep a record of where he searched for documents and materials and who was consulted in the process. He should be very meticulous when conducting the search and compiling the administrative record, otherwise, the court will be limited in their review of the Army's decision and the defense of that decision will be much more difficult. Ultimately, this individual may be required to prepare an affidavit certifying the contents of the administrative record to the court.

Before the certifying officer begins his search, you should discuss the following with him: what type of documents and materials should be included in the administrative record, where

¹ Memorandum from Department of Justice to Federal Agencies, Guidance to Federal Agencies on Compiling the Administrative Record (January 1999) (unpublished memorandum, on file with author).

² See 42 U.S.C. 7607(d)(7)(A); 42 U.S.C. 9613(j) and (k); 40 C.F.R. 300.800-300.825; 40 C.F.R. Part 24.

to look for those documents and materials, how to organize the administrative record, how to handle privileged documents and materials, and the importance of a complete administrative record.

First, the administrative record should consist of all documents and materials directly or indirectly considered by the Army in making the challenged decision. What does that mean? The administrative record should include all documents and materials that were: considered or relied upon by the Army; before or available to the Army at the time the decision was made; and before the Army at the time of the challenged decision, even if they were not specifically considered by the final decision-maker. If a document or material fits into one of the aforementioned categories but does not “support” the Army’s final decision, it should still be included in the admin record. The bottom line is that all documents and materials that are *relevant to the Army’s decision-making process* should be included in the administrative record.

The certifying officer may ask what “type” of documents and materials should be included in the administrative record. Documents and materials should not be limited to paper but should include other means of communication or ways of storing or presenting information such as e-mail, computer tapes and discs, microfilm and microfiche as well as data files, graphs, and charts. These documents and materials may include, but are not limited to, the following: policies, guidelines, directives, manuals, articles, books, technical information, sampling results, survey information, engineering reports, studies, decision documents, minutes of meetings, transcripts of meetings, notes, memorandums of telephone conversations and meetings.

The certifying officer may also ask what types of documents and materials should be excluded from the record. Clearly, documents that were not in existence at the time of the Army decision should not be included in the record. Additionally, as a general rule, the admin record should not include *internal* “working drafts” of documents. Draft documents, however, that were circulated outside the Army for comment and reflect significant changes in the Army decision-making process in their final version should be included in the admin record.

Second, the certifying officer should conduct a thorough search for the purpose of compiling the administrative record. The certifying officer should make a list of where files relating to the Army decision are located and conduct searches of those files. He should include public document rooms and archives on his list of places to look. Additionally, the officer should contact all Army personnel, including installation level and higher headquarters, involved in the decision and ask them to search their files for documents and materials related to the final decision. The certifying officer should also contact former employees involved in the decision and ask for guidance on where to search. If another agency was involved in the Army decision, the officer should contact the other agency and insure that any of their documents that were considered or relied upon by the Army in making the decision are included in the record.

Third, the certifying officer should organize the documents in a logical and accessible way, i.e., chronologically, topically, categorically, or otherwise. The certifying officer should also prepare an index of the administrative record that includes, at a minimum, the date, title, and brief description of the document. Once the certifying officer has completed the admin record, he should consult the installation ELS for review of privileged documents. When the record is finalized, the certifying officer may be required to prepare and sign an affidavit, which attests that he has personal knowledge of the assembly and authenticity of the record.

Fourth, once the certifying officer finishes compiling the record, he should turn it over to the ELS for review of privileged documents. The ELS should review the record and be sensitive to privileges and prohibitions against disclosure, including, but not limited to, attorney-client, attorney work product, Privacy Act, deliberative or mental processes, executive, and confidentiality. The ELS should consult with the assigned ELD and DOJ attorneys for guidance on how to annotate the privileged documents in the administrative

record index or a separate privilege log. The index or log should include, at a minimum, the date, title, and brief description of the document as well as the privilege asserted. The privileged documents themselves should be redacted or removed from the administrative record.

Finally, the ELS should stress the importance of a complete administrative record. By compiling a complete administrative record, the certifying officer will provide the court with evidence that supports the Army's decision and details the Army's compliance with the relevant statutory and regulatory requirements. If the administrative record fails to explain the Army's reasoning and final decision and frustrates judicial review, the court may remand the record to the Army. The court may allow the Army to supplement the record with affidavits or testimony. Once the Army supplements the record, however, the court may allow additional discovery if the opposing party proffers sufficient evidence to show: bad faith, improper influence on the decision-maker, or agency reliance on substantial materials not included in the record. An initially incomplete record raises questions as to the completeness of the ultimately final record. An incomplete record also raises the possibility of additional unnecessary litigation. For these reasons, the ELS and certifying officer should do all they can to avoid an incomplete administrative record. (MAJ Shields/LIT)

Can States Squirm Out Of Liability? The 11th Amendment and CERCLA

LTC David B. Howlett

The Court of Appeals for the Second Circuit recently upheld the dismissal of a clean up suit against a state, saying that the action was barred by the Eleventh Amendment to the Constitution.

In *Burnette v. Carothers*,³ homeowners (the Burnettes) claimed that a nearby Connecticut prison was contaminating their wells. They sued the state for environmental response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴ The District Court granted Connecticut's motion to dismiss for lack of subject matter jurisdiction, finding the suit was barred by the Eleventh Amendment to the Constitution.⁵

The Court of Appeals set out long-standing case law holding that a state is immune from suits brought in federal courts by its citizens. The Supreme Court has held that Congress may abrogate States' sovereign immunity if 1) Congress unequivocally expresses its intent to do so, and 2) Congress acts pursuant to a valid exercise of power.⁶ Although Congress did intend unequivocally to abrogate States' immunity in CERCLA, it was acting pursuant to the Commerce Clause. According to the Supreme Court, only Congressional action taken under the authority of the Fourteenth Amendment would be sufficient to overcome States' Eleventh Amendment immunity.⁷

³ 49 ERC 1247 (2d Cir. 1999).

⁴ 42 U.S.C. §9601, et seq. Plaintiffs also brought claims under the Clean Water Act and the Resource Conservation and Recovery Act, whose sovereign immunity provisions are substantially similar.

⁵ The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

⁶ *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996).

⁷ *Id.* at 59, 65-66.

The Court of Appeals rejected the idea that Congress, by creating a recovery claim, was establishing a property right pursuant to the Fourteenth Amendment. It also rejected the claim that Connecticut consented to federal jurisdiction by accepting federal funds to run its prison system

Plaintiffs next claimed that they were suing State officials rather than the State itself and that this did not violate the Eleventh Amendment according to Ex Parte Young, 209 U.S. 123 (1908). The Court of Appeals found that this claim had been waived by the plaintiffs in earlier proceedings. In any event, it is not clear that individual Connecticut officials would have been responsible parties under CERCLA §107.

In addition to maintaining the vitality of a two hundred-year-old Amendment, this case forces advocates in CERCLA litigation to consider whether State agencies can be properly joined as CERCLA responsible parties. This decision also adds new importance to the question of whether a State National Guard organization is a federal or State actor for purposes of its waste disposal actions. (LTC Howlett/LIT)

ETHICS ADVISORY #00-01 - Misuse of Government Resources

The "Standards of Ethical Conduct" requires employees to "protect and conserve Government property" and "not use such property, or allow its use, for other than authorized purposes." (5 C.F.R. Sec. 2635.704). The DoD "Joint Ethics Regulation (JER)," DoD 5500.7-R, helps to define "authorized purposes." (JER 2-301). In addition to official use, "authorized purposes" can include some occasional, incidental, and intermittent personal use of reasonable duration if it does not interfere with mission or official duties and does not result in significant additional cost, when authorized by the "agency designee."

The CG has authorized AMC employees some occasional, incidental, and intermittent personal use of reasonable duration of their computers, communications systems and other resources. This authorization, and its limitations and restrictions, are set out in AMCIO-T Policy Memorandum #97-08, dated 4 Sep 97, as revised in Change 1, dated 23 Feb 99 (attached to this Advisory).

In "The Washington Post" business section of January 3, 2000, there is a report about five Army employees of the Military District of Washington (MDW) caught allegedly misusing their Government computers, e-mail accounts and internet access. According to the report, they used their Government computers and internet access to download software from a commercial website (AllAdvantage) and install it on their computers. This software tracks and pay the users for their time spent on the web; in addition, they can earn commissions by getting others to join.

Apparently, one of the MDW employees being solicited to join by a fellow employee, talked to a reporter. When the reporter contacted MDW, the spokesman knew nothing about this scheme. However, it was quickly uncovered, and five Army employees are implicated.

AMC employees should be aware that accessing, installing and using AllAdvantage or similar software on their Government computers violates of AMC Policy Memorandum #97-08 and the proscriptions against:

Misuse of official position for personal gain; and
Misuse of Government resources.

Worse, it could even be a violation of a criminal law (18 U.S.C. Sec. 209) that prohibits the supplementation of our Federal salary for the performance of our official duties (e.g., receiving payment for doing research on the web in the performance of our job).

Authorized use of the telephone, computers, e-mail, etc., will never include use for commercial purposes. In addition, we need to be extremely careful about business

dealings with fellow-employees. The general rule is "no solicitation" in the office. I have already provided guidance on the issues involved and you can find these ADVISORIES in the LotusNotes Ethics Advisories Database:

ETHICS ADVISORY 98-03 - Appropriate Use of E-Mail.

ETHICS ADVISORY 98-14 - Solicitations in the Federal Workplace

If you have any further questions, please contact one of us below.

What if you have already installed this software on your Government computer? Uninstall it! What if you have already received money for surfing the web on the job or as commissions for soliciting co-workers? Return it to the source! What if you have concerns about solicitations in your workplace? Go to your supervisor, the IG, or one of your Ethics Counselors!

Mike Wentink, Rm 7E18, 617-8003

Alex Bailey, Rm 7E18, 617-8004

Stan Citron, Rm 7E18, 617-8043

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Ethical Standards in the Public Sector
A Guide for Government Lawyers, Clients and Public Officials

Patricia E. Salkin, Editor

This new book is a compilation of essays, articles, and research intended to help government lawyers, their clients, and other public officials focus on some of the ethical considerations that arise in the practice of law in the public sector. It provides a well-written, clearly presented overview of many of the complexities of public sector ethics, including post-employment restrictions on government employees, whistle-blowing, pro bono work, regulation of honoraria, royalties and travel reimbursements, financial disclosure filing requirements, gift giving, conflicts of interest, and issues in enforcement of local ethics law. Written by some of the best minds addressing government ethics issues today, the guide is a valuable source of thoughts, ideas, suggestions and questions on public office, public service, and the public trust.

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