



Office of Command Counsel Newsletter

April 2000, Volume 2000-2

AMC Command Counsel Newsletter Survey Results--What you said & What we'll do

During the month of March we conducted an informal survey of AMC legal offices to gain your thoughts, suggestions and recommendations on the AMC Command Counsel Newsletter. I appreciate the comments supplied from those who took the time to reply, including CECOM, TACOM, IOC, SBCCOM, STRICOM, and ARL.

As the veteran's of your office know, we have published a bi-monthly Newsletter for the last nine years, and we are starting our third year using the Internet to reach you. When we first went to the Web we had problems in that not all our legal offices had access. The primary reason we went to the Web was to provide a quicker and wider distribution to you, rather than having you wait for internal hard copy distribution.

We are pleased to report that no office reports access or distribution difficulties, the major barrier we faced since 1991. This is a significant, long-sought develop-

ment. Thus, we are committed to continuing web distribution. We are also listening carefully to you and want to respond to improve the quality of the product.

Survey comments included the following:

1. **The Watermark** (background—Command Counsel Newsletter) seems to make reading more difficult in that it hides the text. This problem has been reported before. It appears to be an issue when the Newsletter is printed—but not on every printer. Not sure what we can do about this. We could discard it or seek to lighten the watermark.

2. **Scrolling** the Newsletter from one column to the next to read each article seems to be an issue, especially to our speed-readers. We will try to increase the use of designing articles in a format such as across multiple columns.

3. **Indexing** the Newsletters appears as a recommendation several times. An index was prepared semi-annu-

ally during the hard copy era of the Newsletter. It was a lot of work and there was never a comment made indicating that you considered this a worthwhile endeavor. We will explore the possibility of doing so for the on-line version.

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Survey Results...Continued

What You Can Do

The Office of Command Counsel receives favorable comments from both government and non-government sources after publication of each issue. This is nice to receive and we hope each of you realize this is good for our legal community. Many of you regularly submit articles for publication, for which we are very grateful.

In order to make the Newsletter even better, we ask you to consider the following:

1. **Contributions** from the AMC field offices in the acquisition area have been outstanding. We ask **labor counselors** and **ethics counsel** to especially expand their efforts. Thus far most of the articles in these two disciplines come from the Headquarters teams in these areas.

2. **AMC Legal Office Profiles** became a regular feature of each Newsletter last year. Comments are universally fa-

vorable, as these profiles are a tool to get to know our colleagues. Unfortunately, our true volunteers have already contributed. As you will see, we have no profile in this issue despite both an E-Mail request and an AMC Chief Counsel VTC request (plea?). We are looking for profiles from all AMC offices, especially the smaller ones. Please think about making this contribution.

3. **Consider sending** the Newsletter to or making your clients and commanders aware of the Newsletter

Much thanks goes to **Joshua Kranzberg**, AMCCC Web Master and **Holly Saunders** for their unique expertise in delivering the Newsletter to you on time and in great shape. The three of us look forward to hearing from you.

Thanks for your cooperation.

Steve Klatsky, editor,
DSN 767-2304

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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

Proposal Preparation Costs--Unsolicited Proposals

AMCOM's **Rachel Howard**, DSN 897-1294, has written an excellent article on the subject of proposal preparation costs for unsolicited proposals (Encl 1).

The paper addresses the question of whether you actually have an unsolicited proposal under FAR 15.601. FAR 15.601 defines an unsolicited proposal as "a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposals...or any other Government-initiated solicitation...."

General Rule #1

As a general rule, proposal preparation costs are allowable when the government has solicited submission of the proposal, inducing the contractor to expend the cost of preparing it, and

then behaved in an arbitrary and capricious manner in the evaluation of it or in the award of the contract (such as by failing to consider the proposal in a fair and honest manner).

General Rule #2

The paper addresses case law concluding that as a general rule, unsolicited proposers are not entitled to proposal preparation costs. In one Comptroller General decision, the court held that one who submits an unsolicited proposal becomes a "volunteer, and as such, is not entitled to compensation for his work in preparing the proposal." Matter of Charles G. Moody, 1978 U.S. Comp. Gen. LEXIS 2471, *6, B-191181, April 27, 1978.

Of course, further reading suggests that things are not as clear as might be suggested by the general rules.

List of Enclosures

1. Proposal Preparation Costs--Unsolicited Proposals
2. Competition Advocate--Roles & Responsibilities
3. Partnering & the WLMP
4. Voluntary Services
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Acquisition Law Focus

Competition Advocate: Roles & Responsibilities

The Federal Acquisition Streamlining Act (FASA) of 1994 (Sec. 8104, paragraph 2377 of Public Law 103-355), established a preference for the acquisition of commercial items, and also expanded the duties of Competition Advocates by assigning them responsibility for promoting the acquisition of commercial items (Sec. 8303, Additional Responsibilities for Advocates for Competition). FAR Part 6 implements this increased responsibility as follows:

“Agency and procuring activity competition advocates are responsible for promoting the acquisition of commercial items, promoting

full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses” (FAR 6.502).

There is no guidance or policy for the Competition Advocates stipulating how the responsibility for promoting commercial items is to be fulfilled.

The enclosed paper describes the role and functions of the CECOM Competition Advocate in executing the responsibility of promoting the acquisition of commercial items:

- through participation in acquisition planning and the review of acquisition strategy documents
- assistance with market research
- participation in training sessions with requiring activities and contracting personnel

POC is **Marla Flack**, Competition Management Division, CECOM Legal Office, DSN 992-5057 (Encl 2).

Partnering & the WLMP: The Journey Begins

The FY 2000 DoD Authorization Act, Public Law 106-65, requires the use of Partnering on WLMP as follows: The Army Materiel Command should encourage partnerships with the con-

tractor, with the primary goal of providing quality contract deliverables on time and at a reasonable price.

CECOM's **Larry Asch**, DSN 987-1076, CECOM's original Lead Partnering

Champion has written an excellent paper “The Wholesale Logistics Modernization Program Partnering for Success Journey Begins”, describing the benefits of Partnering to the WLMP (Encl 3).

Voluntary Services

The issue of the acceptance of voluntary services has Anti-Deficiency Act ramifications as described in the enclosed paper by CECOM's **Lea Duerinck**, DSN 992-3188.

The Anti-Deficiency Act ("ADA") greatly limits the Government's ability to accept voluntary services. Specifically, the ADA provides:

An officer or employee of the United States Government or the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. See also, Army Regulation 37-1, para. 7-6, which incorporates the statutory prohibitions. 31 U.S.C. § 1342 (1999).

Generally, voluntary services may only be accepted in emergencies. The ADA provides that "emergencies" do "not include ongoing, regular functions of government the

suspension of which would not imminently threaten the safety of human life or protection of property." 31 U.S.C. § 1342 (1999).

The paper cites case law and discusses several exceptions to the general rule, such as student volunteers, US Forest Service, employment of disadvantaged groups, and cases such as an Army Reserve Officer be ordered to active duty without pay if statute provides for such.

An interesting section discusses voluntary services and government employees. Government officers or employees are generally prohibited from volunteering or gratuitously providing their services.

The general rule is that "it is contrary to public policy for an appointee to a position in the Federal government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority" (Encl 4).

IOC's **Terese Harrison**, DSN 793-8447, provides an article on issues related to 10 U.S.C. 2539b, "Availability of Samples, Drawings, Information, Equipment, Materials, and Certain Services," that are worth sharing. (Encl 5). This statute allows the Secretary of Defense and the secretaries of the military departments to: Sell, rent, lend, or give samples, drawings, and manufacturing or other information; sell, rent or lend government equipment or materials; and sell the services of/ make available any government laboratory, center, range or other testing facility.

CLE 2000

22-26 May 2000

Acquisition Law Focus

Using GSA Federal Supply Schedules- The GAO Rules

During the last decade, there has been an explosion in Federal agency use of the General Services Administration (GSA) Federal Supply Schedules (FSS) Program. Almost all recent developments – be they regulatory, political or technological – have served to fuel that expansion.

A significant constraint, however, was imposed by the General Accounting Office (GAO) in 1999. In the case of

Pyxis Corporation, B-282469, July 15, 1999, 99-2 CPD ¶ 18, the GAO put a formal and complete end to the previously authorized practice of Federal agency ordering of non-FSS items through FSS contracts.

FSS contracts have become increasingly popular in recent years for a number of reasons: regulatory changes that allow agencies to place orders with unlimited dollar values and without any prior

notice to industry; dwindling numbers of acquisition personnel seeking to find alternatives to lengthy and costly, full-blown procurements; and, the availability of an increasing variety of items on FSS contracts.

An examination of the impact of this GAO case on our practice as well as GSA guidance is addressed in an article by CECOM's **Pat Drury**, DSN 221-3359 (Encl 6)

Due Diligence in the WLMP Acquisition

Throughout the WLMP acquisition process, a concerted effort was made to maximize free and open communication between Industry and Government to the extent permissible by law and regulation. Among the numerous innovative acquisition practices used was a commercial business practice known as due diligence.

Due diligence has many meanings in the commercial world, ranging from the investigation process done prior to corporate acquisitions, initial public stock offerings or acquisition of real property to its use as an affirmative legal defense. In the context of the WLMP, due diligence was used to provide offerors with a vast array of information,

including, but not limited to information regarding the operations of the LSSC and ILSC IT systems and the operations and structural nature of the organizations supporting those IT systems.

For a detailed look at due diligence and the WLMP experience we provide an article by CECOM's **Lea Duerinck**, DSN 992-3188 (Encl 7).

Professional Liability Insurance

This addresses implementation of the statute providing for payment of up to 50% of the cost of professional liability insurance for qualified federal employees.

1. The policy for implementation is still being developed by DOD. Bob Fano, Labor & Employment Law Division, OTJAG, who is the Army representative attending DoD's status meetings, believes that the policy will be issued within about a month. The draft provides for payment of either 50% of the cost or \$150.00, whichever is less (coverage has been priced at under \$300.00).

2. It looks as if the personnel community will probably have to accept "applications" and make the call as to whether or not the appli-

cant is covered, but roles and responsibilities are still being debated. DFAS will also be a player.

3. According to **Bob Fano**, DA's official position is that we will not "endorse" liability insurance if asked. Many labor lawyers do not believe that such insurance is really necessary. The policies do not cover criminal charges, and the government is generally substituted for individual defendants in civil actions. However:

a) We represent the Army in discrimination complaints and named supervisors who feel obliged to protect their personal interests are entitled to separate representation at their own cost. These insurance policies cover 3rd party proceedings,

so they might be useful in these circumstances (although the interests of the Army and the supervisors usually diverge only in sexual harassment cases).

b) The policies probably pay for the defense of an employee being disciplined or fired - it may be paradoxical for us to pay half the cost of insurance for this purpose, but it could be the result.

c) \$150.00 per year is probably not a lot to pay if it will help you sleep better at night or reduce your anxiety when you're named as an alleged "discriminator."

4. Law enforcement officials are the most logical beneficiaries of the new statute.

POC is **Linda Mills**, AMCCC, DSN 767-8049.

Union Recognition in the DA

Enclosed is a paper detailing union recognition in the Army based on OPM's publication, Union Recognition in the Federal Government, dated January 1999.

Twenty-four different unions represent 133,221 Army employees in 505 bargaining units. About 60% of the civilian population is represented by a union. There

were 14,418 (9.8%) fewer Army employees represented by a union compared to OPM's January 1997 data (Encl 8).

Statute of Limitations on Back Pay

On December 28, 1999, OPM published an interim regulation in the Federal Register (64 Fed. Reg. 72457) which, among other things, applies a six-year statute of limitations on back pay awards to include settlements of grievances and arbitration awards under 5 U.S.C. 7121.

The regulations implement section 1104 of Public Law 105-261, the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, which amended section 7121 by adding section 7121(h) which provides that “[s]ettlements and awards under this chapter [chapter 71 of title 5, U.S.C.] shall be subject to the limitations in section 5596(b)(4) of this title [title 5, U.S.C.]. The Act added the new section 5596(b)(4) establishing the six-year statute of limitations. Under section 5596(b)(4), other limitations on back pay authorized by applicable law, rule, regulations, or collective

bargaining agreement continue provided they do not go beyond the six-year period.

Section 5596(b)(4) provides as follows:

“(4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was ineffect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.”

Back pay claims dealing with payments under the Fair Labor Standards Act, the 2-year statute of limitations (3 years for willful violations) continue to apply.

Dual Comp & Census Positions

CPMS FAS TRACK #93-3 (June 18, 1999) indicates that the Undersecretary of Defense for Personnel and Readiness issued a memorandum dated May 8, 1998 authorizing most DoD civilian employees to accept temporary, intermittent CENSUS 2000 positions.

See the article entitled “Waiver of Dual Employment Limits for CENSUS 2000” at <http://www.cpms.osd.mil/fas/fastrack/ft699.htm#PAY> for additional information.

FLRA Guide on Labor Relations in the New Millenium

The Office of the General Counsel, FLRA, has developed a slide presentation, Labor Relations Issues in the New Millennium. The slide presentation is available on the Web at

http://www.flra.gov/shows/gc_shw2/gc_shw2.html

Designing ADR Programs--A Three-Step Model

Steve Klatsky, Assistant Command Counsel for ADR, DSN 767-2304 uses a three-step model in describing the design of ADR programs in presentations he makes:

I. Step 1—Planning and Preparation

Motivation—why are you looking at ADR? What are the facts and circumstances on your installation or at your activity that leads you to consider using ADR processes?

Analysis of Disputes—from what organizations? Concerning what issues? Are your disputes primarily in the EEO or MER arena? Do they come from a specific organizational unit? Is a specific issue the subject of an unusual number of cases (performance appraisal, AWOL)?

Planning Committee/Defining “stakeholders”—EEO, Civilian Personnel, Legal, Management, Senior Leadership. The issue of *ownership*.

Gaining Commitment
Barriers to Adopting
ADR

Scope of ADR Program
Resources Supporting
ADR

Education of the Workforce
Union Role
Information brochure—What is in it for me?
Reasons for looking at ADR.
Coverage and scope. Process and Procedures

Publicity—Methods:
Newspaper, bulletin boards,
E-Mail, Town Hall Meetings,
Commander’s staff meeting

II. Step 2—The Process & Procedures

Voluntary—For employees: always. For management: maybe mandatory. Trend is to making it mandatory for individual managers once Management offers ADR, ADR Process or Processes—One method or a menu of ADR options. Don’t stop at mediation

How will ADR be raised?
Who will initiate ADR? Consideration of an issue for ADR.

Relationship to other dispute resolution processes—
Time limitations.

Agreement to use ADR—
Get the parties’ commitment up front. Answer questions on the process early.

Resolution/Settlement Agreement—Authority of participants. Reduce agreements to writing. Legal/CPO review. Confidentiality.

Third-Party Neutrals—
Where they are? What they cost? Growing your own.

Representatives—Impact on the ADR process.

Pilot or Test—Start small. Duration.

III. Step 3—Evaluation and Assessment

How will measure success? Use of Statistics. Dollar Savings: will be tough. Days from Intake to Resolution: Traditional v. ADR.

Use of Intake Form—Time measurement.

Evaluation by participants

What questions should you ask of participants?

Query employees and managers

Important question: Why did you refuse offer to use ADR?

Renewal of Commitment—by Senior Leaders and “Stakeholders”.

Reports—Build on existing reporting requirements.

EEO--Offers of Resolution

Army-Wide ADR Program Established

AMCCC Employment Counsel **Mike Lassman**, DSN 767-8040, has written an excellent article on Offers of Resolution as they pertain to EEO cases (Encl 9).

Offers of Resolution are now possible due to the rule changes made pursuant to 29 C.F.R. 1614.109(c).

The purpose of the offer of resolution is to provide incentive to settle complaints and to conserve resources where settlement should reasonably occur.

This revised regulation eliminates the ability of agencies to dismiss complaints for failure to accept a certified offer of full relief. The prior offers of full relief were difficult for the agency to make and difficult for the complainants to understand.

Thus, these offers of full relief under the old rules were not very effective in the resolution of cases.

The new rule provides that the offer of resolution must be in writing and must

contain the following information: a notice explaining the consequences of failing to accept the offer; attorney's fees and costs, to date; any non-monetary relief must be specified; and monetary relief, which may be offered as a lump sum or may be itemized in amounts and types. It is important to note that although a comparison of non-monetary relief may be inexact and difficult in some cases, non-monetary relief can be significant and cannot be overlooked.

The revised regulation is similar to Rule 68 of the Federal Rules of Civil Procedure offer of judgment rule. The intent of the rule is to limit attorney fees and costs when a complainant rejects an offer and obtains less relief after a hearing.

The paper also includes model language for an Offer of Resolution, and discusses the important ramifications of both the acceptance and rejection of the offer.

In response to a regulation requiring all federal agencies to have an ADR program for discrimination complaints in place by January 1, 2000, the Army will offer servicewide mediation and other alternative dispute resolution processes as a way to settle discrimination complaints in the workplace. Under the program, an EEO office would provide a trained neutral to conduct sessions to assist the participants in finding solutions to the problem through candid discussions on the issues. Mediation sessions are often the first time that an employee and a supervisor sit down and frankly discuss an issue. Early indications from the Military District of Washington EEO Directorate are that the ADR program works, based on several employment-related workplace disputes that have already been resolved to the mutual satisfaction of all parties.

Witness Preparation

Preparing an individual to be a witness in an administrative or judicial proceeding is one of the most important aspects of the practice of law. **Kay Krewer**, Chief, of the TACOM-Rock Island Legal Office, DSN 793-8414, provides an excellent preventive law paper on Witness Preparation from the perspective of the witness reading the document (Encl 10).

The paper has 20 bullets raising excellent points for the prospective witness. Among these are:

Be truthful. You are under oath when you testify in court or on deposition. Testifying falsely under oath can subject you to criminal penalties for perjury. Sometimes being truthful will require you to say "I don't know" or "I don't remember." When you tell the truth, no one can confuse you!

Give **positive, definitive answers** when possible. Avoid saying "I think" or "I believe" if you can be positive. However, if your answer is only an estimate about distances or time or other such factors, be sure to state it is

only an estimate. If asked about details you do not remember, simply say "I don't remember." Unless certain, do not say "That's all the conversation" or "nothing else happened." Instead say "That's all I recall" or "That's all I remember happening." It may be that after more thought or another question, you will remember something important.

Be courteous. Being courteous is one of the best ways to make a good impression on the court and the jury. Respond with, "Yes sir" and "No sir" and address the judge as "Your Honor. Courtesy includes dressing neatly and professionally.

Be attentive. You must be alert when you are in the witness chair so that you can hear, understand, and give an intelligent answer to every question. If the judge or jury gets the impression you are indifferent, they may not believe your story.

Think before you speak. Give your attorney an opportunity to pose an objection, if necessary, and take a moment to think. Hasty and

thoughtless answers may be incorrect and may cause problems. This is particularly true when the opposing lawyer is cross-examining. The cross examiner may ask you leading questions - questions which suggest only one answer. Make sure you understand the question; then answer it as accurately as you can. If you do not know the answer or cannot remember, say so.

Speak clearly. Nothing is more annoying to a court, jury, and lawyers than a witness who refuses to speak clearly enough to be heard. An inaudible voice not only detracts from the value of your testimony, but it also tends to make the court and jury think that you are not certain of what you are saying. Everyone in the courtroom is entitled to know what you have to say, and the court reporter who is recording the proceedings must be able to hear all your testimony. Don't chew gum.

The paper concludes with an excellent list of questions that are tricky and may contain traps (Encl).

Messing with Migratory Birds-- Be Careful!

The Migratory Bird Treaty Act (MBTA) makes it unlawful for any person, by any means or any manner, to 'take' (i.e. pursue, hunt, trap, wound, capture, kill, or collect) any migratory bird (50CFR Part 10.13) without first receiving a permit from the U.S. Fish and Wild Life Service (USFWS). The courts have been issuing varying opinions on whether the MBTA applies to Federal agencies.

In direct opposition to two federal circuit courts of appeals, the federal district court for the District of Columbia held that the MBTA does apply to Federal agencies, who must therefore obtain appropriate permits be-

fore engaging in activities resulting in the taking of migratory bird species. If upheld on appeal, this ruling could require installations to revert to traditional means of obtaining 'take' permits from USFWS, including intentional degradation permits for the control of nuisance birds.

The Army policy issued in 1997 still stands. If you are involved with either primary (e.g. nuisance bird control) or secondary 'take' via implementation of INRMPs or PMPs, continue consultation with your local USFWS Field Office regarding the need for permits. Based on our experience, the USFWS will be satisfied with keeping them apprised of your actions.

However, it is in your interests to maintain a written administrative record of your actions in this regard until this issue is resolved by additional legal opinion or Executive Order.

Additionally, installations need to focus on the difference between "intentional take" (e.g. nuisance birds) and "unintentional take" (e.g. timber harvest) which is generally the take of migratory birds incidental to an otherwise lawful action.

Intentional Take: The Army should adopt the same conservative approach; i.e., apply for and obtain permits prior to the taking.

Unintentional Take: The USFWS has not traditionally issued permits for unintentional take (e.g. birds, nests and eggs taken during timber harvest). They do not have an established regulatory process for doing this. So, the guidance: coordinate with USFWS, consider impacts in project NEPA documentation, address impacts/management in INRMP - remains good advice for activities.

ELD Bulletins

Environmental Law Division Bulletins for January (Encl 11) and February 2000 (Encl 12) are provided for those who have not received an electronic version from ELD or who have a general interest in Environmental Law.

Environmental Law Focus

Modelling Your Federal Facility Agreement

Last year the Department of Defense reached closure with the United States Environmental Protection Agency on additional model language to supplement the existing 1988 model Federal Facilities Agreement (IAG) language and address issues raised in the FFERDC report.

Some of our installations are negotiating Federal Facilities Agreements for installations newly listed on the National Priorities List (NPL) and there is always the potential for additional installations to be listed. Attached in the newly revised Model Language (Encl 13)

Interim UXO Management Procedures for Ranges

The Department of Defense and the Environmental Protection Agency have completed work on a set of managerial principles to address Unexploded Ordnance (UXO) at Closed, Transferring and Transferred military ranges. This consensus document is the *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges*.

These principles will be in effect until the final version of the Range Rule is promulgated. For a copy of the guidance please contact **Stan Citron**, DSN 767-8043,

EPA Issues Institutional Controls Policy--

The United States Environmental Protection Agency (USEPA) has finally issued its policy on considering and using Institutional Controls in the remediation and transfer of property.

This policy indicates what the EPA will expect in documents that institutional controls are effective and enforceable, in relation to Findings of Suitability to Transfer (FOST) for our properties (Encl 14).

**See You In Florida
At CLE 2000**

Conference Planning--New Rules

The military and civilian travel regulations recently added new requirements to DoD's conference planning process.

O As summarized below, the changes express conference planning policy, add certain planning requirements, and authorize certain conference costs.

O Regarding conference planning policy, the regulations:

- oo Express a policy of minimizing costs, including travel costs, administrative costs, and costs of attendees' travel time.

- oo Encourage conference planners to identify methods to reduce overall conference costs, such as planning conferences during the off-season.

O Regarding conference planning requirements, the regulations:

- oo Require activities to conduct and document a cost comparison among different possible conference sites.

- oo Require agencies to

determine whether a Government facility is available at a lesser rate or whether other alternatives, such as video teleconferencing, could be used.

- oo Emphasize that activities must have contracting authority to obligate the Government in connection with conference arrangements. This means that a contracting officer or ordering officer must sign all contracts and agreements with hotels and/or conference facilities.

- oo Establish special rules, required by law and regulation, for conferences held in the District of Columbia.

- oo Require activities to use FEMA-approved accommodations in the United States, unless the authorized conference sponsor determines in writing that waiver of this requirement is necessary and in the public interest for this event.

- oo Require activities to include certain notices of the FEMA-approved accommodations requirement in any conference advertisement or application.

O Regarding conference costs, the regulations:

- oo Establish a "conference lodging allowance" – which permits activities, under certain circumstances, to increase the lodging portion of the authorized per diem rate by up to 25 percent.

- oo Authorize agencies to include the cost of "light refreshments" in a conference administration costs, to the extent consistent with the policy of minimizing conference costs.

- oo Require a proportional meal rate to be deducted from a traveler's per diem reimbursement, where meals are furnished at Government-expense or included in a registration fee.

O These changes apply to conferences where attendees are in a travel status and to certain training conferences. They do not apply to meetings or non-training conferences held in and around attendees' principal duty station.

POC is **Lisa Simon**, AMCCC, DSN 767-2552.

Government Credit Card--Early Guidance and Recent Developments

On October 19, 1998, the President signed the Travel and Transportation Act (TTRA) of 1998 into law. This legislation gave the Administrator of the General Services Administration (GSA) 270 days to develop implementing regulations.

On July 16, 1999, GSA issued Interim Rule 8, which is nothing more than a series of questions and answers about TTRA. Interim Rule 8 did establish that the provisions of TTRA would be effective for all official government travel on or after December 31, 1999.

The Office of the Under Secretary of the Defense (Comptroller) (OUSD©) established several working groups to develop implementing guidance for the Department of Defense (DoD). These working groups have completed their work, but to date, OUSD© has not finalized their guidance and provided it to DoD components.

We provide an early

memorandum, dated 9 December 1999 from the Deputy Assistant Secretary of the Army (Financial Operations) for background information (Encl 15).

The memorandum includes entries on Use of the Travel Card, Collection of Amounts Owed, and Reimbursement of Travel Expenses.

Important Development

The implementation of Section 2 requiring the use of the Government-sponsored, contractor-issued travel charge card has been delayed once again. It was to have applied to travel beginning after 29 February 2000. On 1 Mar 2000, the USD(C) issued a Memorandum stating that it will not apply to travel beginning after 30 April 2000!

The TTRA includes the "reform" of requiring employees to use the contractor-issued, individually billed travel

card. GSA issued implementing regulations with an effective date of 1 March (however, the ASA(M&RA) said that the requirement has already been in effect in the Army because DA guidance was already issued effective 1 January — I don't know if that is the ASA(FM) position).

DoD has finally issued its implementation of the GSA regulation. You will find the implementation here:

<http://www.dtic.mil/comptroller/travel.html>

In an earlier e-mail, I provided the GSA final rule and the DA interim guidance. So that you have all of this in one place, I provide you with these references below:

This is the GSA final rule:
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-695-filed

Now that is a URL befitting this subject.

Faces In The Firm

Hello & Goodbye

HQ AMC

Cherell Gerald-Lonon is the new Legal assistant in the Protest Litigation Branch. She can be reached at DSN 767-2303, 703 617-2303. She joined us on Monday, 28 Feb 00. She previously worked at the Federal Election Commission in DC and is currently taking classes to be a paralegal. Cherell will be handling all admin and report duties for our branch.

CCAD

Two paralegals have recently joined the CCAD Legal Office. **Lloyd Van Oostenrijk** moved from Iowa where he has worked as a paralegal in a private law firm and a member of the Civil Rights Commission for Iowa as a civil rights investigator as well as has worked for the federal government in Iowa.

Eloy G. Solis has worked for private law firms, the Department of Protective and Regulatory Services and the Attorney General of the State of Texas.

CECOM

Jignasa Desai, a general attorney assigned to Business Law Division A, was recently promoted to a GS-13. Before joining the CECOM Legal Office in February of 1999, Jignasa served a one year clerkship with a New Jersey Superior Court Judge and worked for four years as an associate with a law firm, specializing in litigation and appellate matters.

Staff Sergeant Daniel C. Smith, the CECOM's Senior Legal NCO is leaving for a brigade NCO-in-Charge position with the First Infantry Division, Engineering Brigade, in Bamberg, Germany. SSG Smith is a recognized expert in military claims and has provided extensive automation support to the Legal Office.

Retirement

HQAMC

Craig Hodge, retired from the Air Force Reserves after 30 years. His beard is looking great, for an ex-Colonel.

Awards & Recognition

HQ AMC

In an awards ceremony presided over by AMC Chief of Staff **MG Charles Mahan** many AMCCC personnel were recognized, including the following:

Bill Medsger, Meritorious Civilian Service Award; **Ed Stolarun**, Commander's Award for Civilian Service; **MAJ Ed Beauchamp**, Army Achievement Medal; **Steve Klatsky** Achievement Medal for Civilian Service.

Additionally, the following received government service awards: **Bill Medsger**, 5 years; **Mike Lassman**, 5 years; **Mike Wentink**, 10 years; **Stan Citron**, 15 years; **Jeff Kessler**, 20 years; **Debbie Reed**, 25 years; and **Holly Saunders**, 30 years.

New Positions

HQ AMC

Debbie Arnold has moved to the Intellectual Property Branch where she will be Legal Assistant. Her new telephone is DSN 767-2553, 703 617-2553.

Lisa Simon has moved to the Intellectual property Branch where she will be a technology law attorney.

Proposal Preparation Costs for Unsolicited Proposals

By Rachel M. Howard
AMCOM Legal Office

The question has recently arisen whether an unsolicited proposer may be entitled to proposal preparation costs. In our case, a contractor had approached the government with an idea for providing new support services. Conversations were had with the contractor over a period of literally years and it appeared at one point that the government was leaning towards passing on the idea. When the government communicated this position, the contractor began making noises about claiming proposal preparation costs. Given that by this time these costs had reached the tens of millions of dollars, these threats engendered some research on the topic. And given further the trickle-down nature of research assignments, this task eventually found its way to my desk. I thought to share the fruits of this effort might save someone some time in the future.

I. Do you have an unsolicited proposal?

As a general rule, proposal preparation costs are allowable when the government has solicited submission of the proposal, inducing the contractor to expend the cost of preparing it, and then behaved in an arbitrary and capricious manner in the evaluation of it or in the award of the contract (such as by failing to consider the proposal in a fair and honest manner). If a proposal is unsolicited, it appears that proposal preparation costs are probably not allowable. Thus the first question that you must answer, which may seem rudimentary, is whether you are dealing with a truly unsolicited proposal. This is not as simple as it seems, because the character of the proposal can actually change with the evolution of the situation. A proposal for an idea totally originated by a contractor can, by the end of the process, actually have metamorphosed into a "solicited" proposal, even though no solicitation (as we think of it) was ever issued. The place to begin examining this question, of course, is the FAR, which not unsurprisingly has something to say on the subject.

FAR 15.601 defines an unsolicited proposal as "a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposals...or any other Government-initiated solicitation...." This definition seems to stand on its own and to be clear-cut in its distinction that submissions in response to formal government requests are solicited, and that all others are unsolicited. However, the FAR itself immediately muddies the situation by defining a number of types of submissions that are not to be considered unsolicited proposals, namely advertising

materials, commercial item offers, and suggestions made to the government with no accompanying indication that the source intends to devote further effort to the idea. FAR 15.603(b). But does this mean that by the converse, for example, if a contractor suggests an idea to the government which is not in response to any formal request for such a suggestion, while at the same time the contractor indicates that it intends to devote time and money to further develop the concept, the suggestion is a solicited proposal? Why are these definitions of what are not unsolicited proposals necessary if only submissions in response to formalized requests are to be considered solicited?

To further confuse the matter, FAR 15.602 states that it is the policy of the government to encourage the submission of new ideas in response to government-initiated solicitations or programs, but when an idea does not fall under a topic area publicized under those programs, the idea may be submitted as an unsolicited proposal. This seems to indicate that if an idea falls within the advertised purview of a government program, it may be considered solicited, even though no formal government solicitation was issued.

In a further effort to clarify what is solicited and what is unsolicited, the FAR goes on to say that unsolicited proposals "in response to general statements of agency needs" (whatever these may be) are considered to be "independently originated," which is a requirement for a "valid" unsolicited proposal. FAR 15.603(d). Does this mean that proposals submitted in response to specific statements of agency needs are to be considered solicited? This interpretation is borne out to some extent in the case law, where the courts have devoted varying amounts of time to analyzing the content of communications between the government and the contractor before submission of the proposal.

Thus, in the end, even if you have not issued a solicitation, it may still be that you have unwittingly solicited the proposal you have in hand. To decide whether the proposal is truly unsolicited, you should carefully examine any communications between the government and the proposer that took place before its submission. In our case, it remains unclear whether the wealth of communications with the proposer (which included providing input on the content of the proposal) rendered the proposal "solicited." If you decide that your proposal can safely be called "unsolicited," proceed to the next section.

II. Disclaimer of Liability

In the original memorandum upon which I based this article, I spent four pages analyzing the case law on this subject, two of it distinguishing a single aberrant case (the discussion of which is reproduced below). As I am sure you have noticed, decisions of the Comptroller General tend to be very fact-dependent and result-oriented, and are frequently decided without much of an eye for precedent. This makes deriving a general rule of law an arduous

process of harmonizing and distinguishing cases, with much energy spent on discussing the facts of individual cases. This process also leaves much room for reasonable lawyers to disagree about the conclusions thus drawn. Still, I will share with you my general conclusions about the law on this subject, with the caveat that there is some troubling authority to the contrary, and with the warning that you really should go read these cases yourself.

III. Discussion of Case Law

A. The General Rule

It is safe to say that, as a general rule, unsolicited proposers are not entitled to proposal preparation costs. In one Comptroller General decision, the court held that one who submits an unsolicited proposal becomes a "volunteer, and as such, is not entitled to compensation for his work in preparing the proposal." *Matter of Charles G. Moody*, 1978 U.S. Comp. Gen. LEXIS 2471, *6, B-191181, April 27, 1978. In *Moody*, Mr. Moody performed unsolicited work on a technical report after his retirement from the Navy, and then claimed payment for the work. *Id.* at *2-*6. The Comptroller General found that Mr. Moody's actions basically constituted the submission of an unsolicited proposal, and held that as a volunteer he was not entitled to compensation for his work. *Id.* at *6.

In making its decision in *Moody*, the Controller General cited *Matter of International Explosive Services, Inc.*, 55 Comp. Gen. 164, 1975 U.S. Comp. Gen. LEXIS 90, B-183247, August 19, 1975. The *International Explosive Services* case involved a company that had anticipated contracting with the Egyptian Government to reconstruct the Suez Canal, but the work was undertaken by the U.S. government at its own expense, thus usurping the company's opportunity to contract with Egypt to perform the services. *Id.* at *1-*4. The court held that in submitting its unsolicited proposal to the Egyptian Government, *International Explosive Services* was acting as a pure volunteer. *Id.* at *4. The court found that there was no element present in the case that would remove the company from the category of volunteer, as in cases where compensation had been granted. *Id.*

By referring to circumstances that might remove an unsolicited proposer from the category of volunteer, *International Explosive Services* implies that under appropriate circumstances, a submitter of an unsolicited proposal might be entitled to compensation for preparation efforts. The only case cited by *International Explosive Services* for this proposition is *J.C. Pitman & Sons, Inc. v. United States*, 317 F.2d 366 (Ct. Cl. 1963). *J.C. Pitman* is a tax case in which a company paid the tax liability of another company because it was under a mistaken impression that it was required to do so by the IRS. *J.C. Pitman & Sons, Inc.*, 317 F.2d at 366-703. There is actually no meaningful discussion in that case that sheds light on the distinction between a volunteer

and a non-volunteer, merely the implication that one is not a volunteer if under some compulsion or obligation imposed by the government to act. See *id.* at 368. Although this kind of duress would seem to be rare, you should evaluate your case to ensure that there was no obligation imposed by the government analogous to the one present in *J.C. Pitman*.

B. The Aberration

I located only one case wherein a court appeared to believe that proposal preparation costs might be recoverable by an unsolicited proposer. In *Matter of Bell & Howell Company*, Bell & Howell had been subcontractor on an Autonetics contract with the Navy. *Matter of Bell & Howell Co.*, 54 Comp. Gen. 937, 1975 U.S. Comp. Gen. LEXIS 157, B-180199, May 1, 1975. The Navy did not believe that the Bell & Howell equipment met the specifications of the prime contract, and stated its intent to issue a change order requiring Autonetics to use Honeywell equipment instead. *Id.* at *1-*2. The Navy gave Bell & Howell the opportunity to perform tests to prove the equality of the Bell & Howell equipment with the Honeywell equipment. *Id.* at *2. If the data demonstrated compliance, then Bell & Howell would be permitted to compete for a subsequent procurement. *Id.*

The tests were completed, and a Navy official told Bell & Howell that the results were acceptable. *Bell & Howell*, 1975 U.S. Comp. Gen. LEXIS 157, at *3. On this basis, Bell & Howell submitted an unsolicited proposal four days before the issuance of the change order, although the Navy then refused to consider it. *Id.* Bell & Howell filed a claim for proposal preparation costs, arguing that the Navy had encouraged its participation and then refused to consider its proposal. *Id.* at *5. The Navy defended that the test results did not meet the specifications, and further, that the Navy official did not possess actual authority to accept the results. *Id.* at *4.

The court accepted Bell & Howell's view of the issue presented: that the government encouraged Bell & Howell to submit a proposal, and then refused to give it fair consideration. *Bell & Howell*, 1975 U.S. Comp. Gen. LEXIS 157, at *5. The court discussed the rule of law previously applied only to solicited proposals, stating that aggrieved bidders may recover bid preparation costs when the government fails to fairly and honestly consider a bidder's proposal. *Id.* at *6. The court did note that all of the reviewed cases involved direct and open encouragement or inducement by the government to potential bidders to submit bids, impliedly distinguishing those cases and the one before it from cases in which unsolicited proposals were submitted without any encouragement from the government. *Id.* at *6.

The court went on to hold that because the unsolicited proposal was contingent on acceptance of the equipment, the submission of the unsolicited proposal did not give rise to any obligation on the part of the government to fairly and

honestly consider the proposal, even though the government encouraged the proposer's effort. *Id.* at *10-*11. Thus, even if the contractor establishes that the government in some way encouraged its efforts in making the proposal, still no obligation arises on the government's part to afford the proposal any particular level of consideration.

The result in *Bell & Howell* is consistent with the general rule in that the court denied proposal preparation costs to an unsolicited proposer. However, it is worrisome that the court based its holding not on the rule that preparation costs are not recoverable for unsolicited proposals, but rather on the fact that consideration of the proposal was contingent on the Navy's acceptance of the equipment. *Bell & Howell*, 1975 U.S. Comp. Gen. LEXIS 157, at *10-*11.

In fact, the court commented that the "various costs directly related to the preparation and submission of the unsolicited proposal...might very well be compensable as proposal preparation costs." *Bell & Howell*, 1975 U.S. Comp. Gen. LEXIS 157, at *9. When taken out of context, this statement appears to be inconsistent with the general rule that such costs are not compensable. However, the statement does not appear as a part of the court's holding, but rather in a discussion of what costs are includable in bid preparation costs. The court distinguished between the costs incurred by the company in its effort to expand or broaden the needs of the government (which it felt were noncompensable) versus the costs directly related to the preparation and submission of a proposal (which might be compensable). *Id.* at *6-*10.

Perhaps the plainest reading of *Bell & Howell* is that the court simply treated the case before it like a solicited proposal due to the government's encouragement of its submission. Implicit in its rationale is the concept that a proposal may be "solicited" even without a formal solicitation; that "encouragement" is sufficient solicitation to invoke the law applicable to solicited proposals. This serves to reemphasize the importance of evaluating your client's involvement in the submission of the proposal you have at issue.

If *Bell & Howell* is raised by your opponent or the court, your first argument should be that the portion of the *Bell & Howell* decision regarding what costs would be allowed in a proper case is dicta, because the court found that the government owed no duty to *Bell & Howell*, and hence it was unnecessary to the decision. If forced to apply that portion of *Bell & Howell* to your case, you may argue that none of the costs incurred by the contractor would be compensable because they resulted from an effort to convince the government to expand or broaden its needs. In the worst case, the contractor's recovery would be limited to its direct costs in preparing the proposal for submission.

Further, you may be able to distinguish *Bell & Howell* on the facts. In *Bell & Howell*, the government directly encouraged the company to prepare a proposal for

consideration, even though there was no formal solicitation. In your case, did the government approach the contractor with the concept or ask the contractor to prepare a proposal for consideration? This of course is back to the original issue of whether the proposal is solicited or unsolicited, which is a question of fact.

Finally, Bell & Howell was decided in 1975, three years before the Moody case. If necessary, you can argue that Moody impliedly overruled any holding in Bell & Howell to the extent that it conflicts with the Moody decision.

III. Conclusion

Your first defense to a claim for proposal preparation costs should be that these costs are not recoverable for unsolicited proposals, under Moody and International Explosive Services.

If Bell & Howell is raised, you should argue that it does not apply to your case because it has been impliedly overruled, and if not, because it is distinguishable on the facts. Alternatively, if you can discern anything in your facts that could be interpreted as a contingency, you can rely on Bell & Howell for the defense that acceptance of the unsolicited proposal was contingent on some condition which failed, and thus the government was under no duty to consider the proposal. Even if it were found that there was no contingency, and thus a duty did arise, you should argue that the government did not breach the duty to fairly and honestly consider the proposal. Ultimately, even if there were a duty and a breach of duty, the contractor is not entitled to recover its costs if they were incurred in an effort to expand or broaden the government's needs.

There is no simple answer to the question posed at the beginning of this article. If this situation ever finds its way to your desk, how the government proceeds in defending or settling the claim will be based on the cost-benefit analysis required in making such decisions, given as always imperfect facts and imperfectly-clear law.

POC is Rachel Howard at DSN 897-1294.

The Role of the Competition Advocate in Promoting the Acquisition of Commercial Items

The Federal Acquisition Streamlining Act (FASA) of 1994 (Sec. 8104, paragraph 2377 of Public Law 103-355), established a preference for the acquisition of commercial items, and also expanded the duties of Competition Advocates by assigning them responsibility for promoting the acquisition of commercial items (Sec. 8303, Additional Responsibilities for Advocates for Competition). FAR Part 6 implements this increased responsibility as follows:

"Agency and procuring activity competition advocates are responsible for **promoting the acquisition of commercial items**, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses" (FAR 6.502).(emphasis added)

There is no guidance or policy for the Competition Advocates stipulating how the responsibility for promoting commercial items is to be fulfilled. At CECOM, the Competition Advocate's staff, within the Competition Management Division (CMD) of the Legal Office, promotes and encourages the use of commercial items in the following ways:

- through participation in acquisition planning and the review of acquisition strategy documents
- assistance with market research
- participation in training sessions with requiring activities and contracting personnel

One of the avenues that CMD utilizes in advocating the acquisition of commercial items is the review of Acquisition Requirements Packages (ARPs) for excessive test, configuration and quality control requirements, as well as unnecessarily restrictive requirements, and participation with the Functional Requirements Authentication Board (FRAB) to discuss the results of the market research and whether a commercial item is available that would meet the Government's need.

FAR Parts 10 and 12 require that market research be conducted to determine whether or not commercial items are available that could suit the agency's need. Specifically, FAR Subpart 10.001, Policy, states that (a) "Agencies shall... (2) conduct market research appropriate to the circumstances (i) before developing new requirements documents for an acquisition by that agency." This must be accomplished prior to soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold (\$100,000). If market research establishes that a commercial item cannot fill the Government's need, agencies are required (FAR 10.002 (c)) to reevaluate the requirement for possible restatement to include commercial or nondevelopmental items, as defined in FAR 2.101. The findings of the market research must be documented (FAR 10.002(e)).

CMD reviews the data package prepared by the requiring activity and provides guidance on the proposed acquisition strategy. The file documentation should contain evidence of recent and thorough market research, and should address the availability of commercial or nondevelopmental items, as well as the possibility of using modified items to meet the agency's need. Requiring activities are reminded to review all new requirements for potential use of commercial items, and that the regulations prescribe a preference for commercial items.

Requiring activities and contracting personnel are also advised that requirements for items such as space heater units and air conditioners would most likely be considered a commercial item **of a type** even though modifications may be required to meet the Government's needs. FAR 2.101, Definitions, defines a commercial item as an item **of a type** customarily used for nongovernmental purposes that has been sold or offered for sale to the general public, or that will be available in the commercial market place in time to meet delivery requirements. If a commercial item is not readily available, the requirement should be revisited, and the user requirements confirmed to ascertain whether or not the requirement could be modified to allow for use of a commercial item.

FAR Part 11, Describing Agency Needs, provides that, to the maximum extent possible, requirements for supplies and services shall be stated in terms of functions to be performed, performance required, or essential physical characteristics. Requirements are to be defined so that offerors are enabled and encouraged to supply commercial items, or nondevelopmental items if commercial items are not available, and offerors of commercial items shall be provided an opportunity to compete in any procurement. Prime contractors and

subcontractors should be required to incorporate commercial items or nondevelopmental items as components.

FAR 11.002(v) further requires that agencies "modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items."

In conclusion, one aspect of acquisition reform has been statutory and regulatory changes encouraging use of commercial items. The Competition Advocates have been established as the Commercial Items Advocates. In order to determine if there are commercial items capable of meeting the Government's performance requirements, requiring organizations need to perform market research. One technique used by the CECOM CMD has been to participate in early requirements planning/review boards to ensure these requirements are understood and implemented.

POC is Marla Flack, Competition Management Division, CECOM Legal Office, (732)532-5057.

THE WHOLESALE LOGISTICS MODERNIZATION PROGRAM (WLMP) PARTNERING FOR SUCCESS JOURNEY BEGINS

An Executive Partnering Workshop was held with senior personnel from Computer Sciences Corporation (CSC) and the Army Materiel Command (AMC) Operational Logistics Board of Directors on 03 February 2000. The purpose of this session was to get Wholesale Logistics Modernization Program (WLMP) senior management's personnel stamp of approval on Partnering efforts.

WHAT IS PARTNERING?

Partnering is a commitment between Government and industry to improve communications and facilitate contract performance. It is accomplished through a process, with the primary goal of providing our customers with the highest quality supplies and services, on time, and at reasonable prices. It is primarily an attitude adjustment in which the parties mutually commit to form a relationship of teamwork, cooperation, good faith performance and define issue resolution and escalation.

WHY DO WE NEED PARTNERING ON WLMP?

The FY 2000 DoD Authorization Act, Public Law 106-65, requires the use of Partnering on WLMP as follows:

The Army Materiel Command should encourage partnerships with the contractor, with the primary goal of providing quality contract deliverables on time and at a reasonable price. Any such partnership agreement should constitute a mutual commitment on how the Army Materiel Command and the contractor will interact during the course of the contract, with the objective of facilitating optimum performance through teamwork, enhanced communications, and good faith performance.

The AMC Model Partnering Process will allow us to adopt the right partnering attitude, and gain the mutual trust necessary to provide maximum support for the WLMP.

WHAT ARE SOME OF THE BENEFITS OF PARTNERING TO THE WLMP?

- Establishment of mutual goals and objectives to replace the traditional “us vs. them” mentality with a “win-win” philosophy.
- Concentrating on the mutual interests of the parties rather than individual positions or agendas.
- Building trust and encouraging open, honest and continuous communication throughout contract performance.

- Enhanced communication to eliminate surprises that may result in program delays and increased costs, as well as claims and litigation.
- Reduced time and cost of contract performance by adhering to a clear method of raising, discussing, and expeditiously resolving issues.
- A more harmonious business relationship.

WLMP IMPLEMENTATION

Implementation of WLMP will follow the AMC Model Partnering Process. This approach, developed by AMC, in which AMC that can be easily implemented on a wide variety of contracts and can be tailored by Government/contractor teams as necessary to achieve the objectives of their programs.

The facilitator-directed Executive Partnering Workshop held in February 2000 involved senior level CSC and AMC personnel who met to give their personnel stamp of approval to the Partnering process. The items covered were as follows:

- An overview of the AMC Model Partnering Process
- The unique acquisition reform tools and techniques of the contract, and why Partnering is needed in order to make the program a success.
- What the Program Managers (PM WLMP & CSC) expect from senior management, and what senior management should expect from the PMs.
- Integrated Product Team (IPT) discussions, and the need for personnel to support their success.

One of the products that came out of the workshop were the “Rocks in the Road” that senior management sees as potential problems during the program.

An IPT Partnering Workshop to be held in March 2000 will cover the AMC Model Partnering Process Tools and address the “Rocks in the Road” and causes of conflict between organizations. The IPTs will develop a Partnering Charter which will be the focal point of AMC and CSC’s relationship and a blueprint for the program success. As Congress has mandated in the FY 2000 DoD Authorization Act and AMC and CSC have started implementing, we can only facilitate optimum performance through teamwork, enhanced communications, and good faith performance and this can only be accomplished through a Partnering between AMC and CSC.

For more information on the AMC Partnering for Success Program see http://www.amc.army.mil/amc/command_counsel/partnering.html

Voluntary Services

The Anti-Deficiency Act (“ADA”) greatly limits the Government’s ability to accept voluntary services. Specifically, the ADA provides:

An officer or employee of the United States Government or the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. *See also*, Army Regulation 37-1, para. 7-6, which incorporates the statutory prohibitions. 31 U.S.C. § 1342 (1999).

Generally, voluntary services may only be accepted in emergencies. The ADA provides that “emergencies” do “not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or protection of property.” 31 U.S.C. § 1342 (1999). Accordingly, the Comptroller General has held that such an emergency must represent an immediate danger. *See Decision by Comptroller General McCarl*, A-34142, 10 Comp. Gen. 248 (1930) (Agreement to voluntarily tow Navy airplane after being forced down was not an emergency because it did not involve sudden emergency involving loss of human life or destruction of Government property), *but see Decision by Comptroller General McCarl*, unnumbered, 2 Comp. Gen. 799 (1923) (Payment for voluntary service to assist sinking ship in the middle of the Atlantic Ocean was allowable and met the emergency exception).

However, Voluntary Services also may be accepted if authorized by law. *See In Re: Student Volunteers –Traveling and Living Expenses*, B-201528, 60 Comp. Gen. 456 (1981); *In Re: Senior Community Service Employment Program*, B-222248, 1987 U.S. Comp. Gen. LEXIS 1458 (1987) (holding that “in the absence of specific statutory authority, Federal agencies are generally prohibited from accepting voluntary services offered by individuals”). The following are examples of voluntary services authorized by law:

(a) Student Volunteers are authorized, provided they serve without compensation in an established Agency program designed to provide them with educational experience and will not displace any current employees. *See* 5 U.S.C. § 3111(1999); *In Re: Student Volunteers –Traveling and Living Expenses*, 60 Comp. Gen. 456, *but see Decision of the Comptroller General*, B-159715, 1978 U.S. Comp. Gen. LEXIS 1613 (1978) (need statutory authorization to allow Washington work-study students to provide services to the Government)

(b) The U.S. Forest Service may accept uncompensated volunteers. *See* 16 U.S.C. 558 § (1999); Monte and Kathy Kentta, AGBCA No. 85-161-1, 87-1 B.C.A. (CCH) ¶ 19, 342 (1986).

(c) Army Reserve officer may be ordered to active duty without pay if statute provides for such. In Re: Major Jean-Francois J. Romey, USAR , B-216466, 1984 U.S. Comp. Gen. LEIS 248 (1984).

(d) Employment for disadvantaged groups may be accepted if authorized by statute. *See* In Re: Senior Community Service Employment Program, 1987 U.S. Comp. Gen LEXIS 1458 (authorizing the Equal Employment Opportunity Commission to accept the services of volunteers enrolled in the Senior Community Service Employment Program)

(e) 10 U.S.C. § 1588 (1999) authorizes the military to accept the following volunteer services:

(i) Medical services, dental services, nursing services, or other health-care related services;

(ii) Museum or a natural resources program services; and

(iii) Programs to support Armed Forces members and their families (e.g. family support programs, library and education programs; religious programs, housing programs; employment assistance). *See* 10 U.S.C. § 1588 (1999)

(f) The U.S. Army Corps of Engineers may accept volunteers for civil works projects, 33 U.S.C. § 569c

(g) The President may accept Red Cross assistance. 10 U.S.C. § 2602 (1999).

GAO distinguishes gratuitous services from voluntary services and provides that, generally, gratuitous services may be accepted by Federal agencies. Specifically, it has stated that “voluntary service...is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section (the ADA prohibition).” Comptroller General McCarl to the Chairman of the Federal Trade Commission, A-23262, 7 Comp. Gen. 810, 2-3 (1928) (allowing contractor to provide services in exchange for exclusive right to publish certain transcripts). *See also* Opinion of Hon. George Wickersham-Employment of Retired Army Officer as Superintendent of Indian School, 30 Op. Atty. Gen. 51 (1913). Voluntary services have been defined “as

those which are not rendered pursuant to a prior contract, or under an advance agreement that they will be gratuitous. Therefore, voluntary services are likely to form the basis of future claims against the Government.” In Re: Army’s authority to accept services from the American Association of Retired Persons/National Retired Teachers Association, B-204326, 1982 U.S. Comp. Gen. LEXIS 667, 3 (1982).

However, two important elements are necessary to ensure that services are gratuitous, not voluntary. Specifically, any agreement to volunteer without compensation must be done so in writing and must be done in advance. *See* In Re: Army’s authority to accept services from the American Association of Retired Persons/National Retired Teachers Association, 1982 U.S. Comp. Gen. LEXIS 667, 4 (1982) (Army may accept services of the American Association of Retired Persons (“AARP”) if “each volunteer formally agrees in advance to serve gratuitously, and that the agreements are properly documented...”). It is important to note that the reason for the ADA prohibition is that “Congress does not wish to honor pay claims founded on moral consideration or so-called quasi contracts for which pay is not available. Congress does not want employees to work or to be worked in the expectation of having Congress retroactively honor their claims.” Hagan v. U.S., 671 F.2d 1302, 1305 (COFC 1983). Hence, the need for ensuring that prior to gratuitous services being performed there be proper documentation and it must be done so in advance in order to ensure the Government will not be sued for compensation.

An important caveat to the above exception is that unless authorized by statute gratuitous services may not be used to improperly augment work normally performed by Federal employees. Specifically, the GAO has stated that “[i]f the work to be performed by the non-Federal workers would normally be performed by the sponsoring agency with its own personnel and appropriated funds, acceptance of ‘free’ services to perform the same work would augment the agency’s appropriations impermissibly.” In Re: Community Work Experience Program – State General Assistance Recipients at Federal Work Sites, B-211079.2, 1987 U.S. Comp. Gen. LEXIS 1815 (1987). (GAO held that it was essential to find specific statutory authority to allow state workfare program participants to work for agencies and that failure to do so would be an improper augmentation since an agency could not accept gratuitous services).

| Government officers or employees **often** are generally prohibited from volunteering or gratuitously providing their services. The general rule is that “it is contrary to public policy for an appointee to a position in the Federal government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority.” In Re: The Agency for International Development (AID)– waiver of compensation fixed by or pursuant to statute, B-190466, 57 Comp. Gen. 423, 3 (1978) (AID could not enter into an agreement to pay Executive Schedule or General Schedule employee amounts less than the annual rate of pay established by Title 5 or Title 22 of the U.S. Code). *See also*, Comptroller General

Warren to the President, United States Civil Service Commission, B-66664, 26 Comp. Gen. 956, 13 (1947) (Holding that “in the absence of statutory authority therefor, there are no circumstances under which an original appointee to a position in the Federal service properly may legally waive his ordinary right to compensation fixed by or pursuant to law for the position and thereafter be estopped from claiming and receiving the compensation previously waived.” Id. at 13.) This rule could arguably be used by Federal employees covered under the Federal Employees Pay Act (“FEPA) or the Fair Labor Standards Act (“FLSA”) to claim they can not waive their right to compensation for overtime. (Government liability for overtime via the FEPA and the FLSA is discussed *infra*). However, an employee may waive the right to compensation directed by statute if another statute authorizes acceptance of service without compensation. Comptroller General Warran to the Director, Bureau of the Budget, B-69907, 29 Comp. Gen. 194 (1947) (Allowing compensation to be waived by experts and consultants because of statutory authority to hire employees without regard to civil service classification laws).

The case law regarding whether compensation fixed by statute can be waived is further complicated since GAO has held that if a statute fixes a maximum, but no minimum amount of compensation, that amount can be waived. Specifically, “if the level of compensation is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial is permissible.” Principles of Federal Appropriations Law, Vol. II, GAO/OGC 92-13, p. 6-59 *citing* 27 Comp. Dec. 131 at 1333 (1920).

The Principles of Federal Appropriations Law provides a summary of the case law regarding whether compensation can be waived:

- If compensation is not fixed by statute, i.e., if it is fixed administratively or if the statute merely prescribes a maximum but no minimum, it may be waived as long as the waiver qualifies as “gratuitous.” There should be an advance written agreement waiving all claims.
- If compensation is fixed by statute, it may not be waived, the voluntary vs. gratuitous distinction notwithstanding, without specific statutory authority. Unfortunately, the decisions are not consistent as to what form this authority must take, and the extent to which authority to accept donations of services (as opposed to explicit authority to employ persons without compensation) will not suffice is not entirely clear.
- If the employing agency has statutory authority to accept gifts, the employee can accept the compensation and return it to the agency as a gift. Even if the agency has no such authority, the employee can still accept the compensation

and donate it to the United States Treasury. Principles of Federal Appropriations Law, Vol. II, GAO/OGC 92-13, p. 6-62.

Generally, most Federal employees are covered by the FLSA, 29 U.S.C. § 201 *et seq.* or the FEPA, Subchapter V, “Premium Pay,” 5 U.S.C. § 5541 *et seq.*, which require overtime compensation in certain situations. Thus, these statutes could be viewed as requiring a fixed amount of compensation that can not be waived by an employee.¹ The threshold determination to be made is whether any employee is covered by the FLSA or the FEPA. Any employee who is classified as a bona fide executive, administrative or professional employee is exempt from the FLSA’s overtime provisions. 29 U.S.C. § 213 (1999).² Generally, courts will narrowly construe exemption criteria and will presume plaintiffs are nonexempt. Adams et al., v. U.S., 40 Fed. Cl. 772 (1999). If an employee is exempt they are usually covered by the FEPA, which applies to most Federal employees of an Executive agency, with a few exceptions such as United States Justices or members of the Senior Executive Service. 5 U.S.C. § 5441 (1999).

The two primary differences between the two overtime compensation statutes is the amount at which an employee can be compensated and the criteria for determining whether an Agency is liable for compensating an employee for overtime worked. Generally, the FLSA requires compensation of not less than one and one half times regular pay for an employee who works a workweek in excess of forty hours. 29 U.S.C. § 207 (1999). The FEPA requires compensation for work “officially ordered or approved in excess of 40 hours in administrative workweek, or...in excess of 8 hours in a day.” However, an important distinction between the FEPA and the FLSA statutes is that the FEPA caps the rate of compensation for those over a GS-10 level to equal to one and one half times the minimum GS-10 hourly rate. 5 U.S.C. § 5542 (1999). Those employees on a flexible schedule are still entitled per statute to overtime in accordance with whatever statute, the FLSA or the FEPA, that is applicable to their position. 5 U.S.C. § 6123 (1999). The head of an agency may require compensatory time in lieu of overtime pay for employees above a GS-10 level, in an amount equal to the time worked. 5 U.S.C. § 5543 (1999).

Under the FLSA, an employer is obligated to pay overtime for all hours that the employer “suffers or permits” an employee to work. In Re: Frances W. Arnold – Overtime Claim Under the Fair Labor Standards Act, B-208203, 62 Comp. Gen. 187, 8 (1983). The test for whether work is “suffered or permitted” is “if it is performed for the benefit of an agency, whether requested or not, provided that the employee’s supervisor ***knows or has reason*** to believe that the work is being performed. Under the FLSA,

¹ Currently, there are two major litigation actions being brought by attorneys who routinely work beyond a forty-hour a week period, demanding overtime compensation based on FEPA. One of the Defendants’ defenses is that the attorneys voluntarily worked, without being ordered or approved to do so, these hours and therefore are not entitled to compensation under the FEPA.

² Generally, the Office of Personnel Management (“OPM”) administers and sets regulations regarding the FLSA. 29 U.S.C. § 204(f) (1999); Adams et al., v. U.S., 40 Fed Cl. 303 (1998).

employers have a continuing responsibility to ensure that work is not performed when they do not want it to be performed.” Id. (emph. added). Accordingly, an employer having knowledge that a nonexempt employee is working beyond the administrative workweek is enough to make an employer liable for overtime under the FLSA.

The FEPA has a far more stringent standard for determining whether an exempt employee is entitled to overtime. In order for an exempt employee to be compensated, the overtime must be “officially ordered or approved” by someone in authority authorized to approve the work. *See In Re: Emma Welsh*, B-214880, 1984 U.S. Comp. Gen. LEXIS 474 (1984); Decision of Associate General Counsel Higgins, B-257901, 1994 U.S. Comp. Gen. LEXIS 692 (1994). However, if it can be shown that an authorized supervisory official induced an employee to perform overtime work, an exempt employee will be entitled to overtime. *In Re: Emma Welsh*, 1984 U.S. Comp. Gen. LEXIS 474, 3 (1984); In Re: Lillie Alexander – Claim for Overtime Pay, B-224094, 1987 U.S. Comp. Gen. LEXIS 1526, 7 (1987). GAO has held that

[i]nducement is shown if supervisory personnel require the employee to perform the work that cannot be accomplished during regular working hours, schedule extra hours by placing the employee on a roster, or indicate that failure to work overtime will adversely affect the employee's performance rating. On the other hand, a supervisor's mere tacit expectation that extra hours will be worked falls short of overtime “officially ordered or approved.” In Re: Emma Welsh, 1984 U.S. Comp. Gen. LEXIS 474, 3-4 (Sep. 1984)

However, as stated above, supervisors having mere knowledge that an exempt employee is reporting to work early or staying late would not entitle that exempt employee to overtime under the FEPA. In Re: Lillie Alexander – Claim for Overtime Pay, 1987 U.S. Comp. Gen. LEXIS 1526, 7 (1987). Bantom, Jr. et al. v. U.S., 165 Ct. Cl. 312 (1964) (holding that policemen who voluntarily came to work to change into their uniforms, rather than doing so at home, are not entitled to overtime, as it could not be shown that their supervisors directed or induced them to do so).

The Point of Contact for this subject within the Legal Office is Ms. Lea Duerinck, (732) 532-3188, DSN 992-3188.

Issues Re Direct Sales Statute 10 U.S.C. 2539b

We recently had some issues with 10 U.S.C. 2539b, “Availability of Samples, Drawings, Information, Equipment, Materials, and Certain Services,” that are worth sharing. This statute allows the Secretary of Defense and the secretaries of the military departments to: Sell, rent, lend, or give samples, drawings, and manufacturing or other information; sell, rent or lend government equipment or materials; and sell the services of/make available any government laboratory, center, range or other testing facility.

The references for approval authority for this statute can be found in: 1) “Interim Draft Department of Defense (DoD) Guidance Implementing 10 U.S.C. 2539b, ‘Authority to Sell’,” dated 17 April 1997, 2) Assistant Secretary of the Army (Research, Development and Acquisition (SARDA)) Delegation SARDA-98-01, dated 12 February 1998, and 3) Delegation of Authority No. 4-98, dated 26 March 1998. The approval authority is with the Heads of Contracting Activities for paragraphs (a)(1) and (a)(2)(A) of the statute, with the option of redelegating no lower than the Principal Assistant Responsible for Contracting. The approval authority for paragraph (a)(2)(B) remains at the SARDA level, most likely because it involves “demonstrations to a friendly foreign government.” However, the approval authority for paragraph (a)(3), the sale of testing services, is delegated down to the actual directors or commanders of government laboratories themselves. Notwithstanding, the U.S. Army Industrial Operations Command (IOC), in accordance with IOC Direct Sales Policy, 8 March 1999, requires that the sales of such testing services still be directed and controlled by Headquarters, IOC and that the IOC direct sales contracting officer is the signatory on these contracts.

The 1997 Interim Draft DoD Guidance is very comprehensive in terms of how the various words in the statute are to be interpreted. For example, “person or entity” (the statute uses this phrase in terms of to whom we may sell) is defined: “means an individual, partnership, corporation, association, state, local, or tribunal government, or an agency or instrumentality of the United States.” The issue came up as to whether we could sell testing services to, ultimately, a foreign government. Although the foreign government had a liaison office in the United States, the liaison office insisted that the customer was truly the country’s Ministry of Defense. Therefore, this statute could not be an option in this instance, and the customer was then advised to pursue foreign military sales channels. This is an opposite conclusion to another sale where we successfully used this statute, whereby the foreign customer had an actual “corporation...of the United States.”

The 1997 Interim Draft DoD Guidance also dictates that sales of property or services of whatever nature shall be without any express or implied warranty, and that the recipient must agree in writing that the government shall not be liable for any direct or consequential damages. Further, the recipient must agree to indemnify and hold harmless

the U.S. Government for any loss, claim, damage, or liability of any kind arising out of or in connection with property or services so provided. This type of indemnification, which does not even except gross negligence or willful misconduct, may not be the most attractive to potential buyers. Potential buyers may like, however, that the statute requires the test results are confidential. Please see the above-referenced documents for further details.

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Use of General Services Administration Federal Supply Schedules

During the last decade, there has been an explosion in Federal agency use of the General Services Administration (GSA) Federal Supply Schedules (FSS) Program. Almost all recent developments – be they regulatory, political or technological – have served to fuel that expansion. A significant constraint, however, was imposed by the General Accounting Office (GAO) in 1999. In the case of Pyxis Corporation, B-282469, July 15, 1999, 99-2 CPD ¶ 18, the GAO put a formal and complete end to the previously authorized practice of Federal agency ordering of non-FSS items through FSS contracts.

FSS contracts have become increasingly popular in recent years for a number of reasons: regulatory changes that allow agencies to place orders with unlimited dollar values and without any prior notice to industry; dwindling numbers of acquisition personnel seeking to find alternatives to lengthy and costly, full-blown procurements; and, the availability of an increasing variety of items on FSS contracts.

Notwithstanding this vast array of available products, agencies often cannot satisfy all their needs with FSS listings. For example, an agency buying a computer system from a FSS contractor may find that various cables, clamps and racks are not available through the FSS program. In the past, this was a minor nuisance, at worst, because GSA policy and GAO case law sanctioned the inclusion of non-FSS items in the FSS order. In essence, agencies were allowed to order non-FSS items through the FSS program as long as they were "incidental" to the overall acquisition, and their cost was "small compared to the total cost" of the delivery order. VION Corporation, B-275063.2, February 4, 1997, 97-1 CPD ¶ 53; Raymond Corporation, B-246410, March 2, 1992, 92-1 CPD ¶ 252. Although the GAO did not define what it meant by "small compared to the total cost", there were protest decisions in which the GAO sanctioned the inclusion of non-FSS items valued at up to 17% of the overall cost. More significantly, there were no protest decisions placing an upper limit on the allowable value of non-FSS items. Possibly emboldened by the GAO case law, GSA personnel normally advised agencies that they could safely include non-FSS items valued at up to 20-25% of the total cost.

A preliminary death knell was struck by the Court of Federal Claims (COFC) in the 1997 case of ATA Defense Industries, Inc. v United States, 38 Fed. Cl. 489 (1997). The Court found the GAO approach to be "fundamentally inconsistent with Congress' unambiguous statutory mandate in the [Competition in Contracting Act]". The Court indicated that non-FSS items must be acquired competitively, or pursuant to a Justification and Approval (J&A), unless de minimus in value.

However, since the GAO is not bound by the standards enunciated by the COFC, there remained some doubt as to whether the GAO would continue to follow, or overrule, its prior holdings. That question was answered unequivocally in the Pyxis Corporation case. In that case, the Army issued delivery orders to OmniCell Technologies for medical equipment and supplies.

Pyxis protested, alleging in part that some of the ordered products were not on OmniCell's FSS contract. Relying on GAO precedent, the Army argued that the non-FSS products (valued at roughly 5% of the total purchase price) were incidental to the overall acquisition, and that their price represented an insignificant percentage of the total value of each delivery order. Pyxis responded that the Army's "incidentals" and "insignificant" arguments were untenable in light of the ATA case.

In a stark reversal of its prior holdings, the GAO agreed with Pyxis and embraced the COFC's rationale in the ATA case. The GAO concluded that "it was improper for the agency . . . to include non-FSS items in the delivery orders without ensuring that it had complied with the regulations governing purchases of those non-FSS items."

In other words, the GAO now holds that an agency must "follow applicable acquisition regulations" when acquiring non-FSS items. For items valued at or below the micro-purchase threshold (\$2500), the acquisition regulations do not require the use of competitive procedures. Therefore, non-FSS items valued at \$2500 or less may be acquired from the FSS contractor in much the same manner as had been done before the ATA and Pyxis cases. (Acquisitions of \$2500 or less can be viewed as analogous to the "de minimis" allowance enunciated by the COFC in ATA). However, if the non-FSS items are valued at greater than \$2500, more formal procedures must be used. If not exceeding \$100,000 in value, simplified acquisition methods may be used; otherwise, full and open competition must be utilized, or other than full and open competition justified.

After following applicable acquisition regulations, an agency may find that the selected source for the non-FSS items is a company other than the chosen FSS contractor. In that event, can the non-FSS items be acquired through a delivery order to the FSS contractor? On its website, GSA says that non-FSS items can be added to a FSS order "for administrative convenience". What GSA means, it appears, is that non-FSS items acquired from a source other than the chosen FSS contractor can be included on the FSS order if all three parties (the FSS contractor, the agency and the source) agree. Additional GSA guidance regarding these and other FSS-related matters can be found at its website: <http://pub.fss.gsa.gov/sched>.

In summary, it is now clear that the time-honored practice of routinely adding non-FSS items to a FSS order is dead. The importance to the GAO of ending this practice is reflected by the fact that it decided the Pyxis case notwithstanding the untimeliness of this protest ground. Although GAO rules allow it to hear an untimely protest if the protest involves "issues significant to the procurement system" (4 CFR § 21.2(c)), GAO practitioners indicate that it has been nearly a decade since such authority was previously exercised.

The Point of Contact for this subject in the CECOM Legal Office is Mr. Patrick C. Drury, (703) 325-3359; DSN 221-3359.

Use of Due Diligence in the Wholesale Logistic Modernization Program

The Army's Wholesale Logistics Modernization Program (WLMP) will dramatically upgrade the Army's wholesale logistics business processes and supporting information technology (IT), ensuring future and current Army readiness. The WLMP involves converting existing Government functions at the Logistics Systems Support Center (LSSC) and the Industrial Logistics Systems Center (ILSC) to the private sector.¹ Specifically, the WLMP contract requires Computer Sciences Corporation (CSC), the winning offeror, to provide business process re-engineering and modernization services for the Army's current wholesale logistics processes and supporting IT. Moreover, CSC will also provide sustainment services for the Army's wholesale logistics IT systems that will be transferred to CSC. Finally, all Government employees that are displaced by the WLMP will receive a "soft landing." The "soft landing" requires that CSC provide three-year job offers, consisting of equal or better pay and benefits within the same geographic area. Accordingly, the WLMP acquisition is equivalent to a commercial organization acquiring another corporate entity.

Throughout the WLMP acquisition process, a concerted effort was made to maximize free and open communication between Industry and Government to the extent permissible by law and regulation. Among the numerous innovative acquisition practices used was a commercial business practice known as due diligence.

Due diligence has many meanings in the commercial world, ranging from the investigation process done prior to corporate acquisitions, initial public stock offerings or acquisition of real property to its use as an affirmative legal defense. Due diligence investigations are often conducted by corporations prior to making business decisions, such as whether to acquire another corporation. These investigations often entail analyzing the risks, assets and liabilities, of a project, acquisition or venture. This investigation often involves examination of myriad items, including, but not limited to pending litigation, financial records, leases, potential environmental liabilities, etc. Thus, the due diligence investigation can be used as a valuable risk management tool.²

In the context of the WLMP, due diligence was used to provide offerors with a vast array of information, including, but not limited to information regarding the operations of the LSSC and ILSC IT systems and the operations and structural nature of the organizations supporting those IT systems. The WLMP solicitation defined "due diligence" as a "period of time wherein offerors shall be allowed to examine the organizations and operations associated with the WLMP. This

¹ The Office of Management and Budget (OMB) Circular No. A-76's cost comparison requirements were waived for the WLMP in accordance with OMB Circular No. A-76 and the OMB A-76 Revised Supplemental Handbook. Accordingly, the functions at LSSC and ILSC were directly converted to the private sector without an A-76 competition.

² Due Diligence itself is an affirmative legal defense often asserted by underwriters, corporations and venture capitalists and others, when being sued by investors, fiduciaries and shareholders, for breach of a fiduciary duty.

period will allow offerors to assess the program's needs in order to mitigate proposal risks." The decision to use due diligence was made to ensure that offerors fully understood the complexities of those IT systems and the organizations that supported them. Through the use of due diligence, offerors were able to mitigate their proposal risks, which in turn mitigated the Government's risk. Since risk management was one of the fundamental building blocks upon which the WLMP acquisition was constructed, due diligence was an integral component of the WLMP's overall risk management plan.

In applying this commercial concept to the WLMP it was important to tailor it to conform to Federal acquisition regulations and law. Moreover, it was important to mold the process in order to ensure that it would be manageable from a business perspective and at the same time could handle all the offerors' reasonable requests. Generally, the WLMP due diligence process was on-going and consisted of two major components: an Internet based virtual library and site visits.

First, as much information as possible was placed in the WLMP's virtual library, which was updated throughout the WLMP acquisition process. Often, these updates were provided at the request of offerors, via face to face exchanges and the Interagency Interactive Business Opportunities Page (IBOP). The IBOP is a webpage, which the Government uses to electronically procure goods and services. This webpage allows interested Contractors to view and download U.S. Army market surveys and Government solicitations, as well as messages pertaining to those solicitations and to communicate via the IBOP with Contracting Officers. It should be noted that the entire due diligence process was shaped through Industry input throughout the course of the acquisition.

Second, offerors were informed in the solicitation, that only offerors remaining in the initial competitive range were allowed to conduct site visits to the two affected organizations, LSSC and ILSC, as well as various related organizations, such as the Communications-Electronics Command (CECOM). The purpose of the site visits was to provide offerors a chance to verify and validate information (e.g. virtual library information) they had already obtained throughout the acquisition. On the site visits, offerors were able to question and request information pertaining to the WLMP, from Government management personnel and subject matter experts. If the information was not readily available by the end of the site visit, but the information request was reasonable and made during the site visit, a record of the requests was made and an attempt was made to answer those requests in a reasonable period of time after the due diligence site visit period ended.

Throughout the site visit period, the Government strove to maintain an equilibrium between providing offerors as much information as possible within the desired acquisition schedule and ensuring that the overall due diligence process remained manageable without impacting or disrupting the Government workforce's mission. Accordingly, the Government, with substantial input from Industry, formulated written operating procedures for how to conduct the site visits (the solicitation contained a draft due diligence framework, outlining

potential rules and site locations, which was provided to offerors for suggestions and comments and these comments/suggestions were used to develop the operating procedures).

To help facilitate the process, these written operating procedures were provided to Government due diligence Site Managers, who would oversee the offerors' site visits. The operating procedures covered what information could be provided to offerors, and outlined Site Manager guidelines and responsibilities, as well as administration of the site visits. These operating procedures were provided not only to the Site Managers, but also to participating offerors. This was part of the Government's continuous effort to be as open as possible with offerors during the acquisition process, as well as to ensure that both sides clearly understood the guidelines for conducting the site visits.

Limiting the number of offerors and the amount of time to conduct the site visits were two of the key parameters that were necessary to make the site visits manageable. First, only offerors remaining in the initial competitive range³ were allowed to participate in the site visits. The number of attendees an offeror could bring to a location was also limited. Second, the entire due diligence site visit period was limited to a total of ten days. During that time, offerors were allowed to visit ILSC and LSSC for ten days and simultaneously allowed one or two day visits to other organizations. This often meant that offerors sent different teams simultaneously to a multitude of locations. Generally, the visits were only to be conducted during normal business hours to minimize disruption to the workforce and its mission.

However, despite these constraints, it is important to note that a guiding principle during the site visits was to provide as much information as possible within prescribed limits. The operating procedures contained a checklist of questions for Site Managers to use to determine whether to provide information requested by offerors. For example, some of the questions contained in the checklist were: whether the request was reasonable and whether the request for information was prohibited from disclosure for security reasons. Most importantly, the operating procedures emphasized that Site Managers should fully respond to any reasonable information requests provided that the information was available and was not specified as something that should not be disclosed.

Particular attention was paid to ensure that provision of information did not violate any federal regulations or laws. Since this acquisition required the winning offeror to provide job offers to displaced Government employees, there was considerable interest in obtaining personnel information. However, the Privacy Act, 5 U.S.C. § 552a (2000), prohibits the release of certain information regarding individual employees. This was the only area where Site Managers were specifically instructed to only provide the information listed in the operating procedures. In all other instances, Site Managers were informed to provide answers to reasonable requests if the information existed and didn't fall into one of the exceptions (e.g. the requirement

³ Pursuant to Federal Acquisition Regulation (FAR) 15.306(c)(2), offerors were informed in the solicitation that in the interest of conducting an efficient competition it was anticipated that the initial competitive range would consist of no more than three offerors.

not to disclose source selection information). In other words, not disclosing requested information was meant to be the exception, not the rule. Thus, the desire to fully provide any requested information, within prescribed limitations, to offerors, was strongly stressed to the Site Managers. As stated above, an underlying principle of due diligence was to provide offerors with as much information as possible unless an exception applied.

Additionally, it was also important to make certain that the site visits would not create any conflict of interest or post-employment job restrictions per 18 U.S.C. §§ 207-8 (2000) for current employees, since the offerors, as part of the soft landing requirements in the solicitation, were required to provide job offers to the displaced Government employees. Accordingly, offerors were asked to refrain from extending job offers or accepting resumes from those Government employees during this time period. Finally, Site Managers were informed not to disclose proprietary, source selection or competition sensitive information in accordance with FAR Part 3 and 41 U.S.C. § 423 (2000). To help Site Managers prevent disclosure of this type of information, the operating procedures contained examples of what constitutes proprietary, source selection and competition sensitive information.

Finally, since these site visits were part of an overall source selection, it was essential that all offerors were treated equally during the visits. For instance, operating procedures required that there must be consistency for unrequested information (e.g. introductory briefs) provided by Site Managers. Additionally, the availability of locations and the maximum amount of time allotted for the site visits was the same for all offerors. Ultimately, it was the offerors who chose, within prescribed limits, the amount of time to spend at a location or what location to visit. How much time the offerors used or what locations they visited was wholly at the offerors' discretion, but all offerors were given equal opportunity during the visits. This was a crucial aspect of the site visits because it afforded offerors maximum flexibility during due diligence which allowed offerors to gather the information that they felt was necessary.

The due diligence process was an integral part of the overall WLMP acquisition. Use of this commercial business practice allowed interested offerors to examine in-depth, the IT organizations and systems to be transferred to the private sector and thereby fully ascertain the program's needs. With the knowledge gained during due diligence, offerors were able to mitigate their proposal risks. Ultimately, this resulted in the Government being able to mitigate its own program risks, by having confidence that the offeror it selected had a full and thorough knowledge of the needs of the program.

The Point of Contact for this subject within the Legal Office is Ms. Lea Duerinck, (732) 532-3188, DSN 992-3188.

UNION RECOGNITION IN THE DEPARTMENT OF THE ARMY

<u>Union</u>	<u>Employees</u> <u>Represented</u>	<u>Bargaining</u> <u>Units</u>	<u>Units Under</u> <u>Agreements</u>
American Fed of Government Employees	78,896	260	229
National Fed of Federal Employees	27,965	83	78
Nat'l Assoc of Government Employees	12,398	51	48
Int'l Assoc of Machinists & Air Wkrs	4,132	25	24
Service Employees Int'l Union	2,259	4	4
Laborers Int'l Union of N. America	2,073	7	6
Metal Trades Council	1,040	3	3
Int'l Assoc of Fire Fighters	783	24	23
Int'l B'hood of Electrical Workers	712	9	9
Int'l Fed of Profess and Tech Engineers	663	10	5
United Power Trades Organization	490	1	1
Panama DoD Employees Coalition	400	1	1
International Brotherhood of Teamsters	314	2	2
Marine Engineers Beneficial Assoc	263	2	2
National Maritime Union	202	6	6
Fraternal Order of Police	138	4	4
Plumbing and Pipefitting Ind of the U.S.	99	2	2
Int'l Org of Masters, Mates & Pilots	93	1	1
Int'l Brotherhood of Police Officers	82	3	3
Congresso de Uniones Ind de Puerto Rico	80	1	1
Federal Fire Fighters Association	64	3	3
Int'l Guard Union of America	30	1	1
Int'l Association of Tool Craftsmen	23	1	1
Int'l Chemical Workers Union	22	1	1
	133,221	505	458
Appropriated Fund Employees:	121,302	457	413
Nonappropriated Fund Employees:	11,919	48	45

There are 397 collective bargaining agreements within Army covering approximately 96% of the bargaining unit employees. Of those agreements, 36 are multi-unit involving 97 units; only 47 units and 5,245 unit employees are not covered. Of the 133,221 employees, there are 95,904 (72%) white-collar (including 12,562 professionals) and 37,317 (28%) blue-collar employees. There are 14,418 (9.8%) fewer bargaining unit employees but 13 (2.6%) additional bargaining units compared to Jan 97. Data as of Jan 99.

Offers of Resolution

Offers of Resolution are now possible due to the rule changes made pursuant to 29 C.F.R. 1614.109(c). The purpose of the offer of resolution is to provide incentive to settle complaints and to conserve resources where settlement should reasonably occur. This revised regulation eliminates the ability of agencies to dismiss complaints for failure to accept a certified offer of full relief. The prior offers of full relief were difficult for the agency to make and difficult for the complainants to understand. Thus, these offers of full relief under the old rules were not very effective in the resolution of cases.

As labor attorneys review and develop aggressive strategies for dealing with EEO complaints, I believe it is important to use offers of resolution as a way to limit exposure for the agency and to demonstrate to your client that you intend to be proactive. You should review this option with your clients near the beginning of every case. I have found that management officials are receptive to this important strategy device.

The new rule provides that the offer of resolution must be in writing and must contain the following information: a notice explaining the consequences of failing to accept the offer; attorney's fees and costs, to date; any non-monetary relief must be specified; and monetary relief, which may be offered as a lump sum or may be itemized in amounts and types. It is important to note that although a comparison of non-monetary relief may be inexact and difficult in some cases, non-monetary relief can be significant and cannot be overlooked.

The revised regulation is similar to Rule 68 of the Federal Rules of Civil Procedure offer of judgment rule. The intent of the rule is to limit attorney fees and costs when a complainant rejects an offer and obtains less relief after a hearing. An offer of resolution can be made to a complainant who is represented by an attorney at any time from the filing of the formal complaint until 30 days before a hearing. If the complainant lacks legal representation, then the offer cannot be made until after an Administrative Judge is assigned to the case. Also, the agency cannot make the offer later than 30 days before a hearing. Obviously, the impact of an offer is less if the complainant is not represented. Also, if the complainant fails to accept the offer of resolution, an agency may make other offers of resolution and either party may seek to negotiate a settlement of the complaint at any time.

The complainant has 30 days from receipt of an offer to accept it. If the complainant accepts the offer, then according to the revised rules it would normally appear that you have an agreement. However, keep in mind that the resolution does not contain the normal language that you would have contained in the negotiated settlement agreement. I advise that you draft the settlement agreement and incorporate the terms from the offer of resolution. My reason for this approach is because you need the non-compliance and non-admission language that is in the boilerplate agreement.

If the offer is not accepted and the relief awarded in the decision is not more favorable than the offer, the complainant cannot recover attorney fees or costs incurred after the end of the 30-day acceptance period. Thus, it is important to make offers soon after acceptance of the formal complaint in situations where there is an opposing counsel in order to limit fees and costs. Of course, the regulation does allow an interest of justice exception to the withholding of attorney fees and costs in certain circumstances. This will happen when equitable considerations make it unjust to apply the provision. One example, would be when a responsible agency official informs the complainant that the agency would not comply in good faith with the offer. Hopefully, the EEOC will apply this provision in only limited situations. If this provision is used too frequently, then the new offer of resolution rule may be meaningless.

It will be interesting to review how many offers are accepted. Also, how will administrative judges rule with regard to offers of resolution that are not accepted when the ruling is favorable towards the complainant? This new tool can be successfully used to assist our clients limit some of their exposure. I include the model language for making an offer of resolution for your review.

B. Model Language for the Offer

This offer of resolution is made in full satisfaction of the claims of employment discrimination that you have made against [name of agency] in [identify the complaint by number or other clear and unambiguous designation]. This offer includes all of the monetary and/or non-monetary relief to which you are entitled, including attorney's fees and costs.

[For complainants who are not represented by counsel, include this paragraph:]

Your acceptance of this offer must be made in writing and postmarked or received in this office within thirty (30) days of your receipt of the offer. If you accept this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[For complainants represented by counsel, substitute the following paragraph:]

The complainant's acceptance of this offer must be made in writing and postmarked or received in this office within thirty (30) days of your receipt of the offer. If the complainant accepts this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. Please also obtain the signature of the complainant, which should be

placed on the line appearing above [his/her] name and include the date of [his/her] acceptance on the line appearing adjacent to [his/her] name. This offer will not be deemed to have been accepted without the signature of both you and the complainant. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[The following paragraphs must be included in offers sent ALL to complainants:]

If you do not accept this offer of resolution and the relief that you are eventually awarded by the Administrative Judge, or the Equal Employment Opportunity Commission on appeal, is less than the amount offered, you will not receive payment for the attorney's fees or costs that you incur after the expiration of the 30-day acceptance period for this offer. The only exception to this rule is where the Administrative Judge or Commission rules that the interests of justice require that you receive your full attorney's fees and costs.

WITNESS PREPARATION

- Avoid talking about the case anywhere outside the deposition room or courtroom where the judge or other side may overhear you. Don't discuss the case with anyone other than your attorneys, or as directed by your attorney.
- Before you testify, try to picture the scene, the objects at the scene, the times and distances involved and just what happened so that you can recall more accurately when asked. But do not memorize what you are going to say because you may become confused if you forget any part of your memorized statement. For a deposition, it's usually best not to review any files or documents. For a trial, your trial attorney will discuss preparation with you.
- Be prepared for basic questions – your name, your address, your educational background, your job title and experience.
- **Be truthful.** You are under oath when you testify in court or on deposition. Testifying falsely under oath can subject you to criminal penalties for perjury. Sometimes being truthful will require you to say "I don't know" or "I don't remember." When you tell the truth, no one can confuse you!
- Give **positive, definitive answers** when possible. Avoid saying "I think" or "I believe" if you can be positive. However, if your answer is only an estimate about distances or time or other such factors, be sure to state it is only an estimate. If asked about details you do not remember, simply say "I don't remember." Unless certain, do not say "That's all the conversation" or "nothing else happened." Instead say "That's all I recall" or "That's all I remember happening." It may be that after more thought or another question, you will remember something important.
- **Be courteous.** Being courteous is one of the best ways to make a good impression on the court and the jury. Respond with, "Yes sir" and "No sir" and address the judge as "Your Honor. Courtesy includes dressing neatly and professionally.
- **Be attentive.** You must be alert when you are in the witness chair so that you can hear, understand, and give an intelligent answer to every question. If the judge or jury gets the impression you are indifferent, they may not believe your story.
- **Think before you speak.** Give your attorney an opportunity to pose an objection, if necessary, and take a moment to think. Hasty and thoughtless answers may be incorrect and may cause problems. This is particularly true when the opposing lawyer is cross-examining. The cross examiner may ask you leading questions -questions which suggest only one answer. Make sure you understand the question; then answer it as accurately as you can. If you do not know the answer or cannot remember, say so.
- **Speak clearly.** Nothing is more annoying to a court, jury, and lawyers than a witness who refuses to speak clearly enough to be heard. An inaudible voice not only detracts from the value of your testimony, but it also tends to make the court and jury think that you are not certain of what you are saying. Everyone in the courtroom is entitled to know what you have to say, and the court reporter who is recording the proceedings must be able to hear all your testimony. Don't chew gum.
- **If you don't understand a question, ask that it be explained.** Many times, a witness will not understand a question that has been asked, but will try to answer it anyway. This is confusing to the court, the jury, and the lawyers, and it extends the

time a witness will be testifying because the lawyers must go back and correct the misinformation.

- **Answer all questions directly!** Too often, a witness will be so anxious to tell the story that he or she will want to get it all told in answer to the first question. Listen to the question. If you can answer it with a "yes" or "no," do so.
- **Never volunteer information.** Answer ONLY the question that has been directed to you. It's the lawyers' job to get the information they need from you – you have no obligation to help. The information that you volunteer may have no bearing on the case and may delay the proceedings, or may suggest other areas for questions.
- **Stick to the facts!** Don't guess or speculate! The only thing you will be permitted to testify to is what you know personally. What you know is important; what you think is not.
- **Be helpful, not funny.** A trial is an important matter to the parties involved. Their money, property, or freedom may be risked by your testimony. Don't try to be a comedian.
- **Be fair.** Though you may be testifying for a party or a friend whom you would like to see win, don't color your testimony or try to overdo it. You will do the best service by making your testimony as objective as possible.
- **DO NOT ARGUE** with the defense attorney. He/she has the right to question you. If you give him/her smart talk or evasive answers the judge may reprimand you.
- Ordinarily, your attorney will tell you NOT to answer a question if there is something improper about it. If you do not want to answer a question, do not ask the Judge whether you must answer it.
- **Never lose your temper!** A witness who gets angry is at the mercy of the cross-examiner. The witness appears to be prejudiced, and is less likely to be believed by judges and juries. Keep your temper. Your service as a witness will be more pleasant, and your testimony will be more valuable.
- Do not look at the attorney for help when you are on the stand. If you look at the prosecutor when a question is asked on cross-examination or for their approval after answering a question, the jury or judge will notice and it will create a bad impression. Look at the questioner during a deposition, at the jury if it is a jury trial, or the judge if it is a bench trial, when answering the questions.
- Do not let the other side's attorney lure you into thinking he is your friend who is trying to help you. Don't let silence or looks suggest to you that you need to say more. Follow the line of questions carefully.

Types of questions that are tricky and may contain traps are questions that:

- Contain poorly defined terms: "Isn't it true that the account was doing **fine** until that contract was signed?"
- Contain emotionally charged terms: "Mr. Jones was **unreliable**, wasn't he?"
- Ask: "Is that all?"

- Demand a Yes or No answer.
- Ask multiple questions.
- Lead you: "Wasn't that a proper course of action?"
- Are repeated.
- Contain terms such as "always" or "never."
- Are argumentative: the question disputes previous answers more than once or twice.
- Assume facts not in evidence. For example, "What did you do when you saw the client get worse after three days of your treatment?"Assumed facts: (1) The client really did cooperate with the three days of treatment; (2) The client really did get worse; (3) You really did see the client getting worse.
- Define proper conduct or professional performance.
- Ask what publications you: read, rely on, trust, or consider authoritative.
- Are hypothetical.
- Are not specific enough, or ask for a narrative answer.
- Misquote you or someone else.
- Ask you testify as to the accuracy of something you heard or read... hearsay evidence.
- Are complex, ambiguous, or contain double negatives.
- Ask you to speculate or comment on things you are not sure of.
- Ask you for rough (or your best) estimates of quantities you are not sure of.
- Ask you if your testimony is based entirely on written records, concerning issues you cannot remember anything about.
- Make a false statement.
- Seek to place blame.
- Try to make you a mind reader: "Why did the driver turn when he did?"
- Use words or phrases with specific legal meanings: standard of care, basis for opinion, proximate cause, breach of duty.
- Ask you to judge another person. There is a way to objectively describe persons without seeming to be critical.
- Use words having several meanings. For example, in law, there are specific meanings of the words possible, probable, following, and likely. These are not always the same as the common or the scientific meanings of these words.
- Refer to inaccurate, unfamiliar or unknown documents.

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Land Use Controls and Federal Common Law in Real Property Transfers

MAJ Kenneth J. Tozzi

I. *Introduction.* A question has arisen regarding whether federal case law could be read to find a federal property right sufficiently strong to supersede traditional state common law rules in the area of land use controls (LUCs). Specifically, in states that have not enacted statutes in the area of land use controls, there is some support for the notion that federal property interests could be used to enforce LUCs even though under traditional state law the LUC (likely a deed restriction on future use of the land) would not be enforceable. The lack of enforceability would be predicated upon the fact that the covenant did not run with the land¹ in a transfer to a subsequent transferee, and an equitable servitude² was not recognized in that particular state.

II. *Case Law.* There are three federal cases in this area which could lend support to the position that federal property law interests trump state property law based in common law in the area of land use.

a. *United States v. Little Lake Misere Land Co.*³ In this case the U.S. Supreme Court considered the question of whether a Louisiana statute which had the effect of making a reservation of mineral rights "imprescriptible" with respect to lands acquired by the United States subject to reservations was properly applied. Pursuant to the Migratory Bird Conservation Act⁴ the United States acquired two parcels of land in Louisiana, one by deed

¹ A Covenant Running With the Land is a covenant which goes with the land, as being annexed to the estate, and which cannot be separated from the land, and transferred without it. Essentials of a covenant running with the land are that the grantor and grantee must have intended that the covenant run with the land, the covenant must effect or concern the land with which it runs, and there must be privity of estate between the party claiming the benefit and the party who rests under the burden. Black's Law Dictionary, Fifth Edition, p. 329, *citing* Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W. 2d 67,73.

² An Equitable Servitude is "A restriction on the use of land enforceable in court of equity. It is broader than a covenant running with the land because it is an interest in land." Black's Law Dictionary, Fifth Edition, p. 484.

³ U.S. v. Little Lake Misere Land Co., 412 U.S. 580 (1973).

⁴ Migratory Bird Conservation Act, 16 U.S.C § 715 *et seq.*

in 1937, and one by condemnation in 1939.⁵ Both the deed and condemnation judgment reserved oil, gas, sulphur, and other mineral rights to the Little Lake Misere Land Company for a period of 10 years.⁶ At the end of ten years (assuming other conditions had not been met) the reserved rights would terminate, and complete fee title would become vested in the United States.⁷ The parties stipulated that the fee title ripened 10 years from the date of creation of the rights.⁸ Little Lake relied upon Louisiana Act 315 of 1940⁹ in continuing to claim their mineral rights. Little Lake claimed that the Act of 1940 rendered inoperative the conditions set forth in the deed and judgment for the extinguishment of the reservations.¹⁰ In reversing the federal district court and the federal court of appeals for the 5th Circuit the U.S. Supreme Court held that the federal land interests were not necessarily defined by state law, and Louisiana's Act of 1940 does not apply to the mineral reservations agreed to by the parties.¹¹ The Court ruled that since the land acquisition agreement was explicitly authorized, though not precisely governed by the Migratory Bird Conservation Act, and since the United States was a party to the agreement, it would be construed by federal law.¹² The Court ruled that the Louisiana law would not be borrowed in this case since it was plainly hostile to the interests of the United States.¹³ Finally, the Court held that the terms of the agreements were unequivocal regarding the termination of the reservations.¹⁴ In a telling passage, the court stated:

"To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds."¹⁵

Equally noteworthy in this case is the fact that the Court rejected the government's argument that "[V]irtually without qualification, ...land acquisition

⁵ Little Lake Misere, 412 U.S. 580 at 582.

⁶ *Id.*

⁷ *Id.* at 583.

⁸ *Id.* at 584.

⁹ Louisiana Act 315 of 1940, La. Rev. Stat. § 9:5806 A (Supp. 1973) provides: "When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible."

¹⁰ Little Lake Misere, 412 U.S. 580 at 584.

¹¹ *Id.* at 590-604.

¹² *Id.* at 590-593.

¹³ *Id.* at 594-597.

¹⁴ *Id.* at 604.

¹⁵ *Id.* at 597.

agreements of the United States should be governed by federally created federal law."¹⁶

b. *United States v. Albrecht*.¹⁷ In this case the principle set out in *Little Lake Misere* was extended. In *Albrecht* the federal court of appeals for the 8th circuit affirmed a district court holding ordering a farmer to restore drainage ditches on his land and permanently enjoining further drainage of potholes on the land.¹⁸ The issue arose from a waterfowl easement to the United States Fish and Wildlife Service (USFWS) which included a prohibition against draining prairie potholes on the land.¹⁹ Through aerial surveillance the USFWS discovered that ditching was present on the land in question in violation of the terms of the easement.²⁰ The defendant argued that North Dakota law did not recognize waterfowl easements, and that the easement was therefore invalid.²¹ Relying on *Little Lake Misere* the court stated:

"[U]nder the context of this case, while the determination of North Dakota law in regard to the validity of the property right conveyed to the United States would be useful, it is not controlling, particularly if viewed as aberrant or hostile to federal property rights. Assuming *arguendo* that North Dakota law would not permit the conveyance of the right to the United States in this case, the specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible "aberrant" or "hostile" North Dakota law that would preclude the conveyance granted in this case. *Little Lake*, *supra* at 595, 596. We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights to their citizens' property pursuant to 16 U.S.C § 718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds. We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein. Section 718d(c) specifically allows the United States to acquire wetland and pothole areas and the "interests therein."²²

c. *North Dakota v. United States*.²³ This case also dealt with federal acquisition of waterfowl easements. Section 3 of the Wetlands Loan Act of 1961²⁴ provided for state

¹⁶ *Id.* at 595.

¹⁷ *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974).

¹⁸ *Id.* at 912.

¹⁹ *Id.* at 908.

²⁰ *Id.* at 909.

²¹ *Id.*

²² *Id.* at 911.

²³ *North Dakota v. United States*, 460 U.S. 300 (1983).

²⁴ Pub. Law 87-883, 75 Stat. 813.

governor approval of waterfowl habitats. Between 1961 and 1977 the governors of North Dakota consented to the acquisition of easements covering approximately 1.5 million acres of wetlands in North Dakota.²⁵ In the mid-1970's cooperation between the state and federal government began to break down.²⁶ In 1977 North Dakota enacted statutes restricting the ability of the United States to acquire easements over wetlands, permitting landowners to drain wetlands created after the negotiation of the waterfowl easements, and limiting the maximum terms of easements to 99 years.²⁷ The Court ruled that gubernatorial consent could not be revoked at will, as nothing in the federal legislation authorized the withdrawal of approval previously given.²⁸ Citing to *Little Lake Misere* the Court further ruled that the state law provisions authorizing the drainage of after-created wetlands and limiting the terms of easements to 99 years were hostile to federal interests and may not be applied.²⁹ The Court stated "The United States is authorized to incorporate into easement agreements such rules and regulations as the Secretary of the Interior deems necessary for the protection of wildlife, 16 U.S.C § 715e, and these rules and regulations may include restrictions on land outside the legal description of the easement."³⁰

III. Application to U.S. Army Land Use Controls. The cases set out above arguably set up a federal position of strength in those states where land use controls are difficult to enforce under traditional common law property doctrines. The position that federal interests would be viewed as superior to aberrant or hostile state laws could certainly be argued in an attempt to enforce land use controls against subsequent transferors. It appears, however, that there are factors that distinguish the rule of the above cases from the scenario the Army may find itself faced with in the enforcement of land use controls.

The paramount limiting factor of the above cases is the fact that the federal courts were deciding state-federal disputes in which federal action was backed by specific federal law (Migratory Bird laws) authorizing the United States to acquire wetlands and the "rights therein." State legislation was then passed to specifically undermine the federal interests as enunciated in the statutes. Under these circumstances the federal courts were willing to elevate the federal interest over the state interest.

In the context of land use controls we are dealing with a situation in which there really is no federal law authorizing or encouraging the creation of federal rights. The Army could argue that the purposes of human health and environmental protection under environmental statutes provide a federal interest akin to the federal interests in land acquisition in the above cases. The states could counter, however, that outside of the environmental statutes, public health and safety, and traditional police powers are local in nature. In addition, real property law is a traditional area of state law preeminence. Rather than the existence of state laws hostile to federal interests, we are most concerned with the absence of state law in the area of LUCs which potentially impedes the future enforcement of LUCs. This situation is distinguishable from the case law described above.

Based upon the foregoing, I recommend that the *Little Lake Misere* line of cases be used as a fallback position should traditional state law enforcement mechanisms fail in future attempts to enforce LUCs. Working within existing state property laws is a more reasonable

²⁵ North Dakota v. U.S., 460 U.S. 300 at 305.

²⁶ *Id.* at 306.

²⁷ *Id.* at 306-308.

²⁸ *Id.* at 312-316.

²⁹ *Id.* at 316-320.

³⁰ *Id.* at 319.

approach in light of an analysis of the case law and its application to situations we are likely to face in the transfer of Army properties. (MAJ Tozzi/ RNR)

Friends of the Earth Has Friends at the Court

Major Tim Connelly

On January 12, 2000 the Supreme Court decided the latest in a series of significant environmental standing cases.³¹ In *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, the Court addressed Article III standing requirements, deciding that citizen-suit plaintiffs have standing to bring an action for civil penalties payable to the United States Treasury. The seven to two majority, however, remanded, directing the lower courts to decide whether or not the case was now moot, the basis upon which the Fourth Circuit had dismissed the action.³² The decision in this closely watched case arguably lowers the standard of proof for environmental plaintiffs to pursue citizen suits to enforce environmental laws.

The state of South Carolina issued a National Pollution Discharge Elimination System (NPDES) permit to Laidlaw shortly after Laidlaw bought a hazardous waste incineration facility in that state in 1986. The permit allowed Laidlaw to discharge wastewater into the North Tyger River, subject to effluent limitations on specified pollutants. Laidlaw exceeded permit limits almost 500 times between 1987 and 1995.

Friends of the Earth³³ properly gave 60 days notice to Laidlaw, the EPA, and the state, of its intent to file a citizen-suit to enforce the effluent limitations in Laidlaw's permit.³⁴ In response, Laidlaw invited South Carolina to sue it, drafted a complaint for the state, and reached a settlement with regulators on the 59th day of the 60 day notice period. The settlement required Laidlaw to pay a \$100,000 penalty, and to promise make "every effort" to comply with the permit.

Before the District Court, Laidlaw challenged plaintiffs' standing to sue and argued that the state's "diligent prosecution" precluded further citizen enforcement.³⁵ The district court denied both motions, finding that plaintiffs proved standing "by the slimmest of margins" and that the state's enforcement was not "diligent prosecution."

Five years later, the district court rendered final judgment, making several critical findings. First, the district court found that Laidlaw had violated its NPDES permit 36 times between the start of the lawsuit and the final judgment. Second, that Laidlaw had enjoyed \$1,092,581 economic benefit through its pattern of non-compliance before the suit was brought. Third, that Laidlaw's permit violations did not harm the environment or human health. Fourth, that, notwithstanding the 36 violations, Laidlaw had been in substantial compliance with its permit since 1992. As a consequence of this last finding, the court

³¹ *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 2000 U.S. Lexis 501, January 12, 2000. Last year, the Court decided *Steel Co. v. Citizens for a Better Env't*, 140 L. Ed. 2d 210, 118 S. Ct. 1003, 1016-17 (1998)(finding no standing for citizens seeking civil penalties for wholly past violations of the Emergency Planning and Community Right to Know Act); in 1997, *Bennett v. Spear* found that ranchers had standing, under the prudential "zone of interests" test to challenge Fish and Wildlife Service's biological opinion proposing restricted use of reservoir water in order to protect endangered sucker fish.

³² *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 149 F.3d 303 (4th Cir. 1998).

³³ Citizens Local Environmental Action Network (CLEAN) and the Sierra Club also joined as plaintiffs.

³⁴ 33 U.S.C. §1365(b)(1)(A).

³⁵ 33 U.S.C. §1365(b)(1)(B).

denied plaintiff's prayer for injunctive relief. Instead, it imposed \$405,800 in civil fines, to be paid to the United States Treasury, an appropriate amount, the trial court felt, given its "total deterrent effect."

Friends of the Earth appealed to the Fourth Circuit, contending that the civil fine was inadequate. It did not appeal the denial of injunctive relief. Laidlaw, in turn, cross appealed and pressed its position that the plaintiffs lacked standing and that the action was barred by South Carolina's diligent prosecution.

In an unusual twist, the Fourth Circuit assumed that plaintiffs had standing, but dismissed the case for mootness. The Fourth Circuit reasoned that a plaintiff must maintain the three elements of standing throughout the litigation, or the case becomes moot. The court observed that civil penalties were "the only remedy currently available" because the district court declined to grant injunctive relief. It concluded that civil penalties paid to the United States would not redress plaintiffs' claimed injury, and plaintiffs' case was moot.³⁶ Once again, Friends of the Earth sought review, and the Supreme Court granted certiorari.

Justice Ginsburg wrote the majority opinion for the Supreme Court. After reviewing the procedural history of the case, her opinion undertook the standing analysis the Fourth Circuit had assumed away. Because standing must be found in every federal case, Justice Ginsburg analyzed standing on the record available to the District Court.

In federal courts, the concept of standing has a well-settled constitutional basis, firmly rooted in the so-called "case or controversy" requirements of Article III, § 2.³⁷ To prove standing to sue, a plaintiff must show three elements: injury in fact, causation, and redressability. Injury in fact is harm that is real and concrete, not merely speculative or conjectural. Causation reasonably requires a nexus between the action or inaction of the defendant and the claimed injury. To show redressability, a plaintiff must show that some relief the court might award would rectify plaintiff's harm.³⁸

Federal Courts have recognized that harm to recreational and aesthetic interests can suffice to show standing since at least the case of *Sierra Club v. Morton*.³⁹ In this case, the Court agreed that the record, largely in the form of affidavits, showed generally that plaintiffs were "concerned" with the pollution from Laidlaw's facility and avoided using the river into which it discharged its waste water. There was also evidence that one plaintiff "believed" that pollution discharge accounted for the low value of her home relative to similar homes more distant from Laidlaw's facility. Laidlaw countered that the District Court specifically found that none of Laidlaw's discharges had harmed the environment, and so could not have caused

³⁶ Citing the Supreme Court's recent *Steel Company* decision, Note 1.

³⁷ In fact, that section does not address "cases or controversies" in so many words. The relevant text states that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

³⁸ *Steel Co. v. Citizens for a Better Env't*, 140 L. Ed. 2d 210, 118 S. Ct. 1003, 1016-17 (1998).

³⁹ 405 U.S. 727, 735 (1972).

the injury plaintiffs claimed. The majority, however, distinguished between a showing of harm to the environment and harm to the plaintiffs' interests. Here, although the defendant's discharges did no harm to the environment, the plaintiffs' "reasonable concerns" about those discharges directly affected their enjoyment of the surrounding area, and led them to avoid use of the North Tyger River.

Justice Ginsburg next discussed the redressability requirement in the context of civil penalties.⁴⁰ Laidlaw argued that civil penalties paid to the United States Treasury could not redress the Plaintiffs' claimed loss of aesthetic and recreational enjoyment or any possible economic harm. The majority disagreed, reasoning that the deterrent effect of a civil penalty would redress plaintiffs' injury by making the defendant more likely to meet its permit limitations in the future, resulting in a cleaner river and environment.

Having found standing, the majority turned its attention to the issue the Fourth Circuit found dispositive, whether Laidlaw's voluntary conduct – compliance with its permit after the suit was filed or closing the waste incineration plant altogether – rendered the case moot. Here Justice Ginsburg sympathized with the Fourth Circuit's erroneous application of the Court's past treatment of the mootness doctrine. In the past, the Court had seemingly equated mootness with "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."⁴¹ The majority here, however, held that the correct standard for determining when a defendant's voluntary conduct renders a case moot is not merely whether the elements of standing are met throughout the litigation. Rather, in such a case, the test is whether "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur" – a test Justice Ginsburg describes as a "formidable burden."

Having properly framed the mootness inquiry, the Court remanded the case. On remand, the parties are free to dispute whether it is absolutely clear that Laidlaw's permit violations are not likely to recur, either because of its voluntary compliance, or because the facility is no longer operating. If so, then the case has been mooted, and presumably subject to dismissal.

Justice Scalia sees in all of this the impending collapse of democratic government. In Scalia's view, Article III is an appropriate starting point for standing analysis, but its three-part test should not be the end of the inquiry. The dissent disapproves of citizen suits in general, suggesting that they run afoul of the Article II, § 3 of the Constitution. That provision directs the President to "take Care that the laws be faithfully executed." Because this issue was not considered in the lower courts and was not briefed or argued, however, Justice Scalia did not focus on it in his dissent.⁴²

Instead, Justice Scalia analyses the record using the same three part Article III test that Justice Ginsburg applied. He arrives at several very different conclusions. First, he disagrees that the plaintiff's affidavits show cognizable injury in fact. The "concern" they show for the environment falls short of real injury and is based on the type of contradictory, unsubstantiated, conclusory allegations the Court had rejected in a previous standing case.⁴³ Justice Scalia concludes that a "concern for the environment" standard is a sham that will confer standing any time there is a permit violation.

⁴⁰ All parties agreed that a plaintiff must demonstrate standing with respect to each type of relief it seeks.

⁴¹ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997).

⁴² Justice Kennedy, wrote a separate concurrence expressing the same reservations about citizen suits, choosing to reserve judgment for another day, and another case. *Friends of the Earth*, 2000 Lexis 501, 56.

⁴³ *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990).

Justice Scalia is no more convinced by the Court's redressability analysis, which he calls "equally cavalier" to its consideration of the injury in fact question. To begin with, the Court had recently held that civil penalties cannot redress citizen injury for past violations of environmental laws.⁴⁴ Furthermore, in Scalia's view the deterrent effect of civil penalties in general is speculative, because past Supreme Court cases found no "logical nexus" between the threat of enforcement action and future compliance with various laws. He goes on to analyze the lack of evidence that the specific penalty in this case would serve as a deterrent sufficient to redress plaintiffs' injuries, and concludes that the redressability test was not met.

This case leaves several still unanswered questions, and could have serious consequences. First, what effect would a finding of mootness on remand have on the civil penalty imposed by the district court? Justice Stevens' concurring opinion expresses his view that the penalty should stand, whether or not the case became moot at some point. The majority opinion is silent on this issue. Second, the Court still has not squarely addressed Justice Scalia's argument that citizen suit provisions may run afoul of the "take care" clause of Article II. Justice Kennedy's concurrence indicates that he is sympathetic with those concerns. Finally, the dissent raises legitimate concerns for the effect of the Court's opinion on the law of standing. At the core, standing requirements are a limit on judicial power – recognizing that courts are best suited to resolve concrete disputes between interested parties with something real at stake. By finding that payment of civil penalties to the United States somehow offers "redress" for citizens' "concerns" for the environment, the Court effectively empowers those citizens to usurp the government's enforcement prerogative. Because of the Court's willingness in this case to find injury in fact on such a scant record, it is very likely that more citizens will pursue citizen suits more vigorously. (MAJ Connelly/LIT)

NATIONAL ATLAS OF THE UNITED STATES AVAILABLE ONLINE

MAJ James H. Robinette II

*Come forth into the light of things,
Let Nature be your teacher.
-William Wordsworth (1798)*

A public-private venture of the U.S. Geological Survey and various federal and non-governmental organizations has made the National Atlas of the United States available on the Internet. The address for the Atlas is <http://www.nationalatlas.gov/>. Environmental law specialists may find the atlas useful for a number of purposes. It includes zoom in and out features, as well as the ability to include or exclude point sources of pollution, Superfund sites, hazardous waste storage sites, as well as hydrologic, geographic, political, and census data. (MAJ Robinette/RNR)

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Major Robert Cotell

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⁴⁴ Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

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**THE ENVIRONMENTAL LAW DIVISION
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**FEDERAL DEPARTMENTS MAY URGE DEPARTMENT OF JUSTICE TO TAKE THE
FORT ORD CASE TO THE SUPREME COURT**

Mike Lewis

This updates earlier articles regarding the U.S. Court of Appeals for the Ninth Circuit (hereinafter "9th Circuit") decision that section 120¹ of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides an independent authority for cleanups of federal facilities. The case was *Fort Ord Toxics Project v. California Environmental Protection Agency et al.*². On 2 September 1999, the 9th Circuit held that Section 120 was in fact an independent authority to conduct remedial action.

As you may recall, the Fort Ord Toxics Project ("FOTP") sued CAL EPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act ("CEQA")³. FOTP named the Army as Real Parties in Interest and sought to enjoin the Army's remedy.

The Army immediately removed this challenge to U.S. District Court⁴, and citing CERCLA section 113(h)⁵ sought to have it dismissed. CERCLA section 113(h) provides that: No Federal court shall have jurisdiction under Federal law. . . or under state law which is applicable or relevant and appropriate under section 9621 of this title (relating to clean up standards) to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title,

The District Court found that the Fort Ord remedy was selected under section 104 as delegated to the Secretary of Defense and that section 120 "establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities."⁶ The court adopted the logic of *Werlein v. United States*, 746 F. Supp. 887, 892 (D. Minn. 1992); vacated in part, 793 F. Supp. 898 (D. Minn. 1992); that section 120 "provides a

¹ 42 U.S.C. § 9620 (1998).

² *Fort Ord Toxics Project et al., v. California Environmental Protection Agency et al.*, 189 F.3d 828 (9th Cir. 1999).

³ CAL. PUB. RES. Code §§ 21000 – 21178.1. CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

⁴ The basis for the Army's removal was 28 U.S.C. § 1442(a) which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

⁵ 42 U.S.C. § 9613(h).

⁶ Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681 RMW May 11, 1998, at 8.

road map for the application of CERCLA.⁷ The court specifically rejected FOTP's argument that CERCLA section 113(g) was evidence that Congress intend Section 120 to be an independent cleanup authority. To the contrary, the court found the reference in this section to the President taking the action as supporting the Army's case.⁸

FOTP appealed the District Court's order. In its opinion, the 9th Circuit said FOTP's argument that section 120 was a separate cleanup authority falling outside of the protections of section 113(h), "would lead to a rule that is intuitively unappealing." The 9th Circuit then found this issue to be one of first impression. It opined that CERCLA, section 120(g)⁹, seemed to "create a grant of authority separate from sections 104 and 106."

The Army, Navy, Air Force, EPA, and Department of Energy persuaded DOJ to petition the 9th Circuit for a rehearing *en banc* in this case. This petition was denied on January 7, 2000, by the same judge who decided the appeal. The same Federal Departments are now discussing the possibility of a DOJ petition for a Writ of Certiorari for the United States Supreme Court to review this case. No decision has been made to date. (Mr. Lewis/LIT)

What's the Frequency Kenneth? FCC Case Broadcasts Guidance on Use of the NEPA Functional Compliance Doctrine

LTC David B. Howlett

A recent case from the Second Circuit Court of Appeals takes a fresh look at the "functional compliance" doctrine. In Cellular Phone Taskforce v. Federal Communications Commission,¹⁰ the court considered whether a rulemaking by the Federal Communications Commission (FCC) met the requirements of the National Environmental Policy Act (NEPA).¹¹

The FCC adopted a rule that set guidelines for radio frequency radiation from transmitters including maximum permitted exposure (MPE). The FCC also categorically excluded from formal NEPA review tower-mounted telecommunications antennae 10 meters or higher above ground and rooftop antennae emitting less than 1000 watts of power. The FCC elected to exempt such facilities after determining that they pose no risk of exposing humans to RF radiation in excess of MPE levels.

Petitioners challenged the rules on a variety of grounds, including FCC's failure to perform a NEPA analysis for the radiation rule and the alleged arbitrariness of the categorical exclusion.

The court dealt with the challenge to the categorical exclusion first. In light of the low probability of excluded facilities violating MPE levels, the court found it was reasonable to exclude them from detailed NEPA analysis. Moreover, the licensees were still responsible for compliance, and an interested person could petition the FCC for review of a site believed to violate the MPE levels. The court found the FCC's approach was rational and upheld the adoption of the categorical exclusion.

The court then decided the issue of whether the FCC was required to prepare an EIS in conjunction with its rulemaking. To begin, a rulemaking can be subject to NEPA if it

⁷ *Id.*, at 10.

⁸ *Id.*

⁹ CERCLA section 120(g) states that "no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise...".

¹⁰ Docket Nos. 97-4328(L); 98-4003(Con); 98-4005(Con); 98-4025(Con); 98-4122(Con); 2d Cir., 2000 U.S. App. LEXIS 2770, February 18, 2000.

¹¹ 42 U.S.C. §§4321 et seq.

constitutes a major federal action significantly affecting the quality of the human environment. The court noted, however that "where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient."¹²

The function of NEPA to allow the decision-maker to take a hard look at the environmental impacts of a proposed action, consider alternatives to it, and allow public participation in the analysis. The court concluded that the FCC rulemaking functionally met the requirements of NEPA "both in form and substance."¹³

First, the rulemaking included public participation. The FCC also "consulted with and obtained the comments of any Federal agency which has jurisdiction by law or special expertise with respect to[the] environmental impact involved," another requirement of NEPA.¹⁴ The FCC also considered environmental impacts including cumulative effects. Although the court did not mention this, the rulemaking also considered alternatives in that it looked at a variety of possible MPE levels. Finally, any site-specific impacts would be analyzed through the NEPA process when individual facilities are planned.¹⁵ The court concluded that the FCC rulemaking met the functional compliance test.

Army Regulation 200-2¹⁶ recognizes the functional compliance test. Generally, the regulation allows decision-makers to determine that an action has been adequately addressed by existing documents and found not to be environmentally significant.¹⁷ The agency must memorialize its determination in a record of environmental consideration (REC). The regulation also recognizes that a CERCLA¹⁸ Feasibility Study eliminates the need for a NEPA analysis "[i]n most cases."¹⁹ A REC is not required, but the cover of the Feasibility Study should state that it is meant to comply with NEPA.²⁰

Outside the world of CERCLA, it is quite risky for Army planners to rely on the functional compliance doctrine. If there is time to do a proper NEPA analysis, it should be done. If an existing study looked hard at environmental impacts, considered alternatives, and involved the public, it could be relied upon to serve the function of NEPA. This course of action, however, could result in a court returning the issue back for a real NEPA analysis. (LTC Howlett/LIT).

¹² 2000 U.S. App. LEXIS 2770 at *27, quoting Environmental Defense Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

¹³ 2000 U.S. App. Lexis 2770 at *27.

¹⁴ 42 U.S.C. §4332(c).

¹⁵ Essentially, this means that the non-NEPA rulemaking is serving a "tiering" function.

¹⁶ Environmental Effects of Army Actions, 23 December 1988.

¹⁷ Army Regulation 200-2, ¶ 3-1a. Elsewhere in the regulation (¶ 2-3d(1) and ¶ 2-3e(1)), the previous document relied upon must be either a NEPA environmental assessment or an environmental impact statement. Reliance on coverage on non-NEPA documents is not shown in the regulation's NEPA flow chart. To the extent this creates ambiguity, one must hope it will be resolved as AR 200-2 is rewritten.

¹⁸ Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, et seq.

¹⁹ Army Regulation 200-2, ¶ 2-2a(8). Whether the documentation for a CERCLA removal action can legitimately serve as a NEPA substitute is beyond the scope of this article.

²⁰ Id.

December 28, 1998

[This version is drafted on the assumption that the state will be a party. Words or terms have been placed in brackets to make them generic.]

[A] DEFINITIONS

[A]. "Deadlines" shall mean the Near Term Milestones specifically established for the current fiscal year under the Plan. Deadlines are subject to stipulated penalties in accordance with Section [], *Stipulated Penalties*.

[A]. "Fiscal year" shall mean the time period used by the United States Government for budget management and commences on October 1 and ends September 30th of the following calendar year.

[A]. "Milestones" shall mean the dates established by the Parties in the Plan for the initiation or completion of Primary Actions and the submission of Primary Documents and Project End Dates. Milestones shall include Near Term Milestones, Out Year Milestones, Primary Actions, and Project End Dates.

[A]. "Near Term Milestones" shall mean the Milestones within the current fiscal year (FY), the next fiscal year or "budget year" (FY+1), and the year for which the budget is being developed or "planning year" (FY+2).

[A]. "Out Year Milestones" shall mean the Milestones within those years occurring after the planning year until the completion of the cleanup or phase of the cleanup (FY+3 through Project End Date).

[A]. "Plan", unless the context indicates otherwise, shall refer to the *[insert name of management plan]*.

[A]. "Primary Actions" as used in these definitions shall mean those specified major, discrete actions that the Parties identify as such in the Plan. The Parties should identify all major, discrete actions for which there is sufficient information to be confident that the date for taking such action is implementable.

[A]. "Project End Dates" shall mean the dates established by the Parties in the Plan for the completion of major portions of the cleanup or completion of the cleanup of the facility. The Parties recognize that, in many cases, a higher degree of flexibility is appropriate with Project End Dates due to uncertainties associated with establishing such dates.

[A]. ATarget Dates@ shall mean dates established for the completion and transmission of secondary documents. Target Dates are not subject to dispute resolution and they are not Milestones.

[B]. CONTENTS OF PLAN

[B].1 This Agreement establishes a process for creating the Plan. (*Use in the alternative:* The Plan is attached to this Agreement as Appendix []. *Or:* The *[DoD Component]* shall submit a Plan on *[date]*, which will be attached to this Agreement as Appendix [].) The Plan and each annual Amendment to the Plan shall be Primary Documents. Milestones established in a Plan or established in a final Amendment to a Plan remain unchanged unless otherwise agreed to by the Parties or unless directed to be changed pursuant to the agreed dispute resolution process set out in Subsections [C].5 or [C].6. In addition, if an activity is fully funded in the current FY, Milestones associated with the performance of work and submittal of Primary Documents associated with such activity (even if they extend beyond the current FY) shall be enforceable.

[B].2 The Plan includes proposed actions for both CERCLA responses and actions which would otherwise be handled pursuant to RCRA corrective actions per Section [], *Statutory Compliance/RCRA-CERCLA Integration*, and outlines all response activities and associated documentation to be undertaken at the facility. The Plan (will) incorporate(s) all existing Milestones contained in approved Work Plans, and all Milestones approved in future Work Plans immediately become incorporated into the Plan.

[B].3 Milestones in the Plan reflect the priorities agreed to by the Parties through a process of "Risk Plus Other Factors" Priority Setting. Site activities have been prioritized by weighing and balancing a variety of factors including, but not limited to: (i) the DoD relative risk rankings for the site; (ii) current, planned, or potential uses of the facility; (iii) ecological impacts; (iv) impacts on human health; (v) intrinsic and future value of affected resources; (vi) cost effectiveness of the proposed activities; (vii) environmental justice considerations; (viii) regulatory requirements; and, (ix) actual and anticipated funding levels. While Milestones should not be driven by budget targets, such targets should be considered when setting Milestones. Furthermore, in setting and modifying Milestones, the Parties agree to make good faith efforts to accommodate federal fiscal constraints, which include budget targets established by the *[DoD Component]*.

[B].4 The Plan and its annual Amendments include:

[B].4.1 A description of actions necessary to mitigate any immediate threat to human health or the environment;

[B].4.2 A listing of all currently identified Site Screening Areas (SSAs) (if applicable), Operable Units (including Accelerated Operable Units (AOUs)), Interim Remedial Actions, Supplemental

Response Actions, and Critical and Non-Time Critical Removal Actions covered or identified pursuant to this Agreement;

[B].4.3 Activities and schedules for response actions covered by the Plan, including at a minimum:

- Identification of any Primary Actions;
- All Deadlines;
- All Near Term Milestones;
- All Out Year Milestones;
- All Target dates;
- Schedule for initiation of Remedial Designs, Interim Response Actions, Non-Time Critical Removal Actions, AOU's, and any initiation of other planned response action(s) covered by this Agreement; and,
- All Project End Dates.

[B].5 The *[DoD Component]* shall submit an Amendment to the Plan on an annual basis as provided in Section [C], *Budget Development and Amendment of Plan*. All Amendments to the Plan shall conform to all of the requirements set forth in this Section.

[B].6 The Milestones established in accordance with this Section and Section [C], *Budget Development and Amendment of Plan*, remain the same unless otherwise agreed by the Parties, or unless changed in accordance with the dispute resolution procedures set out in Subsections [C].5 and [C].6. The Parties recognize that possible bases for requests for changes or extensions of the Milestones include but are not limited to (i) the identification of significant new site conditions at this installation; (ii) reprioritization of activities under this Agreement caused by changing priorities or new site conditions elsewhere in the *[DoD Component]*; (iii) reprioritization of activities under this Agreement caused by budget adjustments (e.g., rescissions, inflation adjustments, and reduced Congressional appropriations); (iv) an event of force majeure; (v) a delay caused by another party's failure to meet any requirement of this Agreement; (vi) a delay caused by the good faith invocation of dispute resolution or the initiation of judicial action; (vii) a delay caused, or which is likely to be caused, by the grant of an extension in regard to another timetable and deadline or schedule; and (viii) any other event or series of events mutually agreed to by the Parties as constituting good cause.

[B].7 The Deadlines established in the Plan and its Amendments shall be published by EPA and the State.

[C]. BUDGET DEVELOPMENT AND AMENDMENT OF PLAN

[C].1 The *[DoD Component]*, as a federal agency, is subject to fiscal controls, hereinafter referred to as the Future Years Defense Plan (FYDP). The planning, programming, and budgeting process, hereinafter referred to as the POM process, is used to review total requirements for DoD programs and make appropriate adjustments within the FYDP for each program while adhering to the overall FYDP control. The Parties recognize that the POM process is a multi-year process. The Parties also agree that all Parties should be involved in the full cycle of POM activities as specified in this Agreement. Further, the Parties agree that each Party should consider the factors listed in Subsection [B].3, including federal fiscal constraints as well as each of the other factors, in their priority-setting decisions. Initial efforts to close any gap between cleanup needs and funding availability shall be focused on the identification and implementation of cost savings.

Facility-Specific Budget Building

[C].2 In order to promote effective involvement by the Parties in the POM process, the Parties will meet at the Project Manager level for the purpose of (1) reviewing the FYDP controls; (2) developing a list of requirements/work to be performed at the site for inclusion in the *[DoD Component]* POM process; and, (3) participating in development of the *[DoD Component]* submission to the proposed President's budget, based on POM decisions for the year currently under consideration. Unless the Parties agree to a different time frame, the *[DoD Component]* agrees to notify the other Parties within [10] days of receipt, at the Project Manager level, that budget controls have been received. Unless the Parties agree to a different time frame or agree that a meeting is not necessary, the Parties will meet, at the Project Manager level, within [5] days of receiving such notification to discuss the budget controls. However, this consultation must occur at least [10] days prior to the *[DoD Component]*'s initial budget submission to *[Major Command]*. In the event that the Project Managers cannot agree on funding levels required to perform all work outlined in the Plan, the Parties agree to make reasonable efforts to informally resolve these disagreements, either at the immediate or secondary supervisor level; this would also include discussions, as necessary, with *[Major Command]*. If agreement cannot be reached informally within a reasonable period of time, the *[DoD Component]* shall resolve the disagreement, if possible with the concurrence of all Parties, and notify each Party. If all Parties do not concur in the resolution, the *[DoD Component]* will forward through *[Major Command]* to the *[DoD Component]* Headquarters its budget request with the views of the Parties not in agreement and also inform *[DoD Component]* Headquarters of the possibility of future enforcement action should the money requested not be sufficient to perform the work subject to disagreement. In addition, if the *[DoD Component]*'s budget submission to *[Major Command]*

relating to the terms and conditions of this Agreement does not include sufficient funds to complete all work in the existing Plan, such budget submission shall include supplemental reports that fully disclose the work required by the existing Plan, but not included in the budget request due to fiscal controls (e.g., a projected budget shortfall). These supplemental reports shall accompany the cleanup budget that the **[DoD Component]** submits through its higher Headquarters levels until the budget shortfall has been satisfied. If the budget shortfall is not satisfied, the supplemental reports shall be included in the **[DoD Component]**'s budget submission to the DoD Comptroller. DUSD(ES) shall receive information copies of any supplemental reports submitted to the DoD Comptroller.

[DoD Component] Budget for Clean Up Activities

[C].3 The **[DoD Component]** shall forward to the other Parties documentation of the budget requests (and any supplemental reports) for the site, as submitted by the **[DoD Component]** to **[Major Command]**, and by **[Major Command]** to the **[DoD Component]** Headquarters, within 14 days after the submittal of such documentation to the **[DoD Component]** Headquarters by **[Major Command]**. If the **[DoD Component]** proposes a budget request relating to the terms and conditions of this Agreement that impacts other installations, discussions with other affected EPA Regions and states regarding the proposed budget request need to take place.

Amended Plan

[C].4 No later than June 15 of each year after the initial adoption of the Plan, the **[DoD Component]** shall submit to the other Parties a draft Amendment to the Plan. When formulating the draft Amendment to the Plan, the **[DoD Component]** shall consider funding circumstances (including OMB targets/guidance) and "risk plus other factors" outlined in Subsection [B].3 to evaluate whether the previously agreed upon Milestones should change. Prior to proposing changes to Milestones in its annual Amendment to the Plan, the **[DoD Component]** will first offer to meet with the other Parties to discuss the proposed changes. The Parties will attempt to agree on Milestones before the **[DoD Component]** submits its annual Amendment by June 15, but failure to agree on such proposed changes does not modify the June 15 date, unless agreed by all the Parties. Any proposed extensions or other changes to Milestones must be explained in a cover letter to the draft Amendment to the Plan. The draft Amendment to the Plan should reflect any agreements made by the Parties during the POM process outlined in this Section. Resolution of any disagreement over adjustment of Milestones pursuant to this subsection shall be resolved pursuant to Subsection [C].5.

[C].5.1 The Parties shall meet as necessary to discuss the draft Amendment to the Plan. The Parties shall use the consultation process contained in Section [], *Consultation*, except that none of the Parties will have the right to use the extension provisions provided therein. Accordingly, comments on the draft Amendment will be due to the **[DoD Component]** no later than 30 days after receipt by EPA and the State of the draft Amendment. If either EPA or the State provide

comments and are not satisfied with the draft Amendment during this comment period, the Parties shall meet to discuss the comments within 15 days of the **[DoD Component]**'s receipt of comments on the draft Amendment. The draft final Amendment to the Plan will be due from the **[DoD Component]** no later than 30 days after the end of the EPA and State comment period. During this second 30-day time period, the **[DoD Component]** will, as appropriate, make revisions and re-issue a revised draft herein referred to as the draft final Amendment. To the extent that Section [], *Consultation*, contains time periods differing from these 30 day periods, this provision will control for consultation on the Amendment to the Plan.

[C].5.2.1 If the **[DoD Component]** proposes, in the draft final Amendment to the Plan, modifications of Milestones to which either EPA or the State have not agreed, those proposed modifications shall be treated as a request by the **[DoD Component]** for an extension. Milestones may be extended during the Plan review process by following Subsections [C].4 through [C].7. All other extensions will be governed by Section [], *Extensions*. The time period for EPA to respond to the request for extension will begin on the date EPA receives the draft final Amendment to the Plan, and EPA and the State shall advise the **[DoD Component]** in writing of their respective positions on the request within thirty days. If EPA and the State approve of the **[DoD Component]**'s draft final Amendment, the document shall then await finalization in accordance with Subsections [C].5.3 and [C].6. If EPA denies the request for extension, then the **[DoD Component]** may amend the Plan in conformance with EPA and State comments or seek and obtain a determination through the dispute resolution process established in Section [], *Dispute Resolution*, within 21 days of receipt of notice of denial. Within 21 days of the conclusion of the dispute resolution process, the **[DoD Component]** shall revise and reissue, as necessary, the draft final Amendment to the Plan. If EPA or the State initiates a formal request for a modification to the Plan to which the **[DoD Component]** does not agree, EPA or the State may initiate dispute resolution as provided in Section [], *Dispute Resolution* with respect to such proposed modification. In resolving a dispute, the persons or person resolving the dispute shall give full consideration to the bases for changes or extensions of the Milestones referred to in Subsection [B].6 asserted to be present, and the facts and arguments of each of the Parties.

[C].5.2.2 Notwithstanding Subsection [C].5.2.1, if the **[DoD Component]** proposes, in the draft final Amendment to the Plan, modifications of Project End Dates which are intended to reflect the time needed for implementing the remedy selected in the Record of Decision but to which either EPA or the State have not agreed, those proposed modifications shall not be treated as a request by the **[DoD Component]** for an extension, but consistent with Section [], *Dispute Resolution*, EPA or the State may initiate dispute resolution with respect to such Project End Date.

[C].5.2.3 In any dispute under this Section, the time periods for the standard dispute resolution process contained in Subsections [].3, [].4, [].5, and [] 6 of Section [], *Dispute Resolution*, shall be reduced by half in regard to such dispute, unless the Parties agree to dispute directly to the SEC level.

[C].5.3 The **[DoD Component]** shall finalize the draft final Amendment as a final Amendment to the Plan consistent with the mutual consent of the Parties, or in the absence of mutual consent, in accordance with the final decision of the dispute resolution process. The draft final Amendment to the Plan shall not become final until 21 days after the **[DoD Component]** receives official notification of Congress' authorization and appropriation of funds if funding is sufficient to complete work in the draft final Plan or, in the event of a funding shortfall, following the procedures in Subsection [C].6. However, upon approval of the draft final Amendment or conclusion of the dispute resolution process, the parties shall implement the Plan while awaiting official notification of Congress' authorization and appropriation.

[C].5.4 (Include if State is not a Party.) If the State is not a Party to this Agreement, it shall nevertheless be entitled to participate in the consultation process for the Amendment to the Plan as if it were a Party; however, this shall not include a right to dispute resolution.

Resolving Appropriations Shortfalls

[C].6 After authorization and appropriation of funds by Congress and within 21 days after the **[DoD Component]** has received official notification of **[DoD Component]**'s allocation based on the current year's Environmental Restoration, **[DoD Component]** (ER,X) Account, the **[DoD Component]** shall determine if planned work (as outlined in the draft final Amendment to the Plan) can be accomplished with the allocated funds. (1) If the allocated funds are sufficient to complete all planned work for that fiscal year and there are no changes required to the draft final Amendment to the Plan, the **[DoD Component]** shall immediately forward a letter to the other Parties indicating that the draft final Amendment to the Plan has become the final Amendment to the Plan. (2) If the **[DoD Component]** determines within the 21-day period specified above that the allocated funds are not sufficient to accomplish the planned work for the site (an appropriations shortfall), the **[DoD Component]** shall immediately notify the Parties. The Project Managers shall meet within thirty (30) days to determine if planned work (as outlined in the draft final Amendment to the Plan) can be accomplished through: 1) rescoping or rescheduling activities in a manner that does not cause previously agreed upon Near Term Milestones and Out Year Milestones to be missed; or 2) developing and implementing new cost-saving measures. If, during this thirty (30) day discussion period, the Parties determine that rescoping or implementing cost-saving measures are not sufficient to offset the appropriations shortfall such that Near Term Milestones, Out Year Milestones, and Project End Dates should be modified, the Parties shall discuss these changes and develop modified Milestones. Such modifications shall be based on the "Risk Plus Other Factors" prioritization process discussed in Subsection [B].3, and shall be specifically identified by the **[DoD Component]**. The **[DoD Component]** shall submit a new draft final Amendment to the Plan to the other Parties within 30 days of the end of the 30 day discussion period. In preparing the revised draft final Amendment to the Plan, the **[DoD Component]** shall give full consideration to EPA and State input during the 30-day discussion

period. If the EPA and State concur with the modifications made to the draft final Amendment to the Plan, EPA and the State shall notify the **[DoD Component]** and the revised draft final Amendment shall become the final Amendment. In the case of modifications of Milestones due to appropriations shortfalls, those proposed modifications shall, for purposes of dispute resolution, be treated as a request by the **[DoD Component]** for an extension, which request is treated as having been made on the date that EPA receives the new draft final Plan or draft final Amendment to the Plan. EPA and the State shall advise the **[DoD Component]** in writing of their respective positions on the request within 21 days. The **[DoD Component]** may seek and obtain a determination through the dispute resolution process established in Section [], *Dispute Resolution*. The **[DoD Component]** may invoke dispute resolution within fourteen days of receipt of a statement of nonconcurrence with the requested extension. In any dispute concerning modifications under this Section, the Parties will submit the dispute directly to the SEC level, unless the Parties agree to utilize the standard dispute resolution process, in which case the time periods for the dispute resolution process contained in Subsections [].3, [].4, [].5, and [] 6 of

Section [], *Dispute Resolution*, shall be reduced by half in regard to such dispute. Within 21 days after the conclusion of the dispute resolution process, the **[DoD Component]** shall revise and reissue, as necessary, the final Amendment to the Plan.

[C].7 It is understood by all Parties that the **[DoD Component]** will work with representatives of the other Parties to reach consensus on the reprioritization of work made necessary by any annual appropriations shortfalls or other circumstances as described in Section [C].6. This may also include discussions with other EPA Regions and states with installations affected by the reprioritization; the Parties may participate in any such discussions with other states.

Public Participation

[C].8 In addition to any other provision for public participation contained in this Agreement, the development of the Plan, including its annual Amendments, shall include participation by members of the public interested in this action. The **[DoD Component]** must ensure that the opportunity for such public participation is timely; but this Subsection [C].8 shall not be subject to Section [], *Stipulated Penalties*.

[C].8.1 The Parties will meet, after seeking the views of the general public, and determine the most effective means to provide for participation by members of the public interested in this action in the POM process and the development of the Plan and its annual Amendments. The "members of the public interested in this action" may be represented by inclusion of a restoration advisory board or technical review committee, if they exist for the **[Installation]**, or by other appropriate means.

[C].8.2 The **[DoD Component]** shall provide timely notification under Section [C].6, regarding allocation of ER,X, to the members of the public interested in this action.

[C].8.3 The **[DoD Component]** shall provide opportunity for discussion under Sections [C].2, [C].5, [C].6, and [C].7 to the members of the public interested in this action.

[C].8.4 The **[DoD Component]** shall ensure that public participation provided for in this Subsection [C].8 complies with Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.

[D]. FUNDING

[D].1 It is the expectation of the Parties to this Agreement that all obligations of the **[DoD Component]** arising under this Agreement will be fully funded. The **[DoD Component]** agrees to seek sufficient funding through its budgetary process to fulfill its obligations under this Agreement.

[D].2 In accordance with CERCLA Section 120(e)(5)(B), 42 U.S.C. Section 9620(e)(5)(B), the **[DoD Component]** shall submit to DoD for inclusion in its annual report to Congress the specific cost estimates and budgetary proposals associated with the implementation of this Agreement.

[D].3 Any requirement for the payment or obligation of funds, including stipulated penalties, by the **[DoD Component]** established by the terms of this Agreement shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. Section 1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted.

[D].4 If appropriated funds are not available to fulfill the **[DoD Component]**'s obligations under this Agreement, EPA and the State reserve the right to initiate an action against any other person, or to take any response action, which would be appropriate absent this Agreement.

[D].5 Funds authorized and appropriated annually by Congress under the Environmental Restoration, **[DoD Component]** (ER,X) appropriation in the Department of Defense Appropriations Act will be the source of funds for activities required by this Agreement consistent with 10 U.S.C. Chapter 160. However, should the ER,X appropriation be inadequate in any year to meet the total **[DoD Component]**'s implementation requirements under this Agreement, the **[DoD Component]** will, after consulting with the other Parties and discussing the inadequacy with the members of the public interested in the action in accordance with Section [C], *Budget Development and Amendment of Plan*, prioritize and allocate that year's appropriation.

**Institutional Controls and Transfer of Real Property
under CERCLA Section 120(h)(3)(A), (B) or (C)**

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Institutional Controls and Transfer of Real Property under CERCLA Section 120(h)(3)(A), (B) or (C)

Summary

This document provides guidance to the U.S. Environmental Protection Agency (EPA) on the exercise of EPA's discretion under CERCLA section 120(h)(3)(A),(B), or (C) when EPA is called upon to evaluate institutional controls as part of a remedial action. It also informs the public and the regulated community on how EPA intends to exercise its discretion in this context. This guidance is designed to implement the President's policy of promoting, encouraging, and facilitating the redevelopment and reuse of closing military bases while continuing to protect human health and the environment. EPA may change this guidance in the future, as appropriate.

EPA's evaluation of federal property transfers is contingent on the receipt of information establishing that the institutional controls will be effective in preventing human or environmental exposure to hazardous substances that remain on site above levels which allow unrestricted use. For this reason, this guidance requires that the transferring federal agency demonstrate prior to transfer that certain procedures are in place, or will be put in place, that will provide EPA with sufficient basis for determining that the institutional controls will perform as expected in the future. Such procedures, which are listed in Section 5.0 below, include the means for:

- **Monitoring** the institutional controls' effectiveness and integrity.
- **Reporting** the results of such monitoring, including notice of any violation or failure of the controls.
- **Enforcing** the institutional controls should such a violation or failure occur.

1.0 Background of the Guidance

What are institutional controls?

Institutional controls are nonengineering measures designed to prevent or limit exposure to hazardous substances left in place at a site, or assure effectiveness of the chosen remedy. Institutional controls are usually, but not always, legal controls, such as easements, restrictive covenants, and zoning ordinances.

What is the historical basis for this guidance?

The Department of Defense's (DoD) base closure program and the Department of Energy's reuse and reindustrialization of surplus facilities are just two examples of programs where federal properties with hazardous substances remaining on site are being transferred outside of federal control. These property transfers will often require the implementation of institutional controls to ensure that human health and the environment are protected. Such property transfers highlight the need to ensure that institutional controls are clearly defined, oversight and monitoring roles are understood, and appropriate enforcement mechanisms are in place to ensure that human health and the environment are protected.

What is the statutory basis for this guidance?

Section 120(h)(3)(A) of CERCLA requires that a federal agency transferring real property (hereafter, transferring federal agency ¹) to a nonfederal entity include a covenant in the deed of transfer warranting that all remedial action necessary to protect human health and the environment has been taken prior to the date of transfer with respect to any hazardous substances remaining on the property. In addition, CERCLA section 120(h)(3)(B) requires, under certain circumstances, that a federal agency demonstrate to the EPA Administrator that a remedy is "operating properly and successfully" before the federal agency can provide the "all remedial action has been taken" covenant. Under CERCLA section 120(h)(3)(C), the covenant can be deferred so that property may be transferred before all necessary remedial actions have been taken if regulators agree that the property is suitable for the intended use and the intended use is consistent with protection of human health and the environment.

2.0 Purpose and Scope of the Guidance

What is the purpose of this guidance?

This guidance establishes criteria for EPA to evaluate the effectiveness of institutional controls that are part of a remedy or are a sole remedy for property to be transferred subject to CERCLA section 120(h)(3)(A),(B), or (C). Accordingly, this institutional control guidance provides guidelines applicable to property transfers in general and, more specifically, to support "operating properly and successfully determinations" under CERCLA section 120(h)(3)(B).

This guidance does not substitute for EPA regulations, nor is it a regulation itself. Thus, it cannot impose legally binding requirements on EPA, states, or the regulated community, and may not apply to a particular situation based upon the circumstances.

What does the guidance not address?

¹By "transferring federal agency" EPA means the federal agency responsible for cleanup.

This guidance does not address the issue of whether an institutional control is appropriate for a particular site. That decision is made as part of the remedy selection process. If, however, it becomes clear that the criteria set forth in this guidance cannot be met, the scope, effectiveness, or even the use of an institutional control should be reconsidered. This guidance does not change EPA's preference for active and permanent remedies as stated in CERCLA section 121², or any of the requirements for selecting remedies in CERCLA or the NCP³.

3.0 Applicability of the Guidance

Under what circumstances does the guidance apply?

The guidance applies in the following situations:

- When EPA approves “operating properly and successfully demonstrations” for ongoing remedies under CERCLA section 120(h)(3)(B). (See Section 7.0 for more information.)
- When EPA evaluates a federal agency's determination under 120(h)(3)(A) that all remedial actions have been taken, such as when commenting on a “finding of suitability of transfer,” in the consultative process established by DoD.
- When EPA approves a Covenant Deferral Request under 120 (h)(3)(C)⁴ for an early transfer.

4.0 General Guidelines for Institutional Controls

Who is responsible for implementing institutional controls?

²See also 55 *FR*, page 8706 (March 8, 1990).

³See CERCLA section 121 and 40 *CFR* 300.430.

⁴For more information, see *EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)*, June 16, 1998.

The decision to clean up a site to less than unrestricted use or to otherwise restrict the use of the site must be balanced by the assurance that a system will be in place to monitor and enforce any required institutional controls. This assurance is necessary to ensure the long term effectiveness and permanence of the remedy⁵. In EPA's view, the transferring federal agency is responsible for ensuring that the institutional controls are implemented. Even if implementation of the institutional controls is delegated in the transfer documents, the ultimate responsibility for monitoring, maintaining, and enforcing the institutional controls remains with the federal agency responsible for cleanup.

The transferring agency should clearly identify and define the institutional controls and set forth their purpose and method of implementation in a Record of Decision (ROD) or other decision document. Generally referring to or identifying an institutional control in a ROD is only one step in achieving the objective of an institutional control. An institutional control must be implemented in much the same way as an engineered remedy described in a ROD is designed and constructed.

5.0 Specific Guidelines for Institutional Controls

What information does EPA need?

EPA's review of federal property transfers requiring institutional controls should focus on whether the institutional controls, when in place, will be reliable and will remain in place after initiation of operation and maintenance. The information should document that the transferring federal agency will ensure that appropriate actions will be taken if a remedy is compromised. EPA should work with the transferring agency to obtain and evaluate the information described below as a precondition for EPA's support of federal property transfers under 120 (h)(3)(A),(B) or (C). At a minimum, EPA should expect to obtain the following information from the transferring federal agency:

- 1) A legal description of the real property or other geographical information sufficient to clearly identify the property where the institutional controls will be implemented.
- 2) A description of the anticipated future use(s) for the parcel.
- 3) Identification of the residual hazard or risk present on the parcel requiring the institutional control. In addition, the specific activities that are prohibited on the parcel should be identified, including prohibitions against certain land use activities that might affect the integrity of the remedy, such as well drilling and construction.
- 4) The specific institutional control language in substantially the same form as it will appear in the transfer document and a description of the legal authority for the implementation of these controls, such as state statutes, regulations, ordinances or other legal authority including case law.

⁵For more information, see 55 *FR* section 300.430 (e)(9) (iii)(C)(2).

- 5) A statement from the transferring federal agency that, in their best professional judgement, the institutional controls conform or will conform with the legal requirements of the applicable state and/or local jurisdiction. This statement should also explain how the institutional controls will be enforceable against future transferees and successors. Compliance with the institutional control should be enforceable against whoever might have ownership or control of the property. For Base Realignment and Closure properties, the majority of the transfers which EPA reviews, this statement could be included in a memorandum transmitting the final institutional control language for the deed of transfer from a DoD component attorney to the Commanding Officer. The memorandum could state that, based upon a review of the particular state's real estate laws, the component attorney believes that the institutional control is binding in perpetuity and enforceable in state court, and if it is not, he/she will revisit the institutional control or the entire remedy decision. This memorandum could be included in DoD's "operating properly and successfully demonstration" letter to EPA ⁶.
- 6) A description of who will be responsible for monitoring the integrity and effectiveness of the institutional controls and the frequency of monitoring. If this is a party other than the transferring federal agency, the transferring federal agency should provide documentation that the party accepts or will accept the responsibility. The transferring agency should also describe which specific party or office will be responsible for overseeing the institutional controls. The transferring agency might, for example, provide details of the types of assistance that other government agencies will provide in preventing the drilling of drinking water wells as well as the frequency of monitoring to ensure that drilling is not occurring.
- 7) A description of the procedure that will be used to report violations or failures of the institutional controls to the appropriate EPA and/or state regulator, local or tribal government, and the designated party or entity responsible for reporting.
- 8) A description of the procedure that will be used to enforce against violations of an institutional control, an identification of the party or parties that will be responsible for such enforcement, and a description of the legal authority for this enforcement procedure, such as state statutes, regulations, ordinances, or other legal authority including case law.
- 9) Assurance that the transferring federal agency will verify maintenance of the institutional control on a periodic basis unless other arrangements have been made. In the latter case, where another party is performing the monitoring function, that party should provide such assurances. In addition, the transferring federal agency must commit to verify the reports on a regular basis in this case.
- 10) A description of the recording requirements in the jurisdiction where the site is located. The transferring agency also must describe the methods it will use to

⁶This is consistent with DoD's own requirement in their guidance *Responsibility for Additional Environmental Cleanup after Transfer of Real Property*, which states "The DoD component disposal agent will also ensure that appropriate institutional controls and other implementation and enforcement mechanisms, appropriate to the jurisdiction where the property is located, are either in place prior to the transfer or will be put in place by the transferee."

provide notice of the institutional controls at the site to subsequent owners or lessees.

6.0 Documentation of Institutional Controls

What remedy selection documentation should EPA expect from the transferring federal agency?

EPA may base its evaluation of the institutional control on information found in the following remedy selection, remedy design, or other documents:

- RODs that contain sufficient information regarding institutional controls.
- Other post-ROD documents that are completed following the selection of a remedy, such as a Remedial Design, Remedial Action Plan, or Operation and Maintenance Plan. This applies in cases where the ROD requires the use of an institutional control but fails to provide sufficient information regarding purpose, implementation, or enforcement (such as in older RODs).

What if existing documents do not provide sufficient information on institutional controls?

If none of the documents mentioned above provide sufficient detail on the implementation of the institutional control, the transferring federal agency should develop an “Institutional Control Implementation Plan” (ICIP) to assist EPA in evaluating the effectiveness of the institutional control. The ICIP should adhere to the following conditions:

- The ICIP should be a comprehensive strategy for the implementation of institutional controls.
- The ICIP should identify the parties responsible for implementing and monitoring the institutional controls.
- The ICIP should document that procedures adequate for effectively implementing and monitoring the institutional control are in place or will be put in place.
- The level of detail in the ICIP should be commensurate with the risk at the site. Depending on the residual risk posed by the site, for instance, EPA may require that the plan be agreed upon by both EPA and state regulators and/or that the plan be structured as an agreement among all the parties involved via a Memorandum of Agreement, amendment of a ROD or Federal Facilities Agreement, or an operation and maintenance plan.

7.0 “Operating Properly and Successfully Demonstrations”

How does this guidance apply to demonstrations that remedial actions are “operating properly and successfully”?

In August 1996, EPA issued guidance to EPA’s Regional Federal Facility programs describing the approach EPA should use in evaluating a federal agency’s demonstration that a remedial action is “operating properly and successfully” as a precondition to the deed transfer of federally-owned

property, as required in CERCLA section 120(h)(3)(B). In that guidance, entitled *Guidance for Evaluation of Federal Agency Demonstrations that Remedial Actions are Operating Properly and Successfully under CERCLA Section 120(h)(3)*, EPA directed Regional decision-makers to consider a number of factors in evaluating an “operating properly and successfully demonstration” of ongoing remedial actions, including institutional controls. With respect to institutional controls, EPA stated generally that:

“If the integrity of the remedial action depends on institutional controls (e.g., deed restrictions, well drilling prohibitions) these controls should be clearly identified and agreed upon.”

Additionally, under the more specific criteria that must be demonstrated for groundwater remedies, the 1996 guidance included “appropriate institutional controls are in place” as a criterion, but did not describe how federal agencies should meet this requirement. For ongoing remedial actions involving institutional controls and for which EPA must evaluate a transferring federal agency’s demonstration that a remedial action is operating properly and successfully, the information listed in Section 5.0 of this guidance should be submitted as part of the data requirements for the remedial action.

What documentation does EPA need to evaluate “operating properly and successfully demonstrations”?

The following documentation is needed for all “operating properly and successfully demonstrations”:

- The transferring federal agency should research, assemble, and analyze the information to demonstrate to EPA that the remedy is operating properly and successfully.
- The cover letter forwarding the information to EPA should request EPA’s approval of the demonstration and include a statement by a Commanding Officer or senior official similar to the following:

I certify that the information, data, and analysis provided are true and accurate based on a thorough review. To the best of my knowledge, the remedy is operating properly and successfully, in accordance with CERCLA 120(h)(3)(B).

Generally, where institutional controls are a component of a remedy, EPA should not consider “operating properly and successfully demonstrations” that are not consistent with the requirements described above in Sections 5.0 and 6.0.

When should information for “operating properly and successfully” demonstrations be provided?

EPA should encourage federal agencies preparing “operating properly and successfully demonstrations” to work closely with EPA in planning the scope and presentation of the documentation. A minimum of 45 days is needed for EPA to review all “operating properly and successfully demonstrations.”

8.0 Coordination with State, Local, and Tribal Governments

What organizations should be involved in the development of institutional controls?

Successful management of institutional controls is critical to protecting the human health and environment of the communities where federal properties are located. For this reason, EPA encourages early communication and cooperation among federal, state, local, and tribal governments in the development of institutional controls and implementation plans. Where the viability of the institutional control is contingent on state property law or where state institutional control-related laws may apply (e.g., documentation of institutional controls in a state registry), it is particularly important to coordinate with the state. As a matter of policy, therefore, EPA will forward all institutional control information received for federal property transfers to the appropriate state, local, and tribal governments. EPA also will solicit comments from these organizations as appropriate.

9.0 Executive Order 13132, “Federalism”

Does this Guidance have Federalism Implications?

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations and regulatory policies that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

This guidance does not have federalism implications. This guidance aids EPA in implementing its responsibilities under CERCLA section 120(h)(3)(A), (B) or (C). This guidance also encourages Federal agencies to coordinate the development and implementation of institutional controls with state, local and tribal governments. Neither such coordination, nor any other aspect of this guidance, however, will have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of the Executive Order do not apply to this guidance.

10.0 Conclusion

How will EPA evaluate institutional controls?

EPA prefers to work with federal agencies early in the remedy selection process to assure full and consistent consideration of the long term effectiveness of the institutional controls. For this reason, it is imperative that these discussions begin prior to remedy selection. Although the federal government has had less experience designing and implementing institutional controls than engineered remedies, EPA will use its professional judgement in evaluating institutional control plans, as it does in evaluating other aspects of remedies and operations and maintenance. The basis for that judgment may vary depending on the site characteristics. EPA understands the importance of rapid reuse to the surrounding communities and is committed to supporting this effort while maintaining the Agency’s primary goal of protecting human health and the environment.

December 9, 1999

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Interim Army Guidance on Implementation of the Travel and Transportation Reform Act (TTRA) of 1998

On October 19, 1998, the President signed TTRA into law. This legislation gave the Administrator of the General Services Administration (GSA) 270 days to develop implementing regulations. On July 16, 1999, GSA issued Interim Rule 8, which is nothing more than a series of questions and answers about TTRA. Interim Rule 8 did establish that the provisions of TTRA would be effective for all official government travel on or after December 31, 1999.

The Office of the Under Secretary of the Defense (Comptroller) (OUSDC) established several working groups to develop implementing guidance for the Department of Defense (DoD). These working groups have completed their work, but to date, OUSDC has not finalized their guidance and provided it to DoD components.

Please use the following as interim Army guidance for implementation of TTRA. It may require revision once OUSDC issues their final implementing guidance.

- **Use of the Travel Charge Card:**
 - Section 2 (a) of TTRA requires all Federal employees to use the government travel charge card for all payments of expenses for official government travel.
 - To implement this section of TTRA, commanders will simply comply with the DoD Financial Management Regulation (FMR), Volume 9, Chapter 3, (July 1998), Section 030101. This section of the FMR states the DoD policy, "that the government-sponsored, contractor-issued travel card shall be used by DoD personnel to pay for all costs incident to official business travel, including lodging, transportation, rental cars, meals, and other allowable reimbursable expenses." Commanders at all levels shall determine which employees within their organizations must have a travel card to comply with this requirement.

- **Exemptions:**

- Section 2 (b) of TTRA allows the Secretary of Defense or his designee to exempt any payment, person, type or class of payment, or types or classes of DoD personnel from the provisions of Section 2 (a). Based on this authority, the following types of personnel are exempt within the Army:

- All military personnel undergoing initial entry training (Basic Training) or initial skill training (Advanced Individual Training) prior to reporting to their first permanent duty assignment.
- All military prisoners.
- All Cadets of the United States Military Academy.
- All military and civilian employees who are denied a travel charge card by their commander or whose travel charge card is cancelled for financial irresponsibility or other specific reasons (e.g., misuse or abuse).

- **Collection of Amounts Owed:**

- Section 2 (d) of TTRA states that DoD may, upon written request from the contractor, collect by deduction from the pay of any DoD employee any undisputed amounts owed to the contractor.
- Section CB 16 of the GSA master contract provides the contractor with a process to collect undisputed amounts owed by cardholders. Should you receive any such requests from the contractor, direct them to use the process outlined in Section CB 16 of the GSA master contract to collect any debts owed by military or civilian cardholders.

- **Reimbursement of Travel Expenses:**

- Section 2 (g) of TTRA requires DoD to reimburse employee travel expenses within 30 days after submission of a proper settlement voucher. If DoD fails to reimburse these expenses within 30 days, they shall pay the employee a late fee.
- Until full deployment of the Defense Travel System, the Defense Finance and Accounting Service (DFAS) will advise all employees filing a travel claim that they have the right under TTRA to a late fee payment. DFAS will develop procedures which allow employees to initiate a claim for this late fee. Until such time as DFAS

does develop these procedures, please advise your personnel to document any instances where their travel claim takes longer than 30 days to be processed.

I encourage you to work with your commanders and managers to implement TTRA in an intelligent and reasonable manner. In my view, TTRA does not require every soldier and civilian employee to have a DoD Travel Card.

My point of contact for this action is Mr. Michael Petty, (703) 695-3225, DSN: 225-3225 or e-mail pettytm@hqda.army.mil.

/s/

Ernest J. Gregory
Deputy Assistant Secretary of the Army
(Financial Operations)

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13th Finance Group, ATTN: AFVX-CFG-CDR, Fort Hood, TX 76544-5056

18th Finance Group, ATTN: AFZA-FG, Fort Bragg, NC 28307-5000

Superintendent, U.S. Military Academy, ATTN: MARM, West Point, NY 10996-5000

Chief:

U.S. Army Reserve, ATTN: DAAR-CO, Washington, D.C. 20310

U.S. National Guard Bureau, ATTN: NGB-ARC-F, DFAS Indy-Center, Column 2124AA, 8899 East 56th Street, Indianapolis, IN 46249-1701

Commandant, U.S. Army Finance School, Ft. Jackson, SC 29207-7045

Program Manager for Chemical Demilitarization, ATTN: SFAE-CD-IA,
Ms. Maurice Pearson, Building E4585, Aberdeen Proving Grounds, MD
21010-4005

CC:

Mr. Ron Adolphi, OUSD(C)