



# Office of Command Counsel Newsletter

June 2000, Volume 2000-3

## CLE 2000--Recap Awards & Highlights

The AMC Continuing Legal Education Program held during the week of 22-26 May 2000 was, in the estimate of many veteran AMC counsel, the best CLE in memory. Whether through luck, design or chance, the combination of guest speakers, substantive topics and the tour of the Kennedy Space Center seemed to hit a high note for the nearly 140 attendees.

A special thanks to the CLE Planning Committee: Chairperson **Steve Klatsky**, **Holly Saunders**, **COL Demmon Canner**, **Bill Medsger**, **Vera Meza**, **Bob Lingo**, **Cassandra Johnson** and **Ed Stolarun**.

Our Executive Officer **Holly Saunders** did a wonderful job organizing the program and administering to the needs of our attendees. At the CLE she was ably assisted by **Debbie Reed**, HQ AMC, **Martha Zukos**, STRICOM, **Claudia Klus**, AMCOM and **Ed Frazier**, HQ AMC.

As always, the June editions of the Command Counsel Newsletter will highlight several parts of the CLE.

We include comments from some of the plenary speakers in this Newsletter edition.

Our Web Master, **Josh Kranzberg**, will be loading CLE handout materials and presentations on the AMC Command Counsel Web site for access by our readership.

We thank those who took the time to fill out the evaluation sheets and to make substantive comments on CLE Program design and format. **Steve Klatsky** has already sent out an e-mail to all heads of AMC legal offices reminding that the CLE planning is a year-long affair. During the course of the year, if you hear a good speaker or think of a good topic let us know immediately.

**CECOM** Receives the Command Counsel **Editor's Award** for significant contributions to the Command Counsel Newsletter--2 years in a row! Thanks again.

**Charles Blair-  
Atty of the Year**  
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**In This Issue:**

- CLE 2000 Highlights* ..... 1
- Ombudsman*..... 3
- Annual Attorney Awards Program* . 4
- Partnering Implementation Assessment Team* ..... 7
- Consequential Damages* ..... 8
- DOD Labor Relations Partnership*.. 9
- Earth Day Executive Orders* ..... 11
- Toxic Release Inventory Rep'ting*..12
- Ethics Trng-Use & Misuse* ..... 13
- AMC Commo Systems Policy* ..... 14
- Faces in the Firm*.....16
- Lexis Corner*.....18

# Heard at CLE 2000...

## **Ed Korte on the CG's Priorities...**

- People—Stabilize the Workforce
- Army Transformation
- Preserve AMC's Organic Base
- AMC Support's the Warfighter
- ADR—Partnering
- Logistics Modernization
- Strategic Sourcing—A-76
- HQ AMC Reorganiztrion
- HQ AMC Relocation
- Focus on Contract Delinquencies
- Ethics
- Acquisition Reform Implementation

## **BG Bob Barnes, Ass't Judge Advocate General on Litigation, Jurisdiction and the JAG Corps**

Litigation numbers are the same although the workforce is down 50%

ADR—Supporter—more in the future

Leverage IT knowledge to support litigation

Paperless litigation in 5 years

## **MG Chuck Mahan, AMC Chief of Staff:**

### **AMC is...**

**Army's Materiel  
Development Command**

**Army's Technology  
Command**

**MISSION: TO Maintain a  
Logistics Overmatch!**

Extraterritorial Jurisdiction Act of 2000: US Federal court jurisdiction over civilians, dependents and contractors. Military can arrest and detain civilians and bring them back to the US for trial.

Continuation Pay to deal with recruitment and retention issues.

## **Newsletter Details**

### **Staff**

*Command Counsel*  
Edward J. Korte

### *Editor*

Stephen A. Klatsky

### *Layout & Design*

Holly Saunders

### *Administrative Assistant*

Fran Gudely

### *Webmaster*

Joshua Kranzberg

The AMC Command Counsel Newsletter is published bi-monthly, 6 times per year (Feb, Apr, Jun, Aug, Oct and Dec)

Back Issues are available by contacting the Editor at (703) 617-2304.

Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to [sklatsky@hqamc.army.mil](mailto:sklatsky@hqamc.army.mil)

Check out the Newsletter on the Web at [http://www.amc.army.mil/amc/command\\_counsel/](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.

# From the AMC Ombudsman:

## Top 10 Responses From Federal Employees to Industry...

10. We always do it that way, it's the system.
9. If you do that (complaint/protest)it will delay the action and work against you.
8. We had a personnel cut—it will take a long time to look into that.
7. I share your concerns, but you'll have to take that to higher HQ.
6. This is caused by acquisition reform.
5. Direct your action to the KO, PM or...
4. Submit your complaint in writing.
3. You can file a protest or sue us.
2. That action did not get legal review.
1. It's not in the government's best interests.

## ...And What We Can Do

Set good example, help organization be open, responsive and professional.

Ensure complaints/requests are investigated and actions taken.

Don't assume government and industry have common understanding—communication

Actively promote just solutions.

Work to improve problem-solving process and the way we do business.

***The LEXIS  
Corner--A  
New Feature***

## List of Enclosures

1. Partnering Implementation Assessment Team (PIAT)
2. Consequential Damages-Federal Court Decision
3. Toxic Release Inventory Reporting
4. ELD Bulletin March 2000
5. ELD Bulletin April 2000
6. ELD Bulletin MAr 2000
7. Annual Ethics Training--Use & Misuse of Resources
8. AMC Communications Systems Policy
9. Gifts for Guest's of Honor

Check the Web for CLE 2000 Materials--Each Legal Office Attending CLE 2000 received 3 Disks with materials. Share please. Please share. Share please. Please share!!!!

pecial **CLE** edition

## **Charles Blair--**

### **Selected AMC Attorney of the Year**

The AMC Attorney of the Year Award is called the **Joyce I. Allen** Award. Joyce Allen was an attorney with the AMC legal office in St. Louis.

The Joyce I. Allen AMC Attorney of the year Award recognizes that individual in our community who exemplifies the highest professional standards in the quality of legal advice provided to clients in the Army Materiel Command and the United States Army. The recipient of this award epitomizes the attributes in the Command Legal Program philosophy of comprehensive legal support.

This year's nominees selected for special recognition, in alphabetical order, were:

**John Biffoni**, ARL, **Charles Blair**, AMCOM, **Vince Buonocore**, CECOM, **Larry Manecke**, OSC-Rock Island Arsenal, **Robert Maskery**, TACOM-W, **David Scott**, SBCCOM, **Denise Scott**, TACOM-ARDEC, **John Seeck**, OSC.

### ***Blair Selected***

During his 15 year career, Charles Blair has become a recognized expert in foreign sales and has expertly handled many complex, unique and precedent-setting cases in the government contracts arena.

As legal advisor for the Theater Army Maintenance Program, Charles recom-

mended using a multi-year, indefinite quantity contract, which has now become a standard for almost all maintenance and overhaul requirements.

He provided legal advice to the Saudi Arabian Foreign Military Sales Program at ATCOM in 1988, concerning the Blackhawk Program. Mr. Blair was 1 of 2 ATCOM officials requested by the Saudi's to provide in-country program status briefing to the Commander, Royal Saudi Arabian Land Forces Army Aviation Program.

In 1994 Mr. Blair volunteered to deploy to Saudi Arabia to support the AMC Logistics Support Element during Operation Vigilant Warrior. He spent 1 month providing legal support until replaced by an Army Judge Advocate.

When ATCOM was asked to furnish a lawyer to be part of an advance party to Redstone Arsenal, Charles volunteered and arrived in Huntsville 3-months before any other St. Louis personnel.

His early appearance was a great help to the transition and merger of the 2 legal offices. He worked closely with the Primary Move Coordinator, assisting in many important ways to provide information to his St. Louis colleagues, and preparing for the physical move and office relocation.

Charles' amiable likeability, intelligence, and willingness to do whatever was necessary were major factors contributing to the smooth transition.

Congratulations to Charles for setting an outstanding example for all of us.

pecial CLE edition

## **Pat Terranova--** **Managerial Excellence Award**

To honor the former Chief Counsel of the then named US Army Missile Command (predecessor to AMCOM) the AMC Command Counsel established the **Francis J. Buckley, Jr.** Award for Managerial Excellence in 1993. This award recognizes the AMC attorney who exemplifies the highest standards of management in leading members of the AMC legal community in accomplishment of a significant, long-term project or program.

This year we recognize the following nominees: **Beth Biez**, AMCOM, **Pat Terranova**, CECOM, **Dave DeFrieze**, OSC, **CPT Walter Parker**, CECOM.

### ***Terranova Selected***

CECOM's **Pat Terranova's** selection is based upon his sustained ex-

ceptional performance of supervisory duties and management of Business Law Division C, a truly unique and innovative organization within the CECOM Legal Office.

In November 1997, Pat was selected as Chief, Business Law Division C, an organization which consists of subordinate off-site CECOM Legal Office locations at Fort Belvoir, Virginia, Fort

Huachuca, Arizona, Alexandria, Virginia and Tobyhanna Army Depot, Pennsylvania.

Pat organized the newly established Division and implemented policies and procedures to effectively manage the diverse missions, workload, personnel and resources of this truly "virtual" organization.

## **Mike Walby--**

### **Command Counsel Achievement Award**

TACOM's **Mike Walby** has worked a complex and potentially precedent-setting employment law case that deals with novel reduction in force and whistleblower issues. The case started in 1995. The Merit Systems Protection Board ruled in favor of the complainant, TACOM ap-

pealed successfully to the full 3 member Board, and the employee appealed to the US Court of Appeals for the Federal Circuit, where the matter is now pending.

Several novel issues made this case particular sensitive, requiring extensive re-

search and coordination with officials at TACOM, HQ AMC and the Department of Justice.

The Achievement Award is unique in that candidates from AMC field legal offices are nominated by attorneys at HQ AMC.

# Special CLE edition

## Jack Glandon--

### **Preventive Law Program Award**

The Command Counsel Preventive Law Award recognizes the achievement that best exemplifies the philosophy of providing early legal advice and participation in the decisionmaking process so that the client has the benefit of counsel at the vital stage of a program or project.

This year the following counsel were nominated by their Chief Counsels: **Theodore Chupien**, CECOM, **Sam Shelton**, ARL, **Jack Glandon**, AMCOM, **Bradley Crosson**, OSC, **Terese Harrison**, OSC, **Violet Kristoff**, TACOM, **Denise Marrama** and **Paula Pennypacker**, CECOM, **SBCCOM's Legal Assistance Section**, and **Marina Yokas-Reese**, OSC.

### *Glandon Selected*

**Jack Glandon** from AMCOM is a Patent Attorney & member of the AMCOM General Law/Intellectual Property Law Division. He is recognized for his outstanding efforts in the area of legal review of proposed publicly accessible web sites.

During the last 2 years Jack has reviewed and pro-

vided substantive guidance and comment on over 150 proposed web sites to ensure compliance with copyright and trademark laws.

Mr. Glandon has created a preventive law program that includes intensive 1-on-1 training of PAO and Security Directorate personnel on the necessary and essential aspects of the review & created an extensive checklist for the benefit of the user community in creating web pages.

## **Team Project Award to SBCCOM--CSEPP**

Six Teams were nominated this year.

1) **SBCCOM**—Chemical Stockpile Emergency Preparedness Program (CSEPP) Guidebook & Workshop Team

2) **Anniston** Army Depot Legal/CPAC/EEO Roundtable Training Team.

3) **CECOM** and Ft. Monmouth Legal Services Tax Program.

4) **CECOM** Legal Team Supporting the Joint Tactical Radio System Program.

5) **AMCOM** Omnibus 2000 Program Team.

6) The **Operations Support Command** Acquisition Law Team.

SBCCOM's Team supported by **Ruth Flanders**, **Lisa Simon** and **Les Mason** was selected in recognition of the outstanding work in The project consisted of 3 main steps:

1) The team drafted a guidance manual on negotiating and drafting CSEPP MOAs and MOUs.

2) A CSEPP Workshop on MOAs and MOUs was held for

attorneys and emergency planners from the various interested agencies and municipalities.

3) Site-specific assistance in reviewing and revising MOAs and MOUs is being provided on as-needed basis.

The SBCCOM Team guidebook has been adopted by the Federal emergency Management Agency (FEMA) as a model approach to dealing with the complex issues surrounding CSEPP activities.

# Acquisition Law Focus

## Partnering Implementation Assessment Team (PIAT)

This summer a team led by **Ed Korte** and **Sallie Flavin** will review 3 Partnered programs each at CECOM, TACOM-W, STRICOM, AMCOM and OSC. The focus is to determine lessons learned, methods used and results attained in the use of Partnering. This Partnering Implementation Assessment Team (PIAT) will interview those industry and government personnel who are involved in the Partnering process, with the ultimate purpose of revising the AMC Partnering Guide to reflect real-life experiences.

Lead Partnering Champions at the MSCs will be the visit coordinator. Recently, each LPC was provided a list of 20 questions the PIAT will ask each Partnering participant interviewed (Encl 1):

### **The Decision to Partner:**

1. What motivated you to use Partnering (P) in this Program?
2. Who initiated the P effort?
3. Were both parties receptive to the idea of Partnering?
4. What was the first step taken to begin the P effort? When?
5. What role did the AMC P Guide play in the decision to P?

### **Facilitated Partnering Workshop:**

6. Did you use a professional P facilitator?
7. What did you do to locate the P facilitator?
8. Describe the initial P workshop?
  - a. How did you decide who should participate? Sub-contractors included?

- b. What was the length and cost?

- c. What P tools were developed during the P Workshop?

- d. Did you develop Metrics to track develops? What kind?

9. Were follow up P Workshops held?

10. What role did the P facilitator play after and/or between P Workshops?

### **Lessons Learned, Issues & Concerns:**

11. Describe "Lessons Learned": such as techniques used, ideas raised, policies and procedures utilized in the P effort.

12. What difficulties did you face in applying P?

13. How did you solve these problems?

### **Assessment:**

14. What is your personal assessment of P?

15. Describe successes and benefits derived from using P—time, money, resources, morale and other factors.

16. If you had it to do over, what would you do differently in applying P?

17. Would you use P again?

18. Now that you experienced P, what would you say to those who might be deciding whether to P?

19. What revisions to the AMC P Guide and P Model would you recommend?

20. How would you assess your command's support and commitment to P?

# Acquisition Law Focus

## Consequential Damages When Contractors Fail to Perform? *Yes!*

**ISSUE:** Can the Government recover consequential damages for contractors' failure to perform under Federal fixed priced or cost-reimbursable Inspection of Services provisions?

**ANSWER:** Yes, according to the U.S. Court of Federal Claims in Hamilton Securities Advisory Services, Inc. V. United States, 46 Fed. Cl. 164, Mar, 15, 2000; No. 98-169C.

OSC Acquisition Counsel **Dave Defrieze**, SN 793-8424, provides an excellent article focused on a recent court case that involved a contract to provide financial advisory support services to the Department of Housing & Urban Development (Encl 2).

The issue before the court was whether the Inspection of Services Clause - Fixed price (February 1992) provides the exclusive remedy and only possible source of damages for the parties. The court found that it did not, and permitted the Govern-

ment to pursue consequential damages.

Central to this decision was a determination as to whether the claim "arose under" the contract or whether the claim was "related to" the contract. A claim arises under a contract when the contract terms themselves provide for complete definable relief for the specific claim alleged. If the contract specifically provides for relief, then the claim is not a claim for breach of contract. Therefore, breach of contract damages are not allowable.

Accordingly, we should consider claims for consequential damages against contractors our who fail to perform (and possibly set them off as was done in the Hamilton case). Likewise, we should consider the potential for such claims against us should we not meet our duties under contract.

## AMC Protests Statistics

Comparison of case filings with the GAO and under the AMC-Level Protest Program during the October-April FY 99 and FY 00 timeframes:

### GAO:

FY 99--36  
FY 00--35

### AMC-Level

FY 99--11  
FY 00--14

### Total

FY 99--47  
FY 00--49

**Check the  
Web for AMC  
CLE Program  
Materials**

# Report on DOD Labor Management Partnership

# Its Performance Report

“Only by changing the nature of Federal labor management relations so that managers, employees, and employees’ elected union representatives serve as partners will it be possible to design and implement comprehensive changes necessary to reform Government.” (Executive Order 12871, 1993).

So opens the Report of the Examination of Partnership and Labor Relations in the Department of Defense, published on the internet at <http://www.cpms.osd.mil/fas/DPCReport/index.htm>.

We include a copy of the **Table of Contents** to this important compendium:

- Defense Partnership Council Members
- Dedication
- Table of Figures
- Introduction
- Executive Summary
- Methodology of Survey
- Chapter 1 - Characteristics and Causal Factors of Successful Partnerships

Chapter 2 - Improvements in Organizational Effectiveness Resulting from Partnership

Chapter 3 - Barriers to Partnership

Chapter 4 - Training and the Success of Partnerships

Chapter 5 - Unmatched Responses

Chapter 6 - Conclusions, Recommendations, and Next Steps

Appendix A - Survey Questionnaires

Appendix B - Methodology of Survey

Appendix C - Contributors to the Study and Report

Among the many memorable quotes in the study is the following:

“Across the Federal Government, labor and management are forming partnerships. By acknowledging their mutual interests and objectives, many former adversaries now work together as a united team with a common purpose and vision.”

The Federal Labor Relations Authority issued its FY 99 Program Performance report.

The Report addresses four broad goals. 1) providing high quality services that timely resolve disputes; 2) using alternative methods of dispute resolution and avoidance to reduce the costs of conflict; 3) maintaining internal systems that support programs needs — notably information technology systems; and 4) developing FLRA staff to ensure an effective organization with the flexibility to meet program needs.

You’ll learn that Office of General Counsel (OGC) reduced the number of overage representation cases from 51% in FY 1997 to 16% at the end of FY 1999; and that the Authority pretty much met the goal of increasing by 10% the number of decisions issued and reducing by 20% the number of cases pending Authority member decision over one year old.

You can also read the report on the Authority’s web page at [http://www.flra.gov/reports/annual199/annual\\_1999.html](http://www.flra.gov/reports/annual199/annual_1999.html)

## Employment Law Focus

# Executive Order Bars Discrimination Based on Parenthood--EO 11478

Executive Order 11478, as amended on 2 May 2000 bans discrimination against parents in the federal workforce, but does not create any new legal remedies.

Under the new Executive Order, parents cannot be discriminated against in any aspect of employment, including recruitment, referral, hiring, promotions, discharge, or training.

In addition, employers in the Executive Branch are prohibited from acting on the assumption that parents, or individuals with parental responsibilities, cannot satisfy the requirements of a particular job. The new law defines parental status expansively and applies to adoptive and foster parents, as well as biological parents and stepparents. The Office of Personnel Management is expected to provide further guidance.

## REDS Developments

In the six months since REDS was exported throughout AMC via the September 1999 REDS Training Program we have achieved much, to include recognition by Headquarters, Department of the Army as a Model ADR program for workplace disputes, and inclusion in the Office of Personnel Management Com-

pendium of Agency ADR Practices.

Additionally, we have made distribution of over 20,000 REDS brochures to AMC employees, so that they learn about the benefits of ADR and the component parts of REDS at a neutral time and place--before a dispute arises.

We have seen excellent support from Commanders and senior managers.

Without exception AMC labor unions have been very supportive of REDS objectives and focus on the future employment relationship.

If you have questions about REDS or the implementation of ADR for workplace disputes, contact **Steve Klatsky** at DSN 767-2304, [sklatsky@hqamc.army.mil](mailto:sklatsky@hqamc.army.mil).

# Environmental Law Focus

## President Issues Earth Day Executive Orders: **Greening of Government--** Transportation Issues Covered

On April 21 for Earth Day 2000, the President signed three new environmental Executive Orders:

### **Greening the Government**

(1) EO 13148-Greening the Government Through Leadership in Environmental Management,

### **Transportation Efficiency**

(2) EO 13150-Greening the Government through Federal Fleet and Transportation Efficiency, and

### **Federal Workforce Transportation**

(3) EO 13150-Federal Workforce Transportation. They are printed in the Federal Register on 26 April

2000, at 65 FR 24595, 24607, and 24613 respectively.

The Environmental Management Order promotes installation environmental management systems, environmental compliance audits, and pollution prevention.

The Fleet and Transportation Efficiency Order promotes the purchase of alternative and high fuel economy vehicles and recycled materials for vehicle maintenance.

Interestingly, the Federal Workforce Transportation Order directs Federal agencies to implement a transportation fringe benefit program offering qualified Federal employees the option to exclude from taxable wages their commuting costs incurred through the use of mass transportation and vanpools.

## Army Guidance Announced for Lead Hazards in Real Estate Transfers

On March 28 2000 Army issued its Guidance for Lead-Based Paint Hazard Management During Transfer of Army Real Property. It can be obtained on the Army Base Realignment and Closure Website <http://www.hqda.army.mil/acsimweb/brac/braco.htm>.

The Guidance applies to "residential real property, which includes property currently used for non-residential purposes, but for which there is a reasonable certainty that it will be used as residential property after transfer.

The Guidance implements the new DoD lead based paint guidelines for Disposal of DoD Residential Real Property-A Field Guide, also posted on the Army BRAC Website.

# Environmental Law Focus

## Does the Army Have A No New Landfill Policy?

Yes, sort of.

A 1991 Assistant Chief of Engineers policy memo indicated that Army policy would prohibit any new landfills where a regional system exists.

The revised AR 420-49 does provide a procedure for approving new landfills or expansion of existing ones, but only after all other alternatives have been explored.

So, it may be a very cold day in \*\*\* before any new solid waste landfills are approved. Taking together with the emphasis on privatizing Army utility functions, the preferred approach is to have a government agency take over ownership of any Army landfills, with the Army receiving favorable rates that reflect our contributions to the regional system.

## Final Toxic Release Inventory Reporting for Ranges

On April 4, 2000 DoD issued its final Guidance on Applying the Emergency Planning and Community Right-to-Know Act (EPCRA) Toxic Release Inventory Requirement to Ranges, (Encl 3).

This final guidance supplements earlier DoD guidance issued in March 1995, June 1996, and March 1998.

It applies to any designated area set aside, managed, and used to conduct research on, develop, test and evaluate military munitions and explosives, other ordnance, or weapon systems, or to train military personnel in their use and handling.

As the guidance notes, DoD ranges are unique, making application of EPCRA reporting difficult.

## Environmental Differential Pay-- Notification re Grievances

You are asked to notify AMCCC's Employment Law Team in the event a grievance on environmental differential pay is filed. There are both environmental and employment law issues inherent in these type of cases.

### 3 ELD Bulletins

Environmental Law Division Bulletins for March 2000 (Encl 4), April 2000 (Encl 5) and May 2000 (Encl 6) are provided for those who have not received an electronic version from ELD or who have a general interest in Environmental Law.

# From the Command Counsel--Annual Ethics Training for 2000: Use & Misuse of Resources...

**T**he Federal Government's ethics program requires one-hour of ethics training each year for those employees who file Public (SF 278) or Confidential (OGE Form 450 or OGE Optional Form 450-A) Financial Disclosure Reports.

The training must be "verbal" this year for all employees; there is no option for a "written" briefing for the Confidential filers. We are to remind these employees of their responsibilities under part I of Executive Order 12674, as modified, the conflict of interest statutes (18 U.S.C. §§ 201 - 209), the Standards of Ethical Conduct (5 C.F.R. Part 2635), and the DoD Joint Ethics Regulation (DoD 5500.7-R). We also ensure that they know who their ethics officials are, who will help them apply these laws and regulations to their personal situations.

In addition, we normally focus on a particular aspect

of these rules, and make this the primary subject of our training. For CY 2000, I encourage you to adopt the following: ***Use and Misuse of Government Resources***, with special attention given to Government computers, e-mail, and Internet access.

**Mike Wentink** and I already presented this training to about 70 of your SES/ST employees at the SES Executive Roundtable on 1 May. It was a resounding success. It is not surprising that there was considerable interest in this timely topic. We encouraged the attendees to also attend the training that you, their local Ethics Counselors will present, because their presence at such events is an important demonstration of leadership support to the workforce.

In addition, we urged them to have as many of their employees attend as possible — not just the "filers." The fact of the matter is that whether or not employees file

a financial disclosure report, and whether or not they attend ethics training, they are held accountable for compliance with all of the ethics rules and standards of conduct.

Unless you determine that your command requires another topic, please present the ***Use and Misuse of Government Resources*** training this year. I look forward to the synergy created by across-the-board training on this topic in AMC. A training package that you can build on will be sent to all AMC Ethics Counselors shortly after our CLE program in Orlando.

### **EDWARD J. KORTE**

This memo to the AMC Chief Counsels, dated 18 May 2000 is enclosed for your use (Encl 7).

# Ethics Focus

## ...And Ethics Training Material

At the AMC Annual CLE program **Ed Korte** advised the Chief Counsels that the preferred subject matter for this year's training in AMC is "Use and Misuse of Government Resources," with emphasis on Government computers, e-mail and internet access. The memorandum that he presented to the Chief Counsels is enclosed in this Newsletter.

**Mike Wentink** has sent to Ethics Counsel a supportive slide show for your use. Make sure that, after you open the file, hit "View" and then select "Notes page" where Mike provides additional information for most of the slides.

Mr. Wentink says: "Actually, all you have to do is to change some names, and you are set to go. But, you should find the training package to be flexible enough for you to adjust things to meet your specific needs. If you actually use the slides for handouts, I recommend that you hold back the "answer" slides until you are finished".

Another possible hand-out is a question and answer sheet for the attendees to keep track of their answers, also sent out to AMC Ethics Counsel. Finally, Mike suggests that you hand out YES/NO answer cards that the audience can use to vote on the various questions.

Other materials of import to your executing the Ethics Training include AMC CG's Policy #97-08 (Pol97-08.doc), and whatever local policy that might also exist.

There is also a slight change that was issued on 23 Feb 99, but I don't have it in electronic format. You should be able to obtain that from your DOIM.

In addition, don't forget the HQ AMC (AMCIO-F) 9 Oct 98 memorandum concerning additional guidance on the use of cell phones. We don't have this in electronic format, but mention it so that you can obtain it from your DOIM if you don't already have a copy.

## AMC Communications Systems Use Policy--For Official Use Only!

Although dated 1997 we provide an excellent memorandum describing various "for official use" only requirements pertaining to government communications systems (Encl 8).

"Official use" includes communications, including the Internet, that are necessary in the interest of the Federal Government, as well as emergency communications.

"Authorized personal use" include incidental use of communications, including the Internet, as authorized by this policy memorandum or as specifically authorized by supervisors using guidelines issued under this memorandum.

The memorandum highlights several examples and standards that we all should be aware of and to which we must comply.

## Ethics Focus

# Metallica--A Case Study in Computer Misuse

This year's Ethics Training theme is "Use and Misuse of Government Resources" with emphasis on our Government-provided computers, e-mail accounts, and internet access. Here is an example of a potential misuse that creates significant security concerns, and which is an abject lesson of the fact that there is no such thing as anonymity in cyberspace.

It seems that there is software out there that permits individuals to share music on-line by permitting the users to access, search, and download music from each others hard drives!

Wow! I don't know how good our firewalls are, but can you imagine our employees letting whoever wants to come in and search their harddrives and download music? That's like letting any member of the public who has an interest in music to visit our offices at any time, whether we are around or not, and see if they can find our personal CDs that we keep in our drawers... what a security nightmare!

Then there is the part about the lack of anonymity!

This makes the paper because the heavy-metal band

Metallica was upset about the violation of its copyright by many thousands of people. So, one weekend, it hired someone to do some internet sniffing of just one of the software services, and identified more than 335,000 individuals who were allegedly violating the band's copyrights by unlawfully sharing its songs over the internet! The band has now sued the makers of the software for copyright infringement and racketeering. I wonder what the potential liability is of these 335,000 persons (and their employers, if they were doing this from work?) Right now, the band is demanding that the software company block all of these persons from using this service any further. Not very anonymous, is it.

Just something else to worry about... but, I suggest that it is a good teaching point. When we are sending e-mail and surfing out their in cyberspace, we leave little puppy tracks that lead back to us and to our employer!

Here is the link:

[http://dowjones.wsj.com/  
i / l a w /  
SB957292964164971320-d-  
industry-c1-law.html](http://dowjones.wsj.com/i/law/SB957292964164971320-d-industry-c1-law.html)

# Gifts for Guest's of Honor

From **Mike Wentink**, AMC Ethics Team Chief:

"Here is the situation posed to me:

Officers of a particular branch (e.g., Signal Branch) are hosting a formal ball at an installation. They have invited a senior Signal Corps officer (3-star General Officer (GO) not in their chain of command) to attend as the Guest of Honor and Speaker. They want to pay the cost of the Guest Speaker's attendance and also to present a nice token of their appreciation. They are looking at such possibilities as: a crystal clock with pictures of the locality etched in, set into a marble base (about \$50); a crystal eagle for \$35; and a crystal multi-tiered knick-knack with the division patch. They figure that there surely should not be any problem if it is the senior GO who is the Guest Speaker because he is not in their chain of command.

The local Ethics Counselor asked for my thoughts. This is how I analyzed the situation".

To check Mike's analysis we provide the narrative for you (Encl 9).

# Faces In The Firm

## Arrivals Departures Promotions

### AMCOM

Welcome to **CPT Veronica Rodriguez** and **1LT Erick S. Ottoson**, who have joined the Office of Staff Judge Advocate. **CPT Rodriguez** comes to us from Korea while **1LT Ottoson** has just completed the basic course at Charlottesville, VA.

### OSC--Tooele

**F. Gil Brunson** has joined the Tooele Army Depot Legal Office. Gil is a former **LTC** in the JAG Corps with considerable experience in military law and installations.

### OSC--Sierra

**William Bradley**, Environmental/Safety Law Team, and his wife, Linda, are heading for Sierra Army Depot. We certainly will miss them – after all, Bill's been at Rock Island for a hundred years!!! Good luck!

### CECOM

**SFC Ursula Freeman** has joined the SJA Division as the Chief Legal NCO. She arrived from a position as a Court Reporter in Korea.

### CECOM

**LTC Diana Moore**, SJA will PCS to the Standards of Conduct Office, OTJAG. Her replacement is **LTC Donna Wright** who was a Military Judge in Germany.

**CPT Frances Martellacci** left the Army for a position as a Legal Clerk, U.S. Magistrate Judge, in Newark, N.J.

**SGT Donnie Lipsey**, Legal NCO and NCOIC of the Tax Center, left the Army. He plans to continue his education in Iowa.

### OSC

**CPT Humphrey Johnson**, TEAD will be departing for private practice in Maine.

**Major Gene Baime** left the OSC, Environmental/Safety Law Team, for the JAG School

### TACOM/ARDEC

**Robert C. Hennessy**, Attorney Advisor retired on April 28 after 20 years of service with the Picatinny legal office. His specialty for most of that time was environmental law.

### AMCOM

**CPT John L. Faris, III** was promoted on 1 June 2000.

### CECOM

**Marla S. Flack** was promoted to Procurement Analyst, GS-1102-13.

## Births

**CPT Walt Parker** and his wife, Laurie, celebrated the birth of their new daughter, Amber McKenzie Parker, on 19 May 2000, with brother Alec excited about the new arrival. Amber weighed in at 8 pounds, 6 ounces and was 20.5 inches long.

# Faces In The Firm

## Awards & Recognition

### ARL

**Patrick J. Emery** received a Special Act Award for his participation in the Electromagnetic Gun (E-Gun) Program. The E-Gun Program is the largest section 845 prototype agreement awarded by the Army and was awarded in May 2000.

### AMCOM

We are all very proud of our two AMC CLE Award recipients. Congratulations to **Charles Blair**, who received the Joyce I Allen Attorney of the Year Award and **Jack Glandon**, who received the Preventive Law Award.

### HQ AMC--New Jobs

**Lisa Simon** has assumed a new position as Technology Attorney responsible for areas such as Trademark, Copyright, Computer Law and E-Commerce.

**Cassandra Johnson** is the new Office of Command Counsel Fiscal Law counsel.

### CECOM

**Richard C. McGinnis** received the Commander's Award for Civilian Service for his outstanding service as Project Counsel for three of the largest information technology source selections conducted by the CECOM Acquisition Center-Washington: Infrastructure Solutions-1; Personal Computers-3 and Portable Computer-3, the combined estimated value of which exceeds \$775M

**Robert E. Dudley, Jr.** received the Achievement Medal for Civilian Service for his outstanding service as Project Counsel for the 100 kilowatt (kW) and 200 kW Tactical Quiet Generator source selection conducted by the CECOM Acquisition Center. Largely as a result of his efforts, to include the successful defense of three bid protests, this procurement, valued at \$85-100M, was completed in a timely manner.

### CECOM

**Guy Rayner** received the Commander's Award for Civilian Service for his expert procurement knowledge, skills and efforts that contributed greatly to the development and successful accomplishment of CECOM's competition goals to include his development of desktop management information tools used within the Competition Management Division of the Legal Office.

**Garrett E. Nee** received the Commander's Award for Civilian Service for his efforts that contributed greatly to enhanced industry awareness of acquisition opportunities, by developing a systemic process to post a listing of planned requirements for spare parts on the CECOM Acquisition Business Opportunities Page.

## EXCITING NEWS FROM LEXIS/NEXIS

### Editors Note

We hope you enjoy this new Command Counsel Newsletter feature,

Thanks to **Rachel Hankins** of LEXIS for contributing important information to make our legal research user friendly.

If you have questions or have information on your use of technology to support your legal practice, please consider sharing it with our readers.

Contact **Steve Klatsky**, HQ AMC at DSN 767-2304, [sklatsky@hqamc.army.mil](mailto:sklatsky@hqamc.army.mil)

Did you know you have access to LEXIS-NEXIS via your Web browser (Netscape or Internet Explorer)?

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- Quick access to frequently used sources and services

- Information about LEXIS-NEXIS (resources, training, literature, What's New, FAQ's)

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This web page has been specifically customized for Army Materiel Command legal personnel and is intended to be a true time saver in your information gathering process. Bookmark it today at <http://www.lexis-nexis.com/amc>.

# Partnering Implementation Assessment Team

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## Questions for AMC Partnering Program Practitioners

### **The Decision to Partner:**

1. What motivated you to use Partnering (P) in this Program?
2. Who initiated the P effort?
3. Were both parties receptive to the idea of Partnering?
4. What was the first step taken to begin the P effort? When?
5. What role did the AMC P Guide play in the decision to P?

### **Facilitated Partnering Workshop:**

6. Did you use a professional P facilitator?
7. What did you do to locate the P facilitator?
8. Describe the initial P workshop?
  - a. How did you decide who should participate? Subcontractors included?
  - b. What was the length and cost?
  - c. What P tools were developed during the P Workshop?
  - d. Did you develop Metrics to track develops? What kind?
9. Were follow up P Workshops held?
10. What role did the P facilitator play after and/or between P Workshops?

**Lessons Learned, Issues & Concerns:**

11. Describe "Lessons Learned": such as techniques used, ideas raised, policies and procedures utilized in the P effort.
12. What difficulties did you face in applying P?
13. How did you solve these problems?

**Assessment:**

14. What is your personal assessment of P?
15. Describe successes and benefits derived from using P--time, money, resources, morale and other factors.
16. If you had it to do over, what would you do differently in applying P?
17. Would you use P again?
18. Now that you experienced P, what would you say to those who might be deciding whether to P?
19. What revisions to the AMC P Guide and P Model would you recommend?
20. How would you assess your command's support and commitment to P?

ISSUE: CAN THE GOVERNMENT RECOVER CONSEQUENTIAL DAMAGES FOR CONTRACTORS' FAILURE TO PERFORM UNDER FEDERAL FIXED PRICED OR COST-REIMBURSABLE INSPECTION OF SERVICES PROVISIONS?

ANSWER: YES, ACCORDING TO THE U.S. COURT OF FEDERAL CLAIMS IN HAMILTON SECURITIES ADVISORY SERVICES, INC. V. UNITED STATES, 46 FED. CL. 164, MAR, 15, 2000; NO. 98-169C.

FACTS: Hamilton was awarded a contract to provide financial advisory support services to the U.S. Department of Housing and Urban Development (HUD). As part of this contract Hamilton was to recommend "alternative methods for structuring the mortgage sale and pricing options to maximize loan sale proceeds to HUD". Id., at 166. To support this requirement, Hamilton's subcontractor ran a computer program to help the optimize the combination of bids. Unfortunately, the "optimization model" made a slight error in calculations, resulting in HUD receiving less than the maximized loan sale proceeds.

Hamilton's contract was ultimately terminated for convenience, and the government had not paid the final invoice amount to Hamilton. Instead HUD's PCO issued a demand letter for the amount of losses the Government suffered due to Hamilton's errors. Hamilton filed a claim for the unpaid invoice amount. The Government counter-claimed under two theories: 1) Hamilton breached its contract resulting in damages, and 2) Hamilton made negligent misrepresentations relating to the group of bids that would yield the maximum sales proceeds.<sup>1</sup>

The issue before the court was whether the Inspection of Services Clause - Fixed price (February 1992) provides the exclusive remedy and only possible source of damages for the parties. The court found that it did not, and permitted the Government to pursue consequential damages.

Central to this decision was a determination as to whether the claim "arose under" the contract or whether the claim was "related to" the contract. A claim arises under a contract when the contract terms themselves provide for complete definable relief for the specific claim alleged. If the contract specifically provides for relief, then the claim is not a claim for breach of contract. Therefore, breach of contract damages are not allowable.

The court here found that the Inspection of Services clause did not provide complete relief, intend to be the exclusive remedy, for the damages suffered by the Government. The court found two types of damages suffered: 1) the reduced value of the services

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<sup>1</sup> The court dismissed the Government's tort counterclaim under the "economic loss" rule. This rule basically states that "a plaintiff who suffers only pecuniary injury as a result of another cannot recover those losses in tort. Instead, the claimant is limited to recovery under the law of contract." Id., p176; Apollo Grp., Inc v. Avnet, Inc, 58 F.3d 477, 479 (9<sup>th</sup> Cir. 1995).

performed by Hamilton, and 2) the consequential shortfall in proceeds from the mortgage auctions.

The first category could be addressed by the inspection clause, wherein the Government could "reduce the contract price to reflect the reduced value of the services performed" (FAR 52.246-4 (February 1992)). This means that the Government could recover under the clause the contractor's cost of running the "optimization" program, but couldn't recover the consequential loss of mortgage proceeds.

Because the clause provided for no remedy for the consequential losses, and because there was no language in the contract indicating that the Inspection of Services remedies were intended to be exclusive, the court found the government entitled to damages for breach.

The damages allowed were stated as those damages which "should place the injured party in as good a position as he or she would have been had the breaching party fully performed."

Here the court looked to the "expectancy damages" sought by the Government (HUD's expected revenue). The court stated "expectancy damages, including lost profits, are recoverable, so long as they are either actually foreseen or reasonably foreseeable, are caused by the breach of the promisor, and are proved with reasonable certainty."

**APPLICATION TO COST REIMBURSEABLE CONTRACTS:** While this case focused on the Inspection of Services clause for a fixed priced contract, it would seem that the court's reasoning would apply equally well on a cost reimbursable contract. The language of the Inspection of Services - Cost Reimbursement clause (FAR 52.246-5) is similarly limited to addressing the loss of value of the services rendered rather than consequential or expectancy damages.

The clause states:

"(d) If any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, the Government may--

- (1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and
- (2) Reduce any fee payable under the contract to reflect the reduced value of the services performed.

(e) If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, the Government may--

- (1) By contract or otherwise, perform the services and reduce any fee payable by an amount that is equitable under the circumstances; or
- (2) Terminate the contract for default."

None of this language indicates intent to limit other damages or that this clause be the exclusive remedy for failure to perform.

Accordingly, we should consider claims for consequential damages against contractors our who fail to perform (and possibly set them off as was done in the Hamilton case). Likewise, we should consider the potential for such claims against us should we not meet our duties under contract.

POC is Mr. David C. DeFrieze, Attorney-Advisor, U.S. Army Operations Support Command (OSC) (PROV), DSN 793-8424, e-mail: defriezed@osc.army.mil.

# **DOD Guidance on Range TRI Reporting**

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY (ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)

DEPUTY ASSISTANT SECRETARY OF THE NAVY (ENVIRONMENT AND SAFETY)

DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)

DIRECTOR, DEFENSE LOGISTICS AGENCY

**SUBJECT:** Guidance on Applying the Emergency Planning and Community Right-to-Know Act (EPCRA) Toxic Release Inventory Requirements to Ranges

We are pleased to provide the attached final DOD guidance for applying EPCRA Toxic Release Inventory requirements to ranges. This guidance supplements the March 1998 guidance on applying EPCRA to munitions related activities and closes the final gap in our EPCRA policy for munitions activities.

Please distribute this guidance to all commands and installations within your organization. My point of contact is Mr. Eric Spillman (703) 604-1732, email: spillmer@acq.osd.mil.

Sherri W. Goodman

Deputy Under Secretary of Defense (Environmental Security)

**MARCH 2000**

**Updated Guidance**

**EPCRA Compliance for Ranges)**

**Note: This Guidance Supplements DOD's March 1995, June 1996, and March 1998 Guidance**

## **Introduction**

Executive Order 12856, "Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements," requires federal facilities to comply with the Toxic Release Inventory (TRI) reporting requirements of the Emergency Planning and Community Right to Know Act (EPCRA). The Executive Order (EO) states "the Federal Government should be a good neighbor to local communities by becoming a leader in providing information to the public concerning toxic and hazardous chemicals."

Executive Order 12856 requires Federal facilities to reduce EPCRA TRI releases by 50percent from those reported in the baseline. Future Executive Orders on EPCRA TRI will likely include similar reduction goals. Although DOD has reduced the use of toxic chemicals in some ammunition, further significant reductions of toxic chemicals may not be possible without adversely affecting training and readiness. Thus, for any EPCRA TRI reduction goals, DOD will include only those munitions activities associated with the manufacture of munitions. DOD will meet any collective TRI reduction goals for all its activities by allocating the reductions that would have been required of munitions activities excluded by this policy to other programs. DOD will also continue its efforts to identify and reduce the use of toxic chemicals in ammunition through the acquisition process.

## **Installation Reporting**

Activities conducted on DOD ranges are unique, making application of EPCRA difficult. Most DOD ranges are large areas with few or no structures. As a matter of policy, DOD installations shall apply existing EPCRA definitions, exemptions, and thresholds to determine which ranges will be subject to TRI reporting. EPCRA Section 313's employee work hour and toxic chemical thresholds applicable to range activities will not be included in the employee work hour and toxic chemical thresholds applied to any other contiguous non-range activity. If a

TRI report is required, DOD installations will aggregate and report the releases from all reporting DOD ranges at a given site owned or operated by a DOD Component.

## Employee Threshold

A range with fewer than ten full time employees or full time equivalents (20,000 employee work hours) is not required to do TRI reporting. For determining employee work hour threshold for ranges, DOD will calculate the work hours on a given range by adding up the time spent by employees, including contractors, working on the range. Employees working on the range are persons who spend time on the range and whose responsibilities include operating, managing, or maintaining the range. (Examples of such employees are target construction and maintenance crews, contractors or military personnel who perform range clearance sweeps or clean-up activities, and natural resources managers.) Civilian and military personnel conducting training or testing on or over ranges, including those bivouacking on ranges as part of training, do not count toward the employee work hour threshold.

## Release Reporting Thresholds

The following are examples of activities on a range that are subject to chemical threshold determinations and release reporting:

- a) Munitions used in training (e.g., target practice, live fire exercises, aerial bombing, obscurant and smoke training, burning of unused propellant, etc.),
- b) Destruction of munitions on a range (e.g., range clearance or sweep operations, explosive ordnance disposal emergency or training operations, s, etc.).

## Unexploded Ordnance

For purposes of threshold determinations and release reporting, installations should assume that all munitions used on the range will function as intended (i.e., the dud rate will be considered as zero) and all energetics will detonate or burn as designed.

## Application of EPCRA Exemptions to Ranges

- a) Activities in laboratories (40 CFR 372.38(d)): In many cases, DOD ranges are the only laboratories suitable for munitions or weapons research, development, testing, and evaluation (RDT&E). DOD conducts RDT&E activities on DOD ranges under the supervision of technically qualified individuals. Therefore, range activities related to RDT&E of new or existing munitions, weapons systems, and platforms are exempt from threshold determinations and release reporting under this exemption.
- b) Personal Use (40 CFR 372.38(c)(3)): Non-military training or other munitions use activities conducted on DOD ranges (e.g., recreational hunting, Rod and Gun Club events, etc.) are exempt from threshold determinations and release reporting under the personal use exemption.
- c) Structural Use (40 CFR 372.38(c)(1)): Toxic chemicals in targets are exempt from threshold determinations and release reporting under the structural use exemption.

## Implementation

DOD Installations will begin reporting range releases to EPA by July 1, 2002 for calendar year 200 1.

## QUESTIONS, ANSWERS, AND DEFINITIONS

The following questions and answers provide interpretive guidance for applying EPCRA to ranges.

1. What is the definition of the term "munitions" as used in this guidance, and what types of items are included?  
ANSWER: "Munitions" in this guidance is based on the definition of the term "military munitions" found at 40 CFR 260.10. In general, the term includes propellants, explosives, pyrotechnics, chemical weapons, incendiaries,

and smokes in bulk form and in various munitions items. It also includes non-nuclear components of nuclear devices. The term does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices and nuclear components thereof.

2. What is the definition of the term "range" as used in this guidance?

ANSWER: The definition of the term "range" is based on the definition of the term found at 40 CFR 260.10. The term means: a designated area set aside, managed, and used to conduct research on, develop, test, and evaluate military munitions and explosives, other ordnance, or weapon systems, or to train military personnel in their use and handling. Ranges include firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, and buffer zones with restricted access and exclusionary areas. The definition of a military range does not include airspace, or land areas underlying airspace used for training, testing, or research and development where military munitions have not been used.

3. What toxic chemicals in munitions should be considered? What munition constituents are NOT EPCRA toxic chemicals?

Examples of munitions constituents that are EPCRA toxic chemicals:

- \* Energetics: nitroglycerin, aluminum powder, barium and lead compounds, 2,4 DNT (as an impurity)
- \* Structural: chromium in steel alloys, lead projectiles, copper in brass
- \* In addition, minute quantities of certain VOCs and SVOCs may be manufactured incidentally due to incomplete combustion during detonation or burning, for example: propane, acetylene, benzene, and toluene

Examples of munitions constituents that are NOT EPCRA toxic chemicals (therefore need not be reported):

- \* Energetics: TNT, RDX, HMX
- \* Structural: Aluminum metal (as opposed to aluminum powder), or iron.

4. What thresholds apply to basic munitions operations (firing of artillery, dropping of bombs from aircraft, naval gunnery practice, etc.)? What releases should be reported if the threshold(s) are exceeded?

Answer: As a matter of DOD policy, all ranges at an installation constitute a single EPCRA "facility" for TRI reporting purposes. The intended use of munitions on a military range, when those munitions contain toxic chemicals results in the "otherwise use" under EPCRA of toxic chemicals contained in those munitions. Any toxic chemicals present in the munitions count toward the calendar year "otherwise use" threshold of 10,000 pounds. "Manufacture" under EPCRA includes toxic chemicals produced by munitions functioning as intended on a military range. Toxic chemicals produced by the functioning of munitions on DOD ranges count toward the calendar year manufacture threshold of 25,000 pounds. If either threshold is exceeded for a toxic chemical, releases, onsite waste management, and offsite transfers of that toxic chemical must be determined and reported in accordance with EPCRA and DOD policy for the range "facility."

Example: Over the course of a calendar year, training units fire 150,000 rounds during artillery exercises on a given range. For illustrative purposes, assume each round contains 0.10 pounds of Toxic Chemical A and produces 0.0001 pounds of Toxic Chemical B when it functions as intended. In this case, the total amount of Toxic Chemical A "otherwise used" would be 15,000 pounds, which exceeds the otherwise use threshold. The total amount of Toxic Chemical B "manufactured" would be 15 pounds, which does not exceed the manufacture threshold. Therefore, the amount of Toxic Chemical A released would have to be determined and reported on the Form R for the range "facility," but the amount of Toxic Chemical B released would not have to be reported. For both toxic chemicals, the threshold determinations must be documented, maintained, and available for environmental regulators.

5. In the conduct of range operations not all ordnance explodes. How should this fact be handled for EPCRA purposes?

Answer: For EPCRA purposes, DOD is assuming that all munitions function as intended. The relatively low "dud" rate of less than 10 percent for most munitions makes it impracticable to attempt to capture and report individual duds, particularly when EPCRA allows for estimations. Even so, DOD is capturing data regarding the on-range destruction of munitions, as might occur during range clearance activities. DOD acknowledges that some double counting might result (i.e., counting a "dud" when fired, and then again when detonated as part of range clearance activities). However, this double counting will result in an insignificant increase in release amounts. The added

administrative burden associated with trying to determine if range clearance activities involve a recently fired (and therefore already counted) munition or a dud from years ago (and therefore not counted) is unwarranted. Because EPCRA allows for estimations, trying to determine the dud rate for each type of munition, subtracting out the "dud" munitions blown in place, and then conducting separate release calculations is unnecessarily complex.

6. What procedures and requirements are necessary to qualify for the laboratory exemption?

Answer: Toxic chemicals in munitions used as part of a RDT&E program can be exempted from threshold determinations and release reporting. RDT&E programs must have clear plans and procedures for the use of munitions (e.g., a test plan). The use of the munitions in the RDT&E program must also be under the supervision of a technically qualified individual. The plans and procedures should be available (in accordance with any classification restrictions) to environmental regulators to establish that the munitions being used are part of a valid RDT&E program.

7. What are some examples of munitions use on DOD ranges that would qualify for the laboratory exemption?

Answer: Examples of range activities that qualify for the laboratory exemption include: research and development of new weapons systems, testing the performance of a modification to an existing weapon system for quality control, and evaluating the effectiveness of an aging stockpile item. In each case, the requirements outlined in answer #6 above must be followed.

8. What are some examples of munitions use on DOD ranges that would NOT qualify for the laboratory exemption?

Answer: Testing new troop deployment schemes and evaluating new maneuver tactics are examples of range activities that do not qualify for the laboratory exemption. If these activities use munitions, toxic chemicals in the munitions must be included in threshold determinations and release reporting.

**THE ENVIRONMENTAL LAW DIVISION  
BULLETIN**

March 2000

Volume 7, Number 3

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

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**Where Does TSCA End and CERCLA Begin?  
*Be All That You Can PCB***

Ms. Kate Barfield

**Question:** When can a PBC<sup>1</sup> cleanup be handled under the risk-based approach of the Comprehensive Environmental Response, Compensation, and Liability Act,<sup>2</sup> (CERCLA), instead of the Toxic Substances Control Act<sup>3</sup> (TSCA)'s numerical cleanup standards?

**Why Think About This:** CERCLA promotes the notion that cleanup standards should be based on risk and site-by-site assessments. TSCA invokes the idea of numerical standards -- clean to a certain level, unless there is a reason not to. So, suppose you are in the midst of a CERCLA cleanup and among the types of contamination to be addressed are PCBs. Which approach do you take -- the risk-based CERCLA option or a blanket application of TSCA's numerical standards?

The answer will depend on the facts of the cleanup. Should you have the proper type of site -- say, one with little likelihood of residual environmental impact -- the EPA may permit a CERCLA-esque risk-based approach. Since your decision will be fact driven, here is some background to assist you to determine the appropriate course of action.

**TSCA and PCBs:** The scope of TSCA and its definitions is extraordinarily broad.<sup>4</sup> The bulk of TSCA's key requirements apply to persons who

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<sup>1</sup> Polychlorinated biphenyls. This substance was once commonly used in electrical transformers and capacitors.

<sup>2</sup> 42 U.S.C. § 9601, *et. seq.*

<sup>3</sup> 15 U.S.C. § 2601, *et. seq.*

<sup>4</sup> The EPA's authority under TSCA is focused on the ability to require the following:

manufacture and process chemical substances that are distributed into commerce. TSCA § 2605 authorizes EPA to prohibit or limit the manufacture, processing, distribution, use or disposal of chemical substances found to present an unreasonable risk of injury to health or the environment. The EPA has sought to expand its authority to regulate specific substances, such as PCBs. In particular, TSCA § 2605(e)(1) requires that the EPA Administrator promulgate rules for the disposal of PCBs, which led to the development of the PCB Mega Rule.<sup>5</sup> Note that although TSCA does not generally apply to federal agencies, DoD has been made subject to TSCA by Executive Order and DoD policy.<sup>6</sup>

**The PCB Mega Rule on TSCA and CERCLA:** The PCB Mega Rule outlines PCB cleanup requirements, but does not say how TSCA will interface with CERCLA (hazardous substance cleanups) or RCRA<sup>7</sup> (hazardous waste corrective actions).<sup>8</sup> What it does say is this:

- 1) TSCA does not affect the applicability of other laws, such as RCRA and CERCLA.
- 2) When more than one requirement may apply, the more stringent approach must be taken.<sup>9</sup>

- 
- (a) Inventory of Chemical Substances.
  - (b) Reporting and Recordkeeping Requirements.
  - (c) Import and Export Requirements.
  - (d) New Chemical Review and Premanufacture Notices.
  - (e) Testing of Existing Chemicals.
  - (f) EPA authority to refer responsibilities to other agencies.
  - (g) Direct Regulation of Existing Chemical Substances.

<sup>5</sup> See generally, 40 C.F.R. Part 761.

<sup>6</sup> Executive Order 12088, Federal Compliance with Pollution Control Standards (13 Oct. 78), and Department of Defense Instruction 4715.6, Environmental Compliance (24 April 96).

<sup>7</sup> The Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et. seq.*

<sup>8</sup> See, 40 C.F.R. Part 761, Subpart G. Look in vain for more guidance. TSCA's Section 2608, entitled "Relationship to other Federal laws," was intended to prevent overlap and unnecessary duplication of toxic substance regulation. This looks hopeful -- at first. But, this Section mainly provides the EPA with guidelines on how it can refer duties to other agencies. It provides little help on how to resolve conflicts among regulatory approaches.

Likewise, few cases craft a line between TSCA and CERCLA. Instead, Courts seem to assume that the two laws would work seamlessly together. In fact, the bite of specific TSCA penalties often finds its origin in CERCLA's notion of strict and joint/several liability. Meaning that TSCA relies on CERCLA's overarching reach to bring in and hold liable parties to deal with past contamination. As such, little conflict is anticipated between CERCLA and TSCA. See for example, Reading Co. v City of Philadelphia, 823 F. Supp. 1218 (D. Pa 1993).

<sup>9</sup> 40 C.F.R. § 761.120(e)(1).

The Mega Rule goes on to say that RCRA corrective actions and CERCLA remediation may result in "different outcomes" from the traditional TSCA approach to PCB spills.<sup>10</sup> But, the Rule does not provide any further details on how to resolve conflicts among regulatory approaches -- other than to advise taking the stricter approach.

This implies that TSCA's fairly strict numerical approach -- one cleans to preset levels -- should be favored over a more flexible, site-by-site consideration of risk. But the Mega Rule anticipates that a risk-based (CERCLA-type) approach may be quite appropriate for certain types of PCB cleanup. So what's a responsible party to do?

First, look at TSCA's Mega Rule. If your remediation lends itself to a risk-based cleanup, you may be able to use a more flexible approach. (Note that large cleanups involving high levels of PCBs may require strict adherence to TSCA's numerical standards.) Here are your options:

**PCB Cleanup Approaches:** TSCA's Mega Rule anticipates different approaches to remediation, including the use of risk-based standards. These options are:

- 1) *Spills that require more stringent cleanup levels.*<sup>11</sup> This may involve a site where there is a high potential that groundwater contamination will linger after cleanup.<sup>12</sup>
- 2) *Site-by-site application of less stringent or alternative cleanup requirements.*<sup>13</sup> This is your risk-based option and is discussed below.
- 3) *Cleanup of spills exempted from the Mega Rule.* This option also allows for a site-by-site decision regarding cleanup standards, but the emphasis is on the necessity for more control or a totally different approach.<sup>14</sup>

**Risk-Based Cleanup:** If circumstances provide, EPA will allow the use of more flexible standards in a PCB cleanup. The Agency would require the

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<sup>10</sup> 40 C.F.R. § 761.120(e)(2). This paragraph states that "inevitably" there will be times when TSCA standards will be applied to cleanups undertaken in accordance with other laws, such as CERCLA or RCRA. In such circumstances, alternate outcomes may result because these laws involve "different or alternative" decisionmaking factors. So, the EPA recognizes the problem, but provides little advice on how to resolve these potential conflicts.

<sup>11</sup> 40 C.F.R. § 761.120(b).

<sup>12</sup> 40 C.F.R. § 761.120(b)(1).

<sup>13</sup> 40 C.F.R. § 761.120(c).

<sup>14</sup> 40 C.F.R. §§ 761.120(d); 761.120(a)(1). The rationale is that some spills may involve more pervasive contamination, so a blanket approach should not be taken.

responsible party to demonstrate that cleanup to numerical standards is "clearly unwarranted" or that such compliance is not feasible.<sup>15</sup> This means that you need to consider the following:

- (a) That the determination can only be on a site-by-site basis.
- (b) The facts must demonstrate that a more extensive cleanup is not warranted because of: (i) risk-mitigating factors; (ii) compliance with TSCA procedures or numerical standards is impractical given the circumstances at your site or; (iii) that these site-specific issues make the cleanup cost-prohibitive, and
- (c) The EPA agrees that a risk-based approach is OK. (The EPA may consider the impact of this decision on other sites to ensure consistency of spill cleanup standards.)<sup>16</sup>

As a practical matter, you will consider these options in light of your cleanup facts. The determinative issue will be the amount of PCBs released. If your cleanup does not involve significantly high levels of PCBs and the issue of potential contamination (mainly to groundwater) does not loom large, you may be able to use a flexible remediation approach. To justify your application to the EPA, you will be required to demonstrate that your proposed risk-based approach will be protective, given the facts of your cleanup. You do so by presenting data confirming your assumptions about the level of risk involved, while outlining the exact method of remediation.

**PCB Disposal:** Remediation often involves the issue of disposal -- what do you do with the PCBs you have unearthed? Well, the PCB Mega Rule has also incorporated risk-based principles in its requirements for the disposal of PCB-contaminated soil. The general rule is: a responsible authority may dispose of soil contaminated with a PCB concentration of less than 50 ppm at a municipal nonhazardous waste site. If the soil is contaminated at a concentration equal to, or in excess of, 50 ppm, the responsible party would likely send the soil to a RCRA landfill or a TSCA-qualified landfill.<sup>17</sup> Disposal options are:

- 1) *Self-implementing disposal.*<sup>18</sup> This form of disposal is similar to the PCB Spill Cleanup Policy. This approach also incorporates risk-based, site-specific issues into plans for disposal.

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<sup>15</sup> 40 C.F.R. § 761.120(c).

<sup>16</sup> 40 C.F.R. § 761.120(c).

<sup>16</sup> 40 C.F.R. §§ 761.61(a)(5)(i)(B)(2)(ii); (iii).

<sup>16</sup> 40 C.F.R. § 761.61(a).

<sup>16</sup> 40 C.F.R. § 761.61(b).

<sup>16</sup> 40 C.F.R. § 761.61(c).

- 2) *Performance-based disposal*.<sup>19</sup> This would involve the use of existing and approved disposal technologies.
- 3) *Risk-based disposal*.<sup>20</sup> As with risk-based remediation, this option allows for the disposal of PCB remediation waste in a manner different than options #1 or 2, as long as the EPA agrees.

**Regulatory Roundup:** The PCB Mega Rule explicitly provides the option of risk-based cleanup/disposal -- largely based on the PCB concentrations at issue. This option would allow a remediation agent to step out of TSCA's numerically driven approach (clean to a preset level, no matter what) and move towards a CERCLA-esque approach (site-specific risk levels). This flexibility is particularly important when approaching the cleanup of moderately-sized sites where there is little likelihood of residual contamination. Should the regulator agree that a flexible approach makes sense, you could tailor a cleanup solution to meet your needs. (Ms.Barfield/RNR).

## 4<sup>th</sup> Circuit Cites *Laidlaw* to Lay Law Down

LTC David B. Howlett

The Court of Appeals for the 4<sup>th</sup> Circuit, sitting *en banc*, recently reversed its earlier decision in a Clean Water citizen suit. Citing recent Supreme Court precedent, the Court of Appeals found in Friends of the Earth v. Gaston Copper Recycling Corporation<sup>21</sup> that at least one of the citizens involved had jurisprudential standing to pursue the case.

Gaston Copper operated a smelting facility in South Carolina and was subject to a Clean Water Act NPDES permit.<sup>22</sup> The company's discharges frequently exceeded the limits in the permits.

Two environmental groups sued Gaston Copper under the citizens' suit provision of the Clean Water Act, which states that "any citizen may commence a civil action on his own behalf against any person . . . who is

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<sup>21</sup> 204 F.3d 149; 2000 U.S. App. LEXIS 2684, February 23, 2000.

<sup>22</sup> National Pollution Discharge Elimination System, Clean Water Act, §402, 33 U.S.C. § 1342.

alleged to be in violation of an effluent standard or limitation under this chapter."<sup>23</sup> This includes violations of NPDES permits. The act defines "citizen" as "a person or persons having an interest which is or may be adversely affected."<sup>24</sup> Congress intended that this provision confer standing to the full extent allowed by the Constitution.<sup>25</sup>

One plaintiff group member was Mr. Shealy. He lives next to a pond four miles downstream from the Gaston plant. He stated that the pollution or threat of pollution from Gaston had made his family curtail its fishing and swimming activities out of fear of the adverse effects the pollutants could cause. The district court dismissed the suit after a six day trial, finding that none of the plaintiffs' members had standing because they had not shown "injury in fact."<sup>26</sup> The district court pointed to the absence of certain types of evidence: "No evidence was presented concerning the chemical content of the waterways affected by the defendant's facility. No evidence of any increase in the salinity of the waterways, or any other negative change in the ecosystem of the waterway was presented."<sup>27</sup> The original panel of the Court of Appeals upheld this decision.<sup>28</sup>

The *en banc* court began its discussion by setting out the Article III constitutional minimum for standing: a plaintiff must allege (1) injury in fact; (2) traceability; and (3) redressability. The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. The traceability prong means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court. Finally, the redressability prong entails that it must be likely, and not merely speculative, that a favorable decision will remedy the injury.<sup>29</sup>

The court also noted that the Supreme Court had recently held that an effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing.<sup>30</sup>

Examining the status of Mr. Shealy, the Court of Appeals found that he had produced evidence of actual or threatened injury to a waterway in which

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<sup>23</sup> 33 U.S.C. § 1365(a).

<sup>24</sup> 33 U.S.C. § 1365(g).

<sup>25</sup> See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981) (citing S. Conf. Rep. No. 92-1236, at 146 (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3823).

<sup>26</sup> 9 F.Supp. 2d 589 (D.S.C. 1998).

<sup>27</sup> *Id.* at 600.

<sup>28</sup> Friends of the Earth v. Gaston Copper Recycling Corp., 179 F.3d 107 (4<sup>th</sup> Cir. 1999).

<sup>29</sup> Friends of the Earth v. Gaston Copper Recycling Corporation, 2000 U.S. App. LEXIS 2684 at \*12-13, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

<sup>30</sup> Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 145 L. Ed. 2d 610, 120 S. Ct. 693, 705 (2000). The concurring opinions to the Court of Appeals case under discussion argue that the Laidlaw decision itself, rather than preexisting jurisprudence, required reversal.

he has a legally protected interest. In fact, Shealy alleged precisely those types of threats to swimming and fishing that Congress intended to prevent by enacting the Clean Water Act.<sup>31</sup> The court continued:

Shealy is thus anything but a roving environmental ombudsman seeking to right environmental wrongs wherever he might find them. He is a real person who owns a real home and lake in close proximity to Gaston Copper. These facts unquestionably differentiate Shealy from the general public. The company's discharge violations affect the concrete, particularized legal rights of this specific citizen. He brings this suit to vindicate his private interests in his and his family's well-being -- not some ethereal public interest. We in turn are presented with an issue "traditionally thought to be capable of resolution through the judicial process."<sup>32</sup>

Regarding the district court's requirement of actual evidence of damage to the water, the court found that this would eliminate claims of those who were directly threatened but not yet engulfed by the unlawful discharge. Shealy's reasonable fear and concern are sufficient impact; he does not have to wait until his lake becomes barren. The court also noted that the Supreme Court did not require actual damage in Laidlaw.<sup>33</sup>

Having found injury in fact,<sup>34</sup> the court also found that the injury was "fairly traceable" to Gaston Copper. Plaintiffs had produced evidence to show that Shealy's lake was within the range of the discharge. The court concluded that the injury was redressable by the court, especially since Gaston Copper's violations continued throughout the period of the litigation.

Interestingly, the court found not only that Article III did not require rejection of Shealy's claims, but that the Constitution's separation of powers structure *prohibited* it. To bar the suit would undermine the citizen suit provision of the Clean Water Act. This, in turn, would undermine Congress, and "separation of powers will not countenance it."<sup>35</sup>

Army lawyers must still examine citizen suit claims carefully to determine whether plaintiffs or members of plaintiff organizations have standing. To the extent standing requirements may have been tightened under the original

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<sup>31</sup> Friends of the Earth v. Gaston Copper Recycling Corporation, 2000 U.S. App. LEXIS 2684 at \*21. See 33 U.S.C. §1251(a)(2).

<sup>32</sup> Friends of the Earth v. Gaston Copper Recycling Corporation, 2000 U.S. App. LEXIS 2684 at \*22-23.

<sup>33</sup> Friends of the Earth, Inc. v. Laidlaw, 120 S.Ct. at 705.

<sup>34</sup> The Court of Appeals remanded the case to the district court to determine "injury in fact" in the light of Friends of the Earth, Inc. v. Laidlaw.

<sup>35</sup> Friends of the Earth v. Gaston Copper Recycling Corporation, 2000 U.S. App. LEXIS 2684 at \*36.

Gaston Copper decision, they have now been loosened again under Laidlaw.  
(LTC Howlett/LIT)

**THE ENVIRONMENTAL LAW DIVISION  
BULLETIN**

April 2000

Volume 7, Number 4

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

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**DOJ Decides No Supreme Court Review in EPA “Overfile” case**

MAJ Robert J. Cotell

On 16 September 1999, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit ruled that the Resource Conservation and Recovery Act (RCRA) does not give EPA the authority to bring an enforcement action against a company that has already resolved an action over the same violations brought by an authorized state agency<sup>1</sup>

On 24 January 2000 the EPA requested a re-hearing by the three-judge panel, and by the entire Eighth Circuit court. The court denied both requests. An appeal of the Eighth Circuit’s opinion was due to the Supreme Court on 24 April 2000. However, the Department of Justice (DOJ) declined to take the appeal to the Supreme Court on behalf of the EPA. Accordingly, the case is now formally closed. The EPA lacks legal authority to “overfile” environmental cases resolved with state agencies.

The facts of the case are covered extensively in the November 1998 ELD Bulletin. In short, the plaintiff, Harmon Industries, was a manufacturer of safety equipment for the railroad industry. For fourteen years, Harmon’s employees threw used solvent residues out the back door of the plant. The discarded solvents were hazardous wastes under RCRA.

In 1987, Harmon discovered what the employees were doing and ordered the practice to cease. Harmon then reported the disposal to the Missouri Department of Natural Resources (MDNR). EPA had authorized MDNR to administer its own hazardous waste program under RCRA. Since first being authorized to administer a program EPA had never withdrawn the State’s authority.

After meeting with Harmon, MDNR oversaw the investigation and clean up of the Harmon facility. Ultimately, the State approved a post-closure permit for the facility, with costs of over \$500,000 over thirty years. In 1991, the State filed a petition against Harmon in the State court, along with a consent decree signed by both Harmon and MDNR. The court approved the consent decree that specifically provided that Harmon’s compliance with the decree constituted full satisfaction and release from all claims arising from allegations in the petition. The consent decree did not impose a monetary penalty.

Earlier, EPA had notified the State of its view that fines should be assessed against Harmon. After the petition had been filed and approved by the State, EPA filed an

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<sup>1</sup> Harmon Industries Inc. v. Browner, 191 F.3d 894, 49 ERC 1129, 8th Cir, 1999; 180 DEN AA-1, 9/17/99).

administrative complaint against Harmon seeking over two million dollars in penalties. An administrative law judge (ALJ) and Environmental Appeals Board (EAB), found for the EPA. Harmon appealed to the Federal District Court on the issue of the authority of EPA to take an enforcement action where the State had already entered into a consent decree.

Harmon won the appeal to the Federal District Court. According to the court the RCRA does not give EPA authority to override the State once it determines an appropriate penalty. Section 3006(e) of RCRA gives EPA only the option of withdrawing authorization of a State to administer a RCRA program. EPA appealed the case to the Eighth Circuit. As noted above, the Circuit court decided in favor of Harmon, and the DOJ has declined to take the case to the Supreme Court.

In light of this case, installation environmental law specialists should be aware of overfiling issues in all cases brought against an installation by the EPA. In almost all cases, installations will have some dealings with state regulators prior to receiving complaints from the EPA. In those cases which have resulted in the issuance of a state NOV, administrative order, or consent decree, the ability of the EPA to subsequently intervene and file an action on it's own behalf has been severely limited by the court decision. In such cases, EPA must demonstrate that it has denied the authority of the state to administer the RCRA program. Further, such denial is not simply for the case at hand. Instead, it must deny the authority of the state to administer the entire program on all regulated entities. Such requirements will be a heavy burden for the EPA and it is likely that overfilings will be reduced in the future.

One final caveat should be noted. The EPA is currently appealing a similar overfiling case in the Tenth Circuit.<sup>2</sup> Should the case be decided in favor of the EPA, it will create a split of opinion in the circuit courts. It is possible that this split may prompt the DOJ to seek a resolution of the issue with the Supreme Court. (MAJ Cotell/CPL)

## **Conservation Requirements under the Endangered Species Act**

MAJ Michele B. Shields

Army Environmental Law Specialists (ELSSs) should note that the Army not only has an obligation to avoid actions which are likely to jeopardize listed species as required under Section 7(a)(2) of the Endangered Species Act (ESA), but also has a responsibility to carry out programs for the conservation of listed species under Section 7(a)(1) of the ESA.<sup>3</sup> In recent environmental litigation, plaintiffs have challenged the adequacy of agencies' conservation programs in addition to challenging the sufficiency of biological opinions.

Section 7(a)(1) establishes both substantive and procedural duties for the conservation of endangered and threatened species for federal agencies. As defined under the ESA, "conservation" means "to use ... all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the ESA are no longer necessary".<sup>4</sup> First, the substantive duties of Section 7(a)(1) require all federal agencies, including the Army, to carry out programs for the conservation of endangered and threatened species.<sup>5</sup> Second, the procedural duties of Section 7(a)(1)

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<sup>2</sup> U.S. v. Power Engineering Co., D. Colo., No. 97-B-1654

<sup>3</sup> 15 U.S.C. 1536(a)(1) and (2); U.S. Dep't of Army Reg. 200-3, Natural Resources – Land, Forest, and Wildlife Management, para. 11-2a (28 February 1995) [hereinafter AR 200-3].

<sup>4</sup> 15 U.S.C. 1532(3); 50 C.F.R. 424.02(c).

<sup>5</sup> 15 U.S.C. 1536(a)(1).

require the Army to consult with the U.S. Fish and Wildlife Service (FWS) on their conservation programs.<sup>6</sup>

Accordingly, Army ELSs should insure that their installations are implementing conservation programs for listed species pursuant to the ESA. Army Regulation 200-3, Natural Resources – Land, Forest, and Wildlife Management (28 February 1995) provides guidance on how to implement the conservation requirements of the ESA. According to AR 200-3, “The key to successfully balancing mission requirements and the conservation of listed species is long-term planning and effective management to prevent conflicts between these competing interests.”<sup>7</sup> Towards that end, AR 200-3, para 11-5a(1) requires Army installations to prepare an Endangered Species Management Plan (ESMP) for listed and proposed species and critical habitat present on the installation.<sup>8</sup> Specific items that must be included and areas that must be covered in an ESMP are listed in AR 200-3, paragraph 11-5b(4)(a-h). It is important to note that installation ESMPs will vary in length and detail depending on the complexity of management problems with the species and its habitat.<sup>9</sup> Therefore, at a minimum, each installation that has listed and proposed species and critical habitat on the installation must prepare an ESMP.

Army ELSs should also encourage innovation in developing installation conservation programs. For example, installations may carry out their conservation duties through research assistance, logistical assistance, etc. AR 200-3 also includes a number of methods for meeting conservation obligations such as participation in recovery planning, support of the reintroduction of species, etc.<sup>10</sup> Additionally, installations should take a “hard look” at incorporating conservation recommendations from Fish and Wildlife Service’s biological opinions into their ESMPs and/or conservation programs although they are generally discretionary. Finally, because each installation is different and the types of endangered and threatened species and critical habitat present on installations are different, conservation programs will vary widely from post to post throughout the United States.

Next, Army ELSs should insure that the consultation requirements of Section 7(a)(1) of the ESA have been met. The procedural task of “consulting” with FWS under Section 7(a)(1) is not the same as consultation under Section 7(a)(2). Section 7(a)(1) consultation can generally be accomplished by an exchange of letters between the installation and FWS. First, the Army installation should send a letter to the FWS detailing their conservation actions and asking the FWS for comments regarding those actions. In return, FWS may respond with comments and/or suggestions on the installation’s conservation program. Depending on the sufficiency of the ESMP and conservation actions, FWS may concur that the installation’s conservation program meets Section 7(a)(1) responsibilities. Once the installation receives a letter from FWS endorsing the Army installation’s commitment to Section 7(a)(1) of the ESA, the procedural loop of “consultation” can be considered closed.

In conclusion, the Army has committed to being a national leader in conserving listed species.<sup>11</sup> This article lays out the basic steps, installations must take to meet their conservation requirements under the ESA. Army ELSs should be working in conjunction with

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<sup>6</sup> “All other federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authority in ... by carrying out programs for the conservation of endangered species and threatened species....” 15 U.S.C. 1536(a)(1).

<sup>7</sup> AR 200-3, *supra* note 1, para. 11-1a.

<sup>8</sup> *Id.* at para. 11-5a(1).

<sup>9</sup> *Id.* at para. 11-5(b)(4).

<sup>10</sup> *Id.* at para 11-8 “The Army should actively participate in the development of recovery plans, whenever possible, to ensure that the FWS or NMFS and the recovery teams appointed by the FWS or NMFS know and consider Army interests. For listed species present on Army installations, the Army should make a request to the FWS or NMFS to provide for Army representation on recovery teams.” *Id.* at para 11-14 “The Army will support the reintroduction of and introduction of federal and State listed, proposed, and candidate species on Army lands unless reintroduction/introduction will have a significant impact on the present or future ability of the Army to meet its mission requirements.”

<sup>11</sup> *Id.* at para 11-1(a).

installation environmental offices to insure that Army commanders and units are meeting their mission requirements in harmony with the ESA and its conservation requirements. (MAJ Shields/LIT).

### **NEPA in a Nutshell**

MAJ Michele B. Shields

Questions about the National Environmental Policy Act? See the Council for Environmental Quality's (CEQ's) NEPAnet Website <http://ceq.eh.doe.gov/nepa/nepanet.htm>

This website has a lot of information to include: text of the statute, text of regulations, NEPA's Forty Most Asked Questions, CEQ annual reports, and more. The website also has CEQ publications on "hot topics": "Incorporating Biodiversity Considerations into NEPA Process" and "Considering Cumulative Effects under the National Environmental Policy Act". (MAJ Shields/LIT).

## THE ENVIRONMENTAL LAW DIVISION BULLETIN

May 2000

Volume 7, Number 5

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

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### Army Issues Interim Guidance on CERCLA Five-Year Reviews

Ms. Kate Barfield

On April 5<sup>th</sup>, 2000, the Army issued interim guidance<sup>1</sup> on how to conduct five-year reviews in accordance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>2</sup> Both CERCLA and its implementing regulations, the National Contingency Plan (NCP), require a periodic review of cleanup remedies that limit a property's use or access.<sup>3</sup> Because DoD is the Lead Agent in cleanup of its sites,<sup>4</sup> each of the Services is required to conduct five-year reviews when appropriate. The Army has compiled interim guidance to assist with this process. This guidance would come into play at sites where the remedial action specified in the Record of Decision (ROD) or applicable CERCLA decision document would allow hazardous substances, pollutants or contaminants to remain in place above levels that would allow for unlimited use or unrestricted exposure. The Army's interim guidance is applicable to both active Army installations and Base Realignment and Closure (BRAC) installations, as well as National Priorities List (NPL) and non-NPL sites.<sup>5</sup> It is intended to ensure that five-year reviews are conducted in a timely, consistent manner. The new guidance also provides explicit instructions regarding the programming of funds to provide for the expenses of five-year reviews.

**Why Do Five-Year Reviews?** The purpose of a CERCLA five-year review is to ensure the protection of human health and the environment.<sup>6</sup> Such a review provides the Army with the information it needs to ensure that its CERCLA remedy is functioning as planned. Generally, the review focuses on the adequacy of active treatment remedies, long-term monitoring and the imposition of land use controls. One of the main objectives of this process is to evaluate whether cleanup levels remain protective. If the remedy is not protective or fully functional, the Army as Lead Agent, is empowered to take steps to deal with the situation.<sup>7</sup> The Army may also choose to stop doing five-year reviews when they are no longer needed, so the requirements for termination are set forth in the new policy.

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<sup>1</sup> The title of the document is: *Interim Army Guidance for Conducting CERCLA Five-Year Reviews*. This Army interim guidance sometimes tracks the EPA's interim policy on five-year reviews. See, Environmental Protection Agency (EPA) OSWER Dir. 9355.7-03B, *Comprehensive Five-Year Review Guidance*, October 1999.

<sup>2</sup> 42 U.S.C. § 9601, *et. seq.*

<sup>3</sup> 42 U.S.C. § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii).

<sup>4</sup> 42 U.S.C. § 9604(a), (b); Exec. Order 12580, 52 Fed. Reg. 2923, January 23, 1987.

<sup>5</sup> Note that five-year reviews on active and BRAC sites will involve different funding sources.

<sup>6</sup> 42 U.S.C. § 9621(c).

<sup>7</sup> See generally, 42 U.S.C. §§ 9604(a);(b);(e); 9606(a); 9620.

**What Triggers a Five-Year Review?** Under CERCLA, the five-year review requirement is set into motion when a decisionmaker selects a remedial action that "...results in any hazardous substances, pollutants, or contaminants remaining at the site..."<sup>8</sup> The NCP is more specific. It states that a five-year review is triggered if the selected remedial action will allow hazardous substances, pollutants, or contaminants to remain at the site "...above levels that allow for unlimited use and unrestricted exposure..."<sup>9</sup> This conclusion would be incorporated into the site's ROD or applicable decision document and the date upon which it was finalized will become the starting time for projecting a five-year review.

**Focus of the Five-Year Review:** Though complex remedies may require specific approaches, the reviewer will generally try to answer the following questions:

- 1) Is the remedy functioning as intended?<sup>10</sup>
- 2) Are the assumptions used to select the remedy still valid?
- 3) Has new information arisen that would cause the reviewer to question the protectiveness of the remedy?
- 4) Does the remedy remain cost-effective?<sup>11</sup>

**What Data Should be in the Five-Year Review?** In a nutshell, the five-year review report should summarize technical data, laws and regulations (applicable and relevant and appropriate requirements), site-visit observations, reports on treatment-systems operations and determinations on the effectiveness of land use controls. The review should conclude with a determination stating whether or not the remedy is protective of human health and the environment. Should the reviewer determine that modifications are needed to improve remedy operation, the report should outline the proposed changes and work schedules.

**Regulator Review and Comment:** An important element of the Army interim guidance is its procedure allowing for review and comment by the Environmental Protection Agency (EPA) and State regulators. This provision is intended to resolve confusion over the role played by regulators in the course of a five-year review at an Army site. One source of this confusion is that the EPA at NPL sites may be granted a concurrence role, via a Federal Facilities Agreement (FFA), over remedies and subsequent remedy modifications. If such concurrence authority is granted by an FFA (an interagency agreement), the EPA could possess a greater level of authority to accept or decline the conclusions stated in a five-year review. Note, though, that FFA terms may differ, so this extension of EPA authority is not automatically granted. Also, FFAs are limited to NPL sites -- at non-NPL sites, the EPA lacks the authority to concur in five-year reviews.<sup>12</sup> Likewise, State regulators are not granted concurrence authority over a Lead Agent's remedy determination.<sup>13</sup> However, information provided by

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<sup>8</sup> 42 U.S.C. § 9621(c).

<sup>9</sup> 40 C.F.R. § 300.430(f)(4)(ii).

<sup>10</sup> Here, the ROD or other decision document would be used as the primary source for determining the scope and intent of the remedy.

<sup>11</sup> This requirement is intended to ensure that the Army's environmental funds are being spent appropriately.

<sup>12</sup> The EPA has claimed that CERCLA Section § 9620(e)(4)(A) gives the Agency the right to select a remedial action at NPL sites when the EPA Administrator and the Lead Agent are unable to agree upon the appropriate remedial action. However, CERCLA Section 9621 states that it is the President who decides cleanup remedies. The President's decisionmaking authority was delegated to DoD and, subsequently, to the Army. See, Exec. Order 12580, 52 Fed. Reg. 2923, January 23, 1987. Accordingly, the EPA does not possess a unilateral right to determine the outcome of a five-year review, unless an installation's FFA specifically provides for such concurrence. See also, OSWER Dir. 9355.7-03B-P, *Comprehensive Five-Year Review Guidance*, sec. 2.5.4, October 1999.

<sup>13</sup> 40 C.F.R. § 9620(a)(4). This CERCLA provision distinguishes between NPL and non-NPL sites. EPA has authority to deal with NPL sites. On NPL sites, the FFA may grant EPA "concurrence authority" over five-year review findings. However, State regulators deal with non-NPL sites. These cleanups do

both the EPA and State regulators can be very beneficial when compiling a five-year review, so the Army's interim policy provides for such input.

***Making the Procedure Regular:*** The new guidance sets forth specific provisions on the funding and staffing of five-year reviews, while outlining the scope of the document. This will provide for greater regularity among reports. The interim guidance states a preference for having active installations prepare their own five-year reviews, while the MACOM would determine the executor for BRAC sites. The U.S. Army Corps of Engineers is a good resource to consider when selecting an executor to conduct the reviews. Once the draft report is complete, the U.S. Army Environmental Center (USAEC) may be called upon to review the document. (The USAEC will review the findings of five-year reviews conducted at sites where the remedy's operation and maintenance requirements or long-term monitoring costs exceed \$250,000 a year.) When any required USAEC's concurrence is received, the installation Commander (or the MACOM designee, in the case of BRAC facilities) will forward the report to the EPA and State regulators for their review and comment. In cases where the EPA or State regulators object to the report's findings, the five-year review executor will work with USAEC and the MACOM to prepare a coordinated response.

***Community Involvement:*** The installation or MACOM designee will place a copy of the final five-year review in the administrative record and information repository. If a site has a Restoration Advisory Board (RAB) or Technical Review Committee, these groups should be advised of plans for a five-year review. Once the review is complete, these groups should be informed of the scope of data considered and the conclusions reached. For sites where there is no active RAB, public notification can be made by newspaper publication. Also, if the five-year review requires a modification to the ROD, the NCP's community participation requirements would come into play.<sup>14</sup>

***Getting the Guidance:*** Copies of the Army interim guidance will be posted on the Web in the near future. (Barfield/RNR)

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not involve FFAs, so there would be no standard agreement to provide State regulators with a concurrence role.

<sup>14</sup> 40 C.F.R. § 300.435(c)(2)(ii).

## Draft EPA Dioxin Report Leaked to Press

MAJ Gregory Woods

According to the Washington Post, the Environmental Protection Agency (EPA) is planning to release a draft dioxin report next month, which will no doubt create considerable debate among the scientific community<sup>15</sup>. This report has been anticipated for several years and its conclusions come at a time when many were beginning to question the hazardous effects of dioxin compounds. The Washington Post reported that the draft report concluded that the cancer risk associated from dioxin exposure may be as much as 10 times greater than previously projected. The report purportedly warns that the cancer risk is highest, by as much as 1 in 100, among those who eat lots of fatty meats and ingest dairy products. Carol Browner, EPA Administrator, acknowledged that the draft report does in fact conclude that the health risks associated with dioxin exposure are greater than previously believed.

The report, which has not been peer-reviewed, is apparently based upon reviews of existing dioxin studies found in current scientific literature and new research on cancer risk. The report supposedly recommends classifying one form of dioxin, TCDD, as a known human carcinogen and further recommends classifying other dioxin-like compounds as likely carcinogens.

Dioxin is a term that is generally used to describe a class of chemical compounds that are products of combustion and are produced during certain manufacturing processes. One particular dioxin compound, TCDD, has been studied most extensively and is considered the most dangerous dioxin compound based upon its adverse effects on animals. Whether the data derived from these animal studies can be extrapolated to human beings has been the subject of extensive debate.

Environmentalists opposing the construction and operation of the Army's chemical weapons incinerators have vigorously debated the dioxin issue. It is unclear just how this draft report will effect the Chemical Weapons Demilitarization Program, which is relying on baseline incineration technology to destroy chemical weapons at Johnston Island; Tooele, Utah; Anniston, Alabama; Pine Bluff Arkansas; and Umatilla, Oregon. It is clear, however, that any deviation from EPA's previously stance on dioxin will undoubtedly call into question the validity of previous health risk assessments.

The EPA report, eagerly awaited by many environmental groups, will have significant impact in the scientific and environmental community and will fuel controversy industry and environmentalists. Whatever final conclusions EPA may draw in its report, ELSs should be aware that the report will play an extremely important role in the drafting of health risk assessments, especially at installations where combustion has been an issue. (MAJ Woods/LIT).

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<sup>15</sup> Cindy Skrzycki and Joby Warrick, *EPA Links Dioxin to Cancer*, Washington Post, May 17, 2000, at A01.

## The Superfund Recycling Equity Act of 1999

MAJ Scott Romans

As part of the appropriations bill for FY 2000, the Congress passed legislation providing a potential defense to arranger liability under CERCLA. This legislation, entitled the Superfund Recycling Equity Act of 1999,<sup>16</sup> seeks to exempt from CERCLA liability those who can demonstrate that they arranged for recycling of certain materials, as opposed to arranging for disposal of hazardous substances. While federal agencies may be able to avail themselves of the protection of this law, they will certainly will have to expand their investigation of Superfund cases to include new areas of inquiry.

The new law provides that a person who arranges for the recycling of a recyclable material is not liable under sections 107(a)(3) or (a)(4), as long as certain requirements are met. "Recyclable material" is defined as scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, scrap batteries (including lead-acid and spent nickel-cadmium batteries). The definition of recyclable material also includes, "minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap..."<sup>17</sup>

For the exemption from liability to apply, the person seeking to claim the recycling exemption must establish all of the following requirements by a preponderance of the evidence:

- (1) The recyclable material met a commercial specification grade.
- (2) A market existed for the recyclable material.
- (3) A substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new saleable product.
- (4) The recyclable material could have been a replacement or substitute for a virgin raw material, or the product to be made from the recyclable material could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material.
- (5) For transactions occurring 90 days or more after the date of enactment of this section, the person exercised reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person (hereinafter in this section referred to as a "consuming facility") was in compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material.<sup>18</sup>

For purposes of subsection (5), "reasonable care" includes (but is not limited to) the following criteria:

- (A) the price paid in the recycling transaction;

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<sup>16</sup> Act of Nov. 29, 1999, P.L. 106-113, codified at 42 U.S.C.S. § 9627

<sup>17</sup> § 9627 (b).

<sup>18</sup> § 9627 (c).

(B) the ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with recyclable material; and

(C) the result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material. For the purposes of this paragraph, a requirement to obtain a permit applicable to the handling, processing, reclamation, or other management activity associated with the recyclable materials shall be deemed to be a substantive provision.<sup>19</sup>

For the scrap metal and scrap batteries categories of recyclable materials, there are additional requirements that must be met.<sup>20</sup>

The new law also contains a provision that excludes some transactions from the exemption for recycling. The law states that the exemption does not apply if:

- A) the person had an objectively reasonable basis to believe at the time of the recycling transaction--
- (i) that the recyclable material would not be recycled;
  - (ii) that the recyclable material would be burned as fuel, or for energy recovery or incineration; or
  - (iii) for transactions occurring before 90 days after the date of the enactment of this section [enacted Nov. 29, 1999], that the consuming facility was not in compliance with a substantive (not procedural or administrative) provision of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, or other management activities associated with the recyclable material;
- (B) the person had reason to believe that hazardous substances had been added to the recyclable material for purposes other than processing for recycling; or
- (C) the person failed to exercise reasonable care with respect to the management and handling of the recyclable material (including adhering to customary industry practices current at the time of the recycling transaction designed to minimize, through source control, contamination of the recyclable material by hazardous substances).<sup>21</sup>

The provision then discusses what is an "objectively reasonable basis for belief," including, but not limited to, the size of the person's business, customary industry practices at the time the transaction occurred, the price paid for the material, and the ability of the person to determine the handling activities of the facility to whom it sold the material.<sup>22</sup>

The new law does not apply to concluded administrative or judicial actions, or to "any pending action initiated by the United States prior to enactment of this section."<sup>23</sup> Interestingly, the law also provides that if a PRP attempts to bring a contribution action against a person, but the person against whom the action is brought successfully uses this

<sup>19</sup> § 9627 (c)(6).

<sup>20</sup> See § 9627 (d) and (e)

<sup>21</sup> § 9627 (f)(1)

<sup>22</sup> § 9627 (f)(2)

<sup>23</sup> § 9627(i)

exemption, the PRP bringing the action will be liable for the successful party's attorney's fees.<sup>24</sup>

This new law raises a whole host of new issues. It creates another layer of factual disputes, allowing the parties to argue about each requirement for the application of the exemption, such as "reasonable care" in Section 9627(c)(6), and each element of the exclusions from the exemption, such as "objectively reasonable belief" and "reasonable care" for purposes of (f). Indeed, it is not difficult to conceive of a situation where the parties would argue whether a certain substance constitutes "minor amounts of material incident to or adhering to the scrap material as a result of is normal and customary use prior to becoming scrap" therefore calling into question whether the definition of "recyclable material" has been met in the first place.

Complicating the resolution of these issues is the fairly cursory legislative history associated with this Act. There have been no Congressional hearings concerning this provision, and no Congressional reports. The legislative history consists mostly of a statement from Senators Daschle and Lott concerning the provision that was inserted into the Congressional Record.<sup>25</sup>

Because the legislative history is relatively sparse, practitioners will be looking to the courts for assistance in interpreting the provisions of the Act. One such decision has been handed down addressing the section of the law concerning pending and concluded actions. As indicated above, 42 USCS § 9627(i) of the new law by its terms specifically does not apply to completed judicial or administrative actions, and to judicial actions commenced by the United States. In *United States v. Atlas Lederer Company, et al.*<sup>26</sup> the District Court had the opportunity to interpret this provision. In that case, the United States had commenced an action against a number of parties, including Livingston & Co. (Livingston). Livingston was also named in a third party complaint brought by a group of settling PRPs.<sup>27</sup> Livingston, which had previously lost a summary judgment motion, asked the Court to reconsider its ruling in light of the Superfund Recycling Equity Act of 1999.<sup>28</sup>

Livingston argued that the new Act should allow judgment in its favor both in the original action filed by the United States, and in the third party action filed by the settling PRPs. Livingston admitted that the plain language of 42 U.S.C. § 9627(i) would not allow judgment in its favor with regard to the action filed by the United States, but argued that the "spirit and intent" of the legislation called for such a result.<sup>29</sup> The Court disagreed, finding that the plain language of the new statute "precludes its applicability." The Court acknowledged that while the new law may affect the viability of existing case law concerning the useful product defense, the previous decision overruling Livingston's motion for summary judgment was properly based on legal precedent in effect at the ruling was made, 8 years before the new law was enacted.<sup>30</sup>

The second issue the Court addressed was the application of the new law to the third party action. Livingston argued that the third party claim was a separate action, not initiated by the United States, and therefore the new law would apply.<sup>31</sup>

The Court noted the Senators' remarks in the Congressional Record that seemed to support Livingston's argument: "[f]or purposes of this section, Congress intends that any third party action or joinder of defendants, brought by a private party shall be considered a private party action, regardless of whether or not the original lawsuit was brought by the

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<sup>24</sup> § 9627 (j)

<sup>25</sup> 145 CONG. REC. S15048 (daily ed. November 19, 1999)(statement of Senators Lott and Daschle).

<sup>26</sup> No. C-3-91-309, 2000 U.S. Dist. Lexis 3336 (S.D.Ohio, February 16, 2000)

<sup>27</sup> *Id.* at n. 2.

<sup>28</sup> *Id.* at \*1.

<sup>29</sup> *Id.* at \*3.

<sup>30</sup> *Id.* at \*\*4-5.

<sup>31</sup> *Id.* at \*6.

United States."<sup>32</sup> The Court, however, did not find these remarks to be persuasive. The Court noted that these remarks were simply read into the record without an indication of their source, and stated that it "has found not true legislative history with respect to [42 U.S.C.S. § 6927(i)] which would support [the Senators' ] interpretation of the provision." The Court found that the remarks in the Congressional Record, and Livingston's argument, failed to make the proper distinction between a "claim" and an "action." An "action" can be made up of numerous "claims," including the Complaint, cross-claims, counter-claims, and third-party claims. Since all of the claims are part of the same judicial action, and that action was originally brought by the United States, the provisions of the Act do not apply.<sup>33</sup>

The Court held that the ongoing case "as a whole" was a judicial action initiated by the United States and therefore fell outside the new law.<sup>34</sup> To hold otherwise would allow the United States to pursue the settling PRPs while prohibiting that group from pursuing third party claims against other PRPs. The Court believed that allowing this result would punish the settling PRPs for accepting responsibility and settling with the government.<sup>35</sup>

This issue and many others associated with the new law will be the subject of many Court decisions in the coming years. At a minimum, the law creates another area of inquiry for federal agencies as they investigate their potential liability for clean-up costs at sites around the country (MAJ Romans/LIT).

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<sup>32</sup> 145 CONG. REC. S15050 (daily ed. November 19, 1999)(statement of Senators Lott and Daschle).

<sup>33</sup> United States v. Atlas Lederer Company, et. al, 2000 U.S. Dist. Lexis 3336, at \*8-9.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*7-8.

## MEMORANDUM FOR U.S. ARMY MATERIEL COMMAND CHIEF COUNSELS

SUBJECT: Annual Ethics Training for CY 2000

1. The Federal Government's ethics program requires one-hour of ethics training each year for those employees who file Public (SF 278) or Confidential (OGE Form 450 or OGE Optional Form 450-A) Financial Disclosure Reports. The training must be "verbal" this year for all employees; there is no option for a "written" briefing for the Confidential filers. We are to remind these employees of their responsibilities under part I of Executive Order 12674, as modified, the conflict of interest statutes (18 U.S.C. §§ 201 - 209), the Standards of Ethical Conduct (5 C.F.R. Part 2635), and the DoD Joint Ethics Regulation (DoD 5500.7-R). We also ensure that they know who their ethics officials are, who will help them apply these laws and regulations to their personal situations.
2. In addition, we normally focus on a particular aspect of these rules, and make this the primary subject of our training. For CY 2000, I encourage you to adopt the following: ***Use and Misuse of Government Resources***, with special attention given to Government computers, e-mail, and Internet access. Mike Wentink and I already presented this training to about 70 of your SES/ST employees at the SES Executive Roundtable on 1 May. It was a resounding success. It is not surprising that there was considerable interest in this timely topic. We encouraged the attendees to also attend the training that you, their local Ethics Counselors will present, because their presence at such events is an important demonstration of leadership support to the workforce. In addition, we urged them to have as many of their employees attend as possible -- not just the "filers." The fact of the matter is that whether or not employees file a financial disclosure report, and whether or not they attend ethics training, they are held accountable for compliance with all of the ethics rules and standards of conduct.
3. Unless you determine that your command requires another topic, please present the ***Use and Misuse of Government Resources*** training this year. I look forward to the synergy created by across-the-board training on this topic in AMC. A training package that you can build on will be sent to all AMC Ethics Counselors shortly after our CLE program in Orlando.

EDWARD J. KORTE  
Command Counsel

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Policy Memorandum #97-08, Use of United States Army Materiel Command (USAMC) Communications Systems and Other Resources

1. Reference Department of Defense (DoD) 5500.7-R, Joint Ethics Regulation (JER), 30 August 1993 (w/C2).

2. The USAMC communication systems and resources shall be for official use only, except for authorized personal (non-official) use. These communication systems include Government owned telephones, facsimile machines, electronic mail, internet systems, and commercial systems where the Federal Government pays for their use or access. Other resources include computers, typewriters, calculators, libraries, and similar resources and facilities.

a. "Official use" includes communications, including the Internet, that are necessary in the interest of the Federal Government, as well as emergency communications. Upon approval, official use will be extended to Government employees deployed away from home for an extended period of time on official business.

b. "Authorized personal use" include incidental use of communications, including the Internet, as authorized by this policy memorandum or as specifically authorized by supervisors using guidelines issued under this memorandum. Examples of authorized incidental use include the following:

(1) Personal communications, not involving long distance charges to the Federal Government, made from the employee's usual workplace that are most reasonably made during working hours such as:

(a) Briefly checking in with family members.

(b) Scheduling medical appointments, arranging auto or home repair, and making similar appointments.

(c) Occasional short e-mails to and receipt of e-mail from relatives, friends, and fellow employees.

(d) Making a bank transaction.

(2) Authorized incidental use also includes brief communications (including long distance service) from a Federal Government employee in an official travel status made to family members notifying them of schedule changes.

c. In addition to e-mail, the Internet provides a tremendous resource of information interchange and other communications through such vehicles as mail list servers, databases, files, and web sites. You have permission to use your computers to access these Internet resources for professional development purposes, subject to ensuring that your primary duties and mission are accomplished. Subject to paragraphs 3a(5)&(6) and 3b(3)&(4) below:

d. Under some contracts, similar communications systems resources are provided to contractors for carrying out their contract. Contractors must ensure that these Government-provided resources are used only for the purposes set forth in the contract, except that contractors may permit their employees, who do not otherwise have ready access to contractor facilities, the "authorized personal use" set out in paragraph 1b(1)(a) through (e) above, subject to the specific terms of the contract or other contracting officer direction.

### 3. Responsibilities.

a. Supervisors must review employee use of Federal Government communication systems and resources to ensure that the above guidance is followed. The employee's supervisor must first approve any non-official use of Government communications systems not covered above. To preserve security, supervisors are encouraged to minimize unofficial access to the internet. Before authorizing any non-official use, supervisors must ensure that the communications:

(1) Do not adversely affect official duties.

(2) Are of reasonable duration and frequency, and whenever practicable, made during the employee's personal time.

(3) Serve a legitimate public interest. For example, the use keeps employees at their desks, educates employees on the communication system, enhances professional skills, or assists in job searches in response to downsizing.

(4) Do not reflect adversely on DoD. For example, the use may not involve sexually oriented material, gambling, chain letters, unofficial advertising, soliciting, selling, illegal activities, inappropriately handled classified materials, or other uses incompatible with public service.

(5) Do not overburden the communication system.

(6) Do not create significant additional cost to DoD.

b. Supervisors may revoke the authorized personal use noted above, or parts thereof, for any perceived misuse of Federal Government resources. To ensure that such use does not adversely affect the performance of official duties and serves a legitimate public interest, this permission is subject to the following:

(1) Whenever practicable, do it before or after your work hours or during lunch or other authorized break.

(2) If made during your normal work hours, keep the communications infrequent and short.

(3) The Federal Government must not incur any long distance charges for these communications; you must use toll-free numbers, reverse the charges, or charge the communications to your own personal credit card.

(4) This permission does not extend to personal communications to solicit business, advertising or other selling activities in support of a private business enterprise, or any other use that would reflect adversely on DoD or which is incompatible with public service (e.g., threatening or harassing phone calls, gambling, transferring sexually oriented material, or other sexually oriented communications).

(5) You may not send group electronic mailings to offer items for sale or other personal purposes (e.g., selling an automobile or renting a private residence).

c. Employees shall use Federal Government communication systems with the understanding that:

(1) Use of such systems serves as consent to monitoring of any type of use, including incidental and personal uses, whether authorized or unauthorized.

(2) Use of such systems is not anonymous. For each use of the Internet, the name and computer address of the employee user can be recorded, as well as the locations searched.

(3) Most Federal Government communication systems are not secure. Employees shall not transmit classified information over any communication system unless approved security procedures and practices are used (e.g., encryption, secure networks/workstations).

(4) Employees shall not disclose communication system access data (such as passwords) to anyone, unless such disclosure is authorized.

(5) Employees shall use extreme care when transmitting unclassified information or other valued data. Information transmitted over an open network, such as e-mail, the Internet, telephone or fax, is accessible to anyone else on the network. Information transmitted through the Internet or by e-mail is accessible to anyone in the chain of delivery, and may be re-sent to others by anyone in the chain.

d. Supervisors may permit employees limited use of computers, typewriters, calculators, libraries, and other similar resources and facilities, if the supervisor determines that the use:

(1) Does not adversely affect official duties.

(2) Is of reasonable duration and frequency, made only during the employee's personal time.

(3) Serves a legitimate public interest. For example, the use enhances professional skills or assists in job searching resulting from downsizing.

(4) Does not reflect adversely on DoD. For example, the use may not involve sexually oriented material, gambling, chain letters, unofficial advertising, soliciting, selling, illegal activities, inappropriately handled classified materials, or uses incompatible with public service.

(5) Does not create significant additional cost to DoD.

4. This policy is based on the direction and guidance in the Department of Defense Joint Ethics Regulation (DoD 5500.7-R) and the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R., Part 2635) concerning the use and misuse of Government resources and official positions. Violation of this policy will subject military members and employees to possible discipline; additionally, military members are subject to punishment under the Uniform Code of Military Justice. Finally, some misuse of Government resources could result in referral to the local U.S. Attorney for investigation and prosecution for violation of criminal law. Information gathered during the monitoring described in paragraph 2(c)(1) above can be used in any disciplinary or criminal proceeding.

5. Point of contact for this action is Howard Russell, commercial (703) 617-9741, DSN 767-9741, e-mail: [hrussell@hqamc.army.mil](mailto:hrussell@hqamc.army.mil).

6. AMC -- America's Arsenal for the Brave.

FOR THE COMMANDER:

//signed//  
JAMES M. LINK  
Major General, USA  
Chief of Staff

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## Gift for Guest's of Honor

Here is the situation posed to me: Officers of a particular branch (e.g., Signal Branch) are hosting a formal ball at an installation. They have invited a senior Signal Corps officer (3-star General Officer (GO) not in their chain of command) to attend as the Guest of Honor and Speaker at the event. If he cannot attend, then their CG will act in his place. They want to pay the cost of the Guest Speaker's attendance and also to present a nice token of their appreciation. They are looking at such possibilities as: a crystal clock with pictures of the locality etched in, set into a marble base (about \$50); a crystal eagle for \$35; and a crystal multi-tiered knick-knack with the division patch. They figure that there surely should not be any problem if it is the senior GO who is the Guest Speaker because he is not in their chain of command.

The local Ethics Counselor asked for my thoughts. This is how I analyzed the situation.

"First off, you correctly recognize that you have a gift issue even if the senior GO is not in the chain of command, because one of the two rules concerning "gifts between employees" is that employees may not ACCEPT gifts from employees who make less money than they do unless there is an independent personal relationship that justifies such a gift, and there is no official superior-subordinate relationship.

"However, I do not approach this as a "gift" issue as the first analysis. I think that you start at 5 C.F.R. Sec. 2635.807 that says employees may not accept compensation for speaking that relates to their official duties (which is what we have here whether the speaker is the senior GO or the CG). Then, look at the definition of compensation (Sec. 2635.807(a)(2)(iii)). Compensation is anything of value. The important part of the definition is what it does NOT include. Subpara (B) takes care of the meal and free attendance. How do you pay for that? By voluntary donations from the attendees (as part of the ticket price). See Sec. 2635.304(a)(2). I know that it does not exactly fit, but, from the beginning, DA has interpreted this type of situation to be tantatmount to the exception involving food shared among employees. If it doesn't fit here, then it doesn't fit anyplace. There are only two exceptions under gifts between employees where you can solicit from others... food shared among employees and the special, infrequent occasion. OGE does not agree with this interpretation, but we continue to use it. But, I digress from the token of appreciation issue...

"Subpara (A) permits the speaker to accept anything that he could otherwise accept from a prohibited source in Subpart B (Gifts from Outside Sources). So, if the item meets the criteria of what is not a gift (e.g., a plaque or something else with little intrinsic value for presentation purposes only) (Sec. 2635.203(b)(2)), your speaker can accept it. You will have to decide whether the proposed gifts have "little intrinsic value" and are for "presentation purposes only." If it's Waterford crystal, that might be too much intrinsic value, but if it's cheap crystal or heavy glass, with an appropriate plaque commemorating the event, perhaps so. If the proposed item does not fit the exclusion, then the only exception that I see is applicable for either the senior GO or the CG, is the \$20 exception (Sec. 2635.204(a)).

"But, now you have to look at the other side, those who are presenting the gift: his employees (the CG) or from those who make less money than he does (the senior GO). For this part of the analysis, you look to Subpart C, Gifts Between Employees. These rules restrict whether they can solicit among other employees (they can't) and the amount of the gift (\$10).

"If it's the senior GO who's presenting, I suppose that one could argue that "there is a personal relationship between the employees that would justify the gift," meaning that his attendance and presentation at their Signal Ball creates a "personal relationship" between the senior GO and those attending the Signal Ball, so as to "justify the gift." But, that's a strain, and I don't think it's worth the risk... and it only increases the amount that they can give to \$20, because that is all that the senior GO, as the speaker, can accept. But, still the employees may not seek contributions for the gift because it does not fit either of the two situations that permit soliciting among employees (food to be shared or the special, infrequent occasion).

"I suggest keeping the token of appreciation within the "items of little intrinsic value ... which are intended solely for presentation" exclusion. But, you still have the issue as to how to pay for it? You can't use appropriated funds of course. Can you solicit from the attendees sufficient money to cover these costs? I'm not sure that this is correct, but I have opined previously "yes," on the basis that we are not soliciting contributions to gifts (remember, they are excluded from the definition of "gift"). Therefore, I think that these costs, along with the costs of the Guest Speaker's meals, may be amortized in the ticket price.

"I note that the officer asking you the question makes reference to possible donations from POs and vendors. I urge caution here. More often than not, someone is asking for them. If the donations are solicited, they are bad, even if they might fit an exception. But, maybe they are indeed unsolicited. If so, then you only have to worry about them fitting an exception. For example, if, unsolicited, and your local Signal Association wanted to donate the gift to be presented to the senior GO (or the CG) for speaking, that's okay... but, it will be subject to the rules of gifts from outside sources as discussed above.

"As a hint, whatever you decide, you might want to run it by the senior GO's legal advisors. They are the ones that will advise him as to whether he can keep the "gift" or "nongift" as the case might be. You want to ensure that his legal advisor is of the same mind to avoid future embarrassment. Remember, these are opinions, and his or hers might be different from yours.

"I hope that you can follow the above. It is admittedly convoluted, but I think that it is the correct analysis for this issue. If you wish to discuss, feel free to call."

Mike Wentink