



Office of Command Counsel Newsletter

October 2000, Volume 2000-5

500th AMC-Level Protest Resolved

Command Legal Program

The resolution of the 500th AMC-Level Protest under the AMC Alternative Dispute Resolution (ADR) Program was recognized at a September 5, 2000 ceremony at Headquarters, AMC.

General John G. Coburn presided over the ceremony. **General Coburn** recalled that at first Headquarters, Department of the Army was reluctant to grant authority to decide cases in-house. The CG opined that the deciding factor in the Pentagon's approval to conduct a pilot program was the respect that HQDA has for **Ed Korte** and our legal community,

Ed Korte, AMC Command Counsel recited the splendid history of the AMC-Level Protest Program, which includes being named one of the "Ten Best Government Procurement Practices" by the Office of Federal Procurement Policy.

Subsequently, **President Clinton** issued Executive Order 12979 entitled "Agency Procurement Protests" on 25 October 1995, directing that Federal agencies adopt a similar ADR protest resolution procedures.

Also in attendance and addressing the attendees were Army General Counsel **Chuck Blanchard**, whose comments underscored that AMC is a leader in the development and the execution of ADR initiatives; and,

Dan Gordon, Associate General Counsel, General Accounting Office, who spoke of his belief that the AMC-Level Protest Program significantly contributes to the integrity of the procurement process.

To commemorate the 500th Protest observance, **General Coburn** signed a memorandum to the AMC major subordinate commanders, provided as Encl 1 and at page 4.

The Command Legal Program for 2001-2 will be the main topic of discussion at the October AMC Chief Counsel Workshop, scheduled for Gettysburg, Pennsylvania.

Stay tuned for more information in the December Newsletter, which will highlight the role each of us will play in design and implementation of the latest CLP.

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HARVEY REZNICK Dies

Harvey Reznick, Chief, Adversary Proceedings Division, Legal Office, U.S. Army Aviation and Missile Command, died of an apparent heart attack at his apartment in Madison, AL on Wednesday, 6 September 2000.

Harvey was a native of University City, MO. He received his bachelor's degree from Washington University in 1964 as well as a law degree in 1967.

His career with AMC began in November 1968 when, following his graduation from law school, he was hired as a general attorney by William Pemberton, Chief Counsel, U.S. Army Mobility Equipment Command, St. Louis, MO.

In November 1972, Joyce Allen selected Harvey for a procurement law position with the U.S. Army Aviation Systems Command (AVSCOM), which later became the U.S. Army Aviation and Troop Command (ATCOM).

In November 1977, he was promoted and selected for assignment as the System Attorney for the Advanced Attack Helicopter Program, the then largest Army R&D program. In September 1988, he was promoted to GM-15 and assigned to supervise a branch within AVSCOM's Procurement Law Division.

Harvey became Chief, Procurement Law Division in May 1989, following the death of Joyce Allen. He held that position until June 1995, when he was selected to be Chief Counsel, U.S. Army Aviation and Troop Command. He served in that capacity until his reassignment when ATCOM and MICOM merged to become the U.S. Army Aviation and Missile Command (AMCOM) at Redstone Arsenal, AL.

Harvey's career was marked by many outstanding professional accomplishments, reflective of his legal skill and intelligence, but more than any other quality, his actions demonstrated his uncommonly large measure of basic decency and respect for others. He was awarded the prestigious Joyce I. Allen Attorney of the Year Award in 1998.

Harvey and his family kept their residence in Clayton, MO, where he returned regularly to be with his wife, Pamela, and their three sons, Josh, David and Matt.

His funeral was held Friday, 8 September in University City, MO. Many of his co-workers and friends traveled from Huntsville, AL to the funeral. He will be sorely missed by his many co-workers, clients and friends.

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

Acquisition Law Focus

Oral Presentations

The increased use of oral presentations as a source selection technique can be traced to the acquisition reform initiatives flowing from the enactment of the Federal Acquisition Streamlining Act of 1994, Pub L. No. 103-355, 108 Stat. 3243 (FASA) and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub L. No. 104-106, 110 Stat. 186 (FARA).

The FAR Part 15 Rewrite (Federal Acquisition Regulation: Part 15 Rewrite: Contracting by Negotiation and Competitive Range Determination, 62 Fed Reg 51, 224 (1997)), for the first time, explicitly recognized oral presentations as a source selection technique in negotiated procurements by providing for them in FAR 15.102.

Among the few conditions placed on oral presentations in the new FAR Part 15 is that the Contracting Officer maintain a record of oral presentations to document what the agency relied on in

making the source selection decision. FAR 15.102(e)

Two recent decisions by the Comptroller General clearly illustrate that the failure to comply with this FAR provision will result in the General Accounting Office (GAO) sustaining a protest challenging the reasonableness of an agency's source selection decision.

As the above two decisions indicate, the use of oral presentations can become a double-edged sword. Although they are an effective means of streamlining, simplifying and enhancing the acquisition process, when used, the oral presentations, as well as the balance of the evaluation, the strengths and weaknesses of the competing proposals, any tradeoffs made and the rationale for the source selection decision, must be thoroughly documented (Encl 2).

POC for this article is CECOM-Ft. Monmouth's **William Kampo**, DSN 992-3381.

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Acquisition Law Focus

CG Memo re 500th AMC-Level Protest

SUBJECT: Recognizing the Success of the U.S. Army Materiel Command's Alternative Dispute Resolution (ADR) Protest Program

1. The U.S. Army Materiel Command's Protest Program is widely regarded as this Command's most successful Alternative Dispute Resolution Program initiative.

Designed and administered by the Office of Command Counsel with the cooperation and support of our HQ AMC Acquisition professionals and AMC's subordinate commands and activities, this program has recently achieved a significant milestone warranting recognition and commendation. The U.S. Army Materiel Command has successfully resolved the 500th protest filed with this headquarters using the AMC ADR Protest Procedure. In deciding to recognize this event as a major milestone, we must understand that the achievement here is the successful resolution of contractor concerns legitimately raised in the course of our extensive contractual operations without recourse to

time consuming and expensive formal litigation. The AMC Protest Program has afforded 500 contractors an informal forum where fair resolution is consistently attained using an expeditious and economical ADR procedure.

2. The AMC ADR Protest Program has been a resounding success providing us an effective tool to resolve contractor protests with minimal impact on mission requirements. These protests have been resolved in an average of 17 workdays. Our contractors and their industry associations have heralded this AMC forum as a most worthwhile alternative to formal litigation and the Office of Federal Procurement Policy has recognized the AMC Protest Program as "One of the Ten Best Practices in the Federal Government." The President issued Executive Order No. 12979 entitled "Agency Procurement Protests" on 25 October 1995 directing that federal agencies adopt similar ADR protest resolution procedures.

3. The AMC Command Counsel and his attorneys are commended for their outstanding efforts in developing

and administering this highly successful program. I also commend the acquisition personnel of this headquarters who have actively supported the program and you, the MSC Commanders and your personnel who have worked so closely with our headquarters on these cases to ensure the success of our ADR program. Together you have effectively addressed contractor concerns and dramatically reduced the impact of protest litigation. Your professionalism and conscientious efforts to preserve the integrity of the AMC acquisition mission are reaffirmed this day as I sign this "Memorandum of Recognition" commending your contributions to the success of our ADR Program. As we pass this 500th milestone, I extend to each of you my thanks for a job well done - knowing that you will do all that you can to continue accomplishing the goals of this program.

4. AMC — Your Readiness Command . . . Serving Soldiers Proudly!

/S/

JOHN G. COBURN
GENERAL, USA
Commanding

Acquisition Law Focus

The Arsenal Act in Court- *Staffing Shall Means Shall* International Agreements

In what may be perceived by many as a blow to the Arsenal Statute, the United States District Court for the Central District of Illinois has granted the Government's motion for a summary judgment in a lawsuit filed by the American Federation of Government Employees (AFGE).

This lawsuit, AFGE v. Cohen, was brought by the AFGE as a result of reductions in force that were caused by the Army's decision to award two projects to the private sector.

AFGE alleged that these awards were made in violation of the requirements of the Arsenal Statute, 10 U.S.C. 4532(a), in that no cost comparison had been performed to demonstrate that production at a Government-owned facility could not be done on an economical basis.

As background, the Arsenal Statute states:

"The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an eco-

nomical basis." In the AFGE litigation, one of the defenses raised by the Government was that notwithstanding the use of the term "shall" in the Arsenal Statute, the statute is really permissive rather than mandatory. It did not take the Court long to dispose of this defense by concluding that "shall" means "shall" and hence, the statute is mandatory in nature.

The Court, however, found the remainder of the Arsenal Statute to be much more ambiguous, with the Secretary of the Army having discretion to determine what "supplies" fall within the purview of the law.

As an exercise of this discretion, it would seem the Secretary has the sufficient authority to determine whether an end item should be acquired as a "system" or acquired utilizing component breakout and as long as that authority was exercised in a reasonable manner, that exercise of authority would be upheld by the courts.

OSC's **John Seeck**, DSN 793-8462, has written an excellent article on the District Court decision (Encl 3).

AMC Counsel **Louis Rothberg**, DSN 767-8147, has prepared an article describing the requirements and components applicable to the future staffing of International Agreements (Encl 4).

The paper details that the text of an International Agreement must include

- a) a precise description of the background information being given by the US to the foreign partner--and its value;
- b) state whether the foreign entity is providing the US non-financial contributions;
- c) the dollar value of each contribution; and,
- d) the specifics on both the non-financial and financial aspects of the agreement.

The paper also defines what the term "equitable" means with respect to international agreements, stating that this is interpreted through staffing by legal, resource management and the scientific communities.

Electronic Signatures-- New Law

The purpose of the Electronic Signatures in Global and National Commerce Act (ESGNCA) is to permit and encourage the expansion of electronic commerce through free market forces rather than governmental restrictions and mandates by promoting the validity, integrity and reliability of such transactions.

Particulars:

The bill will replace pen and paper signatures and gives validity and reliability to the use of electronic signatures.

E-signatures can take several forms: a name typed at the end of a document, a digitized image of a handwritten signature, or a "digital signature" composed of a string of letters and numbers that can be unscrambled with encryption software.

ESGNCA preempts state laws by setting a national benchmark for electronic signatures.

According to the bill, no document will be denied le-

gally binding status just because it is in electronic form.

The law will help e-commerce thrive by giving the consumer confidence and trust that their transaction is secure and legally binding.

The Inslee Amendment to the bill adds an "opt in" provision, meaning businesses are required to get consumer consent before substituting electronic copies of contracts, loans, etc. for paper ones.

Once consumers do "opt in" they can do everything from open a brokerage account and sign a check to finalize a mortgage online.

The law gives the Government the ability to do e-signatures when it comes to commercial transactions, which will make their contractual dealings faster and easier than the traditional pen and paper method.

Both the potential positive and negative of the act are outlined in a paper written by **Rebecca Frantz**, CECOM, DSN 992-9792(Encl 5).

Duplication of Sustainment Costs & Sole Source Awards

CECOM's **Jignasa Desai**, DSN 992-9827, has written an excellent article addressing Comptroller General decisions concluding that the duplication of sustainment costs, when properly substantiated under the appropriate circumstances, are plausible justifications for a sole source award.

Consequently, Justifications and Approvals (J&As) which cite duplication of sustainment costs as the reason for a sole source award should be reviewed in order to discern both:

- 1) a detailed explanation of the applicable recognized exception to the competition rule; and

- (2) actual analysis and data substantiating the claim of duplicative costs.

This review should be performed on a case by case basis.

Several decisions are cited and analyzed (Encl 6).

Watch What You Sign... Watch Where You Click

This is inspired by an actual incident with an AMC employee and a foreign contractor, but it has application for a great many of us, especially as we increasingly use the internet.

An ARL employee wished to attend a conference on Urban Warfare sponsored by an overseas company. He filled out a registration form on the company's website, intending that the company would send an invoice which he could then provide to contracting. Contracting would then execute a purchase order which, when accepted by the company, would become a binding commitment.

However, when he mentioned this intention to his supervisor, he was told that his branch had insufficient funds to send him that year. He immediately notified the company that he would not be able to attend and asked them to cancel his reservation. The company however, considered that it had a binding commitment based on his online registration. Nine months after the original exchange of e-mail the em-

ployee received notice from a foreign collection agency threatening his credit standing and legal action which would result in "levy execution upon your chattels and possessions" in the amount of 1,760 pounds sterling.

We may put to one side the question of whether the agency will decide it worth its while to finance a trans-Atlantic collection action. The more pressing question is whether a binding contract was actually formed.

Perhaps unsurprisingly, the evidence is ambiguous. Much of the form on the website makes it appear that submission of the form is binding. However, it also included the following: "Payment must be received before the conference date in order to guarantee your place."

ARL's interpretation of that sentence is that the company does not consider itself legally bound until payment is received. Since there must be mutual obligations for a contract to be binding, my conclusion is that no contract was formed.

(The conference company says that it finds this logic unconvincing. Legal has asked the company to provide some evidence of out of pocket expenses, since the researcher might feel a moral obligation to reimburse those. The company has treated this as if it were a request to audit its books and has refused even to assert specific expenses.)

This is still an on-going action, so we cannot report a final disposition. The point of this note is to serve as a warning. The ease and informality of the internet encourages many people to treat it in ways they would never dream of doing were they presented with a paper document. Despite the spread of government credit cards and the impetus to cut through red tape, there is still a reason why we have contract officers to execute contracts and attorneys to review them.

Thanks to ARL's **Bob Chase**, DSN 290-1599, for providing this article. We have asked Bob to keep us informed of developments.

FLRA On-line

REDS at Year 1

The FLRA has gone high-tech. The Authority has now made it possible to complete the following FLRA forms/petitions on line:

- * FLRA Document 1014 - Statement of Standard Procedures in Representation Hearings Before Hearing Officer

- * FLRA Form 21 - Petition

- * FLRA Form 22 - Charge Against an Agency

- * FLRA Form 23 - Charge Against a Labor Organization

- * FLRA Form 24 - Petition for National Consultation Rights

- * FLRA Form 26 - Petition for Consultation Rights on Government-wide Rules or Regulations

- * FLRA Form 43 - Withdrawal Request

- * FLRA Form 75 - Notice of Designation of Representative

While these forms can be completed on line, they must be printed and mailed to the appropriate General Counsel office serving your area. The forms are available on the Authority's web site at www.flra.gov.

In September, the Office of Equal Opportunity, HQ AMC asked each AMC REDS Team to provide information on the results of implementation of the program since September 1999.

The results are impressive in that it appears that most REDS teams operating at the installation level have done an excellent job in the following areas:

- * Briefing Commanders

- * Briefing senior staff

- * Developing REDS training materials--designed as a supplement to REDS Deskbook, based on local needs

- * Training the workforce

- * Defining scope of the REDS program--types of cases

- * Finding third-party neutrals--they are easy to find

- * Union support is exceptional

Participants Favor REDS

Participants in the REDS process like the experience, in comparison to traditional dispute resolution. This is the main conclusion reached in reviewing the REDS evaluation surveys filled out by

management, employees and third-party neutrals.

One area of concern is the length of time between requesting a third-party and the beginning of the ADR procedure (such as Mediation).

EEOC Mediation Program--Impressive Evaluation by Participants

The participant evaluation of the EEOC mediation program shows a high degree of participant satisfaction with the EEOC mediation program. Both the participant groups—charging parties and respondents—gave high marks to the various elements of the EEOC mediation program. A summary of conclusions and their implications are the following:

Would Use Again

An overwhelming majority of the participants (91% of charging parties and 96% of respondents) indicated that they would be willing to participate in the mediation program again if they were a party to an EEOC charge. Participants, regardless of their satisfaction with the outcome of mediation, overwhelmingly indicated their willingness to return to mediation. This is a strong indication of their satisfaction with the EEOC mediation program. The fact that willingness to return was high, even among participants who did not receive what they wanted, indicates

that a fair and neutral process that provides participants with an opportunity to present their views may be even more important than the obtained outcome.

Participants Advised about Process Ahead of Time

The participants expressed strong satisfaction with the information they received about mediation from the EEOC prior to their attendance at the mediation session. They also felt very strongly that they understood the process after the mediator's introduction of the process.

Prompt Scheduling

The vast majority of the participants agreed that their mediation was scheduled promptly. The EEOC's prompt scheduling of mediation sessions is indicative of effective program management. It also increases the chances of dispute resolution since parties

get together in a timely fashion before they hardened their positions.

Opportunity to Present View

An overwhelming majority of the participants felt that they had a full opportunity to present their views during mediation. Thus, the “voice factor,” an essential element of procedural justice, was present in the EEOC mediation process.

Satisfaction with Mediator

The participants were very satisfied with the role and conduct of the mediators. They felt strongly that the mediators understood their needs, helped to clarify their needs, and assisted them to develop options for resolving the charge. They felt even more strongly that the procedures used by the mediators were fair.

The full Executive Summary of the EEOC Report is provided for you(Encl 7).

Red Cross -- Special Status

Have you ever wondered about our support to blood drives sponsored by the American National Red Cross?

Recently, an employee in HQ AMC asked about this, and wondered whether the Red Cross has some special status. Research, indicates that the Red Cross does enjoy a special status that is reflected in JER 3-212f. However, this status is different that you might think.

Here is the response provided by **Mike Wentink**, HQ ANC Ethics Team Chief, DSN 767-8003.

Special Status

You asked if the Red Cross enjoys any special status. The answer is yes. Below (see enclosure) are a number of relevant statutory and regulatory citations. But, this status, and support that comes with the status, is in direct relationship to the Red Cross mission to carry out activities supplementing and otherwise assisting the Army in its programs relating to the health, welfare, recreation, and morale of military personnel and their dependents.

It is our policy to facilitate the accomplishment of this mission and to tender to the Red Cross the services, facilities and privileges whenever the Army has accepted the cooperation and assistance of the Red Cross. So, when the Red Cross sets up shop on our installations to provide support, or when the Red Cross deploys to war zones, etc., we are expected to provide various types of support to the Red Cross and Red Cross personnel.

Fundraising

But, when the Red Cross is out fundraising, or seeking donations of blood, they do not have a special status.

In such situations, the Red Cross is treated like anyone else. When the Red Cross seeks support for its blood drives, we can provide some support, such as providing space and informing (not soliciting or coercing or promoting) our personnel that the event is taking place and where, as long as we are willing to do such for similar types of organization events (there probably are no other organizations other than local hospitals).

Like any other non-Federal entity event, this support is subject to the criteria set out in JER 3-211a (DoD 5500.7-R), i.e.: it cannot interfere with duty performance or readiness; community relations or other local DoD/Army/AMC or community interests are served; it is appropriate to associate ourselves with the event; there is no law or regulation that prohibits the support, and there is no charge (there are some exceptions to the latter factor).

Excused Absences

Finally, JER 3-300d permits "agency designees" (supervisors/commanders) to permit excused absences for reasonable periods of time for their employees to voluntarily participate in community service activities, such as blood donations. This time off is not an award or inducement for participating, rather it is the time necessary for the employee to participate.

Accordingly, there is no objection if the CG wishes to support periodic Red Cross blood drives.

Mike's full opinion with regulatory cites is provided (Encl 8).

Private Associations

As explained in previous **ETHICS ADVISORIES**, there are a number of ethical issues that we must consider when we deal with POs. For example, employees who are officers, directors or active participants in POs, are disqualified from participating in official Army matters that affect their PO. We may not use our official position to endorse or promote a PO, encourage employees to join specific POs, or to help sell a PO's insurance or other products. We must also avoid bias or preferential treatment in our dealings with POs.

Official Relationship

But, does this mean that we cannot have any sort of "official relationship" with POs?

After all, there are quite a number of POs that were created by Army and/or other DoD employees to help themselves in their professional development and to better perform their duties; POs whose ideologies, views, and goals track with the Army.

These are organizations that have developed credibility within their respective pro-

fessions, Government and industry over a period of time. Often, they are a great resource for training. They also establish standards, positions and the like with respect to issues that we deal with in such areas as auditing, law, accounting, engineering, testing and electronics. Accordingly, there is often much to be gained by having an official "presence" with these organizations.

The answer is "yes," there is room for an "official relationship" with such organizations. But, there is a right way and a wrong way to do this.

A No

An employee may **not** be an officer, board member, or otherwise be involved in the management or operation of a PO as part of his or her official duties. Employees can do this only in their personal and private capacities, and then they are disqualified from participating in official matters that affect these organizations.

Another No

An employee may **not** be

directed by his or her supervisor or commander to be an officer, director or other active participant in a PO in his or her personal and private capacity.

A Yes

What we can do is this: in those cases where there is a strong and continuing DoD interest, heads of commands and organizations may assign an employee as an "official liaison" to a PO. As an "official liaison," the employee acts in his or her official capacity and represents the command and agency's interests to the PO. The "official liaison" attends board and other meetings for information on behalf of the command or organization, and may participate in discussions and even vote on matters of mutual interest. However, the PO must understand that such participation in no way binds the Army or the Federal government.

The complete Advisory compiled by **Mike Wentink** and Alex Bailey are provided for your information and use (Encl 9).

Frequent Flyer Rules

In the 28 September 2000 edition of **USA Today**, there is a report of a defense official who is accused of using over \$4,000 worth of FFMs earned while on official travel, for personal travel. Although the report says that the Department of Justice (DOJ) has declined to prosecute, I suggest that the very fact that the matter was referred to DOJ for prosecution, demonstrates the importance of following the rules. The matter has been turned over to the employee's supervisor.

Hence, the AMC Ethics Team has updated a paper on Frequent Flyer rules to ensure that there are no memory lapses concerning the FFM rules. FFMs earned while traveling on official business belong to the Government, and we may not use them for our personal travel, to include travel while on permissive TDY. We may not give them away to a charity. FFM accounts for official travel should be kept separate from personal travel accounts. If we commingle our official and personal FFMs in a single account, all FFMs within the

account are considered to belong to the Government absent a clear accounting to the contrary (so, keep records!).

How do we use the FFMs earned while on official travel? We use them to reduce the cost of future official travel.

Can we use the official FFMs to upgrade our class of travel? Maybe, but probably not. Here are the rules with respect to upgrades:

We may never use official FFMs to upgrade to first-class, unless we are otherwise authorized to fly first-class in accordance with the JTR/JFTR and the SECARMY 9 Apr 99 travel policy. First-class travel requires Secretary of the Army approval. Here is an important point: if there are only two classes on a flight (as many (most?) flights seem to be today), the upper class is always considered to be first-class, whatever the airline might call it — even if the airline calls it “business-class.”

The complete Ethics Advisory of FF rules is included (Encl 10).

Outside Legal Practice Rules

The basic rule for civilian attorneys is found in paragraph 4-17b, AR 690-200: “[N]o Army civilian attorney will engage in the outside practice of law without prior written approval of the QA.” The QA is the attorney's qualifying authority. For AMC civilian attorneys, the QA is the AMC Command Counsel. This rule does not apply to “teaching, lecturing or writing for publication ... [or] the infrequent, occasional rendering of legal advice or assistance without compensation to personal friends and relatives ... “ This rule is adopted in the AMC Command Counsel Policy Statement 96-1 dated 28 Feb 96, Outside Employment.

The rule for uniformed attorneys is found in paragraph 4-3c, AR 27-1: “An attorney of the JALS [Judge Advocate Legal Service] will not engage in private law practice without the prior written approval of TJAG.” Additional guidance is provided in paragraph 10-5, *JAGC Personnel Policies*.

The complete discussion with comments from **Mike Wentink** are provided (Encl 11).

3 Professional Conduct Reminders re Conflict of Interests

I-Loyalty

“Client-Lawyer Relationship” governed by the conflict of interest rules. There are three of them: **Rule 1.7 Conflict of Interest: General Rule**; **Rule 1.8 Conflict of Interest: Prohibited Transactions**; and **Rule 1.9 Conflict of Interest: Former Client**. In addition, each of the rules makes cross-references to other rules.

Multiple Clients-- Adverse Interests

We begin with the first part of **Rule 1.7**.

Rule 1.7 Conflict of Interest: General Rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

The comments accompanying the discussion of this rule highlights the concept of loyalty as an essential element in the lawyer’s relationship with clients.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent.

The full treatment of this issue is provided (Encl 12).

II-Interests Interests & Responsibilities

Rule 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. Comment and Discussion at Encl 13.

III-Transactions Prohibited Transactions

This complex issue has several related issues, all tied to the principle that a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

The full Professional Conduct reminder is at Encl 14.

Thanks to **Mike Wentink** for these Professional Conduct Reminders.

Environmental Law Focus

Are Your Underground Tanks Compliant?

EPA has hit the Army's Fort Lewis with the military's largest proposed fine for alleged underground storage tank (UST) violations. EPA Region X officials say the move should send a clear signal to other potential violators that the agency is prepared to take tough action to prevent irrevocable damage to

aquifers relied upon for drinking water. Most drinking in the Fort Lewis, WA, area comes from relatively shallow groundwater sources that are particularly vulnerable to contamination, according to EPA. The agency in its complaint cited more than half of the base's regulated USTs. EPA proposed the \$470,000

penalty against the base Sept. 18. The agency cited violations at 32 of the base's 62 regulated tank systems. Many of the violations relate to inoperative or malfunctioning leak detection equipment, according to Acting Regional Administrator Chuck Findley in a press statement.

Active BRAC Sites: DOD Issues Interim Land Use Controls Policy

DOD environment chief **Sherri Goodman** signed an interim policy in August that provides a framework for addressing land use controls (LUCs) at both active bases and those being transferred out of federal control, such as closing bases. The policy includes detailed guidance that cover specific LUC issues encountered at active bases and at BRAC sites. LUCs are any type of physical, legal or administrative mechanism that restricts the use of, or limits access to, real property to

prevent or reduce risks to human health or the environment, the interim policy says. The term includes institutional controls, which are discussed in the National Contingency Plan and are primarily legal mechanisms, according to the interim policy. "The intent of this policy is to ensure that land use activities in the future remain compatible with the land use restrictions imposed on the property during the environmental restoration process," the interim policy says. The

document is the first DOD policy on land use controls. The policy comes several months after EPA issued an interim policy on land use controls at BRAC sites that requires transferring agencies, such as DOD, to put procedures in place that allow EPA to determine if land use controls will perform as expected. The policy can be obtained on-line from the DoD Environmental Cleanup web site, as <http://www.dtic.mil/envirodod/brac/>

Environmental Law Focus

Air Base Charged With Deliberate Crimes

Don't let this happen to your installation. Residents in Tennessee have filed a \$2.5 billion class action lawsuit alleging that Arnold Air Force Base has knowingly released hazardous waste and explosive methane gas into the communities around the facility. The suit asks a federal judge to act to protect the 1,500 students at Coffee County Central High School from the threat of a methane explosion. The suit seeks \$2 billion in compensatory damages and \$500 million in punitive damages. The suit also alleges that water consumed by local residents has been poisoned with dangerous

chemicals including birth defect causing trichloroethylene (TCE), and that methane seeping from a landfill on the base threatens the safety of many local residents. The suit alleges that Arnold Air Force Base made the intentional decision not to place methane controls on the landfill, thereby allowing methane to migrate "into a residential community, causing one explosion and serious injury." The suit also attributes cancer cases around the base to the release of TCE into the ground and water in concentrations many times higher than the minimum set by the EPA

First Non-BRAC FOSET for AMC Post Signed

The Army recently signed the Finding of Suitability for Early Transfer (FOSET) for transfer of 940 acres at Volunteer Army Ammunition Plant to the City of Chattanooga and Hamilton County, Tennessee. This was the first non-BRAC FOSET to be approved by the Army.

The FOSET was the result of significant review and support from the Army Materiel and Operations Support Command's legal offices. Upon approval of the Early Transfer by the Governor of Tennessee, the Army transferred the property for \$7.5 million, in a ceremony attended by the Secretary of the Army.

New Army Reg on NEPA

Revised version of AR200-2 published in the September 7 Federal Register.

ELD Bulletins for August & September 2000

Environmental Law Division Bulletins for August (Encl 15) and September (Encl 16) 2000 are provided.

These Bulletins are now available electronically on the JAGC Net Environmen-

tal Forum, and will no longer be provided in the Newsletter. If you have not been granted access to the JAGC Net Forum, you need to contact the Environmental Law Division.

Faces In The Firm

Hello--Goobye

Arrival

TACOM-ARDEC

Robert Beam recently joined the IP Division. Bob graduated from Temple University School of Law and joins ARDEC from private practice. Previously, Bob served as Patent Counsel for corporations in New York and New Jersey.

TACOM-Warren

The Business Law Division welcomes **Tiffany J.L. Hall** has a joint J.D. and Masters of Public Administration from the Southern Illinois University School of Law. She has been working for the Detroit Edison Class Action Office.

The other new hire, **Anna-Maria Martin**, is a graduate of Case Western Reserve University School of Law. She has been working for the past year as a Contract Specialist Intern at TACOM. She also worked as an intern for the U.S. Army JAG Corps and the Office of General Counsel for the U.S. Navy.

CECOM

Janet K. Baker has joined the CECOM Legal Office, Business Law Division C, Fort Huachuca Branch in Arizona. She is an experienced contracts attorney and came to legal from the post's Directorate of Contracting. She had previously worked as a contracts attorney for the Navy.

Pam McArthur has joined CECOM-Ft. Monmouth as the new Chief of Legal Services. She comes from the Fort Dix Legal Office and is also in the Army Reserves.

1LT Michael Stephens graduated from the 152d Basic Course and arrived at Fort Monmouth to work in the SJA Division.

HQ AMC

The Office of Command Counsel welcomes **Major Sandra Forston**, who will work with the Business Operations Law Division, arriving from an assignment with the Contract Appeals Division.

Departure

HQ AMC

Alex Bailey, long time counsel in the General Law Division and formerly from ARL departed AMC in late September to assume a management position with the Department of Energy, a position earmarked for the SES.

CECOM

CPT Walt Parker departed the CECOM Legal Office and is now with the United States Army Claims Service, Tort Claims Division, Fort Meade, Maryland.

CPT Sandy Baggett completed her tour of active duty and has accepted a position with the Bronx District Attorney's Office.

OSC

Bridget Stengel resigned from Federal service to stay home with her family.

Faces In The Firm

Promotions & Awards

HQ AMC

As part of the ceremony recognizing the resolution of the 500th AMc-Level Protest, **General Coburn** gave the AMC Commander's coin to the AMC Protest Litigation Branch:

Vera Meza,

Josh Kranzberg,

Major Cindy Mabry,

Jeff Kessler, graduate of the group

Craig Hodge,

and the former legal technician for the unit

Debbie Arnold.

These individuals wish to express their thanks for the exceptional legal work performed at the AMC command and activity level that forms the nucleus of the AMC Protest Team.

The Teamwork exhibited by those involved in defending protests is a model for field-Headquarters relationships.

CECOM

Ginny Turgyan was selected for promotion to GS-9, Budget Analyst, in the CECOM Legal Office. Ginny's work in this difficult and complex area benefits all of us on a daily basis. We are very fortunate to be able to recognize the increased responsibilities and duties of this position. We are very fortunate that we were able to recognize the increased responsibilities and duties of her position and have it graded accordingly.

Robert Russo, Business Law Division B, was part of the CECOM Electronic Reverse Auctioning team selected as the CECOM Quality Team of the Quarter for the third Quarter FY00.

Michael Russell, Business Law Division C, Fort Huachuca Branch, received the Commander's Award for Civilian Service for his outstanding work supporting the Total Engineering and Integration Services (TEIS) program for the Information Systems Engineering Command, Ft. Huachuca, Arizona.

AMCOM

Congratulations to **Karolyn E. Voigt,** who was recently promoted to GS-0905-15 Lead Attorney in the Acquisition Law Division.

Death

It is with much sadness that we report the passing of **Mark Sagan's** mother, **Jocelyn J. Sagan,** on 5 September 2000.

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Recognizing the Success of the U.S. Army Materiel Command's Alternative Dispute Resolution (ADR) Protest Program

1. The U.S. Army Materiel Command's Protest Program is widely regarded as this Command's most successful Alternative Dispute Resolution Program initiative. Designed and administered by the Office of Command Counsel with the cooperation and support of our HQ AMC Acquisition professionals and AMC's subordinate commands and activities, this program has recently achieved a significant milestone warranting recognition and commendation. The U.S. Army Materiel Command has successfully resolved the 500th protest filed with this headquarters using the AMC ADR Protest Procedure. In deciding to recognize this event as a major milestone, we must understand that the achievement here is the successful resolution of contractor concerns legitimately raised in the course of our extensive contractual operations without recourse to time consuming and expensive formal litigation. The AMC Protest Program has afforded 500 contractors an informal forum where fair resolution is consistently attained using an expeditious and economical ADR procedure.
2. The AMC ADR Protest Program has been a resounding success providing us an effective tool to resolve contractor protests with minimal impact on mission requirements. These protests have been resolved in an average of 17 workdays. Our contractors and their industry associations have heralded this AMC forum as a most worthwhile alternative to formal litigation and the Office of Federal Procurement Policy has recognized the AMC Protest Program as "One of the Ten Best Practices in the Federal Government." The President issued Executive Order No. 12979 entitled "Agency Procurement Protests" on 25 October 1995 directing that federal agencies adopt similar ADR protest resolution procedures.
3. The AMC Command Counsel and his attorneys are commended for their outstanding efforts in developing and administering this highly successful program. I also commend the acquisition personnel of this headquarters who have actively supported the program and you, the MSC Commanders and your personnel who have worked so closely with our headquarters on these cases to ensure the success of our ADR program. Together you have effectively addressed contractor concerns and dramatically reduced the impact of protest litigation. Your professionalism and conscientious efforts to preserve the integrity of the AMC acquisition mission are reaffirmed this day as I sign this "Memorandum of Recognition" commending your contributions to the success of our ADR Program. As we pass this 500th milestone, I extend to each of you my thanks for a job well done - knowing that you will do all that you can to continue accomplishing the goals of this program.

4. AMC -- Your Readiness Command . . . Serving Soldiers Proudly!

/S/

JOHN G. COBURN
General, USA
Commanding

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SIMULATION, TRAINING AND INSTRUMENTATION COMMAND, 12350
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DOCUMENTING THE CONTENT OF ORAL PRESENTATIONS DURING SOURCE SELECTIONS

The increased use of oral presentations as a source selection technique can be traced to the acquisition reform initiatives flowing from the enactment of the Federal Acquisition Streamlining Act of 1994, Pub L. No. 103-355, 108 Stat. 3243 (FASA) and the Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub L. No. 104-106, 110 Stat. 186 (FARA). The FAR Part 15 Rewrite (Federal Acquisition Regulation: Part 15 Rewrite: Contracting by Negotiation and Competitive Range Determination, 62 Fed Reg 51, 224 (1997)), for the first time, explicitly recognized oral presentations as a source selection technique in negotiated procurements by providing for them in FAR 15.102. Among the few conditions placed on oral presentations in the new FAR Part 15 is that the Contracting Officer maintain a record of oral presentations to document what the agency relied on in making the source selection decision. FAR 15.102(e)

Two recent decisions by the Comptroller General clearly illustrate that the failure to comply with this FAR provision will result in the General Accounting Office (GAO) sustaining a protest challenging the reasonableness of an agency's source selection decision. In Future-Tec Management Systems, Inc.; Computer and Hi-Tech Management, Inc., B-283793.5; B-283793.6 dated 20 March 2000, a Request for Proposals (RFP) was issued by the Navy Fleet and Industrial Supply Center (FISC)-Norfolk Detachment, Philadelphia on behalf of the Navy Reserve Information Systems Office and Systems Executive Office for Manpower and Personnel located in New Orleans, Louisiana. The RFP sought offers for a broad range of automated information system support and infrastructure services for those offices. The RFP was a competitive procurement and contemplated the award of a Cost-Plus-Fixed-Fee (CPFF) Indefinite-Delivery/Indefinite-Quantity (ID/IQ) contract. The RFP provided that the award would be made on a best value basis and that the technical factor was more important than the cost factor in the evaluation. Offerors were to prepare their technical proposals in two volumes.

The first volume was to include written descriptions of the offeror's past performance and its personnel resources. The second volume was to consist of slides that the offeror would use in oral presentations addressing its technical approach, management plan and corporate experience. Five offerors submitted proposals and a Technical Evaluation Committee (TEC) reviewed them and prepared a written technical evaluation. The GAO stated that although the evaluation report provided a separate evaluation for each offeror's proposal, the comments for the proposals were identical for Future-Tec Management Systems, Inc. (Future-Tec) and Computer and Hi-Tech Management Systems, Inc. (CHM) – the protestors – and Systems Engineering and Security, Inc. (SES) – the awardee, and provided no explanation regarding any perceived differences among the proposals.

Based on the TEC's evaluation and the Contracting Officer's review of the proposals, the Contracting Officer included Future-Tec, CHM, and SES in the competitive range. These offerors were then allowed to make their oral presentations and to answer questions posed by the TEC. The GAO noted that at the protest hearing, the Contracting Officer stated that no written record was made of the oral presentations or the follow-up discussions. After discussions were completed, the offerors were requested to submit revised technical proposals. The TEC reviewed the revised proposals and prepared a revised technical evaluation report which differed from its initial report only in the evaluation of key personnel resources, for which each proposal was now rated acceptable (in its initial report the TEC rated each proposal as unacceptable in this area). Overall, SES was rated highly acceptable, while Future-Tec and CHM were rated acceptable. These three offerors were then requested to submit best and final offers (BAFOs). The Contracting Officer, acting as the Source Selection Authority (SSA), analyzed the technical ratings and costs for the three proposals and selected SES for award. In her Source Selection Decision Memorandum, the Contracting Officer ranked Future-Tec's proposal third, based on its combined technical rating and cost. Comparing the remaining two proposals, the Decision Memorandum noted that SES' proposal was rated more highly on technical merit though higher-priced than CHM's proposal and then refers to a cost/technical tradeoff analysis for which the

only documentation was the Contracting Officer's conclusory statement in the Decision Memorandum that "the substantial technical superiority of the SES proposal outweighs any benefit that would be gained from CHM's lower cost proposal." Following award to SES and debriefings to Future-Tec and CHM, Future-Tec and CHM protested on, among other grounds, the fact that the Navy's evaluation of the offerors' technical proposals and resulting source selection were improper.

The GAO reiterated its general rule that in reviewing an agency's evaluation of proposals and the source selection decision, its review is confined to a determination as to whether an agency acted reasonably and consistently with the stated evaluation factors and applicable procurement statutes and regulations. GAO also stated that an agency's evaluation of proposals and source selection decision must be documented in sufficient detail to allow for the review of the merits of a protest. Where an agency fails to adequately document its evaluation of proposals and source selection decision in sufficient detail to show that they are not arbitrary, the GAO will conclude that the agency did not have a reasonable basis for its determination.

Applying these rules to the instant protest, the GAO concluded that the Navy did not adequately document its evaluation of the proposals and that the documentation and further explanation offered during the course of the protest, including the hearing, failed to demonstrate that the evaluation and source selection were reasonable and supported by the facts. In support of this conclusion, the GAO found that the Navy's entire technical evaluation record consisted of only three documents: the TEC's extremely brief and conclusory evaluation of initial proposals; the TEC's revised technical evaluation, unchanged from the initial evaluation except in the area of key personnel resources; and the abbreviated Source Selection Decision Memorandum, which generally adopted the TEC's findings and ratings with little further explanation. The GAO found that the documentation lacked any discussion of the relative strengths and weaknesses of each of the proposals under each of the evaluation factors, and contained no evidence that the factors were weighted differently under the evaluation or how the information provided in the oral

presentations was considered. Regarding the oral presentations, the GAO noted that during the hearing when the Contracting Officer was asked why SES' proposal was rated highly acceptable under the technical factor while the protestors' proposals were rated acceptable, she stated that SES went into much greater detail to explain its approach during its oral presentation, and that, therefore, it was clear that it offered a superior technical approach. She also stated that although the TEC members discussed their ratings after the oral presentations, no notes were made of the oral presentations, nor was the evaluation of the oral presentations documented in any way.

The GAO also found that the Contracting Officer at the protest hearing recognized that the source selection decision was poorly documented and attempted to provide additional support. The GAO stated that where post-protest explanations provide sufficient, consistent detail by which the rationality of an evaluation decision can be judged, it is possible to conclude that the agency had a reasonable basis for the decision, however, here, the explanations provided no such reasonable basis. In conclusion, the GAO determined that since the record, including the hearing testimony, offered no convincing explanation as to why SES' proposal was rated technically higher than the protestors' proposals, the source selection lacked a reasonable basis and, accordingly, sustained both protests.

Although the GAO didn't cite or refer to any FAR provisions in sustaining these protests, it specifically did so in a protest decision a few months later. Like the protests discussed above, the GAO sustained the protest in J&J Maintenance, Inc. (J&J), B-284708.2; B-284708.3, decided 5 June 2000 on the basis that the agency's record of the source selection decision did not establish the reasonableness of the evaluation or the cost/technical tradeoff underlying the source selection.

The RFP in this protest was issued by the Army for maintenance and repair of family housing and for operation of a "self-help" center at Ft. Polk, Louisiana. The RFP contemplated award of a requirements contract on a best value basis. The evaluation factors were quality, price

and past performance in descending order of importance. The RFP required the quality portion of each offeror's proposal to be presented orally and indicated that the agency intended to award the contract without discussions.

Six firms, including J&J, the protestor, submitted proposals. Each offeror made an oral presentation as required by the RFP and after the initial evaluation two proposals were rated unsatisfactory. The SSA reviewed the rankings of the four remaining proposals and decided to award the contract on the basis of initial proposals without discussions. The SSA noted that Day and Zimmerman Services' (D&Z's) proposal had the highest score under the quality factor and determined D&Z's proposal to represent the best overall value to the Government and be worth the additional cost to have D&Z rather than J&J perform the work. Based on this determination, the contract was awarded to D&Z and, after a debriefing, J&J filed a protest. The basis of J&J's protest was that the award based upon D&Z's higher priced but higher rated proposal under the quality factor was flawed because the Army had unreasonably downgraded J&J's proposal and evaluated proposals unequally giving D&Z's proposal higher ratings in a number of areas even though J&J's proposal contained similar or better features.

When the GAO reviewed the record, it concluded that the agency did not adequately document its evaluation of the proposals and the source selection decision. As stated above, the RFP required each offeror to make an oral presentation of quality, the most important evaluation factor. The GAO cited FAR 15.102(e), which requires the Contracting Officer to maintain a record of oral presentations to document what the agency relied on in making the source selection decision. The GAO noted that FAR 15.102(e) allows the SSA to select the method of recording the oral presentations and gives the following examples: videotaping, audio tape recording, written record, Government notes, copies of offerors' briefing slides or presentation notes. Regarding the instant protest, the GAO commented that the quality factor proposals consisted of oral presentations, briefing slides and resumes only. While the RFP stated that the agency could videotape and/or record the oral presentations, the agency chose not to do so.

The only record of the oral presentations was the offerors' slides and evaluators' notes. The GAO, while recognizing the discretion of the SSA to decide the method and level of detail of the record of an oral presentation and that the use of offerors' slides and Government notes are two possible methods under the FAR, stated that in the instant protest, the slides and notes did not present sufficient information to determine the reasonableness of the evaluations of J&J's and D&Z's proposals. The GAO commented that the slides were only an outline and did not describe what was included in the two-hour oral presentations and question and answer sessions. The GAO found that the evaluators' notes were not summaries of the oral presentations but mostly sketchy comments providing no elaboration or description of what was in the portion of the oral presentation being commented on by the evaluator. As a result of this lack of adequate documentation of the oral presentations, the GAO concluded that the Army did not meet the requirements of FAR 15.102(e). The GAO also found that the Army failed to meet the requirements of FAR 15.305(a) which requires agencies to document in the record of the evaluation the relative strengths, deficiencies, significant weaknesses and risks of each of the competing proposals. The GAO found that there was nothing in the evaluators' notes of the oral presentations or elsewhere that discussed these aspects of the offerors' proposals. The GAO also concluded that the SSA's Source Selection Decision Document did not meet the requirements of FAR 15.308. That provision requires that the selection decision be documented and include the rationale for any tradeoffs made or relied on. In the instant protest, the GAO found that although the Source Selection Decision Document listed several advantages of D&Z's oral presentation, it did not address any of the advantages or disadvantages of J&J's oral presentation. The SSA simply compared the overall scores of the two offerors in the quality and past performance evaluations and their total prices. This comparison the GAO found failed to document the rationale for the tradeoff between J&J's lower rated, but lower priced proposal and D&Z's high rated and higher priced proposal.

As a result of the agency's failure to provide an adequate record of the oral presentations and the evaluation and adequate rationale for the source selection decision as required by FAR 15.102(e), 15.305(a) and 15.308, the GAO concluded that it had no means to determine, based on the record before it, the reasonableness of the agency's selection and, therefore, sustained J&J's protest.

As the above two protest decisions indicate, the use of oral presentations can become a double-edged sword. Although they are an effective means of streamlining, simplifying and enhancing the acquisition process, when used, the oral presentations, as well as the balance of the evaluation, the strengths and weaknesses of the competing proposals, any tradeoffs made and the rationale for the source selection decision, must be thoroughly documented.

The point of contact for this subject within the CECOM Legal Office is Mr. William Kampo, Jr., DSN 992-3381; (732) 532-3381.

KATHRYN T. H. SZYMANSKI
Chief Counsel

The Arsenal Statute - A New Decision

In what may be perceived by many as a blow to the Arsenal Statute, the United States District Court for the Central District of Illinois has granted the Government's motion for a summary judgment in a lawsuit filed by the American Federation of Government Employees (AFGE).

This lawsuit, *AFGE v. Cohen*, was brought by the AFGE as a result of reductions in force that were caused by the Army's decision to award two projects to the private sector. The AFGE alleged that these awards were made in violation of the requirements of the Arsenal Statute, 10 U.S.C. 4532(a). More specifically, the AFGE alleged that these awards were made in violation of the requirements of the Arsenal Statute in that no cost comparison had been performed to demonstrate that production at a Government-owned facility could not be done on an economical basis.

As background, the Arsenal Statute states:

"The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis."

In a series of decisions rendered by the General Accounting Office (GAO) beginning with an Opinion Letter (B-143232) written on December 15, 1960 to the Subcommittee for Special Investigations of the House Armed Services Committee, the GAO has consistently interpreted the phrase "economical basis" "...to require a comparison of all costs incurred by the Government as a result of producing an article in Government-owned facilities, with the price at which the article could be purchased from a private manufacturer." See B-143232, page 5. This comparison has become known as an out-of-pocket cost comparison.

In the AFGE litigation, one of the defenses raised by the Government was that notwithstanding the use of the term "shall" in the Arsenal Statute, the statute is really permissive rather than mandatory. It did not take the Court long to dispose of this defense by concluding that "shall" means "shall" and hence, the statute is mandatory in nature.

The Court, however, found the remainder of the Arsenal Statute to be much more ambiguous. In discussing the term "supplies" the Court noted that the language of the statute had been changed from "all supplies" to "supplies", thus implying that less than all supplies were covered by the statute, but leaving it somewhat ambiguous as to exactly what "supplies" were subject thereto. The Court further noted that the statute contained "no guidance, criteria, or direction" as to how

the cost analysis required by the statute was to be performed. As a result of these perceived ambiguities in the statute, the Court concluded that as long as the agency interpreted and implemented the statute in a reasonable manner, the Court would not disturb the resulting decision.

More specifically, because of these ambiguities, the Court found that the Secretary of the Army has discretion to determine what "supplies" fall within the purview of the Arsenal Statute. As an exercise of this discretion, it would seem the Secretary has the sufficient authority to determine whether an end item should be acquired as a "system" or acquired utilizing component breakout and as long as that authority was exercised in a reasonable manner, that exercise of authority would be upheld by the courts.

In addition, as long as an acquisition had separate statutory authority, it has been Army policy to treat that acquisition as an exception to the requirements of the Arsenal Statute. For example, if the acquisition of an item is being conducted on a sole source basis under the authority of 10 U.S.C. 2304(c)(1), the Army has treated that acquisition as being an exception to the requirements of the Arsenal Statute. After reviewing this practice, the Court concluded that it "... cannot find that the Army's policy of incorporating these same exceptions [i.e., 10 U.S.C. 2304] into its procurement procedures and policies implementing the Arsenal Act is either an unreasonable construction of the statute or inherently inconsistent with the plain language of the statute."

In summary, *AFGE v. Cohen* tells us two things. First, "shall" means "shall". Second, and more importantly, because of the lack of specific definition in the Arsenal Statute, there are ambiguities in the statute and these ambiguities vest the Secretary of the Army with discretion as to how to implement the statute and as long as that implementation has a reasonable basis, the courts, or at least this particular Court, will not upset that implementation.

POC: Mr. John Seeck, seeckj@osc.army.mil, DSN 793-8462

The following is a legal opinion from AMC Office of Command Counsel (Louis Rothberg), dated 19 June 2000, that applies to all future staffing matters for International Agreements.

1. Section 27 of the Arms Export Control Act [22 USC 2767] and other DoD policy allow the US Army and a foreign partner to make both financial and non-financial contributions to an international project under an International Agreement (IA) such as a PA or MOU. There is both a mandatory legal and policy requirement that, overall, the US and foreign partner's financial and non-financial contributions must be "equitable". The only mutually binding legal document by which the US and the foreign partner commit to these financial and non-financial contributions is the MOU or PA - not the SSOI, not the DDL, not anything other than the IA.

2. The question as to whether an IA is "equitable" is not within the exclusive domain of the proponent scientific community to decide. The legal and comptroller staff elements also review this matter from their respective disciplines. When preparing an SSOI and MOU/PA that will come to me for legal review to determine a proposed IA's compliance with the statutory and regulatory "equitability" requirements, I need to see the following:

In the SSOI:

- a. The financial contributions of the Parties:
- b. Some discussion of the proponent's valuation of the US Army's non-financial contribution or contributions to the foreign partner for use in the Project, which includes, but is not limited to, US Background Information [BI], use of a test range, project equipment, etc.,
- c. Some discussion of the proponent's valuation of the foreign partner's expected non-financial contribution or contributions to the US Army for use in the Project, which includes, but is not limited to, the foreign partner's BI, use of a test range, project equipment, etc.
- d. The proponent's reasons of how and why the overall contributions of the Parties are "equitable" to the USA in light of the Parties' total financial and non-financial contributions.

3. If, after negotiations, the foreign partner refuses to provide Background Information, or any other non-financial contribution which the US Army expected, the Project's "equitability" will need to be re-evaluated before the IA.

4. In addition to the SSOI containing a full discussion of these matters, the PA text or the MOU text must completely and clearly capture the appropriate obligations to provide the financial and non-financial obligations, described in the SSOI.

5. Accordingly, the text of the IA must clearly state all of the following:

a. The precise description of all the BI that the US is providing to the foreign partner(s) and its value. This should appear in the IA as the first US task, e.g., "The US will provide the following US BI to the [foreign partner]:_____, _____." The IA should also state the schedule of dates for the US to provide the BI. The BI description must be clear enough and detailed enough that we can know when or whether the US has fully and legally complied with the obligation. A vague, generic description will not be acceptable for legal sufficiency. The description should also be congruent to the SSOI claim that the US BI is worth US \$_____. The comptroller will likely want to factually verify that your method of computing the BI's value comports with the description of the BI in the IA.

b. Where the SSOI claims that the foreign partner is providing the US non-financial contributions, such as, BI, access to and/or use of their unique facilities, project equipment, unique professional expertise, etc. -- this obligation must appear in the IA. Otherwise, there will be no US right or legal claim to have access to or use thereof. Thus, the foreign party's tasks in the IA must state, for example: "The [foreign partner] will provide access to or use of [specific location and facility] by the US Army so as to carry out the task of _____ at all times [unless other specific times stated herein] during this [MOU/PA]." Where the foreign party is providing BI, this should appear in the IA as the first foreign task, e.g., "The [foreign party] will provide the following BI to the US Army: _____, _____." The IA should also state the schedule of dates for the foreign party to provide the BI. The BI description must be clear enough and detailed enough that we can know when or whether the foreign party has fully and legally complied with the obligation. A vague, generic description will not be acceptable for legal

sufficiency. The description should also be congruent to the SSOI claim that the foreign BI is worth US \$_____. The comptroller will likely want to factually verify that your method of computing the BI's value comports with the description of the BI in the IA.

c. The financial section of the IA must specify the dollar value of each contribution. Thus, the IA must say that the US financial contribution is US\$_____ and the US non-financial contribution is US\$_____ for a total overall contribution of US\$ _____.

d. Also, the IA must say that the [foreign partner] financial contribution is _____, and the [foreign partner] non-financial contribution is _____, for an overall [foreign partner] contribution of _____.

6. The US law and policy, and in many cases master MOUs, require this degree of specificity in the IA text (for Master TRDP MOUs, this is usually found in the Article/Section on Sharing of Tasks and Financial Arrangements).

7. Please remember that, when considering what BI the US Army will provide to the foreign partner under the IA, one should consult with his local legal office to verify that the US Army does, in fact, have the legal right to transfer that Information to that Partner for the proposed purposes described in the IA. This may require a legal review, for example, of contracts under which the US Army BI was generated in the first place

Electronic Signatures in Global and National Commerce Act (ESGNCA)

PURPOSE: To permit and encourage the expansion of electronic commerce through free market forces rather than governmental restrictions and mandates by promoting the validity, integrity and reliability of such transactions.

FACTS:

- ? The bill will replace pen and paper signatures and gives validity and reliability to the use of electronic signatures.
- ? E-signatures can take several forms: a name typed at the end of a document, a digitized image of a handwritten signature, or a “digital signature” composed of a string of letters and numbers that can be unscrambled with encryption software.
- ? ESGNCA preempts state laws by setting a national benchmark for electronic signatures.
- ? According to the bill, no document will be denied legally binding status just because it is in electronic form.
- ? The law will help e-commerce thrive by giving the consumer confidence and trust that their transaction is secure and legally binding.
- ? The Inslee Amendment to the bill adds an “opt in” provision, meaning businesses are required to get consumer consent before substituting electronic copies of contracts, loans, etc. for paper ones.
- ? Once consumers do “opt in” they can do everything from open a brokerage account and sign a check to finalize a mortgage online.
- ? The law gives the Government the ability to do e-signatures when it comes to commercial transactions, which will make their contractual dealings faster and easier than the traditional pen and paper method.
- ? *Positive Aspects of ESGNCA:*
 - o President Clinton said that online signers are guaranteed the same protections they would receive when signing a paper contract.
 - o The law includes consumer protection provisions that require certain documents to still be transmitted on paper. These documents include: cancellation of basic services such as water, power and gas; court orders; eviction notices; cancellation of health or life insurance; product recalls, and paperwork to accompany the shipment of hazardous materials.
 - o By providing Government documents online and giving citizens the ability to sign them using a digital signature, the law makes Government agencies more accessible to the people.

- o The President believes that firms could potentially save billions of dollars by sending and retaining statements and other documents in electronic form.
 - o In the future warehouses previously housed with paper copies of documents will be replaced with a server the size of a VCR.
- ? *Negative Aspects of ESGNCA:*
- o Privacy advocates are concerned that this law could lead to everyone having a digital ID code or number that could be used to track their personal information.
 - o The bill does not detail which technology should be used to identify and authenticate the parties agreeing to a contract online.
 - o It puts the poor or those who do not have access to a computer and the computer illiterate at a disadvantage because they will be unable to conduct e-signature business.
 - o Challengers of the law also say that businesses could unfairly penalize those buyers who want a physical document.
 - o Opponents of the law said that the bill does not establish significant consumer protections against forgery of electronic signatures.
- ? The law takes effect on October 1, 2000, but as of March 1, 2001 companies may begin the electronic retention of legal records such as mortgages and financial securities.

The Point of Contact for this action is Rebecca Frantz, (732) 532-9792, DSN 992-9792, CECOM Legal Office.

Duplication of Sustainment Costs as a Justification for Sole Source Awards

The following Comptroller General decisions indicate that the duplication of sustainment costs, when properly substantiated under the appropriate circumstances as detailed below, are plausible justifications for a sole source award. Consequently, Justifications and Approvals (J&As) which cite duplication of sustainment costs as the reason for a sole source award should be reviewed in order to discern both: (1) a detailed explanation of the applicable recognized exception to the competition rule; and (2) actual analysis and data substantiating the claim of duplicative costs. This review should be performed on a case by case basis.

The instructive case is *Sperry Marine, Inc.*, B-245654, Jan. 27, 1992, where the Comptroller General denied a protest in part and sustained a protest in part. There, the Comptroller General held that the proposed sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) (1988) for navigational radar systems to be used at the Department of the Navy's School for instructional purposes was not objectionable where the agency reasonably determined that it needed a particular radar system that was the same as the other radar system already designated for use at the school. However, the protest against the proposed sole-source award for navigational radar systems to be used in ship overhaul and construction was sustained, where the agency's justification that it would incur substantial duplicative costs if another radar system was acquired for the application was not reasonably based nor supported by the record.

In justifying the contemplated sole-source award to Raytheon, the J&A stated that only the Raytheon product could satisfy the needs of the school because:

- (1) the 50 radars being procured must be identical to the 40 Raytheon SPS-64 radar system training stations being transferred to the school from another school for use in training to ensure continuity of instruction;
- (2) the Raytheon SPS-64 radars are currently deployed on 297 ships in the fleet and the Navy considers it sound to train its personnel on the same equipment as that which they will encounter once assigned; and
- (3) only Raytheon had technical manuals and training materials incorporated into the Naval Training System, and the procurement of different radar equipment would require the development or acquisition of new technical manuals, training materials, and various logistics related plans at an estimated cost of \$844,000.

The Comptroller General held that the proposed sole-source award to Raytheon for the school's requirement was unobjectionable, since the Navy already had 40 Raytheon SPS-64 radar systems for use at the school. *Id.* The Comptroller General further held that the Navy reasonably believed that the equipment being procured must be identical to that which it already had for the school in order to ensure continuity and efficiency in instruction. *Id.* The Comptroller General agreed that it would be disruptive to the learning process, and make instruction less effective, if school instructors have to

teach the same functions or concepts to students who are working on different radar systems. *Id.* While the Comptroller General found that this explanation by the Navy of why identical machines were needed for instruction reasonably supported the sole-source acquisition, the Comptroller General made no comment on the other reasons advanced by the Navy in justifying the sole-source award. *Id.*

The J&A in support of the ship overhaul and construction portion of the proposed sole-source award stated that only the Raytheon SPS-64 could satisfy the needs of the agency because the acquisition of any other radar system would result in the unnecessary duplication of costs for logistics support, training, test and evaluation, engineering support, and ship alteration documents, which would not be recovered through competition. *Id.* The Navy also argued that the acquisition of a radar system other than the SPS-64 would be inconsistent with its desire to have a "standard" navigation radar in use on its ships to allow for the emergent removal and replacement of inoperative equipment. *Id.*

The Comptroller General opined that notwithstanding the desirability of a policy to standardize radar systems in the fleet to achieve savings and efficiency in logistics, the Competition in Contracting Act (CICA) only permits sole source acquisitions where authorized and justified. *Id.* The Comptroller General further stated that while it is appropriate under CICA for an agency to restrict a procurement under 10 U.S.C. § 2304(c)(1) to a specified make or model where "standardization and interchangeability" are required, such a restriction must be reasonably based and justified. *Id.*

After delineating the law above, the Comptroller General held that there was no reasonable justification for the sole-source here. *Id.* The Comptroller General explained that the J&A only contained conclusory statements not supported by probative evidence relating to duplication of costs and that there was no attempt in the J&A to justify the procurement on the basis of a requirement for standardization and interchangeability. *Id.*

In addition to the conclusory statements regarding duplicative sustainment costs above, the J&A listed the following incidental costs:

- (a) Ship Check to identify where equipment will be installed, any equipment which must be removed, and lay-out of compartment space;
- (b) Preparation of installation drawings, block diagrams, cable runs, and connector pin-outs for each piece of equipment;
- (c) Installation and Control Drawing for each ship; and
- (d) Re-identification of equipment to be removed, moved or altered by the overhaul.

Id.

However, the Comptroller General sustained the protest because "during the course of this protest, the agency has not produced any documentation or other

evidence in support of its assertion that it will incur substantial duplicative costs if a radar system other than the SPS-64 is acquired for this application, nor for that matter has it provided an estimate as to the amount of these costs. “ *Id.*

Matter of Allied Signal, Inc., B-247272, May 21, 1992 followed. There, the Comptroller General denied a protest against a sole source award to ESCO for avionics testers where the Air Force's J&A included a detailed cost analysis providing ample support for the agency's conclusion that a competitive award to another source would likely result in substantial duplication of cost to the government that would not be recovered through competition.

The Air Force analysis identified a total of four cost areas. Three of these were: (1) the cost of procuring the data rights for a new tester since the Air Force purchased such rights from ESCO; (2) the cost of rehosting the new tester since the Air Force wanted common test equipment; and (3) the additional cost of procuring test program sets to connect with the existing radar. *Id.* The Comptroller reviewed the assumptions and choices underlying the Air Force's finding that an award to another source would entail substantial duplication of costs in these areas, and found that the Air Force's conclusions were reasonable. *Id.* The Comptroller General found that the fourth category, support equipment maintenance, was not a duplicative cost. *Id.* The Comptroller General found that since maintenance costs were calculated as a fixed annual percentage of the purchase price, these costs were actually lower as a result of a competition. *Id.* Accordingly, the Comptroller General considered these costs as additional savings resulting from competition.

The latest word on the subject was *Matter of American Eurocopter Corporation*, B-283700, Dec. 16, 1999, where the Comptroller General held that restriction of competition by the Department of Energy to a specific make and model of helicopter was reasonable, where that helicopter uses specialized equipment that cannot be used with protestor's helicopter and where, given the nature of the agency's flight mission and its organization, standardization of the agency's fleet was necessary for safety reasons.

The justification stated the following reasons for restricting competition:

- A. [DOE's] current fleet of 4 helicopters is all Bell Helicopters.
- B. [DOE's] inventory of parts and accessories are for Bell Helicopters.
- C. [DOE] owned specialized equipment, such as an Inframetrics IR [infrared] Camera System exclusively used for transmission line and substation IR inspections and a Hazard Marking Sphere and Anti-Spin devices which were designed specifically for a Bell Helicopter.
- D. [DOE's] pilot staff is trained only on Bell Helicopters. Standardization is essential because [DOE's] pilots rotate to different locations as relief pilots. Some of [DOE's] pilots have never been qualified in a helicopter other than Bell.

E. [DOE's] pilots would have to be trained at two different flight training facilities and [DOE's] Instructor Pilot would have to give [DOE] pilots twice as many Competency Check Flights if a different make and model helicopter were operated by [DOE].

F. Costs related to pilot training, currency and travel would double.

G. [DOE] would have to seek and contract with another manufacturer's service center for maintenance requirements.

H. [DOE's] computerized pilot training program is for Bell Helicopters only.

I. [DOE's] Flight Operations Manual, Helicopter External Load Manual and Pilot Training Manuals would have to be completely re-written to accommodate any other make of helicopter. *Id.*

The Comptroller General found no basis to question DOE's determination that the protestor's helicopter could not satisfy all of the agency's particular needs. *Id.* Specifically, the Comptroller General found that the helicopter that the protestor stated it would propose could not perform DOE's hazard marking ball placement work. *Id.* The Comptroller General also found reasonable the agency's concerns with the safe integration of the protestor's helicopter into DOE's fleet considering the nature of the agency's flight missions and its organization. *Id.*

The Comptroller General found the remainder of the bases relied upon by the agency in its limited-competition justification to be unsupported, unpersuasive and/or insufficient to support the limit on competition. *Id.* For example, the Comptroller General found that although the agency expressed concern with costs associated with pilot training, there was no effort to quantify these costs to determine whether in fact this was or should be a significant concern. *Id.* Similarly, the Comptroller General found that the statement that the Inframetrics IR camera system could be used only with Bell Helicopter models was not supported by the record, which indicated that this camera system could be used with the protestor's helicopter. *Id.*

Therefore, it appears from the above that under the appropriate circumstances, the duplication of costs and the need for products that are compatible with the Agency's existing programs and/or mission may serve as plausible justifications for a sole source award, if both a detailed explanation of the applicable recognized exception to the competition rule, and actual analysis and data substantiating these costs, are provided in the J&A.

The Point of Contact in the Legal Office for this subject is Ms. Jignasa Desai, (732) 532-9827; DSN 992-9827.

An Evaluation of the EEOC Mediation Program

Executive Summary

Pursuant to a contract with the Equal Employment Opportunity Commission (EEOC), the authors surveyed the participants of the EEOC mediation program regarding their opinions of the performance of the program. This report presents our findings.

The participant evaluation of the EEOC mediation program shows a high degree of participant satisfaction with the EEOC mediation program. Both the participant groups—charging parties and respondents—gave high marks to the various elements of the EEOC mediation program. A summary of our conclusions and their implications are the following:

- An overwhelming majority of the participants (91% of charging parties and 96% of respondents) indicated that they would be willing to participate in the mediation program again if they were a party to an EEOC charge. Participants, regardless of their satisfaction with the outcome of mediation, overwhelmingly indicated their willingness to return to mediation. This is a strong indication of their satisfaction with the EEOC mediation program. The fact that willingness to return was high, even among participants who did not receive what they wanted, indicates that a fair and neutral process that provides participants with an opportunity to present their views may be even more important than the obtained outcome.
- The participants expressed strong satisfaction with the information they received about mediation from the EEOC prior to their attendance at the mediation session. They also felt very strongly that they understood the process after the mediator's introduction of the process. One of the EEOC goals of mediation is to provide adequate information about mediation to the parties. The results show that the EEOC was very successful in fulfilling this goal.
- The vast majority of the participants agreed that their mediation was scheduled promptly. The EEOC's prompt scheduling of mediation sessions is indicative of effective program management. It also increases the chances of dispute resolution since parties get together in a timely fashion before they hardened their positions.
- An overwhelming majority of the participants felt that they had a full opportunity to present their views during mediation. Thus, the "voice factor," an essential element of procedural justice, was present in the EEOC mediation process.
- The participants were very satisfied with the role and conduct of the mediators. They felt strongly that the mediators understood their needs, helped to clarify their needs, and assisted them to develop options for resolving the charge. They felt even more strongly that the procedures used by the mediators were fair. The questions regarding the neutrality of the mediators elicited some of the strongest responses from the participants,

who felt that the mediators were neutral not only in the beginning of the process, but also remained neutral throughout the process. One of the EEOC goals of mediation is neutrality. As the participant responses indicate, the EEOC was successful in achieving this goal.

- Participant satisfaction with the distributive elements of mediation was more tempered than their satisfaction with the procedural elements. This is indicative of the fact that mediation is a facilitated negotiation process where parties do not usually obtain what they wanted going into the negotiations. This result is also consistent with the dispute resolution literature on distributive justice. Among the distributive elements, the participants were most satisfied with the fairness of the mediation session. They also agreed that most of the options developed during mediation were realistic solutions to resolving the charge. The majority of the participants were also satisfied with the results of mediation.
 - Participant satisfaction with the EEOC mediation program remained high even when the participant responses differed, at times, based on the nature of the charges, such as the statute, basis, and issue, and the characteristics of the mediation session, such as representation, mediator type, and mediation status.
 - Overall, participant feedback regarding the EEOC mediation program indicates that the program is, by any measure, clearly acceptable to the charging parties and respondents who participated in it.
-

Red Cross

Have you ever wondered about our support to blood drives sponsored by the American National Red Cross? Recently, an employee in HQ AMC asked about this, and wondered whether the Red Cross has some special status. I did some research, and it seems that the Red Cross does enjoy a special status that is reflected in JER 3-212f. However, this status is different that you might think.

Here is my response.

You asked if the Red Cross enjoys any special status. The answer is yes. Below are a number of relevant statutory and regulatory citations. But, this status, and support that comes with the status, is in direct relationship to the Red Cross mission to carry out activities supplementing and otherwise assisting the Army in its programs relating to the health, welfare, recreation, and morale of military personnel and their dependents. It is our policy to facilitate the accomplishment of this mission and to tender to the Red Cross the services, facilities and privileges whenever the Army has accepted the cooperation and assistance of the Red Cross. So, when the Red Cross sets up shop on our installations to provide support, or when the Red Cross deploys to war zones, etc., we are expected to provide various types of support to the Red Cross and Red Cross personnel.

But, when the Red Cross is out fundraising, or seeking donations of blood, they do not have a special status. In such situations, the Red Cross is treated like anyone else. When the Red Cross seeks support for its blood drives, we can provide some support, such as providing space and informing (not soliciting or coercing or promoting) our personnel that the event is taking place and where, as long as we are willing to do such for similar types of organization events (there probably are no other organizations other than local hospitals). Like any other non-Federal entity event, this support is subject to the criteria set out in JER 3-211a (DoD 5500.7-R), i.e.: it cannot interfere with duty performance or readiness; community relations or other local DoD/Army/AMC or community interests are served; it is appropriate to associate ourselves with the event; there is no law or regulation that prohibits the support, and there is no charge (there are some exceptions to the latter factor).

Finally, JER 3-300d permits "agency designees" (supervisors/commanders) to permit excused absences for reasonable periods of time for their employees to voluntarily participate in community service activities, such as blood donations. This time off is not an award or inducement for participating, rather it is the time necessary for the employee to participate.

Accordingly, I see no objection if the CG wishes to support periodic Red Cross blood drives.

Mike Wentink

36 U.S.C. Sec. 300102: Purposes. <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=4932314895+16+0+0&WAISaction=retrieve>

10 U.S.C. Sec. 2602: American National Red Cross; cooperation and assistance <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=482112064+0+0+0&WAISaction=retrieve>

10 U.S.C. Sec. 2670 Licenses: military installations <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=4932314895+20+0+0&WAISaction=retrieve>

10 U.S.C. Sec. 711a: American National Red Cross: detail of commissioned officers <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=4932314895+4+0+0&WAISaction=retrieve>

36 U.S.C. Sec 300110: Annual report and audit <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=4932314895+13+0+0&WAISaction=retrieve>
(instead of 36 U.S.C. Chapter 1 that is referenced in the DoDD and the AR).

DoDD 1330.5, American National Red Cross <http://web7.whs.osd.mil/pdf/d13305p.pdf>

DoD 5500.7-R, Section 3-212f (Relationships Governed by Other Authorities) <http://web7.whs.osd.mil/html/55007r.htm>

See also JER 3-211 (Logistical Support of Non-Federal Entity Events) and JER 3-300c (Community Support Activities).

AR 930-5, American National Red Cross Service Program and Army Utilization ftp://pubs.army.mil/pub/epubs/pdf/r930_5.pdf

Private Organizations

As explained in previous ETHICS ADVISORIES, there are a number of ethical issues that we must consider when we deal with POs. For example, employees who are officers, directors or active participants in POs, are disqualified from participating in official Army matters that affect their PO. We may not use our official position to endorse or promote a PO, encourage employees to join specific POs, or to help sell a PO's insurance or other products. We must also avoid bias or preferential treatment in our dealings with POs.

But, does this mean that we cannot have any sort of "official relationship" with POs? After all, there are quite a number of POs that were created by Army and/or other DoD employees to help themselves in their professional development and to better perform their duties; POs whose ideologies, views, and goals track with the Army. These are organizations that have developed credibility within their respective professions, Government and industry over a period of time. Often, they are a great resource for training. They also establish standards, positions and the like with respect to issues that we deal with in such areas as auditing, law, accounting, engineering, testing and electronics. Accordingly, there is often much to be gained by having an official "presence" with these organizations.

The answer is "yes," there is room for an "official relationship" with such organizations. But, there is a right way and a wrong way to do this.

An employee may *not* be an officer, board member, or otherwise be involved in the management or operation of a PO as part of his or her official duties. Employees can do this only in their personal and private capacities, and then they are disqualified from participating in official matters that affect these organizations. There are limited exceptions authorized by statute. For example, the Commandant of West Point is authorized to sit on the Boards of sports leagues under whose aegis the Military Academy plays various sports.

Along the same lines, an employee may *not* be directed by his or her supervisor or commander to be an officer, director or other active participant in a PO in his or her personal and private capacity. This means that a director may not appoint an employee as an organizational point of contact (POC) for a PO's membership drive. In addition, a commander may not designate the command position of a particular battalion as having the "extra duty" of being president of the local chapter of a PO. Even if the officer wants to assume the presidency of the local chapter, the officer may not accept a position that is bestowed upon a particular official position. Employees may be encouraged to join and actively participate in professional and community organizations. But, whether they join and the level of their participation are entirely up to them.

What we can do is this: in those cases where there is a strong and continuing DoD interest, heads of commands and organizations may assign an employee as an "official liaison" to a PO. As an "official liaison," the employee acts in his or her official capacity and represents the command and agency's interests to the PO. The "official liaison" attends board and other meetings for information on behalf of the command or organization, and may participate in discussions and even vote on matters of mutual interest. However, the PO must understand that such participation in no way binds the Army or the Federal government.

But, those who are appointed as "official liaisons" need to exercise caution. What has happened in the past is that the "official liaisons" lose their focus, and begin to identify with the PO. They begin to work with the board on matters involving management of the PO, or they are voted to chair a committee. All of a sudden, they find themselves as a POC for a membership drive or some fundraising campaign. POC for whom? They certainly cannot be a POC for the command or installation for a PO membership drive (remember, the command may not endorse, promote or encourage employees to join and participate in the organization). When the "official liaison" becomes a POC for a membership drive, or chair person of the upcoming dinner-dance, or otherwise involved in the management of the PO, the "official liaison" now has a special relationship with the PO (called a "covered relationship"), meaning that he or she can no longer act as an "official liaison" because of the appearances created by this "covered relationship."

Thus, if we determine that AMC has a strong and continuing interest in the substantive work being done by a particular PO, the head of the appropriate AMC organization may appoint an AMC employee, who is not otherwise an active participant with the PO in his or her private capacity, to be AMC's "official liaison" to the PO. But, this "official liaison" must maintain focus on his or her true status and responsibilities. Specifically, the "official liaison" attends meetings as a Federal employee and represents at all times the interests of his or her employer. This is not an "outside position" and is not reported on the employee's financial disclosure report.

Commanders, directors or supervisors should seek the advice and counsel of their Ethics Counselors before assigning an employee to be an "official liaison" to a PO. "Official liaisons" also should seek the advice and counsel of their Ethics Counselors concerning their liaison activities.

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P.S. These ETHICS ADVISORIES are maintained in a LotusNotes database. If you don't already have the Ethics Advisory Icon on your Lotus Notes Workspace, ask your Information Management POC to add it for you. Then you will have continuous and ready access to these advisories.

Mjw

Frequent Flyer

In July 1997, I issued ETHICS ADVISORY #97-02 because of a Mike Causey column in *The Washington Post* that reported a Merit Systems Protection Board case that upheld a 30-day suspension of an employee who used his official frequent flyer miles (FFMs) for personal travel.

In May 1999, I issued ETHICS ADVISORY #99-02 to explain some important aspects of the Secretary of the Army's new travel policy issued on 8 April 1999. Included in that was his new direction on the use of FFMs earned by Army employees while on official travel.

Now, in the 28 September 2000 edition of *USA Today*, there is a report of a defense official working at Fort Gordon, who is accused of using over \$4,000 worth of FFMs earned while on official travel, for personal travel. Although the report says that the Department of Justice (DOJ) has declined to prosecute, I suggest that the very fact that the matter was referred to DOJ for prosecution, demonstrates the importance of following the rules. The matter has been turned over to the employee's supervisor.

Hence, I figure that it's time for an update to ensure that there are no memory lapses concerning the FFM rules. FFMs earned while traveling on official business belong to the Government, and we may not use them for our personal travel, to include travel while on permissive TDY. We may not give them away to a charity. FFM accounts for official travel should be kept separate from personal travel accounts. If we commingle our official and personal FFMs in a single account, all FFMs within the account are considered to belong to the Government absent a clear accounting to the contrary (so, keep records!).

How do we use the FFMs earned while on official travel? We use them to reduce the cost of future official travel.

Can we use the official FFMs to upgrade our class of travel? Maybe, but probably not. Here are the rules with respect to upgrades:

* We may never use official FFMs to upgrade to first-class, unless we are otherwise authorized to fly first-class in accordance with the JTR/JFTR and the SECARMY 9 Apr 99 travel policy. First-class travel requires Secretary of the Army approval. Here is an important point: if there are only two classes on a flight (as many (most?) flights seem to be today), the upper class is always considered to be first-class, whatever the airline might call it -- even if the airline calls it "business-class."

* We might be able to upgrade to premium-class (less than first-class) travel, but the SECARMY policy is more restrictive than the other services, and permits such an upgrade only if:

-- The traveler is authorized to fly premium-class (less than first-class) under the criteria set out by the JTR/JFTR and the SECARMY 9 Apr 99 policy; or

-- The airline does not permit the use of the FFMs for anything other than an upgrade; or

-- The traveler does not have enough FFMs for a ticket or other reduction in travel costs, but absent a redemption for an upgrade, the FFMs will expire and go unused. Otherwise, the traveler is expected to let the FFMs accrue until there are enough FFMs to apply to future travel requirements.

For additional related travel information, see ETHICS ADVISORY 1999-02, in the LotusNotes Ethics Database.

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Good Morning:

Let's take a break from AR 27-26, Rules of Professional Conduct for Lawyers. This time we will review the rules concerning the outside practice of law, *i.e.*, the practice of law during off-duty time, on weekends, or while on leave.

The basic rule for civilian attorneys is found in paragraph 4-17b, AR 690-200: "[N]o Army civilian attorney will engage in the outside practice of law without prior written approval of the QA." The QA is the attorney's qualifying authority. For AMC civilian attorneys, the QA is the AMC Command Counsel. This rule does not apply to "teaching, lecturing or writing for publication ... [or] the infrequent, occasional rendering of legal advice or assistance without compensation to personal friends and relatives ... " This rule is adopted in the AMC Command Counsel Policy Statement 96-1 dated 28 Feb 96, Outside Employment.

Policy Statement 96-1 requires the attorney to submit a written request to engage in the outside practice of law, and provide sufficient information for evaluation to ensure no potential conflict, *e.g.*, reason for the outside practice, client pool, type of practice, etc. The request is to be forwarded through the Chief of the Legal Office with a recommendation to the AMC Command Counsel for approval. Approval will not be recommended by the Chief of the Legal Office or granted by the Command Counsel "to engage in the outside practice of law with respect to any matters involving government personnel who may receive service in an official capacity from his or her legal office. ... In no event will an AMC civilian patent attorney be permitted to engage in outside employment involving patent law. **[Comment: What about the situation where a prospective client is generally serviced by a different division from where the requesting attorney works? The request will not be approved. The restriction is directed to potential clients who receive "official" legal support from anyone in the legal office. In fact, paragraph 4-17c, AR 690-200 specifically excludes "matters ... (3) Involving Government personnel serviced by is or her legal office."]**

Attached is a format that can be used for such requests.



FORMAT.DOC

The rule for uniformed attorneys is found in paragraph 4-3c, AR 27-1: "An attorney of the JALS [Judge Advocate Legal Service] will not engage in private law practice without the prior written approval of TJAG." Additional guidance is provided in paragraph 10-5, *JAGC Personnel Policies*: "JAs ... may not engage in the outside practice of law ... Exceptions to this policy may be authorized by TJAG. ... JAs ... are not prohibited from practicing law or performing legal services for themselves or members

or their immediate families..." [**Comment: Note that this exclusion is not as broad as that for the civilian attorney, i.e., "personal friends and relatives."**] There is a similar requirement for JAs leaving active duty in paragraph 9-6, *JAGC Personnel Policies*: "The practice of law outside the JAGC during the period of transition leave requires prior approval. TJAG has delegated authority to approve such requests to the Chief, PP&TO."

The format for such requests by JAs is explained in paragraph 10-5b of the *JAGC Personnel Policies*, and Figure 9-7 of that same reference is a format for a request to practice law during transition leave. JAs serving in AMC should send their requests through the Chief of their Legal Office and through the Command Counsel to TJAG or the Chief, PP&TO, as appropriate.

Mike Wentink

Good Morning:

Today, we will begin to address that aspect of the "Client-Lawyer Relationship" governed by the conflict of interest rules. There are three of them: **Rule 1.7 Conflict of Interest: General Rule**; **Rule 1.8 Conflict of Interest: Prohibited Transactions**; and **Rule 1.9 Conflict of Interest: Former Client**. In addition, each of the rules makes cross-references to other rules.

We begin with the first part of **Rule 1.7**.

Rule 1.7 Conflict of Interest: General Rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and**
- (2) each client consents after consultation.**

COMMENT:

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should seek to withdraw from the representation. See Rule 1.16 [Declining or Terminating Representation].* Where more than one client is involved and the lawyer is permitted to withdraw because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9 [Conflict of Interest: Former Client -- we will deal with this Rule in a future PCR]. See also Rule 2.2c [Mediation]. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 [Diligence].*****

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses the general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, does not require consent... Paragraph (a) applies only when the representation of one client would be directly adverse to the other. ...

A client ... may consent to representation notwithstanding a conflict. However, as indicated in Rule 1.7(a)(1) with respect to representation directly adverse to a client ..., when a disinterested lawyer would conclude that the client should not

agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement. ... Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the client to make an informed decision, the lawyer cannot properly ask the latter to consent. ...

While the lawyer must be careful to avoid conflict of interest situations, resolving questions of conflict of interest is primarily the responsibility of the supervisory lawyer... . See also Rule 5.1 [*Responsibilities of the Senior Counsel and Supervisory Lawyers*].

*** Rule 1.16 says in pertinent part: (a) Except as stated in paragraph (c) [i.e., when ordered otherwise by a tribunal or other competent authority], a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if: (1) the representation will result in violation of these Rules ... or other law or regulation**

**** Rule 2.2(c) says in pertinent part: (c) ... Upon withdrawal [as a mediator], the lawyer shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.**

***** The COMMENT to Rule 1.3 says in pertinent part: Doubt about whether a client-lawyer relationship exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.**

In the next PCR, we will continue with the second part of Rule 1.7.

Mike Wentink

CONFLICT OF INTEREST

In PCR #00-10, we began a review of the conflict of interest rules. We started off with the first part of **Rule 1.7 Conflict of Interest: General Rule**. That dealt with the situation of the lawyer having multiple clients with adverse interests. Today, we will examine the second half of this rule, dealing with interests and responsibilities of the lawyer that are adverse to the client. First, the rule (paragraph (b)).

Rule 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[My Comment: When dealing with the type of conflict that involves the lawyer's own interests, we need to be aware that there is another set of Rules that also needs to be considered and also complied with. Sometimes these other rules will "trump" Rule 1.7(b) and its comment (or vice versa). See below for further discussion.]

COMMENT:

...
Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. ... Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate [sic!] and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued.

...
The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a ... desire to take leave or transfer duty stations If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation... .

...

... Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client ..., the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of the proximity and degree.

For example, a legal assistance attorney may not represent both parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them [such as] advising a buyer and seller of an auto and preparing a bill of sale for them.

[My Additional Comment: What if the conflict is a financial interest of the lawyer (or of the paralegal or legal technician -- remember these rules apply to them also)? Criminal law (18 U.S.C. Sec. 208) prohibits Federal employees from participating personally and substantially in an official matter in which they have a financial interest. The law and its implementing regulations (5 C.F.R. Part 2635, subpart D and F; and 5 C.F.R. Part 2640) imputes financial interests belonging to others (e.g., the employee's spouse) to the employee, defines financial interests, establishes exceptions, *etc.* The law and regulations must be read together with *Rule 1.17*. For example, if the conflict arises from such a financial interest by which Section 208 disqualifies the lawyer from participating, the lawyer may not, **MUST** not participate even if it were permissible under *Rule 1.17* (i.e., the lawyer determines that the representation will not be materially limited, or the client consents. Rather, as a Federal employee, the lawyer may not participate unless he or she has a waiver or exception as provided by the statute or the regulation. Indeed, the lawyer should not even consult with the client unless a waiver or exception is in place!

Conversely, what if the lawyer has this waiver or exception to the Section 208 conflict? Well, the lawyer still may not participate in the representation if the client does not consent.

So, I think that the correct approach is to read *Rule 1.17* and the conflict of interest statutes (18 U.S.C. Sec. 201, 203, 205, 207, 208 and 209) and their implementing regulations together. Where there is overlap, the stricter rule applies.]

Mike Wentink

Prohibited Transactions

We have completed *Rule 1.17 Conflict of Interest: General Rule*. Now, let's turn to *Rule 1.8 Conflict of Interest: Prohibited Transactions*. This Rule has numerous subparagraphs, but I will try to complete it in two parts.

RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

COMMENT:

Army lawyers will strictly adhere to [Army] standards of conduct regulations in all dealings with clients. **[My Comment: This should actually refer to "Federal and DoD standards of conduct laws and regulations." As discussed in my commentary to PCR #00-11, there is overlap here with the conflict of interest laws (18 U.S.C. Sections 203, 205, 208 and 209), the Standards of Ethical Conduct (5 C.F.R. Part 2635), and the DoD Joint Ethics Regulation (DoD 5500.7-R).]** Such regulations generally prohibit entering into business transactions with clients, deriving financial benefit from representation of clients, and accepting gifts from clients or other entities for the performance of official duties. This rule does not authorize conduct otherwise prohibited by such [laws and] regulations. **[My Comment: Again, like I said in PCR #00-11, when dealing with conflict of interest issues, we need to read both sets of rules together, and apply the stricter standard.]** An Army lawyer will not make any referrals of legal or other business to any private civilian lawyer or enterprise with whom the Army lawyer has any present or expected direct or indirect personal interest. Special care will be taken to avoid

giving preferential treatment to reserve judge advocates or other government lawyers in their private capacities.

As a general principle, all business transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. [**My Comment:** Outside the corporate world and family-type situations, I can't imagine when engaging in a business transaction with a client would be appropriate -- probably "never" for the Army lawyer.] Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. [**My Comment:** See the related Standards of Ethical Conduct Rule at 5 C.F.R. Sec. 2635.703.]

Mike Wentink

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Retain Records for Power Generating Plants

LTC Rich Jaynes

The United States is involved in litigation concerning the compliance status of several private electric utility coal and oil-fired boilers. As part of the proceedings, the defendants have requested certain materials pertaining to Federal Government compliance of similar units. The Department of Justice is working to narrow the scope of the discovery request, but recently requested that installations with coal- or oil-fired electric generating units preserve all documents related to the compliance of these units with the Clean Air Act and its regulations. This request applies to documents in hard-copy and electronic form. Examples of records to be preserved include inspection reports, Environmental Compliance Assessment System findings, stack test results, and other records required to be kept under permit conditions and regulations. As the utility litigation is expected to be lengthy, installations should accumulate the appropriate records and prepare files to facilitate responding to possible future information requests. Installation environmental law specialists should ensure that air program specialists understand that these files are to be preserved until further notice. Copies of the request from the Department of Justice and a memo from DoD directing installations to retain these records can be obtained from ELD by sending an email to richard.jaynes@hqda.army.mil. (LTC Jaynes/CPL)

Requirements Clarified For Clean-Up Orders

LTC David B. Howlett

The Army must occasionally conduct inspections and obtain samples on the property of neighbors to determine if contamination at Army installations has migrated off-post. The President's authority to do so is set out in section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),² and has been delegated to both the Environmental Protection Agency (EPA) and the Army. Under certain circumstances, federal agencies can seek a judicial order to compel the cooperation of private landowners.³

A recent district court case has clarified the requirements for judicial orders. In United States v. Tarkowski,⁴ the EPA sought a judicial order to enter land behind defendant's home "to implement response actions in response to the release or threat of release of hazardous substances," and to bar defendant from interfering with those actions. Later in the litigation, the government submitted a modified motion asking for a more limited right to enter the property.

¹ Editor's Note: No *ELD Bulletin* was published for the two months prior. The previous edition is Number 5 of this Volume.

² 42 U.S.C. §9604(e).

³ See 42 U.S.C. §9604(e)(5)(B)(i).

⁴ No. 99 C 7308, 2000 U.S. Dist. LEXIS 7393, (N.D. Ill. May 30, 2000).

The court noted that it had to determine three issues before issuing an order: whether the EPA had a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance; whether the EPA's request for access was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; and whether defendant had interfered with the EPA's access to the property.

The court found that EPA established that there were low levels of pesticides and other chemicals in defendant's soil consistent with consumer use. The Court concluded, however, that the statute does not provide an exception to the "reasonable basis" standard for releases resulting from consumer use of products, and that it likewise did not provide an exception to that standard for *de minimis* concentrations.

The court found that EPA's request for investigation went "vastly" beyond what would be considered reasonable given the evidence presented that releases of hazardous substances into the environment had occurred. It therefore found the EPA demand to be arbitrary and capricious.⁵

With respect to the EPA's second request made during the litigation, the court found that there was no evidence that the defendant had refused it. A landowner must refuse a request or otherwise interfere with the federal agency before a court will issue an order for compliance.

The government apparently argued that the court did not have jurisdiction over the issue because the EPA was conducting a CERCLA removal action.⁶ The court did not reach this issue since it was faced not with review of the EPA action *per se*, but rather with the narrow question of whether the requested order was proper.

There are two lessons here for practitioners. First, be sure to document reasonable requests for entry and inspection under CERCLA §104(e). This will later allow you to establish the element that consent was not granted or that interference occurred. Second, be sure that the evidence reasonably justifies the action sought. The Department of Justice prepares complaints for these orders, usually through the local United States Attorney's office. There is a prescribed format for the required litigation report, available from ELD. (LTC Howlett/LIT)

New Resource on Economic Benefit Available

LTC Rich Jaynes

The issue of whether the Environmental Protection Agency (EPA) can or should collect penalties intended to recapture economic benefit from federal facility violators remains a hotly contested matter between EPA and the Department of Defense (DoD). The Environmental Law Division (ELD) has published several articles addressing this topic in previous editions of *The Environmental Law Division Bulletin*.⁷ Recently, LTC Jackie Little, the newest member of ELD's Compliance Branch, completed the Masters of Law (LL.M.) program in environmental law at George Washington University. In partial satisfaction of the requirements for the LL.M., LTC Little wrote her thesis on the subject of EPA's BEN model⁸ and its application to federal facility enforcement actions. This thesis is an excellent and detailed articulation of the many objections that are being raised in response to EPA's new

⁵ The demand for entry or inspection cannot be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. §9604(e)(5)(B)(i).

⁶ Presumably, the argument was that jurisdiction was limited by CERCLA §113.

⁷ See LTC Rich Jaynes, *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ENVTL. L. DIV. BULL. Vol. 6, No. 9, at 6 (Sep. 1999); MAJ Robert J. Cotell, *Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction,* ENVTL. L. DIV. BULL. Vol. 6, No. 10, at 1 (Oct. 1999).

⁸ BEN is the computer model used by EPA to calculate the economic benefit component of an administrative civil penalty. See OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, BEN USER'S MANUAL 1-1 (Sep. 1999) for detailed information about the model, its underlying theories of economic benefit, and its calculation methodology.

enforcement strategy against federal facilities that showcases economic benefit as its centerpiece.

Army installations have found that EPA now often uses economic benefit as well as size of business⁹ penalties to inflate the size of the penalties it seeks. In addition, EPA often refuses to disclose its penalty calculations so as to obfuscate EPA's use of these "business penalties" during settlement negotiations with Army installations. EPA uses this "inflate and then stonewall" tactic in an attempt to conclude a settlement with a substantially larger penalty than what would be achieved by negotiating based on gravity factors alone. Consequently, installations must be vigilant in guarding against these tactics and in opposing them when EPA Regions attempt to apply them. LTC Little's thesis is a tremendous resource for meeting the challenges posed by EPA's new enforcement strategy.

ELD has asked the Air Force to have LTC Little's thesis added to its FLITE database.¹⁰ In the meantime, those interested in obtaining a copy of the thesis may do so by sending an email to LTC Little at **Error! Bookmark not defined.** An abstract summarizing the thesis follows.

THESIS ABSTRACT

TITLE: "Stop the Insanity!" EPA's BEN Model and Its Application in Enforcement Actions Against Federal Agencies

THESIS STATEMENT: The economic benefit component of a civil penalty should not apply to federal agencies, particularly as calculated by the deficient methodology used in EPA's BEN model.

ROADMAP: Part I: Introduction; Part II: Explores EPA's legal authority for recovering economic benefit, generally; Part III: Discusses the BEN model, focusing on its underlying theory of economic benefit and its calculation methodology; also traces the evolution of the model from its inception to the present; closes with a discussion of the most recent version of BEN, as well as a brief overview of lingering criticisms of the revised model and the Agency's current benefit recapture approach; Part IV: Explores the subject of EPA's authority to impose administrative civil penalties on other federal agencies; also highlights the recent Clean Air Act civil enforcement action at Fort Wainwright, Alaska, illustrating how EPA has used its administrative penalty authority to develop a "new" enforcement strategy regarding recapture of economic benefit from federal facility violators; Part V: Explains EPA's September 1999 "Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies" and identifies several potential legal problems with the policy; also reviews the Department of Defense and United States Army positions on why BEN and its underlying theory of economic benefit should not apply to federal facilities; Part VI: Explores various alternatives, including recent Congressional action, for resolving the question of whether EPA can recover economic benefit from other federal agencies; Part VII: Conclusion.

SUMMARY OF MAIN PROPOSITIONS SUPPORTING THESIS STATEMENT:

1. No federal environmental statute expressly defines the term "economic benefit." EPA describes "economic benefit" variously as "represent[ing] the financial gains that a violator accrues by delaying and/or avoiding . . . pollution control expenditures" and "the amount by which a defendant is financially better off from not having complied with environmental

⁹ Size of the business penalties are a surcharge (typically 50%) added to economic benefit and gravity-based penalties to ensure that wealthy violators feel the deterrent sting of enforcement. The amount of this type of penalty is based on the capital assets of the business that are presumed available to be sold or mortgaged to raise funds for environmental compliance or penalties.

¹⁰ The environmental law section of FLITE is accessible via the Internet at **Error! Bookmark not defined.** and is available cost free to environmental legal specialists. ELD's point of contact for FLITE passwords is MAJ Liz Arnold at 703-696-1593, **Error! Bookmark not defined.**

requirements in a timely fashion.” The key to benefit recapture in cases where a polluter delays or avoids compliance is EPA’s presumption that “financial resources not used for compliance . . . are invested in projects with an expected direct economic benefit to the [violator].” According to EPA, “this concept of alternative investment – i.e., the amount the violator would normally expect to make by not investing in pollution control – is *the basis* for calculating the economic benefit of noncompliance.” Since the concept of alternative investment does not apply to federal agencies, generally, there appears to be no basis for recapturing economic benefit in cases involving federal facility noncompliance.

2. Benefit recapture in the federal agency arena “improper[ly] interfere[s] with the missions assigned to and funds allocated for federal agencies by Congress” and, therefore, constitutes bad policy. Because the payment of EPA-imposed penalties effectuates a return to the U.S. Treasury of dollars disbursed by it to support federal agency missions, mission accomplishment is necessarily impeded. Such money shuffling is appropriate when it functions as a deterrent measure to ensure that facility managers reorder priorities in order to achieve environmental compliance. However, economic benefit penalties, by seeking to “recover a net financial gain that does not exist” fail to serve as a deterrent and, instead, “serve only to degrade federal missions.” It is unlikely that Congress intended such a result.

3. EPA has asserted that in cases of federal agency noncompliance, economic benefit accrues to the “federal government as a whole,” with the Department of Treasury acting as the “surrogate holder of the benefit.” EPA bases this position on its 1999 memorandum entitled “Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies.” This “guidance” document identifies the source of economic benefit in federal facility cases as the interest saved on unissued Treasury notes. If it is indeed the federal government or the Treasury that reaps the alleged benefits of a federal facility’s noncompliance, EPA’s position is arguably invalid as explained below.

a. Is It Legal for EPA to Recover Economic Benefit from the “Federal Government”? Environmental statutes authorize EPA to regulate federal departments and agencies – not the federal government as a whole. Clearly, EPA can collect noncompliance penalties only from those over which it has regulatory power – i.e., “departments, agencies, and instrumentalities.” If no economic benefit accrues to these entities, however, EPA cannot legally include such benefit in penalties assessed against either individual facilities or the departments or agencies that oversee them. On the other hand, since the “federal government as a whole” is not subject to EPA regulation under federal environmental laws, it is not liable for penalties of any kind. In short, EPA’s position appears to leave the Agency without a violator from whom it can properly collect the economic benefit it so desperately seeks.

b. Does the Policy Disgorge the Alleged Benefit or Does It Allow the Recipient of Such Benefit to Profit Twice? If the Treasury is the federal government entity that ultimately benefits from federal agency noncompliance, EPA’s position guarantees that the Treasury “benefits” twice – first, by avoiding the costs associated with paying interest on notes that should have been issued to fund pollution control projects; and, second, by collecting inflated penalty payments from federal facilities that failed to complete such projects in a timely manner.

4. The overriding factor in EPA’s analysis of why economic benefit and the BEN model apply to federal agencies is its belief that, without exception, Congress and the President have directed it to treat federal agencies the same as any other member of the regulated community. However, in its attempts to treat federal facility violators “just like” private sector polluters, EPA has had to modify the manner in which it applies its economic benefit policies to federal entities, thereby creating a situation where federal agencies are, in fact, treated differently than similarly-situated private entities. First, the Agency has significantly altered its theory of economic benefit to eliminate “alternative investment” as the basis for determining that benefit has indeed accrued. Second, unlike in the private sector, an EPA federal agency enforcement action collects benefit-based penalties from an entity other than that

which realizes the gain. Finally, it appears that EPA is willing to excuse federal agencies from the requirement that economic benefit penalties be paid in cash, rather than offset with supplemental environmental projects. In sum, in order for EPA to treat federal facilities “just like” private entities in terms of the size of fines, EPA must apply economic benefit penalty policies “differently.”

5. Even if EPA can recover economic benefit from federal agency violators, the computer model it uses to calculate such benefit (BEN) is unsound from both an economic and financial standpoint. As such, any penalty figures BEN generates are inherently suspect and should not be relied upon as a basis for penalty assessments in civil enforcement actions.

Unexploded Ordnance (UXO): An Explosive Issue?

LTC Lisa Schenck

The recent increase in transition of military ranges to non-military uses also has increased public and environmental regulatory agency concern regarding ranges. Much of this concern stems from the identification of UXO and its constituents as possible contributing sources of contamination of groundwater and soils. Making the situation potentially more explosive are EPA Region 1 actions at one of those installations, Massachusetts Military Reservation (MMR), where groundwater contamination has halted live-firing on ranges. This article highlights recent developments in the areas of munitions and ranges that influence the ability of installations to use their ranges.

In 1997, EPA Region 1 asserted the Safe Drinking Water Act (SDWA) as the primary basis for prohibiting the use of lead, propellants, explosives, and demolitions, based on suspicion that on-going training activities could contaminate the sole-source aquifer underlying the MMR impact area, thereby creating an imminent and substantial endangerment to human health and the environment. EPA relied upon the SDWA to issue two administrative orders (AOs) requiring a complete groundwater study for the area underlying the impact area, providing for extensive EPA participation and oversight of the response action, establishing a citizens advisory committee to monitor the work, and ordering all use of lead ammunition, high explosive artillery and mortars propellants, and demolition of ordnance or explosives, (except for UXO clearance) to cease. In a third AO, EPA ordered feasibility studies and removal of contaminated soil. EPA's actions at MMR have Army-wide implications because other installations have training areas that overlay sole-source aquifers.

The Army has some provisions for dealing with military munitions, such as EPA's Munitions Rule (MR) (62 FR 6621), promulgated in February 1997. The MR provides some clarification for the treatment of military munitions by excluding training (including firing, research and development, and range clearance on active/inactive ranges) and materials recovery activities from being classified as waste management activities. The MR also allows DoD storage and transportation standards to supplant environmental regulations under certain conditions. Additionally, EPA postponed the decision regarding the status of military munitions on closed, transferred, and transferring (CTT) ranges pending DoD's publication of the Range Rule, which would govern military munitions at those areas. DoD published the Proposed Range Rule in 1997. DoD, EPA, and the other Federal Land Managers are currently participating in discussions with the Office of Management and Budget as part of the interagency review process regarding the Draft Final Range Rule, the final step before promulgation of the Rule. Publication is expected in January 2001.

Recently, the field received further Army guidance in the *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges* (“Management Principles”) (*available at Error! Bookmark not defined.*). In March 2000, the Deputy Under Secretary of Defense (Environmental Security) and EPA Assistant Administrator for Solid Waste and Emergency Response signed the Management Principles as an interim measure effective until DoD issues the final Range Rule. In August 2000, the Army's Assistant Chief of Staff for Installation Management and Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health) forwarded the Management

Principles, along with an associated “Frequently Asked Questions,” to the MACOMs for distribution to their field organizations. MACOMs and field organizations must consider these Management Principles in planning and execution of response actions at CTT ranges. DOD and EPA Headquarters negotiated the Management Principles and they have been shared with the states and tribes.

The Management Principles indicate that a process consistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Management Principles provide the preferred response mechanism to address UXO at a CTT range. Response activities may include removal actions, remedial actions, or a combination of both, when necessary to address explosive safety, human health and the environmental hazards associated with a CTT range. Prior to accommodating any EPA request deemed unsafe (e.g., from an explosives safety, occupational health, or worker safety standpoint), unreasonable, or inconsistent with CERCLA, the Management Principles, or other DoD or Army policy, installations must resolve those concerns. When necessary, installations should raise unresolved issues or disputes through the chain of command to the Assistant Chief of Staff for Installation Management or through other established mechanisms for resolution.

Installations must provide regulators and other stakeholders an opportunity for timely consultation, review, and comment on all response phases, except for certain emergency response actions. Installations should conduct discussions with local land use planning authorities, local officials, and the public, as appropriate, as early as possible in the response process to determine anticipated future land use.

Those in the field should be advised to follow the requirements set forth in EPA’s MR when dealing with military munitions used in training, testing, materials recovery, and range clearance activities and, until DoD issues the Final Range Rule, comply with the Management Principles when conducting response actions for munitions and their constituents at CTT ranges. As for active range challenges, the Army’s Assistant Chief of Staff for Installation Management recently requested some installations to test for explosive contaminants in their drinking water sources and groundwater adjacent and down gradient of impact areas. Clearly, EPA’s actions at MMR have garnered significant attention throughout the Army as it seeks to formulate workable approaches to assessing the costs and risks that this and similar scenarios pose to military training. (LTC Schenck/CPL)

Update on Punitive Fines and Federal Facilities

MAJ Elizabeth Arnold

During the past year significant developments have effected notable change in the regulatory landscape of federal facilities. One particular issue that has ripened on the vine involves the authority of environmental regulatory agencies to subject federal facilities to punitive fines. This discussion highlights the recent key events that surround this issue. Moreover, a table at the end of this discussion provides a ready synopsis of punitive fines as they currently apply to the primary media programs.

The 1992 amendments to the Resource Conservation and Recovery Act (RCRA) (“RCRA Amendments”), authorize the Environmental Protection Agency (EPA) to assess fines for past violations of underground storage tank (UST) requirements. Five years after the enactment of the RCRA Amendments, EPA began a policy of interpreting the RCRA Amendments so as to impose punitive fines against federal facilities with respect to USTs. From the onset of this policy, DoD’s Services argued that the RCRA Amendments authorized EPA to impose only fines for hazardous and solid waste provisions in RCRA but not for the independent federal facilities provisions for USTs. They also began challenging EPA’s enforcement actions in litigation before EPA administrative law judges (ALJs) and asked OSD’s General Counsel to seek resolution of the issue from the Office of Legal Counsel (OLC) in the Department of Justice (DoJ).

After OSD submitted a request to OLC in April 1999, the Services asked for stays of administrative litigation in pending cases. Shortly before a stay was requested in one Air Force case, however, an ALJ rendered a decision upholding DoD's objections. EPA appealed that decision to the Environmental Appeals Board (EAB). After the OLC decided in June 2000 that EPA has authority to impose fines for UST violations, the Air Force asked the EAB to uphold the favorable ALJ decision. The EAB did not reach the merits of the dispute, but found that there was no compelling need to set aside the OLC opinion. Installations are now settling pending UST cases.

Whether the limited waiver of sovereign immunity in the Clean Air Act (CAA) allows state regulators to impose penalties against federal facilities continues to be a hotly disputed issue. This situation has been exacerbated by a recent 9th Circuit ruling. In a bizarre ruling last year, the 6th Circuit found that the CAA's savings clause for its citizen suits provision contains an independent waiver of sovereign immunity authorizing punitive fines against federal facilities. DoJ chose not to appeal that case to the Supreme Court because there was no split of authority among the circuits. Instead, DoD Services anxiously awaited the decision of the 9th Circuit on a federal district court case in California that had adopted the United States' position. Instead of addressing the central issue, however, the 9th Circuit held that the case should not have been removed to federal court. DoJ is now considering whether to pursue the issue before the Supreme Court. Final resolution of this issue is probably several years away. (MAJ Arnold/CPL)

**ARMY AUTHORITY TO PAY PUNITIVE FINES
and THE YEAR AUTHORITY WAS RECEIVED**

Updated: 10 Aug 00

STATUTE	IMPOSED BY STATE	IMPOSED BY EPA
Resource Conservation and Recovery Act (RCRA) [Subtitles C and D only--re hazardous and solid waste] 42 U.S.C. §6961	YES—1992	YES—1992
RCRA [Subtitle I only—re underground storage tanks] 42 U.S.C. §6991f	NO	YES—2000 ¹
Safe Drinking Water Act (SDWA) 42 U.S.C. §300j-6	YES—1996	YES—1996
Clean Air Act (CAA) 42 U.S.C. §7418	NO ²	YES—1997 ³
Clean Water Act (CWA) 33 U.S.C. §1323	NO	NO

NOTES:

1. DoD disputed EPA's assertion that it has authority to assess fines against federal facilities for UST violations and referred the issue to the Department of Justice (DoJ) in Apr 99. On 14 Jun 00 DoJ released an opinion that concluded that amendments to RCRA in 1992 gave EPA the authority to assess UST fines against federal facilities. The issue was also challenged before EPA's Environmental Appeals Board, who deferred to the DoJ opinion.
2. Many states dispute the United States' position on this, and issue notices of violation that include assessments of fines. This issue was expected to have been settled through litigation in the 9th Circuit Court of Appeals, but that court recently issued a surprise ruling that the case should not have been removed from state court and remanded without addressing the central issue. DoJ may appeal to the Supreme Court on the issue of removing cases to federal courts. It will probably be several years before the sovereign immunity issue is settled nationwide. In the interim, installations will continue to assert the position of the United States (i.e., the sovereign immunity defense) except in the four states (KY, OH, MI, TN) of the 6th Circuit, where the court found that federal facilities must pay penalties imposed by state regulators for CAA violations.
3. The authority of EPA to impose fines stems from an amendment to the CAA in 1990. A DoD challenge to that authority was resolved in favor of EPA in a 1997 opinion by DoJ.

Editor's Note: due to the annual ritual of personnel rotation, the following chart of Environmental Law Division's attorneys' names, contact information, and responsibilities is provided for the ELD Bulletin's readership.

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<u>AREA/POSITION</u>	<u>PRIMARY</u>	<u>PHONE</u>	<u>ALTERNATE</u>
Chief	COL John Benson	1230/1570	LTC Howlett
Chief, Compliance	LTC Rich Jaynes	1569	LTC Little
Chief, Litigation	LTC Dave Howlett	1563	Mr. Lewis
Chief, Restoration/ & Natural Resources	Mr. Steve Nixon	1565	MAJ Tozzi
Executive Officer	MAJ Ken Tozzi	1562	
Alternative Dispute Resolution (General)	MAJ Liz Arnold	1593	LTC Jaynes
Alternative Dispute Resolution	Ms. Carrie Greco	1566	LTC Howlett
Asbestos	LTC Jackie Little	1592	LTC Schenck
BRAC/CERFA	MAJ Ken Tozzi	1562	Ms. Barfield
CERCLA	Mr. Steve Nixon	1565	Ms. Barfield
Chemical Demilitarization (Litigation)	MAJ Scott Romans	1596	LTC Howlett
Clean Air Act (CAA)	LTC Rich Jaynes	1569	LTC Little
Clean Water Act (CWA)	LTC Jackie Little	1592	LTC Schenck
Criminal Liability	MAJ Liz Arnold	1593	LTC Jaynes
Cultural Resources	MAJ Jim Robinette	2516	MAJ Tozzi
ECAS	Mr. Steve Nixon	1565	MAJ Robinette
ELD Bulletin	MAJ Jim Robinette	2516	
Enforcement Actions	MAJ Liz Arnold	1593	LTC Jaynes
EPCRA	Mr. Steve Nixon	1565	MAJ Tozzi
Endangered Species Act (ESA)	MAJ Jim Robinette	2516	Ms. Barfield
Fee/Tax	MAJ Liz Arnold	1593	LTC Jaynes
FLITE (Air Force EL web site) access	MAJ Liz Arnold	1593	LTC Jaynes
Litigation	LTC Dave Howlett	1563	
Litigation	Mr. Mike Lewis	1567	
Litigation	MAJ Scott Romans	1596	
Litigation	MAJ Michele Shields	1568	
Litigation	LTC Tim Connelly	1648	
Litigation	MAJ Greg Woods	1624	
Litigation	Ms. Carrie Greco	1566	
LL.M. Program Liaison	LTC Rich Jaynes	1569	
Military Munitions	LTC Lisa Schenck	1623	
National Environmental Policy Act (NEPA)	MAJ Ken Tozzi	1562	MAJ Robinette
Natural Resources	MAJ Ken Tozzi	1562	Ms. Barfield
Occupational Safety & Health Act (OSHA)	Mr. Steve Nixon	1565	MAJ Tozzi
Overseas & Deployment Issues	MAJ Jim Robinette	2516	MAJ Tozzi
PCBs	LTC Jackie Little	1592	LTC Schenck
Pollution Prevention	Mr. Steve Nixon	1565	Ms. Barfield
Radiation	LTC Jackie Little	1592	LTC Schenck
Ranges and Range Rule	LTC Lisa Schenck	1623	LTC Little
RCRA (solid and hazardous waste mgt.)	LTC Jackie Little	1592	LTC Schenck

<u>AREA/POSITION</u>	<u>PRIMARY</u>	<u>PHONE</u>	<u>ALTERNATE</u>
Reserve Component	MAJ Liz Arnold	1593	
Safe Drinking Water Act (SDWA)	LTC Jackie Little	1592	LTC Schenck
Safety	MAJ Liz Arnold	1593	
Toxic Substances Control Act (TSCA)	LTC Jackie Little	1592	LTC Schenck
Underground Storage Tanks (USTs)	LTC Jackie Little	1592	LTC Schenck
Water Rights	LTC Jackie Little	1592	LTC Schenck

DoD Services Sign N.J. Multisite Agreement

Ms. Kate Barfield

On August 31, DoD services signed the New Jersey Multisite Agreement. The Multisite Agreement is intended to lay the framework for streamlining New Jersey cleanups that are conducted consistent with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601. Parties to the Agreement include the New Jersey Department of Environmental Protection, the Army, Navy, Air Force and U.S. Defense Logistics Agency. Particular emphasis is given to how parties will document and maintain land use controls at various sites. (Land use controls are restrictions in access or uses of property that are intended to protect human health and the environment.) The sites addressed by this Agreement include cleanups at active installations, facilities slated for transfer in accordance with the Defense Base Closure and Realignment Act, See *generally*, 10 U.S.C. § 2687. and formerly used defense sites. A similar Agreement was already signed with the State of Pennsylvania.

Ms. Colleen Rathbun of the U.S. Army Environmental Center negotiated both the Pennsylvania and New Jersey Multisite Agreements on behalf of the Army. (Ms. Barfield/RNR)

Superfund Recycling Equity Act Applies to Pending Litigation Brought by the California DTSC

Ms. Carrie Greco

In 1999, Congress enacted the Superfund Recycling Equity Act Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 6001, *et seq.* in order to remove impediments to recycling created as an unintended consequence of the liability provisions of CERCLA. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* As a matter of "liability clarification," the new provision exempts arrangers for recycling of certain materials from CERCLA liability for clean up costs. These materials include scarp paper, scrap glass, rubber (other than whole tires), scrap metal, and spent batteries. The law states that it will not affect "any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to enactment." Regarding pending actions by parties other than the United States, the Act was silent.

The effect of the Act on such pending actions was recently addressed by a District Court in California. California Department of Toxic Substances Control v. Interstate Non-Ferrous Corp., 50 ERC 1677 (May 2000). The court denied a partial summary judgment motion brought by the California Department of Toxic Substances Control (DTSC), who argued that that the Act does not apply to this action because it was pending at the time the amendments were enacted. DTSC had brought suit against ten scrap metal dealers and the United States seeking response costs DTSC incurred from a release of hazardous substances at the Mobile Smelting Site in Mojave, California. Two years later, the Superfund Recycling Equity Act was passed. DTSC argued that since this case was pending at the time of passage, the Act should not apply.

The court identified and applied the two part test of Landgraf v. USI Film Products: 511 U.S. 244 (1998).

"1) has Congress expressly prescribed the temporal reach of the statute?; and if not, 2) does the statute have retroactive effect?" *Id.*, at 269-270. Regarding the first issue, the court first looked to the language of the Act to determine whether there was an express command or unambiguous directive regarding the temporal reach of the Act for parties other than the United States. DTSC argued that there is no explicit statement that applies the Act's provisions to pending actions brought by a state agency before the date of enactment; therefore, it does not apply to this case. Some of the defendants argued that the specific exclusion of pending United States claims from the Act means that pending claims by all other parties are not excluded. Other defendants and some *amicus* parties argued that the court should first determine whether the language of the Act is plain and unambiguous. If the language is clear, the court's analysis stops. If the court finds no statutory language mandating retroactivity, then the court turns to the congressional intent of the statute. Here, the court reviewed all parts of the statute -- its structure, verb tense, headings, purpose, express prospective language, proof standards, and its legislative history -- in search of any express prescription. The court concluded that many aspects of the Act's structure and legislative history weigh heavily toward the argument that the Act should be read retrospectively.

The court, however, went on to assume, *arguendo*, that there was no conclusive language, and addressed the second test, the Act's retroactive effect. The court in Landgraf found that a statute would be improperly retroactive if "it would impair the rights a party possessed when [the party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." California DTSC, 50 ERC 1672, 1677 (quoting Landgraf, 511 U.S. at 280). Retroactive application is consistently rejected when its application "result[s] in manifest injustice." *Id.*, at 1677 (quoting Two Rivers v. Lewis, 174 F.3d 987, 994 (9th Cir. 1999)). DTSC claimed it was harmed because the amendment eliminated a cause of action that previously existed, but the court concluded that DTSC's rights were not impaired. The recyclers who can avoid liability under the new Act should be able to do so, and the Act does not impose any new duties against DTSC. DTSC will not incur more costs, or suffer greater expense if some parties are exempt from liability under this Act. DTSC did not assert that it engaged in conduct that it would not have otherwise engaged in had the law been enacted earlier. The court saw no vested expectation on behalf of the state that was defeated by the new Act. Overall, the application of the statute made no difference in the State's actions. Therefore, the Act is not improperly retroactive.

The court then identified a separate analytical approach to determine the retroactivity of the Act: whether a new statute clarifies or changes the existing law. *Id.*, at 1677. If the new statute clarifies the existing law then there is no retroactive effect because it is merely restating a current law. If the new statute had no retroactive effect, then it can be applied to the pending case. A significant factor that the court used to determine whether the amendment clarifies an existing law was whether, when the amendment was enacted, the conflict or ambiguity existed with respect to the interpretation of the relevant provision. If so, the amendment is a clarification, not a change of the existing law. After reviewing the arguments of the defendants and *amicus* parties, the court held that the legislative history supports the finding that the amendment is a clarification of recycler liability under CERCLA. *Id.*, at 1696. Therefore, the Act has no improper retroactive effect and the defendants can seek exemption from liability pursuant to the Act in the case.

In third party sites, the Army is often named as a responsible party where it only sent recyclable materials to the site. This holding provides the Army the recycling exemption from liability under CERCLA section 107(a) for cases filed against the Army by a state agency or private party prior to when the Act was enacted. But this is just a beginning: to claim the exemption, the Army must still demonstrate by a preponderance of the evidence that the waste it allegedly generated, arranged, and/or transported to the site consisted solely of recyclable material. In addition, this is one district court's opinion in California: many other courts in other districts will have an opportunity to either follow or reject this ruling. (Ms. Greco/LIT)

Yes, We Need No Permits

Ms. Kate Barfield

When the Army undertakes cleanups under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, we need not obtain permits for on-site response actions conducted under our CERCLA authority. In fact, CERCLA contains a specific permit exclusion, which reads:

[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with this section. 42 U.S.C. § 9621(e)(1).

The primary reasons that this exclusion was created are:

(1) to avoid delays in CERCLA response actions;

(2) CERCLA and the National Contingency Plan (NCP) *See generally*, 40 C.F.R. Part 300, provide detailed procedures that outline all steps of the cleanup action, while allowing for public involvement; and

(3) CERCLA response actions follow the substantive provisions of law and regulation identified in the Record of Decision or comparable decision document. For information on how cleanup standards are identified, *see*, 40 C.F.R. §§ 300.400(g), which outlines the process for determining applicable or relevant and appropriate requirements governing cleanup actions.

Thus, the environmental protection that might be provided by a permit is already met by complying with the requirements of CERCLA, the NCP, and any applicable or relevant and appropriate requirements that are identified in the ROD or other decision document. This process also allows the Army to proceed with cleanups in a straightforward manner and avoid needless delays. The permit exclusion applies to on-site response actions. The NCP defines the term "on-site" to include the "...areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. §§ 300.400(e)(1); 300.5. This concept can sometimes cause confusion at active installations that are undertaking CERCLA cleanups. This is because an installation may have permits for hazardous waste management or air/water discharges. Although the terms of such permits would apply to the installation's operation in general, this does not mean that permits must be acquired to conduct specific CERCLA response actions. When the Army is operating under its authority to conduct a CERCLA cleanup on-site, the permit exemption applies. (Ms. Barfield/RNR)

Court Ruling Heightens Import of Installations' Endangered Species Planning

MAJ Jim Robinette

Recently the Federal district court for the Eastern District of California granted summary judgment to the National Wildlife Federation (NWF) in its lawsuit regarding the Natomas Basin Habitat Conservation Plan (HCP) in the Sacramento area, *National Wildlife Federation v. Babbitt*, Civ. S-99-274 (E.D. Cal. Aug. 15, 2000). finding violations of the Endangered Species Act (ESA) 16 U.S.C. §§ 1631, *et seq.* and the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321, *et seq.* Because the Army (along with other DoD services) is now attempting to gain the same sorts of protections for its installations that HCPs allow for non-federal lands, Army ELSs may wish to note the points of failure of this HCP. There are lessons in this case which are applicable to how the Army develops and implements its Integrated Natural Resource Management Plans (INRMPs) and Endangered Species Management Plans (ESMPs). See, Sikes Act Improvement Act, 16 U.S.C. § 670, *et seq.*; see also Chapters 9 and 11, Army Regulation 200-3, Natural Resources—Land, Forest and Wildlife Management (1995) (AR 200-3).

The HCP in question encompasses approximately 53,000 acres of land straddling the northern boundary of the city of Sacramento, and was developed to protect the habitat of at least two federally listed species, the Giant Garter Snake and Swainson's Hawk. Of the total acreage, just over 11,000 acres fell within Sacramento's jurisdiction, with the remainder of the acreage falling into two counties. At the time of the lawsuit, neither of the counties had applied for an ITP pursuant to the HCP.

The Natomas HCP set up a mitigation scheme whereby for each acre of land to be developed, one half an acre was to be acquired and set aside as a habitat reserve, with the assumption that much of the undeveloped land would remain either undeveloped, or agricultural, the latter also providing good habitat value. Development fees were to be collected that would pay for both the acquisition and management of the reserve lands.

The HCP was developed in accordance with Section 10 of the ESA, which provides an exception from the prohibition on "take" found in Section 9 of the ESA. Section 9 of the ESA prohibits "take" of any listed species. Take is defined very broadly, and includes "harm," (16 U.S.C. § 1538(a)(1)) and the definition of "harm" includes any "significant habitat modification or degradation [which would impair] essential behavioral patterns...." 50 C.F.R. § 17.3. The ITP granted to Sacramento was granted pursuant to Section 10's criteria:

Upon submission of an HCP and an ITP application, [FWS] shall issue the permit if it finds that:

- (1) The taking will be incidental;
- (2) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (3) The applicant will ensure that adequate funding for the plan will be provided;
- (4) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (5) Other measures required by [FWS] will be met." 16 U.S.C. § 1539(a)(2)(B).

The district court held as arbitrary and capricious FWS's findings that Sacramento would to the maximum extent practicable minimize and mitigate the impacts of development, *NWF v. Babbitt*, *supra* note 17, at 42. and that Sacramento had ensured adequate funding for the plan. *Id.*, at 47. Both holdings turned on the inadequacy and lack of economic analysis of the scheme whereby development fees would fund acquisition of reserve lands to mitigate habitat loss. Specifically, the court found it notable that the land inside the Sacramento city border would be rapidly developed, *Id.*, at 41. but there were no assurances that the political entities outside Sacramento would submit ITP applications, *Id.*, at 44. and no analysis of the how the scheme would work if the counties did not participate in the HCP. *Id.*

The NWF also claimed, and the court agreed, that FWS should have prepared an EIS for the HCP, given its duration of 50 years, complexity, and certain controversy. *NWF v. Babbitt*, *supra* note 17, at 64.

For installation INRMPs and ESMPs, the lessons from this holding are clear: if FWS is to grant ITPs and defer critical habitat designations on Army installations pursuant to the installation's INRMP and ESMP, then clearly the Army will have to make an ironclad fiscal commitment to ensure funding, and to minimize and mitigate take. That said, however, it is clear that the Army is clearly committed to sustained funding of not only developing comprehensive, programmatic plans, but also to those plans' implementation. (MAJ Robinette/RNR)

Proposed Suspension of Historic Preservation Regulations Creates Compliance Confusion

Mr. Scott Farley

With the specter of an unfavorable court ruling hanging over its head, the Advisory Council on Historic Preservation (Council) proposed to suspend 36 CFR Part 800 (1999), its regulations governing review of Federal agency actions with the potential to effect historic properties. The Notice of Proposed Suspension, which initiated a 45-day public comment period, was published in the Federal Register at 65 FR 55928, September 15, 2000. The regulations could be suspended as early as 30 October 2000 unless the Council receives comments expressing a compelling reason for not going forward. Once suspended, the procedures set forth in 36 CFR Part 800 (1999), will become non-binding guidance that Federal agencies are encouraged to use to meet their Section 106 responsibilities. The Council anticipates republishing a new final rule by 17 November 2000. This target may be somewhat optimistic given the controversy surrounding publication of the current rules in 1999 and the willingness of certain stakeholders to resort to litigation for relief.

Promulgation of the current regulations has had a long and tortured history. Congress established the fundamental requirements of Section 106 of the National Historic Preservation Act (NHPA) See 16 U.S.C. 470a *et seq.* in 1966. Section 106 directed Federal agencies to consider the effects of their actions on historic properties and provide the Council a reasonable opportunity to comment prior to making a final decision to proceed. Since 1986 Federal agencies have complied with this mandate by following the detailed review procedures published by the Council in 36 CFR Part 800 (1986). Congress amended the NHPA in 1992, in large part, recognizing the need to provide for greater participation of Federally recognized Indian tribes (tribes) and Native Hawaiian Organizations (NHOs) in the review process. See 16 U.S.C. 470a(d)(6)(A) (making clear that properties of traditional religious and cultural importance may be eligible for inclusion in the National Register); see *also* 16 U.S.C. 470a(d)(6)(B) (directing Federal agencies to consult with tribes and NHOs when carrying out Section 106 responsibilities with respect to properties of traditional religious and cultural importance). Realizing that the 1986 regulations were insufficient to address the 1992 amendments, the Council initiated the informal rulemaking process pursuant to the Administrative Procedure Act (APA) 5 U.S.C. §§ 551-559. to amend and update 36 CFR Part 800. After almost five years and publication of two Notices of Proposed Rulemaking, These notices were published in the Federal Register at 59 FR 50396, October 3, 1994; & 61 FR 48580, September 13, 1996, respectively. the Council completed a final rule, The final rule was published in the Federal Register at 64 FR 27044-27084, May 18, 1999. codified at 36 CFR Part 800, which became effective on 17 June 1999 – finally superceding the 1986 regulations. The 1999 regulations significantly altered the Section 106 review process, delegating greater day-to-day responsibilities to State Historic Preservation Officers (SHPOs), redefining the Council's program and policy oversight roles, and establishing mandatory procedures

for involvement of Tribal Historic Preservation Officers (THPOs), tribes and NHO's. See 64 FR 27044-27084 (preamble to final rule discussing major changes).

Just as the Army and other Federal agencies were coming to grips with the compliance challenges posed by the new regulations, the National Mining Association (NMA), filed suit in Federal District Court, alleging, among other things, that the Council's decision to promulgate the final rule violated the Appointments Clause to the US Constitution by allowing representatives of the National Trust for Historic Preservation and National Conference of State Historic Preservation Officers to vote on the issue. Both representatives are members of the Council, but are not appointed by the President. In response to the litigation, the Council voted to suspend 36 CFR Part 800 (1999) to avoid an unfavorable ruling by the Court. It is presently in the process of republishing the regulations, The Council published a Notice of Proposed Rulemaking in the Federal Register on 11 July 2000 (65 FR 42834). The extended comment period closed 31 August 2000. The Council is presently reviewing comments in anticipation of publishing the final rule on 17 November 2000. and anticipates completing a final rule by 17 November 2000. This means that there will be no binding Section 106 regulations between 30 October and the date of final publication. To remedy this regulatory shortcoming, the Council has adopted 36 CFR Part 800 (1999) as "guidance" and encourages Federal agencies to comply with those procedures to avoid disruption in the compliance process while rulemaking proceeds.

Whether the Council meets its 17 November 2000 deadline or not, Environmental Law Specialists should continue to advise their clients to comply with 36 CFR Part 800 (1999) until the Council publishes a final rule in the Federal Register. These procedures are consistent with those contained in Army Regulation 200-4, "Cultural Resources Management," and will ensure that Army continues to meet the fundamental requirements of Section 106. (Mr. Farley/AEC)

Assessing the Aftermath of Section 8149

LTC Richard A. Jaynes

The arrival of 1 Oct 00 signals many things to many people, but to military attorneys who deal with environmental enforcement actions it holds the promise to the end of a year of frustration. The Defense Appropriations Act for FY 2000 (Public Law 106-79) contained a rider (Section 8149) Section 8149 of the Defense Appropriations Act for FY 2000 bill directs that none of the funds appropriated for FY 2000 "may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law." that upset the routine process of negotiating settlements in enforcement actions by requiring specific congressional approval of all settlements that would use FY 2000 funding. For background on the Defense Appropriations Act for FY 2000 and DoD and Army policy implementing it, see the following articles by MAJ Robert Cotell: *Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction*, ELD Bulletin, October 1999; and, *Section 8149 Update*, ELD Bulletin, November 1999. This meant that Army attorneys had to build into each settlement agreement provisions that would suspend payment of penalties or funding of supplemental environmental projects (SEPs) until Congress passed legislation approving the expenditure of funds. An additional dilemma was introduced when a survey of settlements from prior years turned up five installations that required FY 2000 funding to complete SEPs, some of which were already underway. This article surveys the impacts of what is now known simply as "Section 8149" on enforcement actions against Army installations, and the status of legislation that may succeed it.

The main catalyst for Section 8149 was EPA's proposal in August 1999 to issue a \$16 million penalty at Fort Wainwright, Alaska. Over 99% of the proposed fine was based on two types of "business" penalty assessment criteria First, EPA proposed to recover \$10.5 million for alleged "economic benefits" (i.e., net profits from alternative investments) received by the installation for non-compliance. Second, EPA sought an additional nearly \$5.5 million simply because Fort Wainwright is a "large business" and has substantial assets that EPA presumes the Army can sell or mortgage to raise money to pay for penalties. that have no relevance to federal agencies. For a discussion of Army and DoD objections to business penalties, see articles by LTC Richard A. Jaynes: *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ELD Bulletin, September 1999; and *New Resource on Economic Benefit Available*, ELD Bulletin, August 2000. Although intended as the proverbial "shot across the bow" to EPA, it was a message EPA did not receive because EPA has continued

undeterred in its campaign to impose business penalties against federal facilities. For example, EPA dismissed any significance to Section 8149 in a Memorandum from Steven A. Herman, Assistant EPA Administrator to Regional Administrators and Counsels, dated December 7, 1999, subject: Impact of Department of Defense FY 2000 Appropriations Act, Section 8149. Note also that Section 8149 drew Administration criticism both from the President, in his signing statement to the FY 2000 Appropriations Act, and from the Assistant to the President for National Security Affairs in a letter to Senator Frank R. Lautenberg, dated March 10, 2000. Section 8149 not only incurred a reaction of indifference from EPA, it was misunderstood and assailed by states and environmental activist groups. While DoD did not request and did not want the burdens imposed by Section 8149, media coverage suggested otherwise and viewed Section 8149 as an outrageous attempt by DoD's defenders on the Hill to protect DoD from its compliance responsibilities. Consequently, working under the constraints of Section 8149 greatly impeded the process of reaching settlements and served to detract from Army efforts to build positive relations with state regulators.

In its effort to implement Section 8149, the Army submitted six enforcement action settlements for approval, five of which involved SEPs from earlier years. These became part of DoD's legislative package request that was initially submitted in March 2000, and supplemented with a few additional cases as time passed. DoD's request was packaged as a rider intended to be attached to a piece of fast-moving legislation to obtain approval as quickly as possible. Instead, Congress included it as part of both the House and Senate versions of the FY 2001 Defense Authorization Bill. Initially, it was hoped that the Authorization Bill might be expedited under the schedule Congress planned for this election year. Unfortunately, two things happened to frustrate DoD's legislation packaged under Section 8149 from achieving its original purpose. First, it was not passed in FY 2000. Second, and more importantly, DoD's legislative package was amended to only authorize the use of FY 2001 funds to pay for the fines and SEPs listed in the proposed legislation. These developments led to an instruction from ELD in August 2000 for affected installations to spend any FY 2000 funds that had been fenced to meet the requirements of settlement agreements for other purposes before the end of the fiscal year.

The primary impact of Section 8149, as it came to be implemented, was to frustrate the ability to spend FY 2000 funds for fines and SEPs after it became law. Although well intentioned as a means to curb EPA's ill-conceived regulatory enforcement strategy against federal facilities, Section 8149 cannot be said to have achieved its goal. Indeed, the overly broad swath it cut may have spelled doom to a subsequent and more surgical attempt to attack EPA's business penalties strategy. EPA's economic benefit policy for federal facilities is embodied primarily in its Memorandum from Steven Herman, EPA Assistant Administrator, to Regional Administrators and Counsels, dated September 30, 1999, Subject: Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies.

Aside from the provision in the FY 2001 Defense Authorization Bill discussed above, Section 342 of the Senate version (Senate Bill 2549) was originally written to prohibit DoD Services from paying any environmental penalties that are "based on the application of economic benefit criteria or size-of-business criteria" unless Congress specifically approved payment. Had Section 342 been enacted as originally drafted, it would have contributed significantly to resolving the ongoing and contentious dispute with EPA over the application of these "business" penalty criteria to federal facilities. In reporting Section 342, the Senate Armed Services Committee explained its rationale for drafting the business penalties provision. The Committee noted that these penalty criteria are designed for "market-based activities, not government functions subject to congressional appropriations." Senate Report 106-292 (May 12, 2000) of the Senate Armed Services Committee, to accompany the National Defense Authorization Act for Fiscal Year 2001 (Senate Bill 2549). After highlighting essential differences between the government and private sectors, the Committee concluded that applying these penalty criteria "would interfere with the management power of the Federal Executive Branch and upset the balance of power between the Federal Executive and Legislative Branches, exceeding the immediate objective of compliance." These observations of the Committee are diametrically opposed to the position EPA has been taking as the Army has been working to resolve the uniquely-large fine levied against Fort Wainwright, Alaska.

On 12 July 2000, the Senate agreed to Amendment 3815 to Senate Bill 2549 that removed any mention of business penalties in Section 342. Senator Stevens proposed Amendment 3815 Congressional Record for 106th Congress, 2nd Session, 146 Cong. Rec. S 6538 (July 12, 2000). as a compromise that was reached with Senate opponents to Section 342. In addition to removing the business penalties provision, the amendment curtailed the impacts of the section in other respects.

The original version was a permanent requirement for Congress to approve any penalty that is \$1.5 million or greater. Amendment 3815 restricts the application of Section 342 to a three-year trial period and makes it applicable to federal regulators such as EPA (i.e., there is no penalty threshold for state and local regulatory agencies). After Amendment 3815 was submitted, Senator Kerry made a speech explaining that he was opposed to any exemption of federal facilities from business penalties because they should be subject to the full range of penalties that apply to private industry. Senator Kerry's remarks, in contrast to the Senate Armed Services Committee's report on Section 342, make it clear that there is no consensus in Congress on the issue of whether business penalties should apply to federal facilities. Again, the legacy of Section 8149 may have been to spin up political rhetoric on macro issues so as to effectively obscure and preclude a close examination of the profound factual, legal, and policy deficiencies of EPA's business penalties policy; a policy that amounts to rulemaking without any notice and comment procedures. See recent judicial disapproval of this sort of approach by EPA in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 2000 U.S. App. LEXIS 6826, (DC Circ., 2000).

On 13 July 2000, the Authorization Bill passed the Senate on a 97-3 vote as an amendment to its House counterpart. The Bill remains pending in a joint House-Senate conference. It is uncertain both as to when the Bill will be passed and what will remain from the battle fought over Section 342. In light of Amendment 3815, the bill is not expected to have much effect on the administrative litigation pending between EPA and Fort Wainwright. The only possible impact may be that the Bill's \$1.5 million threshold may serve as a negotiating cap to avoid the necessity of requesting the approval of Congress for settlements with EPA Regions.

The Army and DoD view business penalties as a floodgate for greatly increasing the size of fines against installations in most enforcement actions. In contrast, EPA has made business penalties the centerpiece of its new federal facilities enforcement strategy. In practice, EPA often asserts statutory maximum fines in its complaints, and then uses business penalties to develop an inflated negotiating position that drives all settlement discussions thereafter. EPA's practice is particularly problematic because EPA Regions now often refuse to provide penalty calculations, thus making it difficult to determine whether business penalties have been used to inflate the settlement amount. This puts a greater burden on the installation to ensure that business penalties are removed from settlement discussions. These developments make it clear that Army installations must continue to oppose EPA's "inflate and then stonewall" strategy for federal facilities. In individual cases, ELD will work with installation environmental law specialists to ensure that settlements do not bear any "taint" from EPA's business penalties campaign. (LTC Jaynes/CPL)

Editor's Note: The following is an electronic-only supplement to the Environmental Law Bulletin: a review of a new book of poetry and accompanying illustrations by the book's author. We sincerely hope it broadens our readership's cultural horizons.

***Tiepolo's Hound* by Derek Walcott**

LTC David Howlett

Derek Walcott's new book contains a single poem that contains a number of themes. These include the life of Camille Pissaro, colonialism, the poet's own awakening as a painter, and what could be termed a visual arts "anxiety of influence." Walcott pulls this task off well and offers both beautiful phrases and challenging ideas.

To Walcott, growing up in St. Lucia, famous paintings of the world beckoned through "the printed masterpieces of museum missals." They "opened the gates of an empire to applicants from its provinces and islands." Great works civilize, colonize, and then chain the hands of "the gifted exile." Much of the book is the story of Camille Pissaro, who was born on St. Lucia and was drawn to France by his art and arrived at the dawn of Impressionism. At first, Pissaro imagines the warm, colorful island in the dead of a French winter:

Perhaps he stared into a brazier's embers
and saw the flame trees on the ridges of blue smoke
when autumn's flare cindered to grey November's,
the island's sun still in him when he woke.

. . .

A lengthening sorrow, a sinuous sigh of smoke
wandered over Paris's autumnal freight yards,

is rose with his homesickness when he woke,
 it hovered over charred chimneys and carved mansards
 all day in an iron sky.

The narrative includes Pissaro's friendship with Cezanne and his dedication to his work despite poverty. Pissaro's paintings are trampled by the invading Prussians. He is patronized by Gauguin (who actually does move to the tropics) and saddened by the imprisonment of his co-religionist, Dreyfus (who is sent to prison in the Caribbean).

The poem is composed of couplets in rhyming quatrains. Although he presents serious themes, the poet's sense of humor shows through in word play, as in this description of plants:

. . . laburnum, like Susanna, sheds her raiments
 and shakes her yellow hair before the dense
 gaze of the trembling alders . . .

Sometimes the rhymes themselves get to be too much:

Ours was another landscape, a new people,
 not Oise, where a wind sweeps famous savannahs,
 with farms and poplars and a piercing steeple,
 but cobalt bays and roads through high bananas.

Perhaps I am part of the audience that just finds bananas funny, no matter what the context.

The book has several paintings executed by the poet. The connection with the text is sometimes obvious because the subject is a common St. Lucian locale. In other cases it is less clear, as when a portrait of a pensive chess player is placed with lines about an artist's rejection letters.

To a modern practitioner, reference to great art can be exhausting. Walcott writes of the anxiety of facing a blank canvas:

I settle before an easel to redeem the fault
 that multiplies itself in desperate survival.

How can one even attempt to paint, given the great examples of the past? Looking at a painting by Tiepolo, Walcott writes:

In that pose of noble departure, I hold the page
 to the ageing light as my own hand grows older;
 they are eternally fixed, age after age,
 and it is I who fade, dimming beholder.

Running throughout the book is the poet's search for an image of a dog he had seen in a painting by Veronese or Tiepolo years earlier. He sees many dogs, both in paintings and at home in St. Lucia. But never does he find the exact one he was looking for. He finally resolves his quest in a way that serves as a bridge between himself and Pissaro, his own island and Paris, art and nature. This is a powerful and well-written book.

Submitted for review on 10/6/00

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