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Upcoming Conferences

Army Worldwide Environmental and Energy Conference 2000 (AWEEC)

Atlanta, GA December 4-7

The theme of this conference is: "*Sustainable Installations and Operations: Transforming the Army.*"

The AWEEC is hosted by the Assistant Secretary of the Army for Installations and Environment (ASA(I&E)). The conference is intended bring together Army leaders, regulators and installation managers to discuss the challenges related to Army Transformation and to address actions recommended by the Senior Environmental Leadership Conference (SELC) 2000. The AWEEC will feature senior speakers from the Department of the Army, the Presidents Council on Environmental Quality, the Environmental Protection Agency, the Department of Energy and the U.S. Fish and Wildlife Service. Discussion topics will include SELC 2000 Campaign Plan, energy management, green construction, ecosystem management, land use, sprawl, sustainable ranges, unexploded ordnance (UXO), Native Alaskans/American Indians, and Technology Transfer.

To obtain a government rate for hotel reservations, act soon. There is also a \$100 per person conference registration fee. For more information about the conference and how to register, see: www.aweec2000.com

Army's Defense Environmental Restoration (DERP) Workshop 2000

New Orleans, LA December 12-14

The theme of this conference is: "*Cleanup — Restoring the Past, Protecting the Future*"

The DERP 2000 Workshop is hosted by the U.S. Army Environmental Center and will showcase the military's continued emphasis on sound environmental stewardship and improvement of the Restoration Program. Army, Navy, Air Force, and DoD personnel, as well as members of other federal agencies, are invited to attend.

The DERP conference is structured to facilitate discussions and provide a training forum on policies, successes, lessons learned, technology transfer, and information exchange for Army and regulatory personnel involved with the Army's Restoration Program. Held periodically since 1992, the workshop serves as the primary forum for the dissemination of new information on DoD and Army policy and guidance. Breakout sessions are expected to feature a diverse number of technical and legal issues related to cleanup, including: remediation strategies and case studies, land use controls, range issues, unexploded ordnance (UXO), CERCLA five-year reviews, risk assessments and natural resource injuries,

as well as cleanup issues that relate to Native Americans and Alaskan natives. Speakers include experts in their field, as well as installation representatives.

To register or receive an agenda, see:
<http://aec.army.mil/prod/usaec/er/derp2000/home.html>

Ninth Circuit Holds that “Disposal” Includes Passive Migration Under CERCLA Section 107.

LTC Tim Connelly

The Ninth Circuit has ruled that passive migration of hazardous substances from one part of a contaminated site to another is sufficient to establish the “disposal” element of a CERCLA¹ cost recovery action. The Ninth Circuit joins the Fourth Circuit as the only two circuit courts of appeal to take this position.

Carson Harbor v. UNOCAL Corp.² was a cost recovery action stemming from the clean up of a trailer park located in the Dominguez Oil Field in Los Angeles County. The Plaintiff, Carson Harbor, was a partnership that owned the trailer park. While trying to refinance the property in 1993, Carson Harbor learned of a significant deposit of slag and tar in 17 acres of wetlands that ran through the property and abutted a nearby highway storm water runoff area.

Once Plaintiffs had cleaned up the site, they filed a cost recovery action against several persons, alleging that they were potentially responsible parties under CERCLA. A cost recovery action under CERCLA Section 107 has four major elements. To prevail, a private party plaintiff³ must prove that:

- (1) there was a release or threatened release of a hazardous substance;
- (2) the release was from a “facility” as defined by CERCLA;
- (3) the release or threatened release caused the plaintiff to incur necessary response costs that were consistent with the National Contingency Plan; and
- (4) the defendant is within one of four statutory classes of potentially responsible parties.⁴

The four statutory classes are current owners and operators of a facility, persons who were owners or operators of the facility “at the time of disposal of any hazardous substance”, persons who arranged for the disposal of hazardous substances that ended up at the facility, and those who transported hazardous substances to the facility, if the transporter selected the facility.⁵ Interestingly, CERCLA adopts several definitions from the Resource

¹ The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 to 9675.

² Carson Harbor Village v. UNOCAL Corp., 227 F.2d 1196 (9th Cir. 2000).

³ The United States, Indian tribes, and individual states must prove the same elements when it seeks cost recovery, except that it may recover without a showing that its costs were consistent with the National Contingency Plan. 42 U.S.C. § 9607(a)(4)(A).

⁴ 42 U.S.C. § 9607(a).

⁵ 42 U.S.C. § 9607(a)(1) to (4).

Conservation and Recovery Act, including the definition for the term “disposal.”⁶ The RCRA definition provides:

The term “disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water so that such solid or hazardous waste or any constituent thereof may enter into the environment or be emitted into the air or discharged into any waters, including ground waters. 42 U.S.C. § 6903(3)

The defendants included local governments, an oil company that had leased the property years before, and two men who owned and operated the trailer park in a partnership from 1977 to 1983 (the “partnership defendants”). Plaintiffs alleged, *inter alia*, that the partnership defendants were liable under CERCLA as past owners and operators of the site. They had to show, therefore, that during the period 1977 to 1983, there was a “disposal” of hazardous substances at the site.⁷

All parties filed comprehensive motions for summary judgment. They agreed that the tar and slag were hazardous substances, that the plaintiffs had incurred costs to clean up the site,⁸ and that the partnership defendants were prior owners of the site. One of the contested issues was whether or not there was a “disposal” during the period of the partnership defendants’ ownership. The slag and tar that Carson Harbor cleaned up on the site had been in place since before the partnership defendants purchased the property. The Plaintiffs’ theory was that passive migration of the contaminants in the groundwater and the release of lead from the tar and slag met the statutory definition of “disposal” of hazardous substances. The partnership defendants argued that there was no “disposal” of hazardous substances during their ownership, as the tar, slag and lead had been there for decades before they purchased it.

The district court agreed with the partnership defendants, and granted their motion for summary judgment. The court found no evidence that the tar and slag were “disposed” on the property during the relevant ownership period – 1977 to 1983. The court reviewed the statutory definition of “disposal” and concluded that it requires some form of human action causing an release of hazardous substances. Mere passive migration of preexisting hazardous substances is insufficient. Ultimately, the district court found for the various defendants on all but one count, allowing a state law nuisance and trespass claims against UNOCAL.⁹

Plaintiffs appealed, and the Ninth Circuit reversed and remanded. Regarding the CERCLA claims against the partnership defendants, the Ninth Circuit acknowledged a split in the circuits on the passive migration issue.¹⁰ It decided, however, that the district court erroneously decided that passive migration was not a “disposal” under CERCLA.

⁶ 42 U.S.C. § 9601(29)(adopting RCRA definitions for “disposal”, hazardous waste” and “treatment”).

⁷ Liability of past owners and operators attaches to “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of”. 42 U.S.C. § 9607 (a)(2).

⁸ In another part of its opinion, the district court ruled that Plaintiffs’ response costs were not “necessary.” It found evidence that the local water authority had directed the remediation and reasoned that CERCLA was not intended to cover costs incurred to enhance the economic value of private property. *Carson Harbor v. UNOCAL Corp.*, 990 F.Supp 1188, 1193 (C.D. Calif. 1997).

⁹ *Carson harbor v. UNOCAL Corporation*, 990 F.Supp at 1199 (C.D. Calif. 1997).

¹⁰ There is a circuit split on the question whether the statutory definition of disposal encompasses passive migration of hazardous substances, compare *Nurad, Inc. v. William Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir. 1992) (“disposal” includes passive migration); with *United States v. 150 Acres of Land*, 204 F.3d 698, 705-06 (6th Cir. 2000) (“disposal” requires active human conduct); *ABB Indus.*

The Ninth Circuit began its analysis by noting “the argument that [the definition of disposal] encompasses passive migration is straightforward.” It then observed that definitions of several terms included in the definition had well-established passive meanings, including “discharge,” “spill” and “leak.” Next, the court explicitly adopted other courts’ rejection of what it called a “strained reading” of the term “disposal” in both a RCRA case and a CERCLA case. The court felt that an expansive reading of the term would serve CERCLA’s remedial purposes. Next, the court found that “including the passive meaning of the statutory definition coheres with the structure and purpose of CERCLA’s liability provisions”, which the court had found were to “provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.”¹¹

Finally, the Ninth Circuit addressed several arguments against its decision to include passive migration in the definition of disposal. The court recognized that Congress could have clearly included passive terms like “leaching” in the statutory definition of disposal and chose not to, and that its interpretation rendered the borrowed term “disposal” synonymous with the term “release” which is explicitly defined in CERCLA itself to include leaching.

The Ninth Circuit failed convincingly to address some troubling aspects of its holding. For example, there is a helpful distinction between applying passive terms to releases of hazardous substances which are known to be present and under an owner’s control and those which are neither known nor controllable. For example, in *Southfund Partners III v. Sears*¹² the court found an owner liable where hazardous waste containers on the property filled with rainwater and leaked onto the soil. There, the court distinguished cases, such as *Carson Harbor*, where unseen passive migration of contaminants through the ground water occur during a period of ownership.¹³ The Ninth Circuit failed to recognize that there is a difference between foreseeable passive releases into the environment and unknown passive releases from one part of the environment to another. Arguably, imposing liability in the latter case does not serve CERCLA’s laudable purpose of affixing liability on those responsible for causing contamination.

The Ninth Circuit has joined the Fourth Circuit¹⁴ as the only circuit to consider passive migration “disposal” sufficient to establish liability under CERCLA Section 107. Under that decision many more former owners of property now face potential liability for unseen contamination they did not cause, and may not even have been aware of. Now that there is a definitive split in the circuit courts, the Supreme Court is likely to decide whether that reading comports with CERCLA’s language and purpose. (LTC Connelly/LIT)

Environmental Penalties: Thinking Outside the Box

MAJ Elizabeth Arnold

What does the Intergovernmental Personnel Act (IGPA) have to do with payment of an environmental penalty? If you are an Environmental Legal Specialist (ELS), you may think that the IGPA is some Labor Law issue that does not pertain to your area of expertise. Think again.

Sys. Inc. v. Prime Technology, Inc., 120 F.3d 351, 357-59 (2d Cir. 1997) (same); *United States v. CDMG Realty Co.*, 96 F.3d 706, 713- 18 (3d Cir. 1996) (same), and we have yet to weigh in on the issue. See *Kaiser Aluminum & Chemical Co. v. Catellus Development*, 976 F.2d 1338, 1342 n.7 (9th Cir. 1992).¹⁶

¹¹ *3550 Stevens Creek Assoc. v. Barclays Bank of California*, 915 F.2d 1355, 1357(9th Cir. 1990).

¹² 57 F.Supp 2d 1369 (N.D. Ga. 1999).

¹³ 57 F.Supp 2d at 1377.

¹⁴ *Nurad, Inc. v. William Hooper & Sons*, 966 F.2d 837 (4th Cir. 1992).

Fort Leonard Wood recently considered using the IGPA to resolve an enforcement action brought by the Missouri Department of Natural Resources (MDNR). Under Title 5 USC Section 3374, a state or local government can assign an employee to the federal government under certain circumstances. The IGPA specifically provides that during the period of assignment, the federal government pays the employee's salary and the employee is deemed to be a federal employee for purposes of the Federal Tort Claims Act and other tort liability purposes.

During the period of assignment, which can be up to two years, the work performed must be of mutual concern to both the federal agency and the other agency in question. See 5 USC Section 3372(a). The Army could then in theory extend the assignment for up to two more years, for a total of up to four years. Assignments and extensions of assignments must be approved by the head of the federal agency, in this case, the Secretary of the Army. Moreover, the individual employee being assigned must agree to the assignment. See 5 USC § 3372(c).

In the end, Fort Leonard Wood and the MDNR backed away from the possibility of implementing the IGPA as a means of resolving an open enforcement action. The learning point for ELSs in the field is that the option is out there and available for implementation.

For future reference, ELSs should consider the IGPA as a negotiation tool. Meanwhile, negotiated payments of fines and supplemental environmental projects are still important traditional aspects of handling open enforcement actions. However, the IGPA should also be explored and considered where appropriate. The IGPA should be kept in mind as a potential tool to be used in lieu of or in conjunction with traditional negotiation tools.

Penalties and the Defense Authorization Act for FY 2001

LTC Richard A. Jaynes

This is a postscript to an article in last month's ELD Bulletin¹⁵ that surveyed the impacts of Section 8149 of the Defense Appropriations Act for FY 2000 (Public Law 106-79).¹⁶ On October 30, 2000 the President signed the Defense Authorization Act for FY 2001,¹⁷ an act that closed the chapter on Section 8149 but opened a new chapter of congressional interest in how environmental regulators pursue enforcement actions. This article notes key aspects of the Act, which emerged from the Conference of Joint House-Senate Conferees with

¹⁵ LTC Richard A. Jaynes: *Assessing the Aftermath of Section 8149*, ELD Bulletin, October 2000.

¹⁶ 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." 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.

¹⁷ The Floyd D. Spence National Defense Authorization Act for FY 2001 was H.R. 4205, which is a one-page bill that adopts and enacts the provisions of H.R. 5408 (i.e., the designation of the bill as it emerged from the Joint Conference). Consequently, references herein to Sections 314 and 315 of the Act apply equally to H.R. 4205 and H.R. 5408. The President's signing statement did not include any comment on either of the Authorization Act's penalties provisions (i.e., Sections 314 and 315).

significant statutory text and report language that addressed environmental penalties and federal facilities.

The Joint Conferees removed from the Act a provision that would have generally discouraged settlements with EPA if fines and supplemental environmental projects totaled \$1.5 million or greater.¹⁸ That provision was replaced with Section 314--text that prohibits DoD and the Army from paying more than \$2 million in fines or penalties to conclude the enforcement action against Fort Wainwright, Alaska.¹⁹ This is a fitting post script to last year's Section 8149, which was enacted out of congressional concern over EPA's attempt to impose a \$16 million penalty at Fort Wainwright that was based almost entirely on "business" penalty criteria.²⁰ With Section 314, Congress is sending a very clear message that it disapproves of the strong-arm tactics of EPA in the Fort Wainwright case. This conclusion is unmistakable from the text itself, and is resoundingly amplified in the Senate Armed Service Committee's (SASC) report that is part of the Authorization Act's legislative history.²¹ As discussed in last month's article, the SASC's report condemns EPA for its handling of the enforcement action at Fort Wainwright and rejects EPA's new enforcement policy that encourages EPA Regions to include "business" penalty assessments in fines against federal facilities. Because of its tremendous relevance to Section 314, an excerpt from the SASC's report dealing with Fort Wainwright and business penalties is appended to this article.

The SASC's report is even more compelling in light of concerns articulated by the Authorization Act's Joint Conferees over the manner in which environmental regulators pursue enforcement actions against federal facilities:

"The conferees note that a number of questions have been raised about the manner in which environmental compliance fines and penalties are assessed by state and federal enforcement authorities. Therefore, the conferees direct the Secretary of Defense to submit a report to the congressional defense committees no later than March 1, 2002, that includes an analysis of all environmental compliance fines and penalties assessed and imposed at military facilities during fiscal years 1995 through 2001. The analysis shall address the criteria or methodology used by enforcement authorities in initially assessing the amount of each fine and penalty. Any current or historical trends regarding the use of such criteria or methodology shall be identified."²²

¹⁸ Congressional Record for 106th Congress, 2nd Session, 146 Cong Rec S 6538 (July 12, 2000).

¹⁹ House Report 106-945 (October 6, 2000) of the Joint Conference regarding H.R. 5408. The full text of Section 314 follows:

SEC. 314. PAYMENT OF FINES AND PENALTIES FOR ENVIRONMENTAL COMPLIANCE AT FORT WAINWRIGHT, ALASKA.

The Secretary of Defense, or the Secretary of the Army, may pay, as part of a settlement of liability, a fine or penalty of not more than \$2,000,000 for matters addressed in the Notice of Violation issued on March 5, 1999, by the Administrator of the Environmental Protection Agency to Fort Wainwright, Alaska.

²⁰ "Business" penalties include the economic benefit of noncompliance and size-of-business fines. See discussion of the Fort Wainwright case in LTC Richard A. Jaynes: *Assessing the Aftermath of Section 8149*, ELD Bulletin, October 2000, and business penalties in 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.

²¹ 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).

²² *Id.*

From the perspective of Army installations, this requirement to analyze and report enforcement practices must be focused on EPA. That is, Army installations have not encountered state regulators who have vigorously sought to apply business penalties to Army installations. Certainly, this report will be a unique and welcome opportunity to explain many of the frustrations DoD facilities have experienced in recent years in their dealings with EPA Regions' attempts to impose unlawful business penalties against Army installations. ELD will be assembling the information for the Army's input to this report to Congress. The format for reporting details of enforcement cases will be worked out in the coming months with other DoD Services and OSD.

Finally, and unsurprisingly, the Act includes a provision intended to carry out the requirements of Section 8149 with regard to the legislative package DoD submitted to Congress for approval. Section 315 of the Act approved all six enforcement action settlements the Army had submitted.²³ As noted in last month's article, the precise legal and fiscal impacts of Section 315 are unclear and warrant further examination. In any event, the Joint Conferees added in their report that they "are pleased with the Army's most recent efforts to reduce the level of fines and penalties received."²⁴ Army installations can take this as a word of encouragement as they continue their efforts to negotiate the minefield of environmental regulations. Hopefully the overall impact of Section 8149, and now Sections 314 and 315, will be to encourage environmental regulators and Army installations to work cooperatively to achieve and maintain compliance, and avoid becoming mired down in contentious enforcement-related issues.

Appendix: Senate Armed Services Committee Report 106-292 to accompany Senate Bill 2549, National Defense Authorization Act for FY 2001 (May 12, 2000).

Payments of fines and penalties for environmental compliance violations (sec. 342)

The committee recommends a provision that would require the Secretary of Defense or the secretaries of the military departments to seek congressional authorization prior to paying any fine or penalty for an environmental compliance violation if the fine or penalty amount agreed to is \$1.5 million or more or is based on the application of economic benefit or size of business criteria. Supplemental environmental projects carried out as part of fine or penalty for amounts \$1.5 million or more and agreed to after the enactment of this Act would also require specific authorization by law.

The committee recommends this provision as a result of concerns that stem from a significant fine imposed at Fort Wainwright, Alaska, (FWA), a related policy established by U.S. Environmental Protection Agency (EPA), and an apparent need for further congressional oversight in this area. On March 5, 1999, EPA Region 10 sent FWA a notice of violation (NOV) and on August 25, 1999, EPA sent a settlement offer of \$16.07 million: (1) \$155,000 for the seriousness of the offenses; (2) \$10.56 million for recapture of economic benefit for noncompliance; and (3) an additional \$5.35 million because of the "size of business" at FWA.

²³ Section 315 of the Defense Authorization Act for FY 2001 provides: "Army Violations. Using amounts authorized to be appropriated by section 301(1) for operation and maintenance for the Army, the Secretary of the Army may pay the following amounts in connection with environmental compliance violations at the following locations:" The Joint Conference Report (House Report 106-945 (October 6, 2000)) for H.R. 5408 stated that the purpose of this legislation is to implement "section 8149 of the Department of Defense Appropriations Act for Fiscal Year 2000." It further states that "[t]he Secretary of the Army would be specifically authorized to pay following supplemental environmental projects carried out in satisfaction of an assessed fine or penalty: (1) \$993,000 for Walter Reed Army Medical Center, Washington, D.C.; (2) \$377,250 for Fort Campbell, Kentucky; (3) \$20,701 for Fort Gordon, Georgia; (4) \$78,500 for Pueblo Chemical Depot, Colorado; (5) \$20,000 for Deseret Chemical Depot, Utah." Section 315 also included authorization for a fine of \$7,975 for Fort Sam Houston, Texas.

²⁴ House Report 106-945 (October 6, 2000) of the Joint Conference regarding H.R. 5408.

According to EPA, the \$16.07 million fine was imposed to correct excessive emissions of particulate matter from an aging coal-fired central heat and power plant (CHPP) at FWA, and to impose a penalty for years of violations under the Clean Air Act (CAA). The EPA policy or rule that directs the application of economic benefit or “size of business” penalty assessment criteria to federal facilities is based on memoranda dated October 9, 1998, and September 30, 1999, issued by the EPA headquarters Federal Facilities Enforcement Office (FFEO). Notice and comment procedures were not used to promulgate these memoranda.

The compliance and enforcement history of the CHPP provides some insight into this committee's concerns regarding the EPA NOV. In the mid 1980s, EPA delegated its CAA program authority to the State of Alaska. In order to comply with opacity requirements, FWA purchased opacity monitors in 1988 and installed them in 1989, however, the monitors had a high failure and maintenance rate. In March 1994, the Alaska Department of Environmental Conservation (ADEC) issued an NOV for opacity violations at the FWA CHPP that identified a need for PM emission reductions. In response, FWA negotiated a compliance schedule with ADEC for the construction of a full-steam bag house for each of the boilers in the CHPP.

FWA continued to work with ADEC from March 1994 to 1999 to: accomplish about \$15.3 million worth of numerous CHPP upgrades for controlling air emissions; resolve Department of Defense (DOD) privatization issues; conduct a bag house feasibility study; and seek military construction authorization for a \$15.9 million bag house project. In the interim, FWA received a CAA Title V Permit completeness determination from the state on February 19, 1998. As a result, FWA continues to operate the CHPP under a CAA Title V permit application, which contains schedules for compliance that were the result of careful coordination with ADEC.

The \$15.9 million bag house was programmed for fiscal year 2000 and was authorized and appropriated by Congress in fiscal year 2000. As planned, the bag house design complies with all applicable CAA requirements, including compliance assurance monitoring. When the EPA NOV was issued, FWA was in compliance with the Title V schedules for implementing air emission control technologies agreed to with ADEC.

First, the committee questions EPA's regulatory judgment in assessing fines and penalties despite the fact that the installation was operating in good faith under a Title V permit application that is overseen by a state with delegated authority. Second, it is the committee's view that the application of economic benefit or “size of business” penalty assessment criteria to the DOD is inconsistent with the statutory language and the legislative history under section 7413 of title 42, United States Code.

The terms economic benefit and “size of business” suggest market-based activities, not government functions subject to congressional appropriations. In addition, the statement of managers accompanying the Clean Air Act Amendments of 1990 (Public Law 101 549; 104 Stat. 2399 (October 27, 1990)) provides that with respect to the economic benefit criterion: “Violators should not be able to obtain an economic benefit vis-à-vis their competitors as a result of their noncompliance with environmental laws.” The committee is not aware that the DOD has competitors.

As a practical matter, the functions of DOD facilities are not analogous to private business. The DOD, unlike private sector, must fund all of its operations, to include environmental compliance, through congressional appropriations. “No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.” (U.S. Constitution, Article 1, Section 9, Clause 7; Anti-Deficiency Act (ADA) 31 U.S.C. 1501). Moreover, the expenditure of federal funds must be consistent with authorization and appropriation acts--Congress and the Office of Management and Budget oversee apportionment of funds to agencies during the fiscal year to avoid overspending--DOD allocates funds to the military departments, which in turn issue allotments to command and staff organizations. (31 U.S.C. 1341(a)(1); Department of Defense Directive 7200.1, Administrative Control of Appropriations (1984)).

The committee has concluded that DOD payment of fines or penalties based on economic benefit or size of business 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. Therefore, the committee recommends a provision that would prohibit the Secretary of Defense and the secretaries of the military departments from paying such fines and penalties without specific authorization by law. (LTC Jaynes/CPL)

Environmental Provisions of NDAA for FY01

LTC David Howlett

Here are the environmental provisions of the National Defense Authorization Act for 2001. In addition to those listed, section 2831 and following contain provisions regarding the transfer of land at specific installations, and the chemical weapon storage and demilitarization provisions are omitted.

SEC. 312. CERTAIN ENVIRONMENTAL RESTORATION ACTIVITIES.

Subsection (b) of section 2703 of title 10, United States Code, is amended to read as follows:

(b) OBLIGATION OF AUTHORIZED AMOUNTS- (1) Funds authorized for deposit in an account under subsection (a) may be obligated or expended from the account only--

(A) to carry out the environmental restoration functions of the Secretary of Defense and the Secretaries of the military departments under this chapter and under any other provision of law; and

(B) to pay for the costs of permanently relocating a facility because of a release or threatened release of hazardous substances, pollutants, or contaminants from--

(i) real property on which the facility is located and that is currently under the jurisdiction of the Secretary of Defense or the Secretary of a military department; or

(ii) real property on which the facility is located and that was under the jurisdiction of the Secretary of Defense or the Secretary of a military department at the time of the actions leading to the release or threatened release.

(2) The authority provided by paragraph (1)(B) expires September 30, 2003. The Secretary of Defense or the Secretary of a military department may not pay the costs of permanently relocating a facility under such paragraph unless the Secretary--

(A) determines that permanent relocation--

(i) is the most cost effective method of responding to the release or threatened release of hazardous substances, pollutants, or contaminants from the real property on which the facility is located;

(ii) has the approval of relevant regulatory agencies; and

(iii) is supported by the affected community; and

(B) submits to Congress written notice of the determination before undertaking the permanent relocation of the facility, including a description of the response action taken or to be taken in connection with the permanent relocation and a statement of the costs incurred or to be incurred in connection with the permanent relocation.

(3) If relocation costs are to be paid under paragraph (1)(B) with respect to a facility located on real property described in clause (ii) of such paragraph, the Secretary of Defense or the Secretary of the military department concerned may use only fund transfer mechanisms otherwise available to the Secretary.

(4) Funds authorized for deposit in an account under subsection (a) shall remain available until expended. Not more than 5 percent of the funds deposited in an account under subsection (a) for a fiscal year may be used to pay relocation costs under paragraph (1)(B).

SEC. 313. ANNUAL REPORTS UNDER STRATEGIC ENVIRONMENTAL RESEARCH AND DEVELOPMENT PROGRAM.

(a) REPEAL OF REQUIREMENT FOR ANNUAL REPORT FROM SCIENTIFIC ADVISORY BOARD- Section 2904 of title 10, United States Code, is amended--

(1) by striking subsection (h); and

(2) by redesignating subsection (i) as subsection (h).

(b) INCLUSION OF ACTIONS OF BOARD IN ANNUAL REPORTS OF COUNCIL- Section 2902(d)(3) of such title is amended by adding at the end the following new subparagraph:

(D) A summary of the actions of the Strategic Environmental Research and Development Program Scientific Advisory Board during the year preceding the year in which the report is submitted and any recommendations, including recommendations on program direction and legislation, that the Advisory Board considers appropriate regarding the program.'

SEC. 314. PAYMENT OF FINES AND PENALTIES FOR ENVIRONMENTAL COMPLIANCE AT FORT WAINWRIGHT, ALASKA.

The Secretary of Defense, or the Secretary of the Army, may pay, as part of a settlement of liability, a fine or penalty of not more than \$2,000,000 for matters addressed in the Notice of Violation issued on March 5, 1999, by the Administrator of the Environmental Protection Agency to Fort Wainwright, Alaska.

SEC. 315. PAYMENT OF FINES OR PENALTIES IMPOSED FOR ENVIRONMENTAL COMPLIANCE VIOLATIONS AT OTHER DEPARTMENT OF DEFENSE FACILITIES.

(a) ARMY VIOLATIONS- Using amounts authorized to be appropriated by section 301(1) for operation and maintenance for the Army, the Secretary of the Army may pay the following amounts in connection with environmental compliance violations at the following locations:

(1) \$993,000 for a supplemental environmental project to implement an installation-wide hazardous substance management system at Walter Reed Army Medical Center, Washington, District of Columbia, in satisfaction of a fine imposed by Environmental Protection Agency Region 3 under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(2) \$377,250 for a supplemental environmental project to install new parts washers at Fort Campbell, Kentucky, in satisfaction of a fine imposed by Environmental Protection Agency Region 4 under the Solid Waste Disposal Act.

(3) \$20,701 for a supplemental environmental project to upgrade the wastewater treatment plant at Fort Gordon, Georgia, in satisfaction of a fine imposed by the State of Georgia under the Solid Waste Disposal Act.

(4) \$78,500 for supplemental environmental projects to reduce the generation of hazardous waste at Pueblo Chemical Depot, Colorado, in satisfaction of a fine imposed by the State of Colorado under the Solid Waste Disposal Act.

(5) \$20,000 for a supplemental environmental project to repair cracks in floors of igloos used to store munitions hazardous waste at Deseret Chemical Depot, Utah, in satisfaction of a fine imposed by the State of Utah under the Solid Waste Disposal Act.

(6) \$7,975 for payment to the Texas Natural Resource Conservation Commission of a cash penalty for permit violations assessed with respect to Fort Sam Houston, Texas, under the Solid Waste Disposal Act.

SEC. 317. NECESSITY OF MILITARY LOW-LEVEL FLIGHT TRAINING TO PROTECT NATIONAL SECURITY AND ENHANCE MILITARY READINESS.

Nothing in the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or the regulations implementing such law shall require the Secretary of Defense or the Secretary of a military department to prepare a programmatic, nation-wide environmental impact statement for low-level flight training as a precondition to the use by the Armed Forces of an airspace for the performance of low-level training flights.

SEC. 2890. SENSE OF CONGRESS REGARDING IMPORTANCE OF EXPANSION OF NATIONAL TRAINING CENTER, FORT IRWIN, CALIFORNIA.

(a) FINDINGS- Congress makes the following findings:

(1) The National Training Center at Fort Irwin, California, is the Army's premier warfare training center.

(2) The National Training Center was cited by General Norman Schwarzkopf as being instrumental to the success of the allied victory in the Persian Gulf conflict.

(3) The National Training Center gives a military unit the opportunity to use high-tech equipment and confront realistic opposing forces in order to accurately discover the unit's strengths and weaknesses.

(4) The current size of the National Training Center is insufficient in light of the advanced equipment and technology required for modern warfare training.

(5) The expansion of the National Training Center to include additional lands would permit military units and members of the Armed Forces to adequately prepare for future conflicts and various warfare scenarios they may encounter throughout the world.

(6) Additional lands for the expansion of the National Training Center are presently available in the California desert.

(7) The expansion of the National Training Center is a top priority of the Army and the Office of the Secretary of Defense.

(b) SENSE OF CONGRESS- It is the sense of Congress that the prompt expansion of the National Training Center is vital to the national security interests of the United States.

SEC. 2891. SENSE OF CONGRESS REGARDING LAND TRANSFERS AT MELROSE RANGE, NEW MEXICO, AND YAKIMA TRAINING CENTER, WASHINGTON.

(a) FINDINGS- Congress makes the following findings:

(1) The Secretary of the Air Force seeks the transfer of 6,713 acres of public domain land within the Melrose Range, New Mexico, from the Department of the Interior to the Department of the Air Force for the continued use of these lands as a military range.

(2) The Secretary of the Army seeks the transfer of 6,640 acres of public domain land within the Yakima Training Center, Washington, from the Department of the Interior to the Department of the Army for military training purposes.

(3) The transfers provide the Department of the Air Force and the Department of the Army with complete land management control of these public domain lands to allow for effective land management, minimize safety concerns, and ensure meaningful training.

(4) The Department of the Interior concurs with the land transfers at Melrose Range and Yakima Training Center.

(b) SENSE OF CONGRESS- It is the sense of Congress that the land transfers at Melrose Range, New Mexico, and Yakima Training Center, Washington, will support military training, safety, and land management concerns on the lands subject to transfer. (LTC Howlett/LIT)
