



# Office of Command Counsel Newsletter

December 2000, Volume 2000-6

## The AMC Command Legal Program for 2001-2002 CLE 2001

The Command Legal Program (CLP) is a two-year plan initiated by the AMC Command Counsel with active participation and substantive contributions from the MSC Chief Counsel.

The CLP for 2001-2002 was designed during the AMC Chief Counsel CLP Workshop, held October 25-27, 2000 in Gettysburg, PA.

The Command Counsel and MSC Chief Counsels determine the categories that will comprise the CLP. The Chief Counsels identify those initiatives that are common to every AMC MSC legal organization.

Each AMC MSC legal organization then develops initiatives under each CLP category that are unique to its legal organization. The CLP is a "living" document that envisions changes during the two years as new subject areas and legal issues arise.

The CLP 2001-2002 theme is **"AMC Attorneys: Providing Solutions to Support the Army's Transformation."**

The CLP for 2001-2002 is comprised of the following five categories:

- **Comprehensive Client Service & Support**
- **Preventive Law**
- **Professional Development**
- **Information Technology & Knowledge Management**
- **Quality of Life**

During the AMC Chief Counsel CLP Workshop, we developed a list of draft CLP initiatives for each category that we believe is applicable across the AMC legal community. We believe it essential that each employee actively participate in the development of CLP initiatives.

Active participation in the development and implementation of the CLP for this two-year period is considered to be an important component of the job of each member of the AMC legal community.

Check inside for details on the annual AMC Continuing Legal Education Program, to be held 21-25 May 2001 at the Grosvenor Hotel, Lake Buena Vista, Florida.

See what you can do to help design and actively participate in our program.

### *In This Issue:*

<i>CLP 2001-2002</i> .....	1
<i>CLE 2001 Coming in May</i> .....	2
<i>Pres. Clinton &amp; DOD Auth Act</i> .....	3
<i>Competitive Neg WLMP Style</i> .....	4
<i>Anti-Deficiency Act</i> .....	5
<i>Voluntary Services</i> .....	6
<i>FLRA &amp; ADR</i> .....	7
<i>DOD-EEOC Rule Waiver</i> .....	8
<i>Holidays &amp; Ethics</i> .....	10
<i>AEC Compliance Newsletter</i> .....	11
<i>Env on JAGCNet</i> .....	11
<i>Faces in the Firm: Taucher Retires</i> ...12	

# CLE 2001: The Basics & What You Can Do

## Dates:

The annual Command Counsel Continuing Legal Education Program will be held at the Grosvenor Hotel, Lake Buena Vista, Florida **Monday 21 May through Friday 25 May 2001.**

You will be receiving a great deal of information to plan attendance and participation in our important annual CLE.

## Planning:

The HQ AMC CLE Planning Committee will meet for the first time in December to map out our general approach. We will then begin substantive planning in early January. **Steve Klatsky**, DSN 767-2304, will again chair the CLE Planning Committee.

## What you can do:

We need and value your contributions to building the substance of the CLE Program.

Especially important is the identification of relevant and important topics and speakers.

**Ed Korte** has asked the Chief Counsels to take the time to work with their staff to identify topics and speakers for discussion.

Steve sent an e-mail to each AMC legal office providing the information contained in this note, soliciting support from the field with respect to CLE substance.

Submit potential topics and a proposed speaker to make the presentation if one is known. These should be submitted to Steve **NLT Friday 5 January**—earlier submissions are encouraged.

## Theme:

During the Chief Counsel Workshop in October a CLE 2001 theme was chosen:

**AMC Attorneys: Providing Solutions to Support the Army's Transformation**

## **Newsletter Details**

### **Staff**

*Command Counsel*  
Edward J. Korte

### *Editor*

Stephen A. Klatsky

### *Layout & Design*

Holly Saunders

### *Webmaster*

Joshua Kranzberg

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

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

# Acquisition Law Focus

## President Clinton's Statement re DOD Auth Act

On October 30 **President Clinton** signed the DOD Authorization Act for Fiscal Year 2001. In a statement accompanying the signing the President highlighted the following components of the legislation:

O 3.7% across the board raise in base pay for the military.

O The Act reaffirms support for key efforts to modernize the military forces and reaffirms the \$60 billion in overall procurement funding requested.

O Support for modernization of the Armed Forces by supporting Navy's LPD-17 Amphibious Ship, DD-21 (the next-generation destroyer), the F/A-18 E/F, the Air Force's F-22 tactical fighter aircraft, the Joint Strike Fighter, and support for the Army's transformation effort.

O Expressed disappointment for that Congress did not support 2 further rounds of BRAC

O Stated strong concerns about the provision authorizing the Secretary of Defense to adopt a pilot program for the resolution of equal employment opportunity complaints of civilian employees of the Department of Defense that waives procedural requirements of the Equal Employment Opportunity Commission (EEOC).

The President highlighted that eliminating these procedural safeguards could leave civilian employees without important means to ensure the protection of their civil rights. Therefore, he directed the Secretary of Defense to personally approve any pilot program, and that the Secretary approve no more than 3 pilot programs, 1 in a military department and 2 in Defense agencies. In order to assure that participation by civilian employees is truly voluntary, he also directed that the pilots provide that complaining parties may opt out of participation in the pilot at any time.

The entire statement is provided (Encl 1).

## List of Enclosures

1. President Clinton's Statement on DOD Authorization Act
2. Role of Leadership in Partnering
3. Competitive Negotiations WLMP Style
4. The Anti-Deficiency Act
5. Voluntary Services
6. Accessibility Requirements for IT Purchases
7. FLRA & ADR
8. DOD EEOC Rules Waived
9. EEOC-EO on Reasonable Accommodation
10. Being Sued--A Primer for Clients
11. Holidays--Ethics
12. ebay Military Item Up for Auction
13. ELD Bulletin Oct 2000
14. ELD Bulletin Nov 2000
15. AEC Compliance Newsletter
16. ELD: People & Practice

# Acquisition Law Focus

## Role of Leadership in Partnering

**Kathryn L. Hall**, an OSC acquisition directorate employee, was a student at the Army Management Staff College.

Ms. Hall wrote an interesting paper entitled "The Role of Leadership in Partnering". The focus of the paper is on the experience gained in using Partnering for the 2.75" Rocket Systems program.

She conducted a survey on this acquisition program that has a mature partnering history. The 2.75" Rocket Systems/General Dynamics Ordnance Systems Partnering program is starting its fourth year.

Based on the results of the survey, she found that leadership by both the government and industry managers is the critical element necessary to maintain the energy and focus of the Partnering with Industry Program.

The paper can be used as an educational tool when you are introducing Partnering to a program. It can be especially useful in describing both the Partnering philosophy and the Partnering experience.

Ms. Hall highlights Partnering training, top leadership commitment and reinforcement of that commitment and--"Communicate, Communicate, Communicate (Encl 2).

## WLMP Articles: A Historical View

The CECOM experiences regarding the unique Wholesale Logistics Modernization Program have been memorialized in an excellent series of articles, some published in prior Nesletters, and one in this issue,

The series includes the following:

Innovations in Logistics Modernization WLMP Will Overhaul

WLMP--The Cutting Edge  
WLMP Partnering for Success

Due Diligence  
Paper Free Contracting  
Evaluating Process Risk in Competitive Acquisitions  
Innovative Contracting Approaches: A Contractor's Perspective

Small Business Participation--A Factor in Source Selection with Unprecedented Results

For copies of these articles please contact **Tom Carroll**, DSN 992-9805.

## Competitive Negotiations WLMP Style

This WLMP article contains an excellent narrative divided into several sections, including Exchanges with Industry Before Receipt of Proposals and with Offerors After Receipt of Proposals.

It also contains an inter-

esting basic introduction to the WLMP Program to include the vital role that innovation and flexibility called for in FAR 15 rewrite had on program success (Encl 3).

POC is CECOM's **Tom Carroll**, DSN 992-9805.

## The Anti-Deficiency Act--A Primer for Clients

**Pat Sheldon**, SBCCOM Chief Counsel, DSN 584-3724, has written an excellent paper on the Anti-Deficiency Act, written from a perspective that the reader will be a client (Encl 4).

The introduction describes the scope of the paper:

“Its all about money – your tax dollars – the appropriation that authorizes the expenditures you make to accomplish your mission and what happens if you don’t learn from history.

In this paper you will discover:

Those valid contracts can create Antideficiency Act violations.

That the word “voluntary” may not mean what you think it does.

That the fiscal mistakes we make today could saddle future generations.

And a lot more about the Antideficiency Act.”

The paper refers back in time to the origins of the Act: As early as 1819, Congressmen complained on the record about Executive Agencies disregarding the constitutional appropriation process. Funds were obligated without or in advance of appropriations.

Funds were co-mingled and used for purposes other than those for which they were appropriated.

The Executive Agencies would spend all their funds early in the year and then seek a deficiency appropriation to continue operations. These practices led directly to what we commonly refer to as the Antideficiency Act.

There is an excellent basic definition of the Act--actually, three acts: It is not one, but three separate statutes that are addressed in the article.

The basic principle of the Acts is that we must

pay as we go. Normally Governmental officials may not obligate, commit, or expend funds to make payments unless sufficient funds are available through the normal appropriation process to cover the cost.

The key provision of the Antideficiency Act is 31 USC 1341 (a)(1).

An officer or employee of the United States Government ...may not –

a. Make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

b. Involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

## Voluntary Services

CECOM's **Lea Duerinck**, DSN 992-3188, has written an outstanding article on voluntart services, and its relationship to the Anti-Deficiency Act (Encl 5).

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

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

Generally, voluntary services may only be accepted in emergencies. The ADA provides that "emergencies" do "not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or protection of property." 31 U.S.C. §

1342 (1999). Accordingly, the Comptroller General has held that such an emergency must represent an immediate danger. See Decision by Comptroller General McCarl, A-34142, 10 Comp. Gen. 248 (1930) (Agreement to voluntarily tow Navy airplane after being forced down was not an emergency because it did not involve sudden emergency involving loss of human life or destruction of Government property).

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

The paper addresses many circumstances under which voluntary services are authorized under law, with many case citations.

## New Accessibility Requirements for Information Technology Purchases

**Lisa Simon**, HQ AMC, DSN 767-2552, recently addressed the Chief COUnsel VTC on the topic of the new accessibility requirements for information technology purchases.

There were several inquiries after the presentation, so we include a previously published point paper oin the issue (Encl 6).

The law that is applicable is the amended section 508 of the Rehabilitation Act , 29 USC Sec 794d.

Under the statute all federal electronic and information technology developed or procured must be comparably accessible todisabled employees and disabled members of the public as to their able-bodied counterparts.

The definition of "federal electronic and information technology" is quite broad, including not just hardware and software, but websites and information kiosks.

# Employment Law Focus

## The FLRA's Collaboration and Alternative Dispute Resolution Program

Federal sector labor-management relations has changed significantly in recent years. Greater emphasis is now placed on the use of alternative dispute resolution (ADR) and consensus decision-making in resolving workplace disputes and in improving labor-management relationships in the Federal sector.

The FLRA's Collaboration and Alternative Dispute Resolution (CADR) program enhances these efforts by integrating ADR into all of the case processes used by the various FLRA components.

### Frequently Asked Questions

#### **What types of services does the CADR program provide?**

The services focus on alternatives to traditional case processing and formal dispute resolution.

The CADR program assists the parties both in preventing disputes before they become cases and in coming up with ways to informally

resolve disputes in pending cases. This includes interest-based conflict resolution and intervention services in pending unfair labor practice cases, representation cases, negotiability appeals, and impasse bargaining disputes.

The CADR program also provides facilitation, training and education to help labor and management develop collaborative relationships.

The ultimate goal is to provide parties with the skills they need to do ADR on their own.

#### **Is the CADR program voluntary?**

Yes.

#### **Where does the CADR program fit in the normal case processing?**

The FLRA's Regulations for negotiability, unfair labor practice, and representation cases ensure that parties have the opportunity to use ADR to resolve their cases. For example, in negotiability cases, during the post-petition conference, if the parties express interest in using ADR services, the case will be put on hold to give the parties time to get help from the

CADR Office. In unfair labor practice cases, an ADR process is available that allows the parties to resolve the underlying dispute by facilitating a problem-solving approach, rather than having the Regional Office investigate the facts and determine the merits of the charge. For cases on their way to hearing, the Administrative Law Judge (ALJ) settlement program is available for one more attempt at informal resolution.

ADR services are also available in some circumstances for parties who do not have a case filed, but would like assistance with disputes or relationship issues.

#### **Who provides CADR program services?**

All of the FLRA components provide CADR program services.

The Office of the General Counsel (OGC) offers ADR services in unfair labor practice and representation cases, both before cases are filed and while they are pending.

For further information see Enclosure 7.

# Employment Law Focus

## DOD Authorized to Waive EEOC Rules in Order to Test ADR

House and Senate lawmakers have approved legislation authorizing the Defense Department to waive Equal Opportunity Employment Commission regulations in order to test the use of alternative dispute resolution mechanisms to expedite settlement of job complaints.

The bill provides for the pilot project to commence on Jan. 1, 2001, and says the Defense Department should establish procedures "to reduce processing time and eliminate redundancy with respect to processes for the resolution of equal employment opportunity complaints, reinforce local management and chain-of-command accountability, and provide the parties involved with early opportunity for resolution."

Participation in the pilot program would be voluntary on the part of the complainant, and complainants who participate in the pilot program shall retain the right to appeal a final agency decision to the EEOC to file suit in district court.

However, the "Equal Employment Opportunity Commission shall not reverse a final agency decision on the grounds that the agency did not comply with the regulatory requirements promulgated by the Commission," the conference report says.

The bill also provides that the program may be run outside of EEOC requirements and regulations. According to the conference report, "Complaints processed under the pilot program shall be subject to the procedural requirements established for the pilot program and shall not be subject to the procedural requirements of part 1614 of title 29 of the Code of Federal Regulations or other regulations, directives, or regulatory restrictions prescribed by the Equal Employment Opportunity Commission."

The legislation also would require the department's comptroller general to report to Congress on the implementation of the pilot program.

The complete report is provided (Encl 8)

## Revised FLRA Guide to the Federal Labor-Management Relations

The Federal Labor Relations Authority is publishing a new edition of its publication, Guide to the Federal Service Labor-Management Relations Program. The Guide, which is a major revision of the previous edition, is designed to assist readers, in a non-technical way, in understanding the rights and obligations of Federal agencies, employees, and labor organizations under the Federal Service Labor-Management Relations Statute.

This guide should be helpful to civilian personnel generalists as well as supervisors new to the labor relations program.

This publication may be obtained on a pro-rated cost basis with the Authority by "riding" the FLRA Requisition Number :

Document No. 1213  
Requisition No. 0-00048  
Jacket No. 471-103

# Employment Law Focus

## Policy Guidance On Executive Order 13164: Procedures To Facilitate Reasonable Accommodation

On July 26, 2000, President Clinton signed Executive Order 13164 (Order),<sup>(1)</sup> which requires each federal agency to establish effective written procedures for processing requests for reasonable accommodation.

The Order helps to implement the requirement of the Rehabilitation Act of 1973<sup>(2)</sup> that agencies provide reasonable accommodation to qualified employees and applicants with disabilities. It is an important part of the government's national policy to create additional employment opportunities for people with disabilities.

Where workplace barriers exist, such as physical obstacles or rules about how a job is to be performed, reasonable accommodation serves two fundamental purposes. First, reasonable accommodations remove barriers that prevent people with disabilities from applying for, or performing, jobs for which they are qualified. Second, reasonable accommodations enable agencies to expand the pool of qualified workers, thus allowing the agencies to benefit from the talents of people who might otherwise be arbitrarily barred from employment.

On October 20, the EEOC issued an explanatory policy guidance letter that explains the requirements of the Executive Order. This Guidance first sets forth some background information on the obligation to provide reasonable accommodation and the standards of the Rehabilitation Act. It then addresses each of the requirements of the Order. This Guidance is to be read in conjunction with relevant EEOC regulations, see 29 C.F.R. part 1630, and the EEOC's "[Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#)," available on the web at [www.eeoc.gov](http://www.eeoc.gov).[www.eeoc.gov](http://www.eeoc.gov)

See Enclosure 9.

# Being Sued-- Some useful basics for your clients

**Pamela McArthur**, of the CECOM SJA Division, DSN 992-4760, has written an interesting paper that we provide to you outlining some real basic concerns real people have when they are sued (Encl 10).

There are sections entitled How A Lawsuit Begins, Deciding Whether to Hire a Lawyer and How Lawyer's Charge, and the Stages of A Lawsuit.

The paper is written in a very to easy style that should be useful to all legal offices in communication with clients.

## Holidays

## eBay auctions of military items--

AMC Ethics Counsel **Mike Wentink**, DSN 767-8003 has prepared an outstanding paper addressing various issues arising during the holiday season (Encl 11),

Among the several issues addressed:

### Fundraising

Another issue is fundraising. Let's look at a fictional organization called the Technical Directorate (TD). The TD employees want to have this wonderful celebration of their working relationship and teamwork during this holiday season at an upscale restaurant. The cost will be \$50 a piece! A lot of money, but the employees decide that they will try to raise money to pare down the cost. Can they?

The general rule is no fundraising. But, there are exceptions and, in this type of situation, the TD employees may do so. But, there are limits. A couple of common mistakes are as follows:

It is wrong to solicit outside sources (local restau-

rants, car dealerships, department stores, professional associations, contractors, and other businesses) for donations, to include door prizes, for the function. Even in a situation where the "gift" might fit one of the gift exceptions, that exception cannot be used if the gift was solicited in the first place.

### Gifts

May we exchange gifts among ourselves during the holiday season? Yes! But again, there are limits.

The highest value of any gift that we can give to a superior in this type of situation is \$10. And, we may not solicit contributions from other employees.

We may not accept a gift from anyone who makes less money than we do as a Federal employee, unless there is no superior-subordinate relationship, and there is a personal relationship that would justify the gift. Again, the exception would be for a gift where the value does not exceed \$10, with no soliciting of contributions from other employees.

"Picture a Government Attorney sitting at her desk, surfing eBay.com during work hours and later describing the great bargain she found there to her Supervisor! My Supervisor demanded that I attend ethics training immediately before I interjected to explain the situation.

A few weeks ago, I surfed the web regularly because an anonymous seller was auctioning a military item, the Interceptor Body Armor (IBA), to the highest bidder on eBay, an online auction operator. The manufacturer of the item informed this office about the auction in progress which continued for another few days.

Time was of the essence. E-mails deluged the Legal Office's computer systems, including one from our Commanding General, inquiring about what actions this Office would employ to rectify this situation. "

So begins the interesting saga of Natick counsel **Srikanti Dixit**, DSN 256-5971.

For the details see Enclosure 12.

# Environmental Law Focus

## Connect to: JAGCNET Environmental Forum

The Army OTJAG Environmental Law Division is making a major effort to revitalize the JAGCNET Environmental Law Forum and distribute environmental information on the Forum.

**EVERY AMC** attorney who practices or has an interest in Environmental Law should be registered to access this forum.

Use the link to request access: <http://www.jagcnet.army.mil/Forums>

## Environmental Law Division People & Practice

The Environmental Law Division has a number of new attorneys.

Enclosed is a list of their attorneys and areas of responsibility (Encl 16).

## EPA Is There To Help Us Comply

The U.S. Environmental Protection Agency (EPA) recently initiated the Federal Facilities Compliance Assistance Center, or FedSite, and Internet-based resource aimed at helping federal agencies comply with environmental laws and regulations. FedSite is a centralized site linking individuals to information regarding compliance with environmental regulation. The new center can be reached on the Web at: [www.epa.gov/oeca/hdtomick@aec.apgea.army.mil/fedfac/cfa](http://www.epa.gov/oeca/hdtomick@aec.apgea.army.mil/fedfac/cfa).

## AEC Compliance Newsletter

The Army Environmental Center publishes a very good monthly AEC Compliance Newsletter. The October letter is included. Encl 15. Anyone who would like to be added to the mailing list should contact AEC POC at [hdtomick@aec.apgea.army.mil](mailto:hdtomick@aec.apgea.army.mil).

Send your name, installation name, mailing address, position, e-mail address, phone and fax number.

## Are You Listed as a DA ELS?

The Environmental Law Division has compiled an army-wide roster of Environmental Law Specialists (ELS). The roster is organized by MACOM and it includes the name, rank or civilian pay grade, location, phone number and e-mail address for each Army ELS.

The POC for this roster is MAJ Elizabeth Arnold, [Elizabeth.Arnold@hqda.army.mil](mailto:Elizabeth.Arnold@hqda.army.mil), DSN 426-1593 or COML (703) 696-1593. AMC attorneys should check the roster and contact the POC for changes or corrections.

## ELD Bulletins- -Oct & Nov

Environmental Law Division Bulletins for October (Encl 13) and November 2000 (Encl 14) are provided. The November issue has significant articles about a new Executive Order on Tribal Consultation and NEPA Cumulative Impacts Analysis, among other articles.

These Bulletins are now available electronically on the JAGCNet Environmental Forum, and will no longer be provided in the Newsletter.

# Faces In The Firm

## HELLO & GOODBYE

### Arrivals

#### CECOM

**Raymond Ross** has recently joined the Intellectual Property Law Division. Ray is both an attorney and an engineer, although he has not yet taken the Patent Bar Examination. He is familiar with the operations and personnel here at CECOM since he was formerly employed by that portion of the Army Research Laboratory previously resident here. Ray returns to the Fort Monmouth community after several years in private practice and is already a productive member of the staff.

### Farewell

#### OSC

**Bridget Stengel** left federal service in September 2000. Bridget was an attorney in the acquisition law area for 15 years. She and her family decided she would devote her time to them – giving up her glamorous federal job for her glamorous domestic job! She'll be missed here in the office.

### Retirement

#### TACOM-Warren

**Peter A Taucher** retires January 2001. In his 35 years of federal service Mr. Taucher has been involved with all aspects of Intellectual Property law. He is best known for his work in obtaining license right to foreign patents and data for various items used on Army vehicles. This has included the 120 mm cannon for the M-1 tank, armor work with the United Kingdom, and the chain gun used on the Bradley.

In recognition of his work he has been nominated for several AMC awards with the highlight being when he was named attorney of the year for AMC in 1990. His counsel and experience will be sorely missed.

#### OSC

FINALLY! **Mike Patramanis** and his wife, Vicki, are grandparents!!!! Their son, George, and his wife, Alexa, celebrated the birth of their first child, Madeline Rose. Congratulations to Grandpa and the entire family.

## Awards

#### CECOM

**Walter (Jay) Harbort** and **Theodore Chupein** received the Department of the Army Achievement Medal for Civilian Service for guidance and technical expertise provided on the acquisition of AN/PSC-5 Spitfire satellite radios.

**Thomas Carroll, Lea Duerinck, CPT Robert Paschall** and **Vincent Buonocore** were honored as members of the CECOM "Quality Team of the Quarter" for the 4th Quarter of Fiscal Year 2000 for their work in support of the Wholesale Logistics Modernization Transition Team. The team was also selected as the "Quality Team of the Year" for FY 2000.

#### HQAMC

**MAJ Sandra Fortson** received the Meritorious Service Medal for her exceptional service as a member of the Contract Appeals Division

### Births

#### CECOM

**Maureen Osborn**, of the Competition Management Division, and her husband, Dave, proudly announce the birth of their son, Patrick, born 13 October 2000, weighing in at 5 pounds 14 ounces.

## STATEMENT BY THE PRESIDENT

Today I have signed into law H.R. 4205, the "Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001," which authorizes FY 2001 appropriations for military activities of the Department of Defense (DOD), military construction, and defense activities of the Department of Energy (DOE). While I have concerns with several provisions in this Act, I have determined that H.R. 4205 generally reflects my strong commitment to the Nation's security. It provides for critical national defense needs and priorities, maintains the readiness of our Armed Forces, supports my continued commitment to improving the quality of life for our military personnel and their families, and allows for the modernization of our weapons systems.

In particular, this Act authorizes key elements of my plan to improve military compensation, including my request for a 3.7 percent across-the-board increase in basic pay for our Armed Forces. I am also pleased that the Act authorizes my request for increases in housing allowances, which will reduce servicemembers' out-of-pocket expenses. In providing service members with a supplemental subsistence allowance, H.R. 4205 begins to address the concern the Congress and I share with regard to servicemembers. In addition, the bill provides military retirees access to prescription drugs with low out-of-pocket costs, a significant benefit. I strongly support enactment of the Administration's prescription drug benefit for all Medicare retirees through the Medicare program. As prescription drugs play an increasingly important role in health care, it is imperative that our seniors have prescription drug coverage. Finally, the Act provides comprehensive health care coverage to military retirees over the age of 65. Although I am concerned that the Congress fails to deal fully with the high, long-term cost of this new benefit, I am pleased overall with the way the Act supports individuals, who dedicated so much to the service of our country.

I am also pleased that the Act supports my request for key programs to continue modernizing our military forces and reaffirms the \$60 billion in overall procurement funding I requested to meet the recommendation of the 1997 Quadrennial Defense Review. I am encouraged that the Act includes funding for the Navy's LPD-17 Amphibious Ship, DD-21 (the next-generation destroyer), the F/A-18 E/F, the Air Force's F-22 tactical fighter aircraft, the Joint Strike Fighter, and support for the Army's transformation effort. These programs are critical to

ensuring our Nation's military superiority into the 21st century. I am disappointed, however, that the Congress has again failed to support my proposal to authorize two additional rounds of base closure and realignment. The Department of Defense's base infrastructure is far too large for its military forces and must be reduced if the Department is to obtain adequate appropriations for readiness and modernization requirements during the next decade.

I am pleased that the bill includes a program to compensate individuals who have suffered disabling and potentially fatal illnesses as a result of their work in the Department of Energy's nuclear weapons complex. My Administration has advocated compensating these workers for their heroic sacrifices in a manner that is fair, science-based, and workable, and I commend those in the Congress and in my Administration who have worked tirelessly toward this goal. The passage of this legislation is very encouraging and, while there are constitutional concerns with this provision that I will interpret as advisory, I recognize that much work will need to be done to ensure that this program is successfully implemented so that these workers can be fully and fairly compensated for their sacrifices.

I am also pleased that the conferees included a provision transferring a majority of Naval Oil Shale Reserve No. 2 to the Ute Indian Tribe in Utah, and providing for cleanup of a former uranium mill tailings site near Moab, Utah, on the Colorado River. About 84,000 acres would be returned to the Ute Indian Tribe.

H.R. 4205 also enacts provisions of the Directives I issued regarding the Navy range on Vieques, Puerto Rico. The Directives reflect an agreement with the Government of Puerto Rico that meets local concerns and enables our military personnel to resume training at Vieques. Like the agreement, the Act, most importantly, provides that the residents will determine through a referendum whether there will be any training at Vieques beyond that which is critical to the readiness of the Navy and the Marine Corps to conduct at Vieques. This is training with nonexplosive ordnance for no more than 90 days per year through May 1, 2003. In addition to \$40 million for projects to address the residents' current concerns related to the training, if they decide to allow the Navy to extend it, the Act authorizes \$50 million to provide benefits typically enjoyed by residents in the vicinity of important military installations.

The Act, additionally, requires the Navy to relinquish ownership of

land not used for training. But, different from the agreement, it would have some of this land transferred to the Interior Department rather than local ownership and set a deadline for the transfer of May 1, 2001, rather than December 31, 2000. Further, if the Viequenses vote for all training to end, it requires the Navy to relinquish the land used for training, but would have most of that land transferred to Interior rather than the General Services Administration for disposal. These variations are relatively minor, but they are neither justifiable nor prudent. They are not justifiable because Interior and Puerto Rico would together manage the land not used for training that requires protection under either the Act or the agreement. Further, if the people of Vieques vote for all training to end May 1, 2003, there is no known reason why the Federal Government would want to continue to maintain most of the land used for training. The changes are not prudent because they resurrect a basic part of the issue that had largely been put to rest by the agreement -- the military's credibility on Vieques community matters. We are, therefore, submitting legislation to further transfer the land at issue to Puerto Rican ownership or to GSA for disposal as is appropriate. And the Navy will transfer the land that the Act already would transfer to local ownership by December 31.

I am concerned with two provisions of H.R. 4205 relating to the Department of Energy. First, the Act would limit to 3 years the term of office for the first person appointed to the position of Under Secretary for Nuclear Security at the Department of Energy and would restrict the President's ability to remove that official to cases of "inefficiency, neglect of duty, or malfeasance in office." Particularly in light of the sensitive duties assigned to this officer in the area of national security, I understand the phrase "neglect of duty" to include, among other things, a failure to comply with the lawful directives or policies of the President.

Second, I am deeply disappointed that the Congress has taken upon itself to set greatly increased polygraph requirements that are unrealistic in scope, impractical in execution, and that would be strongly counterproductive in their impact on our national security. The bill also micromanages the Secretary of Energy's authority to grant temporary waivers to the polygraph requirement in a potentially damaging way, by explicitly directing him not to consider the scientific vitality of DOE laboratories. This directs the Secretary not to do his job, since maintaining the scientific vitality of DOE national laboratories is essential to our national security and is one of the Secretary's most important responsibilities. I am therefore signing the bill with the

understanding that it cannot supersede the Secretary's responsibility to fulfill his national security obligations.

I am disappointed that the Congress did not fund the chemical weapon destruction facility in Shchuch'ye, Russia. It is vital to U.S. security and nonproliferation interests to work with Russia to eliminate the 5,450 tons of modern, nerve agent munitions at this site. I urge the Congress to restore funding for this critical threat reduction program next year.

My Administration has worked hard to modernize our export controls and protect our national security while strengthening the global competitiveness of our high tech companies. Through our efforts, U.S. companies have been allowed to export computers that do not pose a threat to our national security. That is why I asked the Congress to reduce the congressional review period required from 180 to 30 days before I can adjust the notification threshold for high performance computer exports. Although the bill makes an adjustment that is an improvement from the status quo (60 days, but excluding time when the Congress has adjourned sine die), this notification period is still too long. Neither U.S. national security nor the global competitiveness of U.S. companies will be well served by such delays.

The Act also would require the Department of Defense to contract only with U.S. air carriers that participate in the Civil Reserve Air Fleet program for the transportation abroad of passengers and property. This provision would limit the ability of the executive branch, including DOD, to use the narrow authority in current law to waive Fly America restrictions on international transport of U.S. Government passengers and property in cases where the United States receives "rights or benefits of similar magnitude." It could also impair the executive branch's ability to open foreign aviation markets, thus denying economic benefits to U.S. airlines, communities and consumers. My Administration strongly opposed this provision and favors its repeal.

I am disappointed that the conferees did not include hate crimes legislation in this Act. The hate crimes legislation would have enhanced the Federal Government's ability to prosecute violent crimes motivated by race, color, religion, or national origin, and would have authorized Federal prosecution of crimes motivated by a victim's sexual orientation, gender, or disability. I will continue to fight for this important legislation, and urge Congress to enact it before it adjourns.

The Act also raises other constitutional concerns. The constitutional separation of powers does not allow for a single Member of Congress to direct executive branch officers to take specified action through means other than duly enacted legislation. Thus, I will instruct the Secretaries concerned to treat congressional members' requests for the review and determination of proposals for posthumous or honorary promotions or appointments as precatory rather than mandatory. Another provision establishes a Board of Governors for the Civil Air Patrol. Insofar as this Board is an office of the Federal Government exercising significant authority, the provision for the appointment of the Board's members would raise concerns under the Appointments Clause. Accordingly, I will instruct the Secretary of the Air Force, in issuing the regulations authorized by this provision, to retain a degree of control over the Board that appropriately limits its authority. Finally, because the Constitution vests in the President the authority and responsibility to conduct the foreign and diplomatic relations of the United States, the Congress cannot purport to direct the executive branch to enter into an agreement with another country, and thus I will treat such language as advisory only.

With respect to Government Information Security Reform, the Act directs the Director of the Office of Management and Budget to delegate certain security policy and oversight authorities to the Secretary of Defense, the Director of Central Intelligence, and another agency head. The policies, programs, and procedures established by the Secretary of Defense, the Director of Central Intelligence, and other agency heads will remain subject to the approval of and oversight by the President and by offices within the Executive Office of the President in a manner consistent with existing law and policy.

Finally, I have serious concerns with several personnel provisions. One provision of this Act requires the Secretary of Defense to authorize a pilot program for the resolution of equal employment opportunity complaints of civilian employees of the Department of Defense that waives procedural requirements of the Equal Employment Opportunity Commission (EEOC). Eliminating these procedural safeguards could leave civilian employees without important means to ensure the protection of their civil rights. Therefore, I am directing the Secretary of Defense to personally approve any pilot program, and that the Secretary approve no more than 3 pilot programs, 1 in a military department and 2 in Defense agencies. In order to assure that participation by civilian employees is truly voluntary, I am directing that the pilots provide that complaining parties may opt out of participation in the pilot at

any time. Finally, I am directing that the Secretary submit an assessment of the pilots, together with the underlying data, to the EEOC within 180 days of the completion of the 3-year pilot period.

I am also troubled by a provision affecting personnel demonstration projects that could undermine the merit system principles and might result in adverse budgetary consequences. I am, therefore, directing the Department of Defense to work with the Office of Personnel Management to resolve these issues before developing any plan to implement this new authority.

Notwithstanding these concerns, I have signed this Act because it demonstrates this Nation's commitment to the readiness and well-being of our Armed Forces and provides for a modernization effort that will ensure the acquisition of weapon systems with the technologies necessary to meet the challenges of this new century.

WILLIAM J. CLINTON

THE WHITE HOUSE,  
October 30, 2000.

**The Role of Leadership in Partnering**  
**Lessons Learned from a Mature Partnering Program**

**Kathryn I. Hall**

**AMSC Class 99-1**

**Seminar 4**

**8 March 99**

**The Role of Leadership in Partnering**  
**Lessons Learned from a Mature Partnering Program**

**Abstract**

Ever since Vice President Gore brought the \$400 hammer issue into the limelight, acquisition reform has been one of the biggest initiatives undertaken by the Army. Top Army leaders have directed senior leaders to embrace various reform initiatives. One of these initiatives directed is Partnering with Industry – a new way of doing business.

I conducted a survey on an acquisition program that has a mature partnering history. The 2.75” Rocket Systems/General Dynamics Ordnance Systems Partnering program is starting its fourth year. Based on the results of the survey, I found that leadership by both the government and industry managers is the critical element necessary to maintain the energy and focus of the Partnering with Industry Program. Learning from the successes and problems of others is one of the quickest ways to acclimate your program to the new way of doing business. I believe leaders need to address issues caused by changes in order to maintain energy and focus.

## **The Role of Leadership in Partnering**

### **Lessons Learned from a Mature Partnering Program**

#### **INTRODUCTION**

Ever since Vice President Gore brought the \$400 hammer issue into the limelight, acquisition reform has been one of the biggest initiatives undertaken by the Army. Top Army leaders have directed senior leaders to embrace various reform initiatives. One of these initiatives directed is Partnering with Industry.

I conducted a survey on an acquisition program that has a mature partnering history. The 2.75" Rocket Systems/General Dynamics Ordnance Systems Partnering program is starting its fourth year. Results of the survey identify and validate that leadership by both the government and industry managers is a critical element necessary to maintain the energy and focus of the Partnering with Industry Program.

Leadership is an important part of any body of individuals working together toward a common goal and mission. Today's leaders are challenged by the dynamic environment – things change and they must be ready to be proactive rather than reactive in order to keep pace with these changes. Some changes leaders are facing now result from significant downsizing experienced in the past 10 years - doing more with less. We can't do things the same way as we did in the past. Another driving force is acquisition reform initiatives changing the way business is conducted between government and industry.

## TOP MANAGEMENT DIRECTIVES

General Dennis J. Reimer, Chief of Staff of the Army, stated: “senior leaders must seek out new ways of doing business. I expect you to...Establish long-term partnerships and partner with companies that are the best in their class.”

Army Materiel Command (AMC) embraced this guidance and instituted a Partnering for Success Program. The Command encourages partnering be applied to all acquisitions, where feasible, which supply the sustaining base. Major General Johnnie E. Wilson, Commanding General, states “Accomplishment of AMC’s mission depends on our ability to work effectively with our partners in industry. Partnering helps us to do this successfully and deliver the very best products to our ultimate customers-the soldiers.”

## PARTNERING REQUIRES CHANGE

The Partnering for Success program is defined as “a project-specific, inter-organizational, dispute-avoidance process. It is not simply a ‘working together’ or ‘being friendly’ or singing and holding hands’. Rather...it is a specific process that must be followed to change not only the philosophy, but the actions of the parties involved in performance of the project.” (DeFrieze) 1999. It is not always easy for leaders to change the way they have done business for so many years. They may encounter resistance from their employees. Leaders must communicate their philosophy and lead their employees into the cultural change by example. “A leader doesn’t coerce people into change that they resist. A leader articulates a vision and persuades people that they want to become part of it, so that they willingly, even enthusiastically, accept the distress that accompanies its realization.” (Hammer & Champy) 1993.

## LEARN FROM OTHERS

The best way for leaders to learn how to successfully partner is to look at a mature partnering program. The 2.75” Rocket Program is a highly visible partnering program within the AMC community. It has been used as an example of how partnering should be done in the Partnering for Success pamphlet and training video.

The 2.75” Rocket Systems Project Manager and General Dynamics Ordnance Systems have been effectively partnering since a multi-million dollar contract was signed in November of 1995.<sup>1</sup> Partnering and teaming training started within 1-1/2 months of the contract award because immediate planning and implementation of the partnering process is vital. For the past 3 1/2 years, the Project Manager (PM) and GDOS have successfully utilized the partnering process to implement their production contract together. Leaders and employees were challenged by this cultural change, but they enthusiastically accepted partnering and find that it is refreshing to work as partners instead of adversaries. Any doubts they had about the effectiveness of partnering have been dispelled. It is, “in reality, a workforce multiplier, the utilization of which is absolutely essential to our future success.” (AMC Pamphlet) 1994

## RELOOKING AT THE PROGRAM

Recent changes have occurred that may impact the program. This business partnership is similar to a marriage; it takes a continuing effort to maintain it and improve with age. Relationships do not remain constant over time. Partnering momentum usually

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<sup>1</sup> Note for clarification purposes: The original contract was signed with Lockheed Martin Ordnance Systems (LMOS). General Dynamics (GDOS) subsequently bought LMOS. I refer to our partners now as GDOS.

starts out with a great deal of speed, goes along at a good pace for a few years but may lose a little steam as it matures.

Analyses of survey results indicate that leaders need to strongly emphasize the partnering philosophy, openly communicate with other managers and their employees. They also need to train the force, bring new employees into the process immediately, celebrate successes and continuously reinforce, monitor and follow-up.

### COMMUNICATE, COMMUNICATE, COMMUNICATE

An old adage that “the path between neighbors becomes choked with weeds if not traveled often” applies to keeping communications open between partners. (LTC Jeffrey Staser) 1963

A leader must set the tone by constantly reinforcing the partnering philosophy to program participants. He must communicate his thoughts on the way all players should handle their relationships with counterparts in the program. It is not dictating the hows or whats but providing guidance and setting the tone. I believe a leader should periodically attend working level meetings to see how issues are handled, and review what has been done with team leaders to make sure it meets his philosophy.

Team leaders are the essential glue that holds partnering together. They reinforce the guidelines of senior leaders and maintain the pulse of partnering efforts. It is their actions on day to day program issues that demonstrate the partnering philosophy to both government and industry personnel.

## TRAINING

Every respondent replied that it is well worth the time and cost when I asked if annual partnering training was valuable. Partnering and team training, both at the beginning and periodically, “is both valuable and vital. Training not only assures that everyone understands what partnering is, but it also assures they have the same understanding of partnering.” (Survey) 1999 “It gives members an opportunity to develop, review and practice the use of partnering tools, assess performance, share lessons learned, work real issues, assimilate new members, and reaffirm the commitment to both partnering ideals and to each other.” (Survey) 1999

I recommend leaders also consider other types of training for their team members. Courses on acquisition reform, Alternate Dispute Resolution, and team leadership for employees are all applicable, and tie into the partnering philosophy. As teams mature, in-house expertise may possibly be utilized. I also recommend leaders investigate utilizing government training schools. They may be able to provide quality training at lower cost.

## NEW EMPLOYEES

There has recently been the inevitable change in personnel of both the PM and GDOS. While this change happens in many organizations, it must be recognized it is something that impacts partnering immensely. Almost every respondent to the survey mentioned that there was a need for immediate orientation to and acceptance of the partnering philosophy by new employees. To quote one respondent: “The only obstacle to continuance is created by the change of personnel. It is difficult to maintain partnering

philosophies and methods in a dynamic environment.” (Survey 1999) This finding is also addressed in the AMC Partnering Pamphlet:

“Significant employee turnover within the government and/or industry can potentially undermine the success of the Partnering relationship. It is, therefore, imperative that when personnel changes are experienced, particularly among the “Champions” or primary stakeholders, the new Partnering participants be familiarized immediately with and embrace the process, especially the necessity for open and continuous communication.”

There’s an important message here. Leaders must see that it is easy for people to revert to “old school” mentality if their counterparts are not responding to their needs in the partnering way to which they have become accustomed. Changes are inevitable; how well leaders handle these changes will ultimately determine if the program flourishes or flounders.

Another question in the survey asked what leaders were actively doing to help new employees to accept the partnering concept. Responses indicated leaders were aware of this need. Answers ranged from: “Primarily follow my lead – this is how I deal with the government and I expect you to do the same” and “Sharing the history of the experience and counseling” to “Exposure to annual formalized training program” and “providing a historical overview of the program from pre-partnering to partnering using examples.” (Survey 1999) New employees view the AMC partnering tape and are included in program management reviews where they are introduced to the whole team.

Based on the unanimous endorsement by government and industry team members, I find that formalized training should definitely be instituted soon after contract award. Also, yearly follow-up training “renews the partnering spirit among the attendees

and secondly, it brings new people that are not familiar with the process up to speed quickly.” (Survey) 1999. The 2.75” team utilized the same facilitators for the last three years and plans to utilize them again for the fourth year. It should be mentioned that training should be held at a neutral site so the team members are not easily called away by business.

### CELEBRATE SUCCESS

Leaders may overlook the importance of celebrating employee’s successes. I am referring to success as employees showing that they have demonstrated, simply by their actions, that they operate as true partners with their co-workers. General Dynamics initiated a delightful way of recognizing the partnering successes of employees. At each Program Management Review, “The ASWAD” award “is presented to the government or industry team member who best exemplifies the partnering spirit of breaking down barriers, thinking outside the box, and working together to achieve program success.” (Survey 1999) In fact, “The ASWAD” is actually a broken barrier from a subcontractor’s parking lot, which Jon Aswad, a GDOS employee, accidentally drove through in a late-night rush. Recipients highly value this serious, yet fun, recognition.

### CONCLUSION

I found a passage by 2LT Lawrence E. Collins Jr. in the book In Pursuit of Excellence that was so applicable to my subject I thought I should share it. This paragraph summarizes everything:

“Successful leadership has many faces to it. A leader must know the fundamentals of leadership, but must also be able to improvise. Answers to most leadership puzzles will never be found in a book because the people involved will change constantly, causing new puzzles. A successful leader must be able to understand people and human nature. Leaders need to know

the limits and capabilities of those they lead to maximize their potential. Being able to adapt to changing situations quickly and effectively has always been the hallmark of the more successful leaders.”

Changing the way we do business requires leaders to be motivators, innovators, trainers and mentors. By looking at the leaders who have successfully experienced the Partnering with Industry process, they can learn techniques that work and look for the inevitable pitfalls caused by changes.

Partnering with Industry is an acquisition reform that is beneficial to both government and industry. My survey results validate this. But the responses this survey also indicate that the role of leadership is critical to success. Communicating, training, orientating new employees and celebrating successes are all the keys that leaders must use to unlock the door to successful continuance of the partnering process.

“Partnering works if it is taken seriously. But will not be taken seriously if the commitment is not from the top down.” (Survey 1999)

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# **COMPETITIVE NEGOTIATION WLMP STYLE**

## **INTRODUCTION**

The primary objective of the Wholesale Logistics Modernization Program (WLMP) is to reengineer the Army's wholesale logistics business processes by adopting commercial business practices and the information technology supporting those commercial practices. It was clear from the inception of the WLMP in 1997 that, in order to take the right first step to accomplishing the intended revolution in military logistics, the acquisition and source selection had to be conducted in a manner that was revolutionary in its own right. After all, the uniqueness of the program and its critical importance to the readiness of the Army made finding the right industry partner and negotiating the best possible contract absolutely essential to the success of this program.

The basic regulations governing how the federal government conducts its acquisitions are set forth in the Federal Acquisition Regulation (FAR). FAR Part 15 is the section of the FAR that governs the conduct of competitive negotiations. Through a fortunate coincidence for the WLMP, 1997 was also the year that the FAR Part 15 underwent some reengineering of its own. In September of that year the long awaited FAR Part 15 Rewrite was published as a final rule and became effective for all solicitations to be issued after January 1, 1998. In publishing this final rule, the FAR Council described the Part 15 Rewrite as something that "reengineers the processes used to contract by negotiation." It was part of the FAR Council's "continuous improvement" efforts intended to make the competitive negotiation process easier to use and better designed to promote best value for the government. The expressed goal was "to infuse innovative techniques into the source selection process, simplify the process...and facilitate the acquisition of best value." The publication of this final rule was a greatly anticipated and vigorously debated step in the Acquisition Reform movement that has been sweeping through the Federal Government in recent years. The WLMP saw the Part 15 Rewrite as providing the program with a golden opportunity! A program looking for an innovative way to conduct a revolutionary acquisition was handed a "reengineered" process designed to "infuse innovative techniques". So lets look at what the WLMP did with this golden opportunity.

There is clearly a predominant theme running throughout the changes made by the Part 15 Rewrite - an attempt to foster and encourage open communication between industry and the Government during an acquisition and to expand the scope of the information exchanged during those communications. In fact, the following phrases are some of those used by the FAR Council itself to describe what the changes are intended to accomplish:

- “Supporting more open exchanges between the Government and industry, allowing industry to better understand the requirement and the Government to better understand industry proposals”,
- “Providing early feedback as to whether a proposal is truly competitive”,
- “Increasing the scope of discussions”, and
- “Enhancing the ability of the parties to communicate and document understandings reached during discussions.”

The term “exchange” is a good place to start in examining this predominant theme. In this regard, the new FAR Part 15 has two sections that warrant our attention, FAR 15.201 “Exchanges with industry before receipt of proposals” and FAR 15.306 “Exchanges with offerors after receipt of proposals”.

### **EXCHANGES WITH INDUSTRY BEFORE RECEIPT OF PROPOSALS**

FAR 15.201 states “Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, is encouraged.” It goes on to describe the purpose of these exchanges as improving the “understanding of Government requirements and industry capabilities”, “allowing potential offerors to judge whether or how they can satisfy the Government’s requirements”, and enabling all participants in the acquisition to “identify and resolve concerns regarding the acquisition strategy”. It also identifies a number of specific techniques to promote these exchanges, such as industry conferences, market research, one-on-one meetings with potential offerors, presolicitation notices, draft solicitations, requests for information, and site visits. Clearly this section is promoting a broad, open, and two-way exchange of information between industry and the Government throughout the early formative stages of an acquisition, to include development of the requirement, the acquisition strategy, the evaluation approach, and the solicitation itself. Notice that this open exchange of information is intended to continue right up to the receipt of proposals. It should not stop when the solicitation is issued.

The WLMP decided early on to embrace the guidance in FAR 15.201 to the fullest extent possible. Before developing an acquisition strategy or any requirements or solicitation documents, the program held a conference in October 1997 that was open to all of industry. The purpose was to explain what the Army wanted to accomplish with this acquisition and to solicit ideas from industry regarding the feasibility of the program, definition of requirements, and acquisition strategy. Extensive market research was conducted by the WLMP team regarding what industry had already accomplished in the field of logistics business process reengineering, what the Army’s logistics business process needs for the future are, and what the best strategy for change might be. This market research included one-on-one sessions with any industry member that was

interested in sharing its thoughts on the program. The one-on-one format was chosen in order to achieve an atmosphere conducive to the exchange of information and advice without the normal industry fear of compromising competitive sensitive information or giving away a possible competitive advantage in the open forum of a presolicitation conference.

In March 1998, as the market research drew to a close and the development of the solicitation and requirements documents commenced, the WLMP also made use of another new tool added to the acquisition toolbox by the Part 15 Rewrite – the advisory multi-step process. This process is described at FAR 15.202. It is nothing more than a presolicitation notice published to provide a general description of the scope or purpose of an upcoming acquisition and to ask potential offerors to submit a certain limited amount of information about their qualifications to participate in the acquisition. The Government then evaluates the information submitted and tells the company that submitted the information whether the Government considers that company to be a viable competitor. The notice must specifically identify the information to be submitted and the criteria that will be used in evaluating the information. The purpose of this tool is to provide constructive feedback to industry sufficient to assist them in making an informed judgment regarding whether to continue to pursue this business opportunity. The responses to the notice could also give the Government some indication of which industry members are seriously interested in the acquisition. Due to the enormous scope and breadth of the initial industry interest in the WLMP, it was determined that the additional effort involved in using the multi-step advisory process would produce a result that had value to the program. Namely, it would serve to narrow the potential field of offerors through feedback that would explain the scope and level of capabilities and resources that would be necessary in order to be a viable competitor. It should be recognized that this process is not a mandatory down-selection where offerors who are determined to not be viable are prohibited from participating further in the acquisition. It is merely advisory. For this reason, before making a decision to utilize this new tool, the potential value of using this process should always be carefully weighed against the additional effort that will be needed to implement this process. It is also important to recognize that the extent of value to be realized from the use of this process will be directly proportional to the program's ability to ask for the right information, effectively evaluate that information when it is received, and provide substantive feedback to all companies that submit information - those that are considered viable as well as those that are not. A letter stating that the company is, or is not, considered viable, with nothing more, should not be considered "substantive" feedback. The letter should explain the basis for the conclusion and where the information evaluated shows weakness or strength in terms of viability. The WLMP did provide this type of substantive feedback with some positive results. One company that submitted information and was told that it was not considered viable did not participate further in the acquisition. Several companies that were told they were considered viable but had some weaknesses in their evaluated information actually made changes to their teams of subcontractors to shore up these weaknesses.

Throughout this acquisition, beginning with the market research, the WLMP made maximum use of the Communications-Electronics Command's (CECOM's) Business Opportunities Page (BOP) World Wide Web site to disseminate and to gather information regarding the WLMP. The BOP, also implemented in 1997, uses interactive commercial technology that gives Government and industry personnel the ability to use the "point and click" technology of Internet browsers to view information about draft and final solicitation documents. This technology makes it easier than ever before to exchange information and proved to be an invaluable tool for the WLMP [In fact, implementation of the BOP at CECOM was so successful that it has been adopted for use by the entire Army Materiel Command, State Department and Department of Energy, and is now called the Interagency Interactive Business Opportunities Page (IBOP).]. The BOP was utilized to publish numerous draft solicitations and receive comments thereon between May 1998 and March 1999. Comments were received in a secure area of the BOP to protect any that were sensitive in nature. The BOP was also used to issue the final solicitation on 29 April 1999. In May 1998, a "Virtual Library" was created containing extensive information about every aspect of the WLMP. This Virtual Library was also accessible through the BOP. Additionally, a site was provided on the BOP for a continuously open question and answer dialogue between the WLMP team, industry and the general public on the subject of WLMP.

Another technique that the WLMP used to foster an open exchange of information was to conduct one-on-one face-to-face sessions with industry to discuss in detail their comments on the draft solicitations. These sessions were held in September and October 1998 with each company that was still seriously interested in potentially participating in the WLMP competition as a prime contractor. These were essentially the same companies that had submitted information for evaluation under the advisory multi-step process. In preparation for these sessions, WLMP team members were told that absolutely anything about the program or the draft solicitation was open for discussion. They were also schooled in the idea that these exchanges were not for the purpose of "defending" what was in the solicitation. The word "draft" was emphasized. Rather, the exchanges were to answer honestly and forthrightly any questions that industry may have about the draft solicitation and to listen openly to industry comments or suggestions about how to revise the solicitation. Although human nature made it difficult, this schooling helped the team successfully rid itself of this "defensive" mode during these sessions. Industry was also a little tentative when they arrived at these sessions, but the WLMP team's openness and honesty brought industry out of its shell within a few hours. Each session was scheduled for two full days and proved to be very constructive and informative for both Government and industry.

In fact, when the final solicitation release, originally scheduled for late fall 1998, was delayed until April 1999, the WLMP team used this same technique again. Shortly after the final solicitation was issued, one-on-one face-to-face sessions were held with

each of the companies that had participated in the fall 1998 sessions. The purpose of these sessions was to explain to industry the reasons for the delay, the status of any on-going issues with respect to the program, the changes made to the solicitation during the delay, and to answer any questions industry may have had at that time. Because the purpose was more limited than the original sessions, these sessions were much shorter – each was scheduled for four hours. Industry was very appreciative of this additional openness by the Government, especially in light of the lengthy delay and all the rumors that had surfaced about the program during the delay.

## **EXCHANGES WITH OFFERORS AFTER RECEIPT OF PROPOSALS**

FAR 15.306 implements some of the most significant and interesting changes to the competitive negotiation process that have come out of the Part 15 Rewrite. This section delineates three types of exchanges that it labels “clarifications”, “communications”, and “negotiations”. It is important to understand what each of these terms means within the context of the Part 15 Rewrite.

**CLARIFICATIONS:** Clarifications are a very limited type of exchange applicable only to acquisitions where award without discussions is contemplated. The Government can have exchanges with offerors for the limited purpose of resolving minor clerical errors or to clarify certain aspects of the proposal. This is a very limited opportunity for exchanges with the offerors. These exchanges must be for the sole purpose of “clarifying” minor informalities or clerical errors in order to not be considered to be a commencement of “discussions” and, therefore, to preserve the Government’s ability to award without discussions. However, even though clarifications are a type of exchange that is quite limited, there may even be a slight broadening of this concept by the Rewrite with the express inclusion in FAR 15.306(a) of certain aspects of past performance as examples of matters that could properly be addressed in an exchange prior to an award without discussions.

Since the WLMP never had any intention of awarding the contract without discussions, the WLMP team never considered utilization of clarifications.

**COMMUNICATIONS:** The second type of exchange discussed in FAR 15.306 is communications. Communications are described in FAR 15.306(b) as exchanges between the Government and the offerors occurring after receipt of the proposals but before the establishment of the competitive range. Thus, this type of exchange would be applicable where the Government does intend to establish a competitive range and conduct discussions. This type of exchange is certainly broader than clarifications, but still must satisfy certain criteria set forth in FAR 15.306(b). The exchanges may only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. The new FAR language gives a fairly broad sampling of the types of topics that can be covered during communications, including things of such significance as perceived deficiencies and weaknesses, and even states that these exchanges “...may be considered in rating proposals.” The language even requires that these exchanges address adverse past performance information that the offeror has not previously had an opportunity to comment on. The key limitation on this broad type of exchange is stated twice, probably for emphasis. FAR 15.306(b)(2) states that these communications “...shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal.” FAR 15.306(b)(3) again states that these communications “...shall not provide an opportunity for the offeror to revise its proposal...” The Rewrite has clearly and

significantly expanded the scope of the information that can be exchanged with the offerors prior to setting the competitive range. The only type of exchange allowed under the old version of FAR Part 15 prior to setting the competitive range was clarifications. Pursuant to the new FAR, communications, “(m)ay be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government’s evaluation process” and “Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. [Note the new standard set forth in FAR 15.306(c) for determining which proposals shall be included in the competitive range. It is no longer based on those proposals which have a “reasonable chance” to win. Instead, it is based on the “most highly rated” proposals and “efficient competition”.] It would appear that anything that is reasonably related to the Government’s understanding or evaluation of the proposal can properly be addressed during communications, as long as it does not involve allowing an offeror to revise its proposal in any way. It seems clear that this expanded type of exchange of information with the offerors prior to the establishment of the competitive range is for the express purpose of allowing the Government to make the most educated and effective competitive range determination possible. The bottom line here is that the Government has a much broader ability than ever before to exchange information with offerors about their proposals before establishing a competitive range.

The WLMP decided to take maximum advantage of this new broader ability in a number of ways. Again using the paperless technology referred to above, proposals were received electronically from the offerors through the BOP. These electronic proposals were then loaded into the Acquisition Source Selection Interactive Support Tool (ASSIST), a newly developed software tool enabling the entire proposal evaluation to be done electronically. To reiterate what was stated above, this new technology proved invaluable to the WLMP in implementing some of the innovative techniques that were used to exchange information with the offerors.

In conducting the initial proposal evaluation, the evaluators must identify the “strengths”, “weaknesses” and “deficiencies” that serve as the basis for their assessment of the merits of the proposal. But, as evaluators go through initial proposals, there are always many aspects of the proposals that are unclear, confusing, or that the evaluators just don’t understand. As a result, the evaluators aren’t sure whether there is a strength, weakness or deficiency. The WLMP evaluators were instructed to identify all these aspects of the proposals in a new category called “uncertainties”. The WLMP coined this term in its Source Selection Plan (SSP) to signify that category of information that would be addressed with the offerors prior to the establishment of the competitive range using communications. To assist and guide the members of the WLMP evaluation team to properly identify and manage all four of these categories of evaluation information, the SSP included the following definitions;

***Strength:*** Any aspect of a proposal which, when judged against a stated evaluation criterion, enhances the merit of the proposal or increases the probability of successful performance of the contract.

***Weakness:*** Any aspect of a proposal which, when judged against a stated evaluation criterion, reduces the merit of the proposal or decreases the probability of successful performance of the contract.

***Deficiency:*** Any aspect of a proposal that fails to meet a solicitation requirement.

***Uncertainty:*** Any aspect of a proposal for which the intent of the offer is unclear because there may be more than one way to interpret the offer or because inconsistencies in the offer indicate that there may be an error, omission or mistake.

Each offeror's uncertainties were released to that offeror as they were identified during the conduct of the initial evaluation. Before release, however, each of these uncertainties was carefully reviewed and approved by the Source Selection Evaluation Board (SSEB) Chairman, Deputy Chairman, Contracting Officer and Legal Advisor to ensure that it was consistent with the concept of what communications should properly address. Each offeror was allowed to respond to/comment on these uncertainties, but was not allowed to revise its proposal at that time. When all these responses/comments were received from all the offerors, the evaluators completed their assessment of the merits of the proposals and prepared the Initial Evaluation Report. This report included identification and explanation of strengths, weaknesses, and deficiencies, as well as a rating (supported by an appropriate narrative explanation) for each evaluation Factor and Subfactor set forth in the solicitation but did not include any uncertainties. If communications are used properly, there should never be any "uncertainties" in the Initial Evaluation Report [the evaluation report upon which the competitive range determination is based]. Remember that the primary purpose of this early type of exchange with the offerors about their proposals is to clear up vague or ambiguous aspects of the proposal or aspects of the proposal that are not clearly understood prior to making a determination of which proposals should be included in the competitive range. Note that, in being cleared up, or resolved, an uncertainty could simply go away or it could become a strength, weakness, or deficiency. Because these uncertainties will not show up in the Initial Evaluation Report, it is very important for the SSEB to maintain a trackable record of what uncertainties were identified and how they were resolved.

The WLMP's next exchange with the offerors was something quite unique. After the Initial Evaluation Report was completed, but before the establishment of the competitive range, each offeror was given a copy of the Initial Evaluation Report on its proposal. The purpose of this disclosure was to keep the offeror fully informed as to

how the Government currently viewed the merits of that offeror's proposal. The offeror was also given a limited opportunity (only a few days) to provide the Government with whatever comments on the Initial Evaluation Report. However, the offeror was not allowed to revise its proposal at that time. The WLMP's logic here was that the Part 15 Rewrite is encouraging a very robust exchange of information between the Government and the offerors throughout the source selection process. The WLMP felt this disclosure would serve several purposes. First, if the SSEB had missed something or got something wrong in its attempt to clear up these uncertainties or in evaluating the entire proposal, the offeror would have an opportunity to bring that error to the SSEB's attention before the competitive range was established. Such an error could have an impact on whether an offeror was included in the competitive range or not, especially under the new more stringent competitive range standard discussed above. Second, by allowing the offeror to see the Government's evaluation of the merits of the offeror's proposal in its entirety before entering into the full blown negotiations and bargaining contemplated by the Part 15 Rewrite [see below], the offeror would be better prepared for those negotiations. The offeror would have a clear understanding of what the Government did not like about the proposal and why, as well as what the Government did like about the proposal. The offeror would be able to make much better informed business judgments about how best to fix weaknesses and deficiencies and what trade-offs it should make in attempting to give the Government the best possible offer. Third, by seeing the Initial Evaluation Report, the offeror could know not only those aspects of the proposal that are considered weak or deficient, but also those aspects that are considered a strength. This should eliminate the possibility an offeror, while making revisions to fix some deficiency or weakness disclosed to it during negotiations, could inadvertently remove or change that aspect of its proposal considered a strength. Remember that, traditionally, strengths are not matters normally addressed during negotiations [although, with the emergence of bargaining, one could argue that will change (see below)]. Therefore, the offeror may unknowingly lose the strength and, with it, maybe an advantage the offeror enjoyed in comparison to the competing offerors and not find out about it until the offeror receives its unsuccessful offeror debriefing. Showing the offeror the Evaluation Report should avoid this problem.

It must be pointed out that disclosing Evaluation Reports to offerors cannot be done on a whim or without preparation. Obviously the Reports have to be well written, thorough, complete, and consistent with the SSP. Otherwise the intended benefits will not be achieved and the Government will be asking for trouble - maybe even "documenting a protest". Furthermore, Evaluation Reports are considered "source selection" information pursuant to Section 27 of the Office of Federal Procurement Policy Act and FAR 3.104, "Procurement Integrity". Pursuant to FAR 3.104-5, source selection information cannot be disclosed to anyone other than someone authorized by the agency head or designee. The Army FAR Supplement (AFARS) designates the Source Selection Authority (SSA) as the person who can authorize the release of source selection

information after the release of the solicitation but prior to award in a formal source selection, which is what the WLMP was. Therefore, the WLMP made sure to specifically inform the SSA of this proposed document release and include a description of what was going to be done in the SSP. When the SSA approved the SSP, he was also approving the release of the Evaluation Reports in accordance with the delegation of authority in the AFARS.

It must also be pointed out that the other document that must be disclosed to the offerors if you intend to disclose the Evaluation Reports is the SSP. This is because, in order for the offeror to understand the Evaluation Reports, the offeror must understand the rating methodology being used in the evaluation. For example, the WLMP used adjectival ratings [Outstanding, Good, Acceptable, Marginal, and Unacceptable] supported by narrative explanation. As discussed above, the Evaluation Reports also identified strengths, weaknesses, and deficiencies. To assure understanding and consistency of implementation by the evaluators, the rating methodology and terminology was all defined in the SSP. Therefore, when the WLMP obtained the SSA's approval to disclose the Evaluation Reports to the offerors, it also obtained the approval to disclose the content of the SSP (except for the names of the members of the SSEB, the Source Selection Advisory Council, and the SSA) to the offerors. In order for the offerors to understand the entire process that the WLMP intended to use for this acquisition, including the communications before the establishment of the competitive range, the use of "uncertainties", and the intent to disclose to them the Evaluation Reports, this disclosure had to be accomplished before the offerors submitted their proposals. The WLMP again used the BOP to publish this information in late May 1999, approximately one month before the proposal due date of June 28, 1999.

COMPETITIVE RANGE: After receipt and consideration of the offerors' comments on their Initial Evaluation Reports [the comments received were few in number and mostly complimentary of the quality of the Reports], the Contracting Officer made a determination, with approval by the SSA, of which offerors were to be included in the initial competitive range. Here again, the WLMP took advantage of one of the opportunities presented by the Part 15 Rewrite. As discussed above, the Rewrite set forth a new standard for determining which offers should be included in the competitive range – one based on the "most highly rated proposals" rather than the old "reasonable chance for award" standard. But the Rewrite also included language allowing the competitive range to be "further reduced for the purposes of efficiency." FAR 15.306(c)(2) states;

"After evaluating all proposals... the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency... the contracting officer may limit the

number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals...”

The proposal evaluation strategy developed for the WLMP encompassed a complex and resource consuming effort with respect to the offerors determined to be in the competitive range. This strategy included Government site visits to a prior customer of the offeror where similar work had already been accomplished, Government Process Risk Evaluation (PRE) site visits to the offeror’s facilities, offeror Due Diligence site visits/reviews of the Government activities to be outsourced by the program, offeror oral presentations of the sample task solution to the SSEB, and extensive face-to-face negotiations/bargaining on the terms and conditions of the contract. In light of all these planned activities, it was not considered feasible to efficiently conduct the portion of the WLMP acquisition following the establishment of the competitive range with more than three offerors. This determination and the supporting explanation were documented in the contract file during the development of the SSP and the solicitation included a notice of the Government’s intent to limit the initial competitive range to no more than three offerors for the purposes of efficiency. As it turned out, the WLMP only received two proposals in response to the solicitation and so did not have to avail itself of the ability to further reduce the competitive range for the purposes of efficiency. However, the acquisition planning recognized the potential need for this ability and the tools in the FAR were utilized to make that ability available if it were needed.

It must be recognized during acquisition planning that there is an irrefutable relationship between this new treatment of how the competitive range is established and the expanded scope of exchanges between the Government and the offerors that is allowed before establishment of the competitive range. The Part 15 Rewrite is certainly encouraging smaller more efficient competitive ranges, but not before the Government thoroughly examines, fully understands, and completely assesses the merits of all the initial proposals. Surely expanded communication with the offerors before establishing that smaller more efficient competitive range, and thereby eliminating some offers from any further consideration for award, is sound business practice for both the Government and the offerors. The Government is able to make a better informed determination of which initial proposals truly show enough merit to be worth carrying forward into the full-scale negotiations and bargaining. These negotiations can be very demanding on both the Government’s and the offeror’s resources. Also, offerors who are eliminated from the competitive range may be more likely to feel that they were given a fair opportunity to compete before being eliminated, which could lessen the chances for a protest. Finally, with respect to those offerors who do make it into the competitive range, both they and the Government should be much better prepared for negotiations and true bargaining because of a much better understanding of the other party’s position. Under the old rules of no communication before establishment of the competitive range, much time and effort

were often wasted during negotiations just trying to reach a level of full understanding of the other party's position.

**NEGOTIATIONS:** Having reached the establishment of the competitive range, this brings us to the third type of exchange discussed in FAR 15.306 - negotiations. Negotiations are described in FAR 15.306(d) as exchanges between the Government and the offerors occurring after the establishment of the competitive range. These are exchanges “that are undertaken with the intent of allowing the offeror to revise its proposal.” [Note that FAR 15.306(d) defines negotiations that are conducted in a competitive acquisition as “discussions”. Therefore, in a competitive acquisition, the terms negotiations and discussions mean the same thing.] The primary objective of negotiations is “to maximize the Government’s ability to obtain best value”. The scope and extent of the negotiations are “a matter of contracting officer judgment.” While the scope of the negotiations is left to the contracting officer’s discretion, the clear intent of the Rewrite is to broaden what has traditionally been the scope and focus of negotiations under the old FAR language – disclosing deficiencies and weaknesses and giving the offeror an opportunity to fix the problem. The new language requires that negotiations with an offeror cover “significant weaknesses, deficiencies, and other aspects of its proposal [such as cost, price, technical approach, past performance, and terms and conditions] that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award.” But the new language also says negotiations may include “bargaining”. “Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.” The FAR Council even included an example of the type of bargaining that would be permitted during negotiations at FAR 15.306(d)(3);

“In discussing other aspects of the proposal, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums, and the Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.”

Clearly, the FAR Rewrite contemplates negotiations that are very broad in scope, encompassing full-scale bargaining with the offeror until agreement is reached on the best deal obtainable from that offeror. This focus on negotiating to agreement and bargaining for the best deal with each offeror is substantially different from the traditional focus on giving each offeror notice and the opportunity to fix whatever is deficient or weak in its proposal. This shift of focus is apparently intended to liberate the Government evaluators and negotiators from concentrating only on the weaknesses and deficiencies. The weaknesses and deficiencies are the mandatory part of negotiations – they must be

covered during negotiations. But what about the discretionary part of the negotiations – the “other aspects” referred to in the language quoted above, the “bargaining” that may be included in the negotiations. This is where the new language is encouraging the Government to negotiate more like a commercial buyer – try to get the best deal you can possibly get for your agency. To emphasize this freedom, the Part 15 Rewrite even narrowed the limitations on the scope of exchanges, set forth at FAR 15.306(e). The traditional prohibitions on “technical leveling” and “auctioning” have been removed. The new language simply prohibits conduct which would favor one offeror over another, reveal an offeror’s technical solution or intellectual property to another offeror, reveal an offeror’s price without that offeror’s permission, reveal the names of people providing past performance information, or improperly disclose source selection information. This opening up of the potential scope of the negotiations could easily be perceived as the biggest change to come out of the Part 15 Rewrite.

With this new concept of negotiations in mind and after the competitive range was established, the WLMP team sent to each offeror remaining in the competitive range a package of information called Items for Negotiation (IFNs). These were questions addressing each of the deficiencies and weaknesses identified in the Initial Evaluation Reports regarding that offeror. This act was the beginning of the exchanges with the offerors after establishment of the competitive range, in other words, the beginning of negotiations. This is the phase of the acquisition where the offerors are given the opportunity to revise their proposals in order to cure deficiencies and improve or remove weaknesses. Offerors were given a specific period of time to respond to these IFNs. While the offerors were working on and submitting these responses, a number of other evaluation activities referred to above were conducted concurrently – such as the customer site visits, the PRE site visits, the Due Diligence site visits, and the oral sample task presentations. After all of these evaluation activities were completed and the IFN responses had been received and evaluated, the WLMP team was ready to enter into face-to-face negotiations with each of the remaining offerors.

The WLMP team developed an agenda for these face-to-face negotiations. First, they would go over all remaining weaknesses or deficiencies with the offeror to make sure the offeror understood the nature of the perceived problem and had one last opportunity to resolve it. Remember, weaknesses and deficiencies are the mandatory part of the negotiations. Therefore, the WLMP team wanted to make sure that these had been adequately covered with the offerors. Next on the agenda was to cover all those areas of the offeror’s proposal that were considered strengths by the evaluators. The object here was to make sure that all of these aspects or features are actually captured in the contract document and that the offeror is actually willing to be contractually bound to include these aspects or features in its performance [See the discussion of “model contract” below]. Then the agenda moved to those areas of the proposal where the Government wanted to bargain for a better deal than had been offered. This included areas such as attempting to persuade the offeror to increase levels of offered performance [even, in

some cases, where the performance offered already exceeded the minimum required level] where these increases were considered advantageous to the program; endeavoring to get a better “soft landing” package for the displaced Government employees who the offeror was required to give job offers to; and attempting to flesh out a more definitive and beneficial schedule for the logistics business process improvements. This bargaining even encompassed efforts to dissuade the offeror from including aspects in its proposed approach that the evaluators did not consider of value or benefit to the Government but which could add cost to the contractor’s performance.

As discussed above, the only limitation on this bargaining was to avoid five types of conduct –favoring one offeror over another, revealing an offeror’s technical solution or intellectual property to another offeror, revealing an offeror’s price without that offeror’s permission, revealing the names of people providing past performance information, and improperly disclosing source selection information. The last three types of conduct are quite clear and easy to understand. They are also relatively easy to manage and avoid. The first one, conduct that would favor one offeror over another, simply involves fair treatment of all offerors. The WLMP agenda [described above] applied in the same manner to each offeror accomplished fair treatment. The second one, conduct that would reveal an offeror’s technical solution or intellectual property to another offeror, is probably the one that worried the WLMP team the most. The team came up with a simple test to check themselves. Any aspect of an offeror’s proposal that involves that offeror’s methodology for achieving a particular result or output [as opposed to the result or output itself] is an aspect of the proposal that the team must not reveal to any other offeror in the course of this bargaining. In other words, to bargain for more result or output is not prohibited conduct. To bargain for one offeror to utilize the same methodology as the other offeror to achieve that result or output would be prohibited conduct.

The WLMP team concluded that the best way to “negotiate to agreement” is to write it down. Therefore, the team decided to utilize the face-to-face negotiations to draft a complete “model contract” for each offeror. This would be the actual contract document that would be signed by the contracting officer if that offeror were selected as the winner of the competition. By drafting the actual contract during negotiations, the parties are able to reach written agreement on the statement of work, the specification, the delivery schedule and terms, the acceptance criteria, the terms and conditions of the contract, and any special provisions, added features or higher levels of performance that have resulted from bargaining. Again, the paperless technology that the WLMP was utilizing to conduct this acquisition proved to be invaluable in executing this model contract strategy. At the face-to-face negotiations, a computer was hooked up to a projector and a screen was set up in the room. Since all the relevant documents - solicitation, proposals, statement of work, specification, and the model contracts themselves – were in electronic format, the WLMP team and the offeror were able to access and work on all the documents right there at the negotiation table simply by

projecting them up on the screen. When the negotiations were completed, all the documents were also essentially done.

For example, in the WLMP contract there is something called a Performance Bonus Plan. Under this Plan, significant portions of the contractor's potential payment under the contract are contingent upon the contractor exceeding minimum acceptable levels of performance against measurable logistics metrics. The solicitation allowed the offerors to propose what metrics they wanted to use, how much of their payment would be contingent upon this Plan, and how much of the money set aside in the Plan would be earned at each successive level of performance. At the face-to-face negotiations, the actual Plan document to be included in the contract was agreed to, including the specific metrics, the target levels of performance for earning the bonus money, and how much money would be earned by the contractor if it achieved that level of performance. Since the Plan is focused on exceeding minimum acceptable performance, it was also critical to agree at the face-to-face negotiations on the specific acceptance criteria included in the contract, both for the minimum levels of acceptable performance and for the "bonus" performance. At every opportunity, the WLMP bargained with the offerors for the best possible deal for the Government. For instance, higher target levels than were originally offered, specific metrics that were considered of more value to the Government than the ones originally offered, or even larger portions of the contractor's potential payment under the contract being made contingent upon achieving "bonus" levels of performance rather than just acceptable levels of performance. The agreements reached as a result of this bargaining were written right into the model contract at the negotiation table.

When the face-to-face negotiations were completed with all the offerors in the competitive range the SSEB prepared the Interim Evaluation Report which, just like the Initial Report, included identification and explanation of strengths, weaknesses, and deficiencies, as well as a rating (supported by an appropriate narrative explanation) for each evaluation Factor and Subfactor set forth in the solicitation. At this point in the process, each offeror was again provided a copy of the Interim Evaluation Report on its proposal. The purpose of this second disclosure of the Evaluation Report was to keep offerors fully informed as to how the Government viewed the merits of that offeror's proposal at this point in the acquisition. The offerors were again given a limited opportunity [a few days] to provide to the Government whatever comments on the Interim Evaluation Report they felt were appropriate. After receipt and consideration of any such comments, the Contracting Officer made a determination, with approval by the SSA, of which offerors should still be included in the competitive range and requested to submit final proposal revisions.

It is appropriate here to point out another advantage of the "model contract" approach. If executed smartly, it can reduce the time and effort needed to actually award the contract after the SSA's final source selection decision is made. The smart way to utilize the model contract in this fashion is to tell the offerors early and often that the

model contract agreed to during negotiations is the document that the Government intends to use for award. Tell them that, even though FAR 15.307(b) requires that each offeror be given the opportunity to submit a final proposal revision when the negotiation phase has been completed, the Government is definitely not expecting any changes to the model contract at that time. When final revisions are requested, the exchange of information is over. Negotiations have ended. If this final revision is something the Government doesn't understand or doesn't like, the offeror will have no further opportunity to explain it or to revise the proposal. Of course, any change made by the offeror at this point presents the risk that it could adversely affect the Government's evaluation of the proposal and, therefore, the offeror's standing in the competition. Make sure that the offerors understand that the burden of this risk lies solely with the offeror if it decides to make a change. It is probable that the combination of this risk and the broad scope of those "negotiations to agreement" that the model contract is a product that will discourage most offerors from making any changes at this point. When the request for final proposal revisions is actually issued, it should include a reminder that revisions are not actually expected or encouraged. The request should also instruct the offerors to respond to the request, whether they plan to make revisions or not, by submitting to the contracting officer a copy of the model contract signed by an individual with the authority to bind the offeror to the contract. The offerors should also be instructed that, if revisions are made, they must be included in the model contract and clearly highlighted. When these signed model contracts are submitted by the offerors, the Government has binding offers that require nothing more than a contracting officer's signature to make them binding contracts. All that is needed is money and an SSA decision regarding which offer represents the best value to the Government.

After final proposal revisions were received, the WLMP SSEB prepared the Final Evaluation Report. This report, just like the ones before it, included identification and explanation of strengths, weaknesses, and deficiencies, as well as a rating (supported by an appropriate narrative explanation) for each evaluation Factor and Subfactor set forth in the solicitation. At this point in the process, each offeror was again provided a copy of the Final Evaluation Report on its proposal. The purpose of this disclosure was once again to keep offerors fully informed as to how the Government viewed the merits of that offeror's proposal at this point in the acquisition. However, at this point, unlike the previous disclosures, since negotiations had been concluded, the offerors were not allowed to provide any comments on the Final Evaluation Report.

## CONCLUSION

The WLMP contract was awarded on December 29, 1999. The unsuccessful offeror was debriefed on January 6, 2000 and, although deeply disappointed at not winning, did not file a protest. Contract performance is currently well under way. The contract that was put in place and the working partnership that has developed between the Government and the contractor to date are unique in this writer's experience. I believe the success of the acquisition to date is a direct result of the WLMP team maximizing the opportunity handed to it by the FAR Part 15 Rewrite to be open and innovative in finding the right industry partner and negotiating the best possible contract. While not every specific aspect of the WLMP acquisition process will work for, or is appropriate for, every single acquisition, one aspect that will improve any acquisition is to open up the lines of communication between industry and the Government during an acquisition and to expand the scope of the information exchanged during those communications. The WLMP experience demonstrates that the opportunity for innovation is there. Seize it!

If you have any questions regarding this article, the point of contact is Thomas D. Carroll, (732) 532-9805.

# THE ANTIDEFICIENCY ACT

## Introduction

Its all about money – your tax dollars – the appropriation that authorizes the expenditures you make to accomplish your mission and what happens if you don't learn from history.

In this paper you will discover:

- Those valid contracts can create Antideficiency Act violations.
- That the word “voluntary” may not mean what you think it does.
- That the fiscal mistakes we make today could saddle future generations.
- And a lot more about the Antideficiency Act.

## Background

The US Constitution gives the Congress the power of the purse. Section 8, Article 1, grants Congress the power to “... lay and collect taxes, duties, imports, and excises, to pay the debts and provide the common defense and the general welfare of the United States....” Section 9 of the same article directs “... no money shall be drawn from the treasury but in consequence of an appropriation made by law.”

This constitutional order is clear. No one in Congress, the Executive Departments, or the Judiciary may obligate or expend public monies until Congress has exercised its Constitutional duty to appropriate funds.

This seems clear enough, but as early as 1819, Congressmen complained on the record about Executive Agencies disregarding the constitutional appropriation process. Funds were obligated without or in advance of appropriations. Funds were co-mingled and used for purposes other than those for which they were appropriated. The Executive Agencies would spend all their funds early in the year and then seek a deficiency appropriation to continue operations. These practices led directly to what we commonly refer to as the Antideficiency Act.

Some of these practices and others (such as obligating expired funds) still exist. Today they bring administrative sanctions. Knowing and willful violations bring criminal prosecutions. Anyone who manages public monies or solicits business for their programs must know and understand the Antideficiency Acts. These Acts operate in conjunction with other fiscal statutes, most notably, the agency appropriations and statutes in Title 31 of the US Code.

Anyone who has experience working on an Antideficiency Act violation will tell you that time spent understanding this law is time wisely spent. We have often heard that we have to act more like a business. This is one area where the law requires us to act like the Government.

### **What is the Antideficiency Act?**

It is not one, but three separate statutes that we will consider in this document.

The basic principle of the Acts is that we must pay as we go. Normally Governmental officials may not obligate, commit, or expend funds to make payments unless sufficient funds are available through the normal appropriation process to cover the cost.

### **The Acts prohibit:**

- a. Making or authorizing expenditure from, or creating, or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law.
- b. Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose unless law authorizes the contract or obligation.
- c. Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law except in cases of emergency involving the safety of human life or the protection of property; and
- d. Making obligations or expenditures in excess of an apportionment or reappropriation, or in excess of the amount permitted by agency regulations.

You will also learn that the law requires disciplinary and criminal sanctions for violating the Act.

**The key provision** of the Antideficiency Act is 31 USC 1341 (a)(1).

An officer or employee of the United States Government ...may not –

- a. Make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.
- b. Involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

These two prohibitions directly support the Constitutional provisions discussed in the background section. You must understand that a) you violate the law if there are insufficient funds in an account when payment becomes due, and b) the act of obligating the United States to

make a payment when the funds are not already in the account also violates 1341(a). You cannot make expenditures in excess of available appropriations. You cannot make expenditures in advance of appropriations.

## **Exhaustion**

Assessments of Antideficiency Act violations are not frozen at the point of obligation. Once an appropriation is exhausted, the account is obviously no longer available for obligation.

Why should we be concerned about that?

Any obligation made against an exhausted appropriation violates the Antideficiency Act. The Act is violated if

- insufficient funds remain to liquidate an otherwise valid obligation when actual payment is due;
- upward adjustments cause the obligation to exceed available funds.

Even if there are sufficient funds available when a particular contract is signed, if before payment is due, other obligations and payments to contractors exhaust the appropriation, the contract will violate the Antideficiency Act.

Each of us must live within our share of the apportionment or appropriation.

Both the Navy and the Army have experienced substantial exhaustion Antideficiency Act violations. 55 Comp Gen. 768 (1976) discusses the Army situation. It over obligated four procurement appropriations in the aggregate amount of more than 160 million dollars that caused it to halt payments to some 900 contractors. There were adequate funds when the contracts were awarded so the contractors had valid enforceable obligations. The Army recognized its duty to mitigate the Antideficiency Act violation. The GAO sanctioned an option to terminate some of the contracts for convenience even though the termination costs might have to come from a deficiency appropriation.

The Navy obligated and expended \$110 million more than it had in its Military Personnel, Navy appropriation. The GAO concluded while there may have been some concealment, the basic violation was not the result of some evil scheme. The violation was caused by the separation of the authority to create obligations from the responsibility to control them.

One theme that runs through the case law is that **agencies must do everything in their power to cure a potential violation**—stop work, terminate contracts, or freeze spending or programs. You must not allow a violation to exist. Agencies do not appreciate informing Congress and the President that an Antideficiency Act violation exists.

### **Obligations in excess of appropriation**

The United States Supreme Court has stated absent statutory authorization “it is clear that the head of the department cannot involve the government in an obligation to pay anything in excess of the appropriation. Bradley v. United States, 98 U.S. 104, 114 (1878)

Two basic cases represent the way these issues arise. First, when an agency accepted an offer to install automatic telephone equipment for \$40,000 when it had only \$20,000 in the relevant account, it violated the Antideficiency Act, 35 Comp. Gen. 356. In the second case, the Air Force wanted to buy some computer equipment, but did not have funds. Instead it made an initial down payment with the balance of the purchase price to be paid in installments over a period of years. The Comp Gen termed this a sale on credit and because the contract constituted a sale in excess of available funds, it violated the Antideficiency Act 48 Comp. Gen. 494 (1969).

### **The Purpose Statute**

The “Purpose Statute” 31 USC 1301 (a) prohibits the use of appropriations for purposes other than those for which they are appropriated. Making an obligation for a purpose beyond a specific appropriation may violate the Antideficiency Act if no other funds are available for that purpose to cover the obligation. The Comptroller General has explained the relationship between the Purpose Statute and the Antideficiency Act:

Not every violation of 31 USA 1301 (a) also constitutes a violation of the Antideficiency Act...Even though an expenditure may have been charged to an improper source, the Antideficiency Act’s prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where authorized, were already obligated) both 32 USC 1301 (a) and Section 1341 (a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated making readjustments of accounts impossible.

You may not spend any appropriated fund for a purpose other than the purpose for which it was appropriated.

An appropriation may have a ceiling for a particular element within the appropriation. Depending on how the words in the ceiling are drafted, you may violate the Antideficiency Act if you exceed the ceiling amount.

In ECBC we support a number of customers who send us their appropriated funds so that we can perform tasks for that customer. If we expend our funds for the purpose of their appropriation, or if we spend their funds for our purpose unrelated to any specific task we have from them, we violate the Purpose Statute and may violate the Antideficiency Act. In dealing with appropriated fund customers, it pays to follow the advice of Jerry McGuire – “Show me the money!” We may not obligate our funds for that customer’s purpose; we must receive funds from their appropriation.

### **Factors beyond an agency’s control**

The fact that an action beyond our control has caused a deficiency may or may not excuse it. Two cases demonstrate this point. Currency fluctuations have been held to trigger an Antideficiency Act violation. 58 Comp. Gen. 46 (1978), an over obligation resulting from Judicially awarded attorney fees for a case won under the Equal Access to Justice Act did not violate the Antideficiency Act. The distinction in this line of cases appears to be based on the extent to which the agency can act to avoid the over obligation even though it is imposed by some external force beyond its control. In the currency fluctuation case, the Comptroller General was persuaded that the contracting officer had options to avoid the over obligation, such as a Stop Work Order or a Termination for Convenience, 58 Comp. Gen. 46 (1978).

Always remember that the general constitutional and statutory scheme is that we pay as we go. To state the reverse, if we can’t pay, we don’t go. You should recognize that we are expected to take all possible steps to alleviate potential Antideficiency Act violations. Terminating contracts or stopping work can affect programs far beyond the offending contract or expenditure. Know what funds you have available. Live within that funding.

**... unless authorized by law**

You may remember this phrase from 31 USC 1341(a)(1)(B). It requires specific authority to incur an obligation in excess of or in advance of appropriations, not just authority to undertake an activity. For example, statutory authority to acquire land and pay for it from a specified fund is not an authorization by law to acquire land without an appropriation, nor was the authority to conduct hearings the authority to act without an appropriation. An example of an obligation authorized by law for Antideficiency Act purposes is Mandatory entitlement programs administered by the Department of Veterans Affairs.

### **The Second of the Antideficiency Acts is 31 USC 1342**

“An officer or employee of the United States government . . . may not accept voluntary services . . . or employ personnel services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . .”

Section 1342 is a logical extension of Section 1341. This language first appeared in a deficiency appropriation in 1884 and was codified in 1906. This rationale is that an agency must not do indirectly what it is not permitted to do directly. If an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly voluntary services and then presenting Congress with the bill, in the hope that Congress will recognize a moral obligation to pay for the benefits conferred. Congress has been very critical of what have been termed “coercive deficiencies” The prohibition on accepting voluntary services closes the door to one coercive deficiency possibility.

### **Personal Services**

Section 1342 contains a second closely related prohibition. It bans the employment of personal services exceeding that authorized by law. One of the practices this prohibition was designed to correct was a controversial practice in 1884 – lower graded government employees were being asked to volunteer their services of overtime periods in excess of the periods allowed by law which let the agency economize at the employees expense. The employees then filed claims for compensation for the hours they worked.. The law was designed to block this practice.

This prohibition against personal services has most frequently been addressed on issues of whether a government officer or employee, or an individual about to be appointed to a government position, could work voluntarily for nothing or a reduced salary. In 1931 the Attorney General decided that a retired Army officer could be employed as superintendent of an Indian school without additional compensation. In deciding this case, the Attorney General drew a distinction, which the GAO and Justice Department continue to follow – the distinction between “voluntary services” and “gratuitous services”. The key test is whether there is a fixed salary mandated for the position. If the law fixes compensation, an appointee may not agree to serve without compensation or to waive that compensation in whole or in part. If, however, the

salary is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial is permissible.

Operation of this rule served to preclude uncompensated service of student interns. This obstacle to employing student interns was overcome in 1978 with the enactment of 5 U.S.C. 3111. This statute permits agencies to accept the uncompensated services of high school and college students, “notwithstanding Section 1324 of Title 31”. This is the authority we use today for student interns.

There is a sort of reverse Report of Survey case on voluntary services. An Agriculture employee had an accident while driving a government-owned vehicle assigned to him for his work. A department official ordered the damaged vehicle towed to the employee’s driveway, to be held there until it could be sold. The GAO allowed the employee’s claim for reasonable storage charges on a *quantum meruit basis*. Agriculture argued it could not pay the claim because it stemmed from a voluntary service. Since the Government did have a role in the employee’s assumption of responsibility for the wreck, GAO found no violation of 31 USC 1342.

Section 1342 covers any type of voluntary service that could have the potential to create a legal or moral obligation to pay the person rendering the service.

### **Exceptions to the 1342 prohibition**

We have briefly examined two exceptions so far – where acceptance of services without compensation is expressly authorized by law and where the government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment.

The statute contains an express – “emergencies involving the safety of human life or the protection of property”. There must be a bonafide emergency not just an inconvenience. Two cases demonstrate the operation of this exception on the safety of human life.

- a. When a man saw a navy seaplane make a forced landing, the GAO denied his claim for towing the seaplane two miles to the nearest island. The aircraft had landed in tact and the pilot was in no immediate danger. Rendering service to overcome mere inconvenience or even a potential future emergency is not enough to overcome the statutory prohibition. 10 Comp. Gen. 248 (1930).
- b. The SS Rexmore, a British Vessel, deviated from its course to answer a distress call for help from an Army transport ship carrying over 1,000 troops. The ship had sprung a leak and appeared to be in danger of sinking. The Comptroller General allowed a claim for the vessels actual operating costs plus lost profits attributable to the services performed. The Rexmore had rendered tangible services in

an emergency to save the lives of the troops and to save the ship itself. 2 Comp. Gen. 799 (1933).

Two other cases demonstrate the operation of this exception for the protection of property. Property must be either government owned property or property for which the Government has some responsibility.

- a. An individual gathered up US Mail scattered in a train wreck and delivered it to a nearby town. The government did not own the mail, but it did have a responsibility to deliver it. The Comptroller of the Treasury determined these services came within the statutory exception and the individual could be paid for the value of his services, 9 Comp. Gen. 182 (1905).
- b. A municipality which had rendered fire fighting assistance to prevent the destruction of federal property where the federal property was not within the territory for which the municipality was responsible. The Comptroller General determined these services were within the exception. 3 Comp. Gen 979 (1924)

### **The third statute in the Antideficiency Act is 31 USC 1517**

This is sometimes called the apportionment statute because it states that you may not make or authorize an expenditure or obligation exceeding an apportionment or an administrative division of an apportionment. If you do, then 1517 requires the Secretary of the Army to “report immediately to the President and the Congress all relevant acts and a statement of actions taken.”

There are several points to understand here.

- We normally do not receive an appropriation in a lump sum. It is apportioned to us. An apportionment is a distribution by the Office of Management and Budget of amounts available in an appropriation into amounts available for specified time periods, activities, projects, objects or combinations thereof.
- The Secretary may establish further administrative controls on the money you receive and you are legally required to comply with any such administrative division.

No one wants to have to report a violation of the Act to the President and the Congress. We must pay as we go and take all possible steps to cure a violation.

### **Intent**

What if you have found a really good deal for the program? The fact that an officer or employee was ignorant of the fact, or was simply acting in good faith, or was trying hard to get the Government a good deal, is not relevant to a determination that a particular obligation or expenditure violates the Antideficiency Act. The Comptroller General has held that a violation speaks for itself. Intent may influence the applicable penalty, but it does not affect the basic determination that a violation has occurred.

### **Administrative and Criminal Penalties.**

Two statutes authorize adverse personnel actions for individuals who violate the Antideficiency Act. These statutes authorize penalties up to removal from Federal Service in appropriate cases.

I have seen the Army sanction Commanders and their subordinates for violations involving significant sums for construction and for small sums spent for mementos. In the past, the Army sought only the highest-ranking officer or employee with knowledge of a violation, but now administrative action can be taken against virtually anyone involved. Violations are so embarrassing to the command and damaging to individuals, that each of us must act as early as we can to head off a violation. We have had two recent violations within SBCCOM. Everyone involved will tell you that an ounce of prevention would have been far easier to take than the pound of cure that the investigation, reporting, and sanctions represent.

Violation of the Antideficiency Act may also be prosecuted as a **felony**. Two other statutes authorize Criminal penalties for knowing and willful violations of the Act – two years in jail and a \$5,000 fine. To date, I don't believe any Army Official has been criminally prosecuted, but no one should want to be the first. Those of you who remember the effect of the Criminal Prosecutions of the "Aberdeen Three" over the environmental violations at the Pilot Plant understand the substantial personal, financial, and professional toll a prosecution can take on an individual and the family.

### **Conclusion**

We may not expend funds in excess of an appropriation or in advance of one; we may not accept voluntary or personal services; and we may not violate an apportionment or an administrative division of funds.

We must take the taxpayers money seriously. Understanding the Antideficiency Act is an important step in understanding the appropriation philosophy of the government. We must pay as we go. While we know that budget deficits have occurred, we must recognize that the deficits resulted from the Appropriation process, not from Antideficiency Act violations.

Violations are an anathema. We must understand that AMC and DA expect us to avoid violations. If we discover a potential violation we must take every reasonable step we can to cure it.

## Voluntary Services

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Kathryn T. H. Szymanski  
Chief Counsel

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AMCCC-B-IP

POINT PAPER

27 June 2000

SUBJECT: New Accessibility Requirements for Information  
Technology Purchases

PURPOSE: To Update AMC Staff on New Accessibility Requirements  
for Information Technology Purchases

FACTS:

O THE LAW NOW REQUIRES COMPARABLE ACCESSIBILITY FOR ALL FEDERAL  
INFORMATION TECHNOLOGY.

O Congress recently amended section 508 of the Rehabilitation Act to "beef up" the extent to which federal electronic and information technology must be accessible to disabled employees and disabled members of the public.

O All federal electronic and information technology developed or procured after the law's effective date must be comparably accessible to disabled employees and disabled members of the public as to their able-bodied counterparts -- unless to do so would represent an "undue burden". (29 USC 794d)

oo The effective date is sixth months after final standards are published. So far, only the draft standards have been published.

O To the extent there is an "undue burden", the law requires that agencies provide disabled employees and disabled members of the public an alternative means of access to the data or information.

O THE LAW APPLIES TO ALL FEDERAL INFORMATION TECHNOLOGY, INCLUDING  
WEB SITES; HOWEVER IT DOES NOT APPLY TO NATIONAL SECURITY SYSTEMS.

O "Federal electronic and information technology" includes federal hardware, software, printers, fax machines, copy machines, telecommunications, web sites, and information kiosks.

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- oo It does not include national security systems or technology or systems that are an integral part of a weapons system.

- oo In addition, it does not include contractor-purchased information technology that is incidental to the performance of a Government contract, although it does include contract deliverables.

O AFTER THE STANDARDS GO INTO EFFECT, DISABLED EMPLOYEES AND DISABLED MEMBERS OF THE PUBLIC WILL BE ABLE TO SUE AGENCIES FOR NON-COMPLIANCE.

O Disabled employees and disabled members of the public will be able bring suit against an agency for failure to make information technology comparably accessible. They may do this in one of two ways:

- oo Through an administrative complaint with the agency;  
or

- oo Through a private lawsuit in Federal District Court.

O AN "ACCESS BOARD" WILL ISSUE FINAL STANDARDS - WHICH WILL BE INCORPORATED INTO THE FEDERAL ACQUISITION REGULATION.

O On 31 March 2000, a specially-established "Access Board" issued proposed standards for all federal electronic and information technology. (65 Fed. Reg. 17,346 (2000)(to be codified at 36 C.F.R. Part 1194))

O The standards are extremely detailed. Some general highlights include:

- oo A requirement that all computer work stations be at least compatible with "assistive devices" such as screen readers or refreshable Braille displays;

- oo A requirement that all web pages be capable of being read by assistive devices through text equivalents of

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any images, color-prompts, or image-based documents such as PDF files; and

oo A requirement that all software be capable of being used through keystroke or voice-recognition commands, instead of mouse-only direction.

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O The "Access Board" is currently considering comments from agencies and members of the public. Six months after the Board publishes the final standards, they will be incorporated into the Federal Acquisition Regulation.

ACTION OFFICER:  
LISA SIMON  
ASSOCIATE COUNSEL  
AMCCC-B-IP  
DSN 767-2552

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# The FLRA's Collaboration and Alternative Dispute Resolution Program

Federal sector labor-management relations has changed significantly in recent years. Greater emphasis is now placed on the use of alternative dispute resolution (ADR) and consensus decision-making in resolving workplace disputes and in improving labor-management relationships in the Federal sector. The FLRA's Collaboration and Alternative Dispute Resolution (CADR) program enhances these efforts by integrating ADR into all of the case processes used by the various FLRA components. The CADR Office (CADRO) provides overall coordination and support to the FLRA components in implementing the CADR program.

## Frequently Asked Questions

### *What is Alternative Dispute Resolution (ADR)?*

ADR is an informal process that allows parties to discuss and develop their interests in order to resolve the underlying issues and problems in their relationship. The discussion is facilitated by a third party neutral who is there to ensure a productive dialogue.

### *What are the benefits of using ADR in Labor-Management Relationships?*

ADR allows everyone to have an active part in the decision-making process. Solutions are adopted by consensus, and reflect an understanding of the interests of all parties. As a result, the solutions are tailored to the needs of the participants.

ADR encourages creative, innovative solutions, moving away from the traditional win/lose results of adversarial proceedings.

ADR resolves disputes while preserving relationships, and thereby helps create a productive working environment.

### *What types of services does the CADR program provide?*

The services focus on alternatives to traditional case processing and formal dispute resolution. The CADR program assists the parties both in preventing disputes before they become cases and in coming up with ways to informally resolve disputes in pending cases. This includes interest-based conflict resolution and intervention services in pending [unfair labor practice cases](#), [representation cases](#), [negotiability appeals](#), and [impasse bargaining disputes](#).

The CADR program also provides facilitation, training and education to help labor and management develop collaborative relationships.

The ultimate goal is to provide parties with the skills they need to do ADR on their own.

### *Is the CADR program voluntary?*

Yes.

### *Where does the CADR program fit in the normal case processing?*

The [FLRA's Regulations](#) for negotiability, unfair labor practice, and representation cases ensure that parties have the opportunity to use ADR to resolve their cases. For example, in [negotiability](#) cases, during the post-petition conference, if the parties express interest in using ADR services, the case will be put on hold to give the parties time to get help from the CADR Office. In [unfair labor practice cases](#), an ADR process is available that allows the parties to

resolve the underlying dispute by facilitating a problem-solving approach, rather than having the Regional Office investigate the facts and determine the merits of the charge. For cases on their way to hearing, the [Administrative Law Judge \(ALJ\) settlement program](#) is available for one more attempt at informal resolution.

ADR services are also available in some circumstances for parties who do not have a case filed, but would like assistance with disputes or relationship issues.

### ***Who provides CADR program services?***

All of the FLRA components provide CADR program services.

The Office of the General Counsel (OGC) offers [ADR services](#) in unfair labor practice and representation cases, both before cases are filed and while they are pending. Through its [Regional Offices](#) and the [National Office](#), the OGC provides [facilitation, intervention, training and education services](#) to agencies and unions. Each Regional Office has a [Regional Dispute Resolution Specialist](#) who coordinates ADR services within the Region.

The [ALJ's office](#) has a settlement program for parties who have hearings pending before an ALJ. The [Federal Service Impasses Panel](#) uses ADR techniques in resolving bargaining impasses. Staff from the Authority Members' offices participate in interventions in negotiability and other cases, offering facilitation to help the parties resolve their differences before the case is ruled on by the Authority.

The CADR Office assists all FLRA components in the delivery of ADR services in cases and training sessions.

## **Examples of CADR Activity**

Specific examples of recent CADR activity are contained in the [FLRA Bulletin](#), which is issued every four months.

## **How to Get More Information or Ask for Assistance or Training**

For more information about the CADR program or for assistance or training requests, contact the CADR Office at [CADRO@flra.gov](mailto:CADRO@flra.gov) or 202-482-6503 (phone) or 202-482-6574 (fax). The mailing address for the CADR Office is:

Federal Labor Relations Authority  
Collaboration and Alternative Dispute Resolution Office  
607 14<sup>th</sup> Street, NW  
Washington, D.C. 20424

You may also contact any of the [Regional Dispute Resolution Specialists in the Regional Offices](#), the [Office of General Counsel's National Office](#), the [Office of Administrative Law Judges](#), or the [Federal Service Impasses Panel](#).

## **CADR Office Staff**

Steve Svartz, Acting Director  
Sarah Rudgers, Senior Attorney  
Leslie Barnett, Legal Technician

[ssvartz@flra.gov](mailto:ssvartz@flra.gov)  
[srudgers@flra.gov](mailto:srudgers@flra.gov)  
[lbarnett@flra.gov](mailto:lbarnett@flra.gov)

**House and Senate lawmakers have approved legislation authorizing the Defense Department to waive Equal Opportunity Employment Commission regulations in order to test the use of alternative dispute resolution mechanisms to expedite settlement of job complaints.**

The legislation authorizing the ADR pilot project, a massive defense and energy spending bill for fiscal year 2001, now awaits President Clinton's signature. Under the bill, the Defense Department is required to test the use of ADR mechanisms to resolve employment disputes on a pilot basis for three years at one military department and two defense agencies, and the project would not be subject to federal EEO regulations.

The pilot project has drawn criticism from the White House since its introduction because of the EEO waiver, and federal officials say the administration remains concerned about the potential impact of the legislative provision. According to Peter Steenland, senior counsel in the Justice Department's Office of Dispute Resolution, the administration's position "remains consistent" that the pilot project is "ill-advised and unnecessary." Steenland said the administration "believes there are a host of highly effective internal workplace dispute resolution programs that can operate without the waiver."

In a statement of administration policy issued this summer, the White House warned that it opposed the proposed project because it would prevent the EEOC from addressing any concerns raised by complainants, and the ground rules of the project would vary significantly from principles outlined by the Federal ADR Council in its guidance to federal agencies on the design and operation of Federal ADR programs.

Federal officials would not speculate on the potential for the administration to place limits on the pilot project when it is implemented.

#### Three-Year Program

The bill provides for the pilot project to commence on Jan. 1, 2001, and says the Defense Department should establish procedures "to reduce processing time and eliminate redundancy with respect to processes for the resolution of equal employment opportunity complaints, reinforce local management and chain-of-command accountability, and provide the parties involved with early opportunity for resolution."

Participation in the pilot program would be voluntary on the part of the complainant, and complainants who participate in the pilot program shall

retain the right to appeal a final agency decision to the EEOC to file suit in district court. However, the "Equal Employment Opportunity Commission shall not reverse a final agency decision on the grounds that the agency did not comply with the regulatory requirements promulgated by the Commission," the conference report says.

The bill also provides that the program may be run outside of EEOC requirements and regulations. According to the conference report, "Complaints processed under the pilot program shall be subject to the procedural requirements established for the pilot program and shall not be subject to the procedural requirements of part 1614 of title 29 of the Code of Federal Regulations or other regulations, directives, or regulatory restrictions prescribed by the Equal Employment Opportunity Commission."

The legislation also would require the department's comptroller general to report to Congress on the implementation of the pilot program, detailing the processes tested under the project, the results of the processes, a comparison of the results to traditional and alternative dispute resolution processes used in government and the private sector, and finally, recommendations for changes to the processes used to resolve equal opportunity employment complaints based on the results of the pilot program.

#### Text of Defense Funding Bill EEO Pilot Program Provisions

### SEC. 1111. PILOT PROGRAM FOR REENGINEERING THE EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT PROCESS.

#### (a) Pilot Program:

(1) The Secretary of Defense shall carry out a pilot program to improve processes for the resolution of equal employment opportunity complaints by civilian employees of the Department of Defense. Complaints processed under the pilot program shall be subject to the procedural requirements established for the pilot program and shall not be subject to the procedural requirements of part 1614 of title 29 of the Code of Federal Regulations or other regulations, directives, or regulatory restrictions prescribed by the Equal Employment Opportunity Commission.

(2) The pilot program shall include procedures to reduce processing time and eliminate redundancy with respect to processes for the resolution of equal employment opportunity complaints, reinforce local management and chain-of-command accountability, and provide the parties involved with early opportunity for resolution.

(3) The Secretary may carry out the pilot program for a period of three years, beginning on January 1, 2001.

(4)(A) Participation in the pilot program shall be voluntary on the part of the complainant. Complainants who participate in the pilot program shall retain the right to appeal a final agency decision to the Equal Employment Opportunity Commission and to file suit in district court. The Equal Employment Opportunity Commission shall not reverse a final agency decision on the grounds that the agency did not comply with the regulatory requirements promulgated by the Commission.

(B) Subparagraph (A) shall apply to all cases--

(i) pending as of January 1, 2001, before the Equal Employment Opportunity Commission involving a civilian employee who filed a complaint under the pilot program of the Department of the Navy to improve processes for the resolution of equal employment opportunity complaints; and

(ii) hereinafter filed with the Commission under the pilot program established by this section.

(5) The pilot program shall be carried out in at least one military department and two Defense Agencies.

(b) Report: Not later than 90 days following the end of the first and last full or partial fiscal years during which the pilot program is implemented, the Comptroller General shall submit to Congress a report on the pilot program. Such report shall contain the following:

(1) A description of the processes tested by the pilot program.

(2) The results of such testing.

(3) Recommendations for changes to the processes for the resolution of equal employment opportunity complaints as a result of such pilot program.

(4) A comparison of the processes used, and results obtained, under the pilot program to traditional and alternative dispute resolution processes used in the government or private industry.

# **Policy Guidance On Executive Order 13164: Establishing Procedures To Facilitate The Provision Of Reasonable Accommodation**

## **Introduction**

On July 26, 2000, President Clinton signed [Executive Order 13164](#) (Order),<sup>(1)</sup> which requires each federal agency to establish effective written procedures for processing requests for reasonable accommodation. The Order helps to implement the requirement of the Rehabilitation Act of 1973<sup>(2)</sup> that agencies provide reasonable accommodation to qualified employees and applicants with disabilities. It is an important part of the government's national policy to create additional employment opportunities for people with disabilities.

An accommodation is a change involving the workplace that enables a person with a disability to enjoy equal employment opportunities. Many individuals with disabilities can apply for and perform jobs without the need for an accommodation. However, where workplace barriers exist, such as physical obstacles or rules about how a job is to be performed, reasonable accommodation serves two fundamental purposes. First, reasonable accommodations remove barriers that prevent people with disabilities from applying for, or performing, jobs for which they are qualified. Second, reasonable accommodations enable agencies to expand the pool of qualified workers, thus allowing the agencies to benefit from the talents of people who might otherwise be arbitrarily barred from employment.

Effective procedures for processing reasonable accommodation requests will advance both these goals. They will enable agencies to handle requests in a prompt, fair, and efficient manner; they will assure that individuals with disabilities understand how to approach the system and know what to expect; and they will be a resource both for individuals with disabilities and for agency employees, so that all parties can understand the legal requirements of the Rehabilitation Act. The U.S. Equal Employment Opportunity Commission (EEOC or Commission) is responsible for issuing guidance to implement the Order. This Guidance first sets forth some background information on the obligation to provide reasonable accommodation and the standards of the Rehabilitation Act. It then addresses each of the requirements of the Order. This Guidance is to be read in conjunction with relevant EEOC regulations, *see* 29 C.F.R. part 1630, and the EEOC's "[Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](#)," available on the web at [www.eeoc.gov](http://www.eeoc.gov).

# Being Sued

It's not unusual to be sued. Thousands of people in the United States are named in lawsuits every day. The suits may result from a slip and fall on your sidewalk, a fender-bender car accident or just a misunderstanding about the payment of a debt. If you are sued, it's important to know what's involved and to understand your options.

## How a Lawsuit Begins

When someone files a lawsuit, they must formally notify everyone being sued. This is usually done by delivering a document known as a summons. The lawsuit, or complaint, is generally included with the summons. In most jurisdictions a summons is served or delivered in person to the individual being sued, or to someone in the household, by a sheriff or a process server. Sometimes, especially in lawsuits involving smaller matters, a summons may be served through the mail, usually via registered or certified mail that requires a signed receipt indicating it was delivered. The summons tells the person being sued what they must do to protect their rights to defend the suit. It usually includes the deadline for filing an answer to the complaint. The complaint tells the person being sued why the action was brought against him or her and what the demands are.

## Deciding Whether to Hire a Lawyer and How Lawyers Charge

If a lawyer is not otherwise provided for you and alternative dispute resolution (such as arbitration or mediation) is not an option, you must decide whether to hire a lawyer or to represent yourself. When deciding whether to hire a lawyer, it is generally best to look at the economics of the situation. How much are you being sued for, what is the likelihood you will win or lose in court, and how much will the lawyer cost? Many lawyers do not charge for an initial consultation, which may be a helpful opportunity to decide whether you need counsel or not.

Lawyers charge clients in various ways. Most attorneys charge on an hourly basis. Others charge a flat fee, although this is generally done only for the most routine cases. In either instance, most lawyers will ask for a retainer. A retainer is the amount you pay a lawyer to begin work on your case. In some cases a lawyer will proceed on a contingency fee, meaning the lawyer will receive a percentage of the award or settlement obtained on your behalf. This is rare when representing someone being sued, but could be used if you have a counterclaim, or lawsuit, against the person suing you. Regardless of the method of payment, you should always have a written fee agreement with a lawyer. When you try to decide about hiring a lawyer, keep in mind that fees vary from one lawyer to another, as does the quality of the services provided. You may want to speak to several lawyers before retaining one to represent you.

You also **will** have to pay a filing fee, which is the court's cost for you to file your response to the lawsuit, and there may be other costs in addition to your lawyer's fees.

You may decide to defend yourself in a lawsuit instead of retaining a lawyer, especially if it is a matter for small claims court. The small claims division of the Monmouth County Court hears only those cases where the money claimed is below \$2,000.00. In small claims court, procedures are generally less formal and the judge sometimes helps the parties resolve the matter. However, in some small claims courts, parties may have a lawyer and demand a formal trial.

## The Stages of a Lawsuit

The steps involved in a lawsuit are different from one court system to another. Therefore, when you receive a summons and complaint, it is important to read them carefully. Usually, when a case is filed and you are served with a summons, a clock starts running. You have a limited time to respond to the lawsuit by filing a document known as an appearance and, in most cases, filing an answer to the complaint. If you fail to take these steps, you may lose your right to dispute the lawsuit and defend yourself.

After you have filed your appearance and answer, a date may be set for either a trial or a report to the court on the status of the case. In the meantime, the parties have the right to conduct discovery. Discovery is a process for each side to find out more about the issues in dispute. It may require people to answer questions under oath in a deposition or through interrogatories. A deposition is an oral examination, while interrogatories are written answers to questions.

In most courts, the judge **will** try to settle the case after discovery is completed and before the trial. The great majority of cases do settle without going to trial. When a civil case goes to trial, it may be heard and decided by a judge or a jury. A jury **will** decide the case if any of the parties asks for one. Usually there is an additional filing fee to demand a jury. If the case is decided against the person being sued, the judge or jury **will** also decide how much the damages are.

After a settlement or trial, a court order is written and signed by the judge. The order sets out the obligations resulting from the lawsuit. If there is an order for damages and money is owed, the order can be enforced by various collection methods such as wage assignment, where money is taken out of a paycheck, or the sale of assets such as a car or house.

If you lose a lawsuit, you might be able to bring an appeal to a higher court. However, appeals can be brought for only a limited number of reasons and are costly and time consuming.

The opinions expressed herein should not be construed as representing the policy or position of the New Jersey Legal Services Corporation, the American Bar Association, the Fort Monmouth Staff Judge Advocate or the Joint Service Pentagon Legal Assistance Office. This

article is published for general informational purposes only. It is issued as a public service and is not a substitute for obtaining professional advice from a Legal Assistance Attorney, other qualified person, attorney, legal firm or corporation.

## Holidays

We are approaching that time of the year when HQAMC employees plan and prepare their office celebrations during the holiday season. It's a time when groups of employees get together in some way to enjoy each other's camaraderie and teamwork, which might involve songs, games, sharing a meal, pictures, and a good time. Such celebrations raise ethics and related type of issues -- there are some absolute rules... but, in many cases, the issues involve the application of "**Judgment!**"

Before we actually get to the issues, I must point out the need for each of us to be sensitive to the fact that not all of us celebrate the same holidays. What we call the celebration, how we refer to the season, and our greetings to one another should take this fact into account. Unless we know for sure whether and what holidays our colleagues celebrate, we should consider being more generic in our references.

The first, and perhaps most obvious issue, is whether we can partake in this employee celebration on Government time. Yes, but only up to a point. The issues usually don't arise with the time taken for the actual event -- perhaps a "pot luck" in the office, or a more formal luncheon event at a restaurant. The issue usually comes about with the preparations. The key to resolving these issues is "**Judgment!**" Certainly, our supervisors, directors and commanders can permit us to use some duty time for the preparations... some things must of necessity be done during the duty day. However, preparing the holiday celebration should not become a significant part of any employee's duties. Examples:

- It would be wrong to have a committee of five employees spend two duty days visiting potential restaurants to explore facilities and menus, followed by another two days worth of time to inform the group, obtain votes, and develop consensus, followed by another trip to make final arrangements. On the other hand a few short telephone calls during the day requesting fax'es from some restaurants, a couple of short planning discussions in the office, and visiting one or two during lunch, maybe even a "long" lunch with supervisory approval, would be permissible. **Judgment!**
- It would be wrong for the decorations and games committee to spend a duty day visiting party shops to get ideas, followed by another work day of organizing the games and making the decorations. However, a brief planning session on Government time, followed by a few short telephone calls to party shops, with visits and purchases made after duty hours, assignment of responsibilities and delivery of purchased items to volunteers during the duty day, with the decorations made during lunch periods or after the duty day, would be permissible. **Judgment!**

Another issue is fundraising. Let's look at a fictional organization called the Technical Directorate (TD). The TD employees want to have this wonderful celebration of their working relationship and teamwork during this holiday season at an upscale restaurant. The cost will be \$50 a piece! A lot of money, but the employees decide that they will try to raise money to pare down the cost. Can they?

The general rule is no fundraising. But, there are exceptions and, in this type of situation, the TD employees may do so. But, there are limits. A couple of common mistakes are as follows:

- It is wrong to solicit outside sources (local restaurants, car dealerships, department stores, professional associations, contractors, and other businesses) for donations, to include door prizes, for the function. Even in a situation where the "gift" might fit one of the gift exceptions, that exception cannot be used if the gift was solicited in the first place.
- It is wrong to raise money by running a raffle.

The DoD Joint Ethics Regulation permits an organization of employees to raise money among their own members for benefit of their own members when approved by the head of that organization after consultation with the Ethics Counselor. Therefore, the TD employees could run a bakesale (or some other event like a silent auction) in the AMC HQ building to raise money to reduce the cost of tickets for the employee celebration. They can even solicit from other employees in the AMC family in the HQ building. However, the Director needs to approve the plan after consultation with the Ethics Counselor. Here is what the EC will advise:

- Keep it low key. This fund-raiser should not begin to look like the sole occupation of the TD employees in the week leading up to the event, and the day of the sale. Do not use official Government e-mail to announce the bakesale (i.e., do not send an e-mail to HQAMC-All-Personnel, which is addressed to 1,400 people here, the Pentagon, and elsewhere).
- Use minimal Government time. No duty time should be used to bake or purchase cakes, cookies, etc. However, some minimal time during the day could be used to plan and decide who would bring what. The employees actually conducting the sale should do so primarily on their personal time, although the Director might also permit the use of a minimal amount of duty time. This effort should not become a significant part of anyone's duties. **Judgment!**

- It would be permissible for an employee to use the Government computer and printer to print a few flyers to post on the elevator hall bulletin boards, or to use office "butcher paper" to announce the sale, and borrow the office easel to post the "butcher paper" announcement at the entrance to the building. (However, this should be first coordinated with the building management). It would not be permissible to order placards and other announcements of the event from the audio-visual office. Use of Government resources requires **Judgment!**
- Do not solicit outside sources (such as employees of support contractors) to contribute baked goods.
- Contractor employees, cafeteria workers and other visitors to the building who become aware of the bake sale may purchase items. The important thing is that we do not personally solicit them, or engage in other solicitation that targets them.

A common question is whether the employees of the contractors that support our DCSs may attend our celebratory gathering. Of course they can. However:

- There should be no official encouragement of someone else's employees to leave their workplace. However, we can let it be known that they may attend and will be a welcome part of the event.
- Whether the contractors' employees can take the time off to attend, and the nature of the time off (e.g., leave, personal day, administrative absence) are between the contractor and its employees. When a contractor's employee is absent, the contractor cannot bill for services not delivered, and may have concerns about such issues as contract schedules, delivery dates, and other matters. Accordingly, it is the contractor that must decide if and under what conditions one or more of its employees may be absent.
- Contractor employees should not be tasked or asked to volunteer to organize the event.

A final common issue has to do with gifts. May we exchange gifts among ourselves during the holiday season? Yes! But again, there are limits.

- The highest value of any gift that we can give to a superior in this type of situation is \$10. And, we may not solicit contributions from other employees.

- We may not accept a gift from anyone who makes less money than we do as a Federal employee, unless there is no superior-subordinate relationship, and there is a personal relationship that would justify the gift. Again, the exception would be for a gift where the value does not exceed \$10, with no soliciting of contributions from other employees.
- We may have a gift exchange among employees. If it is an anonymous-type exchange, a reasonable value should be established for the individual gifts. If it is not anonymous, i.e., each employee knows for whom they are buying a gift, a value of not to exceed \$10 is the limit.

In summary, it is permissible for us, as employees, to plan and participate in an event during the holiday season. However, be careful of the pitfalls, some of which are set out above. And, while some limited use of Government resources and time is permissible, we must be careful and apply reason, common sense and **Judgment!** Finally, remember that Government funds may not be used for decorations, greeting cards, and other elements of our holiday festivities.

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

Mike Wentink, 617-8003, Room 7E18  
Ethics Counselor

Stan Citron, 617-8043, Room 7E18  
Ethics Counselor

LTC Mike Walters, 617-8081, Room 7E18  
Ethics Counselor

Picture a Government Attorney sitting at her desk, surfing eBay.com during work hours and later describing the great bargain she found there to her Supervisor! My Supervisor demanded that I attend ethics training immediately before I interjected to explain the situation. A few weeks ago, I surfed the web regularly because an anonymous seller was auctioning a military item, the Interceptor Body Armor (IBA), to the highest bidder on eBay, an online auction operator. The manufacturer of the item informed this office about the auction in progress which continued for another few days. Time was of the essence. E-mails deluged the Legal Office's computer systems, including one from our Commanding General, inquiring about what actions this Office would employ to rectify this situation. My gut reaction prompted ruminations on whether the situation was the pinnacle of commercialization. Is this merely a harbinger of the future for Government procurement? Should we venture out to the auction block and hope to offer the highest bid? After revisiting the numerous e-mails, I got down to business.

SBCCOM, Natick awarded the contract for IBA to introduce a lighter, bulletproof jacket for front line troops. The armor consists of a tactical vest and small arms protective inserts. Only the vest portion was available on eBay. The manufacturer sells IBA exclusively to the U.S. Army and the U.S. Marines Corps.

I contacted eBay's General Counsel to inquire about the auction and the seller's description, which came directly from official Government publications. The seller copied and pasted the description from the Warrior, a Natick Publication. See <http://www.natick.army.mil:80/warrior/99/septoct/bitingthebullet.htm>. eBay's Counsel directed me to their safeharbor guidelines a few mouse clicks away and described their policy for withdrawal of an item during an auction. The safeharbor guidelines describe prohibited, questionable and potentially infringing items. The recent story involving the auction of a kidney highlights their guidelines. eBay abruptly halted the kidney auction since human parts and remains are on their prohibited list. Additionally, eBay will purge an item if the requester can articulate a legal basis for removal. If the legal basis is sound, eBay will not alter the content but remove both the description and the item from sale. For example, eBay would remove an item from its webpage if it violated copyright laws. In this case, the Government cannot claim copyright violation since Government publications fall into the public domain. Furthermore, there was no proof to allege the seller had stolen the item or possessed stolen merchandise since any manufacturer could have obtained the performance specification. I reluctantly acknowledged that any manufacturer could have produced its version of the item. There was no sound basis to officially request removal by eBay so I proceeded to the next alternative, the source of the sale.

I contacted the mysterious seller, known to me only as "taurus954", via e-mail and expressed a strong objection to the posting of the "Interceptor Body Armor System" on the eBay website. I requested the seller inform offerors that the item is not tested by the U.S. Government since its origin is unknown and requested a description of the seller's basis to copyright this material as stated at the end of the description, "[c]opyright 2000 militarysurplusenthusiast's [a]uction. All rights reserved." The seller succinctly replied as follows, "Ok, I'll do that. I always copyright my html's so it's not just this one." The text on the website remained unaltered and I accepted

the most likely outcome would involve an uncooperative seller who would not convey the Government's concerns.

The manufacturer of the body armor intended to purchase the item from the website and trace its origin via the item's serial number. They were unsuccessful. Their Counsel is currently in discussions with eBay's Counsel to ensure that eBay does not provide a venue for the sale of their body armor in the future.

After inquiries from this office and the manufacturer, Ebay decided to call the seller. However, eBay could not contact the seller using the telephone number provided by the seller. After subsequent e-mail communications without a response, eBay suspended this item from auction because the seller gave "false contact information," an incorrect phone number, which is also against EBay's policy. EBay suspended the auction immediately. Coincidentally, my days surfing eBay.com during work hours came to an abrupt halt and my Supervisor supplemented my existing training agenda to include attendance at several ethics trainings.

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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](http://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 CERCLA<sup>1</sup> 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.<sup>2</sup> 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 plaintiff<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Interestingly, CERCLA adopts several definitions from the Resource

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

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

<sup>3</sup> 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).

<sup>4</sup> 42 U.S.C. § 9607(a).

<sup>5</sup> 42 U.S.C. § 9607(a)(1) to (4).

Conservation and Recovery Act, including the definition for the term “disposal.”<sup>6</sup> 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.<sup>7</sup>

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,<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> It decided, however, that the district court erroneously decided that passive migration was not a “disposal” under CERCLA.

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

<sup>7</sup> 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).

<sup>8</sup> 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).

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

<sup>10</sup> 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.”<sup>11</sup>

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*<sup>12</sup> 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.<sup>13</sup> 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 Circuit<sup>14</sup> 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.

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*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).<sup>16</sup>

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

<sup>12</sup> *57 F.Supp 2d 1369* (N.D. Ga. 1999).

<sup>13</sup> *57 F.Supp 2d at 1377*.

<sup>14</sup> *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 Bulletin<sup>15</sup> that surveyed the impacts of Section 8149 of the Defense Appropriations Act for FY 2000 (Public Law 106-79).<sup>16</sup> On October 30, 2000 the President signed the Defense Authorization Act for FY 2001,<sup>17</sup> 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

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

<sup>16</sup> 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.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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."<sup>22</sup>

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

<sup>19</sup> 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.

<sup>20</sup> "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.

<sup>21</sup> 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).

<sup>22</sup> *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.<sup>23</sup> 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."<sup>24</sup> 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.

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<sup>23</sup> 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.

<sup>24</sup> 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)).



**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)

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### DoD Range Rule Withdrawn With a View Towards Re-proposal LTC Lisa M. Schenck

During DoD's Environmental Cleanup Stakeholders Forum in St Louis, Missouri in November, the Deputy Under Secretary of Defense (Environmental Security), Ms. Sherri Goodman, announced that she withdrew the Range Rule from the Office of Management and Budget (OMB), with the intent to re-propose the Rule.<sup>1</sup>

As Ms. Goodman pointed out, she withdrew the Rule from the OMB for several reasons. First, DoD and EPA must resolve difficult issues, especially the role of explosives safety. Second, as the Environmental Council of the States and National Association of Attorneys General pointed out to DoD, after several years of sorting through and refining the draft range rule, it is time to step back and hear from all the stakeholders and state regulators. Third, all the parties involved must achieve a greater understanding and consensus regarding the processes, tools, techniques, and end goals of the unexploded ordnance cleanup program. Keeping the Range Rule at OMB excludes further input from our community and state stakeholders. Finally, as DoD develops the major initiative of defining a range sustainment program, Ms. Goodman wants to be sure that everyone's concerns are included in that process.

In the interim, DoD will issue a DoD Directive (DoDD) and DoD Instruction (DoDI) to provide consistent guidance regarding how to proceed with a closed, transferred, transferring range response program. The "DoD Policy for Closed, Transferred, and Transferring Ranges Containing Military Munitions Fact Sheet" and the outlines for the DoDD and DoDI were provided for public comment at DoD's Environmental Clean-up Stakeholders Forum and are available at: **Error! Bookmark not defined..**

Environmental law specialists should continue to use DoD and EPA's *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges*<sup>2</sup> until DoD issues the DoDD and DoDI. (LTC Schenck/CPL)

### New Executive Order on Tribal Consultation Mr. Scott Farley<sup>3</sup>

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<sup>1</sup>Available at **Error! Bookmark not defined..**

<sup>2</sup>Available at **Error! Bookmark not defined..**

On 6 November 2000, President Clinton signed Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments" (EO 13175).<sup>4</sup> Consistent with the Presidential Memorandum of 29 April, 1994, "Government-to-Government relations With Native American Tribal Governments," EO 13175 recognizes the following fundamental principles: (i) Indian tribes, as domestic dependent nations, exercise inherent sovereignty over their lands and members; (ii) the United States government has a unique Trust relationship with Indian tribes and deals with them on a government-to-government basis; and, (iii) Indian tribes have the right to self-government and self-determination.

When developing and implementing "policies that have tribal implications,"<sup>5</sup> Section 3 of EO 13175 directs Federal agencies to adhere to the fundamental principles listed above: "to respect Indian tribal self-government and sovereignty, to honor tribal treaty rights and other rights, and to strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." In addition, Federal agencies are required, when developing such policies, to encourage tribal development of policies to meet the agency's program objectives, to defer to tribally established standards, and to consult with tribes to consider the need for Federal standards and alternatives that would preserve tribal authority and prerogatives.

The EO also imposes significant new responsibilities on Federal agencies that promulgate regulatory policies or rules that impact tribes or tribal governments. By February 2001, each Federal agency must designate an official responsible for implementing the order. By March 2001, the designated agency official must submit documentation to the Office of Management and Budget (OMB) describing the agency's process for ensuring timely and meaningful consultation with tribes early in the rulemaking process.

Prior to going forward with any regulation that imposes substantial direct compliance costs on a tribal government<sup>6</sup> or any regulation that preempts tribal law, an agency must meet several cumbersome procedural requirements. The agency must consult with affected tribes early in the promulgation process, prepare a tribal summary impact statement as part of the regulation's preamble, and submit to the Director, OMB, any written communications from tribal officials. When transmitting a draft final regulation with tribal implications to OMB, the agency must certify that "the requirements of EO 13175 have been met in a meaningful and timely manner."<sup>7</sup>

How will this impact the Army in its day-to-day operations? Initially, it is important to note that the EO is not limited to natural and cultural resource actions; it applies to any regulations or policies that have the potential to directly impact tribes, tribal governments and tribal resources. At Headquarters, Department of the Army (HQDA), the EO imposes several new responsibilities. HQDA must designate an agency official responsible for implementing the EO and forwarding a tribal consultation procedure to OMB. In addition, HQDA and the Secretariat will need to ensure that proposed regulations and policies are reviewed early in the developmental process for potential impacts to tribes, tribal resources or tribal governments. Where such impacts are identified, HQDA and the Secretariat must determine whether any of the requirements of the EO apply.

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<sup>3</sup> Mr. Farley is an attorney with the Army Environmental Center's Office of Counsel.

<sup>4</sup> The new Executive Order supercedes Executive Order 13084 "Consultation and Coordination With Indian Tribal Governments," 14 May 1998.

<sup>5</sup> The EO broadly defines "policies that have tribal implications" as " regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

<sup>6</sup> These requirements only apply to proposed regulations that are not mandated by statute.

<sup>7</sup> Similar certification requirements apply to proposed legislation with tribal impacts submitted to OMB.

At the local installation level, the EO will apply to “policy statements or actions that have substantial direct effects on one or more tribes.” This term is not defined in the EO, and will be subject to interpretation by local decision makers. Management plans<sup>8</sup> that impact tribally protected resources are the types of “actions” most likely to trigger Section 3 of the EO. For all practical purposes, Section 3’s requirements can be met by consultation with Federally recognized Indian tribes in accordance with the principles and procedures set forth in the *Department of Defense American Indian and Alaskan Native Policy*, 20 October 1998 and Department of the Army Pamphlet 200-4, Cultural Resources Management, Appendix F, *Guidelines for Army Consultation with Native Americans*.<sup>9</sup>

ELs should work with cultural resource managers and/or designated Coordinator for Native American Affairs to identify Federally recognized tribes affiliated with their installation and land impacted by installation activities. ELs can then assist in identifying installation plans and policies with the potential to impact tribal governments or tribal resources protected by law or treaty.<sup>10</sup> Where development and implementation of installation plans and policies<sup>11</sup> may directly effect tribal governments or resources, ELs should ensure that early tribal consultation occurs on a government-to-government basis in a manner consistent with Army policy and the principles discussed above. (Mr. Farley/AEC)

### ELs Roster Now Available

MAJ Elizabeth Arnold

Across the Army JAG Corps, there are a number of officers and civilians who practice environmental law. Whether they are full or part time environmental law specialists (ELs), they need access to a handy network of other ELs.

To meet the demand for such a practical tool, ELD has compiled an army-wide roster of ELs. The roster is organized by MACOM and it includes the name, rank or civilian pay grade, location, phone number and e-mail address for each Army EL. The POC for this roster is MAJ Elizabeth Arnold, [Error! Bookmark not defined.](#), DSN 426-1593 or COML (703) 696-1593. Please contact the POC for changes or corrections.

You may access the roster now on JAGCNET. If you do not have access to JAGCNET, contact the POC for a faxed copy or else one can be electronically mailed to your location.

Last but not least, another handy networking tool for ELs is the Air Force FLITE database. See [Error! Bookmark not defined.](#) Thanks to the kind assistance of the Air Force, Army ELs are now entitled to limited FLITE access (FLITE-EL) to further their environmental research. If you need a FLITE password, you may also contact the above POC to arrange for that as well. If you have a FLITE password already and have experienced technical difficulties with it, please contact the same POC. (MAJ Arnold/CPL)

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<sup>8</sup> Master Plans, Integrated Cultural Resource Management Plans, Integrated Natural Resource Management Plans and range management plans are the types of planning documents that might trigger compliance requirements.

<sup>9</sup> These documents can be found on the US Army Environmental Center web site, [Error! Bookmark not defined.](#), under Conservation, Cultural Resources.

<sup>10</sup> Protected tribal resources usually involve cultural resources such as those covered by the Native American Graves Protection and Repatriation Act (burial of ancestral human remains) and National Historic Preservation Act (properties of traditional religious and cultural importance) or access to natural resources on traditional hunting areas guaranteed by Treaty.

<sup>11</sup> For example, an installation may develop a policy that restricts access to a site that is significant to a tribe for practice of traditional religion and culture.

## NEPA And Cumulative Impacts Analysis

MAJ Ken Tozzi

Army environmental law practitioners should be well familiar with the requirements of the National Environmental Policy Act of 1969 (NEPA).<sup>12</sup> Requirements involving the use of categorical exclusions,<sup>13</sup> and the merits of using an Environmental Assessment<sup>14</sup> or an Environmental Impact Statement<sup>15</sup> are generally well known and regularly applied by environmental lawyers. An area that can be overlooked in NEPA practice, however, is the analysis of the cumulative impacts<sup>16</sup> of a federal action. This note will highlight the area of cumulative impacts analysis under NEPA and provide an example of a scenario where the need for cumulative impacts analysis may not be readily apparent.

The Council on Environmental Quality (CEQ) defines cumulative impact as:

{T}he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.<sup>17</sup>

Army Regulation 200-2 requires consideration of cumulative impacts in all levels of NEPA analysis. The screening criteria of Appendix A dictate that categorical exclusions may only be used if "[t]here are minimal or no individual or cumulative effects on the environment as a result of this action."<sup>18</sup> Paragraph 5-2 states "An EA is required when the proposed action has the potential for - (a.) Cumulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration."<sup>19</sup> The considerations above also apply to Environmental Impact Statements. In sum, cumulative impacts must be considered in the analysis of Army actions under NEPA.

The methodology for examining the cumulative impacts of Army actions under NEPA is beyond the scope of this article. For those interested in the technical aspects of such analysis, the Council on Environmental Quality has published "Considering Cumulative Effects Under the National Environmental Policy Act." This publication can be downloaded from the CEQ NEPA net website.<sup>20</sup>

Environmental attorneys must be cognizant of cumulative impacts in rendering advice on NEPA issues. Environmental Assessments and Environmental Impact Statements will include a section analyzing cumulative impacts. However, situations may arise where cumulative

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<sup>12</sup> 42 U.S.C.A. §§ 4321-4370.

<sup>13</sup> See Army Regulation 200-2, Environmental Effects of Army Actions, Chapter 4 and Appendix A (23 December 1988).

<sup>14</sup> Council on Environmental Quality NEPA Regulations, 40 C.F.R. §1508.9.

<sup>15</sup> 42 U.S.C.A. §4332(C).

<sup>16</sup> 42 U.S.C.A. § 1508.7.

<sup>17</sup> *Id.*

<sup>18</sup> Army Regulation 200-2, Appendix A, paragraph A-31(b).

<sup>19</sup> *Id.* at paragraph 5-1(a).

<sup>20</sup> Considering Cumulative Effects Under the National Environmental Policy Act, January 1997  
<<http://ceq.eh.doe.gov/nepa/ccnepaccnepa.htm>>

impacts could be overlooked. Consider a set of facts where there are several building projects on an Army installation either recently completed or where construction is ongoing. Assume that all of these projects are in the same general area, within two or three miles of one another. Now consider a proposal for the construction of another building on the same installation and in the same general area. Assume further that the proposed building is relatively small and no extraordinary circumstances are raised by its plans. It might be understandable to conclude after analyzing the environmental impacts of the project itself that there would be no significant impact on the human environment. However, it is important to include in the analysis the cumulative impacts of the project in conjunction with the "...past, present, and reasonably foreseeable future actions in the area."<sup>21</sup> This would include all of the recent building projects and any other reasonably foreseeable actions to be taken in the area. CEQ regulations require consideration of whether "...a project's environmental effects may be cumulatively significant in conjunction with other environmental conditions that are reasonably foreseeable, even if they are not significant by themselves."<sup>22</sup> Analysis of the direct and indirect environmental effects of the project along with analysis of the cumulative impacts could, of course, still result in a Finding of No Significant Impact (FNSI),<sup>23</sup> but the cumulative impacts clearly must be considered.<sup>24</sup>

Cumulative impact analysis raises a number of factual questions, such as what geographic area should be considered in the analysis? What are foreseeable future actions? Is there a good baseline from which to base the analysis of cumulative impacts? The answers to these questions are rarely clear and will depend upon the facts and conditions existing on and around the installation in question. What is clear is that a good faith attempt to analyze cumulative impacts is required for compliance with NEPA.

These facts also arguably raise the related but slightly different issue of the improper segmentation of projects. "Significance cannot be avoided by terming an action temporary or by breaking it down into small components."<sup>25</sup> The courts have held that "Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without 'significant' impact."<sup>26</sup> Segmentation issues require analysis of the degree to which the actions are related and connected to each other. The CEQ regulations provide definitions and some factors to consider in making such determinations.<sup>27</sup> Under our facts above, it would have been ideal to analyze all of the

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<sup>21</sup> *Supra* note 6.

<sup>22</sup> *Roanoke River Basin Association v. Hudson*, 940 F. 2d 58, 64 (4<sup>th</sup> Cir. 1991).

<sup>23</sup> 40 C.F.R. §1508.13. "Finding of no significant impact' means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference."

<sup>24</sup> *See generally*, *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F. 2d 60(D.C. Cir. 1987); *Roanoke River Basin Association v. Hudson*, 940 F. 2d 58 (4<sup>th</sup> Cir. 1991).

<sup>25</sup> 40 C.F.R. §1508.27(b)(7).

<sup>26</sup> *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F. 2d 60, 68 (D.C. Cir. 1991).

<sup>27</sup> 40 C.F.R. §1508.25(a)(1), in the context of defining the scope of an action, defines connected actions as "...closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification. 40 CFR §1508.25(a)(2) defines "Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. 40 C.F.R. §1508(a)(3) defines "Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

building projects in a single NEPA document. However, this is not always possible as new projects are not always foreseeable. Assuming good faith on the part of the agency, our facts more properly raise the issue of cumulative impacts as opposed to segmentation.

The importance of a proper cumulative impacts analysis under NEPA cannot be overemphasized. Awareness of cumulative impacts issues is vital to compliance with NEPA and should be understood by the environmental attorney. This note provides the environmental practitioner with a starting point for spotting cumulative impacts issues and some basic references to begin legal research into this important issue. (MAJ Tozzi/RNR)

### **Army Environmental Center Prepares Guidance on Fuel Tanker Trucks**

Ms. Colleen Rathbun

The Army Environmental Center (AEC) is preparing compliance guidelines regarding fuel tanker trucks. In connection with this effort, AEC's Office of Counsel has prepared a legal analysis of some of the issues associated with the tanker trucks. According to the opinion, if a fuel tanker truck leaves post (i.e., it is not used exclusively within the confines of the installation), it is subject to DOT regulations (49 CFR 130), and not EPA's Spill Prevention Control and Countermeasures (SPCC) regulations (40 CFR 112). On the other hand, if the tanker truck is used exclusively within the confines of the installation, and the other prerequisites for the SPCC regulations are met, the SPCC regulations would apply, and secondary containment is required unless it can be shown to be impracticable. The AEC memo provides some recommendations as to Army policy for fuel tanker trucks, including tanker trucks used during training exercises. Most importantly, AEC OC recommends that secondary containment be avoided for tanker trucks used in connection with training exercises, either because it is not required or because it is impracticable. Other fuel tanker trucks that serve in more of a storage role should be protected with some form of secondary containment. The memo and some related briefing slides used during the last ELS conference are posted on JAGCNET. If you can not access JAGCNET, and you would like a copy of the memo or slides, please feel free to contact Colleen Rathbun at [colleen.rathbun@aec.apgea.army.mil](mailto:colleen.rathbun@aec.apgea.army.mil), or in her absence, LTC German at [Error! Bookmark not defined.](#) (Ms. Rathbun/AEC)

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consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement."

**COMPLIANCE NEWSLETTER  
OCTOBER 2000**

No newsletter was sent out in Aug or Sep.

Here's what's happening in Compliance Branch at AEC!

Visit the Compliance Section of the AEC Web Site at:

<http://aec.army.mil/>

Anyone who would like to be added to or deleted from our mailing list should contact my secretary, Helena Tomick, at [hdtomick@aec.apgea.army.mil](mailto:hdtomick@aec.apgea.army.mil). Send her your name, installation name, mailing address, position/title/function, e-mail address, phone and fax numbers.

This newsletter is primarily intended for government (mostly Army) environmental offices. I'm only putting contractors on the direct distribution if they are directly supporting an Army environmental office and the request to add them is forwarded by their government POC. For contractors, in addition to the information above we request that you provide the name of your company, along with the position/title/function you perform for the Army environmental office you support.

Readers are invited to submit questions and topics for later newsletters. Information for doing so is at the end of this newsletter.

**GENERAL**

- \* In June, 2000 the Department of Justice issued an opinion that EPA can fine installations for UST violations. The Army Environmental Law Division has updated their matrix of who can fine Army installations for what. That matrix is inserted at the very bottom of the newsletter. The first fine, a large one, has already been issued.
- \* We at AEC completed our review of the Spring 2000 EPR Submission in July. All of our comments have been returned to the MACOMs.
- \* A new draft AR 200-2, Environmental Analysis of Army Actions, was published as a proposed rule in the Federal Register on 7 Sep 2000 (Volume 65, Number 174). The public is requested to provide comments to the Army Environmental Policy Institute by 6 Nov 2000. Army MACOMs and Installations will have one last chance to comment on it when the draft final is sent for approval to the ARSTAF.
- \* One of the services AEC provides to the Army is to analyze proposed regulations issued by EPA and the States and support the DOD Services Steering Committees in

developing DOD comments. Commenting on State regulations is headed by our Regional Environmental Offices (REOs), with support from the HQ AEC staff. Compliance Branch is heavily involved in this. We also inform Army MACOMs and installations about the content of these proposed rules, as well as providing the same service with regard to new final rules when they are issued. In FY01 we have identified 48 rules, proposed and final, that we anticipate will have some impact on the Army. Several of them are expected to have major impacts, both in costs and effects on Army operations. In addition to providing information about the rules, we also attempt to provide guidance and technical support to help installations comply. As an example of the potential impact of these new rules, we are currently working to support installations in dealing with the Clean Air Act Hazardous Waste Combustor NESHAP, which is expected to cost the Army, mostly AMC, \$15 M to \$25 M in air pollution control upgrades and furnace testing, and a new standard for Arsenic in drinking water that may cost the Army \$13M-\$36M to upgrade drinking water treatment plants. Information on the activities of this Environmental Legislative/Regulatory Analysis and Monitoring Program (EL/RAMP) will become a regular feature in the next Compliance Newsletter. (Information on State Regulatory Analysis and Monitoring Program (S-RAMP) activities is provided in the various REO Newsletters.) Information regarding several rules we have recently reviewed is included in the paragraphs below. The EL/RAMP Program Manager in Compliance Branch is Pam Klinger, 410-436-1207

\* Just received this 6 Oct 2000 from the facilities side of ACSIM regarding the 2001 DOD Recycling Workshop (also referred to as the Combined Services Recycling Workshop). It will be held 15-18 Oct 2001. One big change is that the 2001 DOD-Recycling Workshop will be held in conjunction with the Solid Waste Association of North America (SWANA) in Baltimore, MD.

The Air Force is the host for the 2001 conference. Please submit your abstract for the 2001 DOD Recycling Workshop (also known as the Combined Services Recycling Workshop) to Nancy Carper of the Air Force **by 10 December 2000**. Submit Electronically to: **Error! Bookmark not defined.** She can be reached at DSN 240-4964. Abstracts for topics areas relating to INTEGRATED SOLID WASTE MANAGEMENT (source reduction, reuse, recycling, composting, construction and demolition debris, etc) and AFFIRMATIVE PROCUREMENT must clearly define objective, scope of work, results, lessons learned and conclusions in 350 words or less.

The Air Force Web site with information about the workshop is <http://www.afcee.brooks.af.mil/eq/wastecon/wastecon.htm> The site will contain additional workshop information as it becomes available. (I checked this URL before I sent the newsletter and could not get through. However, I did some more checking and the AFCEE site appears to be down today.)

**AIR - POC Larry Webber, 410-436-1214**

\* Emission reduction credits (ERCs). Larry briefed Ms. Menig (DACSIM) and Mr. Nerger, Director, Facilities and Housing, OACSIM on this topic recently. While the popular ideas regarding ERCs are about buying and selling, they can also be necessary within the installation for offsetting increases in emissions caused by new missions, or even changes in existing operations. Offsets are an integral part of the New Source Review program, which covers major new construction as well as modifications to sources. A review of activity has found that only one installation in DOD has participated in the pilot program that allows installations to keep revenues from ERC sales. Market prices for ERCs range dramatically across the country from \$86,000/unit in California to \$2000/unit in the east (for NOx).

\* (EL/RAMP Related Activity) Diesel and JP-8 continues to be a hot issue. DOD, with the Defense Energy Support Center in the lead, and with strong Army support, submitted comments to EPA on recently proposed rules that would control particulates from diesel engines and reduce allowable sulfur limits in diesel fuel. This is "2 rules in one" as the control technology needed to meet the PM limits is sensitive to sulfur. Consequently, sulfur in fuel needs to be limited to prevent the controls from being "poisoned" and rendered ineffective. In the proposed rule, EPA raised the ideas of considering JP-8 as a diesel fuel (historically they have not) and not allowing national defense exemptions for control requirements (historically they have). EPA's concern was the potential fueling of future diesel engines incorporating the new PM controls with higher-sulfur JP-8. The Western Regional Environmental Office continues to monitor activity in California with regard to control of diesel emissions, which the state has declared to be a "toxic air contaminant". In their evaluation of strategies, the state is considering JP-8 as a diesel fuel. Recently, Texas proposed rules that would limit the sulfur content of diesel fuel in the eastern part of the state. The Air Force REC in Texas submitted comments to ensure that DOD concerns are considered. Diesel emissions are a hot item and will be for quite some time. Request MACOM/installation assistance in keeping the REOs and Compliance Branch informed of state activities regarding these emissions. Our biggest concern is where JP-8 may be impacted. Please let Larry and your REO know if your state proposes regulations that would place controls/limits on diesel fuel so we can evaluate their potential impact.

\* EPA has published a guide for their inspectors on what to look for when reviewing facility compliance with the General Duty Clause associated with the Accidental Release Prevention Program. AEC is working on a summary guide to help installations understand the expectations. EPA's guide can be found on the CEPPO website: **Error! Bookmark not defined.**

\* On 4 Aug 00 the EPA published their rule regarding disclosure of offsite consequence analyses (65FR48107). The rule generally provides for the establishment of reading rooms around the country where Risk Management Plans will be available in a somewhat limited fashion to the community. **Error! Bookmark not defined.**

\* Rochelle Williams, the FORSCOM Air Pollution Program Manager, is supporting Army and DOD as the DOD representative to the White House Air Quality Research Subcommittee. AEC Compliance Branch supports her efforts. This subcommittee is involved in collecting and reviewing research on the effects of particulate matter. Rochelle also has the lead for the Army Compliance Technology Team for developing the Environmental Quality Technology User Requirement for Particulate Matter Research. Finally, she produces a Particulate Matter Research Newsletter that is available to DOD folks who are interested. She asks that anyone in DOD doing work on particulate matter let her know so that she can include it. Rochelle can be reached at (404) 464-7695. Her E-mail address is williaro@forscom.army.mil.

#### **HAZARDOUS AND SOLID WASTE - POC Bob Shakeshaft, 410-436-7077**

\* (EL/RAMP Related Activity) We are currently working on 4 EPA rulemaking actions, two of which might have significant impacts on the Army.

Land Disposal Restrictions (LDR), ANPR - The EPA published an Advanced Notice of Proposed Rulemaking (ANPR) on June 19, 2000, which was supposed to propose ideas that would streamline the LDR program. Our review found little reason to expect any real improvements but did raise a real concern. EPA discussed changing revisions to the LDR treatment standards for reactive wastes (D003), which had potential to impact Explosive Ordnance Disposal and demil operations. AEC worked with the OEESCM Stockpile committee to prepare comments on this and request further coordination with DoD.

- Electronic Manifesting, ANPR - FYI. OMB asked us to review a draft EPA proposal to automate HW manifesting. This will be optional and is generally good news for DoD installations. We will request MACOM and installation comments when the rule is published in the Federal Register, scheduled by the end of 2000.

#### **MUNITIONS - POC Tim Alexander, 410-436-1218**

\* Munitions Rule Computer Based Training (CBT). Mr. Larry Nortunen, of the Defense Ammunition Center (DAC), recently briefed the Army Munitions Workgroup (MWG) that the long-awaited CBT program had been completed and that 878 CDs have been sent to a wide variety of Army users (including USAR, ARNG and COE

customers). Development of the CBT was a joint effort of AEC and DAC, with participation of MWG members. MACOM environmental offices and ammunition offices have also received the CD. Larry noted that the first version had a few computer problems (for Windows NT users) but that the next “production run” would solve these minor difficulties. He also stated that a total of 3000 CDs would eventually be produced and available to all requestors. He concluded by noting that copies of the CD could be requested from DAC on the following web site:

<http://www.dac.army.mil/as/produ.html>

\* MUNITIONS RULE SITE ASSISTANCE VISITS

The Army Munitions Work Group, together with MACOM representatives, will bring Munitions Rule training to selected installations in FY00 – 01. Currently training is scheduled for the following dates and locations. Additional installations are still to be selected.

Week of October 23<sup>rd</sup>/Host MACOM – FORSCOM/FT Campbell

Week of November 13<sup>th</sup>/Host MACOM – NGB/Camp Shelby

Week of December 4<sup>th</sup>/Host MACOM – TRADOC/FT Bliss

This initiative is designed to provide participating Army staff with seminar style training on MR implementation, combined with a hands-on, “no fault” Munitions Rule compliance staff assistance visit. The site assistance visits will be performed by a team comprised of government subject matter experts (ODCSLOG/DAC/AEC/CHPPM), augmented with technically qualified staff provided by an AEC support contract. It is recommended that individuals attending the planned training first complete the MR computer based training (CBT) mentioned above.

This training is intended for ammo specialists, range operators, and environmental staff involved in the implementation of the Military Munitions Rule and the supporting DoD policy. MACOMs have been allocated spaces for each of these training opportunities. There is no tuition fee. Please contact your MACOM Munitions Rule POC or Tim Alexander by phone or e-mail (**Error! Bookmark not defined.**) for additional information.

\* QUALIFIED RECYCLING PROGRAM AEDA WORKSHOP  
COURSE #444

TUITION \$ 275

The Qualified Recycling Program AEDA (Ammunition, Explosives, and other

Dangerous Articles) Workshop is scheduled to be presented at the US Army Corps of Engineers, Tom Bevill Center, Huntsville, AL on the following date:

SESSION 01-01	28-29 Nov 00
Huntsville, AL	
SESSION 01-02	21-22 Feb 01
Huntsville, AL	
SESSION 01-03	18-19 Apr 01
Huntsville, AL	

To register for a space in this session, you should call Ms. Joy Rodriguez, 256-895-7448 or e-mail the name of the student, method of payment, telephone number, and fax number to Rebecca.J.Rodriguez@usace.army.mil. Payment may be made by Credit Card, billing against DD Form 1556, MIPR, or check made out to Finance and Accounting, Corps of Engineers. All DD Form 1556's should be faxed to 256-895-7497.

Hotel information and additional information on the class sessions will be provided to all students prior to class start date. Any questions on these workshops should be referred to Ms. Joy Rodriguez, Professional Development Support Center, Huntsville, AL, 256-895-7448.

**WATER – POCS: Storm water and Clean Water Action Plan Georgette Myers, 410-436-1203; Wastewater Billy Ray Scott, 410-436-7073; Drinking Water Misha Turner, 410-436-7071**

\* (EL/RAMP Related Activity) Compliance Branch recently supported the DOD Drinking Water Services Steering Committee in preparing DOD comments on the Proposed Arsenic MCL. We thank all the installations which submitted copies of their Consumer Confidence Reports. Without those we could not have done all that we did. Comments and potential cost estimates for the proposed rule were received from all Services. Even though only relatively few installations would be impacted, the estimates for capital improvements DOD-wide were almost \$100 million, with annual O&M at about \$6 million. Comments were also submitted regarding other potential impacts the rule could have on other environmental programs (such as site cleanup and water compliance programs).

\* (EL/RAMP Related Activity) On 25 Aug a memo was signed forwarding copies of our information paper about the new rule on Underground Injection Control of Class V Injection Wells to all of the MACOM Environmental Chiefs. This rule impacts those Army installations that currently operate Class V motor vehicle waste disposal wells (MVWDW) and large-capacity cesspools. An MVWDW may be any hole in the ground (there are conditions that must be met) that receives or has received fluids from vehicular

repair or maintenance activities, such as auto craft shop, motor pools, or any facility that does any vehicular repair work. It will soon be posted on the AEC web site. An electronic copy can be sent to anyone who needs one.

\* The following water related items have recently been added to the Compliance section of the AEC web page:

1. Unified Federal Policy for a Watershed Approach to Federal Land and Resource Management. This policy is one of the Clean Water Action Plan's Action items. The final document will be signed by DOD and seven other Federal Agencies this month. This policy is an agreement between federal agencies to share information and common goals when developing plans for watersheds. This policy is NOT a regulatory driver for funding. DOD is currently working on guidance for implementing this policy across DOD.

2. Under Clean Water Act, Total Maximum Daily Loads (TMDLs), the document "The Effects of TMDLs on Army Installation Natural Resource Management Programs", is available for download from DENIX

3. Under Safe Drinking Water Act, the document, "Ft. Meade Source Water Assessment" is available for download. You will need a DENIX password to download reports from the DENIX links on the AEC web site.

\* AEC worked with the DOD CWA Services Steering Committee to prepare a DOD guidance document on the Storm Water Phase II Rule. This document was just completed and is currently being distributed to the MACOMs. This document will also be put on DENIX with a direct link to the document through the AEC web page.

### **STORAGE TANKS and SPILLS- POC Michael Worsham 410-436-7076**

\* (EL/RAMP Related Activity) DOD was recently given the opportunity to comment on a final EPA regulation on SPCC plans being worked in OMB prior to publication. The proposed version of this rule was published many years ago. The AEC Compliance Branch had less than one day's notice to review the 400 page final rule to identify any major issues we might have with it. None were noted, as was expected, as the rule will generally decrease the regulatory burden with respect to SPCC plans. When the final rule is issued, possibly in just a few months, the AEC will provide an Information Paper and additional guidance as necessary for this new rule.

\* At the DOD-EPA Region III Symposium in Baltimore in August, Garry Sherman of the EPA's RCRA Compliance and Enforcement Branch spoke briefly. He stated that the EPA's enforcement focus is shifting from "Do facilities have cathodic protection and leak

detection systems?", to "Are the systems functioning and do the operators know how to use them?" Afterwards he told Mr. Worsham that EPA can do a compliance assistance visit for USTs, in which the regulator comes in a less aggressive mode to help installations with compliance issues. Mr. Sherman has promised the AEC a list of the common UST compliance problems the EPA is seeing on its various inspections, and this will be forwarded to MACOMs as soon as we receive it. Mr. Sherman used to work at both Air Force and Navy installations. His number is 214-814-5267, or sherman.garry@epa.gov.

### **LEAD BASED PAINT & ASBESTOS - POC Michael Worsham 410-436-7076**

\* The EPA recently released a clarification memo regarding disposal of lead-based paint waste. The memo states that LBP waste generated from a residence (houses, apartment buildings, military barracks, etc.) comes under the RCRA household hazardous waste exemption, even if it is generated by a contractor. The exemption also includes concentrated LBP wastes such as lead chips, dust and sludges. This means that these LBP wastes generated from houses may be disposed of as non-hazardous solid waste, and do not require TCLP testing. The memo is intended to encourage LBP abatements, for which lead waste disposal is a costly and inhibiting factor when the waste is treated as hazardous waste. However, the memo notes that states are free to adopt stricter disposal standards, including not recognizing the household waste exemption in whole or part. The Army Lead Hazard Management Team is considering the memo, and may create a short guidance memorandum regarding this EPA memo. No one should change their LBP management practices without first consulting their regulator.

### **PRIVATIZATION - Billy Ray Scott, 410-436-7073**

\* On 12 Jul 00 MG Van Antwerp, Assistant Chief of Staff for Installation Management, signed a memorandum to the MACOMs distributing information prepared by Compliance Branch about environmental issues related to Utilities Privatization. The subject of the memo was: Frequently Asked Questions (FAQs), No. 3: Environmental Compliance Issues Related to Privatization of Water and Wastewater Utilities.

\* Compliance Branch, in conjunction with the ACSIM Privatization Manager, is also working on a Privatization Guidance Document that will bring together a lot of information from both sides of ACSIM regarding how to proceed with Utilities Privatization.

COMPLIANCE is an INFORMAL communication of the undersigned, who is solely responsible for its content. Official policy/guidance/alerts will

continue to be sent through established channels. Please send any comments, questions or topics for future newsletters to me via one of the mechanisms listed below. Let me know if anyone wants to be added to or taken off the list.

THANKS.

Lee Merrell  
 Chief, Compliance Branch  
 US Army Environmental Center  
 e-mail: Lee.Merrell@aec.apgea.army.mil  
 phone: 410-436-7069  
 FAX: 436-1675  
 DSN 584-7069

Mailing Address:  
 US Army Environmental Center  
 ATTN: SFIM-AEC-EQC (Merrell)  
 5179 Hoadley Road  
 Aberdeen Proving Ground, MD 21010-5401

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

Updated: 6 Jul 00

<b>STATUTE</b>	<b>IMPOSED BY STATE</b>	<b>IMPOSED BY EPA</b>
Resource Conservation and Recovery Act (RCRA) Subtitles C and D only (hazardous and solid waste) 42 U.S.C. §6961	YES—1992	YES—1992
RCRA Subtitle I only (underground storage tanks) 42 U.S.C. §6991f	NO	YES—2000 <sup>1</sup>
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 <sup>2</sup>	YES—1997 <sup>3</sup>

Clean Water Act (CWA) 33 U.S.C. §1323	NO	NO
<p>NOTES:</p> <ol style="list-style-type: none"> <li>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.</li> <li>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 9<sup>th</sup> Circuit Court of Appeals, but that court recently issued a surprise ruling that remanded the case to state court without addressing the central issue. DoJ will likely 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 6<sup>th</sup> Circuit, where the court found that federal facilities must pay penalties imposed by state regulators for CAA violations.</li> <li>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.</li> </ol>		

**U.S. ARMY ENVIRONMENTAL LAW DIVISION**

**AREAS OF RESPONSIBILITY**

(as of 15 August 2000)

**Central ELD Telephone: (703) 696-1230 (FAX -2940) (DSN 426-XXXX)**

**Direct Lines & Voicemail (703) 696-XXXX**

**Address: 901 North Stuart Street, Suite 400, Arlington, VA 22203-1837**

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<b>Chief, Compliance</b>	<b>LTC Rich Jaynes</b>	<b>1569</b>	<b>LTC Jackie Little</b>	<b>1592</b>
<b>Chief, Litigation</b>	<b>LTC Dave Howlett</b>	<b>1563</b>	<b>Mr. Mike Lewis</b>	<b>1567</b>
<b>Chief, Restoration/ &amp; Natural Resources</b>	<b>Mr. Steve Nixon</b>	<b>1565</b>	<b>MAJ Ken Tozzi</b>	<b>1562</b>
<b>Executive Officer</b>	<b>MAJ Ken Tozzi</b>	<b>1562</b>		
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ELD Bulletin	MAJ Jim Robinette	2516		
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Safety	MAJ Liz Arnold	1593		
Toxic Substances Control Act (TSCA)	LTC Jackie Little	1592	LTC Lisa Schenck	1623
Underground Storage Tanks (USTs)	LTC Jackie Little	1592	LTC Lisa Schenck	1623
Water Rights	LTC Jackie Little	1592	LTC Lisa Schenck	1623