



Office of Command Counsel Newsletter

October 2001, Volume 2001-5

Changed Utterly

As the men and women who have fought America's wars, you-more than all others-understand what the September 11th attack on freedom and democracy means for the days ahead. More than simple acts of terrorism by radical or unbalanced individuals, this was an attack on our way of life, our country, our home.

In a recent message to U.S. armed forces here and abroad, I spoke of the memorable moments that have marked all great crises throughout our history, images that live forever in our hearts and in our minds.

Not surprisingly, we've seen many such moments during this crisis as well-moments of remarkable courage and selflessness; moments of fierce patriotism and pride: Policemen and firefighters working night and day, with no thought for themselves; men, women and children giving blood until the banks are overflowing; businesses and corporations donating coffee, food and water to sustain those who would not stop working; chaplains counseling distraught

families; friends and total strangers reaching out in loving gestures of human support. And everywhere-the American flag, on buses and taxicabs, in windows and over doorways, as armbands, on jackets and hats, and most especially, waving in glorious defiance above the smoking and twisted wreckage our enemies have wrought.

One such flag, unfurled by firefighters, proudly hangs huge and proud near the gash in the Pentagon wall. While the immediate task of vanquishing freedom's enemies will fall to our military men and women, all of us-particularly those like you who understand the price of freedom-will be called upon to strengthen our national resolve.

And so, as we ask God's tender mercies on all those who have fallen, we ask also for His guidance and protection for all of us who remain to finish the task now before us. I thank the same God for America's veterans-those of you who made us free and kept us free.

I thank God for all you have done, and for all I know you will do again, to support peace and final victory. God bless you, and God bless America.

(Full text at Enclosure 1)

Donald H. Rumsfeld

Changed Utterly-from Easter 1916: WB Yeats (Encl 2)

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Ernie Willcher Killed in Pentagon Attack -- Retired from DA OGC as Senior Employment Counsel

Ernest M. Willcher, 62, of North Potomac, retired in April after 25 years as a civilian employee at the Pentagon.

In May, he took a job with consultants Booz, Allen & Hamilton in McLean because they were on the top of his list, said Shirely Willcher, his wife of 23 years. "He was very, very pleased with the choice that he made."

Willcher and two other company employees were caught in the terrorist attack on the Pentagon while briefing LTG Timothy J. Maude, the Army's Deputy Chief of Staff for Personnel, on an improved system for survivor benefits for military employees.

"It's just so difficult to believe," she said. "The irony is that he didn't have to be there every day anymore. He was there for a meeting."

Willcher, who was born in the District and grew up in Montgomery County, received an undergraduate degree in business from the University of Maryland and a law degree from American University, which he earned at night

while working for the Army. He served in the Army for four years and spent 36 years as a civilian employee in various posts.

He was assigned to the U.S. Army Map Service, Walter Reed Army Medical Center, Fort Detrick and then to the Army general counsel's office in the Pentagon.

"He was self-motivated and determined," said his wife. He returned to work after retirement, she said, to help ensure that his children — Benjamin, 20, and Joel, 17 — "could go as far as they wanted in school."

Their devoted father never missed a baseball game for one son or a theatrical performance for the other, she said. And he never had doubts, she said, about working for the military: "He always said he was working for the right client — the citizens of the country."

— **Sandra Fleishman**

From the Washington Post, Friday Sept 14, 2001

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

Miscellaneous Thoughts and Comments

Sacrifice:

“Dear Lord, Lest I continue my complacent way, help me to remember, somewhere out there a man died for me today. As long as there be war, I must ask and answer—am I worth dying for?”

Eleanor Roosevelt

“I am always amazed at how these men walk into fires when the rest of us run from them.”

Rudy Giuliani

“The living that throng Broadway care little perhaps for the dead at Antietam, but we fancy they would jostle less carelessly down the great thoroughfare, saunter less at their ease, were a few dripping bodies, fresh from the field, laid along, the pavement. As it is, the dead of the battlefield come up to us very rarely, even in dreams. We see the list in the morning paper at breakfast, but dismiss its recollection with the coffee. There is a confused mass of names, but they are all strangers; we forget the horrible significance that dwells amid the jumble of type...it is

a thunderbolt that will crash into some brain—a dull, dead, remorseless weight that will fall upon some heart, straining it to the breaking. There is nothing very terrible to us, however, in the list, though our sensations might be different if the newspaper carrier left the names on the battlefield and the bodies at our doors instead.”

“*The Dead at Antietam*”,
NY Times, 1862.

“No matter how long it may take us to overcome this premeditated invasion, the American people in their righteous might will win through to absolute victory. I believe I interpret the will of the Congress and of the people when I assert that we will not only defend ourselves to the uttermost, but will make very certain that this form of treachery shall never endanger us again.”

FDR on after Pearl Harbor in his “Day of infamy speech.”

“We shape our buildings; thereafter they shape us.”

Sir Winston Churchill

The Lover Tells Of The Rose In His Heart

ALL things uncomely and broken, all things worn out and old,

The cry of a child by the roadway, the creak of a lumbering cart,

The heavy steps of the ploughman, splashing the wintry mould,

Are wronging your image that blossoms a rose in the deeps of my heart.

The wrong of unshapely things is a wrong too great to be told;

I hunger to build them anew and sit on a green knoll apart,

With the earth and the sky and the water, re-made, like a casket of gold

For my dreams of your image that blossoms a rose in the deeps of my heart.

William Butler Yeats

Message from the Secretary of the Army

My fellow field soldiers all over the Army, from Kosovo to Korea, wherever you may be happening to pull your duty: As you all know by now, our nation, this department and the United States Army was attacked 11 September.

I want you to know that we have survived that attack. That attack has made us stronger and we are now engaged in what our president has called the first war of the 21st century. We will win that war.

Now the war is not going to won in a single day, or a single raid or a single event. We are engaged in a campaign against a cowardly enemy. And it will take us a while to root him out. But let there be no question about our resolve, our discipline, our professionalism, our tenacity; and in the end, the result of that war.

It started at a point of time dictated by the enemy.

It will end in a point of time — as the president has said — of our choosing.

It won't be easy. But few things that are truly worth doing ever are. This is our challenge: to preserve the freedoms that make America what Abraham Lincoln called the "last best hope on earth." And I can assure that the civilized people in countries of the world have united in support of our cause.

You and I, the American soldier and the veteran, now carry the hopes of the American people on our shoulders. I know that you will do your duty. I have every confidence in that as does the Secretary (of Defense), the Chief, and the President of the United States.

America expects no less of you and I and we can do no more. And always know that wherever you are, your nation stands behind you with absolutely solid support.

The Chief, General Shinseki and I, extend our condolences, and ask God's tender mercies on our foreign comrades and their loved ones. We have 74 people unaccounted for in our headquarters. We will mourn them and we will shed our tears. They are part of our family. But once that's finished, we will go forward, with anger and with purpose in our hearts, to see this campaign through to the end.

Tuesday, Sept. 11 has already been described as the darkest day in American history. I say to our adversaries, be very, very careful, for you are going to experience the finest hours of the United States Army as we prosecute this campaign against you.

God bless you, God bless the Army. God bless our great nation.

Thomas E. White
Secretary of the Army

Role of SSA in the A-76 Process

As an A-76 study, which uses “best value” procedures, approaches the cost comparison stage, it is important to consider the role of the Source Selection Authority (SSA) after the selection of the successful private sector offeror and prior to the cost comparison between the successful private sector offeror and the Government’s in-house offer.

Specifically, recent rulings by the General Accounting Office (GAO) and the United States Court of Federal Claims have focused on the importance of the analysis the SSA must conduct in order to determine whether the “level of performance and performance quality” outlined in the private sector proposal equates to that of the in-house offer.

There have been two recent decisions, one by the GAO and one by the United States Court of Federal Claims that provide additional guidance and clarification as to the role of the SSA and the SSEB in this regard.

In Rust Constructors, Inc. v. The United States, decided 31 May 2001, the United States Court of Federal Claims made it absolutely clear that the “level of performance” review is completely distinct from the source selection evaluation that had been conducted between the private sector competitors. In that case, the Court rejected an unsuccessful private sector argument that in conducting an A-76 study the Government had “erred by failing to conduct a “best value analysis” when it compared its proposal to the government’s MEO.”

The GAO case is BAE Systems, B-287189.2, May 14, 2001. A thorough analysis of what appears to be required SSA is the crux of the narrative,

CECOM Counsel **James Scuro**, DSN 992-9801, provides an outstanding paper on this burgeoning subject (Encl 3).

List of Enclosures

1. Message from Secretary of Defense
2. Easter 1916-- William Butler Yeats
3. Role of Source Selection Authority in the A-76 Process
4. Personal Services Contracts in the A-76 Process
5. Contract Litigation--Not Quite Gone and Shouldn't Be Forgotten
6. DOD Labor Relations Guidance--National Emergency
7. Supreme Court Docket--
8. Deployment of Civilian Personnel
9. Exemptions/Waivers in Major Environmental Statutes
10. August 2001 ELD Bulletin
11. Damage to Rental Cars while on TDY
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Protest Filings--Stats & Trends

HQ AMC-Level Protests

FY 96--42

FY 97--57

FY 98--32

FY 99--23

FY 00--28

Fy 01 42

GAO Protests

FY 96--101

FY 97--120

FY 98--70

FY 99--73

FY 00--75

FY 01--88

Personal Services Contracts & the A-76 Process

The Office of Management and Budget (OMB) Circular No. A-76, dated 4 August 1983, established Federal policy regarding the performance of commercial activities.

The Circular provides that the Federal Government is to rely on commercially available sources to provide commercial products and services if it is determined, after a cost comparison of the cost of contracting and the cost of in-house performance, that the product or service can be procured more economically from a commercial source.

FAR 37.104(b), however, prohibits Government agencies from awarding personal

services contracts unless specifically authorized by statute to do so such as contracts for architect-engineer services authorized by 40 U.S.C. 541-544.

The question that arises is whether the policy set forth in OMB Circular A-76 is consistent with the prohibition against contracts for personal services at FAR 37.104(b).

The enclosed paper addresses several important aspects of this issue, citing statutes, regulations, Army Pamphlets and applicable GAO decisions.

Another excellent article by CECOM Counsel **James Scuro**, DSN 992-9801. (Enclosure 4)

Contract Litigation--Not Quite Gone, and Shouldn't be Forgotten

CECOM Counsel **Cruz Febres-Ferrer**, DSN 992-9807, provides an excellent synopsis of contract litigation, including the role of installation attorney, case

preparation--The Rule 4 File, relationship with the Contract Litigation Division and the Department of Justice (Enclosure 5).

Employment Law Focus

National Emergency & Labor Relations

On September 14, 2001, President Bush issued Proclamation 7463, Declaration of National Emergency by Reason of Certain Terrorists Attacks.

This proclamation states that "a national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States."

The President declared that the national emergency has existed since September 11, 2001, and has exercised authorities under various statutes.

Questions have been raised concerning what impact Proclamation 7463 has on our statutory obligations under 5 USC Chapter 71, the Federal Service Labor-Management Relations Statute.

DAPE's **David Helmer** provides a Q and A on this issue. One of the issues addressed at length is whether management can terminate alternative or compressed work schedules pursuant to the Proclamation (Encl 6).

Eleven Employment Law Cases on Supreme Court Docket

Leave Request Form Changed

The US Supreme Court convened its session Monday, October 1.

Eleven employment law cases are already on the docket, and six of them are scheduled for oral argument. More cases may be added soon.

Enclosure 8 contains short summaries of 11 cases.

For more information, including links to the decisions below:

- <http://www.lawmemo.com/emp/sum/courts/supreme/>.

Calendar of oral arguments:

- <http://www.lawmemo.com/emp/sum/courts/supreme/schedule.htm>.

Please re-distribute this email to anyone who is interested.

(Enclosure 7)

Following is a notice that went to MACOM POCs regarding the termination of the SF-71, Application for Leave. Army's policy is to adopt the OPM 71 as the Leave Request form.

As the notice states, please complete your labor relations obligations, if appropriate, prior to use of the OPM 71 for bargaining unit members. A copy of the OPM form is available at http://www.opm.gov/forms/pdf_fill/opm71.pdf

SOELR

This year's session will be in Albuquerque, New Mexico, during the week of March 12, 2002.

This is a preeminent program for the labor practitioner.

Civilian Deployment

Civilian employees have always accompanied the force during operations and today they perform many of the duties formerly performed by soldiers. Although this is well known, there may not be the same emphasis on preparing civilians for deployment as there has been for preparing military personnel. Emergency Essential (EE) personnel notified of deployment, as well as their families, are eligible for legal assistance on deployment related matters as determined by the supervising attorney.

Just as soldiers may need wills, powers of attorney, family care plans, so do civilian employees. Army legal assistance attorneys should be prepared to advise and assist deploying civilians and their families in their preparation for deployment.

A good source of information on civilian personnel supporting military operations is the Operation Law Handbook published by the International and Operational Law Department, The Judge Advocate General's School which can be accessed through JAGNET at www.jagc.net.army.mil.

CECOM Counsel **Kim Sawicki**, DSN 992-1146 prepared a point paper for the CECOM Commander outlining the basic rules regarding the Army and AMC deployment of civilian status. (Enclosure 8)

This issue is likely to become more important and even more relevant in the months to follow.

At HQ AMC, **Steve Klatsky** has the lead on policy issues supported by **Sam Shelton**.

We have received several preliminary inquiries on deployment issues that leads to the conclusion that each AMC legal office should review their library of materials to ensure they have the most complete and up-to-date materials.

Waiver of Bi-Weekly Aggregate

Waiver of Limitation on Biweekly Civilian Pay Effective 11 Sept 01. The Under Secretary of Defense (Personnel and Readiness) determined that work related to the attacks on the World Trade Center and the Pentagon or their aftermath meet the emergency criteria within the meaning of title 5, United States Code, Section 5547(b). Employees who are performing such work therefore are not subject to the limitation on aggregate bi-weekly pay for the duration of the emergency or until otherwise discontinued.

They are subject, however, to the annual limitation: their aggregate basic and premium pay cannot in any calendar year exceed the maximum rate payable for GS-15 step 10 in effect at the end of the year in their pay locality.

Higher HQ have taken an open stance on the scope of work covered by the waiver rather than their earliest guidance that implied only direct recovery, support, and response work. The waiver does not affect activity funding levels.

Environmental Law Focus

Environmental Emergency Provisions

As a result of the World Trade Center and the Pentagon attacks, many AMC installations are facing Force Protection and other mission requirements that may be impacted by environmental statutes and regulations.

In the vast majority of cases, we should be able to simultaneously meet these new mission requirements and comply with applicable environmental regulations.

However, it should be noted that most of the major environmental laws have emergency provisions. Of course, these provisions require extraordinary circumstances to justify requesting an emergency exemption.

The attached information paper was prepared by the Air Force Environmental Law community and outlines these various emergency provisions.

If you have any questions, please contact **Stan Citron**, DSN 767-8043 (Enclosure 9).

USAEC Guidance Documents

Below is a partial list of USAEC-developed guidance/training packages for the field. If you see something you would like to see, AEC will be glad to provide it to you. You could also visit the AEC Website at www.aec.army.mil and click on "publications". This would provide you many more examples—but not all were developed by AEC.

Restoration:

--U.S. Environmental Restoration Guidance Library (on CD May 2001).

Compliance:

--Closure/Post Closure Guidance for RCRA Open Burning and Open Detonation Units (CD March 2001)

--NEPA Manuals (CD Feb 2000)

Conservation:

--Army Alternate Procedures to Section 106 of Historic Preservation Act (Fed Reg July 2001)

Pollution Prevention:

--NEPA Manual for Material Acquisition (Notebook Nov 2000)

EPA Reuse Assessment Guide

The reasonably anticipated future land use is a critical part of the CERCLA cleanup process.

The reasonably anticipated future land use assumptions play a critical role in developing the baseline risk assessment and selection of the appropriate response action.

The EPA has developed which conveys a concise and practical approach to addressing future land use issues.

You are encouraged to share this information with you local Installation Restoration Program manager.

The EPA Reuse Assessment Guide is available at <http://www.epa.gov/superfund/resources/reusefinal.pdf>.

ELD Bulletin

ELD Bulletin for August 2001 is enclosed for you. (Enclosure 10)

To All AMC Ethic Counsel: The Newsletter Needs Your Assistance

Bob Garfield is the new AMC Ethics Team Leader. He is settling in as we go to press and actually will have a working computer soon.

Bob will continue the active use of the Ethics Counsel joint e-mail list to provide timely information to you.

We ask that each AMC Ethics Counsel participate in sharing the information you provide to your clients and commanders--and to submit items to the bi-monthly Newsletter.

Thanks.

Damage to Rental Vehicles While on TDY

Pamela McArthur, DSN 992-4760, provides an excellent paper intended to educate clients and the workforce with respect to damage to rental vehicles while you are on TDY.

Hope this does not happen to you.

But, if it does this will tell you what to do. The paper is geared to the Ft. Monmouth community, but can be tailored for your installation and command. (Enclosure 11).

The Lexis Corner--October 2001

Enhancements to LexisNexis' @ www.lexis.com:

Powerful new enhancements have been added to lexis.com to eliminate steps in the research process, saving you time and increasing your productivity. These enhancements include:

Get a Document

Retrieve the right document by citation quickly and easily with one simple function. No need to choose between LEXSEE" and LEXSTAT". In addition, use "Citation Formats" to display a single list of acceptable citation formats for getting or Shepardizing' documents.

Tagged Documents

Document checkboxes are now available in ALL browse formats to mark documents for print/download/fax/email delivery. In addition to tagging for delivery, the tag feature can be used for FO-

CUS' searching as well. This enables you to utilize your answer set more effectively by eliminating the need to weed through documents you have already deemed irrelevant.

Document Page Count

New page count on the top right side of your screen estimates the number of pages in any document. This allows you to anticipate delivery volume before printing large documents. Lexis.com also gives you the ability to print pinpoint pages or a range of pages from a selected document.

Streamlined Document Delivery Options

The ability to select all delivery options from a single page makes it easier to locate the most frequently used options and provides flexibility in delivery. Documents can quickly be downloaded to Microsoft Word, WordPerfect, or Adobe PDF. Remember

that dual column print is available for case law.

Power Navigation Bar

Whether using Internet Explorer or Netscape, don't forget about the navigation bar located at the bottom of your browser screen. This includes:

Term Browse--Rapidly review documents by jumping to highlighted key search terms within the document.

Document Browse--Quickly move to a specific document by entering a document number.

Star Pagination--Review documents in the reporter pagination of choice by selecting a specific reporter and/or page numbers to navigate easily within the document.

Explore--Navigate through a document quickly by linking to a specific section (i.e., case summary, disposition, opinion, dissent, etc.) (Enclosure 12)

Faces In The Firm

Departures

HQ AMC

Bill Medsger has been appointed to the Senior Executive Service as a member of the Office of General Counsel, National Imaging and Mapping Agency,

AMCOM

Claudia Klus retired on 30 September 2001 after 38 years of government service. She was awarded the Department of the Army Superior Civilian Service Award at a luncheon given in her honor on 20 September 2001. Claudia has served in several positions in the Legal Office since she first joined the office as secretary to the Chief Counsel in 1972.

Births

AMCOM

Rachel Howard, Acquisition Law Division, and her husband have a new baby son. Griffin Matthew During was born on 2 August and joins two big sisters.

Promotions

AMCOM

Sharon R. Hill, has been promoted to Chief, General Law/Intellectual Property Law Division. This is the position that was formerly held by Robert H. Garfield, who recently transferred to Office of Command Counsel, AMC.

CCAD

O. Carlos Lovell was recently selected as the Depot Chief Counsel at Corpus Christi Army Depot.

50 Years of Government Service

Winslow L. Hill, AMCOM Patent Advisor, completed 50 years of government service on 26 August. At a ceremony chaired by the AMCOM CG Mr. Hill received a four-star note, and an AMC Commander's coin.

Reorganization

HQ AMC

Business Law Division

Business Law Branch Chief (Supervisory): **Dave Harrington**

Protest Law Branch Chief (Supervisory): **Vera Meza**

Information Technology/Intellectual Property Branch: **Lisa Simon**

Assistant Command Counsel for International Affairs and Acquisition: **Craig Hodge**

These leaders will report directly to the Deputy Command Counsel, **Nick Femino**.

ARL

Effective 1 October 2001, the ARL Office³ will consolidate two positions previously assigned to other ARL organizations. The first new member to the ARL Counsel "family" is **Mark H. Rutter**. He will stay stationed at ARL's Research Triangle Park (RTP) site. The second new member is **Tina L. Dempsey**. She will stay stationed at ARL's NASA-Langley site and continue her duties as Paralegal Specialist primarily carrying out patent functions.

Subject: Message from the Secretary of Defense to America's Veterans

UNCLASSIFIED

Subject: Message from the Secretary of Defense to America's Veterans

As the men and women who have fought America's wars, you-more than all others-understand what the September 11th attack on freedom and democracy means for the days ahead.

More than simple acts of terrorism by radical or unbalanced individuals, this was an attack on our way of life, our country, our home.

In a recent message to U.S. armed forces here and abroad, I spoke of the memorable moments that have marked all great crises throughout our history, images that live forever in our hearts and in our minds.

Not surprisingly, we've seen many such moments during this crisis as well-moments of remarkable courage and selflessness; moments of fierce patriotism and pride:

Policemen and firefighters working night and day, with no thought for themselves; men, women and children giving blood until the banks are overflowing; businesses and corporations donating coffee, food and water to sustain those who would not stop working; chaplains counseling distraught families; friends and total strangers reaching out in loving gestures of human support.

And everywhere-the American flag, on buses and taxicabs, in windows and over doorways, as armbands, on jackets and hats, and most especially, waving in glorious defiance above the smoking and twisted wreckage our enemies have wrought. One such flag, unfurled by firefighters, proudly hangs huge and proud near the gash in the Pentagon wall.

But I also warned that more-much more-will be asked of Americans in the weeks and months ahead.

We face well-organized and sophisticated enemies, made all the more powerful by the terror they are so willing to unleash. Now that terror has been brought to our door, we owe it to ourselves and-as the president has said-to all future generations, to stop it, eliminate it and destroy it at its core.

Today, all Americans are united in anguish and anger. But we must also be united in purpose and in will.

While the immediate task of vanquishing freedom's enemies will fall to our military men and women, all of us-particularly those like you who understand the price of freedom-will be called upon to strengthen our national resolve.

And so, as we ask God's tender mercies on all those who have fallen, we ask also for His guidance and protection for all of us who remain to finish the task now before us.

I thank the same God for America's veterans-those of you who made us free

and kept us free. I thank God for all you have done, and for all I know you will do again, to support peace and final victory.

God bless you, and God bless America.

Donald H. Rumsfeld

The term "changed utterly has been used often in editorials and commentaries in the last several says.
The words formed the framework of a poem by WB Yeats Easter 1916--William Butler Yeats

I

I have met them at close of day
Coming with vivid faces
From counter or desk among grey
Eighteenth-century houses.
I have passed with a nod of the head
Or polite meaningless words,
Or have lingered awhile and said
Polite meaningless words,
And thought before I had done
Of a mocking tale or a gibe
To please a companion
Around the fire at the club,
Being certain that they and I
But lived where motley is worn:
All changed, changed utterly:
A terrible beauty is born.

II

That woman's days were spent
In ignorant good will,
Her nights in argument
Until her voice grew shrill.
What voice more sweet than hers
When young and beautiful,
She rode to harriers?
This man had kept a school
And rode our winged horse.
This other his helper and friend
Was coming into his force;
He might have won fame in the end,
So sensitive his nature seemed,
So daring and sweet his thought.
This other man I had dreamed
A drunken, vain-glorious lout.
He had done most bitter wrong
To some who are near my heart,
Yet I number him in the song;
He, too, has resigned his part
In the casual comedy;
He, too, has been changed in his turn,
Transformed utterly:
A terrible beauty is born.

III

Hearts with one purpose alone
Through summer and winter, seem
Enchanted to a stone
To trouble the living stream.
The horse that comes from the road,
The rider, the birds that range
From cloud to tumbling cloud,
Minute by minute change.
A shadow of cloud on the stream
Changes minute by minute;
A horse-hoof slides on the brim;
And a horse plashes within it
Where long-legged moor-hens dive
And hens to moor-cocks call.
Minute by minute they live:
The stone's in the midst of all.

IV

Too long a sacrifice
Can make a stone of the heart.
O when may it suffice?
That is heaven's part, our part
To murmur name upon name,
As a mother names her child
When sleep at last has come
On limbs that had run wild.
What is it but nightfall?
No, no, not night but death.
Was it needless death after all?
For England may keep faith
For all that is done and said.
We know their dream; enough
To know they dreamed and are dead.
And what if excess of love
Bewildered them till they died?
I write it out in a verse --
MacDonagh and MacBride
And Connolly and Pearse
Now and in time to be,
Wherever green is worn,
Are changed, changed utterly:
A terrible beauty is born.

Role of the Source Selection Authority in the A-76 Process

1. As an A-76 study, which uses “best as value” procedures, study approaches the cost comparison stage, it is important to consider the role of the Source Selection Authority (SSA) after the selection of the successful private sector offeror and prior to the cost comparison between the successful private sector offeror and the Government’s in-house offer. Specifically, recent rulings by the General Accounting Office (GAO) and the United States Court of Federal Claims have focused on the importance of the analysis the SSA must conduct in order to determine whether the “level of performance and performance quality” outlined in the private sector proposal equates to that of the in-house offer.
2. There have been two recent decisions, one by the GAO and one by the United States Court of Federal Claims that provide additional guidance and clarification as to the role of the SSA and the SSEB in this regard.
3. The GAO’s decision in BAE Systems, B-287189; B-287189.2, May 14, 2001, appears to require the following:
 - a) The SSA must review every “strength” identified in the private sector proposal and make a determination whether it can be characterized as “meaningful”.
 - a) If a private sector strength is meaningful, then the SSA must ensure that the Government’s in-house offer includes the same level of performance and performance quality. If it does not, then the in-house offer must be revised.
 - a) If an identified strength is found not to be meaningful, then a record should be created documenting that the strength was considered and determined to be “not meaningful.” (It should be noted, however, that the GAO has provided no criteria for determining “meaningfulness”. If a feature of a private sector proposal was attractive enough to warrant its identification as a “strength” by the evaluators, it might be concluded that it is, by definition, “meaningful”. Nevertheless, the BAE decision does imply that a “non-meaningful” finding is possible.)
 - a) Although the scenario is not specifically addressed in the BAE decision, it appears clear that if the in-house offer cannot under any circumstances meet the same level of performance, then the private sector competitor must be allowed to revise its proposal so that it meets only the lesser level of performance called out by the PWS. (In the event that transpires, we need to consider whether this would also require us to re-open the evaluation of the private sector proposals to ensure that no unsuccessful private sector competitor was prejudiced.)

- a) If, during the course of this review, it comes to the attention of the SSA that the in-house offer does not satisfy the minimum PWS requirements (despite the fact that it has been certified by AAA), “that deficiency need(s) to be resolved before the agency could proceed to the public/private cost comparison.” The in-house offer may not be thrown out because of this shortcoming, however. Rather, it must be revised so as to meet the minimum PWS requirements. If that is impossible, then those requirements must be relaxed and the private sector competitor must be allowed to revise its proposal accordingly. (As mentioned in paragraph “d”, above, this situation might also require that the unsuccessful private sector proposals be re-opened.)

4. In Rust Constructors, Inc, v. The United States, decided 31 May 2001, the United States Court of Federal Claims made it absolutely clear that the “level of performance” review is completely distinct from the source selection evaluation that had been conducted between the private sector competitors. In that case, the Court rejected an unsuccessful private sector argument that in conducting an A-76 study the Government had “erred by failing to conduct a “best value analysis” when it compared its proposal to the government’s MEO.” In denying the unsuccessful offeror’s motion for summary judgment the Court held that:

Plaintiff contends that the evaluation of the government’s price failed to consider any elements of “best value” as required by the Solicitation. The Corps, however, was not required to determine whether Rust’s proposal or the MEO’s proposal offered the best value to the government. OMB Circular A-76 does not require the government to perform a best value analysis when comparing the performance of a commercial contractor to the government’s in-house staff. OMB Circular A-76 states that the determination of who will do the work is based upon a “comparison of the cost of contracting and the cost of in-house performance.” OMB Circular A-76, Para. 5(a).”

The Court also held that “(t)he Solicitation did not require the government to perform an analysis to determine whether the plaintiff’s proposal or the MEO represents the best value to the government. The Solicitation required that the choice be determined upon the basis of cost. Therefore, defendant’s failure to perform a best value comparison between Rust and the MEO did not violate applicable law, regulation or procedure and hence, does not support a basis for awarding plaintiff a permanent injunction.”

5. The Rust Constructors, Inc., v. The United States Court provides a good description of the SSA’s responsibilities after the private sector competitor has been selected, as follows:

After plaintiff was identified as the successful offeror, the Source Selection Evaluation Board (SSEB) compared the technical section of Plaintiff’s proposal

with the government's Technical Performance Plan. See AR at 36. Michael Whitacre, the SSEB Chairman, concluded that both organizations appear "capable of delivering quality service as defined by the technical requirements" and that each had proposed an equivalent level of work. See AR at 36. The Source Selection Authority, Larry M. Brom, confirmed this conclusion based upon his independent determination that "[Rust's] proposal does not exceed the performance or performance quality requirements of the solicitation or the [Technical Performance Plan]." AR at 36.

6. The Court held that the successful offeror must demonstrate that the procurement official's decision that the MEO did offer the same level of performance and performance quality as the successful private sector offeror "lacked a rational basis." The Court held that Contracting Officers are entitled to exercise discretion upon a broad range of issues, and that a reviewing court is required to "sustain an agency action evincing rational reasoning and consideration of relevant factors."

7. Based on the above ruling, it is clear that the comparison of the in-house offer with the successful private sector offer is an increasingly important and complex part of the A-76 process. The SSA must be satisfied that the in-house offer and the successful private sector offer are offering the same level of performance and performance quality before the cost comparison can take place. In addition, if in the course of this comparison the SSA or the SSEB members supporting him/her become aware that the in-house offer does not satisfy the minimum requirements of the PWS, then the deficiencies in the in-house offer must be resolved prior to the cost comparison.

8. The Point of Contact for this subject in the CECOM Legal Office is Mr. James Scuro, (732) 532-9801; DSN 992-9801.

KATHRYN T. H. SZYMANSKI
Chief Counsel

Personal Services Contracts and the A-76 Process

1. The Office of Management and Budget (OMB) Circular No. A-76, dated 4 August 1983, established Federal policy regarding the performance of commercial activities. The Circular provides that the Federal Government is to rely on commercially available sources to provide commercial products and services if it is determined, after a cost comparison of the cost of contracting and the cost of in-house performance, that the product or service can be procured more economically from a commercial source.
2. FAR 37.104(b), however, prohibits Government agencies from awarding personal services contracts unless specifically authorized by statute to do so such as contracts for architect-engineer services authorized by 40 U.S.C. 541-544.
3. The question that arises is whether the policy set forth in OMB Circular A-76 is consistent with the prohibition against contracts for personal services at FAR 37.104(b).
4. OMB Circular No. A-76 addresses the prohibition against contracting for personal services at paragraph 7(c)(5), where it states that the Circular and Circular No. A-76 Revised Supplemental Handbook (RSH) do not:

Authorize contracts, which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. However, limited and necessary interaction between Government employees and contractor employees, particularly during the transition period of conversion to contract, does not establish an employer-employee relationship.

5. Department of the Army Pamphlet 5-20 (DA Pam), dated 31 July 1998, specifically excludes contracts for personal services from inclusion in an A-76 study. At paragraph 6-9, DA Pam 5-20 states that:

In reviewing the PWS you forward with the purchase request, the DOC [Directorate of Contracting or Director of Contracting] will determine if it contains any personal services. Personal service contracts are strictly prohibited unless specifically authorized by law. A personal services contract, by its expressed terms or how it is administered makes contractor personnel appear to be government employees. This happens when it appears that contractor personnel

are subject to relatively close and continuous government supervision. Your DOC representative will advise you to either omit those PWS tasks identified as personal services, or rewrite the task descriptions to omit any personal service-type references.

6. The A-76 process cannot, therefore, be used as a vehicle to circumvent the prohibition against awarding contracts for personal services. The next question is what is the basis for the DOC to determine whether or not a PWS for an A-76 study includes requirements for personal services.

7. The guidance set forth in OMB Circular No. A-76 and the DA Pam is consistent with the definition of personal and nonpersonal services set forth at FAR 37.101- Definitions. A personal services contract is defined at FAR 37.101 as “a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees (see 37.104).” This definition of a personal services contract is also similar to that set forth in Army Regulation (AR) 5-20, Commercial Activities Program, dated 1 October 1997, which defines a personal services contract as one which “by its expressed terms or how it’s administered, makes contractor personnel appear to be government employees. This happens when it appears that contractor personnel are subject to relatively close and continuous government supervision.”

8. A nonpersonal services contract is defined at FAR 37.101 as “a contract under which the personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.”

9. Other than providing definitions as to what constitutes personal and nonpersonal services, however, the OMB Circular, RSH, AR and DA Pam provide no additional guidance to assist the DOC in determining if an A-76 study could result in a prohibited personal services contract.

10. FAR 37.103 – “Contracting officer responsibility”, states that it is the contracting officer’s responsibility to determine if the proposed services are for a personal or nonpersonal services contract using the definitions in FAR 37.101 and the guidelines in FAR 37.104. However, as previously discussed, in an A-76 study, DA Pam 5-20 states that it is the DOC’s responsibility to determine if personal services are included in the PWS for the A-76 study.

11. The only guidelines available to the DOC are set forth in Part 37 of the FAR. FAR 37.104 - Personal services contracts, provides that an employer-employee relationship under a service contract occurs when, as a result of (i) the contract’s terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee. The example given at FAR 37.104 is that giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor into a Government employee.

12. According to FAR 37.104 (c) (2), the determination as to whether a service being provided by a contractor is personal or nonpersonal is based on the facts and circumstances of each situation. The key question is “will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?”

13. FAR 37.104 (d) sets forth the following “descriptive elements” that should be used as a guide in assessing whether or not a proposed contract is personal in nature:

1. Performance on site.
1. Principal tools and equipment furnished by the Government.
1. Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
1. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
1. The need for the type of service provided can reasonably be expected to last beyond 1 year. The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to –
 - (i) Adequately protect the Government’s interest;
 - (ii) Retain control of the function involved;or
 - (i) Retain full personal responsibility for the functions supported in a duly authorized Federal officer or employee.

14. Further guidance can be found in General Accounting Office (GAO) decisions that address what constitutes personal services contracts.

15. In Americorp, B-231644, Oct. 6, 1988 88-2 CPD 331, the GAO denied a protest in which the protestor alleged that the Department of the Navy was attempting to convert a nonpersonal services contract into a personal services contract in violation of FAR 37.104(b). In denying the protest the GAO held that:

We have carefully examined the protestor’s allegations in regard to the specific provisions of the RFP and we find no basis to conclude that the Navy is attempting to procure an unauthorized personal service contract. In order for such a situation to occur, the contract must provide for detailed government direction or

supervision of the contractor's employees. See *McGregor FSC, Inc.*, B-224634, Nov. 7, 1986, 86-2 CPD 537.

FAR 37.104 (c) (2) states that the key question is always whether the government will exercise continuous supervision and control over the contractor personnel performing the contract. Here, the RFP provides that the contractor shall monitor employees and ensure that employees meet the requirements of the RFP and that the Family Advocacy Counselor/Program Coordinator, not the government, has the duty and responsibility of overseeing employees and coordinating and carrying out the agency's programs or services under the RFP. Therefore, we find no basis to conclude that the Navy is attempting to award an unauthorized personal services contract.

16. In *W. B. Jolley*, B-234146, March 31, 1989, 89-1 CPD 339, the GAO held that an agency contract for aircraft maintenance services did not create an illegal employer-employee relationship where the services to be provided were not subject to relatively continuous Government supervision and control and adequate direction was provided to the contractor through detailed written specifications contained in the solicitation. In this case the solicitation specifically stated that the services to be provided were nonpersonal services and that no employer-employee relationship existed. The solicitation also provided that the contractor was to provide management and supervisory functions.

The GAO held that:

Each contract arrangement is judged in light of its particular circumstances. *Monarch Enterprises, Inc.*, B-233303 et al., Mar. 2, 1989, 89-1 CPD. While the FAR enumerates various factors to be considered in making this judgment, including whether performance is on site and whether principal tools are furnished by the government, it provides that the "key question" in determining whether a contract is for personal services is "Will the government exercise relatively continuous supervision and control over the contractor personal performing the contract." FAR 37.104 (c) (2) (FAC 84-40).

In denying the protest the GAO also determined that:

First, many essential characteristics of the employer-employee relationship are not present here in the relationship between the government and contractor employees. Factors such as the contractor's right to hire and fire employees, to grant or deny individual leave requests, and to reassign employees negate the existence of a personal services contract as defined in the FAR. Second, and most importantly, our review of the language contained in the IFB indicates that the contractor is solely responsible for the supervision, management, and inspections of its employees' work under the contract. Specifically, the terms of the IFB provide that contractor employees, not the government, have the duty of

overseeing employees and coordinating performance with the contracting officer's representative. See *Americorp*, B-231644, Oct. 6, 1988, 88-2 CPD 331. Also, our review indicates that adequate direction is provided to the contractor through detailed written specifications contained in the solicitation. We therefore do not find that the government will exercise relatively continuous supervision and control over the contractor personnel performing the contract.

17. The A-76 process does not permit the awarding of personal services contracts. If an A-76 study is to be conducted, the DOC must review the PWS to be issued to determine if it contains any personal services requirements. If the PWS does contain personal services requirements, they must be deleted from the PWS. In determining if a PWS to be used in an A-76 study contains personal services, the DOC should follow the guidance set forth in Part 37 of the FAR and the criteria applied by the GAO in determining if a solicitation is for personal or nonpersonal services. Therefore, it appears that contracting for administrative or secretarial services traditionally provided by the Legal Office support staff would be difficult since obtaining those services from contractor personnel without relatively continuous supervision does not appear feasible.

18. The Point of Contact for this subject in the CECOM Legal Office is Mr. James Scuro (732) 532-9801, DSN 992-9801.

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Contract Litigation – Not Quite Gone, and Shouldn't be Forgotten!

Litigation between the Government and industry in the current defense acquisition environment is comparatively uncommon. The increased use of performance-based contracting, Alternative Dispute Resolution techniques and Partnering, and a general decrease in the industrial base have resulted in the reduction of litigation. The number of Government contract disputes between the Army and industry which have culminated in law suits has drastically decreased over the last ten years. This very positive development has a down-side, however.

When a dispute does end up in litigation, the Government personnel involved may feel that they are venturing into what seems like uncharted waters and the unfamiliarity of the process can be daunting. However, the Command has been a party to litigation on many occasions before with a great deal of success. The attorneys in the CECOM Legal Office are experienced subject matter experts in the area of contract litigation and are always ready to ensure that the Army's interests are protected. A short outline of what to expect follows:

The process starts when the Contracting Officer issues a final decision on a contractual matter in dispute in accordance with FAR 33.211. The contractor then has two options as to where to challenge the decision. It may appeal to the Armed Services Board of Contract Appeals (ASBCA) within 90 days, or file a complaint in the United States Court of Federal Claims (Claims Court) within 12 months. In cases before the Claims Court, CECOM counsel works with the U.S. Department of Justice (DOJ). In the ASBCA forum, CECOM counsel works with the Judge Advocate General's Office, Contract Appeals Division (CAD).

The litigation is commenced by the contractor with the filing of either a "Complaint" (if the case is at the Claims Court) or a "Notice of Appeal" followed by a Complaint (if the action is before the ASBCA). The Complaint is the document that outlines, paragraph by paragraph, the facts as the contractor would like the Judge to believe them to be and concludes with a request for remedy.

At this point, either CAD or DOJ have no idea what the case is actually about, beyond the papers filed by the contractor. It is up to the CECOM Team involved in the action (which usually includes the Contracting Officer and Specialist, the Attorney, the responsible technical personnel and/or the Government's auditors) to educate CAD or DOJ counsel, and that is accomplished largely through the compilation and distribution of documents. If the Complaint is filed with the ASBCA, two files are prepared and sent to CAD: the "Rule 4 File" (so called because it comes from Rule 4 of the ASBCA Rules) containing all documents pertinent to the issue in litigation, and the Trial Attorney's Litigation File (TALF), containing witness information, privileged documents, a legal memorandum and the Contracting Officer's analysis. The TALF contains any documentation relevant to the case which we do *not* want shared with the contractor. Copies of the Rule 4 are sent to the ASBCA, the contractor and CAD, while the

TALF is sent only to CAD. *The TALF must never be sent to either the ASBCA or the contractor!* If the case is filed in the Claims Court, the same information is sent to DOJ in the form of a Litigation Report in accordance with AR 27-40.

As can be imagined, these cases can involve thousands of documents and document management can be a burden. Still, it is essential that the preparation of the Rule 4 File and TALF or Litigation Report be completed correctly and rapidly if the Army's interests are to be protected. The Contracting Officer took a stand on the dispute in issuing his or her final decision and this step is key to making that decision withstand intense scrutiny. The CECOM Legal Office will ensure that this critical material is prepared correctly and in accordance with all requirements of the ASBCA or Claims Court.

Besides the Rule 4, TALF and/or Litigation Report mentioned above, the Government must prepare and file an "Answer" to the contractor's Complaint. This is prepared in coordination with either CAD or DOJ and states the Army's side of the story in response to the one outlined in the contractor's Complaint. (Both the Complaint and Answer are referred to as "Pleadings".) It is a paragraph by paragraph reply to the allegations made by the contractor and contains a detailed statement of how the Government sees the facts at issue. It is filed with the ASBCA or Claims Court and is provided to (or "served on") the contractor and its attorney.

Once the Pleadings are filed and served, the case moves into the "Discovery" phase. Discovery is the process by which each side gets to learn about the evidence supporting their adversary's position, thereby determining the strengths and weaknesses of each side of the case. Contrary to what is depicted on television, litigation, if pursued correctly, should not entail too many surprises. Each side may serve extensive questions on the other seeking to obtain copies of evidence, names of witnesses, and the details of their case, referred to as "Interrogatories". Witnesses for a party can be required to answer questions posed by the opposing counsel under oath and on the record transcribed as a "Deposition". The Discovery process is usually the longest portion of any litigation and can take years to complete. The idea behind Discovery is that, once both parties fully understand the relative merits of their respective cases, it is more likely that the dispute will settle without having to go to trial. In the event that the matter does proceed to trial, the case will go more smoothly because each side has a good idea of the evidence supporting their opponent's case.

The CECOM Team is heavily involved in the Discovery process, and can expect to spend a great deal of time working with the Legal Office in preparing or answering Interrogatories, and participating as witnesses or technical experts in Depositions.

The case will eventually culminate (assuming it is not settled beforehand) in a Trial. If the action is before the Claims Court, the Trial will be held in Washington, D.C. If pending at the ASBCA, it could be held at some local site, or at the ASBCA Headquarters in Falls Church, VA. Unlike the Claims Court, the ASBCA will often go on the road to a location near either the Agency or the contractor. CECOM personnel will almost certainly be called upon as witnesses to give

testimony in the case, and the Legal Office will work closely with CAD or DOJ to see that witnesses in support of the Government's position are fully prepared, know what to expect, and can tell their piece of the Army's side of the story effectively.

Litigation is demanding, time-consuming and expensive. Although some form of Alternative Dispute Resolution should be considered by the CECOM Team in all cases, when a case unavoidably goes in the direction of formal litigation, the Legal Office has the expertise and experience to defend the Contracting Officer's decision all the way through the process.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Cruz Febres-Ferrer, (732) 532-9807; DSN 992-9807.

KATHRYN T. H. SZYMANSKI
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DoD Labor Relations Guidance
National Emergency
October 9, 2001

Background:

On September 14, 2001, President Bush issued Proclamation 7463, Declaration of National Emergency by Reason of Certain Terrorists Attacks. This proclamation states that “a national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.” The President declared that the national emergency has existed since September 11, 2001, and has exercised authorities under various statutes.

Questions have been raised concerning what impact Proclamation 7463 has on our statutory obligations under 5 USC Chapter 71, the Federal Service Labor-Management Relations Statute (Statute). This guidance is intended to address the most commonly encountered questions on this matter.

Questions and Answers:

- 1) Does Proclamation 7463 override the requirements of the Federal Service Labor-Management Relations Statute?

No. Proclamation 7463 **does not** override your statutory obligations under the Statute. While the Proclamation is intended to provide the President certain flexibilities and authorities, it does not relieve you of any obligations you have under the Statute. The Statute continues to apply to the Department of Defense during this national emergency.

- 2) Since there is a national emergency and management has the right under 5 USC 7106(a)(2)(D) to take whatever actions may be necessary to carry out the agency mission during emergencies, what are our obligations concerning changes to conditions of employment?

As a general rule, the Authority has held that prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. See 55 FLRA 848, 852.

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In the case of emergencies under 5 USC 7106(a)(2)(D), the Authority has recognized that there may be instances where the agency may implement a change due to an emergency situation and bargain with the union on a post-implementation basis. See 29 FLRA 307, 325. With this in mind, there may be an emergency that requires an immediate response from the agency and the response will affect conditions of employment of bargaining unit members. In this case, you would advise the union of the immediate changes being made and offer to conduct post-implementation bargaining with the union over these changes to the extent that conditions of employment are affected. Any agreement you reach with your union under these circumstances should be applied retroactively, if practical.

However, you must *be careful* when considering making unilateral changes under these conditions. We anticipate that these circumstances will be rare and we note that it is rare that the Authority has accepted this defense from an agency when making unilateral changes. Also, the mere fact that the President has declared a national emergency is **NOT** in itself a basis for asserting that any or all unilateral changes to conditions of employment are now necessary due to an emergency within the meaning of 5 USC 7106(a)(2)(D). In each instance, you should determine whether the change being considered concerns an emergency that necessitates immediate action. If an unfair labor practice charge is filed against you for making unilateral changes due to an emergency, you should be prepared to establish that an “overriding exigency” existed that required an immediate response.

In 43 FLRA 1565, the Authority rejected the agency’s contention that Desert Shield constituted an emergency situation that would allow it to unilaterally implement a restriction on leave usage without giving notice to the exclusive representative and giving it an opportunity to bargain. In this decision, the Authority stated that it previously ruled that an agency, to avoid a bargaining obligation, must do more than make a bare claim that certain actions cannot be taken because of a military operation.

The more likely situations during an emergency are those situations where there is an exigency that does not require an immediate response from the agency, but does require a response from the agency in the near future that will affect conditions of employment. Under these circumstances, there should be adequate time to notify the union about the impending change in conditions of employment and an opportunity to bargain. However, there may not be adequate

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time to complete the bargaining process before it is necessary to implement the change. In this situation, the agency determines that a unilateral change, before the bargaining process is completed, is necessary for the functioning of the agency.

A party asserting this defense must establish, with evidence, that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission. See 55 FLRA 892. A similar argument could be made when immediate changes are being made (as previously discussed) due to an "overriding exigency. The Authority uses the terms "overriding exigency" and "necessary functioning of the agency" interchangeably. See 55 FLRA 892 (where ALJ notes that for an agency to establish a change is for the necessary functioning of the agency, it requires "evidence that an overriding exigency existed which required immediate attention). See also 29 FLRA 734, 740-741.

Again, even when you implement the change for the necessary functioning of the agency, this does not relieve you entirely of your statutory obligations. You are still obligated to bargain with your union on a post-implementation basis. See 29 FLRA 307, 325. Any agreement you reach with your union under these circumstances should be applied retroactively, if practical.

- 3) In order to meet our mission requirements during this national emergency, we believe it may be necessary to terminate flexible and compressed work schedules. On what basis may we terminate such schedules for bargaining unit employees?

The Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Work Schedules Act) intends the establishment and termination of alternative work schedules to be fully negotiable, subject only to the provisions of the Work Schedules Act itself. See 52 FLRA 1265, 1293. Thus, management cannot assert a management right under the Statute as a basis for terminating an alternative work schedule.

The criteria for terminating an alternative work schedule is found at 5 USC 6131. Specifically, 5 USC 6131(a) states that "if the head of an agency finds that a particular flexible or compressed work schedule under this subchapter has had or would have an adverse agency impact, the agency shall promptly determine not to (1) establish such schedule; or (2) continue such schedule, if the schedule has already been established." 5 USC 6131(b) defines "adverse agency impact" to

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mean “(1) a reduction of the productivity of the agency; (2) a diminished level of services furnished to the public by the agency; or (3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).”

If you have an agreement with your union concerning alternative work schedules and wish to terminate the schedule, 5 USC 6131(c)(3)(A) requires you to reopen the agreement with your union to seek termination of the schedule involved. However, you should check your existing collective bargaining agreement to see whether it already gives management sufficient leeway to make adjustments required to accomplish the mission. If not, then you are required to negotiate with the union. If you reach impasse in bargaining with respect to terminating such schedules, the impasse shall be presented to the Federal Service Impasses Panel for resolution.

Under 5 USC 6131(c)(3), the Panel is required to take final action in favor of the agency determination if there is evidence that an alternative work schedule has caused adverse agency impact. The Panel has indicated that for an agency to establish adverse agency impact, it will be looking for certain information. The Panel encourages the agency to present information on the methodology used to collect the evidence to support its determination there is adverse agency impact. It is also expected, that the agency would rely on evidence from the time period where there is adverse agency impact, rather than on evidence collected after the fact. When productivity accomplishments of two time periods are being compared, to the greatest extent possible, such evidence should be presented in like units that permit a fair comparison. Finally, if cost is a factor being raised, the actual costs should be presented and the connection between the cost and the work schedule explained. See 97 FSIP 107.

- 4) We understand the requirements for terminating an alternative work schedule, but what if we are unable to complete this bargaining before it is necessary to terminate the alternative work schedule?

In these instances, you must establish that the delay caused by lengthy negotiations is impeding the agency’s ability to effectively and efficiently carry out its mission. As a result, you would be terminating the alternative work schedules for the necessary functioning of the agency before bargaining is completed. Although bargaining is not completed before you terminate the schedule, you should continue negotiations. Any agreement you reach with

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your union under these circumstances should be applied retroactively, if practical.

In one case, a union filed an unfair labor practice charge against the agency when it unilaterally terminated a compressed work schedule without bargaining. The agency argued that because the compressed work schedule was causing “substantial adverse effects on work at the Headquarters office, [which at the same time] was facing an increased workload, change of mission with the onset of Desert Shield, and a shortage of staff, there was an urgent and compelling need to correct this situation.” The Authority ruled that the agency failed to establish that the unilateral change was consistent with the necessary functioning of the agency. The agency was found to have committed an unfair labor practice and ordered to reestablish the previous compressed work schedule. See 44 FLRA 599.

The Panel has also noted that in cases where the Employer has already implemented its decision to terminate an alternative work schedule and the Panel determines the agency finding is not supported by the evidence, it will order the Employer to restore the affected employees to their prior schedules. See 97 FSIP 107.

- 5) If we anticipate that we may need to make changes in working conditions due to an overriding exigency or for the necessary functioning of the agency, would you recommend that we inform our union that we may be unable to complete bargaining on certain future changes in working conditions arising from this emergency or handle this on a case-by-case basis?

It depends. While informing the union of this possibility in advance keeps the lines of communication open with your union, you also do not want to give the impression that you do not expect to meet bargaining obligations in all cases. We recommend that you make a determination on a case-by-case basis whether to make such changes due to overriding exigencies or for the necessary functioning of the agency. Establishing this very tough standard before the Federal Labor Relations Authority will be challenging for individual cases of unilateral changes. It is very unlikely that we could successfully defend before the Authority a “blanket” determination that all unilateral changes in the near future are due to overriding exigencies or for the necessary functioning of the agency. In any case, we recommend that you always contact your union to make them aware of any changes you intend to make before you make such changes.

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You should advise them of the change to be made, how it is connected to operations resulting from the national emergency, when you will conduct post-implementation bargaining, and that any agreement you reach will be applied retroactively, if practical.

The bottom line is our labor unions have been cooperative during past emergencies. We expect this to continue, especially if management keeps the lines of communication open with its unions. We encourage you to keep these lines of communication open during this national emergency. We also encourage you to use informal methods of cooperation and communication during this time, such as partnership.

The US Supreme Court will be back in session Monday, October 1. Eleven employment law cases are already on the docket, and six of them are scheduled for oral argument. More cases may be added soon.

Here are short summaries of 11 cases.

For more information, including links to the decisions below:

- <http://www.lawmemo.com/emp/sum/courts/supreme/> .

Calendar of oral arguments:

- <http://www.lawmemo.com/emp/sum/courts/supreme/schedule.htm> .

Please re-distribute this email to anyone who is interested.

ERISA - Whether ERISA suits by fiduciaries against beneficiaries for reimbursement seek "equitable" relief.

MSPB - Use of other pending disciplinary actions to support penalty.

Arbitration - Can EEOC still obtain a remedy for the individual employee?

Constitutional question - DOT's race-conscious presumptions.

OSHA - Jurisdiction over off-shore barge.

Disability - The meaning of substantially limited.

Disability - Effect of seniority on right to reassignment.

Title VII - Continuing violation theory.

EEOC procedure - Does late verification of EEOC charge relate back?

FMLA - Requirement that employer designate leave and notify employee.

Constitutionality of 28 USC Section 1367(d) in 11th amendment case.

ERISA - Whether ERISA suits by fiduciaries against beneficiaries for reimbursement seek "equitable" relief. Oral argument October 1.

In *Great-West Life & Annuity v. Knudson* the Court will decide whether ERISA suits by fiduciaries against beneficiaries for reimbursement seek "equitable" rather than "legal" relief. If an ERISA plan makes payments for medical care on behalf of an injured beneficiary, and then the beneficiary settles a claim against those responsible for the injury, the ERISA fiduciary may seek reimbursement. If the fiduciary sues a beneficiary under 29 USC Section 1132(a)(3) seeking reimbursement, the claim must be for "equitable" rather than "legal" relief. Lower courts are split on whether such claims are legal or equitable.

MSPB - Use of other pending disciplinary actions to support penalty. Oral argument October 9.

In *United States Postal Service v. Gregory* the Court will decide whether other pending disciplinary actions may be considered in MSPB grievance proceedings. An employee was discharged from the postal service for allegedly overestimating her delivery time. The Merit Systems Protection Board (MSPB) denied her appeal on the ground that the discharge was justified by her prior disciplinary record, part of which was subject to then-pending administrative grievance proceedings. The Federal Circuit held that "as a matter of law, consideration may not be given to prior

disciplinary actions that are the subject of ongoing proceedings challenging their merits."

Arbitration - Can EEOC still obtain a remedy for the individual employee?
Oral argument October 10.

In EEOC v. Waffle House Inc the Court will decide whether a private arbitration agreement limits the EEOC's litigation remedies. If an individual employee has signed an agreement to arbitrate employment disputes, can the EEOC still obtain reinstatement and monetary damages on behalf of that employee? Lower courts are split on the issue.

Constitutional question - DOT's race-conscious presumptions. Oral argument October 31.

In Adarand Constructors v. Mineta the Court will decide whether the 10th Circuit correctly applied the "strict scrutiny" standard mandated by Adarand Constructors v. Pena, 515 US 227 (1995). Adarand submitted the low bid for a federal government subcontract. The prime contractor awarded the subcontract to a certified small business owned and controlled by socially and economically disadvantaged individuals - because the government provided a financial incentive for doing so. Adarand sued claiming that the use of a race-conscious presumption in determining who is a socially and economically disadvantaged individual violated its 5th amendment equal protection rights. The 10th Circuit found that there was a compelling governmental interest in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," and that the government's program was narrowly tailored.

OSHA - Jurisdiction over off-shore barge. Oral argument October 31.

In Chao v. Mallard Bay Drilling the Court will decide whether OSHA has jurisdiction over an oil drilling barge located within the territorial waters of Louisiana. The 5th Circuit held that the United States Coast Guard has exclusive jurisdiction over the regulation of working conditions of seamen aboard such vessels.

Disability - The meaning of substantially limited. Oral argument November 7.

In Toyota Motor Mfg v. Williams the Court will decide whether an employee is disabled because she was substantially limited in performing manual tasks. An employee had work-induced carpal tunnel syndrome. The 6th Circuit concluded that she was "substantially limited in performing manual tasks" because "the impairments of limbs are sufficiently severe to be like deformed limbs and such activities affect manual tasks associated with working, as well as manual tasks associated with recreation, household chores and living generally."

Disability - Effect of seniority on right to reassignment.

In US Airways v. Barnett the Court will decide whether seniority trumps a disabled employee's right to reassignment. Although the ADA provides that job reassignment is a potential method of reasonably accommodating an individual with a disability, courts are split on what to do when another employee has greater seniority rights. In this case the 9th Circuit held, "If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees."

Title VII - Continuing violation theory.

In National Railroad Passenger Corp v. Morgan the Court will review the "continuing violation" theory. Title VII has a 300 day statute of limitations. Conduct occurring earlier is often used as evidence solely for providing "background" or "context." The question in this case is whether the earlier conduct, assuming it is related to the later conduct, can create liability.

EEOC procedure - Does late verification of EEOC charge relate back?

In Edelman v. Lynchburg College the Court will decide whether an EEOC charge must be verified (signed under oath or affirmation) within the 300 days statute of limitations period, or whether an out-of-time verification relates back to an earlier unverified charge.

FMLA - Requirement that employer designate leave and notify employee.

In Ragsdale v. Wolverine Worldwide the Court will review the validity of a series of DOL regulations dealing with the Family and Medical Leave Act. The regulations provide that (a) the employer must designate leave as FMLA-qualifying and notify the employee of the designation, (b) the employer must designate leave as FMLA leave prospectively rather than retroactively, and (c) any leave taken prior to the notice cannot be counted as FMLA leave. The 8th Circuit held that the regulations are not a permissible interpretation of the statute, saying that the FMLA was not intended to require an employer to grant more than 12 weeks of leave.

Constitutionality of 28 USC Section 1367(d) in 11th amendment case.

In Raygor v. Regents of the University of Minnesota the Court will decide whether 28 USC Section 1367(d) is constitutional as applied in this case. Section 1367(d) tolls a state statute of limitations for claims asserted under federal supplemental jurisdiction while those claims are pending in federal court. Raygor's state and federal claims were dismissed from federal court because of the 11th amendment. His state court suit was filed late under the state statute of limitations, but Section 1367(d) would toll

the state limitation period while the state claim was pending in federal court. The Supreme Court of Minnesota held that applying Section 1367(d) in this case would be unconstitutional under the 11th amendment.

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POINT PAPER

SUBJECT: Deployment of Civilian Personnel

PURPOSE: To Provide the CG With an Overview of Army/AMC Policy on Deployment of Civilians

FACTS:

- Under existing DOD policies and procedures, management has the authority to direct and assign civilian employees so as to accomplish the DOD mission. The AMC policy is to implement the authority in a manner that will minimize the number of employees who must be involuntarily deployed.
- Civilians who serve in certain positions that are either located overseas or that are anticipated to be transferred overseas during a crisis situation are designated Emergency Essential (EE) employees. The positions are designated as EE to ensure the success of combat operations or to support combat essential systems during a military crisis, and cannot be converted to military slots because the positions require uninterrupted performance to provide immediate and continuing support for combat operations or combat essential systems. Employees that occupy EE positions are required to execute a Form 2365, "DOD Civilian Employee Overseas Emergency-Essential Position Agreement", in which these employees agree to accept certain conditions of employment arising out of crisis situations.
- Due to unforeseen circumstances or the exigencies of a particular military crisis, it may become necessary to identify additional positions as "EE". These are positions that are either located in an overseas area or to which an employee located in the United States would be sent on temporary duty or reassignment overseas. A civilian occupying a newly designated EE position will be requested to execute an EE agreement. It should be noted that all designated EE employees must meet certain physical and medical requirements prior to deployment.
- If the newly-designated EE employee declines to execute an EE agreement, but possesses special skills and expertise which, in management's view, renders it necessary to send that employee without execution of the EE agreement, the employee may be directed on involuntary temporary duty to the location where the skills are required. However, prior to invoking the authority to direct the deployment of a civilian, a search should be conducted to determine if military personnel are available to satisfy the requirement, or civilians on a voluntary basis.

Management may take appropriate administrative actions, to include separation from the federal service, against a civilian employee who refuses to perform such duties required of an EE designated employee.

BRIEFER: Kim Sawicki, GS-14, AMSEL-LG-A, ext. 21146.

REVIEWED/APPROVED BY:
KATHRYN T. H. SZYMANSKI
Chief Counsel

EXEMPTIONS/WAIVERS IN MAJOR ENVIRONMENTAL STATUTES

1. National Environmental Policy Act (NEPA)

Emergency Actions: This provision can be invoked when emergency circumstances outside the control of the Agency make it necessary to take an action with significant environmental impact without first complying with pertinent regulations. It requires that the action proponent consult with the Council on Environmental Quality (CEQ) regarding alternative arrangements. Requests for consultation must be submitted to CEQ as soon as the need is identified. The exemption only applies to those aspects of a proposal that must continue on an emergency basis, and only applies to Federal actions with significant environmental impacts. Lesser actions may be subject to agency NEPA procedures. Ordinarily the failure to plan properly does not establish an emergency. 40 CFR § 1506.11.

2. Clean Water Act (CWA)

Presidential Waiver: This provision requires that the action be in the paramount interest of the U.S. It exempts any effluent source, such as a pipe or a vessel, of any Federal agency from compliance with any requirement relating to such source unless they involve the requirements under 33 USC § 1316 (national standards of performance) or §1317 (toxic and pretreatment effluent standards). The waiver is applicable for one year only, but it can be renewed. Congress must be notified in January of waivers granted in the preceding year. 33 USC § 1323 (1251 to 1387).

3. Endangered Species Act (ESA)

National Security Exemption: This provision requires the Endangered Species Committee (committee composed of various Cabinet and sub-cabinet level officials) to exempt DOD from the prohibition against jeopardizing the continued existence of a listed species if the Secretary of Defense finds that an exemption is necessary for reasons of national security. Upon signing the ESA into law, President Carter stated that the Department of Defense should rely on this exemption “only in grave circumstances posing a clear and immediate threat to national security.” 16 USC § 1536(j).

4. Coastal Zone Management Act (CZMA)

Presidential Exemption: This provision requires that there be an appealable judgment, decree or order from a Federal court that a Federal agency action is not consistent to the maximum extent practicable with the enforceable policies of an approved state coastal zone management program. The Secretary of Commerce must certify that mediation will not likely result in

compliance and request that the President exempt from compliance those elements of the proposed action that a court has found to be inconsistent. The President must find that the exemption is in the paramount interest of the U.S. 16 USC § 1456(c)(1)(B).

5. National Historic Preservation Act (NHPA)

Emergency Undertakings: When a Federal agency head determines, under extraordinary circumstances, that there is an imminent threat to the national security such that an emergency action is necessary to the preservation of human life or property, and that such emergency actions would be impeded if the Federal Agency were to concurrently meet its historic preservation responsibilities, the Agency head may immediately waive all or part of its responsibilities under the NHPA for the period of the emergency. The Agency must notify the Secretary of Interior within 10 days of the waiver action. 36 CFR § 78.

6. Marine Mammal Protection Act (MMPA)

Does not contain a provision for waiver or exemption.

7. Noise Control Act

Presidential Exemption: Section 4 of the Noise Control Act authorizes the President to exempt federal agencies from noise control requirements “if he determines it to be in the paramount interest of the United States to do so”. The exemption is valid for not more than one year and notification to Congress is required. 42 U.S.C. § 4903(b).

8. Clean Air Act (CAA)

Presidential Exemption: Section 118 of the Clean Air Act authorizes the President to exempt federal agency sources from compliance with Clean Air Act requirements “if he determines it to be in the paramount interest of the United States to do so”. The exemption is valid for not more than one year and notification to Congress is required. This exemption does not apply to CAA § 411 new source review and special provisions apply to exemptions from CAA § 112 hazardous air pollutants. 42 U.S.C. § 7418(b). (See also CAA §110(f))

9. Resource Conservation and Recovery Act (RCRA)

Presidential Exemption: Section 6001 of the Solid Waste Disposal Act (SWDA) authorizes the President to exempt federal agencies from compliance with RCRA requirements “if he determines it to be in the paramount interest of the United States to do so.” A lack of appropriation cannot be the basis for an exemption unless the President specifically

requested such an appropriation and Congress failed to make it available. The exemption is valid for not more than one year, but the President may grant additional exemptions for periods not to exceed one year if he makes a new determination. The President must notify Congress of the exemption. 42 U.S.C. § 6961(a).

10. Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

EPA Administrator Exemption: Section 18 of FIFRA authorizes the EPA Administrator to exempt, at the Administrator's discretion, any Federal or State agency from compliance if "emergency conditions exist which require such exemption." 7 U.S.C. § 136p.

11. Toxic Substances Control Act (TSCA)

National Defense Waiver: Section 22 of TSCA requires the EPA Administrator to waive compliance with any TSCA provision upon a request and determination by the President that the requested waiver "is necessary in the interest of national defense." 15 U.S.C. § 2621.

12. Prevention of Pollution From Ships (APPS)

The requirements of this statute "do not apply during time of war or a declared national emergency." 33 U.S.C. § 1902(b)(2)(B).

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Retain Records for Power Generating Plants

LTC Rich Jaynes

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

Requirements Clarified For Clean-Up Orders

LTC David B. Howlett

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

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

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

² 42 U.S.C. §9604(e).

³ See 42 U.S.C. §9604(e)(5)(B)(i).

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

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

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

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

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

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

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

New Resource on Economic Benefit Available

LTC Rich Jaynes

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

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

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

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

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

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

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

ELD has asked the Air Force to have LTC Little's thesis added to its FLITE database.¹⁰ In the meantime, those interested in obtaining a copy of the thesis may do so by sending an email to LTC Little at Jacqueline.Little@hqda.army.mil. An abstract summarizing the thesis follows.

THESIS ABSTRACT

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

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

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

SUMMARY OF MAIN PROPOSITIONS SUPPORTING THESIS STATEMENT:

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

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

¹⁰ The environmental law section of FLITE is accessible via the Internet at <http://envlaw.jag.af.mil> and is available cost free to environmental legal specialists. ELD's point of contact for FLITE passwords is MAJ Liz Arnold at 703-696-1593, elizabeth.arnold@hqda.army.mil.

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

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

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

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

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

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

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

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

Unexploded Ordnance (UXO): An Explosive Issue?

LTC Lisa Schenck

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

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

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

Recently, the field received further Army guidance in the *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges* (“Management Principles”) (available at <http://www.dtic.mil/envirodod/UXO-Mgt-Principles.pdf>). In March 2000, the Deputy Under Secretary of Defense (Environmental Security) and EPA Assistant Administrator for Solid Waste and Emergency Response signed the Management Principles as an interim measure effective until DoD issues the final Range Rule. In August 2000, the Army's Assistant Chief of Staff for Installation Management and Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health)

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

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

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

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

Update on Punitive Fines and Federal Facilities

MAJ Elizabeth Arnold

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

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

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

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

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

Updated: 10 Aug 00

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

NOTES:

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

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

Central ELD Telephone: (703) 696-1230	FAX extension -2940
DSN 426-XXXX	Direct Lines & Voicemail (703) 696-XXXX
Address: 901 North Stuart Street, Suite 400, Arlington, VA 22203-1837	

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

Safe Drinking Water Act (SDWA)	LTC Jackie Little	1592	LTC Schenck
Safety	MAJ Liz Arnold	1593	
Toxic Substances Control Act (TSCA)	LTC Jackie Little	1592	LTC Schenck
Underground Storage Tanks (USTs)	LTC Jackie Little	1592	LTC Schenck
Water Rights	LTC Jackie Little	1592	LTC Schenck

Damage to Rental Cars While on TDY

Government travelers on temporary duty (TDY) often are authorized and provided a rental car to perform their official travel. On occasion, the rental cars are damaged, and the rental agency attempts to collect from the traveler for the damage. In the event that you are involved in such an incident, the following information will prove helpful.

First, remember to remain calm. Most people involved in an accident will panic, but bear in mind that the Military Traffic Management Command (MTMC) has negotiated a contract with many rental agencies whereby the rental agency will accept liability for damage to or loss of rental vehicles. Generally, under MTMC insurance coverage, neither you personally nor your personal insurance company is held liable for damages, even if you solely caused the accident.

Take initial steps to avoid insurance coverage problems. What steps can you take to avoid problems? First, choose your car rental agency wisely. To receive the MTMC insurance coverage benefit, you must ensure that you rent from a covered car rental agency. The MTMC contract only provides coverage with certain rental car agencies. You can pick up a list of those rental car providers at the Legal Services Branch in Building 677 on Wilson Avenue. (The list is also available online at www.mtmc.army.mil/travel/car/list.pdf) Subject to limitations, to include those discussed below, the MTMC contract provides rental insurance coverage for rental vehicles used for official business by U.S. military and civilian employees, Government contractors, most NATO military members and employees, and U.S. Government local national employees in some foreign countries. However, coverage is limited to the amount(s) claimed for

- (1) damage to or loss of the rental vehicle;
- (2) \$25,000 property damage to the property of third persons; and
- (3) \$100,000 per person and \$300,000 per incident for personal injury to third parties.

Next, be proactive in documenting your official travel status with the rental agency. To ensure coverage by the MTMC Contract, the traveler should authenticate his/her official travel status by presenting travel orders to the rental agency or by using a Government charge card. In addition, the traveler should note on the rental agreement any other authorized users. While not required by the MTMC Contract, these actions make clear to the rental agency that the MTMC Contract will apply to the rental. Note that the terms of the MTMC Contract supersede any individual rental agreement except where the Government agency rents under a special, promotional government, affinity, or discounted rental program.

While you are out on the road practice courteous, defensive driving habits – there is no substitute for safety on the highway. Remember that changes in traffic patterns may affect your arrival time, so don't wait until the last minute to start your trip. Always allot adequate time to reach your destination without having to rush or disregard applicable traffic rules, regulations and requirements. Everyone has a responsibility for highway safety. The insurance coverage does not represent a release from this responsibility. Accordingly, the MTMC coverage does not provide coverage for charges or damages stemming from (1) illegal activities or willful misconduct of the driver, (2) operation of the vehicle off-road or across international boundaries without authorization, or (3) damages stemming from pushing/towing another vehicle. In addition,

MTMC will not accept liability for traffic tickets, court costs or attorney's fees spent defending a traffic charge, or travel to the TDY site to defend against traffic charges.

If you are involved in an incident with a rental car, contact the nearest military installation claims office. The telephone number for the Fort Monmouth Claims Office is (732) 532-4371 or DSN 992-4371. You will need the following documents: (1) a copy of your TDY orders authorizing a rental car; (2) a copy of your itinerary/settlement voucher; (3) a copy of the rental contract; (4) a copy of a valid driver's license; (5) copies of all known police reports related to the accident; and (6) copies of all known witness statements, if available. The Claims Office will forward all of this paperwork to MTMC, which will in turn contact the rental agency directly and coordinate for repairs to rental vehicles or otherwise resolve the claim. You may refer the rental company to the Claims Office, and claims personnel will take over the matter once you have provided the requested information.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Pamela McArthur, (732) 532-4760, DSN 992-4760.

KATHRYN T. H. SZYMANSKI
Chief Counsel

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If you have any questions, contact Rachel Hankins, your LexisNexis Account Manager, at (202) 857-8258 or rachel.hankins@lexisnexis.com