

Enclosure 1

Summary of Senior ELS Workshop (1 November 2001)

1. Litigation Update

a. **Judgment Fund Availability (Carrie Greco)** – The judgment fund may be used to satisfy most judgments, DOJ compromise settlements (28 USC Section 2414), and some administrative awards/claims (e.g., FTCA claims over \$2500). Unless, the statutory authority provides otherwise, the judgment fund is available to pay attorney's fees. Attorney fees under RCRA, CAA, CWA, and SDWA are payable out of the judgment fund. Under the Equal Access to Justice Act, attorney fees are payable to prevailing parties out of agencies appropriations. Therefore, attorney fees in NEPA, ESA, and CERCLA cost recovery litigation which are payable under the EAJA must be paid out of agency appropriations.

b. **Makua Range Litigation (MAJ Tim Cody)** – An environmental group challenged the adequacy of NEPA EA to support training at the Makua Range. The Makua Range has approximately 30 endangered species and several culturally significant sites. After the September 11 Attacks, the Army was prepared to resume training at Makua as an emergency action but the case was subsequently settled. Under the settlement, the Army is allowed to resume limited training for the next three years pending completion of an EIS.

2. Restoration/Natural Resource Update

a. **Privatizing BRAC Cleanups (Creighton Wilson)** – The Army is using early transfer authority (Section 334) and cooperative agreement authority (10 USC Section 2701d) at two BRAC installations (Bayonne and Fitzsimmons). At these BRAC installations, the Army will early transfer the property and provide funding for the local reuse authority to finalize the cleanup. This arrangement will allow the Army to have an early transfer and the LRA is able to integrate cleanup and redevelopment of the property.

b. **NEPA Alternate Arrangement for Emergency Circumstances (MAJ Jeanette Stone) and ESA Update (CPT Jeffery Hatch)** – This presentation included a summary of the CEQ Alternate Arrangement Guidance. In addition, it was noted that mobilization/force protection activities may have ESA implications. The installation should determine whether mobilization/force protection activities create new Section 7 consultation requirements or create new incidental take requirements. Note – AMC has prepared NEPA Force Protection Guidance (see below discussion).

3. Compliance Update

a. **Payment of Administrative Fees for CAA Violations (MAJ Liz Arnold)** – Over the past several years, the Army has used payment of administrative fees to resolve 9 CAA cases and 1 CWA case. Under this approach, any administrative fees should be tied to documented costs incurred by the regulators (e.g., inspections, oversight, etc.). It is possible that the administrative fee settlement may exceed the amount of the original fine provided the regulators adequately document their costs. However, we should avoid situations where the administrative fee equals the original proposed fine since gives the appearance that the “administrative fees” are a defacto fine.

b. **Fort Wainwright CAA Case (LTC Chas Green)** – On 4 Oct 01, EPA chief administrative law judge (ALJ) heard oral arguments in Fort Wainwright's challenge to \$16M

in proposed business penalties. The ALJ found Fort Wainwright liable for eight CAA violations but reserved for oral argument issues related to penalty factors.

c. Range CWA Permitting Update (LTC Lisa Schenck/Colleen Rathbun) –
On 15 June 01, the Army received a notice of intent alleging that firing munitions into wetlands at the Eagle River Flats Range (Fort Richardson) requires a CWA permit. This issue could impact DoD-wide training. Under the CWA Section 1323a, the President may issue regulations exempting from CWA requirements “any weaponry, equipment, . . . or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces and which are uniquely military in nature” if it is in the paramount interest of the U.S. The Army and other services are considering using this authority to propose Presidential regulations exempting ranges from CWA permitting requirements.

4. AEC Update

a. New Army Alternate Procedures (AAP) for NHPA Section 106 Consultation (Scott Farley). The Army has 52K buildings that will become 50 years old within the next 30 years. The new Army Alternate Procedure (AAP) is optional and provides an alternative to the Section 106 consultation process. Under the AAP, the Army consults with stakeholders “up front” to develop a beefed up Historic Properties Component (HPC) of the Installation Cultural Resources Management Plan (ICRMP). The ICRMP is released for public review and submitted to the Historic Preservation Advisory Council for certification. After certification, the installation implements the HPC and is no longer required to have external project by project review. A copy of the AAP is available at – <http://www.achp.gov/army.html#aap>. See also the ELD Bulletin (July 2001) – A New Option for Compliance with the NHPA.

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