

**THE ENVIRONMENTAL LAW DIVISION
BULLETIN**



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Editor's Note

Spaces are still available to attend the U.S. Air Force's Basic Environmental Law course. The course will be held in Montgomery, Alabama, from 5 through 9 May 1997. There is no tuition; however, participants are responsible for their travel and per diem costs. If you would like to attend, please send a facsimile with your name, rank or grade, installation, and telephone number to the attention of SSG Stannard of the Environmental Law Division. The facsimile number is (703) 696-2940 or DSN 426-2940.

Beginning with the March edition of the Environmental Law Division Bulletin, CPT Silas DeRoma will take over as the Bulletin's editor. Any inquiries regarding the Bulletin should be addressed to CPT DeRoma at (703) 696-1230 or DSN 426-1230, or electronic mail address deromasi@otjag.army.mil. Thank you for the support and cooperation that you have shown in helping us to bring the Bulletin to you via electronic mail. Ms. Fedel.

Environmental Structured Settlements - CPT Stanton

Structured settlements have been used for a number of years to spread out payments in personal injury and medical malpractice cases, but only recently have they been applied to environmental cleanup cases. Structured settlements can take a number of forms and can be tailored to meet a variety of different situations. A common manner of setting up such a settlement involves the creation of a reversionary trust, where a trustee manages the corpus of the trust, the United States retains ownership, and any reversion left in the trust is returned to the U.S. Treasury after the United States' obligation has been satisfied. Not only does this allow the trustee to invest the money not yet paid out of the trust to the benefit of the United States, but the beneficiary may avoid significant tax liability by not realizing the full amount of the settlement in the first year.

Structured settlements may make payments according to a pre-determined schedule, or they may be used to pay a percentage of cleanup costs on an ongoing basis. For example, in one rather complex structured settlement, the private potentially responsible parties (PRPs) have agreed to perform the cleanup (using their own contractors), while the United States has agreed to fund a percentage of cleanup costs. Under this arrangement, the private PRPs will submit bills to the United States' trustee, and will receive reimbursement for costs that the trustee determines are "allowable." In addition, the trust will hire (1) an investment manager in order to leverage the maximum possible amount of time-value out of the funds in the trust, (2) an accounting firm to conduct periodic audits, and (3) an environmental consulting firm to act as a technical advisor. The cost savings in such a case can be considerable, and in this example, where cleanup costs may run as high as \$300 million, savings to the United States are estimated to be more than \$20 million.

DID YOU KNOW? . . . ROAD TRAFFIC KILLS AN AVERAGE OF 45 ENDANGERED KEY DEER IN FLORIDA ANNUALLY AND IS THE SUBSPECIES' SINGLE LARGEST CAUSE OF DEATH. AVERAGE ANNUAL MORTALITY IS 63 DEER FROM A TOTAL POPULATION OF APPROXIMATELY 300.

RCRA General Permit To Be Proposed In Upcoming Rulemaking - MAJ Anderson-Lloyd

The U.S. Environmental Protection Agency (USEPA) is nearing completion of a plan for a streamlined permitting process that will allow some generators and recyclers to qualify for a general permit rather than the more complex individual permit. The agency's Permit Improvement Team (PIT) has been working on improving and streamlining the permitting process for the past two years. The PIT recommendations for a general permit will be included in an upcoming rulemaking that will amend the definition of solid waste and modify the current recycling program.

Through this new initiative, the general permit would be available to off-site recyclers and to hazardous waste generators who accumulate their wastes in tanks or containers on-site for more than 90 days. The USEPA would formulate technical and management standards for a general permit that would be applicable to facilities nationwide. Under the general permit, the RCRA requirements would remain the same; however, USEPA would require much less information for permit approval.

Under the new scheme, a facility interested in a general permit would first hold a public meeting to discuss the planned waste management activities. In place of filing a Part A application, the facility would file with the permitting agency a notice of intent to be covered by a general permit. The notice of intent includes a summary of the public meeting and information on waste streams, management practices, and volumes of waste managed. Based on this information, the permitting agency would make the initial determination whether the facility meets the scope of the general permit. If necessary, site-specific conditions are added to the general permit and public notice of the tentative decision is provided. On the request of a stakeholder, a public hearing and public comment period of 45 days follows the notice of the tentative decision. After considering the public comments, the agency would make the final decision on the permit; the permit is effective after 30 days.

In addition to streamlining the review of the initial application, any modifications to the permit would also be expedited. Changes such as an addition of new waste streams or increases in capacity would require only the submission of the information, not agency oversight or approval. USEPA plans to formally propose the rule in April 1997.

DID YOU KNOW? . . . RADIAL TIRES CAN BOOST YOUR GAS MILAGE BY AS MUCH AS 10%.

New Ozone and Particulate Matter Standards - LTC Olmscheid

The U.S. Environmental Protection Agency (USEPA) published new proposed National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter on 13 December 1996. 61 Fed. Reg. 65638 - 65872 (1996). The USEPA proposed these new standards because it does not believe the current standards adequately protect the public from the adverse health effects caused by ozone and particulate matter. These standards will likely have an adverse effect on military operations.

One of the standards involves ozone. Ozone is used as an indicator of photochemical smog and is caused by the chemical reaction of ozone precursors in the atmosphere. Exposure to ambient ozone concentrations has been linked to increased hospital admissions for respiratory

causes such as asthma and is associated with 10-20 percent of all of the summertime respiratory-related hospital admissions. Repeated exposure to ozone increases the susceptibility to respiratory infection and lung inflammation, and can aggravate preexisting respiratory diseases. Long-term exposures to ozone can cause repeated inflammation of the lung, impairment of lung defense mechanisms, and irreversible changes in lung structure, which could lead to chronic respiratory illnesses such as emphysema, chronic bronchitis, or premature aging of the lungs.

Mobile and stationary combustion sources are the primary source of ozone precursors. The primary stationary source of ozone precursors on Army installations is fossil fuel boilers.

The USEPA projects that a number of counties that are currently in attainment for either ozone or particulate matter will be in nonattainment under the proposed standards. Based on these projections, the new standards will place 13 Army installations that are currently located in ozone attainment areas into ozone nonattainment areas. These installations include Forts Bragg, Gordon, and Jackson.

The U.S. Army Center for Health Promotion and Preventive Medicine (USACHPPM) evaluated the costs of meeting the new ozone standards. Their study indicates it will cost installations currently in attainment areas, and that will be placed in nonattainment areas, from one to five million dollars to comply with the new standards. Installations that are currently in nonattainment areas may also incur additional costs if regulators impose additional control measures on sources.

The other standard involves particulate matter. Particulate matter refers to solid or liquid material that is suspended in the atmosphere. It includes materials of both organic and inorganic chemicals, and is divided into primary and secondary components. Primary particulate matter consists of solid particles, aerosols, and fumes emitted directly as particles or condensed droplets from various sources. Secondary particulate matter is produced from gaseous pollutants that react with one another and with oxygen and water in the atmosphere to form new chemicals that are particles or condensable compounds.

The current particulate matter program is designed to protect the public from the effects of "coarse" particulate matter of ten microns or smaller (PM10). Coarse particles affect the respiratory system and contribute to health effects such as aggravation of asthma. PM10 at military installations primarily consists of dust kicked up on unpaved roads from vehicular traffic or from soldier training activities. The USEPA proposed minor changes to the PM10 standard, and these changes will not adversely affect Army operations.

A number of recently published community epidemiological studies indicate that "fine" particulate matter of 2.5 microns or smaller (PM2.5) are more likely than coarse particles to adversely affect health (e.g., premature mortality and increased hospital admissions). As a result, USEPA proposed PM2.5 standards. The new annual PM2.5 standard is set at 15 micrograms per cubic meter, and a new 24-hour PM2.5 standard is set at 50 micrograms per cubic meter.

PM2.5 is generally emitted from activities such as industrial and residential combustion and vehicle exhaust. PM2.5 also is formed in the atmosphere from gases and volatile organic compounds that are emitted from combustion activities and become particles as a result of chemical transformations in the ambient air. Dust is also a major contributor to PM2.5.

The new PM2.5 standards will have a major adverse affect on obscurant training (smoke consists of particulates of 0.5 - 1 microns), open burning, open burning/open detonation operations, troop training exercises that produce a large amount of dust, and Army Materiel Command (AMC) installations with industrial activities. Using USEPA's projections, 22 Army installations will be in PM2.5 nonattainment areas.

The USEPA has solicited comments regarding the impact of the new proposals, as well as the impact of several other possible standards to better control ozone and particulate matter. It should be noted that industry, many state regulators, and some members of Congress have been very critical of these proposed rules, asserting that they are both unnecessary and too costly.

DID YOU KNOW? . . . ENVIRONMENTALISTS REFER TO
THEODORE ROOSEVELT'S PRESIDENCY AS THE "GOLDEN AGE OF CONSERVATION."

Environmental Law Division On Line - CPT DeRoma

The Environmental Law Division's Environmental Law Link pages are up and running. The pages may be reached by the link off of the Judge Advocate General's (JAG) Corps home page at <http://www.jagc.army.mil/jagc2.htm>, or by going to <http://160.147.194.12/eld/eldlinks.htm> directly. The site is designed to be used as a starting point for legal and general law research. The pages contain links to the following areas: DOD environmental sites, DA environmental sites, environmental regulations, environmental legislation, environmental statutes, courts, case law, U.S. Government environmental departments and agencies, environmental interest groups, international environmental sites, search engines, general law sites, and general points of contact in the armed forces. You may also view an e-mail listing of personnel in the Environmental Law Division. Please enjoy the site and e-mail us your comments.

DID YOU KNOW? . . . THE SNOWY OWL WEIGHS 4 TO 6 POUNDS AND HAS A WING SPAN OF 5 FEET.

Ninth Circuit Rules on Natural Resource Damages - Ms. Fedel

The United States Court of Appeals for the Ninth Circuit has held in favor of Federal natural resource trustees on two important issues concerning natural resource damage (NRD) recoveries. U.S. v. Montrose Chemical Corp., et al., No. CV-90-03122-AAH, 1997 U.S. App. LEXIS 704, (9th Cir. January 17, 1997). The Ninth Circuit decision overrules a district court decision holding that the Trustees' action was barred by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) statute of limitations. CERCLA §113(g)(1), 42 U.S.C. §9613(g)(1) (1986). Section 113(g)(1) provides that an action for NRDs must be commenced within three years of the later of (A) the date of discovery of the loss and its connection with the release in question, or (B) the date on which regulations are promulgated under CERCLA §301(c), 42 U.S.C. §9651(c) (1986). Section 301(c) instructs the U.S. Department of Interior (DOI) to promulgate two types of regulations governing NRDs, "Type A" and "Type B" regulations. The district court had held that the statute of limitations began to run when the Type B regulations were promulgated in 1986, and since the Trustees had filed the complaint in 1990, the action was time barred. The Trustees argued that the statute of limitations did not begin to run until the Type A regulations were promulgated in 1987. The Ninth Circuit agreed with the Trustees, stating that:

[T]he phrase in section 9613(g)(1)(B) that triggers the statute of limitations on 'the date on which regulations are promulgated under section 9651(c)' should also be interpreted as referring to 'regulations' as used by section 9651(c)--including both Type A and Type B regulations.

Montrose, 1997 U.S. App. LEXIS at *13. Therefore, the statute of limitations did not begin to run until all of the regulations contemplated in the statute had been promulgated.

The court also reversed the district court's ruling that the Montrose defendants' liability was capped at \$50,000,000 pursuant to CERCLA §107(c)(1). CERCLA §107(c)(1), 42 U.S.C.

§9607(c)(1) (1994). Section 107(c) limits each owner's and/or operator's liability for "each release of a hazardous substance or incident involving release of a hazardous substance" to the costs of response plus \$50,000,000. The Montrose defendants had argued successfully to the district court that the legislative history of CERCLA demonstrates that the term "incident" is a term of art synonymous with "contaminated site," and that the Complaint had alleged only one "incident involving release." Montrose, 1997 U.S. App. LEXIS at *33. The Ninth Circuit disagreed, holding that the term "incident involving release" should be interpreted in accord with its common definition and the legislative history to mean an "occurrence" or "event." As stated by the court, "a series of events that lead up to a spill of hazardous substance would be considered an incident involving release; however, a series of releases over a long period of time might or might not." *Id.*, at *35. Therefore, the record was insufficient to support the district court's conclusion that the Complaint only alleged one "incident involving release." The court reversed the district court's holding and remanded the case for further determination of whether the Montrose defendants' liability was capped at \$50,000,000.