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Overseas Environmental Baseline Guidance Document (OEBGD) - MAJ Thomas Ayres

The Air Force is currently updating the OEBGD, but no formal draft has yet been submitted to the Services for comment. Department of Defense Instruction (DoDI) 4715.5, "Management of Environmental Compliance at Overseas Installations," dated 22 April 1996, mandates the establishment and maintenance of the OEBGD. The OEBGD is designed to set specific media criteria that establish a baseline standard for military installations and that are designed to protect human health and the environment.

The Air Force is designated as the lead Service to review and update the OEBGD, last promulgated in October 1992, under DoDI 4715.5. As part of the review process, Air Force technical staff recently submitted a draft, revised OEBGD to several technical counterparts at overseas commands. This informal draft created some controversy at several overseas commands. As a result, Air Force environmental staff requested guidance from the Office of the Deputy Under Secretary of Defense (Environmental Security) (DUSD(ES)) on several "policy issues" raised by the revision process. At a meeting called by the DUSD(ES) staff on 16 April 1997, the Services agreed to coordinate several policy precepts to guide the Air Force revision process. DoDI 4715.5 also requires formal coordination with the Services prior to publication of an OEBGD, and the Services requested a sufficient formal comment period to allow time for coordination with overseas commands on any draft revised OEBGD.

Executive Order for Protection of Children from Environmental Health Risks and Safety Risks - MAJ Allison Polchek

On 21 April 1997, President Clinton issued Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks, 62 Fed. Reg. 19885. This Executive Order notes that children often suffer disproportionately from environmental health and safety risks, due in part to a child's size and maturing bodily systems.

In light of these risks, the Executive Order requires Federal agencies, to the extent permitted by law and mission, to identify and assess environmental health and safety risks that may affect children disproportionately. The Order further requires Federal agencies to ensure that its policies, programs, activities, and standards address these disproportionate risks.

The Order defines environmental health and safety risks as "risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breath, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to)."

Installations will find that this Executive Order could have wide reaching implications, and are urged to begin integrating this Executive Order into daily practice. One area of obvious integration is within the National Environmental Policy Act (NEPA). As is currently being done with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations, NEPA is the perfect tool to examine the effects an action will have on children.

No Ands, Ifs, Or Buts: Federal Facilities And The Clean Water Act - CPT Silas DeRoma

Bigger, better, faster? This seems to be the trend of federal facility sovereign immunity waivers under the major federal environmental laws. On 20 March 1997, Representative Dan Schaefer (R., Colo.) introduced H.R. 1194 - A Bill to Amend the Federal Water Pollution Control Act (FWPCA) Relating to Federal Facilities Pollution Control. The bill, also known as the Federal Facilities Clean Water Compliance Act of 1997, expands the present waiver of sovereign immunity under the Clean Water Act (CWA), and, for the most part, follows the pattern set by the waivers passed under the Resource Conservation and Recovery Act and the Safe Drinking Water Act, both of which Mr. Schaefer introduced. The legislation was initially referred to the House Committee on Transportation and Infrastructure. It was subsequently referred to the Subcommittee on Water Resources and Environment on 3 April 1997. This bill exemplifies the type of “rifle shot”, low resistance, CWA legislation expected during this Congress. While it may appear that the legislation has a way to go before becoming law, unlike other proposed environmental reforms, such as the amendment of Superfund or the Intermodal Surface Transportation Efficiency Act, this bill is not one that is likely to encounter significant legislative opposition. As this legislation moves through Congress, more information will be provided.

Cumulative Effects under the National Environmental Policy Act (NEPA) - MAJ Allison Polchek

The Cumulative Effects analysis of most National Environmental Policy Act (NEPA) documents is an area worthy of careful scrutiny, yet it is often found to be legally deficient. This deficiency is not surprising considering the lack of direction on this issue provided in NEPA and in the implementing Council on Environmental Quality (CEQ) regulations. To remedy this problem, CEQ recently published “Analyzing Cumulative Effects Under the National Environmental Policy Act.” The CEQ guidance is intended to provide a practical framework for assessing the cumulative impacts of an agency’s proposed action.

Many actions, taken in isolation, are insignificant. When added together with other actions, however, the effects may collectively become significant. These are the types of effects NEPA documents should be examining. Cumulative effects are defined in 40 C.F.R. ' 1508.7 as:

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

The new CEQ guidance recommends paying particular attention to cumulative effects during the scoping process, while describing the affected environment, and when

analyzing the environmental consequences of the action. The guidance provides eight general principles that can be used to assess cumulative effects. The CEQ recommends examining the cumulative effects on a resource or ecosystem beyond traditional political or administrative boundaries. This might require examining the impact an action will have on an entire watershed, not just within the installation. In addition, CEQ provides many examples of tools available to assist the NEPA practitioner in assessing cumulative impacts, ranging from simple checklists and questionnaires to more formal modeling or trends analysis techniques.

Army NEPA practitioners are encouraged to adopt some or all of the CEQ guidance in order to strengthen this traditionally weak area of analysis. Copies of the guidance are available on the Environmental Law portion of the LAAWS BBS.

Enforcement Update - CPT Anders

Statistics. Since Congress expanded the waiver of sovereign immunity for solid and hazardous waste violations in October 1992, Army installations have been assessed $13.4 million in 147 fines and penalties cases. The 83 RCRA fines account for 78 percent of the fines, totaling $10.4 million. Although 97 of the 147 fines and penalties were levied by States for a total of $4.7 million, the 29 imposed by the EPA amount to $8.5 million. EPA recently released statistics on agency enforcement actions taken in fiscal year 1996. ***See Toxics Law Reporter***, March 5, 1997, at 1098-9. ***See also, Environmental Policy Alert,*** March 12, 1997, at 38. EPA's combined total of $173 million in criminal, civil, and administrative penalties assessed ($76.6 in criminal penalties, $66.3 in civil judicial penalties, and $29.9 million in administrative penalties) was the highest in EPA history. In one notable case, Georgia-Pacific Corporation paid more than $35 million in penalties and projects to settle allegations of illegal and unpermitted emissions of volatile organic compounds from several wood processing facilities. Sylvia Lowrance, EPA's Deputy Assistant Administrator for Enforcement and Compliance Assurance, indicated that the numbers will likely increase markedly in FY 1997, stating, "the environmental cop is back on the beat."

Reporting Requirements. Note that the new Army Regulation 200-1, published in February 1997, provides slightly different reporting requirements than the previous 1990 edition of the regulation. Installations must report enforcement actions through the Army Compliance Tracking System Report (ACTS) within 48 hours and any fine or penalty within 24 hours. AR 200-1, paras. 1-27a(16), 13-6, 15-7b (1997). An enforcement action is defined as "[a]ny written notice of a violation of any environmental law from a regulatory official having a legal enforcement authority." This includes a "Warning Letter, Notice of Noncompliance (NON), Notice of Violation (NOV), Notice of Significant Noncompliance (NOSN), Compliance Order (CO), Administrative Order (AO), Compliance Notice Order (CNO), [and] Finding of Violation." ***Id.*** at Appendix A. Any enforcement action that "involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact" will be reported within 48 hours through legal channels (i.e., through the MACOM ELS), at the same time it is reported through ACTS; this initial notification will be followed by written notification within seven days. ***Id.***, para. 15-7c. Note that the notification requirement extends not only to an assessed fine, but also to a "fee," because states have in the past assessed a "fee" against installations that was actually imposed to settle a minor instance of noncompliance, or was actually a veiled tax, which Federal facilities may not pay. The portion of the reporting requirement quoted above, therefore, requires not that a report be made of every fee that is paid, but of every "enforcement action that involves a fee."

Increased use of BEN Model by States. EPA's Inspector General is recommending that EPA prompt state regulatory agencies to recover the economic benefit of noncompliance from alleged violators. The EPA inspector general's March 31, 1997 report, ***Further Improvements Needed in the Administration of RCRA Civil Penalties***, notes specifically:

> [I]t is essential that EPA and state enforcement actions recover a violator's benefit of economic noncompliance [through use of the "BEN Model"], and that EPA's "overfiling" authority can be used to recover these benefits "when necessary," i.e., when a state has not properly applied the BEN Model.

Inside EPA, Vol. 18, No. 15, April 11,1997. The current DoD position is that application of economic benefit principles based upon avoided or delayed compliance expenditures to Federal facilities is not appropriate for the following three reasons: 1) DoD is not a profit seeking enterprise and has a non-profit mission; 2) DoD facilities do not self-determine their environmental compliance budgets, but are dependent upon outside executive and legislative authorizations; and, 3) the federal budget structure is such that imposing BEN-based penalties is more likely to reduce the level of environmental compliance spending than increase it and could draw money from otherwise achievable environmentally beneficial projects. In light of this stepped-up pressure from EPA, installations should be wary of state attempts to impose inappropriate BEN-based penalties in enforcement actions.

Has EPA Deserted Oregon Natural Desert? - CPT DeRoma

"Yes, no, maybe" seem to be the answers out of EPA on the issue of regulating nonpoint source runoff from federal lands via state water quality certification programs. This issue arose after the United States District Court for the District of Oregon issued the opinion in ***Oregon Natural Desert Association v. United States Forest Service***, 940 F. Supp. 1534 (D.Or. 1996). In that opinion, the District Court held, ***inter alia***, that the phrase "any discharge" under § 401 of the Clean Water Act was not restricted to point source discharges. Under this interpretation, the District Court held "§ 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources." ***Id.*** at 1540. Following the court's decision, EPA began drafting a preliminary framework for the regulation of nonpoint sources similar to those addressed in the case. The framework purportedly would have broadened the types of discharges from federal lands to be considered by states when establishing water quality standards and also would have delineated how states should analyze the impact of the discharges upon water quality.

Several Federal agencies were surprised by both the decision in ***Oregon Natural Desert*** and the EPA's subsequent reaction. Since these events, the Department of Agriculture has asked the Department of Justice (DOJ) to support an appeal of the case, and DOJ has filed a motion of appeal in the case, pleadings for which are due on 21 May 1997. When asked about the status of the framework, one EPA staff member stated that progress had been frozen. The individual would not state if further progress would occur or whether the project had been abandoned. If work on the framework resumes, it is possible that it could affect significantly the ability of states to control Federally permitted, or licensed, activities on Federal lands via § 401 certification. These activities are currently addressed by memoranda of understanding between EPA and Federal agencies. As noted above, DOJ pleadings on this issue are due 21 May 1997. As this case progresses, further updates will be provided.

Punitive Fines and the Clean Air Act - LTC Mel Olmscheid

Recently, in ***United States v. Tennessee Pollution Control Board***, No. 3:96-0276 (M.D. Tenn. Apr. 10, 1997), the United States District Court for the Middle District of Tennessee held that the Clean Air Act (CAA) allows States to assess punitive fines against federal facilities. This decision is contrary to another United States District Court decision in ***United States v. Georgia Dep't of Natural Resources***, 897 F. Supp. 1464 (N.D. Ga. 1995).

The case began when, on 20 August 1993, the Tennessee Air Pollution Control Board (TAPCB) assessed a $2,500 civil penalty under the Tennessee Air Quality Act against the Milan Army Ammunition Plant (Milan) for past violations of Tennessee's Division of Air Pollution Control Rules. Although Milan did not dispute the underlying allegation that it failed to provide written notice of its intention to remove 330 linear feet of pipe containing asbestos, the Army contended that the sovereign immunity of the United States barred imposition of the penalty. Following a hearing on this issue, an administrative law judge concluded on 26 January 1996 that CAA § 118(a) waives sovereign immunity.

On 14 February 1996, the TAPCB issued orders providing final denial of the Army's administrative appeal and staying enforcement of the penalty until exhaustion of judicial remedies. The action in the U.S. District Court for the Middle District of Tennessee to enjoin the penalty followed.

In the memorandum in support of the motion for summary judgment, the United States argued that, based on the Supreme Court decision in ***United States Department of Energy v. Ohio***, 503 U.S. 607 (1992) (***DOE v. Ohio***), the CAA did not waive sovereign immunity for civil penalties. In ***DOE v. Ohio*** the Supreme Court held that neither the Clean Water Act (CWA) nor the Resource Conservation and Recovery Act (RCRA) waived sovereign immunity for civil penalties. The United States also emphasized the recent United States District Court ruling in ***United States v. Georgia Department of Natural Resources***, 897 F. Supp. 1464 (N.D. Ga. 1995), where that court, based on facts nearly identical to those in the Milan case, held that the CAA does not waive immunity.

TAPCB filed a cross-motion and argued that the CAA's language was sufficiently different from the CWA and RCRA to find a waiver. TAPCB argued as well that the citizen suits provision, CAA §304, also provided a waiver. On 8 April 1997, the court rejected the United States' arguments, granted TAPCB's cross motion for summary judgment, and dismissed the complaint for failure to state a claim.

This adverse decision was not entirely unexpected because the same judge hearing the ***Milan*** case had held in ***United States v. Tennessee Air Pollution Control Board***, 31 Env't Rep. Cas. 1500 (M.D. Tenn. 1990), that the CAA allowed States to impose punitive fines against federal facilities. The Army expects this decision will be appealed to the United States Court of Appeals for the Sixth Circuit and has not changed its position that Army facilities do not pay punitive fines assessed under the CAA.

U.S. Army Environmental Management and ISO 14000 - Mr. Steve Nixon

The Future of Environmental Management? The Army Study Team working on ISO 14000 recently briefed their progress to the Deputy Assistant Secretary of the Army for Environment, Safety and Occupational Health. ISO 14000 is an internationally accepted standard for environmental management. Many multinational companies are converting to

this management system so that they can compete in the European market, where such a system is a generally accepted practice. The Army is examining any potential benefits from adopting or incorporating such a system into our current environmental management program. The Army's Environmental Compliance Assessment System and Installation Status Report II programs are widely approved by regulators and provide commanders with all required information to stay in compliance with environmental laws. Although ISO 14000 is not required to ensure compliance, it might add an improved management tool for use by installation commanders. The Study Team recommended, and the DASA approved, a pilot program at Fort Lewis and Tobyhanna Army Depot to gauge the benefits of ISO 14000 to the Army.

EAB Decision Upholds Use of Penalty Policies - Even Absent Rulemaking - CPT Anders

A February decision by the U.S. Environmental Protection Agency's Environmental Appeals Board (EAB) dealt a small blow to industry when it ruled that EPA's penalty policies under the various environmental statutes could guide the process of setting the amount of a punitive fine, even though the policies failed to use the formal public notice and comment rulemaking process under the Administrative Procedure Act (APA). ***In re Employers Insurance Company of Wausau and Group Eight Technology, Inc.,*** TSCA Appeal No. 95-6, (EAB, Feb. 11, 1997), 6 E.A.B. __ (***Wausau II)***. This rulemaking argument has long been used by industry facilities as a possible defense in contesting an assessed administrative penalty derived mechanically under one of the environmental penalty policies.

In 1995, Chief Administrative Law Judge Jon Lotis had ruled that EPA's environmental penalty policies do not bind judicial penalty decisions, unless those policies were promulgated through a formal rulemaking process under the APA. ***In re Employers Insurance Company of Wausau and Group Eight Technology, Inc.,*** TSCA-V-C-66-90, 1995 TSCA LEXIS 15 (1995) ("***Wausau I***"). In ***Wausau I***, Judge Lotis lowered a fine assessed against a company under the Toxic Substances Control Act (TSCA) from $76,000 to $58,000, holding that the fine was rigidly derived under EPA's TSCA Penalty Policy, which had not been adopted pursuant to the APA's rulemaking procedures. ***Wausau I*** was hailed as a significant victory for industry, as it obligated EPA, through evidence presented at hearing, to support factually any findings, assumptions, or determinations on which its assessed penalty rests. Then, as long as the hearing judge had "considered" the penalty policy, he or she would be free to apply the policy or to depart from it, basing the decision solely upon the strength of the parties' evidence. ***Wausau I,*** 1995 TSCA LEXIS at 36-37.

On appeal, however, the EAB ruled that Judge Lotis had taken an extreme position on the rulemaking issue and held that mechanically applied penalty policies could form the basis for civil penalties, even though they had foregone APA formal rulemaking procedures. The EAB explained, "we readily agree that EPA's adjudicative officers must refrain from treating [a penalty policy] as a rule," and should question the policy where applicable, ***Wausau II,*** TSCA Appeal No. 95-6 at p. 35, citing ***McLouth Steel Products Corp. v. Thomas***, 838 F.2d 1317 (D.C. Cir. 1988). But the Board stopped short of disallowing reliance on the penalty policies by enforcement officials, "either as a tool for developing penalty proposals or to support the appropriateness of such proposals in individual cases." ***Id.***

The EAB's ***Wausau II*** ruling still retains some of the sting of Judge Lotis' ***Wausau I*** ruling, to the satisfaction of industry practitioners. The EAB specified that penalties are only supportable to the extent that they are:

> calculated in a manner consistent with the Agency's obligation to "take into account" the factors enumerated in [TSCA penalty policy]. . . . It is therefore incumbent upon the complainant in all TSCA penalty cases, in order to establish the 'appropriateness' of a recommended penalty, to demonstrate how the TSCA penalty criteria relate to the particular facts of the violations alleged.

Id. at p. 29. The EAB also definitely reaffirmed that presiding officers are not bound by EPA's penalty policies and can depart where the facts make departure appropriate. The Board, citing 40 C.F.R. § 22.27(b), held: if "the Presiding Officer does not agree with the Region's analysis of the statutory penalty factors or their application to the particular violations at issue, the Presiding Officer may specify the reasons for the disagreement and assess a penalty different from that recommended by the Region. While the Presiding Officer must consider the Region's penalty proposal . . . , he or she is in no way constrained by the Region's penalty proposal, even if that proposal is shown to have 'take[n] into account' each of the prescribed statutory factors." ***Id.*** at p. 30.

Installation attorneys should press EPA regional counsel to comply fully with Agency internal policy guidance directing its attorneys to build a case for administrative fines sought in enforcement actions. ***See, Memorandum to EPA Regional Offices on Use of Penalty Policies in Administrative Cases, written by*** Robert Van Heuvelen, Director of EPA's Office of Regulatory Enforcement (December 15, 1995). The memorandum directs its attorneys to follow specific procedures. For example, "[i]n the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence." The memorandum also directs EPA attorneys to maintain a "case 'record' file," which documents all factual information relied upon in developing the penalty amount pled in the complaint, and which "may be provided to the Respondent with copies of relevant documents from the case file."

Discovery of Electronic Information
A Gold Mine or a Mine Field? - Ms. Carrie Greco

A recent study has shown that in the year 2000, 60 billion e-mails will have been sent.[1] Along with this increase in the use of the e-mail system, is an increase in the number of people who approach the e-mail in a casual manner. Many people see e-mail as a temporary and private means of communicating an informal message. This is a misconception, however, because not only does the e-mail message exclude the non-verbal cues that notify the reader of the context of the message, but the message is not necessarily private, or temporary. This fact becomes visible after someone inadvertently transmits an embarrassing message to the wrong person, but it also becomes dangerously apparent when this message becomes discoverable pursuant to a discovery request for electronic information.

Litigators have found electronic data a gold mine of information ever since the rules on discovery have been expanded to include electronic information in 1970. Fed. R. Civ. P. 34. More recently the court found that e-mail messages were "records" under the Federal Records Act. ***Armstrong v. Exec. Office of the President***, 1 F.3d. 1274 (D.C. Cir. 1993). As litigators increase their use of interrogatories and depositions to obtain electronic

[1] Scott Dean, E-Mail Forces Companies to Grapple with Privacy Issues, CORP. LEGAL TIMES, Sept. 1993, at 11.

information, the question is no longer whether, but when you will be asked to respond to a request for electronic information. When you obtain this request you have an obligation and a duty to understand both the terminology and the technology of your client. Quickly, the use of discovery turns what was a gold mine into a mine field. To avoid getting lost in the mine field of information, here are some points to consider as you prepare for a request.

1. Discovery has limitations. Although a litigator can request any information that can be obtained or translated through detection devices into a reasonable usable form, the traditional limitations of discovery still apply to a request for electronic information. For example, in ***Fennel v. First Step Designs, Ltd.,*** 83 F.3d. 526 (1st. Cir. 1996) the court found that discovery of a hard drive was an undue burden on the owner.

2. Privileges may not apply. Remember that the protection of attorney client privilege only applies to communications between the attorney and the client, and not to communications between two co-workers. Also keep in mind that the work product doctrine only applies to work in anticipation of litigation, and not to documents or electronic messages created in the normal course of business

3. Anticipate discovery requests before creating the information. Educate others on the proper time and place for electronic information. Create electronic documents with the expectation that they may be subject to the scrutiny of a judge or jury at some later date in the context of an adversarial proceeding.

4. Enforce Record Retention Regulations. Manage electronic information in accordance with your document retention regulations. This will help determine when information that is not subject to litigation can be destroyed. Absent a reasonable business purpose, destruction of information to frustrate a subsequent suit can provide a basis for sanctions, adverse evidentiary presumptions, and even tort liability for spoliation.

5. Know the form of your records. Become familiar with the various forms of information that are on your installation's computer systems. This may include word processing files, spreadsheets, databases, bulletin boards and service providers.

6. Know where your records are. Electronic information may be found in various forms. This includes floppy disks, hard drives, even those that are potentially broken, PCs connected to a LAN, portable PCs used by employees while away from the office, backups and archival tapes, and data stored on magnetic tapes. Keep in mind that tangible things might be requested along with the intangible. Identify new forms of technology that could become a target of a discovery request and initiate information management rules from the outset.

7. Create a system that will organize your e-mail. Discuss with key personnel at the installation what types of information must be retained and the proper methods on how to organize key information in a matter that is retrievable. Keep in mind that your purpose of information organization is going to be different than the other people in your organization. Therefore, when you present your need to organize the information generated at the installation, recognize that this might bring on conflict and try to implement a system that efficiently and effectively minimizes a particular risk while creating the least amount of disruption.

8. Remember evidentiary rules. If you find yourself doing a search for electronic information pursuant to a discovery request, keep in mind that evidentiary issues require the

documentation of how the file was found, what tools were used to locate it, where it was found, and how it was transferred to its current format. Avoid creating any basis for a charge of altering or tampering with data, of introducing a virus into the computer being searched, or of inadvertently crashing the system and losing valuable data.

Through preparation, you can avoid being faced with a land mine in your electronic information search and be prepared when new technology arrives at your installation.

Editor's Note: Look for the Environmental Law Bulletin on the Environmental Law Division Home Page (http://160.147.194.12/eld/eldlink2.htm) for download as a text file or in Adobe Acrobat format by the end of this month. Currently, the Bulletin is available in the environmental law files area of the LAAWS BBS.