

**THE ENVIRONMENTAL LAW DIVISION
BULLETIN**

June 1997

Volume 4, Number 9

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

***EPA Issues Final Rule on Land Disposal Restrictions (LDR) Phase IV
and Issues Supplemental Proposed Rule - MAJ Lisa Anderson-Lloyd***

On 12 May 1997, EPA finalized portions of the Land Disposal Restrictions (LDR) Phase IV rule (see Land Disposal Restrictions-Phase IV: Treatment Standards for Wood Preserving Wastes, Paperwork Reduction and Streamlining, Exemptions From RCRA for Certain Processed Materials; and Miscellaneous Hazardous Waste Provisions, 62 Fed. Reg. 25998 (1997) (to be codified at 40 C.F.R. pts. 148, 261, 268, and 271). This final rule reduces reporting and record keeping, finalizes treatment standards for wood preserving wastes, and clarifies the exception for de minimis amounts of characteristic wastewater from LDR requirements. The rule also changes the definition of solid waste to exclude from Resource Conservation and Recovery Act (RCRA) regulation, processed scrap metal and shredded circuit boards that are being recycled. This rulemaking is the most recent portion of the LDR program mandated by the 1984 Hazardous and Solid Waste Amendments (HSWA) of RCRA, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6992 (1988)). HSWA prohibits land disposal of hazardous waste unless the waste meets EPA established treatment standards. Phase IV is the latest in a series of LDR rulemaking that establish treatment standards for newly listed and identified wastes. The Army Environmental Center is currently in the process of writing an Army impact analysis on the final rule.

On 12 May 1997, EPA also issued a supplemental proposed rule that revises LDR treatment standards for mineral processing wastes, certain metal wastes, and metal constituents that are hazardous wastes (see Land Disposal Restrictions Phase IV: Second Supplemental Proposal on Treatment Standards for Metal Wastes and Mineral Processing Wastes, Mineral Processing and Bevill Exclusion Issues, and the Use of Hazardous Waste as Fill, 62 Fed. Reg. 26041 (1997) (to be codified at 40 C.F. R. pts. 148, 261, 266, 268, and 271) (proposed May 12, 1997). The proposed rule revises the "mixture rule" exemption for mineral processing wastes and revises the universal treatment standards for twelve metal constituents. The supplemental proposal clarifies EPA policies on EPA granted variances from hazardous waste treatment and on the acceptable use of hazardous waste as fill material.

Environmental Law Division and the Army Environmental Center will be reviewing the supplemental proposed rule and will draft DOD comments to be submitted to EPA by the closing deadline of 12 August 1997. You are encouraged to read the proposed rule and submit any comments as soon as possible, but not later than 21 July 1997. Please submit comments to Bob Shakeshaft, by mail, to: Commander, Army Environmental Center (ATTN: SFIM-AECECC, Mr. Shakeshaft), Aberdeen Proving Ground, MD 21010-5401; by fax DSN 584-1675 or (410) 612-1675; or by E-mail rashakes@aec.apgea.army.mil.

***Endangered Species Act - Legislation and
Litigation Update - MAJ Tom Ayres***

Legislative proposals and court decisions indicate that the Endangered Species Act (ESA),¹ as it applies to Federal agencies, remains viable and soon may be stronger. Currently, Congress is contemplating a "discussion draft" of a bill to reform the Endangered Species Act.² While the draft bill is geared primarily toward relieving what have been viewed as past hardships upon private interests, the consequence may be to increase the responsibilities of Federal land managers. Meanwhile, in the courts, litigation over numerous aspects of implementation of the ESA continue to prove the ESA can indeed be the "pit bull" of environmental laws.³

Of particular interest to the Army, plaintiffs continue to press the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service to speed listing actions and to designate critical habitat for listed species. In one case, plaintiffs and the Department of Interior (Dol) recently agreed to a settlement and joint stipulation to set specific deadlines for listing decisions on over 80 species.⁴ In the case, Dol agreed to publish either a proposed rule for listing a species as threatened or endangered, or to publish a determination that the species no longer warranted listing according to the following schedule: determinations made for 41 identified candidate species by April 1, 1998, and determinations made for another 43 species by December 31, 1998.

In addition to facing litigation over not listing species quickly enough, Dol also faces several cases where their decision not to identify critical habitat is being questioned.⁵ The United States Court of Appeals for the Ninth Circuit recently strengthened this avenue of attack by scrutinizing a specific designation decision made by the USFWS.⁶ In the case, the USFWS decision not to designate critical habitat for a listed, threatened bird (the California gnatcatcher) was found to be arbitrary and capricious, even though that decision had been previously upheld by the United States District Court for the Middle District of California. In yet another listing case, the Court of Appeals for the Ninth Circuit clarified that the Secretary must publish the final regulation regarding a listed species within one year after the proposed notice is published.⁷

Finally, the ESA also recently withstood a constitutional attack, when land developers argued that Congress only has the power to regulate interstate commerce and

¹ The Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531 to 1544 (1996).

² Environmental and Energy Weekly Bulletin (Congressional Green Sheets), May 19, 1997, at 23 ("Senators Kempthorne and Chafee are circulating a 'discussion draft' of legislation to comprehensively reform the ESA."). A copy of the discussion draft is on file with the author at Army Environmental Law Division (ELD). ELD assisted the Department of Defense in preparing comments to the discussion draft; the comments were submitted on March 21, 1997.

³ David D. Diner, *The Army and the Endangered Species Act: Who's Endangering Whom?*, 143 Mil. L. Rev. 161, 174 (1994) (citing Robert D. Thornton, *The Endangered Species Act: Searching for Consensus and Predictability: Habitat Conservation Planning Under the Endangered Species Act of 1973*, 21 *Envtl. L.* 605 (1991)).

⁴ *The Fund for Animals Inc. v. Babbitt*, No. 92-0800 (D. D.C. January 30, 1997) as reported in *Wildlife Law News Quarterly*, Spring 1997, at 11.

⁵ In a case of immediate concern to the Army, plaintiffs desire the Department of Interior to designate critical habitat for 278 plant species in Hawaii, some of which only exist on military installations. *Conservation Council for Hawaii, et. al. v. Babbitt, et. al.*, No. 97-00098 (D. Hawaii).

⁶ *Natural Resources Defense Council, et. al. v. U.S. Dep't of Interior, et. al.*, No. 95-56075 (1997 WL 266835) (9th Cir. 1997).

⁷ *Oregon Natural Resources Council, Inc. v. Kantor*, 99 F.3d 334 (9th Cir. 1996).

that the “takings” provision of the ESA was unconstitutional if applied to a solely intrastate species. In the case, a coalition of land developers alleged that a California fly that lives only in a localized area of California could not affect interstate commerce.⁸ The court found, however, that the Delhi Sand Flower-Loving Fly, (a federally-listed species) and other wildlife that live within one state’s borders, could be a part of the stream of interstate commerce and could have an effect on interstate commerce. Therefore, the Court found that despite the fact that the Delhi Sand Flower-Loving Fly lived only in California, the species was subject to Congressional power to regulate interstate commerce.

***Fifth Circuit Determines A Release Above Background Levels
Does Not Trigger Need For CERCLA Response - LTC Mike Lewis***

In *Licciardi v. Murphy Oil USA Inc.*, 111 F.3d 396 (5th Cir. 1997), the United States Court of Appeals for the Fifth Circuit held that whether a defendant is liable for Superfund response costs depends on whether the hazardous substance released justified incurring cleanup costs. The allegations involved the migration from Murphy Oil of lead contamination in excess of background levels. The Fifth Circuit reversed a District Court finding of liability based on exceeding the background level for lead as established by U.S. Geological Survey data. The Court of Appeals found that this is not a regulatory standard, that the background level was based on measurements some 30 miles from the site, and that TCLP was below regulatory standards. *Id.*

This ruling expanded the Fifth Circuit’s 1989 ruling in *Amoco Oil Co. v. Borden Inc.*, 889 F.2d 664, which held that a plaintiff who is seeking to recover response costs must prove that the release violates, or the threatened release is likely to violate, an applicable state or federal regulatory standard. Simply proving the release of a CERCLA hazardous substance in any quantity is not sufficient. Lawyers for Murphy Oil said that the appeals court focus on whether a release posed a threat to the public or the environment was consistent with the purpose of CERCLA. Plaintiff’s counsel said they will file a certiorari petition with the Supreme Court.

***Tenth Circuit Denies Attempt To Regulate Tooele Stack
Emissions Under CWA - MAJ Mike Mulligan***

On April 22, 1997, the United States Court of Appeals for the Tenth Circuit, in *Chemical Weapons Working Group Inc. (CWWG) et al. v. U.S. Dept. of the Army et al.*, 111 F.3d 1485 (10th Cir. 1997), denied the attempt by advocacy groups opposed to incineration of chemical weapons, to force regulation of the stack emissions from the Army’s Tooele Chemical Agent Disposal Facility (TOCDF) under the Clean Water Act. The Army has a Clean Air Act permit for the facility’s incinerator stack emissions, but the plaintiffs alleged that the Clean Water Act, which places an absolute ban on the discharge of any chemical warfare agent into navigable waters, applied to the stack emissions.

The TOCDF has a valid Clean Air Act permit, which specifically authorizes limited amounts of chemical warfare agent particles to be discharged into the atmosphere as part of the incinerator’s emissions. CWWG argued that §301(f) of the Clean Water Act, 33 U.S.C. §1311(f), absolutely and unambiguously prohibited the discharge of chemical warfare agent that could eventually be deposited by atmospheric deposition into navigable

⁸ *National Association of Home Builders of the United States v. Babbitt*, 949 F. Supp. 1 (D. D.C. 1996).

waters from TOCDF's stack emissions. CWWG contended that the text of the provision placed no limitation on the form of chemical agent discharged or on the manner by which it enters navigable waters. Absent such limitations, CWWG had urged the court to read section 301(f) broadly to include discharge by way of atmospheric deposition to comply with the Congressional intent of the CWA.

The Utah district court below had rejected CWWG's broad reading of the CWA to include the stack emissions of the facility and found that such a reading would lead to an irreconcilable conflict with the provisions of the Clean Air Act permit. Consequently, the district court dismissed for failure to state a claim the allegation that the TOCDF stack emissions were subject to the provisions of the Clean Water Act. *Chemical Weapons Working Group Inc. et al. v. U. S. Dept. of the Army et al.*, 935 F. Supp. 1206 (D. Utah 1996). The plaintiffs appealed the dismissal.

In affirming the district court's dismissal of the Clean Water Act allegation, the Tenth Circuit also declined to construe the Clean Water Act as broadly as plaintiffs proposed, holding it "would lead to irrational results . . . [and] would create a regulatory conflict between the Clean Water Act and Clean Air Act." *Chemical Weapons Working Group Inc. (CWWG) et al. v. U.S. Dept. of the Army et al.*, 111 F.3d 1485, 1490 (10th Cir. 1997). The plaintiffs' argument that atmospheric deposition of the emissions from even cars and chimneys that could find their way to navigable waters could be regulated by the EPA under a nationwide permit was rejected by the Tenth Circuit as "exposing the absurdity of their position." *Id.* The court held that although Plaintiffs "may be correct in arguing that an object may fly through the air and still be "discharged . . . into the navigable waters" under the Clean Water Act, common sense dictated that Tooele's stack emissions constitute discharges into the air - not water - and are therefore beyond §301(f)'s reach. *Id.*

***Environmental Compliance Assessment System - Program
Information Notebook Update - Mr. Steve Nixon***

The ECAS Program Information Notebook (PIN), the compendium of guidance documents for ECAS, the Army's in-house environmental inspection system, is under revision. The portion of the PIN dealing with legal issues has been consolidated into one memorandum from ELD.⁹ The ELD guidance is that ECAS documents are working documents until completion of the Final Environmental Compliance Assessment Report, and thus not to be released under the Freedom of Information Act. ELD has further advised commanders of the importance of ensuring that all environmental problems identified are promptly addressed, either through correction or through appropriate funding requests. Army lawyers at installations being assessed under ECAS are reminded of the importance of active attorney involvement, to include advising on reporting requirements, FOIA issues, and funding priorities.

⁹ This memorandum is located in the ELD Online Information area of the ELD Environmental Law Links website (<http://160.147.194.12/eld/eldlink2.htm>), as well as in the Environmental Files area of the LAAWS BBS.

Editor's Notes:

Environmental Law Division has recently reviewed an environmental compliance compendium, *Environmental Compliance in Virginia*, published by Business & Legal Reports, Inc.(BLR). It is an easy-to-use service covering federal and state regulations, in which issues are arranged by alphabetical order. To review the volumes that cover your state regulations contact BLR at 39 Academy Street, Madison, Connecticut 06443-1513. Similar services are available from the Bureau of National Affairs, Inc. and other publishers of environmental compliance information. The same information is also available in the Environmental Compliance Assessment System Protocol Manual that may be ordered from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

Looking for the latest on Environmental Criminal and Civil Liability or the Military Munitions Rule? How about this or last month's Environmental Bulletin? Get them all in the ELD On-line Information center at the ELD Environmental Law Links website. Go to <http://160.147.194.12/eld/eldlink2.htm> and select the box marked "ELD On-line Information." This will take you to the On-line Information area of the page where you can select the appropriate topic of interest. Files are posted either in Word, WordPerfect 5.1 for DOS, various DOS text formats, and Adobe portable document format. Viewing Adobe files requires the Adobe Acrobat file reader, which can be downloaded via <http://www.adobe.com>.