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***EPA Addresses DOD's Concerns Over New  
Ozone and Particulate Matter Standards - LTC Mel Olmscheid***

On July 17, 1997, EPA Administrator Carol Browner sent a letter to DoD, addressing DoD concerns raised during informal discussions with EPA regarding the impact of the new Ozone and Particulate Matter standards on DoD training and readiness. Among other concerns raised, DoD had questioned whether the new standards would adversely affect training exercises, such as those that used obscurants.

Administrator Browner replied in her letter that, while obscurants would not be exempted under the rule, EPA will not require States to count particulates from obscurants in its attainment demonstration. Consequently, States will not have to regulate obscurants to meet the new ozone and particulate matter standards. EPA's policy, however, will not prevent States from regulating obscurants if they so choose. A State may regulate obscurants if they pose a health risk, since obscurants could, under the right conditions, cause an area to exceed the daily limit for particulate matter imposed by EPA regulations. EPA asserts that these health-based particulate matter standards protect sensitive populations.

The EPA letter also stated that military activities are among the smallest sources of fine particulates, and in its implementation guidance, it will advise States to target what EPA feels are the primary sources for fine particulates, such as power plants and large combustion sources. A State could, however, choose to regulate military activities that produce fine particulates, such as dust producing field exercises.

Therefore, it appears, at least for the moment, that EPA is serious about addressing DoD's concerns with the impact the new standards will have on military training and readiness. A copy of Ms. Browner's letter can be found on ELD's homepage at <http://160.147.194.12/eld/eldlink2.htm>).

***Clinton Privilege Decision Provides Timely Reminder for  
Commanders and Managers -- CPT Bruce Anders***

On June 23, 1997, the Supreme Court denied certiorari to review the 8th Circuit's decision that lawyers in the White House counsel's office must disclose notes of their

private conversations with First Lady Hillary Rodham Clinton.<sup>1</sup> Commanders and environmental program managers at all levels, correctly perceiving the current climate of stiffening EPA and State enforcement priorities, are increasingly aware of environmental criminal and civil liability issues pertaining to both installation and personal liability. It is therefore important for installation attorneys to review periodically the basics of privilege and confidentiality issues with their client. The 8th Circuit decision, which received considerable press coverage, provides installation attorneys a timely opportunity to remind their commanders and environmental program managers about attorney-client and deliberative process privileges.

The 8th U.S. Circuit Court of Appeals' decision involved two sets of notes taken by White House attorneys subpoenaed by Kenneth Starr, the Whitewater independent counsel. The notes involved Mrs. Clinton's activities following the suicide of her friend and deputy counsel to the president, Vince Foster, and the unexplained reappearance last year of some of Mrs. Clinton's 1980s Little Rock law firm billing records, long sought under subpoena in the investigation.

The White House argued that these conversations were protected by attorney-client privilege. The attorney-client privilege under FRE 501 "is governed by the principles of common law," and is considered the oldest known to common law.<sup>2</sup> The White House's position is intuitive for many attorneys, considering the purpose of the privilege, which protects citizens' right to private, candid discussion with their lawyers. But the 8th Circuit ruled 2-1 against the White House granting the Office of the Independent Counsel's motion to compel production of the notes. The Supreme Court denied the White House's request for certiorari.

Many in the legal community view the 8th Circuit decision with skepticism. New York University law professor Stephen Gillers opined, "This is a very dangerous precedent and very unwise for the long term. I fear this is driven by anti-Clinton sentiment or people who just want to get to the bottom of this Whitewater business. But long after we have forgotten about Whitewater, this precedent is going to be on the books."<sup>3</sup>

Installation attorneys should consider discussing with their commanders two points regarding the attorney-client privilege and the 8th Circuit decision. First, the 8th Circuit carefully distinguished the unprivileged communications between Mrs. Clinton and White House attorneys from the privileged nature of any communications between Mrs. Clinton and her *personal* attorney, who was also present at the meetings.<sup>4</sup> Commanders should not draw the wrong inference from this distinction, and should understand clearly who is the client of a JAG advisor. In virtually all discussions between an Army commander and an Army JAG, the client is the Army, not the commander.<sup>5</sup> Commanders must understand that the type of attorney-client protection Mrs. Clinton may have had with her personal attorney would be applicable only to communications between an Army attorney representing an

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individual client, which typically occur in either a legal assistance or disciplinary defense context.

Second, the court distinguished the White House (i.e., the Office of the President), which cannot be held criminally liable by the criminal conduct of its employees, from a

<sup>1</sup> *In re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert denied*, *Office of President v. Office of Independent Counsel*, \_\_\_ S.Ct. \_\_\_, 1997 WL 274825, 65 USLW 3767 (June 23, 1997) (NO. 96-1783).

<sup>2</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981).

<sup>3</sup> David Savage, *Privilege Ruling Disturbs Lawyers Courts: Attorneys Fear Foundation on Which Appellate Panel Built its Ruling Against First Lady Could Have a Serious Effect on a Key Legal Tradition*, *The Los Angeles Times*, May 18, 1997.

<sup>4</sup> *In re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 at 917.

<sup>5</sup> DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.13 (1 May 1992).

corporation (or federal agency like DoD), which can theoretically be criminally liable. The court discussed its refusal to extend the privilege in Mrs. Clinton's case, as distinguished from an attorney's communications with a corporate client, explaining: "corporate attorneys [whose corporations can be criminally liable] have a compelling interest in ferreting out any misconduct by its employees. The White House simply has no such interest with respect to the actions of Mrs. Clinton."<sup>6</sup> Commanders can likely conclude from this holding that, where an Army attorney collects materials relevant to his or her representation of the installation pertaining to possible criminal activity of the command, these documents would fall outside the scope of this decision and be deemed privileged.

It may also be necessary to remind commanders and managers about the difference between the attorney-client privilege and the deliberative process privilege under FOIA. FOIA's deliberative process privilege is unique to the government, and is intended to protect open and candid communication within government agencies.<sup>7</sup> The privilege establishes the fifth of nine exemptions under FOIA, exempting from release "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency."<sup>8</sup>

While commanders should not discourage the flow of communication through command channels concerning the installation's compliance status, they should be aware of two points establishing the somewhat narrow scope of the deliberative privilege. First, the privilege only applies to pre-decisional, mental, or deliberative processes, and governmental evaluations, expressions of opinion, and recommendations on policy and decision-making matters.<sup>9</sup> Thus, only documents that are prepared to assist a commander in making a decision, i.e., decision memoranda containing fact synthesis and/or analysis, are privileged -- purely factual materials are not. It is for this reason that final ECAS reports are not privileged, and would have to be disclosed upon forwarding of a proper FOIA request. Second, the deliberative privilege is "qualified," not absolute. Factors to be considered in a court applying the privilege are: (1) the relevance of the evidence to be protected, (2) the availability of other evidence, (3) the seriousness of the litigation and issues involved, (4) the role of the government in the litigation, and (5) the possibility of disclosure's chilling effect on other employees.<sup>10</sup> Appreciating these limitations might alleviate Commanders' anxiety over when their communications with "their lawyer" are protected from disclosure to the public.

**NEW CEQ GUIDANCE ON NEPA AND  
TRANSBOUNDARY EFFECTS -- MAJ Allison Polchek**

On July 1, 1997, the Council on Environmental Quality (CEQ) issued guidance for agencies regarding the applicability of the National Environmental Policy Act (NEPA) to transboundary effect.<sup>11</sup> This guidance will undoubtedly impact installations near the Mexico and Canadian borders, and should be followed when the installation examines a proposed

<sup>6</sup> *In re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 at 933.

<sup>7</sup> *Badwar v. United States Dep't of the Air Force*, 622 F. Supp. 1364, 1367 (D.C. Cir. 1985).

<sup>8</sup> 5 U.S.C.A. § 552(b)(5) (West 1996).

<sup>9</sup> *U.S. Postal Service v. Phelps Dodge Refining Corp.* 852 F. Supp. 156, 164 (E.D.N.Y. 1994).

<sup>10</sup> *Franklin Nat'l Bank Securities Litigation*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979).

<sup>11</sup> "Council on Environmental Quality Guidance on NEPA Analysis for Transboundary Impacts," (July 1, 1997). The CEQ guidance can be obtained on the Environmental Law forum on the LAAWS BBS.

federal action in a NEPA analysis.

The CEQ guidance requires a federal agency to include an analysis of reasonably foreseeable transboundary effects of a proposed action which occurs in the United States. It applies only to actions that are currently covered by NEPA, and that occur within the United States or its territories. The guidance is not intended to expand the range of actions to which NEPA applies.

Under the guidance, NEPA analysis must consider the reasonably foreseeable effects of a proposed federal action across international boundaries. Possible examples include: an action that may result in increased water usage that would affect an aquifer shared by another country, or the siting of a hazardous air pollutant source on the installation that could impact individuals in the foreign country.

CEQ recommends using the scoping process to identify actions that could have transboundary effects. The guidance recommends particular attention be paid to actions that could effect migratory species, air quality, watersheds, and other ecosystem components that cross borders. Interrelated social and economic effects should also be considered, although social and economic effects alone will not be enough to trigger an Environmental Impact Statement analysis.

The extent of information to satisfy this new guidance remains within the discretion of the agency. CEQ notes that agencies are responsible to “undertake a reasonable search for relevant, current information associated with an identified potential effect,” and are not required to address remote or highly speculative consequences. Installations should consult applicable international agreements to determine if a specific process for obtaining information could constitute a reasonable search for information.

### ***Migratory Bird Treaty Act - Litigation Update - MAJ Tom Ayres***

Courts continue to wrestle with the applicability of the Migratory Bird Treaty Act (MBTA) to federal agencies.<sup>12</sup> As previously reported, some public advocacy groups allege that the MBTA’s prohibitions apply to federal agencies.<sup>13</sup> Two Circuit Courts ruled recently that the MBTA does not apply to the actions of federal agencies.<sup>14</sup> Installations that coordinate actions that may adversely affect migratory birds with the U.S. Fish and Wildlife Service remain in the best posture to avoid this “flurry” of MBTA litigation.

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### ***Sikes Act Reauthorization Efforts - MAJ Tom Ayres***

Despite two consecutive years of unsuccessful efforts, it appears that Congress will pass a revised, updated, and strengthened Sikes Act.<sup>15</sup> Currently, the Sikes Act authorizes DoD to enter into cooperative plans with the Department of Interior and State fish and game agencies to manage fish and wildlife on military installations. Two bills under consideration in Congress would alter the permissive nature of the Sikes Act and would create a statutory requirement for military installations to prepare integrated natural resources management plans.<sup>16</sup> In anticipation of Sikes Act reauthorization and pursuant to

<sup>12</sup> The Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1989).

<sup>13</sup> See Farley, *Migratory Bird Treaty Act*, THE ARMY LAWYER, 29 (December 1996).

<sup>14</sup> *Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997); *Newton County Wildlife Association v. U.S. Forest Service*, 113 F3d 110 (8th Cir. May 6, 1997).

<sup>15</sup> The Sikes Act, 16 U.S.C. § 670a-f (1997). Congress initially enacted the Sikes Act in 1960 and has amended the Act five times since 1960, with the most recent amendments passing in 1986.

<sup>16</sup> H.R. 374 was offered by Mr. Young (R-Alaska) and an amendment to H.R. 1119 was offered by Mr. Saxton (R-N.J.).

Department of Defense instruction,<sup>17</sup> the Department of the Army recently issued guidance on preparing Integrated Natural Resource Management Plans (INRMPs).<sup>18</sup>

Both Sikes Act reauthorization bills currently being considered by Congress also detail mandatory contents of INRMPs. The contents required by each bill, however, differ slightly. Congressional staff speculate that it is likely that a compromise version of the two bills will be incorporated into the Fiscal Year 1998 Defense Authorization Act.<sup>19</sup> Stay tuned.

***Air Force Environmental Law  
Course Dates - Mr. Steve Nixon***

Advanced Course: December 1-3 1997  
Update Course: February 23-25 1998  
Basic Course: May 4-8 1998

All courses are held at Maxwell AFB, Montgomery Alabama. The course is free, but travel and TDY are the attendee's responsibility. The Advanced Course has a very limited number of seats and requires nomination by the MACOM ELS. For the Update and Basic courses, Army attorneys can enroll themselves by contacting Ms. Mary Nixon, Environmental Law Division, FAX: 703 696 2940; Voice: 703 696 1230; e-mail: nixonmar@otjag.army.mil.

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**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.

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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>.

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<sup>17</sup> DEP' T OF DEFENSE INSTRUCTION 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (May 3, 1996).

<sup>18</sup> See *Integrated Natural Resources Management Plan (INRMP) Guidance Released*, THE ARMY LAWYER, 57 (June 1997).

<sup>19</sup> Discussion with Ms. Anne Mittemeyer, General Counsel to Senate Armed Services Committee, July 1, 1997.