



Office of Command Counsel Newsletter

August 1997, Volume 97-4

CLE Resounding Success!

The 1997 AMC Continuing Legal Education Program was held in Alexandria, Virginia 16-20 June. By any measure the Program was very successful with nearly 150 attorneys from AMC, DA and several other federal agencies, enjoying a series of plenary sessions, nearly two-dozen electives, and four-

hour sessions devoted to environmental, intellectual property, employment and acquisition law.

This year's theme of "AMC Attorneys: Teaming for Success" recognizes that to be successful, to actively participate in the AMC mission, we must Team, not just within the legal community, but with our clients and customers.

My thanks to **Steve Klatsky** who chaired the CLE Planning Committee, and his committee comprised of **Colonel Bill Adams, Dick Couch, Bill Medsger** and **Elizabeth Buchanan**. A special thanks to **Tom Cavey** for ensuring a smooth, organized, trouble-free meeting, and to **Holly Saunders** and **Debbie Arnold** for their valuable admin. assistance. ©

Allen Receives Attorney of the Year Award

As part of the AMC Command Counsel's Award Program, this year's nominees for the Joyce I. Allen Attorney of the Year Award were **Fred Allen**, MICOM; **Tim Connelly**, ARL; **MAJ Susan Gibson**, TECOM; **LTC Phil Lower**, CBDCOM; **Bob Parise**, TACOM-ARDEC; **John Seeck**, IOC; and **Tony Vollers**, ATCOM.

The recipient is **Fred Allen**, Acting Chief, Acquisition Law Division, MICOM.

Mr. Allen has been a valued member of the MICOM legal staff for 29 years, working in every phase of the acquisition process. He has been involved in the develop-

ment and fielding of some of the most important weapon systems, including the Pershing II and Multiple Launch Rocket System, and spearheaded the development of the first NATO Project Office — the NATO Medium Extended Air Defense System Management Agency.

Surveys of the MICOM workforce indicate that under Mr. Allen's management, the Acquisition Law Division enjoys a tremendous reputation from both clients and customers. Congratulations to each nominee and to **Fred Allen**.

More details on the Command Counsel's Award Program can be found on page 4.

In This Issue:

<i>CLE Resounding Success</i>	1
<i>Attorney of the Year Award</i>	1
<i>Letter to Editor</i>	2
<i>Enclosure Listing</i>	2
<i>CLE Special Edition</i>	3
<i>Washington After Dark</i>	3
<i>Command Counsel Awards</i>	4
<i>Acquisition Law</i>	7
<i>Balance of Power at the Court</i>	8
<i>Environmental Law</i>	9
<i>Bumper Cars</i>	10
<i>Employment Law</i>	11
<i>Ethics</i>	14
<i>Faces in the Firm</i>	15

Letters to the Editor

Frequent Flyer Follow-up

Dear Editor:

In the June 1997 AMC Command Counsel Newsletter was printed a Letter to the Editor from John Stone, SSCOM concerning cash awards to employees enrolled in the frequent flyer program. I couldn't agree with Mr. Stone more on this subject. The gainsharing program could be a wonderful opportunity to encourage the use of the frequent flyer program (with its huge potential for cost savings).

When we first asked DA whether this program could be pursued, OGC opined that it could not, because such a program does not fall under the categories of awards con-

templated by the Government Employees' Incentive Awards Act. Later, we became aware of several things that we thought might effect DA's opinion. First, I verified that GSA has, indeed, an active gain sharing program up and running. I was even provided a copy of that program. Next, my boss brought to my attention an article published in the May 12, 1997 Federal Traveler Magazine, which praised the GSA gainsharing program and claimed that GSA had saved \$120,000 since 1995 through the program.

This office forwarded all of this information to DA, asking that another review be
continued on page 13, column 1.....

List of Enclosures

1. Creative Use of ADR at the GAO
2. Timely Definitizations of Undefinitized Contractual Actions
3. Foreign Military Sales Contingent Fees—A Change?
4. Signing a Non-Disclosure Statement
5. Oral Presentations Revisited
6. General Legal Approach to Bundling Or Consolidating of Requirements
7. Environmental Law Division Bulletin June 1997
8. Environmental Law Division Bulletin July 1997
9. BRAC Installation Responsibilities
10. Environmental Team Functional Areas
11. National Environmental Policy Act
12. BRAC and Acquisition Environmental WebSites
13. Pre-Decisional Involvement: Management and Labor Solving Problems Early
14. Frequent Flyer Miles and Other Travel-Related Benefits
15. Gifts From Foreign Governments
16. Fender Benders While On Government Business-Who Pays?
17. CPOC EEO Complaint Processing Policy

Newsletter Details

Staff

Command Counsel
Edward J. Korte

Editor
Stephen A. Klatsky

Copy Editor
Linda B.R. Mills

Administrative Assistant
Fran Gudely

Typist
Billy Mayhew

Layout & Computers
Joe Edgell
Holly Saunders

The AMC Command Counsel Newsletter is published bi-monthly, 6 times per year (Feb, Apr, Jun, Aug, Oct, Dec).

Back Issues are available by contacting the Editor at (703) 617-2304.

Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to sklatsky@hqamc.army.mil

Check out the Newsletter on the Web at http://amc.citi.net/amc/command_counsel/

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

pecial edition

CLE Goes to Washington

The Supreme Court Through the Eyes of the Clerk

One of this year's CLE Program highlights was the group tour of the Supreme Court, specially arranged for and administered by **MG (Ret) William K. Suter**, Clerk of the U.S. Supreme Court.

MG Suter spoke to us from within the Courtroom, with attendees in awe of the setting. The 60-minute discussion was filled with inside stories, anecdotes

and historical references. We can not thank **MG Suter** enough for taking time to be our personal tour guide.

For an attorney there is no more impressive venue.

Washington After Dark

Some 75 attendees and their families enjoyed a 3-hour guided bus tour to many Washington, D.C. landmarks — the Vietnam and Korean War Memorials; the Lincoln, Jefferson and F.D.R. Memorials; and the Iwo Jima Memorial.

The tour put in perspective the important work we do for the U.S. Army, soldiers and civilians alike.

For most of us it was our first visit to the new FDR Memorial - an extremely impressive park-like setting that honors the former President and Eleanor Roosevelt. And, we lucked out with a beautiful June evening over the Nation's Capitol.

When in Washington please take the time to visit these historic places.

CG Speaks at Preventive Law Program 1997 AMC Award to Esparraguera Command Counsel's Award Program

A highlight of our annual CLE Program is the Command Counsel's Award Program, a time to reflect back on this year's critical individual and team achievements, and to recognize those counsel whose professionalism and exceptional work products contributed significantly to the success of AMC.

This year, our Commander, **General Johnnie E. Wilson** participated in our Awards Program, and provided attendees with an update on developments within the Command, DA and DOD.

General Wilson conveyed his appreciation for the significant contribution that AMC attorneys and support personnel make to accomplish the AMC mission, and encouraged our active participation as part of the AMC "Board of Directors".

This award recognizes efforts that encourage each AMC attorney to anticipate the needs of client and commands, to identify areas of greatest vulnerability and to develop programs to address those needs.

Nominees for this year's award were **Emanuel Coleman**, MICOM; **Bradley Crosson**, IOC; **Hal Dilworth**, MICOM; **Rita Edy**, MICOM; **Maria Esparraguera**, CECOM; **Margaret Gillen**, CECOM; **John Klecha**, TACOM; **Jeanne Rapley**, TECOM; **Marcia Stevens**, MICOM; and **CPT Christopher Wood**, ATCOM.

Maria Esparraguera is this year's awardee.

Ms. Esparraguera is primary counsel for the Base Realignment and Closure construction contracts at CECOM. Maria designed Partnering Agreements to ensure that Ft. Monmouth personnel and the construction contractors developed a relationship based on open and honest communication, early identification of potential problems, face-to-face discussions, and a mutual commitment to resolve issues without resort to litigation. **Ms. Esparraguera's** skillful, dedicated and proactive approach greatly contributed to the overwhelming success of the BRAC projects.

Command Counsel's Editors Award

In the fourth year of this award, **CPT Joe Edgell**, HQ, AMC, became the first individual to be recognized for his significant contribution to our Newsletter. (Previously, AMC legal offices were recipients). **CPT Edgell** has been the driving force behind automation of the Newsletter, which has made the Newslet-

ter available quicker and to a wider audience, with a much more attractive design. Thanks to **CPT Joe Edgell** for his tireless efforts to bring the AMC legal community closer towards the 21st century. **CPT Edgell** leaves us with the huge task of maintaining his standards!

LOGCAP Performance Earns CECOM Accolade for Teamwork

The Team Project Award recognizes exceptional contributions by groups or teams working together on a project or program.

This year's nominees were the ARL Alternative Dispute Resolution Project Team chaired by **Sam Shelton**; ATCOM's Legal, CPO, EEO Team with **Bob Garfield** representing legal; LOGCAP Legal Team, comprised of CECOM and AMC attorneys managed by **Kathi Szymanski**; SSCOM's Command Legal Program Team, **John Stone, Maria McDermott, Peter Tuttle, Jessica Niro, James Savage, Vince Ranussi** and **Richard Mobley**; TACOM's Automation Team, **John Klecha,**

Frank Rodriguez, Barry Dean and **Pat Jacques**; TACOM's Tech Transfer License Team, **Marty Kane, Ed Goldberg, Michael Sachs** and HQ AMC's **Ed Stolarun**; and, TECOM's Team Legal, **Laura Haug, MAJ Susan Gibson,** and **SFC Monique Wagner**. The recipient of this year's Team Project Award is the LOGCAP Legal Team .

The team is comprised of **Kathi Szymanski, Mark Sagan, Paula Pennypacker, Vince Buonocore, Howard Bookman,** and **Kim Melton** from CECOM, and **Jeff Kessler** and **LTC Paul Hoburg** from HQ AMC.

LOGCAP is the Logistics Civil Augmentation Program, a DA initiative to preplan dur-

ing peace time for the use of civilian contractor personnel to perform selected services and other contingencies to augment U.S. forces in support of DOD missions.

CECOM was selected to serve as the Contracting Agency, quickly moving to form a team with pre-award and contract administration expertise.

Teamwork was an essential reason why the contract for this high-visibility, high-dollar value contract was awarded 125 days from issuance of the solicitation.

After award 3 of the 4 unsuccessful offerors praised CECOM for its professionalism throughout the process. No protest litigation was filed in connection with this extremely complex acquisition.

Buckley Managerial Excellence Award

Named for the late Chief Counsel of MICOM, the Francis J. Buckley Jr. Managerial Excellence Award emphasizes the importance of quality management to the AMC legal system.

This year's nominees were **Don Hankins**, MICOM; **Laura Haug**, TECOM; **Bruce Jones**, ATCOM; **Kay Krewer**, TACOM-ACALA; and, **Mark Sagan**, CECOM.

This year's recipient is **Bruce Jones**, ATCOM.

As Chief of Branch A in the ATCOM Procurement Law Division, **Mr. Jones** ably handled the tremendous challenges of the departure of two experienced attorneys by reorganizing his Branch, cross-training, and mentoring counsel on the important work done by his organization.

Branch A supports the development of the Commanche and Longbow Apache helicopter, two of the most visible, costly and vital weapons systems programs.

The common thread to the success of Branch A is the ability of **Bruce Jones** to convince clients, peers, and subordinates that doing the right thing will, in fact, yield the best results.

Achievement Award

The Command Counsel's Achievement Award is unique in that HQ AMC attorneys nominate field attorneys who have achieved extraordinary achievement on a significant case or project.

This year's recipient is **CPT Harry Hamilton** from CECOM. As part of AMC's highly regarded Environmental Law Specialist community, **CPT Hamilton** expertly handled a number of very significant legal and practical matters pertaining to the National Environmental Policy Act (NEPA) review process and for the complex issue of radioactive sources.

Regarding NEPA, **CPT Hamilton** was instrumental in pursuing completion of the Ft. Monmouth-Evans subpost Environmental Impact Statement, a 500 page document, analyzing and interpreting many complex issues, satisfying the concerns of lawyers and program personnel at AMC and DA.

Concerning radioactive sources, **CPT Hamilton** successfully counseled his clients regarding the interface between NEPA and the Nuclear Regulatory Commission process, and coordinated an agreed upon approach and ultimate approval by HQ DA.

Outsourcing and Privatization Panel

HQ AMC's **Elizabeth Buchanan** chaired a panel on this timely and vital subject, and CLE attendees actively participated in presentations by **David Childs**, Program Examiner, Office of Management and Budget and **COL Henry Leonard**, Director of Outsourcing and Privatization, Office of ACS for Installation Management, Department of the Army.

Current governmental DA and AMC efforts were discussed, as well as legal issues that are being raised.

Outsourcing is defined as a transfer of function which had been performed by Government employees to performance by contractor employees (Example: A-76 studies and depot maintenance competition).

Privatization is the process of changing a public entity to private control and ownership (Example: divesting utilities and housing).

As we look to the future to meet the expectations of the Administration and DOD no subject will be as important to us as the related disciplines of outsourcing, privatization and the A-76 contracting out process. Teamwork will be essential in order to succeed.

Edgell Smashes a Pinch Hit Homerun!

With the unexpected cancellation of one of our plenary speakers, we called upon **CPT Joe Edgell** to demonstrate the AMC Web Site and to provide conferees' with "basic training" on the Internet, a difficult task to accomplish for an audience of 150. With less than 24-hours notice, **CPT Edgell** planned and executed an exceptional presentation for attendees, during which Joe created a spirited dialogue by his excellent teaching methods.

General Wilson recognized this highly professional effort by issuing **CPT Edgell** an AMC coin.

And Thanks To All Of You ...

To each of you who prepared a presentation, assisted invited guests, and made our field counsel feel at home, a heartfelt thanks. You practiced well the theme of this year's program — Teaming for Success".

Your work and planning for the implementation of the Annual CLE Program is not a substitute for the outstanding work you do for our client on a daily basis; it is a vital "extra duty" which brings us closer together as a lawfirm and community.

Acquisition Law Focus

Try It: ADR at Revisiting Oral GAO Presentations: FAR 15

HQ AMC Protest Counsel **Jeff Kessler**, DSN 767-8045, reports on his successful use of Alternative Dispute Resolution (ADR) techniques on bid protest cases (Encl 1).

Three specific examples are cited, with an ADR Conference approach used to expedite raising issues, discussion and resolution. GAO attorneys were made available and fully supported these efforts at early resolution.

While not a panacea for all cases, ADR for bid protest cases should always be considered. Coupled with our AMC-Level Protest Program, ADR at GAO provides another vehicle for reaching agreement.

FMS Contingent Fees--A Change?

HQ AMC International Law counsel **Larry Anderson**, DSN 767-1040, has written an excellent memorandum, outlining the changes with respect to contingent fees in federal government contracts. The Director of Defense Procurement issued an interim rule on 17 January to eliminate the requirement for a government review

CECOM's **Tom Carroll**, DSN 992-9805, has prepared a treatise highlighting the Federal Acquisition Regulation (FAR) Council rewrite of FAR Part 15, Contracting by Negotiation. A history of the issue from the first version published in September 1996 to the May 14, 1997 proposed rule is included.

Subpart 15.1 entitled "Source Selection Processes and Techniques and 15.103 addresses "Oral Presentations" which will provide specific regulatory guidance for the first time.

This new FAR section allows oral presentations to be used as an information gathering tool at any time in the

of a prospective contractor's contingent fee arrangement for FMS contracts.

An amendment in June proposes to eliminate the current \$50,000 ceiling on contingent fees, permitting fees in excess of this amount when the foreign customer approves the payment in writing before the contract award (Encl 3).

acquisition process; describes what types of information may be suitable for gathering through an oral presentation; what types of information must be obtained in writing; provides some criteria to consider in deciding exactly what information to obtain through an oral presentation in any particular acquisition; describes what instructions should be included in the solicitation if oral presentations by offerors are to be required; and, requires that the contract file include a record of the oral presentation with the method and level of detail left to the discretion of the source selection authority. A great paper (Encl 5).

Definitizations Explained

After reading that title a second time, you are invited to read the article by AMCOM's **Diane Beam** article. She describes the statutory requirements of UCAs contained in 10 USC e 2326, highlights requirements, addresses restrictions and defines "qualifying proposals." The technical issue of timeliness under the 180 day or 50% rule contained in the statute and at DFARS 217.7404-3(a) is also addressed (Encl 2).

Acquisition Law Focus

Signing A Non-Disclosure Agreement

SSCOM's **Vin Ranucci**, DSN 256-4510, provides an interesting paper addressing the circumstances of a non-federal party submitting an item to an Army facility for test and evaluation. The submitter general includes a non-disclosure agreement (NDA) raising the question whether the Army should sign.

DA policy suggests that it should not be signed by Army representatives unless the item is very important to the Army and the submitter insists. In this case, a contracting officer is deemed to be the only appropriate Army official to sign (Encl 4). Your attention is invited to JALS-IP guidance dated 16 November 1992.

AMC Partnering Guide and Videotape

The Guide and Videotape are now available. As Acquisition Law Counsel have you informed your clients in the Acquisition Centers and Directorates of the availability of these critical program tools?

August 1997

Bundlin' Ain't Bumblin'

ACALA's **Joe Picchiotti**, DSN 793-8435, provides a paper outlining GAO cases upholding the agency decision to bundle: procurements that combine separate, multiple requirements into one contract. And, a case in which an agencies decision was not supported at GAO. In the latter case, GAO determined that when concerns of administrative convenience are being weighed against ensuring full and open competition, CICA, 41 USC 253, and implementing regulations require that the scales be tipped in favor of ensuring full and open competition (Encl 6).

Who's Who in AMC: See the Defense News

The Summer 1997 edition of the Defense News has a fine supplement on the Army Materiel Command, highlighting missions, values, and the people who comprise our Command. When your non-AMC clients and customers ask you who we are, this would be a great method of educating them.

Balance of Power at the Court

The Supreme Court is often measured by its 5 to 4 decisions, 17 this term **Justice Anthony M. Kennedy** was in the majority in 14 of these cases, more than any other justice. Overall, Kennedy stood with the majority 94 percent of the time. **Justice Sandra Day O'Connor** was in the majority in 12 of these cases and, overall, in the majority 89 percent of the time.

Although in recent terms **Kennedy** and **O'Connor** played the center more, signing on with liberal leaning justices in some key cases, this term they were more inclined to be with the three most conservative members of the bench: **Chief Justice William H. Rehnquist** and **Justices Antonin Scalia** and **Clarence Thomas**. This quintet voted together in eight cases. No other five justice combination prevailed nearly as much.

The dissenting block most often includes **Justice John Paul Stevens**, **David H. Souter**, **Ruth Bader Ginsburg** and **Stephen G. Breyer**, with **Stevens** being the greatest dissenter.

The two Supreme Court Justices who voted together most often were **Scalia** and **Thomas** — in all but one case.

Environmental Law Focus

EPA Military Munitions Rule Information & Status Report

Stan Citron, HQ AMC ELS continues to provide exceptional representation for implementation of the munitions rule. Highlights of recent developments are summarized:

MR Effective Date - The EPA Military Munitions Rule (MR) was published several months ago with an effective date of 12 August 1997. Despite the "effective" date established by EPA, the MR will not take effect in most states until it is formally adopted through the state administrative rulemaking process

MR Implementation - Over the past four months the military services have met with the states to discuss implementation of the MR. Many of the states support the MR but most states will not be able to complete the administrative process to adopt the MR by the 12 August 1997 deadline

ELD Summer Bulletins

ELD Bulletins for June and July 97 are provided (Enclosures 7 and 8) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version.

What should installations do after 12 August 97?

If the state accepts the MR, the installation should implement the rule on 12 August 97. On the other hand, if the state does not accept the MR and has not proposed alternative rules, the installations should maintain the status quo regarding munitions operations until the state's concerns are adequately addressed.

Conclusion - The successful implementation of the MR will require communication within all levels of AMC. Any questions regarding the MR may be addressed to the AMC DSC for Ammunition **Oscar Guarnstrom**, DSN 767-9799, the AMC Environmental Office **Don Gower**, DSN 767-9571, or the AMC Legal Office, **Stan Citron**, DSN 767-8043

Edgell to Ft. Stewart

CPT Joe Edgell has been reassigned to Ft. Stewart after more than two years of outstanding work for the Army Materiel Command. Best wishes to Joe for a successful tour as a Trial Defense Counsel. Luckily, Georgia has liberal bike riding laws.

CEQ NEPA Impact Analysis

Major Allison Polchek has prepared an excellent outline on the National Environmental Policy Act (NEPA), enclosure 11. One area of NEPA analysis that is getting increasing emphasis by the courts and interest groups is the requirement to assess the cumulative impact of an action in relation to other past, present, and reasonably foreseeable future actions in the area. The Council on Environmental Quality has put together an extensive reference guide, which is available on its Web site as well as a wealth of other important aid for writing and reviewing NEPA documents.

New AMC ELS and Real Estate Team

Major Michael (Mike) Stump joined HQ AMC and the Environmental Law Team on 1 July 1997. His arrival presented an opportune time to reassign the responsibilities of our Team members with respect to both which BRAC installations they will be responsible for, and the general environmental functional areas of responsibilities. The BRAC Installation Responsibilities are at enclosure 9 and environmental team functional areas at enclosure 10.

Environmental Law Focus

Suitability to Lease or Transfer Army Real Estate

The new AR 200-1, Environmental Protection and Enhancement, 21 Feb 1997, paragraph 15-6 now requires a Finding of Suitability to Lease (FOSL) for leases and a Finding of Suitability to Transfer (FOST) for Army leases or sales divesting title. Previously these documents were only required for real estate transactions at BRAC sites. Details of any differences between procedures at BRAC sites versus transactions at active bases will be provided in DA PAM 200-1, soon to be published. In light of this expansion of the FOST/FOSL process AMCCC-G in conjunction with the AMC Environmental Quality Divi-

sion is in the process of developing a comprehensive guide and representative model to use. It will be distributed to environmental law specialists, as well as located on our Command Counsel WWW Home Page. DoD has recently published an extensive revision of its FAST TRACK TO FOST guidance as well as a FOSL Factsheet and Guide. These should be consulted by anyone involved in the process or writing, reviewing either a FOST or FOSL. If you cannot obtain a copy from the Web Site, contact **Bob Lingo**, DSN 767-8082 or **Stan Citron**, DSN 767-8043 in our office.

Bumper Cars on Government Time

ARL Paralegal Specialist **Angee Acton**, DSN 767-1072, prepared an ARL Chief Counsel Comment on an all too common occurrence. This interesting paper addresses POV's, rental vehicles, and the relationship between private insurance and the Federal Employee Compensation

Act (FECA). You are reminded that you are acting "outside the scope of employment," for example, when traveling beyond a reasonable distance from the location of the Government business. In such cases, the employee may not be covered by the Federal Government in the event of an accident (Encl 16).

Surfing for BRAC and Environmental Websites

There is a **Wealth** of information out there if one only knows where to work. In relation to that statement, enclosed is a list of BRAC sites which have information of the BRAC real estate transfer and environmental process (Enclosure 12). Similarly, we have put together a list of sites that emphasize environmental law and issues as it relates to the acquisition process. Enclosure . A copy of the final Air Force Affirmative Procure Guide, mentioned at our Continuing Legal Education Conference, can be obtained through contacting the site for the Air Force Center for Environmental Excellence, contained on the list.

1997 CLE Critiques

Appreciate the some 75 CLE attendees who took the time to make important comments about program content and administration. Our planning committee will incorporate them for our 1998 CLE Program.

Employment Law Focus

Affirmative Action at the High Court

The Supreme Court has agreed to rule on the legality of a workplace affirmative action plan and decide whether a New Jersey school board lawfully used race in deciding to lay off a white teacher. The case of the Board of Education of Piscataway, N.J. v. Taxman, US Sup Ct No. 96-679, June 27, 1997, involves an affirmative action plan adopted by the school board, not to remedy past discrimination, but as a voluntary effort to promote racial diversity.

In 1989, the school board had to lay off a teacher from its high school business department. Two teachers, one white and one black, had been hired the same day and had the same qualifications. The white teacher sued after the layoff claiming a violation of the Civil Rights Act of 1964. The Third Circuit agreed that reverse discrimination occurred. The decision by the Court will likely be as important to layoff cases as Adarand Constructors, Inc. v. Peña 515 U.S. 200 (1995) is to government contracting.

Sometimes You Can Lie!

The Supreme Court will review whether federal employees can be disciplined for making false statements to agency investigators in addition to being disciplined for the underlying misconduct for which they are being questioned or investigated.

The case of King v. Erickson, US Sup Ct, No. 96-1395, June 22, 1997, and others such as Walsh v. VA, 62 MSPR 586 (1994), decided by the MSPB and sustained by the US Court of Appeals for the Federal Circuit, established that an employee cannot be disciplined for the mere act of denying an alleged act of misconduct, but could face discipline for "telling a story" to agency investigators.

At the CLE Program, Anniston's **George Worman** and **Susan Bennett** gave a very well-received elective on this important employment law issue.

Labor-Management Partnership

Let us know of your success stories, experiences and recommendations on improving communication during this time of personnel turbulence.

Labor Management Pre-decisional Problem -Solving

The Federal Labor Relations Authority (FLRA) issued a guidance memorandum on July 15, Subject: Pre-Decisional Involvement: A Team-Based Approach Utilizing Interest-Based Problem Solving Principles.

FLRA **General Counsel Joe Swerdzewski** believes that pre-decisional involvement is the cornerstone of labor-management partnership. This term represents those activities where employees through their union representatives are afforded by agency management the opportunity to shape decisions in the workplace which impact on the work the employees perform. This does not waive management rights or the right to bargain collectively, and it does not expand the scope of bargaining.

Pre-decisional means that the parties work together to design and implement comprehensive workplace changes. Under this doctrine workplace participants have input into the decision-making process, allowing them to present and explore solutions that may not have otherwise been discussed. The FLRA OGC's Executive Summary is provided (Encl 13).

Employment Law Focus

What You Tell Future Employers May Be Your One Big Regret

The U.S. Court of Appeals for the Ninth Circuit in Hashimoto v. Dalton, CA 9, No. 95-15827, July 3, 1997, ruled that advising a prospective employer that the applicant met with an EEO counselor is a prohibited act of discrimination (retaliation) for engaging in protective activity (the right to consult with a counselor). The supervisor's act would have a chilling effect on other employees who might wish to consult with an EEO counselor.

Sexual Harassment: A Quid Pro Quo Refresher

A good case to refresh yourself on several important sexual harassment issues is Hunter v. Air Force, 1997 U.S. App. LEXIS 15256, a Federal Circuit decision that addresses the correct burden of proof (preponderance of the evidence), the requirement for corroborating evidence (none needed), and credibility (an Administrative Judge responsibility not often disturbed on appeal), and discipline of supervisor (held to higher standard of care).

DA Issues CPOC-EEO Complaint Processing Policy

The DA issued guidance on July 7, addressing the procedures to be followed in processing EEO complaints of discrimination involving actions by the Civilian Personnel Operations Center (CPOC).

When the CPOC is processing actions for a serviced installation or activity it is in the "acting for" capacity for that installation or activity commander/director. As such, the CPOC is working for the commander/director of the activity who requested the personnel action. Under this guiding principle, although geographically separated, the CPOC can be looked upon as part of the serviced commander's/director's staff when processing personnel actions for that commander's/director's installation or activity.

When a CPOC is acting for a serviced commander/director and an employee or applicant alleges discrimination which involves an action taken by the CPOC, the EEO Office servicing the commander/director is responsible for counseling and complaint processing. For example:

(a) If a Fort Bragg employee applies for a position at Fort Bragg and alleges that Southeast CPOC personnel at Fort Benning discriminated based on sex in non referral for the position, the Fort Bragg EEO Office is responsible for counseling and complaint processing.

(b) If a Fort Bragg employee applies for a position at Fort Polk and alleges that South Central CPOC personnel discriminated based on sex in non-referral for the position, the Fort Polk EEO Office is responsible for counseling and complaint processing.

Additionally, the guidance ensures that the labor counselor, EEO manager and CPO work as a team for issues such as access to records, settlement, and other related issues (Encl 17).

Planning for January 1998

It's not too early to put the Annual OPM Symposium on employee and Labor Relations (SOELR) on your training calendar. The most comprehensive employment law and policy program for you.

Downsizing Impacts Union Representation

OPM reports that the number of federal employees represented by unions has dropped sharply the past five years — 13% between 1992 - 1997. DoD unions show the biggest decrease as a result of BRAC and other downsizing. Some figures: Metal Trade Council dropped by 56%; International Association of Machinists and Aerospace Workers declined by 22%; National Federation of Federal Employees declined 16%; National Association of Government Employees dropped 17%; and, the

American Federation of Government Employees by 10%.

In terms of numbers of employee represented by unions, the Army, Navy and Air Force rank second, third and fifth, respectively, of the 65 Federal agencies surveyed.

Based on the latest OPM data, Army has 448 bargaining units covering 135,679 appropriated fund employees (about 59% of our work force.), 36,373 are blue collar and 99,306 are white collar. 394 units (128,672 employees) are covered by collective bargaining agreements.

...Letter to the Editor continued done to see if DA's opinion was now different. OGC responded that its opinion had not changed and that the Government Employees Incentive Awards Act does not authorize such an award program. Further, OGC added a new justification for not authorizing such a program - that is, the interest of maintaining uniformity between civilian employees and soldiers since 10 USC

continued on page 15, column 3.....

Off Duty Rape May Not Create A Hostile Work Environment

Unique Facts Lead to Strange Conclusion

A Treasury employee was not subjected to a hostile work environment when she was raped by a colleague during off-duty. In the case of Temparali v. Rubin, DC EPA, No. 96-5382, June 19, 1997, the Court decision emphasized that the victim failed to file a discrimination claim within 45 days of the incident, waiting 158 days and offering no excuse for the delay. The Court also concluded that the agency was not liable absent a showing of actual or constructive of the accused's poor past behavior. An important fact in the case is that the two parties work thousands of miles from each other. ©

FMCS Arbitration Fee Schedule Rules Issued

The Federal Mediation and Conciliation Service (FMCS) issued substantially revised rules on June 25 (see Federal Register 62 FR 34170), the first revision in 18 years.

New deadlines are imposed upon both the parties and arbitrators. For the first time participating parties and

arbitrators will be required to pay for FMCS services. For example, FMCS will assess a \$30 fee for each request for a panel of arbitrators; will be assessed \$100 for an annual FMCS listing; and, will impose a \$10 fee (plus 10 cents a page) for a list and biographical resumes for all arbitrators in a designated geographical area. ©

Ethics Focus

Frequently Asked Questions on Frequent Flyer Miles

HQ, AMC's **Mike Wentink**, DSN 767-8003, has prepared a very informative paper on this complex issue. While the rules may not be intuitive or logical, Mike Wentink's paper is both.

In short, mileage points received from an airline for traveling TDY on its aircraft belong to the government — and there are no exceptions. After this hard and fast rule, the fun begins when you speak about airline upgrades, bumping, and credit cards.

The rules regarding credit cards are particularly tricky. For example, if you have a VISA card that is affiliated with United Airlines, and if you buy a \$500 ticket for a TDY flight on United Airlines, you receive 500 miles from VISA credited to your United Airlines account. Those 500 miles belong to you. However, the 2,000 miles that are credited to your account for the miles you fly on that ticket belong to the government. (Encl 14).

August 1997

Trinkets From Abroad

Many of us deal with representatives of foreign governments. These representatives often offer gifts to those they visit, or who visit them. The situation is usually such that it is almost impossible to refuse or return the gifts. So, what to do? Can you keep

these gifts? Like most things, it depends.

The Constitution says that we may not accept such gifts, at least not without the permission of Congress. Congress authorizes us to accept gifts of "minimal value" which is currently defined as not exceeding \$245 retail value in the United States.

If the gift exceeds "minimal value" then your acceptance is on behalf of the United States Government. You must turn it in (to an office in PERSCOM), although you may indicate your wish to purchase the item from the United States.

Enclosed is an information paper that explains the rules (Encl 15). AMC Regulation 600-29 that prescribed procedures for the handling of such gifts in AMC has been rescinded. If you have any questions now or later, please contact **Mike Wentink**, DSN 767-8003.

The Village People, the YMCA and DOD

Some concern has been expressed because of a Memorandum of Understanding (MOU) between DOD and the Army Services YMCA which was signed by the Secretary of Defense and dated 11 April 1984. Aspects of the MOU conflict with the Joint Ethics Regulation (JER). Questions have been asked as to what rules apply, and does the MOU take precedence. The answer is that the MOU remains in effect, but the JER controls. That was made clear in the Secretary's Memorandum dated 8 May 1997, subject: DoD Support of the Armed Services YMCA. POC is **Mike Wentink**, AMCCC, DSN 767-8003.

Welcome Mike Wentink

AMC is pleased to have Mike Wentink join AMCCC as Ethics Team Leader after several successful years of practice with the DA Standards of Conduct Office.

Faces In The Firm

Hail & Farewell!

Arriving

HQ AMC

Major Mike Stump has been with the General Law Division long enough to bring in bagels to celebrate an anniversary - 1 month. He is a member of the Environmental Law Team.

AMCOM

The following personnel from ATCOM have already signed in at Huntsville: **Jeff Augustin, Chris Barrett, Bruce Bartholomew, Charlie Blair, CPT Scott Gardiner, Bruce Jones, Tina Pixler, Larry Runnels, Brian Toland, Tony Vollers**, all to the Acquisition Law Division, **CPT Chris Wood**, Office of Staff Judge Advocate, and **Suzanne B. Sammons**, General Law/IP Law Division.

CECOM

Major Marvin Gibbs joined CECOM in June from the Contract Appeals Division.

STRICOM

Michael Lassman has joined the legal office as the Command's General Law Counsel.

TECOM

Welcome to **Dick Wakeling** who transferred from Letterkenny.

Departing

HQ AMC

CPT Joe Edgell will report to Ft. Stewart in late August to become a Trial Defense Service defense counsel. Joe has made very significant contributions — he will leave his mark and will be greatly missed.

CECOM

Major Margaret Talbot-Bedard has PCS'd to attend to Command and General Staff College.

IOC

Dick Wakeling has left Letterkenny to accept a position at HQ TECOM, Aberdeen Proving Ground.

TACOM

We wish **Michael Lassman** good luck in his new job for the enemy, STRICOM.

Promotions

Ms. Mary Ernat, IOC Plans and Concepts Analyst, has received a promotion. Ms. Ernat has worked in the Office of Counsel for over two years now. Thanks for the wonderful support!

Awards

HQ AMC

Mike Wentink received the Superior Civilian Service Award and the Achievement Medal for Civilian Service for his work at DAJA

Births

CECOM

Congratulations to **CPT(P) Brian Godard** and his wife Suzanne. They are now the proud parents of a baby boy. Alexander Joseph was born on June 2 weighing 7 lbs., 5 oz. and 20 inches long. Mother and son are doing fine.

IOC

John Rock, IOC Environmental/Safety Law, is aka: Grandpa John! Sara (Grandpa John and Grandma Betty's daughter) and Brian Brahm celebrated the birth of their first child, Anna Christine, in June. We've only just seen pictures - she's beautiful!

...Letter to the Editor continued

1124 does not allow such awards to military members.

It seems clearly that some review should be made concerning the gainsharing program. How is that GSA can do it, yet we in DA cannot? Is there a legal interpretation DA could adopt to allow such a program? And is the interest of maintaining uniformity between civilians and military all that important - since the Awards Act is now used to justify awards to civilians that military cannot receive? The goal of reducing government travel costs seems important enough to justify the effort needed to resolve these issues.

Teresa Watmore
TACOM Legal Office

MEMORANDUM FOR THE DEPUTY COMMAND COUNSEL

SUBJECT: CREATIVE USE OF ALTERNATE DISPUTE RESOLUTION AT THE GENERAL ACCOUNTING OFFICE

1. In the last several months I have had the opportunity to use Alternate Dispute Resolution (ADR) techniques in a creative fashion at the General Accounting Office (GAO). ADR in GAO's bid protest process normally involves convening a conference of the parties, although it may take other forms (like special use of expert witnesses). The use of ADR has enabled us to enhance mission accomplishment in resolving AMC protests. By mission accomplishment through creative ADR, I mean not only winning the protest outright at the ADR conference. I also include within this concept resolving the protest by quickly reaching an appropriate result for the contracting office, win or lose. It is often an "outside the box" approach to litigation. However, this approach will frequently (but, as explained below, not always), get the program back on track faster than if the protest is allowed to proceed to a full 100 day GAO final decision. Three examples are discussed below.

2. United Ammunition Container, Inc., B-275213, Jan. 30, 1997, 97-1 CPD ¶ 58, involved a \$500,000 award for ammunition shipping containers, and a protester represented by major outside counsel. The protester challenged the evaluation of past performance, as well as the method of calculating the prices of option quantities. Pricing was the critical issue. Because the two competing proposals had been determined to be technically equal, award was based upon total evaluated price. There were a series of complex allegations relating to pricing. Review of the protest led to the conclusion that the protester's basic allegation, namely that the wrong formula had been used to compute option prices, was correct. We went back to our Section M clause, and made a redetermination of the correct manner of computation. Recalculations were made, and it was determined that the protester could not win under the revised, appropriate, calculations, using either its basic or alternate pricing proposal. These determinations were made just a few days prior to the date set for submission of the administrative report, and we requested an expedited ADR conference. GAO accommodated our request.

3. We had several goals for the ADR conference. First, we wanted to avoid wasting everyone's litigation time through the continuation of this protest, because our revised computations (which would also later be challenged by the protester), showed that it was a mathematical certainty that the protester had not been prejudiced. We also wanted to show GAO counsel that while errors may have been made during the conduct of the procurement in the evaluation process, we were smart enough to recognize and accept those errors, and to correct them during litigation on our own, without the need for a sustained protest. We also sought to enhance our overall credibility in the protest regarding all litigated issues through this action. We did *not* believe that the protest could be settled at the ADR conference itself.

4. GAO counsel specifically asked us what we wanted from the ADR conference. We explained that we had recognized a fundamental error in the evaluation as pointed out in the protest. We had reviewed the situation and made appropriate price recalculations, and believed that due to lack of prejudice we felt the protest was moot. We explained our position to counsel for the protester during the conference, and asked that he take our position back to his client to ask for a withdrawal of the protest. At this point the concept of the "reasonable businessman" disappeared. Not only did the protester not withdraw, but they filed a significant response to the administrative report, and then took the case to Federal District Court after they lost at GAO. (The protester subsequently also lost in District Court.)

5. I believe that the use of the ADR conference was a positive step in this protest. It did not shorten the litigation process due to the protester's actions in not withdrawing the protest, and in subsequently going to District Court. However, I believe that it did establish the credibility of the contracting office when the protester's actions forced the GAO to write a decision on the merits. This can be seen in the manner in which the issues were treated by GAO in the decision, cited above. Instead of being people who erred and then foolishly defended, we were people who erred but recognized and corrected our errors, and I believe we were treated accordingly.

6. The second request for ADR was more successful in the traditional sense. Weckworth Mfg. Inc., B-277139 (no merit decision issued). Weckworth involved a series of complex factual issues raised by a pro-se protester in a case worth over \$60M (with options). Because of the number and complexity of factual, rather than legal issues, it was necessary to submit the actual administrative report in order to give the GAO attorney a clear picture of what was going on.

However, we decided early on that we would do ADR, and arranged to have a conference set for the week after the submission of the admin report. A detailed admin report was prepared which rebutted every allegation raised by the protester. The goal in this case was to convince the protester that it had no chance to win, and that it should withdraw its protest. This mission was accomplished, and the protester withdrew the protest even prior to the ADR conference (while still complaining about its fate in a lengthy letter to GAO). This was done on day 42 of the protest, saving 58 days of potential litigation expense under GAO's 100 day decision time frame.

7. The third case, Famous Construction Corporation, B-227295 (no merit decision rendered), involved a single, possibly precedent-setting legal issue, rather than a mixture of factual/legal issues as in United Ammunition Container or a multiplicity of factual issues, as in Weckworth. The protester was represented by private counsel, and both private counsel and I recognized early on the appropriateness of ADR in this \$1/2M procurement. I believe that a major factor for the protester was limiting litigation expenses in a protest involving a relatively low value award. GAO also indicated early on (prior to hearing from counsel) that it desired to pursue ADR.

8. The single issue involved the protester's responsiveness under Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause 52.219-7008 "NOTICE OF EVALUATION PREFERENCE FOR SMALL DISADVANTAGED BUSINESS CONCERNS -- CONSTRUCTION ACQUISITIONS -- TEST PROGRAM (APR 1996)." This clause uses an unusual formula in computing the evaluation preference for small disadvantaged businesses. The computation in part depends upon a separate breakout of bid, performance and payment bond prices from the total price in a bid or offer. This was not done by the protester, and because of this the Contracting Officer determined its bid to be non-responsive. However, case law indicated that this was not the likely position which would be taken by GAO. In addition, there was an additional "out" in that while the protester may have erred, the mathematics showed that there was no prejudice to any other party.

9. The key was to get to a resolution of the protest, and at the same time retain good relationships between the procurement and legal communities by showing the Contracting Officer that she was not being needlessly overruled or abandoned by her attorneys. We had no interest in making law for the rest of the procurement community, especially if we were wrong. Discussions with counsel

for the protester led to an agreement that both parties would be bound by the recommendation/opinion of the GAO attorney at the ADR conference. (Even a formal decision of the GAO is technically only a recommendation to the executive branch, and what happens at an ADR conference is not “final” to GAO or the parties.) If the recommendation went against the protester, they would withdraw. If the recommendation went against the Army, we would take corrective action. The Contracting Officer was present for the ADR conference. As anticipated, the GAO working level attorney’s statement at the ADR conference was that while not final, she saw this case as a sustain. Immediate corrective action was taken. AMC and the contracting office avoided wasting litigation time, and also avoided becoming an unnecessary protest statistic. The conference was held on day 27, so that over two-thirds of the GAO litigation time was saved by the ADR process. While not a “win” in the traditional sense, I consider it a win in the mission accomplishment sense.

10. These three cases illustrate why Alternate Dispute Resolution techniques should always be an early consideration when litigating GAO cases. It may not be appropriate or feasible to use ADR for all protests. However, GAO attorneys are currently favorably inclined towards ADR, so counsel should explore these new avenues and use them where possible.

JEFFREY I. KESSLER
Associate Counsel, AMC
(703) 617-8045, DSN 767-8045

SUBJECT: Timely Definitizations of Undefined Contractual Actions (UCAs)

1. As a result of audits to determine whether UCAs have been definitized in a timely manner, questions have arisen regarding definitization requirements and qualifying proposals.

2. The statute which establishes "restrictions" on "Undefined contractual actions" (UCAs) is 10 USC § 2326. This statute requires that an undefined contractual action provide for "agreement upon contractual terms, specifications, and price by the earlier of--(A) the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or (B) the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action." The term "qualifying proposal" is defined as "a proposal that contains sufficient information to enable the Department of Defense to conduct complete and meaningful audits of the information contained in the proposal and of any other information that the Department is entitled to review in connection with the contract, as determined by the contracting officer."

3. The policies and procedures implementing 10 USC § 2326 are prescribed in Defense Federal Acquisition Regulation Supplement (DFARS) subpart 217.74. The definition of the term "qualifying proposal" in DFARS § 217.7401(c) is almost identical to that in the statute. In DFARS § 217.7404-3(a), the requirement for definitization schedules in UCAs provides for definitization by the earlier of "(1) [t]he date which is 180 days after issuance of the action...; or (2) [t]he date on which the amount of funds obligated under the contract action is equal to more than 50 percent of the not-to-exceed price." In addition DFARS § 217.7404-3(a) provides that the first date ("180 days after issuance of the action") "may be extended but may not exceed the date which is 180 days after the contractor submits a qualifying proposal." Thus, DFARS is more restrictive than the statutory requirement which addresses the "180-day period beginning on the date on which the contractor submits a qualifying proposal" but not the "180 days after issuance of the action."

4. It must be noted that 10 USC § 2326 does not present a timeliness question as long as definitization occurs by "the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal...." However, timeliness questions do arise under the DFARS requirements. If a qualifying proposal is not submitted before "the date which is 180 days after issuance of the action," timeliness during

the period after the 180th day and before submission of a qualifying proposal is not addressed in DFARS ä 217.7404-3. Unfortunately, despite the Government's best efforts, the contractor's delay in submitting a qualifying proposal or causing a new qualifying proposal to be required could result in untimely definitizations, unless the contracting officer unilaterally determines "a reasonable price or fee" as provided in DFARS clause 252.217-7027.

5. No further extensions of the time for definitization of a UCA beyond the "180 days after the contractor submits a qualifying proposal" are provided by the statute or the DFARS. However, the requirements may change between the time that a UCA is issued and definitization. Both the statute and DFARS ä 217.7404-1(c) provide for approvals for modification of the scope of a UCA under which performance has begun, but neither addresses definitization of the modified UCA. If the government's requirements or the contractor's proposed methods of complying with the requirements have changed to such an extent that any proposal previously submitted no longer would meet the definition of a "qualifying proposal," submission of a new qualifying proposal would be necessary. If the changes for which a new qualifying proposal is necessary require approval by the head of the contracting activity (in accordance with DFARS ä 216.7404-1(c)) and are so extensive that they would be considered to be issuance of a new UCA, then in order to be timely, definitization would have to be completed within 180 days after the contractor submits a qualifying proposal" (DFARS ä 217.7404-3(a)). The determination of whether the changes to a UCA are sufficient to be considered a new UCA must be made on a case-by-case basis.

//s//
Diane V. Beam
AMSAM-L-A
DSN 788-0545

FOREIGN MILITARY SALES CONTINGENT FEES - - A CHANGE?

By Larry D. Anderson

All negotiated United States Government (USG) contracts, in excess of the simplified acquisition threshold and for other than commercial items, are required by statute to contain a warranty that the contractor has not retained any person or agency to solicit or obtain contracts on a contingent fee basis; there is an exception to this warranty for a *bona fide* employee or agency relationship.¹ To implement this statutory requirement, the Federal Acquisition Regulation (FAR) mandates that a "Covenant Against Contingent Fees" clause be included in applicable solicitations and contracts.² Subparagraph (a) of that clause is a succinct statement of the law:³

"The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon agreement or understanding for a contingent fee, except a *bona fide* employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee."⁴

¹ 10 U.S.C. § 2306(b), for Department of Defense contracts. See also 41 U.S.C. § 254(a), for other government contracts.

² The statutory basis for the contingent fee warranty applies only to negotiated contracts, but it has been applied as a matter of policy to all federal procurements, including sealed bid contracts. FAR 3.403.

³ FAR 52.203-5, COVEANT AGAINST CONTINGENT FEES (APR 1984).

⁴ The clause and FAR contain a definition for most of the key terms used in this clause. The term "contingent fee" is defined to mean "any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract". A "bona fide employee" means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or to obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence." A "bona fide agency" is similarly defined as "an established commercial or selling agency, maintained by a contractor" for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence". "Improper influence" is broadly defined to mean any influence that would tend to induce a Government employee or officer to make a contract

Recently there has been a fair amount of change with respect to contingent fees in federal government contracts. A proposed rule, to revise FAR 3.404, was published on 13 November 1995.⁵ FAR 3.404(b) once required the Contracting Officer to insert the provision at FAR 52.203-4, "Contingent Fees Representation and Agreement", in most solicitations. That provision required offerors to provide information on contingent fee arrangements. When the representation was answered affirmatively, the offeror was then to provide a completed Standard Form (SF) 119, "Statement of Contingent or other Fees". The proposed rule, which became final on 24 September 1996, deleted the requirement to provide information on contingent fee arrangements and the submission of the SF 119.⁶

To conform the Defense Federal Acquisition Regulation Supplement (DFARS) to the contingent fees provisions adopted in the FAR, the Director of Defense Procurement issued an interim rule, effective on 17 January 1997, to eliminate the requirement for a government review of a prospective contractor's contingent fee arrangement for foreign military sales (FMS) contracts.⁷ An amendment to this interim rule was proposed on 5 June 1997.⁸ As it is currently written, the interim acquisition rule makes several changes. First, DFARS 225-7303-4 guidance on contingent fees has been completely revised. It had asked the contractor to identify any sales commission or fees when it submitted price and availability data for a FMS case. Such fees were then to be justified and supported through submission of SF 119 to the Contracting Officer. This DFARS provision also directed that the Chief of the Contracting Office to approve the Contracting Officer's determination that there was a *bona fide* employee or agency relationship and that the fee was reasonable. These justifications and review requirements have been eliminated by the interim acquisition rule. Second, based upon public comments received on the interim rule, it is now proposed to eliminate the current \$50,000 ceiling on contingent fees. If adopted, DFARS would permit payment of a

decision "on any basis other than the merits of the matter". See, FAR 3.401.

⁵ 60 Federal Register 57140, November 13, 1995 [FAR case 93-009].

⁶ 61 Federal Register 39188, July 26, 1996.

⁷ 62 Federal Register 2616, January 17, 1997.

⁸ 62 Federal Register 30831, June 5, 1997. Public comments on the proposed rule to the interim rule [elimination of the \$50,000 limitation] may be submitted on or before 4 August 1997. DFARS Case 96-D021 should be cited in the comment.

contingent fee in excess of \$50,000 per FMS case, when the foreign customer approves the payment in writing before contract award. As amended, the new DFARS 225.7303-4 would read:

"(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under defense contracts provided that the fees are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose securing business (see FAR Part 31 and FAR Subpart 3.4).

(b)(1) Under DoD 5105.38-M, Security Assistance Management Manual, Letters of Offer and Acceptance for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) must provide that all U.S. Government contracts resulting from the Letters of Offer shall prohibit the payment of contingent fees unless the payments have been identified and approved in writing by the foreign customer before contract award (see 225.7308(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, no payment of contingent fees in excess of \$50,000 per FMS Case shall be made under a U.S. Government contract, unless payment has been identified and approved in writing by the foreign customer before contract award."

Finally, there is a complete rewrite of the solicitation clause found at DFARS 252.225-7027. It now provides:

"RESTRICTIONS ON CONTINGENT FEES FOR FOREIGN MILITARY SALES

(a) Except as provided in paragraph (b) of this clause, contingent fees, as defined in the Covenant Against Contingent Fees clause of this contract, are generally an allowable cost, provided that the fees are paid to a bona fide employee or to established commercial selling agencies maintained by the Contractor for the purpose of security business.

(b) For foreign military sales, unless the contingent fees have been identified and payment approved in writing by the foreign customer before contract award, the following contingent fees are unallowable costs under the contract:

(1) For sales to the Government(s) of _____, contingent fees in any amount.

(2) For sales to Governments not listed in paragraph (b)(1) of this clause, contingent fees in excess of \$50,000 per foreign military sale case."

Besides indicating the recent acquisition changes, this article will place them in their proper FMS context.

Let us first review briefly the federal law with respect to contingent fees in government contracts. There has been a long-standing federal policy against the employment of agents on a contingent fee basis to secure government contracts. In Tool Company v. Norris⁹, the Supreme Court refused to enforce an agreement for compensation to procure a Civil War arms contract. In that case Justice Field declared:

". . . All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of public funds."¹⁰

In the subsequent case of Oscanyan v. Arms Company¹¹, Justice Field applied the policy expressed above to preclude the Turkish consul-general in New York from obtaining a commission on the sales of weapons to the Turkish government. The federal policy against contingent fees was enforced by an Executive Order during World War II.¹² Subsequently, and in

⁹ 69 U.S. 45 (1864).

¹⁰ Id., at p.54. This stringent view gradually evolved into a rule that, in the absence of a statute or regulation, courts would enforce contingent fee contracts except when an attempt to introduce personal solicitation and personal influence into dealings with the government is actually intended or in fact results. See, Racquet Club, Inc. v. Lipper, 373 F.2d 753, 754 (1st Cir., 1967) and the cases cited therein.

¹¹ 103 U.S. 261 (1880); See also, Hazelton v. Skeckells, 202 U.S. 71 (1906); Valdes v. Larrinaga, 233 U.S. 705 (1914); and United States v. Mississippi Valley Generation Co, 364 U.S. 520, 550 n14 (1961).

¹² Executive Order No. 9001 of December 27, 1941, 6 Federal Register 6787. However, variations of the present covenant against contingent have been included in federal government contracts since World War I. See, Acme Process Equipment Co. v. United States, 347 F.2d. 538, 549 n.10 (Ct. Cl. 1965).

furtherance of this federal policy, Congress enacted two statutes requiring the warranty against contingent fees.¹³

It should also be noted that the purpose of the statutory contingent fee warranty, as implemented by FAR Subpart 3.4, is to prevent the attempted or actual exercise of improper influence by third parties over the federal procurement system; the warranty does not preclude the payment of all contingent fees - - only those made for the purpose of improperly obtaining a federal contract.¹⁴ In Browne v. R&R Eng'g Co.¹⁵, the court held that contingent fee services in connection with a proposed contract that did not involve any dealings with officials responsible for the award of contracts were not prohibited. Further, the fact that no improper influence can be established does not result in a finding that the agent is bona fide; it is only a factor to be weighed with the totality of the evidence.¹⁶

The Arms Export Control Act (AECA) imposes disclosure requirements with respect to agent fees and other payments in connection with FMS contracts and direct commercial contracts for the sale of defense articles and services to foreign governments.¹⁷ The AECA, as implemented by the International Traffic in Arms Regulations (ITAR)¹⁸, requires applicants for exports license and FMS contractors to disclose whether they or their "vendors have paid, or offered or agreed to pay . . . [f]ees or commissions in an aggregate amount of \$100,000 or more."¹⁹ The ITAR broadly defines "fees and commissions" as any payment made to a person for the "solicitation or promotion or otherwise to secure the conclusion of a sale of

¹³ Section 4(a) of the Armed Service Procurement Act of 1947, 62 Stat. 21, 23 (1947) - the statutory predecessor for 10 U.S.C. § 2306(b); and section 304(a) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 395 (1949) - the statutory predecessor for 41 U.S.C. § 254(a).

¹⁴ Puma Industrial Consulting v. Dual Associates, Inc., 808 F.2d 982 (2nd Cir. 1987); Qunn v. Gulf & Western Corp., 644 F.2d (2nd Cir. 1981); E&R, Inc. - - Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264; and Howard Johnson Lodge - Reconsideration, B-244302.2, March 24, 1992, 92-1 CPD ¶ 305.

¹⁵ 264 F. 2d 219 (3rd Cir. 1959).

¹⁶ FAR 3.408-2(c); and Acme Process Equipment Co. v. United States, 347 F. 2d. 538, 547-553 (Ct. Cl. 1965), reversed on other grounds, 385 U.S. 138 (1966). See also, John Cibinic, Jr. and Ralph C. Nash, Jr., *Administration of Government Contracts*, 108-111 (1995).

¹⁷ Section 39 AECA, 22 U.S.C. § 2779.

¹⁸ 22 CFR Parts 120 - 130.

¹⁹ 22 CFR § 130.9(a)(1)(ii), (b)(2).

defense articles or defense services."²⁰ The ITAR specifically exclude the following categories of payments from the definition of "fees and commissions": (a) certain political contributions, (b) normal salaries to regular employees, (c) general advertising or promotional expenses, and (d) payments made solely for the purchase of specific goods or technical, operational, or advisory services that are not disproportionate the value of the goods or services actually furnished.²¹ If the fees or commission in the aggregate meet the \$100,000 threshold, the export license applicant or FMS contractor must make a detailed disclosure to the Department of State.²² In addition, if an individual fees or commission exceed \$50,000 there is a further reporting requirements.²³

The AECA also provides that the President by regulation may "prohibit, limit, or prescribe conditions" with respect to such commissions and fees as he determines will further the purposes of the Act.²⁴

In addition, the AECA substantially repeats the same conditions as expressed in the contingent fee warranty for FMS contracts. It declares:

"No such contribution, gift, commission, or fee may be included, in whole or in part, in the amount paid under any procurement contract . . . [for FMS], unless the amount thereof is reasonable, allocable to such contract, and not made to a person who has solicited, promoted, or otherwise secured such sale, or has held himself out as being able to do so, through improper influence. For the purposes of this section, "improper influence" means influence, direct or indirect, which induces or attempts to induce consideration or action by any employee or officer of a purchasing foreign

²⁰ 22 CFR § 130.5(a)(2).

²¹ 22 CFR § 130.5(b).

²² 22 CFR §§ 130.9(a)(1), (b)(2), and 130.10.

²³ 22 CFR § 130.10(a)(4), (b).

²⁴ 22 U.S.C. § 2779(b) ("The President may, by regulation, prohibit, limit, or prescribe conditions with respect to such contributions, gifts, commissions and fees as he determines will be in furtherance of the purposes of this Act.").

This appears to be the statutory authority for the prohibition on use of Foreign Military Financing to pay "commissions or contingent fees" in connection with direct commercial sales financed with funds appropriated by Congress. See, paragraph 8, Table 902-6 "Guidelines for Foreign Military Financing of Direct Commercial Contracts", DoD 5105.38-M, *Security Assistance Management Manual*, page 902-47 (Change No. 7, 5 January 1996).

government or international organization with respect to such purchase on any basis other than such consideration of merit as are involved in comparable United States Procurements."²⁵

But there is a difference between the contingent fee warranty contained in federal government contracts from the comparable one expressed in the AECA for FMS contracts. The emphasis in the latter is on the improper influence to obtain the requirement for rather than improper efforts to obtain the actual government contract to satisfy the requirement.

Provisions to be used in FMS cases for contingent fees are expressed in section 80103 of the *Security Assistance Management Manual (SAMM)*²⁶. Based upon the FAR changes for contingent fee noted above in this Article, substantial changes need to be made to this whole section. The SAMM also contains a \$50,000 limitation on agent fees for direct commercial contracts financed with FMS credits.²⁷

Payments to a foreign sales agent may also have implications under the Foreign Corrupt Practices Act, if the agent is also a foreign government official or is used as a conduit to make payments to foreign government officials.²⁸

The contingent fee warranty changes, discussed in this Article, present some problems for the security assistance program. First, the elimination of the SF 119 removes almost the only practical means to enforce the contractual warranty. Indeed, the DFARS change, other than the elimination of \$50,000 cap, merely implements the already approved FAR change. Now, with these acquisition changes, the only way to determine whether a contingent fee is involved with an FMS contract is through the ITAR disclosures to State Department. Second, the possible elimination of the \$50,000 cap on contingent fees for FMS contracts raises an even more specific question. How is it possible to make the determination, under AECA, that the amount of the contingent fee in the FMS contract is reasonable? The apparent intent, of the proposed change to the interim DFARS rule, is allow the foreign customer to make the determination of reasonableness. But is that process authorized by AECA?

²⁵ 22 U.S.C. § 2779(c)

²⁶ Section 80103, DoD 5105.38-M, *Security Assistance Management Manual*, pages 801-4 through 801-6 (Change No. 2, 2 July 1990).

²⁷ Section 80103.F, DoD 5105.38-M, *Security Assistance Management Manual*, page 801-6 (Change No. 2, 2 July 1990).

²⁸ 15 U.S.C. §§ 78mm, 78dd-1, 78dd-2, 78ff.

Since all that appears to have been accomplished with most of the changes to the contingent fee warranty provisions in federal government contracts is the removal of the means for enforcement, it a little like the movie scene from *Young Frankenstein* where Gene Wilder as the doctor says, "Perhaps I could do something about your hump" and Marty Feldman, as Igor replies, "What hump?". I think the relevant question here is "what change".

Signing a non-disclosure agreement (NDA) -

Very often a non-federal party (Submitter) submits an item to an Army facility for test or evaluation of the item. At times the Submitter initiates the submittal, and on other occasions, the facility requests the item from the Submitter. The Submitter generally include an NDA which requires a signature by Army. Should the Submitter's NDA be signed? If yes, who should sign on behalf of Army? If no, should any other document be used? If yes, what other document? Should that other document be signed by Army? If yes, by whom? If no, what is the significance of the other document?

A memorandum dated 16 November 1992 entitled, "Nondisclosure Agreement Policy", signed by Anthony Lane, JALS-IP, outlines guidance, which appears to confirm existing Army procedures, for situations described above. The memorandum includes an enclosure #1 which is a model "Nondisclosure Policy Statement". The Statement assures a Submitter of the conditions of the submittal. The Submitter should sign the Statement as an acknowledgment of the conditions. Army does not sign the Statement.

The memorandum also includes an enclosure #2 for cases where a Submitter wants a signed Agreement with Army and the item to be tested/evaluated is extremely important to Army. The memorandum states that the Agreement should only be signed by a contracting officer. In fact the Agreement includes similar information to that delineated on the Statement, except that the format is an agreement rather than a statement.

Thus, the memorandum includes a Statement for signature by only the Submitter, and an Agreement for signature by the Submitter and an Army contracting officer.

Addressing the above issues:

Should the Submitter's NDA be signed? Army's Policy suggests that the answer is no, but that the Army's Statement be used and signed by only the Submitter. However, the Policy also suggests that if the test/evaluation of an item is very important to Army, and the Submitter insists on an agreement, the Agreement enclosed with the Policy should be used and signed by the Submitter and, on behalf of the Army, by only by a contracting officer. However, if the Submitter insists on using its own agreement, the Policy is silent. However, it seems reasonable that if the test/evaluation is important enough to Army, the Submitter's agreement could be negotiated, if necessary to satisfy Army, and signed by the Submitter and an Army contracting officer. A Submitter's NDA or the Agreement suggested by Army's Policy should not be signed by an Army employee who is not a contracting officer. Only a contracting officer can bind the Army which, of course, is what the Submitter wants. Anyone, who is not a contracting officer, and who signs an NDA, generally binds him/herself and not

Army. Although 18 USC 1905 provides sanctions, such as a fine, imprisonment, or loss of job, for unauthorized disclosure by Government employees, such sanctions may not satisfy a Submitter who alleges significant damages for an unauthorized disclosure by an Army employee. Contracting Officers, prior to signing an NDA, should carefully consider whether they are creating an unfunded obligation, and a potential Anti-Deficiency Act violation.

Preferably, according to Army's Policy, neither the Submitter's nor Army's NDA should be used and signed at all. It is preferred that Army's Statement be used, and that it be signed by only the Submitter. In fact, Army employees who are not contracting officers are encouraged to not sign any NDA under any circumstances. Such employee must weigh the risk of personal liability versus the importance of testing/evaluating the item. At times, an Army employee may be scheduled to tour a party's facilities, but the employee is told to sign the party's NDA before taking the tour. The employee should not sign. However, the employee may decide that taking the tour is worth the risk of signing. It is recommended that prior to attending a party's facility, an employee resolve any requirement for signing an NDA. If necessary, an AMC attorney can discuss this issue with the party's representative, and resolve the issue prior to the employee's trip.

ORAL PRESENTATIONS - REVISITED

One of the “tools” which has gotten a lot of attention and use in the current acquisition streamlining environment is “oral presentations”. While much has been written about this topic in the way of articles and essays describing the authors’ opinions and experiences, there is currently no regulatory guidance addressing oral presentations. This, however, is about to change. The Federal Acquisition Regulation (FAR) Council is presently in the process of rewriting major portions of the FAR. Their proposed rewrite of FAR Part 15, Contracting by Negotiation, was published in the Federal Register on May 14, 1997 as a “proposed rule” with request for comments by July 14, 1997. This is the second version of the proposed rewrite of FAR Part 15. The first version was published in September 1996. That first version generated intense controversy and resulted in the receipt of over 1500 comments. The FAR Council has attempted to address as many of the concerns raised by these comments as possible and this second version of the rewrite is probably very close to what will ultimately become the final version.

FAR Part 15, as published in the Federal Register on May 14, 1997, includes a Subpart 15.1 entitled “Source Selection Processes and Techniques”. Within that Subpart is FAR 15.103, “Oral Presentations”, providing, for the first time, specific regulatory guidance addressing the use of oral presentations in negotiated acquisitions. This new FAR section allows oral presentations to be used as an information gathering tool at any time in the acquisition process, describes what types of information may be suitable for gathering through an oral presentation and what types of information must be obtained in writing, provides some criteria to consider in deciding exactly what information to obtain through an oral presentation in any particular acquisition, describes what instructions should be included in the solicitation if oral presentations by offerors are to be required, and requires that the contract file include a record of the oral presentation (the method and level of detail of the record is left to the discretion of the source selection authority).

Under the current FAR, one of the most perplexing issues a contracting agency must deal with in using oral presentations is whether the

oral presentation constitutes “discussions” as that term is used in FAR Subpart 15.6. FAR 15.601 currently defines the term as follows;

“Discussion,” as used in this subpart, means any oral or written communication between the Government and an offeror (other than communications conducted for the purpose of minor clarification), whether or not initiated by the Government, that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal.

FAR 15.610, which is based in statute (10 U.S.C. Section 2305 (b) (4) (A)), requires that, unless award is made without discussions, discussions must be held with all offerors within the competitive range. The General Accounting Office (GAO) has consistently held that the Government has a duty to assure that these discussions are “meaningful”. The GAO case law considers discussions meaningful only if the offeror is put on notice of all significant weaknesses and deficiencies in its proposal and is given an opportunity to cure these problems. FAR 15.611 requires that, upon completion of discussions, the Government must request Best and Final Offers (BAFO) from all offerors still in the competitive range. The issue that this regulatory framework presents with regard to oral presentations is whether, if the Government engages in a dialogue with the offeror or asks questions of the offeror during the oral presentation, discussions have commenced. If the answer is yes, the Government must make sure it conducts meaningful discussions with all the offerors still in the competitive range. In other words, the Government would have to be sure to put every offeror which has not been officially notified prior to that point in time that it was no longer within the competitive range on notice of all significant weaknesses and deficiencies in its proposal and give each of those offerors a chance to cure those problems. If the answer is no, then the Government may still determine that an offeror is not within the competitive range without going through the complete meaningful discussion process. It should be clear that, depending on the answer, the result can be a significant increase in the time, complexity and cost of a competitive negotiated acquisition, especially where there is a substantial number of initial proposals and some of them are clearly not competitive, i.e. clearly have no chance of winning the award.

An illustration of how perplexing this issue can be and the problems it can cause for an agency can be seen in a recent protest decided by the

GAO (General Physics Federal Systems, Inc., B-275934, April 21, 1997, redacted version released May 8, 1997). The agency in this case wanted to use oral presentations as part of its evaluation scheme but also wanted to award without discussions under the current provisions of FAR 15.610. Following a theory currently popular in acquisition circles, the agency clearly defined in the solicitation what information the offerors must submit for evaluation. The solicitation also clearly differentiated between that information which was to be considered part of the offeror's proposal and that information which was not to be considered part of the offeror's proposal. The solicitation told the offerors that there would be an oral presentation addressing the portion of the offeror's submission which was not part of the proposal, followed by a question and answer (Q&A) session regarding that information. The solicitation also expressly stated that this Q&A session was not considered discussions as that term is used in the FAR and that the Government intended to make award without discussions. In spite of all this explanation of the ground rules of this acquisition, one of the unsuccessful offerors protested that the agency failed to conduct meaningful discussions as required by statute and regulation. The protestor alleged that, contrary to what the solicitation said, the agency's Q&A session constituted discussions and, therefore, the agency improperly failed to advise the protestor of significant weaknesses in its proposal and failed to give the protestor a chance to submit a revised proposal. The GAO, in denying the protest, declined to decide the question of whether the Q&A session constituted discussions. GAO avoided this difficult issue by holding that, because the protestor was not prejudiced by the agency's actions in this particular case, the GAO would "...hold in abeyance our views on whether this approach is consistent with current statutory and regulatory requirements." Thus, even the GAO seems reluctant to tackle this perplexing issue. This reluctance is not surprising in light of the current absence of regulatory guidance combined with the fact that the issuance of new regulatory guidance that purportedly will significantly impact this issue is just around the corner. GAO has, after all, been deeply involved in shaping this new regulatory guidance through its comments on the proposed rules issued by the FAR Council.

Has the FAR Part 15 rewrite solved or eliminated this difficult dilemma for the contracting agency? The short answer is "Maybe." The FAR Part 15 rewrite, at FAR 15.001, introduces a new term - "communications" - which is defined as follows;

Communications are all interchanges after receipt of proposals between the Government and an

offeror, including discussions conducted after the competitive range is established.

The FAR Part 15 rewrite, at FAR 15.406, also establishes four different stages or phases of communications with offerors as set forth below;

- (a) Communications and award without discussions.
- (b) Communications with offerors before establishment of the competitive range.
- (c) Competitive range.
- (d) Communications with offerors after establishment of the competitive range.

Prominently displayed at the beginning of FAR 15.406(d) is the statement, “Such communications are discussions...” At FAR 15.001, the FAR Part 15 rewrite also introduces a new definition of the term “discussions”, which reads as follows;

Discussions are negotiations that occur after establishment of the competitive range that may, at the contracting officer’s discretion, result in the offeror being allowed to revise its proposal.
(emphasis added)

Thus it should be clear that, while communications can occur at any time in the acquisition process after receipt of the proposals, discussions are only intended to occur after the competitive range has been established. “Discussions” are apparently a subset of “communications”. The definition of discussions seems to have two mandatory elements - 1) they have to be “negotiations” and 2) they have to occur after establishment of the competitive range. “Negotiation” is defined at the new FAR 15.001 as follows;

Negotiation is a procedure that, after receipt and evaluation of proposals from offerors, permits bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

This new regulatory framework shows a clear intent to allow communication with offerors prior to the commencement of discussions.

It sets up a tiered framework in which different levels of communication are allowed at different stages of the acquisition process. First, where the Government intends to award without discussions, FAR 15.406(a) states that the Government can still communicate with offerors for the limited purpose of resolving minor clerical errors or to clarify certain aspects of the proposal. This limited window of communication is very similar to the “clarification” window recognized in the current definition at FAR 15.601 and in GAO case law - communications with offerors for the sole purpose of “clarifying” minor informalities or clerical errors are not considered to be a commencement of “discussions”. Second, where the Government does intend to establish a competitive range and conduct discussions, FAR 15.406(b) allows the Government to communicate with the offerors prior to establishing that competitive range. Apparently these communications will not be considered discussions because, as we have seen above, the new definition of discussions says it is communications which occur after the competitive range has been established. This second level of communications is certainly broader than the first level (clarification), but still must satisfy the criteria set forth in FAR 15.406(b). The communications may only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. The new FAR 15.406(b) language gives a fairly broad sampling of the types of topics that can be covered during this second level of communications, including things of such significance as perceived deficiencies and weaknesses, and even states that these communications “...may be considered in rating proposals.” The language even mandates that these communications address adverse past performance information that the offeror has not previously had an opportunity to comment on. The key limitation on this broad level of communication is one that is stated twice. FAR 15.406(b)(2) states that this second level of communications “...shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal.” FAR 15.406(b)(3) again states that these communications “...shall not provide an opportunity for the offeror to revise its proposal...” The third level of communications is that which occurs after the establishment of the competitive range and is described in the new FAR 15.406(d) language. This level of communications is the broadest of all and, as stated above, is specifically defined as “discussions”. It involves “bargaining” with the offerors and clearly encompasses the concept of allowing the offeror to alter or revise its proposal.

The bottom line here seems to be that the new FAR 15.406 gives the Government a broader ability to talk to offerors about their proposals before establishing a competitive range. If the Government intends to award

without discussions, the ability to communicate is still limited as in the past to “clarifications”. However, it should be recognized that there may even be a slight broadening of the concept of clarification with the express inclusion in FAR 15.406(a) of certain aspects of past performance as examples of matters which could be addressed in a communication prior to an award without discussions. Where the Government intends to have discussions, the matters that can be addressed in a communication with the offeror prior to setting the competitive range have been greatly expanded, apparently for the purpose of allowing the Government to make the most educated and effective competitive range determination possible. This purpose is expressly addressed in the new FAR 15.406(b), where it is stated that this level of communication prior to establishment of the competitive range;

- (2) May be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government’s evaluation process...
- (3) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range...

(Note the new standard set forth in FAR 15.406(c) for determining which proposals shall be included in the competitive range - which is no longer based on those proposals which have a “reasonable chance” to win but rather on those proposals “most highly rated” and “efficient competition”.) It would appear that anything that is reasonably related to the Government’s understanding or evaluation of the proposal would be fair game for being addressed during this second level of communication, as long as it did not involve allowing the offeror to revise its proposal in any way. This type of broad license to “communicate” with offerors prior to establishing the competitive range should increase an agency’s ability to effectively utilize oral presentations prior to establishing a competitive range without fear of inadvertently and prematurely “commencing discussions”. Most of those who are experienced with the use of oral presentations will agree that, in order to be effective and useful to the Government, an oral presentation by an offeror must include an opportunity for the Government to engage the offeror in a dialogue/question and answer session about the offeror’s proposal.

One word of caution might be appropriate here. From the discussion of this issue set forth above, it should be clear that there is great significance to the question of whether the communication allows the offeror to revise its “proposal”. This, of course, presents the further

question of exactly what constitutes a “proposal”. The FAR Part 15 rewrite did not include, within the new language of Part 15, any definition of the word “proposal”. Therefore, if the FAR Part 15 rewrite were to become final as published on May 14, 1997, the only provision in the FAR which gives any indication of what is meant by the word proposal is FAR 2.101, which states;

“Offer” means a response to a solicitation that, if accepted would *bind* the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called “bids or sealed bids”; responses to requests for proposals (negotiation) are offers called “*proposals*”; responses to requests for quotations (negotiation) are not offers and are called “quotes”. (Italics added)

This language would seem to indicate that “proposal” refers to that portion of the information submitted by an offeror which is intended by the parties to be binding (i.e., part of the contract). However, the FAR Part 15 rewrite does not use the word proposal strictly in accordance with the definition in FAR 2.101. For example, FAR 15.103(a) states that the solicitation “...may require each offeror to submit part of its proposal through an oral presentation.”(emphasis added) On the other hand, FAR 15.103 states that any information which the parties intend to include as part of the contract “...shall be put in writing.”(emphasis added) Instead, the word "proposal" seems to be used in Part 15 to refer to that complete body of information submitted by the offeror, whether orally or in writing, for evaluation by the Government. The FAR Council could easily resolve this potential area of confusion - which is critical to an agency being able to distinguish between that level of communication which is permissible prior to establishing the competitive range and that level of communication which is permissible only after the competitive range has been established - by specifically defining what the word "proposal" means as that term is used in the new FAR Part 15. In the absence of such a specific definition, it is suggested that, in trying to understand or apply the new FAR Part 15 language, the term "proposal" be construed to mean all that information that is submitted to the Government for evaluation, regardless of whether it is submitted orally or in writing.

In summary, it is clear that, if the proposed changes to the FAR that have been discussed above become final, the regulatory framework within which we conduct our acquisitions will have changed. The intent of these

changes is to increase the Government's ability to communicate with offerors throughout the acquisition and source selection process. To this end, this new regulatory framework specifically allows "communication" with offerors both prior to making award without discussions and prior to establishing a competitive range, as well as after establishing a competitive range. The new regulatory framework also sets parameters for what level of communication is permissible at each of these stages of the acquisition process. Of course, there is nothing new about having extensive communications with offerors after establishing a competitive range. The level of communication permissible at this stage will be as it has always been - full discussions, "bargaining", give and take between the parties, revision of proposals, etc. The concept of allowing communications with offerors for the limited purpose of "clarifying" the proposal or resolving minor or clerical errors prior to awarding without discussions is also not new. The big change here is in the area of communication with the offerors prior to establishing a competitive range. Under current regulations, the level of permissible communication at this stage is limited to "clarifications". Under the new regulations, the level of permissible communication is expanded significantly. These new regulations make it permissible for these communications to address almost anything that is reasonably related to the Government's understanding or evaluation of the proposal, as long as these communications are not used to revise or give the offeror an opportunity to revise its proposal. The purpose of this expanded level of permissible communications is to maximize the Government's ability to understand the proposals submitted and thereby effectively apply the new competitive range standard of determining which proposals are "most highly rated" and should be included in the competitive range in order to conduct an "efficient competition". Remember, the underlying objective of all this rewriting of the regulations is to make the acquisition process more efficient. Also remember that, once these new regulations are approved and published, GAO will generally not disturb a procurement as long as the agency complies with its own published regulations.

Thus, these new regulations should make oral presentations a more useful tool in the acquisition and source selection process because of the expanded ability to communicate with offerors within the context of an oral presentation conducted prior to the establishment of a competitive range and the commencement of discussions with offerors within that competitive range. In making sure that these expanded communications stay within the bounds of what is permissible under these new regulations, a good rule of thumb may be what could be called the "uncertainty rule" - if the Government is uncertain about something, communication is permissible; if the Government is certain about something, communication is not

permissible until after the competitive range has been established. For example, if the Government is not sure about whether something is a deficiency, it would be permissible to “communicate” with the offeror about this perceived deficiency prior to establishing the competitive range. If the Government is certain that something is a deficiency, then it would not be permissible to communicate with the offeror about this deficiency until after the competitive range has been established. This means that any questions asked of offerors during the oral presentation should probably be framed in the form of an “uncertainty”.

Should you have any questions regarding “oral presentations” generally, please contact Mr. Thomas Carroll at ext. 29805.

CECOM Bottom Line: THE SOLDIER.

//s//
KATHRYN T. H. SZYMANSKI
Chief Counsel

General Legal Approach to Bundling or Consolidating of Requirements

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition and to include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. *Acoustic Sys.*, B-256590, June 29, 1994, 94-1 CPD P 393. The contracting agency, which is most familiar with its needs and how best to fulfill them, must make the determination as to what its minimum needs are in the first instance, and the GAO will not question that determination unless it has no reasonable basis. *Id.*; *Corbin Superior Composites, Inc.*, B-242394, Apr. 19, 1991, 91-1 CPD P 389.

Since bundled or consolidated procurements combine separate, multiple requirements into one contract, they have the potential for restricting competition by excluding firms that can only furnish a portion of the requirement. We review such solicitations to determine whether the approach is reasonably required to satisfy the agency's minimum needs. See *National Customer Eng'g*, 72 Comp. Gen. 132 (1993), 93-1 CPD P 225. Because procurements involve unique situations, contracting officers must base their decisions whether to consolidate or "bundle" certain requirements on the individual facts. Our review recognizes the uniqueness of each case.

There are several cases where the GAO upheld the agency's decision to bundle. In one case, the agency reported that two work requirements were interrelated in that they must be installed at same time and that a single general contractor was needed to coordinate all phases of the statement of work. The agency stated that having a single contractor install both systems would ensure that they will work together. Installing one system after the other would be inefficient, according to the agency, in terms of coordinating efforts and costs. The GAO found this to be reasonable. See also:

* *Electro-Methods, Inc.*, B-239141.2, Nov. 5, 1990, 90-2 CPD P 363 (agency properly combined requirements for jet engine upgrade modification kits and engineering services);

* *Southwestern Bell Tel. Co.*, B-231822, Sept. 29, 1988, 88-2 (contractor to provide a complete telecommunications system to an Air Force base to ensure military readiness);

* *Batch-Air, Inc.* B-204574, Dec. 29, 1981, 81-2 CPD P 509, (GAO upheld the single package concept for purchase, overhaul and installation of aircraft engines plus spare engine services for design and engineering to ensure overall integration of the tasks); and

* *LaQue Center for Corrosion Tech., Inc.*, B-245296, Dec. 23, 1991, 91-2 CPD P 577, (it was reasonable for the Navy to seek an integrated approach for solving marine corrosion problems.).

The GAO has also found against an agency's decision to bundle. In one case, the GSA contended that separating two requirements would increase the number of offers to be evaluated and the number of contracts to be administered, thus resulting in a significant duplication of effort. The GAO found that GSA's contention did not justify bundling the two requirements. First, GSA presented no evidence showing that any expected additional contracts would involve significant additional cost to the government. Further, the fact that bundling will be more administratively convenient is insufficient to support this inherently restrictive approach. When concerns of administrative convenience are being weighed against ensuring full and open competition, the Competition in Contracting Act (CICA), 41 U.S.C. @ 253 et seq. (1994), and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition. The GAO further found that, allowing vendors to contract separately for services under the schedule would provide the user agency more choice as to how to meet its requirements--since it would not be bound to use the same vendor for sales and service--and the presence of additional vendors could result in a wider range of prices for these services. In any case, administrative convenience is not a proper basis for restricting competition, so says the GAO. See also:

* *Allfast Fastening Sys., Inc.*, 72 Comp. Gen. 149 (1993), 93-1 CPD P 266, (GAO found that a minor rearrangement in the agency's requirements would increase the level of competition, permitting the protester to compete, and still meet the agency's minimum needs.)

**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>.



**THE ENVIRONMENTAL LAW DIVISION
BULLETIN**

July 1997

Volume 4, Number 10

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 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.¹ 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.² 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."³

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.⁴ 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.⁵ 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

ELD Bulletin

Page Three

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

¹ *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).

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

³ 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.

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

⁵ 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."⁶ 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.⁷ 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."⁸

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.⁹ 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.¹⁰ 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.¹¹ This guidance will undoubtedly impact installations near the Mexico and Canadian borders, and should be followed when the installation examines a proposed

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

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

⁸ 5 U.S.C.A. § 552(b)(5) (West 1996).

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

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

¹¹ "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.¹² As previously reported, some public advocacy groups allege that the MBTA’s prohibitions apply to federal agencies.¹³ Two Circuit Courts ruled recently that the MBTA does not apply to the actions of federal agencies.¹⁴ 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.

ELD Bulletin

Page Five

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.¹⁵ 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.¹⁶ In anticipation of Sikes Act reauthorization and pursuant to

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

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

¹⁴ *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).

¹⁵ 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.

¹⁶ 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,¹⁷ the Department of the Army recently issued guidance on preparing Integrated Natural Resource Management Plans (INRMPs).¹⁸

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.¹⁹ 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.

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.

ELD Bulletin

Page Six

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>.

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

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

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

BRAC ENVIRONMENTAL & REAL ESTATE DOCUMENTATION

ATTORNEY RESPONSIBILITIES

With the large number of BRAC actions and BRAC related environmental and real estate issues and documents being reviewed by our office, sometimes there is confusion as to which member of the Environmental and Real Estate Law team is responsible for what issues. While we all attempt to maintain some familiarity with various actions, for your assistance here is a list of the primary attorney assigned to each of our BRAC installations, with the MSC or Installation attorney who we are aware of as also reviewing such issues.

<u>Installation</u>	<u>AMC Attorney</u>	<u>NEPA Document</u>	<u>MSC Attorney</u>
Alabama AAP	Bob Lingo	No NEPA Action	IOC/ Tom Jackson
Anniston Depot	Bob Lingo	Relocation EA	ANAD/ M Starling
Detroit Army Tank Plant	Bob Lingo	Disposal EA	TA/Violet Kristoff
Detroit Arsenal	Bob Lingo	Realignment EA	TA/ Violet Kristoff
DPSC (DLA)	Mike Stump	Disposal EA	DLA/
Ft Monmouth	Mike Stump	Relocation EA	CE/CPT Hamilton
Ft Monmouth Evans Area	Mike Stump	Disposal EIS	CE/CPT Hamilton
Ft. Wingate Depot	Stan Citron	EA/NEPA Deferred	IOC/Bill Bradley
Hawthorne Depot	Bob Lingo	Relocation EA	IOC/John Rock
Jefferson Proving Ground	Stan Citron	Disposal EIS	TE/Dick Wakeling
Letterkenny Army Depot	Stan Citron	Disposal EA	LEAD/ M Finucane
Lexington Army Depot	Stan Citron	Disposal EA	BGAD/Les Renkey
McAlester (Ammo School)	Mike Stump	Relocation EA	IOC/Lynn Sturgis
Memphis Def Depot	Mike Stump	Disposal EA	DLA/
Ogden Def Depot	Mike Stump	Disposal EA	DLA/

Pueblo Army Depot	Stan Citron	NEPA for Lease	CBD/Ruth Flanders
Red River Depot	Stan Citron	Disposal EA	IOC/Garland Yarber
Redstone Arsenal	Bob Lingo	Relocation EA	AM/Amy Meredith
Savanna Army Depot	Bob Lingo	Disposal EIS	IOC/Rick Murphy
Seneca Army Depot	Bob Lingo	Disposal EIS	IOC/Rick Murphy
Sierra Army Depot	Stan Citron	Disposal EA	IOC/Rick Murphy
Stratford AEP	Mike Stump	Disposal EIS	TA/Violet Kristoff
Tobyhanna Depot	Bob Lingo	Relocation EA	TOAD/M Stanczak
Tooele Army Depot	Bob Lingo	Disposal EIS	IOC/Rick Murphy
Umatilla Army Depot	Stan Citron	NEPA for Lease	CBD/Ruth Flanders
Universal Test Range	Mike Stump	Relocation EA	IOC/Rick Murphy
Vint Hill Farm Station	Bob Lingo	Disposal EIS	CE/John Metcalf
Watertown (WA) Arsenal	Stan Citron	Disposal EIS	ARL/Tim Connolly
WA Yacht Club Parcel	Stan Citron	Disposal EA	ARL/ Tim Connolly
Woodbridge RF	Bob Lingo	Disposal EA	ARL/Tim Connolly

AMC ENVIRONMENTAL and REAL ESTATE TEAM

AREAS OF PRIMARY RESPONSIBILITY

From time to time, we have received inquiries about which attorney on the AMC Environmental and Real Estate Law Team is primarily responsible for a particular subject matter area. Enclosed is a breakout among the team attorneys, and "some" of their areas of primary legal responsibilities. If you have a question regarding one of these particular areas, it is recommended you contact the identified attorney first. Of course, we all are available for assistance, if that particular attorney cannot be reached.

Bob Lingo: 617-8082, DSN 767-8082

** Environmental Law Team Leader

- o 10 USC 2692 Storage/Disposal Issues
- o Acquisition Environmental Requirements
- o Ozone Depleting Substances Restrictions
- o Water Law and Water Rights Law Program
- o Safe Drinking Water Act Requirements
- o EPCRA and Pollution Prevention
- o NEPA Compliance
- o BRAC Environmental Documentation
- o Licensing and Disposal of Army Radioactive Material/Wastes
- o Occupational Health and Safety Program

Stan Citron: 617-8043, DSN 767-8043

- o Conventional and Chemical Munitions Issues
- o Environmental Compliance and Enforcement Orders

- o Clean Air Act Compliance
- o Hazardous & Solid Waste Management
- o Environmental Alternative Dispute Resolution
- o Chemical Stockpile Emergency Preparedness Program
- o ECAS Program, Audits, and Review
- o Restoration Orders and Federal Facility Agreements (IAGs)
- o Restoration and IRP Program

Mike Stump: (703) 617-8081, DSN 767-8081

- o Real Estate Leasing or Disposal
- o Lead Based Paint Issues
- o Endangered Species Act Issues
- o Cultural Resources Protection
- o Native American Protection Issues
- o Asbestos Containing Materials Issues
- o PRP and 3rd Party Liability Issues

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

AIR FORCE ENVIRONMENTAL BASIC COURSE

5 MAY 1997

I. REFERENCES

- A. National Environmental Policy Act (NEPA) of 1969, P.L. 90-190, 42 U.S.C. " 4321-4347
- B. Council on Environmental Quality (CEQ) Regulations on Implementation of NEPA, 40 C.F.R. Parts 1500-1508 (1986)
- C. Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026 (23 Mar 81)
- D. Army Regulation 200-2, Environmental Effects of Army Actions (23 Dec 88), as amended.
- E. Air Force - AFI 32-7061, The Environmental Impact Analysis Process (Jan 95)
- F. OPNAVIST 5090.1B, The Environmental and Natural Resources Program Manual (1 Nov 94)
- G. Marine Corps Order 5090.2, Environmental Compliance and Protection Manual (26 Sep 91)
- H. Department of Defense, 32 C.F.R. Part 188, Environmental Effects in the United States of DoD Actions (10 Dec 91)
- I. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations (11 Feb 94).
- J. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks (21 Apr 97), 62 Fed.Reg. 19885
- K. Helpful Web Sites - <http://ceq.eh.doe.gov/nepa/nepanet.htm>
<http://es.inel.gov/oeca/ofa>

II. OVERVIEW OF NEPA

- A. Statutory Purpose
 - 1. Declares a national environmental policy (' 101)
 - 2. Mandates that federal agencies prepare a detailed statement on the environmental impacts of major federal actions significantly affecting the quality of the human environment (' 102(2)(c)).
- B. Goals
 - 1. Insert environmental considerations into decision-making process
 - 2. Ensure public participation

C. Nature of NEPA

1. NEPA is procedural, not substantive.
 - a. Prescribes a process, not a result
 - b. Requires identification and evaluation of adverse environmental effects
 - c. Prohibits uninformed, not unwise, actions. Robertson v. Methow Valley, 490 U.S. 332, at 350 (1989)
2. Courts cannot “interject itself within the area of discretion of the executive as to the choice of the action to be taken.” Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, at 228 (1980).

III. REGULATORY FRAMEWORK

A. CEQ regulations.

1. Promulgated as federal regulations and binding on agencies
2. Require agencies to prepare implementing regulations

B. Agency regulations.

1. Provide specific agency procedures for analysis and documentation
2. Must identify typical actions that normally:
 - a. are categorically excluded from further evaluation (CATEX)
 - b. require an environmental assessment (EA)
 - c. require an environmental impact statement (EIS)

IV. EXCEPTIONS TO NEPA COMPLIANCE

A. Classified Information - 40 C.F.R. ' 1507.3 (c). Limited exemption which only excuses public disclosure of classified portions. Does not justify non-compliance.

B. Statutory Exemptions - 40 C.F.R. ' 1500.6

1. Explicit exemption required.
2. Examples - BRAC, EPA actions

C. Statutory Conflict - 40 C.F.R. ' 1500.6

1. If another statute makes NEPA compliance impossible, may be excused.

2. “Impossible” interpreted narrowly by courts.

D. Emergencies - 40 C.F.R. ' 1506.11

1. Actions necessary to protect life and property, or to protect national defense and national security.
2. Exemption only applies to actions necessary to control immediate effects.
3. CEQ consultation required.

V. NEPA ENVIRONMENTAL ANALYSIS FRAMEWORK

- Do I have a federal action? (See Outline Section VI below)
- If so, is there an exemption that applies? (See Outline Section IV above)
- If not, what level of environmental analysis is required? (See Outline Section VII below)

VI. FEDERAL ACTION

- A. Definition of federal action is found within the definition of “Major Federal Action” at 40 C.F.R. ' 1508.18.

1. Includes adoption of official policy, plans, programs, or projects.
2. Agency specific regulations may further define this term.

3. **NOTE:** A federal action does not have to be considered “major” for NEPA to apply. If you have a federal action, it is only a question of what level of NEPA is required. The EIS requirement kicks in for “major” federal actions.

B. Examples of federal actions

1. An expenditure of money or issuance of a permit may be enough of a federal hook to trigger NEPA.
2. Activities of a non-federal agency can become a federal action through the federal agency’s ability to influence or control the non-federal activity. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988).
3. Can inaction be a federal action? Split of authority, but general rule is that if the agency has no discretion to act, NEPA is not required. Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980).

C. Proposal - 40 C.F.R. ' 1508.23

1. Exists when agency has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the effects can be meaningfully evaluated.
2. May exist in fact as well as by declaration.

VII. LEVELS OF ENVIRONMENTAL ANALYSIS

A. Categorical Exclusions (CATEX) - 40 C.F.R. ' 1508.4.

1. A CATEX is a category of actions which an agency has determined, through promulgated rules, has no significant individual or cumulative effect on the human environment.
2. The purpose of a CATEX is to reduce unnecessary paperwork and delay.
3. Regulations must provide for extraordinary circumstances under which CATEX is not appropriate.
4. Documentation of some types of CATEX are often required (i.e. Record of Environmental Consideration (REC)).

B. Environmental Assessment (EA) - 40 C.F.R. " 1501.3, 1508.9

1. An EA is a concise document which briefly provides sufficient analysis for determining the environmental impacts of a decision. It is used to determine whether or not an EIS is required.
2. CEQ created EA's, not NEPA.
3. Contents of EA:
 - a. Need for the proposed action.
 - b. Reasonable alternatives.
 - c. Examines environmental impacts of proposed action and alternatives.
 - d. Listing of agencies/persons consulted.

4. EA has only two possible results:

- a. Finding of No Significant Impact (FONSI), or
- b. Intent to prepare an EIS.

5. Mitigated FONSI

- a. Using mitigation measures to reduce the significance of an action to insignificant level justifying a FONSI rather than an EIS.
- b. Not recognized by NEPA or CEQ.
- c. EA should commit to adopting specific mitigation measures, and analyze how these measures will mitigate the impacts to insignificant levels.

C. Environmental Impact Statement (EIS) - 40 C.F.R. " 1501.4, 1502.1-1502.25, 1508.11

1. EIS Specific Requirements

- a. Publish Notice of Intent to prepare EIS
- b. Scoping
- c. More extensive public comment and review periods
- d. Record of Decision (ROD)

2. Threshold for EIS -- **MFASAQHE**

- a. **M**ajor **F**ederal **A**ction
- b. **S**ignificantly **A**ffecting
- c. The **Q**uality of the **H**uman **E**nvironment

3. "Major Federal Action Significantly..."

- a. "Major" reinforces but does not have a meaning independent of "significantly." 40 C.F.R. ' 1508.18.
- b. "Significance" requires consideration of both context and intensity of the effect or impact of the action. 40 C.F.R. ' 1508.27. (effects and impacts are synonymous)

- 1. Context - Will the project affect society as a whole, or be felt only regionally or locally? The significance of a project will vary depending upon the setting of the proposed action.

2. Intensity - What is the severity of the project's impact?

- identify beneficial and adverse impacts
- degree which the action affects public health or safety
- unique characteristics of the affected geographic area
- likelihood of controversy
- degree of uncertainty
- establishes precedent for future actions with significance
- cumulative impact
- effect on scientific, cultural or historic resources
- effect on endangered species or critical habitat
- cause violation of federal, state or local environmental laws

4. "...Affecting the Quality of the Human Environment" - Must consider the nature of the proposal's effects on the quality of the human environment.

a. Affecting - "will or may have an effect on" - 40 C.F.R. ' 1508.3

b. Types of Effects - 40 C.F.R. ' 1508.8

1. Direct - caused by the action and occurring at the same time and place
2. Indirect - caused by the action and are later in time or farther removed in distance, but still reasonably foreseeable.
3. Cumulative - 40 C.F.R. ' 1508.7 (see section VIII C. below).

c. Human Environment - includes natural and physical environment and the relationship of people with that environment - 40 C.F.R. ' 1508.14

1. Effects may be beneficial or detrimental.
2. Effects include ecological, aesthetic, historic, cultural, economic, social, or health. But economic and social effects alone do not constitute significance (40 C.F.R. ' 1508.14).

VIII. PROBLEM AREAS

A. Development of Purpose and Need - 40 C.F.R. ' 1502.13

1. Courts unlikely to overturn an agency's statement of purpose and need
2. Define narrowly to limit alternatives
3. Examples

- a. NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972) - Secretary of Interior's EIS to examine oil and gas leasing with the purpose to "meet nation's energy crisis needs" found to require examination of all alternatives which could meet that need.
- b. Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir. 1981) - Corps of Engineers EIS for a new lock and dam defined the purpose as the "need for more capacity at the lock and dam, more capacity in waterways, and more safety at the lock and dam." With these underlying needs, only the replacement of the lock and dam was

and need
the
narrow
feasible.

B. Consideration of Adequate Range of Alternatives - 40 C.F.R.' 1502.14

1. Alternatives are the heart of an EIS
2. Examine in comparative form to give choice among options
3. Include No Action Alternative
4. Reasonable Alternatives

C. Cumulative Impacts - 40 C.F.R. ' 1508.7

1. Defined as "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."
2. Suggested analysis:
 - a) Define analysis area. The boundaries will differ depending on resource category. May also include temporal boundaries.
 - b) Define impact evaluation criteria. At what point does the impact become

significant to the resource category?

- c) Conduct interviews with on and off post officials to determine past, present, and reasonably foreseeable future actions, no matter how minor. Use scoping and comments to draft to help identify these activities.
- d) Analyze the effects of your action in relation to those other activities.

3. CEQ draft guidance: "Analyzing Cumulative Effects Under the National Environmental Policy Act."

D. Environmental Justice - Executive Order 12898

1. Purpose is to avoid disproportionate placement of adverse environmental, economic, social or health impacts from Federal actions and policies on minority and low-income populations or communities.

2. Suggested Analysis

- a) Identify minority or low-income populations off-post
- b) Consider whether or not proposed action will disproportionately affect these populations
- c) Identify mitigation measures
- d) Perform outreach

3. Draft Guidance for Considering Environmental Justice Under the National Environmental Policy Act, CEQ, 28 Mar 97

E. Segmentation

1. NEPA requires examination of related actions in a single document. 40 CFR '1502.4. Examining an overall plan in a piecemeal fashion in order to avoid significance which might merit an EIS is segmentation. 40 C.F.R. '1508.27(b)(7)

2. Related actions are those with a common purpose, timing, impact, or location. 40 C.F.R. '1508.25(a)(1) tests:

- a. Automatically trigger other actions which may require EIS;
- b. Cannot or will not proceed unless other actions are taken previously or simultaneously (will proceeding on this piece prejudice the ultimate decision on the rest of the action?), or;
- c. Are interdependent parts of a larger action and depend on the larger action for their justification (independent utility test).

3. Other limitations during NEPA process:

- a. Take no action with an adverse environmental impact.
- b. Take no action which will limit the choice among alternatives.
- c. Make no irretrievable commitment of resources.

F. Supplementation - 40 C.F.R. '1502.9(c).

1. Supplementation of an environmental document is required if:

- a. the agency makes substantial changes in the proposed action that are relevant to environmental concerns;
- b. there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; or
- c. where the agency thinks the purposes of NEPA will be furthered.

2. Whether new information is "significant" is a determination for the agency to and is accorded deference by the courts (arbitrary and capricious standard).

resolve,

- If there remains a major Federal Action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment, a SEIS must be prepared.

-Marsh v. Oregon National Resources Council, 490 U.S. 360 (1989).

3. Supplements are prepared the same as a regular document, except for scoping.

G. Incomplete or unavailable information - 40 C.F.R. '1502.22.

1. Must include info in EIS if

- a) info is relevant to reasonably foreseeable significant adverse impacts
- b) is essential to a reasoned choice among the alternatives, and
- c) the overall costs of obtaining it are not exorbitant.

2. If the costs to obtain the info are exorbitant, or there are unknown means to obtain it, the EIS must contain a statement explaining the omission.

MAJ Allison Polchek
Environmental Law Division

ACQUISITION ENVIRONMENTAL WWW SITES

I. DoD Acquisition Environmental Sites:

- a. Office of the Undersecretary for Acquisition and Technology

www.acq.osd.mil/HomePage.html

- b. Office of the Undersecretary for Environmental Security

www.acq.osd.mil/ens

- c. DoD Directive 5000 Series

- d. Defense Supply Center Richmond

On-Line Catalog of Environmental and Energy Efficient Products

Hazardous Technical Information Service Bulletins

www.dscr.dla.mil/dscr1.htm

- e. National Defense Center for Environmental Excellence

www.ndcee.ctc.com

II. Army Sites

- a. Army Acquisition Pollution Prevention Support Office

www.aappso.com

- b. Army Environmental Policy Institute

<http://aepi.gatech.edu/>

- c. Army Environmental Center

<http://aec-www.apgea.army.mil:8080>

III. Air Force Sites

- a. Air Force Commitment to Environmental Excellence

www.af.mil/environment/index.html

- b. Air Force Center of Environmental Excellence

www.afcee.brooks.af.mil/

- c. Aeronautical Systems Center Acquisition Environmental Management

www.ascem.wpafb.af.mil

- d. Air Force Affirmative Procurement Guide: A Guide to Buying Recycled

www.afcee.brooks.af.mil/ep/ap-guide.htm

IV. Navy Sites

- a. Navy Acquisition Environmental Policy

www.abm.rda.hq.navy.mil/aep.html

- b. Navy Environmental Programs-Pollution Prevention

<http://enviro.navy.mil/p2progra.htm>

- c. Navy Facilities Engineering Service Center (NFESC) Pollution Prevention

http://cayuga.nfesc.navy.mil/pp/pp_top.htm

- d. NFESC Environmental Weapon Systems Acquisition Support

http://cayuga.nfesc.navy.mil/pp/p_s/envrweeps/envrwep.htm

EXECUTIVE SUMMARY

FLRA GENERAL COUNSEL JOSEPH SWERDZEWSKI'S MEMORANDUM TO REGIONAL DIRECTORS ON "PRE-DECISIONAL INVOLVEMENT: A TEAM-BASED APPROACH UTILIZING INTEREST-BASED PROBLEM SOLVING PRINCIPLES"

This Executive Summary of the Federal Labor Relations Authority, General Counsel's Guidance Memorandum to the Regional Directors discusses the concept of "pre-decisional involvement" and its implementation utilizing a team-based approach which relies upon interest-based problem solving skills, techniques and strategies.

The Memorandum serves as guidance to the Regional Directors in educating the parties on the benefits of collaborative approaches to labor-management relations and in assisting them in their efforts to improve those relationships. The Guidance also implements the Office of the General Counsel Facilitation, Intervention, Training and Education Policy (FITE) which sets forth the principles and criteria that the Office of the General Counsel follows when working with the parties and delivering FITE activities to further the development of collaborative relationships and dispute resolution.

The Guidance Memorandum is divided into four parts which address the concept of pre-decisional involvement and what it is and where it comes from? (Part I), the benefits of engaging in pre-decisional involvement - why do it? (Part II), the relationship between pre-decisional involvement and the statutory duty to bargain - what must be decided before you begin about what you will do after it is done? (Part III), and the use of interest-based principles and teams to accomplish pre-decisional involvement - a model on when and how to do it (Part IV). Attached to this Guidance is a step-by-step approach for the Regions to use when assisting the parties in designing a pre-decisional involvement process. The Guidance Memorandum and this Executive Summary reflect the views of the General Counsel and do not constitute an interpretation by the Authority Members.

PART I WHAT IS PRE-DECISIONAL INVOLVEMENT AND WHERE DID IT COME FROM?

Q. #1: What is "pre-decisional involvement?"

Simply stated, "pre-decisional involvement" is a term which represents those activities where employees through their elected exclusive representative are afforded by agency management the opportunity to shape decisions in the workplace which impact on the work the employees perform.

Q. #2: Where did this concept originate?

The preamble of the Executive Order provides that "[t]he involvement of Federal Government employees and their union representatives is essential to achieving the National Performance Review's Government reform objectives." Pre-decisional involvement is a vehicle that provides for that "involvement."

Q. #3: Is pre-decisional involvement important to collaborative labor-management relations?

In the General Counsel's view, pre-decisional involvement is the cornerstone of Executive Order 12871, as amended, "Labor-Management Partnerships."

Q. #4: Does pre-decisional involvement expand the number of subjects over which there is a duty to bargain under the Federal Service Labor-Management Relations Statute (Statute)?

No. It does not expand the topics which are mandatorily negotiable under the Statute.

Q. #5: Does pre-decisional involvement require either the union or the agency to waive or give up any rights under the Statute?

No. Pre-decisional involvement does not waive management's statutory right to make decisions under section 7106 of the Statute, nor does it waive a labor organization's right to engage in bargaining prior to implementation to the extent required by the Statute.

Q. #6: What does pre-decisional involvement provide for?

It represents a process where unit employees who perform the daily tasks that collectively accomplish the mission of the agency have input into a decision-making process in order "to design and implement comprehensive changes necessary to reform Government" and "to champion change in Federal Government agencies to

transform them into organizations capable of delivering the highest quality service to the American people, as expressed in the Executive Order."

Q. #7: What prerequisites do the agency and union have to meet before embarking on a pre-decisional involvement process?

In order to be successful, it is critical that both parties to the relationship, labor and management:

- have a common understanding of what pre-decisional involvement, as they themselves define it, means;
- share a mutual appreciation of why it is in their own best interest to engage in pre-decisional involvement;
- have similar expectations of the results they seek to obtain from pre-decisional involvement; and
- agree on what actions occur after pre-decisional involvement has concluded.

Q. #8: What are the basic principles underlying the concept of pre-decisional involvement?

These are the basic principles of pre-decisional involvement::

- The process begins early when ideas are forming;
- The parties have common expectations;
- Information is freely shared throughout the process and there is an understanding on confidentiality of the information and the process;
- The participants utilize a problem solving approach founded on interest-based principles;
- The participants adapt a team approach to their activities; and
- The parties and the participants demonstrate a high degree of commitment to the process and to achieving their shared expectations.

PART II
THE BENEFITS OF ENGAGING IN PRE-DECISIONAL INVOLVEMENT -

WHY DO IT?

Q. #1: Should a party engage in pre-decisional involvement just because it is "the thing to do?"

No. No party should engage in pre-decisional involvement unless that party believes that it is in its interest to do so. No party should engage in pre-decisional involvement unless it has willingly participated in a process to develop exactly what pre-decisional means, how it will be accomplished, what the parties hope to get out of the process and what actions will occur upon the conclusion of the process.

Q. #2: Then why should a party engage in pre-decisional involvement?

Because it makes sense as a means to accomplish the agency's mission and it is essential to transform agencies into organizations "capable of delivering the highest quality service to the American people," as envisioned by the Executive Order and the National Performance Review.

Q. #3: Does the Executive Order explain how the parties should "involve employees and their union representatives as full partners with management representatives to identify problems and craft solutions to better serve the agency's customers and mission?"

No. The Executive Order, however, does not define the term "involvement" nor does the Executive Order establish at what stage of the decision-making process this "involvement" should occur or how this "involvement" should be accomplished.

Q. #4: Who then decides these critical issues?

These matters are left for the parties, through their partnership councils, to deliberate and decide. The Guidance Memorandum sets forth a model of pre-decisional involvement that the Office of the General Counsel has developed in working with parties under the Executive Order.

Q. #5: Why should employees be involved in the decision-making process? Isn't that management's job and responsibility?

The ultimate responsibility for making management decisions rests with management. Management manages the agency and unions represent bargaining unit employees. However, management decisions on how work should be performed must be implemented - and it is employees who perform those work tasks. Those employees have valuable suggestions on such matters as ways to work better and cost less, achieve significant results for the money spent, provide value to customers and stakeholders, deliver products and services on time, bring recognition to the agency for the services it provides and foster a productive and constructive labor-management relationship.

Q. #6: Why is it necessary to deal with the union if it is the employees who have the suggestions?

When employees are in bargaining units under the Statute exclusively represented by a labor organization which was chosen in a secret ballot election to represent the interests of those employees in workplace matters, the union is the means to tap into those employees' extensive hands-on experience.

Q. #7: What are the benefits of pre-decisional involvement?

- Better decisions.
- Fuller implementation of decisions.
- Greater support of the decisions.
- More timely implementation.
- Any subsequent collective bargaining will be facilitated.

Q. #8: What are the risks of pre-decisional involvement?

- Increased investment of time.
- Increased administrative costs.
- Collective bargaining under the Statute may still be necessary.

Q. #9: Is pre-decisional involvement an end in and of itself where "the box needs to be checked?"

No. Pre-decisional involvement is a means to better decisions which are timely and fully implemented with the intended results. It is not an end in and of itself. Rather, it is a tool or method to achieve a goal which is in the interests of employees, labor organizations and agencies, the delivery of the "highest quality services to the American people," as envisioned by the Executive Order.

**PART III
THE RELATIONSHIP BETWEEN PRE-DECISIONAL INVOLVEMENT
AND THE STATUTORY**

DUTY TO BARGAIN - WHAT HAPPENS AFTER YOU DO IT?

Q. #1: Does pre-decisional involvement mean that there is no need to bargain afterwards?

Maybe. Successful pre-decisional involvement may obviate the need for other bargaining under the Statute, or may facilitate any bargaining that is required at the conclusion of the decisional involvement process. But the decision to engage in a pre-decisional involvement process does not disadvantage the agency or the union with respect to any statutory rights.

Q. #2: What alternatives may occur after pre-decisional involvement has been completed?

- Recommendation adopted. The parties accept the option(s) presented by the team and there is no need for statutory bargaining.
- Recommendation modified and accepted. The parties modify the option(s) presented by the team and there is no need for statutory bargaining.
- Statutory bargaining required. The parties accept none or some of the options presented by the team and engage in statutory bargaining limited to the areas where the team options were not accepted as presented or modified.

Q. #3: Is it important that the parties understand that bargaining under the Statute might have to occur after pre-decisional involvement?

It is more than important - it is critical! Both parties should fully recognize the possibility that it may indeed be necessary to engage in some statutory bargaining after pre-decisional involvement and prior to implementation of a change which otherwise triggers a duty to bargain under the Statute. Our experience has shown that conflict can occur when the parties do not have a common understanding of this concept.

Q. #4: Then why should a party, particularly an agency, engage in pre-decisional involvement if it is not guaranteed to replace bargaining under the Statute?

Properly implemented pre-decisional involvement results in better decisions, faster and full implementation, and less conflict, even if bargaining is still required. Seldom do both parties agree that they will be bound by any recommendation that is generated by a team or work group as part of a pre-decisional involvement process. If the parties recognize and articulate their respective interests and set forth the standards which any solution must meet, there is a high possibility that the team members will be able to produce options which provide the basis for the best solution.

Q. #5: Is the pre-decisional process a barrier or facilitator of the bargaining that must still take place?

If properly implemented, pre-decisional involvement serves to assist the subsequent bargaining process. Since the parties already have a full understanding of the issue, their respective interests, and the extent to which the team proposed options meet those interests, they may agree to post-implementation bargaining, or to partial implementation on those matters where there is no disagreement, or to an expedited bargaining schedule.

PART IV

THE USE OF INTEREST-BASED PRINCIPLES AND TEAMS TO ACCOMPLISH PRE-DECISIONAL INVOLVEMENT - A MODEL ON WHEN AND HOW TO DO IT

Q. #1: What are the initial matters that should be agreed upon by the parties to determine whether pre-decisional involvement is appropriate?

The parties should come to a common understanding on the following matters:

- The issues or types of issues that are appropriate for pre-decisional involvement.
- The information that the agency will provide to the union when the pre-decisional involvement process is triggered.
- The factors that the union will evaluate to determine whether it will engage in pre-decisional involvement.
- The range of options for the union to choose from in determining whether to engage in pre-decisional involvement.
- The consequences of a union decision not to engage in pre-decisional involvement.
- Circumstances which allow the union to initiate the pre-decisional involvement process.

Q. #2: What are some of the basic issues that the parties must address in structuring a pre-decisional involvement process?

The parties participating in the pre-decisional process should jointly reach a common understanding on such matters as the charge, size and membership of the team, the role of team members, what matters are "off the table," time limitations, time

commitment, format of the final work product, information needed, and the decision-making process. These general topics are more fully developed in the Guidance Memorandum.

Q. #3: What are some of the basic issues that the team members must address before the team begins operation?

The team members should have a common understanding on such general matters as the scope of their charge, expectations, limitations, decision-making process, standards and interests that any solution must meet, method of team operation, commitment to the task, information and resources needed, format of final work product, confidentiality and skills needed. These general topics also are more fully developed in the Guidance Memorandum.

Q. #4: How can the parties apply interest-based principles to a pre-decisional team-based process?

The Guidance sets forth one model for the use of interest-based problem solving by a team charged with developing solutions to workplace issues in a pre-decisional setting. In sum, the model utilizes teams which are charged with brainstorming solutions and analyzing the extent to which various options meet the interests and standards that have been identified by a partnership council composed of the leadership of the entities that have agreed to utilize a pre-decisional process. The model also provides for individual team members to present their independent interests that may not have been recognized by the partnership council.

Q. #5: Can you practice pre-decisional involvement if you do not have a partnership council?

Yes. This model provides for union and agency leaders, plus any other entity that is participating (such as a mid or executive level manager's group) to serve as decision-makers. These leaders normally would comprise a partnership council where one existed.

Q. #6: What is the role of the partnership council?

The partnership council decides the matters described above in question # 2. In particular, the partnership council identifies the issue, drafts the charge, and develops the standards that any solution developed by the team must meet. Further, each entity participating in the process identifies their interests which must be satisfied by any solution.

Q. #7: Why does the model provide that the standards and interests are developed by the partnership council?

This model allows the parties to ensure that their institutional interests have been identified and will be met by any proposed solutions. Some employees and managers selected to participate on a team may not know or share the institutional interests of their principals. Sometimes, the principals themselves have not given the identification of their interests the proper attention. This model ensures that all institutional interests are identified before the team begins its work and expends its resources.

Q. #8: What is the role of the team?

As noted in question #4, the model also provides an option for individual team members to present their independent interests that may not have been recognized by the partnership council. Whether or not this occurs, the team is charged with brainstorming options to resolve the issue in the charge and evaluating the extent to which various options meet the interests of all of the parties in a manner that is consistent with the previously established standards.

Q. #9: Who do the team members represent?

Under this model, the team members represent the party that selected them for participation on the team. The members are not "independent operators," but represent the often broader interests of the party they represent. All team members are charged with developing options that best meet the previously identified interests of all the parties and which are consistent with the standards developed by the partnership council and any team members if that option is selected.

Q. #10: Who makes the final decision?

In this model, the partnership council engages in the decision-making process. The partnership council may modify the options presented by the team. The ultimate decision maker may be the partnership council itself or, if that authority has not been delegated by the agency, by the appropriate high level agency official with responsibility for the issue. The model also provides for an option to delegate the final decision-making authority to the team.

Q. #11: Does the model provide for subject matter experts?

Yes. This model also provides for subject matter experts to be selected by the agency, or jointly by the agency and the union, to serve as technical experts. These subject matter experts may be managers, unit employees who are union members, unit employees who are not union members or unrepresented employees. These technical experts are not serving as union or agency representatives, but rather serve on the team as expert advisers pursuant to the assignment of work.

Q. #12: What is the team's final work product?

Any options recommended by the team should be consistent with the standards and the interests articulated by the partnership council prior to the commencement of the team's efforts. A written report could be used to analyze how each of the recommended options meets the interests which had been expressed and the extent to which it meets those interests. The model also allows the team the option to prioritize options, based on the team's collective assessment of the extent to which a solution meets the interests and is consistent with the criteria. If the team cannot reach consensus on prioritizing options, the report details the extent to which each supported option satisfies, and does not satisfy, the various interests represented on the team. The technical experts participate as subject matter resources during this evaluation process, but do not participate as a principal of the team in determining the prioritization of the options.

Q. #13: What are the options for the partnership council when presented with the team's work product?

Unless the team has been delegated final decision-making authority, the partnership council has the option to return the work product to the team with further instructions or to clarify certain questions raised by the partnership council, accept or modify the options, or create a new option to recommend to the ultimate decision-maker, if the partnership council itself has not been granted that authority. The partnership council reports its action to the team, regardless of the action taken.

Q. #14: Why isn't the team under this model always empowered to engage in a final decision-making process?

The team may be delegated final decision-making authority. However, even if no delegation occurs, the team does engage in a decision-making process to the extent that the team evaluates the various options and attempt to prioritize the options based on the extent to which they meet all of the parties' interests and are consistent with the standards. The model allows the team members to focus their energies on the development of solutions to the issue, rather than become entrenched in attempting to reach consensus on one final decision.

Q. #15: Why does the model move the decision-making process to the partnership council?

Our experience has shown that most team recommendations are usually modified by the ultimate decision-maker(s) prior to acceptance. This model enhances the use of time and talents by utilizing the leadership to develop the parameters of any solution (identification of the issue, the standards and identification of the parties' interests), allowing the team members to use their knowledge skills and abilities and experiences to formulate proposed solutions (brainstorming and evaluation), and providing for final decision-makers by those leaders who are responsible for making decisions (either the steering committee or the ultimate agency decision maker). However, there are also alternatives presented where the team itself can be

delegated to be the final decision-maker and where the team members may raise their individual interests that may not have been recognized by the parties.

A GUIDE TO DESIGNING A PRE-DECISIONAL INVOLVEMENT PROCESS

GROUP	STEP	ACTION
Agency Executives and Union Leadership	1	The Agency and the Union Determine if They Will Engage in Pre-Decisional Involvement Over a Particular Matter.
Agency and Union Representatives	2	Representatives of the Agency and the Union Come to a Common Understanding on the Relationship Between the Pre-Decisional Involvement Process and the Statutory Duty to Bargain.
Partnership Council	3	The Agency and the Union (and any Other Entities Involved in the Process) Come to a Common Understanding on the Structure of Their Pre-decisional Involvement Process.
Partnership Council	4	The Partnership Council Identifies the Interests of the Agency and Union That Must be Satisfied by the Team's Recommendations and the Standards With Which any Solution Must be Consistent.
Partnership Council	5	The Partnership Council Creates the Charge of the Team and Meets with the Team to Discuss the Charge.
Pre-Decisional Involvement Team	6	The Pre-Decisional Involvement Team Meets and Reaffirms a Common Understanding Among All Team Members of their Charge and Fulfills Its Charge.
Partnership Council	7	The Partnership Council Reviews the Teams' Work Product and Takes Appropriate Action.

**Frequent Flyer Miles
& Other Travel-Related Benefits --
To Whom Do They Belong?**

by

Mr. Michael J. Wentink
Army Standards of Conduct Office
Office of The Judge Advocate General

(U)

I. Introduction

The Army Standards of Conduct Office has received many questions concerning the use of frequent flyer miles and related benefits received while on official Government temporary duty (TDY) orders. This is good, because the rules are not easy to understand; they are complicated (some would say Byzantine), and they are not always intuitive or logical. As a result, we encourage you to contact your Ethics Counselor to help resolve these issues. The purpose of the following article is to give you a basic understanding as to how to deal with these matters.

The travel industry is constantly coming up with innovative ideas to induce your business and create brand loyalty. For example, airlines give “mileage” that their customers can accumulate and use for free upgrades and tickets in the future. When you are “bumped” by an airline, you might receive a free overnight in a local hotel, meals and a coupon good for a free round-trip ticket; this “bump” might be voluntary or involuntary. When you pay your TDY expenses using your personal credit card, you might receive a rebate for each dollar charged, or you might be given a frequent flyer mile for each dollar charged.

However, by law and regulation, we must always have the best interests of the United States, our Service and the taxpayer in mind when conducting Government business; not how we can best benefit personally.

II. Frequent Flyer Miles

The mileage points received from an airline for traveling TDY on its aircraft belong to the U.S. Government. There are no exceptions. Even if the Government cannot use them (for example, you retire from Government service), you may not use them for your personal travel. You may not even donate them to a charity.

These mileage points can be used only in connection with official travel (*e.g.* TDY or official permanent change of station (PCS) travel). You may also use these mileage points if, after retirement, you are issued invitational travel orders for official travel. They may not be used for travel on permissive TDY or while on leave.

Department of Defense policy is to use mileage points to reduce the cost of future official TDY travel. However, you may also use them to upgrade your seat while on official TDY travel, but **not** to First Class. You may upgrade only to something less than First Class. If there are only two classes on the flight, the higher class is considered First Class, no matter what it might be called, and you may not upgrade. If you use official TDY travel points to upgrade to business class for an overseas flight, but the first portion of your travel in the United States (*e.g.* from your origination point to the port of embarkation) has only two classes, you may not ride in the higher (first) class section during that portion of the trip.

It is not required, but recommended, that you maintain separate accounts for your personal travel benefits and those benefits earned while on official TDY travel. However, if you keep your personal and official miles in the same airline account, you must keep track of those that belong to you and the Government because the presumption is that all of the mileage belongs to the Government.

III. Upgrades to First Class Air

The rule set out in the Joint Travel Regulation (JTR) and Joint Federal Travel Regulation (JFTR) prohibits First Class air travel except in three narrowly construed situations. Secretary of the Army approval is required if any one of these exceptions is used. However, this does not mean that you may never upgrade yourself to fly First Class while on official Army travel. You may upgrade and fly First Class in the following situations:

- a. You may use your own Frequent Flyer benefits, earned while on **personal** travel, to upgrade to First Class.
- b. You may use your own funds to purchase an upgrade to First Class.
- c. You may accept an on-the-spot upgrade that is **not** being offered because of your grade or position, but to anyone under the circumstances (for example, you arrive late and the aircraft is full except for a First Class seat which you are offered).
- d. You may use a coupon that you received because you are a member of an airline “club” by virtue of the number of miles that you have flown with the airline, even if some or all were flown on TDY. However, this must be a “no cost” upgrade,

meaning that you did not “cash in” official mileage points to gain membership to the club, or exchange official points for the coupon.

If traveling in first class in one of the above situations, to avoid inappropriate appearances, military personnel should not travel in uniform.

IV. Gifts Received When “Bumped”

If you are “bumped” from a flight, or there is some other delay, the airline might provide you with a room for the night, your meals, and a coupon for a round-trip ticket anyplace in the United States. All such benefits belong to the Government. Your TDY claim should reflect no cost for the hotel room and your *per diem* should be reduced accordingly for the meals provided. The coupon for a round-trip ticket can only be used for future Government travel. Similarly, if your flight is delayed for five hours and the airline gives each of the inconvenienced passengers a coupon for a free flight, that coupon also belongs to the Government.

However, if you **volunteered** to be “bumped” and received these benefits, they belong to **you**. Your delay, however, must not interfere with your mission, nor should the Government incur any additional costs because of your delay. You are considered to be on your own time, and your travel claim must reflect this personal time.

V. Credit Cards

Numerous credit card plans offer cash rebates, discounts on future purchases, and even airline mileage points, all calculated by how much you charge. If you use your personal credit card while on TDY to charge your meals, hotel rooms, and even travel

tickets, the benefits extended to you by your credit card company belong to you. For example, if you have a VISA card that is affiliated with United Airlines, and if you buy a \$500 ticket for a TDY flight on United Airlines, you receive 500 miles from VISA credited to your United Airlines account. Those 500 miles belong to you. However, the 2,000 miles that are credited to your account for the 2,000 miles that you fly on that ticket belong to the Government.

VI. Conclusion.

Some of the rules concerning the use of frequent traveller benefits are easy to understand, *e.g.*, frequent flyer miles earned while on TDY belong to the Government. However, there are many permutations in this area, especially with so many different marketing schemes constantly being developed by the travel industry. Accordingly, you are encouraged to seek the advice of your Ethics Counselor.

INFORMATION PAPER

AMCCC-G
16 July 1997

SUBJECT: Receipt of Gifts from Foreign Governments

1. **Purpose.** To summarize the rules concerning gifts from foreign governments.

2. **Facts.**

a. The Constitution prohibits anyone holding a position of trust from accepting a gift from a foreign government without the consent of Congress.

b. Congress passed a law that applies to Federal employees, experts or consultants under contract, members of the uniformed services (this includes retired members and Reservists), and their spouses and dependents. This law:

(1) Prohibits requesting or encouraging a gift from a foreign government;

(2) Permits acceptance and retention of an unsolicited gift of minimal value “tendered and received as a souvenir or mark of courtesy” from a foreign government; and

(3) Permits acceptance of an educational scholarship or medical treatment.

c. Congress also permits the acceptance of a tangible gift of more than minimal value:

(1) If refusal would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States, *but*:

(2) It is accepted on behalf of the United States and, upon acceptance, becomes the property of the United States; and

(3) Within 60 days, the recipient must turn the gift over to his or her agency. In the Army, the repository for such gifts from foreign governments is:

Commander, PERSCOM
ATTN: TAPC-PDO-IP
200 Stovall Street
Alexandria, VA 22332-0474

POC: Mr. Tom Feazell, (703) 325-4530

AMCCC-G

SUBJECT: Receipt of Gifts from Foreign Governments

e. When turning in a gift of more than “minimal value” from a foreign government, include the following information:

- (1) Name and title of recipient (advise if you wish to purchase the gift);
- (2) Brief description of the gift, date of acceptance and estimated value;
- (3) Identification of the foreign donor and government;
- (4) The circumstances justifying acceptance on behalf of the United States.

f. “Minimal value” is defined by the General Services Administration. It is currently \$245 or less retail value in the United States. The burden to establish “minimal value” is on the recipient of the gift.

(1) All gifts presented at a single event by the same foreign Government are combined to determine whether “minimal value” has been exceeded.

(2) This combination includes the gifts to the spouse, if any, at the same event.

(3) To determine retail value in the United States, check catalogs and retail establishments that sell substantially similar items; ask dealers who might carry such an item what they think it might sell for; if applicable, check auction realizations for similar items.

(4) If the uniqueness of the gift require significant judgment as to its retail value, and you are inclined to conclude that its value is close to, but not more than, \$245, you may wish to make a written request for an ethics opinion concerning your conclusion.

g. The law and regulations also permit the acceptance of travel and travel expenses from foreign governments of more than minimal value if such acceptance is appropriate, consistent with the interests of the United States, permitted by the employing agency, and the travel takes place entirely outside the United States. Never accept gifts of travel expenses (whether the travel is personal or official) without first consulting with your Ethics Counselor.

Michael J. Wentink/617-8003

**VEHICULAR ACCIDENTS WHILE ON
GOVERNMENT BUSINESS: WHO PAYS?**

1. This Comment responds to concerns about Government employee liability when the employee is involved in a motor vehicle accident while conducting Government business. Below is a brief discussion of this issue based on the type of vehicle involved. It is assumed that the employee is acting within the scope of employment at the time of the accident. An employee is acting “outside” the scope of employment, for example, when traveling outside a reasonable distance of the location of the employee’s Government business. In such cases, the employee will not be covered by the Federal Government in the manner indicated below.

2. It is also important to note that the Army Claims process will not cover damage to the vehicle operated by an employee found to be at fault or outside the scope of employment. However, many private insurance companies will act as a secondary insurer to cover property damage caused by Government employees performing official Government business and found legally obligated to pay for damage to (1) motor vehicles owned or leased by the Government, or (2) rented motor vehicles used for Government business. **You must review the coverage of your personal insurance policy to know where you stand.**

A. PRIVATELY OWNED VEHICLE (POV):

(1) EMPLOYEE AT FAULT.

3rd Party: Property damage and/or personal injury to any third parties are covered through the Army Claims process.

Employee: Property damage is not covered by Army Claims process. Property damage may be covered through your personal insurance company (see your policy). Personal injuries are covered under the Federal Employees Compensation Act (FECA) process.

(2) EMPLOYEE NOT AT FAULT.

3rd Party: Neither property damage or personal injury to third parties is covered through the Army Claims process. However, the employee should report the accident to the legal office and the employee’s private insurance company.

Employee: Property damage is covered by the other driver’s insurance company if the other driver is found at fault. Personal injuries will either be covered by the other driver’s insurance or FECA.

B. GOVERNMENT VEHICLE:

(1) EMPLOYEE AT FAULT.

3rd Party: Property damage and/or personal injury to any third party is covered through the Army Claims process.

Employee: The Army Claims process does not apply to damages incurred to Government vehicles. As Government property is involved, Report of Survey procedures will be followed (see AR 735-5, Policies and Procedures for Property Accountability). If the Report of Survey results in a finding that the operator is liable, he or she may be liable for no more than one month's base pay. (See paragraph 2 above on possible recovery from private insurer.) However, the Approving Authority may waive liability in cases involving damage to a government owned or leased motor vehicle through simple, but not gross, negligence. AR 735-5 defines **simple negligence** as "[t]he failure to act as a reasonably prudent person would have acted under similar circumstances." **Gross negligence** is defined as

[a]n extreme departure from the course of action to be expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

Personal injuries are covered under the FECA process.

(2) EMPLOYEE NOT AT FAULT.

3rd Party: Property damage and/or personal injury to any third parties is not covered through the Army Claims process. However, the employee should report the accident to the legal office and the employee's private insurance company.

Employee: Pursuant to para. 14-29, AR 735-5, a Report of Survey is conducted for accidents involving third party civilians who are at fault but refuse to admit liability or admit liability but will not make restitution. After assessment of financial liability, the Approval Authority will forward the approved Report of Survey to the servicing claims office. The claims office will initiate action against the third party. Personal injuries are covered under FECA or the insurance of the third party who is at fault.

C. RENTAL VEHICLE:

(1) EMPLOYEE AT FAULT.

3rd Party: Property damage and/or personal injury to a third party is covered through the Military Traffic Management Command (MTMC) Agreement or Army Claims process if the MTMC Agreement does not apply.

AMSRL-CS-CC

SUBJECT: Vehicular Accidents While on Government Business: Who Pays?

Employee:

a. Property damage is covered through the MTMC Agreement when a car or passenger van is rented. Special rental vehicles (i.e., truck, utility vehicle, 4-wheel drive vehicle, etc.) are not covered by the MTMC agreement. Additionally, **the MTMC Agreement only applies where a third party is involved**. Personal injuries are covered under the FECA process.

b. For instances where the MTMC agreement does not apply, the rental agency's loss will be paid out of travel funds, and the employee's injuries are covered under FECA. The following procedures should be followed:

(i) upon return of the vehicle to the rental agency, obtain another rental vehicle;

(ii) **do not provide any personal insurance information to rental agency no matter how insistent the agency may be;**

(iii) obtain a written estimate from the rental agency for damages incurred--the agency should be familiar with working with the Government and realize that it will take approximately 4-6 weeks to receive their monies;

(iv) call Ms. Angee Acton, of this office, (301) 394-1072, if the rental agency refuses to provide you with another rental vehicle without your personal insurance information or requires you to charge it to your Government American Express; if Ms. Acton is not available, contact Mr. Timothy W. Connolly, of this office, at (301) 394-1073;

(v) upon return to your office, submit the damage estimate from the rental agency as a supplemental voucher with your travel reimbursement voucher. Note: damage expenses will be taken from the employee's office budget.

NOTE: If you travel overseas, to include Puerto Rico, and the rental car agency offers supplemental insurance (i.e., collision damage waiver insurance, etc.), you should buy it. It is a reimbursable expense for overseas TDY locations only.

(2) EMPLOYEE NOT AT FAULT.

3rd Party: Neither property damage or personal injury to third parties is covered through the Army Claims process. However, the employee should report the accident to the legal office and the employee's private insurance company.

Employee: If a third party is at fault, the rental agency is responsible for taking action against that party to collect for property damage. If the accident was caused by a defect in the rental vehicle, provide this information to the rental company and note the defect upon submission of your travel voucher. Negotiation of the deductible may be possible in this circumstance. Employee injuries are covered under FECA or the insurance of the "at fault" third party.

AMSRL-CS-CC

SUBJECT: Vehicular Accidents While on Government Business: Who Pays?

3. A final determination of liability will depend on the particular facts and circumstances involved. Because the facts and circumstances of each case vary, official determinations can only be given on a case-by-case basis. And remember to “drive with care and make accidents rare.”

STEVEN B. LUNDBERG
COL, JA
Chief Counsel

DISTRIBUTION:
ALL ARL EMPLOYEES

CCC #97-01

July 7, 1997

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Processing Equal Employment Opportunity (EEO)
Complaints Concerning Civilian Personnel
Operations Center (CPOC) Actions

The following policy addresses the procedures to be followed in processing EEO (individual and class) complaints of discrimination involving CPOC actions.

When the CPOC is processing actions for a serviced installation or activity it is in the "acting for" capacity for that installation or activity commander/director. As such, the CPOC is working for the commander/director of the activity who requested the personnel action. Under this guiding principle, although geographically separated, the CPOC can be looked upon as part of the serviced commander's/director's staff when processing personnel actions for that commander's/director's installation or activity.

1. EEO Office Responsible for Complaint Processing.

When a CPOC is acting for a serviced commander/director and an employee or applicant alleges discrimination which involves an action taken by the CPOC, the EEO Office servicing the commander/director is responsible for counseling and complaint processing. For example:

(a) If a Fort Bragg employee applies for a position at Fort Bragg and alleges that Southeast CPOC personnel at Fort Benning discriminated based on sex in non referral for the position, the Fort Bragg EEO Office is responsible for counseling and complaint processing.

(b) If a Fort Bragg employee applies for a position at Fort Polk and alleges that South Central CPOC personnel discriminated based on sex in non referral for the position, the Fort Polk EEO Office is responsible for counseling and complaint processing.

Aggrieved employees and applicants who allege discrimination by CPOC personnel should contact their servicing or the nearest Army operating EEO Office for complaint information and direction. That office will help the individual identify the responsible EEO Office for counseling and complaint processing and immediately refer the individual to the responsible EEO Office.

2. Access to CPOC Personnel and Records.

a. Access to Personnel. CPOC Directors will ensure that EEO Counselors, EEO Officers, and Labor Counselors are accorded direct access to CPOC personnel to carry out their respective responsibilities in the EEO complaint process. When a CPOC is acting for a serviced commander/director and an employee or applicant alleges discrimination which involves an action taken by the CPOC, the EEO Counselor must have direct access to CPOC personnel. Additionally, Labor Counselors serving as agency representatives must have direct access to CPOC personnel to gather information about the complaint and to interview prospective witnesses.

b. Access to Records. CPOC Directors will ensure that EEO Counselors, EEO Officers, and Labor Counselors are accorded direct access to CPOC records to carry out their respective responsibilities in the EEO complaint process. When a CPOC is acting for a serviced commander/director and an employee or applicant alleges discrimination which involves an action taken by the CPOC, the EEO Counselor must have direct access to CPOC records. Additionally, Labor Counselors serving as agency representatives must have direct access to CPOC records to gather information about the complaint. However CPOC records may be available through access of the regional data base at the servicing CPAC. Therefore, EEO Counselors, EEO Officers, and Labor Counselors are encouraged to coordinate with their servicing CPAC before requesting records directly from the CPOC. CPOC Directors will designate an individual within the CPOC to serve as EEO Liaison/POC to facilitate timely response to installation or activity requests for records in connection with EEO complaints. Original personnel records should be transmitted through the CPAC to ensure accountability for the records.

3. Settlement Authority and Coordination.

a. Settlement Authority

(1) When an employee or applicant alleges discrimination which involves an action taken by CPOC personnel on behalf of a serviced commander/director, the authority to settle the matter rests with the serviced commander/director (not the CPOC Director).

(2) A serviced commander/director may not offer or agree to a remedy which impacts on the CPOC's processing of other installations' actions except as reasonably necessary to implement specific relief to the individual complainant.

b. The Labor Counselor, the EEO Officer, and the appropriate CPAC official will coordinate and consult with each other as equal members of the commander's/director's advisory team. If a personnel issue involves a matter within the CPOC's purview, the CPAC official should consult with the CPOC.

c. If an installation or activity is considering entering into a settlement agreement, the terms of which require action by the CPOC, the proposed agreement must be coordinated with the CPOC. The same is true when the terms of a proposed agreement would not require action by the CPOC but would have the effect of changing or overruling a CPOC action. If the CPOC objects to the proposed remedy or a proposed term in the settlement agreement, and the commander/director cannot reach agreement with the CPOC on the proposed remedy or proposed term of the agreement, the commander/director, after consultation with the Labor Counselor, EEO Officer, and CPAC Director, will decide the agency's position on the settlement proposal. A serviced commander's/director's authority to settle an EEO complaint over the objections of the CPOC may be delegated no lower than the commander's/director's immediate subordinate who acts for the commander/director such as the Deputy Commander/Director, or Chief of Staff.

d. Under normal circumstances, installation/activity coordination of proposed settlement agreements with CPOCs should be accomplished by the local CPAC.

When time is of the essence (e.g., proposed settlement reached during hearing before an EEOC Administrative Judge or during an OCI investigation or mediation), the EEO Officer or the Labor Counselor serving as the agency representative may directly contact the CPOC for coordination.

e. To assure that the terms of a settlement agreement are carried out and to facilitate any necessary arrangements with the CPOC, the installation or activity should designate an official responsible for implementation. This may be the EEO Officer, a CPAC official, or another management official, as appropriate. Normally the EEO Officer is responsible for monitoring compliance with the terms of the settlement agreement.

4. Processing Costs and Monetary Remedies.

When a CPOC is acting for a serviced commander/director and an employee or applicant alleges discrimination which involves an action taken by the CPOC, the installation or activity that requested the personnel action is responsible for complaint processing costs as well as the payment of any monetary remedy, including compensatory damages agreed to by settlement or awarded in a decision by an appropriate authority.

5. EEO Complaints within the CPOC (internal).

For internal CPOC complaints of discrimination (those filed by CPOC employees or applicants for CPOC positions) the following procedures apply. Except as provided below, the host installation EEO Office is responsible for counseling and complaint processing. If a CONUS CPOC Director is named or otherwise designated as a principal agency witness based upon actions he or she personally has taken against the complainant, the CPOC Director's function in the complaint process will be assumed by the Director, Civilian Personnel Operations Center Management Office (CPOCMA) and the CPOCMA's Servicing EEO Office will process the complaint. If the CPOC Director is named by virtue of his or her position, the CPOC Director's role in the complaint process will not be affected and

the CPOC's servicing EEO Office will continue processing the complaint.

6. Finding of Discrimination.

If the Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA) or the Equal Employment Opportunity Commission finds discrimination in an EEO complaint, and the finding is based upon action or inaction by the CPOC or a CPOC official, the Director, EEOCCRA will notify the Director, Civilian Personnel Operations Center Management Agency or the appropriate OCONUS Major Commander, in addition to normal distribution of the complaint decision.

This policy has been developed in coordination with the Labor and Employment Law Division, Office of The Judge Advocate General (OTJAG), the Department of Army Equal Employment Opportunity Agency, and the Department of Army Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA). This information should be provided to your servicing Civilian Personnel Advisory Center, Equal Employment Opportunity Office and Labor Counselor.

//s//

Carol Ashby Smith
Deputy Assistant Secretary
(Civilian Personnel Policy)

DISTRIBUTION:

OFFICE, SECRETARY OF THE ARMY (JDPEW)

COMMANDER IN CHIEF
U. S. ARMY EUROPE AND SEVENTH ARMY

COMMANDER
EIGHTH U. S. ARMY
FORCES COMMAND
U. S. ARMY MATERIEL COMMAND
U. S. ARMY TRAINING AND DOCTRINE COMMAND
U. S. ARMY CORPS OF ENGINEERS
U. S. ARMY SIGNAL COMMAND

DISTRIBUTION: (CONT)

MILITARY TRAFFIC MANAGEMENT COMMAND
U. S. ARMY CRIMINAL INVESTIGATION COMMAND
U. S. ARMY MEDICAL COMMAND
U. S. ARMY INTELLIGENCE AND SECURITY COMMAND
U. S. ARMY MILITARY DISTRICT OF WASHINGTON
U. S. ARMY SOUTH
U. S. ARMY SPECIAL OPERATIONS COMMAND
U. S. ARMY RESERVE PERSONNEL CENTER
U. S. MILITARY ENTRANCE PROCESSING COMMAND
U. S. ARMY RECRUITING COMMAND
SUPERINTENDENT, U. S. MILITARY ACADEMY
U. S. ARMY CIVILIAN PERSONNEL EVALUATION AGENCY
DIRECTOR, ARMY CENTER FOR CIVILIAN HUMAN RESOURCE
MANAGEMENT

CIVILIAN PERSONNEL OPERATIONS CENTERS (CPOCS)
USAREUR REGION (SECKENHEIM, GERMANY APO AE)
SOUTHEAST REGION (FT. BENNING, GA)
ARMY NATIONAL CAPITAL REGION (FT. BELVOIR, VA)
SOUTHWEST REGION (FT. RILEY, KS)
NORTHEAST REGION (ABERDEEN PROVING GROUND, MD)
NORTH CENTRAL REGION (ROCK ISLAND ARSENAL, IL)
SOUTH CENTRAL REGION (REDSTONE ARSENAL, AL)
PACIFIC REGION (FT. RICHARDSON, AK)
KOREA REGION, APO AP