

**THE ENVIRONMENTAL LAW DIVISION
BULLETIN**

August 1997

Volume 4, Number 11

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.

**HQDA Issues Guidance on Nomination of Historic Properties to the National Register of
Historic Places – MAJ Ayres**

On 25 July 1997, Headquarters, Department of the Army (HQDA) issued "Interim HQDA Policy on Nomination of Historic Properties to the National Register of Historic Places" (hereinafter Policy). In accordance with the Policy, installations should focus scarce resources toward managing and maintaining historic properties rather than diverting resources toward developing and preparing nomination packets. The Policy further states, "[o]nly those historic properties that will be actively managed by the installation as a site of interest open to the general public should be formally nominated to the National Register." The Policy is consistent with the proposed revisions to the Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs. The Policy will remain in effect for one year or until AR 420-40 HISTORIC PRESERVATION, dated 15 May 1984, is revised and replaced by AR 200-4, CULTURAL RESOURCES MANAGEMENT. AR 200-4 should be published and distributed prior to the end of the calendar year.

**Underground Storage Tank (UST) Upgrade Compliance and EPA's UST Enforcement Policy -
MAJ Anderson-Lloyd**

By 22 December 1998, all existing UST systems that do not meet the new UST performance standards of 40 C.F.R. §280.20 must be upgraded in accordance with the technical requirements of 40 C.F.R. §280.21, or permanently closed. These Resource Conservation and Recovery Act (RCRA) regulations require various forms of corrosion protection, interior lining, and/or cathodic protection, depending on the type of UST. In addition, spill and overflow protection must be installed on all existing USTs, and all metal pipes that contain regulated substances and are in contact with the ground must be cathodically protected.

Data collection by HQDA in 1996 provided inconsistent information, but indicated that the upgrade deadline may not be met for a number of Army USTs. An audit is underway to determine the status of UST upgrade compliance for Army installations that have not already been audited by the Army Audit Agency or the DOD Inspector General. Tiger teams organized by the Army Environmental Center will perform on-site audits at 38 priority installations, while self-audits will be carried out at all remaining installations.

Possible noncompliance with upgrade requirements raises the question as to whether Federal facilities can be assessed punitive fines for violating UST regulations. Under RCRA, 42 U.S.C.A. §6961(a) (West 1995), Federal facilities are subject to Federal, State, interstate, and local solid and hazardous waste disposal and management requirements. The Federal Facility Compliance Act of 1992 (Pub.L.No. 102-386 (1992)) amended RCRA §6961 to permit the assessment of punitive fines and penalties, however, this waiver of sovereign immunity applies only to the management of solid and hazardous waste, and does not extend to UST operations.

A separate RCRA section, 42 U.S.C.A. §6991f(a) (West 1995), addresses USTs and requires Federal facilities to comply with Federal, State, interstate, and local requirements. The FFCA did not amend §6991f to allow the assessment of fines and penalties. The UST section has language similar to the pre-FFCA language of §6961 that the U.S. Supreme Court in *DOE v. Ohio*, 112 S.Ct. 1627 (1992), found insufficient to allow the enforcement of punitive penalties.

In a February 1997 memorandum to Regional Division Directors, EPA HQ asserted their authority under RCRA Subtitle I and the FFCA to assess penalties against Federal facilities for violations of UST regulations. This guidance allows EPA inspectors to issue field citations under a streamlined process, without consulting with EPA's Federal Facilities Enforcement Office.

Since this guidance was issued, EPA Regions have assessed UST penalties against the Army in Hawaii and against the Air Force in Louisiana. The DOD Hazardous Waste Subcommittee of the Defense Environmental Security Compliance Committee has designated a tri-service panel to study the EPA field citation policy and recommend a DOD position and response.

Standing Under the National Environmental Policy Act: Beware the Plaintiff Alleging Procedural Harm – MAJ Romans

NEPA is primarily a statute of procedure. Plaintiffs' often attack agency actions by alleging lack of compliance with the procedural requirements of the law. Indeed, courts have granted substantial consideration to those asserting procedural rights. As the Supreme Court stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "There is much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Id.* at 572 n.7.

A generalized interest in procedural compliance, in and of itself, is not enough to confer standing to challenge a federal action under NEPA. In *Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996), the circuit court considered the issue of standing under NEPA in the context of procedural rights. The court found that an interest in procedure, without more, is not enough to establish standing. Instead, procedural rights confer standing only when the right in question is designed to protect a threatened concrete interest of the plaintiff. *Florida Audubon* at 664. The court concluded:

In this type of case, which includes suits demanding preparation of an EIS, in order to show that the interest asserted is more than a mere "general interest [in the alleged procedural violation] common to all members of the public," *Ex Parte Levitt*, 302 U.S. at 634, 58 S.Ct. at 1, the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff. The mere violation of a procedural requirement thus does not permit any and all persons to sue to enforce the requirement. *Id.*

Useful Product Defense Upheld – Ms. Greco

The U.S. District Court for the Eastern District of Arkansas recently upheld the Useful Product Defense. The court held that Standard Chlorine of Delaware's sale of chlorinated benzene compound, or 1,2,4,5 Tetrachlorobenzene, to Vertac was the sale of a useful product, not an arrangement for disposal under CERCLA. The court looked into the nature of the transaction and found that this transaction was a sale of a technical grade chemical product for use as a raw material. Standard Chlorine of Delaware avoided the contribution claims brought by Hercules Chemical Corp, Vertac's successor, by arguing that plaintiff must first establish liability under section 107 of CERCLA before it can prevail under contribution claims brought under section 113 of CERCLA. *United States v. Vertac*, No. LR-C-80-109 (E.D. Ark. May 21, 1997).

Sikes Act Reauthorization Update – MAJ Ayres

Sources continue to report that the Sikes Act will be revised and updated this year after two consecutive years of failure. *Managing wildlife on military lands*, CONGRESSIONAL GREEN SHEETS, ENVIRONMENT AND ENERGY WEEKLY BULLETIN, (Environmental and Energy Study Conference, Wash. D.C.) Aug. 5, 1997 at 5. The revised Sikes Act will likely be included in the Fiscal Year 1998 Defense Authorization Act). *Id.* The latest draft details the following required elements for an installation Integrated Natural Resource Management Plans (INRMP): “Consistent with the use of military installations to ensure the preparedness of the Armed Forces, each integrated natural resources management plan . . . shall, where appropriate and applicable, provide for –

- (a) fish and wildlife management, land management, forest management, and fish and wildlife oriented recreation;
 - (b) fish and wildlife habitat enhancement or modifications;
 - (c) wetland protection, enhancement, and recreation, where necessary for support of fish, wildlife, or plants;
 - (d) integration of, and consistency among, the various activities conducted under the plan;
- establishment of specific natural resources management goals and objectives and time frames for proposed actions;
- (e) sustainable use by the public of natural resources to the extent such use is not inconsistent with the needs of fish and wildlife resources;
 - (f) public access to the military installations that is necessary or appropriate . . . subject to requirements necessary to ensure safety and military security;
 - (g) enforcement of natural resource laws and regulations;
 - (h) no net loss in the capability of military installation lands to support the military mission of the installation; and
 - (i) other such activities as the Secretary of the military department considers appropriate;” Unpublished draft of “Amendment to H.R. 1119 as Reported Offered by Mr. Saxton of New Jersey, Title XXIX, Sikes Act Improvement”, on file with the author.

DOJ Decides Field Citation Dispute Against DOD – LTC Jaynes/MAJ DeRoma

The Department of Justice (DOJ) issued a memorandum on 16 July 1997 resolving an ongoing dispute between the Environmental Protection Agency (EPA) and DOD about the Clean Air Act’s (CAA) field citation authority (42 U.S.C. § 7413d(3)). EPA had asserted that it could issue field citations to Federal agencies for CAA violations, while DOD had opposed EPA’s jurisdiction. DOJ decided the issue in favor of EPA.

The 1990 CAA amendments gave EPA the authority to issue on-the-spot administrative penalties against any “person” for minor violations of the CAA and its implementing regulations. This authority allows EPA to promulgate regulations identifying those minor violations that could result in civil penalties not to exceed \$5,000 per day of violation. When EPA proposed a field citation rule (59 Fed. Reg. 22776, 3 May 94) DOD provided comments opposing EPA’s authority to apply the rule to Federal agencies. This prompted EPA to seek an opinion from DOJ.

DOD argued that this interpretation would raise serious separation of power concerns, as resorting to Federal judicial review is part of the statutory recourse for field citations. DOD also disputed EPA’s assertion that including Federal agencies in the CAA’s general definition of “person” necessarily means that Federal agencies are subject to field citation enforcement. EPA responded with a rebuttal.

DOJ agreed with EPA that the CAA provides a “clear statement” that its enforcement provisions allow EPA to assess administrative penalties against other Federal agencies. Although the CAA’s enforcement section has no definition of the term “person,” DOJ rested its conclusion primarily on the CAA’s general definition of “person,”

which includes “any agency, department, or instrumentality of the United States” (42 U.S.C. §7602e). DOJ also found support for EPA’s position in the CAA’s legislative history. Finally, DOJ concluded that EPA’s exercise of this authority did not violate Articles II and III of the Constitution.

There is no immediate impact of DOJ’s decision, as EPA must complete its field citation rulemaking. DOD will have an opportunity to comment on any procedures EPA proposes that grant Federal agencies a right of administrative review. DOJ’s opinion did not address the enforcement provisions of any media statute besides the CAA.

Update on E-mail Ethics – Ms. Greco

Environmental attorneys licensed to practice in Illinois can use e-mail to communicate confidential client matters. The Illinois State Bar Association recently issued an opinion that attorneys who use e-mail to communicate with their clients have an expectation of privacy similar to those who use the ordinary telephone. Illinois State Bar Association Committee on Professional Conduct, Opinion No. 96-10. In reviewing whether the use of e-mail violated the attorney’s duty to maintain the confidentiality of client information, the Illinois State Bar Association Committee identified three methods of e-mail (internal, commercial, and Internet) and decided that because interception is difficult and illegal, e-mail communication provides a reasonable assurance that the message is kept confidential. In a 1990 opinion, the committee determined that attorneys should not communicate confidential client matters over cordless or mobile telephones because of the ease in which one may intercept the conversation.

Military Munitions Rule Effective 12 August 1997 -- Now What? LTC Bell

The EPA’s long-awaited Military Munitions Rule (MR) is out and effective on August 12, 1997 (62 Fed. Reg. 6621, February 12, 1997). The Rule identifies when military munitions become a hazardous waste subject to the Resource Conservation and Recovery Act (RCRA)(42 U.S.C. 6901 et seq.) and provides for their safe storage and transportation. The Rule also explicitly exempt military training, materials recovery, and emergency response activities from RCRA’s requirements.

The Military Services have been met several times over the past six months in an effort to discuss how DOD proposes to implement the MR and to determine the states’ plans for implementation. During these discussions, most states have indicated that they support the MR, but most will not be able to complete the administrative process to adopt the MR by August 12th. In fact, only Oregon has adopted the MR as of this writing. It appears, therefore, that the provisions of the MR will be effective in only four states -- Alaska, Hawaii, and Iowa, which do not have authorized RCRA programs, and Oregon -- until more states are able to complete their state rulemakings.

Until these other states adopt the MR, military installations should maintain the status quo regarding munitions operations. In particular, military installations should continue to manage any items previously designated as waste munitions in accordance with appropriate RCRA regulations. While the Services have encouraged states to adopt an interim approach to implementation, i.e., adopt those provisions that EPA has characterized as “interpretations” of existing law and regulation, each state is free to determine for itself the degree to which such latitude will be allowed.

Regional Environmental Coordinators are keeping tabs on the issues, monitoring the progress of state rulemakings, and can serve as a source for information on a state’s intentions. The key in either circumstance -- MR adopted or not -- is to coordinate with state and federal regulators.