



Office of Command Counsel Newsletter

October 1997, Volume 97-5

Dr. Kelman Harvard Bound

Acquisition Reform Leader Departs

Dr. **Steven J. Kelman** who served for four years as Director of the Office of Federal Procurement Policy, Office of Management and Budget, departed his position in September to return to Harvard to teach graduate public management courses.

Dr. Kelman was a tremendous innovator, seeking ways to reinvent government through change in the procurement system. According to Dr. Kelman, "We tried to get the burdensome procurement process out of the way... and we've tried to increase the chances that we will get suppliers who give us good prices and products."

Dr. Kelman became an advocate of several AMC initiatives including the AMC-level Protest Program, Debriefing, Past Performance and Partnering. His leadership, enthusiasm, and creativity will be missed by all of us who were lucky to have met and worked with this superlative person.

Your friends in AMC wish you luck. ©

AMC Attorneys Speak Up

Thanks to TACOM's **Ron Kuhn** for conducting a survey of AMC attorney opinions and experience regarding client relations in the changing work environment (Encl 1).

Main points raised include the following:

1. Selectively working on multidisciplinary teams is a viable way for lawyers to gain

non-legal expertise and to better render practical advice.

2. Lawyers realize the need to market services — education in this area need not be a top priority. Some AMC attorneys may see a conflict between needing to gain customer appreciation and the need sometimes to render unpopular opinions.

In This Issue:

| | |
|--|----|
| <i>Dr. Kelman Goes to Harvard</i> | 1 |
| <i>AMC Attorneys Speak Up</i> | 1 |
| <i>Randolph-Sheppard Act</i> | 2 |
| <i>Meaningful Discussions</i> | 3 |
| <i>Fiscal Fitness</i> | 3 |
| <i>GAO Highlights ADR Successes</i> | 4 |
| <i>EO Issued on Religious Expression</i> | 5 |
| <i>DA Sexual Harassment Report</i> | 6 |
| <i>DOD Proposed Range Rule</i> | 8 |
| <i>BRAC Leasing Procedures</i> | 8 |
| <i>Gifts to Superiors</i> | 10 |
| <i>Financial Disclosure Reporting</i> | 11 |
| <i>Faces in the Firm</i> | 12 |

3. A significant number of AMC lawyers feel they or their colleagues will benefit from training in sensitivity to cognitive and communication styles of others. This may show where training is both desired and useful for most AMC lawyers.

4. AMC lawyers believe it is worthwhile to set aside a portion of time to get to better know customers, their business and problems.

5. AMC counsel believe that knowing more about other functional areas will help AMC lawyers be more valuable. ©

Randolph-Sheppard, Food Service and FAR 15

MICOM's **Karolyn Voight**, DSN 746-6131, provides a thought provoking analysis of the Randolph-Sheppard Act (RSA) as it was applied and interpreted during a recent raucous competition for food services for a troop dining facility at Redstone Arsenal (Encl 2)

The RSA authorizes the operation of vending facilities on Federal property and gives a priority to blind persons licensed by a state agency.

The problems stemmed from trying to assign a priority to the State Licensing Agency (SLA) representing a blind vendor, as required in the Randolph-Sheppard Act, 20 USC 107(e), and implementing regulations, 34 CFR 395.33 , DODD 1125.3, AR 210-25 and, at the same time, compete the effort in compliance with acquisition laws and defense regulations pertaining to "best value" awards. (In this discussion, "SLA" is used interchangeably with "the blind".)

Ms. Voight's paper describes the confusion caused by the distinction between FAR 15 and the language in the RSA implementing regulations. It appears that RSA

implementing instructions require the interruption of a statutory created process, designed for the sole purpose of identifying the proposal offering the "best value" to the Government for a totally different statutory purpose - priority to the blind. These conflicting objectives are so difficult to achieve that it may become particularly important to consider carefully the sole source avenue of "direct negotiations" with the SLA as provided in the implementing regulations, see AR 210-25(b)(2). This is permissible when the on-site official (HCA) with concurrence of HQDA, has determined that the SLA, through its blind licensee, can provide the cafeteria services required at a reasonable cost, with food of a high quality comparable to that available from other providers of cafeteria services.©

PARC-Chief Counsels' Workshop

As we go to press the PARC's and Chief Counsels are meeting at AMCOM. Newsletter 97-6 will report to you on the highlights and developments discussed during that session. **STAY TUNED!**

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

Acquisition Law Focus

When Discussions *BETTER* Be Meaningful . . .

Percival Parks, CECOM Acquisition Center - Washington Operations Office, DSN 221-3304, provides an excellent article concerning the issue of meaningful discussions (Encl 3)...Defined in FAR 15.601 to mean: 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.

GAO does not require "all-encompassing" discussions, but requires an agency to point out weaknesses or deficiencies in a proposal as specifically as practical considerations permit.

The paper also highlights the issue of subjects that may be discussed but do not have to be — the FAR says little on this.

The paper discusses the proposed Rewrite, under which the contracting officer must indicate to, or discuss with, each offeror still being considered for award, signifi-

cant weaknesses, deficiencies, and other aspects of its proposal (such as, cost, price, performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered to enhance materially the proposal's potential for award.(Prop.FAR 15.406(d)(3)). The Rewrite does provide a definition for "weakness", including "Significant weakness", as well as an expanded definition of "deficiency." ©

List of Enclosures

1. AMC Attorney Survey
2. Randolph-Sheppard Act
3. Meaningful Discussions
4. Ethics Through Green-Eye Shades: Maintaining Your Agency's Fiscal Fitness
5. Gambling
6. DOD Proposed Range Rule
7. Command Counsel Environmental VTC
8. Environmental Law Division Bulletin, August 97
9. Environmental Law Division Bulletin, Sept 97
10. Transfer and Cleanup
11. Gifts to Superiors
12. OGE Form 450-A
13. Financial Disclosure Reporting System

Ethics Through Green Eye-Shades: Maintaining Your Agency's Fiscal Fitness

Thanks to **Mike Wentink** for including an excellent dissertation by **Steve Epstein**, DOD OGC and **Scott Castle**, DA OGC, the purpose of which is to:

- Review, from a fiscal law perspective, the Office of Government Ethics regulations pertaining to use of government resources.

- Propose methodologies for assessing the legal sufficiency of agency regulations which government resources may be used.

The paper recites the role of OGE and individual agencies in regulating the use of government property; states the general restriction that employees must protect and conserve government property and use it only for authorized purposes; and, describes the relationship between fiscal law and ethics regulations (Encl 4)

Employment Law Focus

GAO Survey Surfaces ADR Successes

In an August report to the House Government Reform and Oversight Subcommittee on Civil Service, the General Accounting Office (GAO) found that interest in alternative dispute resolution (ADR) continues to grow in both the public and private sectors, with participants reporting excellent results.

ADR processes used to resolve workplace issues include mediation, arbitration, peer panels and management review boards. Mediation seems to be the approved process.

Five Federal agency programs are highlighted: State, Agriculture, Air Force, Postal Service and Walter Reed Medical Center. ©

Smoking in Federal Buildings **BANNED**

On August 9, President Clinton issued an Executive Order banning smoking in buildings under control of the executive branch of government.

The order requires agency heads to evaluate the need to restrict smoking near doorways and courtyards adjacent to buildings.

The order does not apply to buildings under the control of the judicial or legislative branches of government. ©

Some of the lessons agencies learned were:

- The importance of top management commitment.
- Employee involvement in ADR program development.
- Early intervention when problems are perceived.
- Balance the desire to settle or close a case against the need for fairness.
- GAO concluded that a common problem is the lack of tools to measure and evaluate ADR results

The report is entitled Alternative Dispute Resolution: "Employers' Experiences with ADR in the Workplace." It is available by writing to GAO at P.O. Box 6015, Gaithersburg, Maryland 20884. ©

Know Where to Fold 'em

SSCOM's **Jim Savage**, DSN 256-5165, provides an excellent example of a preventive law note on Gambling on Federal Installations. The paper addresses MSPB case law, DoD Regulations (in the Joint Ethics Regulation), provisions in morale and welfare regulations, concluding that restrictions and prohibitions go back to the 1960s (Encl 5). ©

AMC ADR Program for Workplace Disputes

Building on the success of past ADR initiatives, AMC announces that it is designing a dispute resolution program for employer-employee workplace disputes. AMC Director of Equal Opportunity, **Ms. Jean Cozart**, is leading an interdisciplinary team comprised of EEO, civilian personnel and command counsel representatives. AMC installation and activity EEO managers were asked to volunteer to have their installations and activities serve as pilot programs to assess the benefits of bringing the ADR philosophy to the workplace.

Employment litigation is expensive, consumes time and resources, with decisions made by third parties who have no stake in the outcome of the dispute. ADR focuses on the relationship, the interests of the parties rather than highlighting the positions of the parties. The parties to the dispute create their own solution to the problem that gave rise to the dispute, leading to a healing of the problem. More information on this important ADR development will be forthcoming. POC in the Office of Command Counsel is **Cassandra T. Johnson**, DSN 767-8050. ©

Workplace Religious Expression Guaranteed

On August 14, President Clinton issued guidelines aimed at protecting religious expression in the federal workplace, provided that it does not conflict with an employee's work. The guidelines address many issues, including the following:

- federal employees may freely express their religious views and exercise their faiths as long as it does not infringe on workplace efficiency.

- federal employers may not discriminate in employment on the basis of religion;

- agencies must "reasonably accommodate" employees' religious practices.

- when a federal agency permits nonreligious speech because it does not hinder the rights of others, it also

generally must allow similar speech of a religious nature.

Agencies must accommodate an employee's religious practice in the absence of nonspeculative costs and may need to accommodate such practice even when doing so will impose some hardship on the agency's operations. ^c

FSIP Restates Management's Burden in Terminating AWS

Actual harm must be shown before an agency may terminate employees' alternate or compressed work schedules under a recent opinion of the Federal Service Impasses Panel.

In VA, Lutz Medical Center, 97 FSIP 64, June 1997, management's conjecture about possible negative effects on operations is not enough to end existing AWS schedules. A predicted future impact is not enough — agencies must show adverse impact at time it decides to cancel a program. Thus, a belief that buyouts and other reductions in the workforce will cause adverse impacts in the future does not satisfy management's burden. ^c

Supreme Court to Issue Truth About Lying King to be argued this term

The U.S. Supreme Court has granted review of petitions to determine whether an employee accused of misconduct can be punished for making an untrue denial, King v. Erickson, U.S. SupCt No. 96-1395, June 27, 1997. The MSPB upheld the charge of misconduct in each of the disputed five cases but reversed the additional charge that the employee made false statements. The Federal Circuit upheld the MSPB mitigation of penalties in all five cases.

The government's brief states that the lower tribunal decisions create a "right to lie" for federal employees suspected of on-the-job wrongdoing. ^c

SOELR 98 Announced

OPM has announced that their annual Symposium on Employee and Labor Relations will be held in March in Hershey, Pa. Plan on attending AMC Labor Counselors!

Mother Teresa Remembered

"Love cannot remain by itself-it has no meaning, Love has to be put into action and that action is service. Whatever form we are, able or disabled, rich or poor, it is not how much we do, but how much love we put in the doing; a lifelong sharing of love with others."

Sexual Harassment in the Army

Special Focus: DA Sexual Harassment Report and

Secretary of the Army **Togo West** and Chief of Staff **General Dennis Reimer** announced key findings of two reports on the issue of sexual harassment as well as an Army Human Relations Action Plan to combat deficiencies noted in the inquiries.

Major findings are:

- Sexual harassment cases throughout the Army, cross gender, rank and racial lines.

- Gender discrimination is more common than is sexual harassment.

- Army leaders are the critical factor in creating, maintaining and enforcing an environment of respect and dignity in the Army; too many leaders have failed to gain the trust of their soldiers.

- The Army lacks institutional commitment to the Equal Opportunity program and soldiers distrust the EO complaint system.

- The overwhelming majority of drill sergeants and instructors perform competently and well, but "respect" as an Army core value is not

well institutionalized in the Initial Entry Training process.

Components of the Action Plan include:

- The Army Chief of Staff has appointed the Deputy Chief of Staff for Personnel as the Army's staff agency with responsibility for leadership, leader development and human relations. The Secretary of the Army has given oversight responsibility to the Assistant Secretary of the Army for Manpower and Reserve Affairs.

- A brigadier general has been named director of the Army's Human Resources Directorate. He is supported by two colonels in positions on the Human Relations Task Force.

- AR 600-20, *Army Command Policy*, is being rewritten to strengthen human relations areas and require that commanders conduct climate assessments within 90 days of assuming command (160 days for reserve, components). The assessment examines a

command's morale, teamwork and communication.

- The Chief of Staff instituted the Character Development XXI program, which refocuses the Army on its institutional values of honor, duty, integrity, loyalty, courage, selfless service and respect. FM 22-100, *Army Leadership*, is being revised to emphasize the Army's core values.

- Fielded the Living Army Values Video which discusses the history of Army values and current societal and organizational conditions that warrant renewed emphasis on Army values.

- The Secretary of the Army has approved increased staffing for human relations/equal opportunity positions at Army, MACOM corps, division, brigade and installation.

- Equal opportunity complaint procedures were completely revised to establish a more effective timeline. Whistleblower protection was also revised to ensure protection of complainants against retribution. The revisions will be included in the new AR 600-20.

- Chief of Staff tasked U.S. Army Training and Doctrine Command to add an additional week to Initial Entry Training to allow for more intense and rigorous soldierization.

Sexual Harassment in the Army

- Implemented a new drill sergeant program of instruction in March 1997 which includes 10.5 additional hours in human relations training.

- Assign a three-star deputy commanding general to U.S. Army Training and Doctrine Command at Fort Monroe, Va to serve as a watchdog over the Army's training centers.

- Toughen the drill-sergeant selection process to include a personnel records review, a requirement that a lieutenant colonel or above personally certify that candidates demonstrate requisite leadership potential and meet other selection criteria, and a requirement for mental evaluations of both volunteer and nonvolunteer drill sergeant selectees.

- Implement follow-on human relations refresher training for advanced individual training courses longer than eight weeks.

- Continue to publish command information that addresses ongoing Army efforts to eliminate sexual harassment and support equal opportunity.

Within AMC the Commanding General has in place a designated PM POSH-Program Manager for the Prevention of Sexual Harassment located in the Office of Equal Opportunity. ©

PARTNERING FY 98 PLAN OF ACTION

The primary objective of the FY 98 Partnering Plan of Action is to assess current AMC Partnering initiatives and to expand Partnering to important acquisition programs awarded in 1998.

In the next few weeks each AMC MSC will be asked to identify two programs for which Partnering will be used. These two programs will utilize Partnering through the AMC Partnering Model contained in the AMC Partnering Guide.

Additionally each MSC will be asked to identify five Partnering Champions to include an attorney. These Champions will be part of a two-day training program on the AMC Partnering Model, after which they will be responsible for the implementation of the Partnering process for that MSC's Partnering Programs.

Further, AMC Roadshow 7 will address the issue of Partnering in a couple of ways. First, in the opening plenary session Partnering will be discussed, with an emphasis on what we have accomplished thus far, and what to expect in FY 98. Second, we will have a 1-1/2 day facilitated Partnering Workshop that will be program specific, discussing the Partnering process from the perspective of the two acquisition programs identified earlier by the MSCs. Although we have achieved significant success with the publication and distribution of the AMC Partnering Guide and Videotape we have a long way to go to ensure that Partnering becomes part of our acquisition business strategy. ©

AMC Receives Three 1997 Presidential Awards for Quality

A panel of government and private sector quality management specialists picked eight federal organizations for special recognition rewarding each with Quality Achievement Awards. Three AMC activities were recognized: The CECOM Acquisition Center, The CECOM Logistics and Readiness Center and Rock Island Arsenal

Environmental Law Focus

DOD Proposed Range Rule

DoD announced its proposed rule for Remediation of Closed, Transferred, and Transferring Ranges Containing Military Munitions in the Federal Register on 26 September, 62 FR 50796. While this is, of course, a proposed rule, it presents a good overview of DoD policy and procedures regarding cleanup for ranges, including those on BRAC installations. A summary of the proposed rule is enclosed (Encl 6). This office also has a twenty page briefing of the Rule, which can be obtained by contacting **Stan Citron**, DSN 767-8043. ©

XTRA...XTRA: Read All About It...

ELD Bulletins for August and September 97 are provided (Encl 8 and 9) 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.

The Aftermath of Property Transfer: Environmental CleanUP

DoD has finalized its Policy on Responsibility for Additional Environmental Cleanup After Transfer of Real Property (enclosure 10). Previously it had been available on the DoD Environmental Cleanup Homepage, **HYPERLINK** <http://www.dtic.mil/envirodod/> but indicated it was a draft policy. This policy may be particularly significant in discussions with BRAC Redevelopment Authorities and others who will be transferred Army lands, with respect to the continuing responsibility of the government to remediate newly discovered contamination after the land is transferred.

Call the HQ AMC Environmental Law Team for further information on this important development. ©

Revised BRAC Leasing Procedures Delegates Authorities

On 24 September 1997, the Deputy Assistant Secretaries for Installation and Housing and for Environment, Safety and Occupational Health issued revised procedures for process leases at BRAC installations. A copy has been provided to our MSC legal offices. The revised procedure delegated signature and execution authority for Reports of Availability packages and for FOSTs and FOSLs to the MACOM, and eliminates the formal Headquarters Department of the Army review, which has previously been required. However, prior to execution of documents, installations and the MACOM must insure that the members of the BRAC Transfer Team have the opportunity to review packages. Copies of the revised policy may be obtained by contacting **Bob Lingo**, DSN 767-8082. ©

Environmental Law Focus

Environmental Law Specialist Meet In TV Land

Command Counsel Environmental and Real Estate VTC

On 10 October 1997, the Command Counsel Environmental and Real Estate Team presented a VTC on recent environmental developments. Topics included new BRAC leasing procedures, status of the AMC FOST/FOSL Guide, update on lead based paint issues by AEC, natural resource damage claim issues, the new AMC quarterly environmental council meetings, and update on the military munitions implementation. Copies of the briefing slides are at (Encl 7 - Enclosure may not be complete and accurate if you want further information please contact **Bob Lingo**). ©

Steps Toward Computer Security: Protecting Against High-Tech Theft and Sabatoge

- o Limit the number of employees with access to sensitive computer operations.
- o Create an environment in which employees feel free to report suspicious behavior.
- o Complete thorough background checks on new employees.
- o Maintain backup tapes in a secure off-site facility.
- o Develop a policy on how to handle computer mischief.
- o Make sure all employees are aware of security policies.
- o Ensure that complex passwords are used, making it tougher for one employee to crack another's pass word.
- o It is better to avoid using your name, instead choose a combination of letters or numbers.
- o Install anti-virus software at network servers and individual work stations.
- o Conduct frequent reviews of security worklogs.

(From the Santa Clara County District Attorney's office)

Gifts to Superiors Explained

General Rules & Exceptions Highlighted

The issue of gifts to superiors, always a complex one, becomes particularly important as we head towards the holiday season. The general rule is two-fold. First, employees may not directly or indirectly give gifts to an official superior, or solicit other employees to contribute to or give a gift to an official superior. Second, employees may not accept gifts from employees who are paid less than they are unless there is a personal basis justifying the gift and there is no subordinate-official superior relationship between them.

Of course, since life sometimes is filled only with exceptions to general rules there are two main ones to keep in mind: "occasional basis" and "special infrequent occasions."

The "occasional basis" exceptions are as follows:

- Food and refreshments shared in the office.
- Personal hospitality at home of a type and nature customarily provided by the employee to friends.
- Customary gifts given in connection with receipt of personal hospitality.

- Items, other than cash, with an aggregate market value of \$10 or less on any occasion on which gifts are traditionally given or exchanged.

The "special infrequent occasions" exception permits a "gift appropriate to the occasion," and solicitation of contributions in a "nominal amount" from Army employees in "donating groups," in the following two situations:

- Infrequently occurring occasions of personal significance such as marriage, birth of child, or illness (this does not include birthdays or other annual celebrations; it does not include official visits to commands or other organizations by a visiting Army or other DoD dignitary; and it does not include promotions).

- Occasions that terminate a subordinate official superior relationship, such as retirement, resignation, or transfer.

The paper also addresses the definition and application of the term "donating groups" and provides guidance on what to do when you receive gifts (Encl 11). ©

OGE's New, Easier Financial Disclosure Form

The Office of Government Ethics Form 450-A, permits employees to file this form rather than OGE Form 450 (Encl 12).

This 450-A can only be used if employees meet all of these requirements

"After examining a copy of my confidential financial disclosure report (OGE Form 450), I certify to the following:

Since filing my last OGE Form 450:

1. I have no new reportable assets or sources of income, for myself, my spouse, or my dependent children;
2. Neither my spouse nor I have new reportable sources of income from non-Federal employment;
3. I have no new reportable liabilities (debts), for myself, my spouse, or my dependent children.
4. I have no new reportable outside positions for myself;
5. I have no new reportable agreements or arrangements concerning future, current, or past non-government employment for myself;
6. I have no new reportable gifts or travel reimbursements for myself, my spouse, or my dependent children."©

'Tis The Season: Confidential Financial Disclosure Reporting System Requirements

AMC Ethics Counsel **Mike Wentink** provides this outstanding information paper addressing these questions: Who Must File, Filing Time, Filling Out the Form and Reporting Requirements (Encl 13).

Who Must File

Federal employees in the grade of GS-15 and below, or the rank of colonel and below, with duties involving decision or the exercise of significant judgment concerning:

- (a) contracting or procurement;
- (b) administration of grants, subsidies, or licenses or other Federal benefit;
- (c) regulation or audit of any non-Federal entity; or
- (d) other activities which will have a direct and substantial economic impact on a non-federal entity.

In addition, the DoD *Joint Ethics Regulation* (JER) requires filing of the report by commanders, heads and deputy heads, and executive officers of Army installations, bases, air stations or activities.

The JER excludes certain DoD employees whose procurement responsibilities involve less than \$2,500 per transaction and less than \$20,000 per year, as long as they are not actually employed by a contracting office (e.g., employees who make purchases with the IMPAC Credit Card). This does not prevent commanders and supervisors from determining that specific individuals in this category should file the form. Being excluded from the filing requirement, however, does not waive any conflicts of interest.

Filing Time

Employees required to file the OGE Form 450, must file their **annual** report with their ethics official **NLT 30 November**. Extensions are available from the HQ US AMC ethics counselors, or the chief of legal offices at subordinate commands and offices upon written request from the filer. However, plenty of time is provided for filing and extensions should be the rare exception. Those who have not filed by 30 November, with or without an

extension, are reported to Headquarters, Department of the Army. Ethics counselors will normally establish earlier suspense dates (such as NLT 7 November to the supervisor and 14 November to the ethics counselor) to help employees to file timely.

Exception:

Employees who served less than 61 days in their position during FY 97 do not have to file an **annual** OGE Form 450 Report. But, they must have filed their **new entrant** OGE Form 450 Report within 30 days of assuming their position. Therefore, any employee who assumed a position on or after 2 August 1997 and who filed their **new entrant** report, are not required to file an **annual** report this year.

Your attention is invited to the enclosure to receive helpful hints on filing (remember spouses and minor children) and do not report bank accounts, money market mutual funds or U.S. Government bonds. ©

Faces In The Firm

Arrivals

IOC

Geraldine Lowery has joined the Office of Counsel at the Industrial Operations Command (IOC). Geraldine comes to the IOC from the Corps of Engineers, Rock Island District, where she focused on real estate law. She has thirteen plus years with the government and is a welcomed addition to the IOC/AMC legal community.

Captain Rick Murphy departs and **Mr. Rick Murphy** arrives! Rick left military service for a life as a civilian on the Rock. Rick will continue to work in the environmental law area at the Industrial Operations Command. Rick, his wife Janene, and their daughter, Robin, make their home in Bettendorf, Iowa.

CECOM

1LT Christian J. Knapp joins CECOM after completing The Judge Advocate General's basic course in Charlottesville, VA. He has been assigned to the Legal Services Branch.

Lea Elaine Duerinck will be joining the legal of-

fice and will be assigned to Division B. She comes to CECOM from the Acquisition Directorate. She is admitted to the NJ and NY bars.

TECOM

MAJ Maria S. Chana, arrived 27 May 1997, following her graduation from the 45th Graduate Course, TJAGSA. She is assigned to this office as the new Deputy Staff Judge Advocate replacing **MAJ Susan S. Gibson**.

COL James S. Currie, arrived from Fort Irwin on 3 July 1997 to become the new Chief Counsel and Staff Judge Advocate. He's new to the AMC Community. Welcome Colonel Currie!

Dick Wakeling arrived on 8 July 1997 from Letterkenny Army Depot as the new environmental attorney.

Pamela Purcell joined the office on 20 July 1997 from Fort Drum, New York. She is the Chief Client Services Division in the legal office. Ms. Purcell is a welcome addition to our legal staff.

Departures

TECOM

MAJ Susan S. Gibson, Deputy Staff Judge Advocate PCS'd in July 1997. MAJ Gibson will be continuing her education at University of Virginia for her LLM. Good luck MAJ Gibson!

COL Edward W. France III, Chief Counsel and Staff Judge Advocate, TECOM, PCS on 8 August 1997 to Huntsville. He will be the Chief Counsel, U.S. Army Space and Strategic Defense Command. Good luck COL France!

CPT Michael Lancer, Chief Criminal Law, TECOM, ETS'd in June 1997. He accepted a civilian attorney position outside the Government in Buffalo, New York.

SPEC Becky Stoble, Legal Assistance, ETS'd 6 August 1997. She is residing in Bel Air, Maryland has enrolled in the paralegal program at Harford Community College.

**HAIL AND
FAREWELL...**

and thanks for your
dedicated service!

Faces In The Firm

Births

TECOM

SPEC Matthew Bower, joined the Test and Evaluation Command (TECOM) Legal staff in May 1997. SPC Bower's wife gave birth to a 8 lbs 6 oz boy, Nathan Mathias on 5 August 1997. Both baby and mom are doing fine.

HQ AMC

Stan and Carol **Citron** welcomed Rachel in early October joining her sister Lauren.

Promotions

TECOM

Marian Goldsmith promoted to a GS-7, Office Support Assistant in the TECOM front office. Well deserved Marian!

Jean Buckholtz and **Alene Williams**, both promoted to GS-7, Legal Assistants. A well deserved promotion!

Awards

TECOM

MAJ Susan S. Gibson, Deputy Staff Judge Advocate, was presented with the Legion of Merit, for her outstanding contributions during the cadre incidents and for her work as the Deputy Staff Judge Advocate.

Colonel Edward W. France III, Chief Counsel and Staff Judge Advocate, was presented with the Legion of Merit, for his outstanding contributions as the Chief Counsel and Staff Judge Advocate.

TECOM Legal Assistance Division, won the "Chief of Staff Award for Excellence in Legal Assistance for 1996," for superior achievement in providing professional legal advice and assistance to soldiers and their families on their personal legal affairs and needs. This office has received the award for six out of the last seven years. **Major General Andrews**, TECOM Commanding General, presented the award to the Legal Assistance Division. The following individuals from the Legal Assistance Division were responsible for the Division

achieving this prestigious award: **Mrs. Katherine Williams**, Legal Assistant, **Mrs. Jean Buckholtz**, Legal Assistant, and **CPT Creighton Wilson**, Legal Assistant Attorney.

HQ AMC

The AMC **Chief of Staff MG James Link** presided over a ceremony at the HQ AMC on 19 September to recognize efforts of two teams for significant achievements in two important issue areas:

AMC Partnering Team

Recipients of the Decoration for Meritorious Civilian Service: Team Leader **Mark Sagan**, CECOM, **Dave Defrieze**, IOC, **Ken Bousquet**, TACOM Acquisition Center and **Steve Klatsky**, HQ AMC.

Privatization and Outsourcing Team

Recipients of the Commander's Award for Civilian Service: from HQ AMC **Elizabeth Buchanan**, **Cassandra Johnson** and **Dave Harrington**, from ATCOM **LTC Ron Heuer**, and from DA Office of General Counsel **Frank Sando**, **Fred Moreau**, and **Gary Bacher**.

Below are the numerical results from the Questionnaire recently sent to all AMC attorneys. I've simply reproduced the questionnaire with the number of responses shown for each value (1 through 5) at each question. The number of responses is in parentheses behind each value. The average value given each question is shown in brackets following the question.

QUESTIONNAIRE FOR AMC ATTORNEYS

This survey is intended to gauge AMC attorney opinions and experience regarding client relations in the changing work environment.

Below are a series of statements followed by a set of numbers, 1 through 5. Please assign a number to each statement by circling the number after the statement you deem most appropriate. The numbers have the following meanings:

- 1 Agree strongly**
- 2 Agree
- 3 Neither agree nor disagree
- 4 Disagree
- 5 Disagree strongly

1. Legal Office personnel are more immune than others from the effects of budget cuts. **[3.870]**
1(0) 2(26) 3(41) 4(75) 5(66)
2. It is necessary for me to market my services. **[2.034]**
1(67) 2(93) 3(26) 4(12) 5(8)
3. Lawyers must be able to convincingly explain why clients should spend their own funds to pay for lawyers. **[2.100]**
1(59) 2(96) 3(32) 4(18) 5(4)
4. There is a strong nexus between the perceived value of lawyers and the funding for lawyer slots. **[2.000]**
1(71) 2(84) 3(31) 4(17) 5(2)
5. Our Legal Office competes not only with potential outside contractors for legal work, but also competes with other legal groups within DoD. **[2.970]**
1(21) 2(60) 3(48) 4(52) 5(22)
6. Our Legal Office competes for funds and slots with other activities, such as, for example, R&D, logistics and acquisition. **[1.990]**
1(69) 2(93) 3(34) 4(9) 5(5)
7. The Legal Office should allot more of its available person-hours to things like: giving seminars to individual groups of clients, giving presentations in the auditorium and publishing advice on electronic mail media. **[2.584]**
1(26) 2(95) 3(41) 4(39) 5(7)
8. Lawyers are qualified to contribute common-sense, non-legal inputs to planning or problem solving processes. **[1.474]**
1(139) 2(52) 3(10) 4(5) 5(3)

9. Knowing more about other functional areas (such as, for example, DOIM, logistics, counterintelligence, finance and accounting, personnel management and quality control) will help me be a more valuable lawyer. *[1.517]*
1(119) 2(77) 3(9) 4(3) 5(1)
10. It is beneficial to attend meetings of organizations other than Legal even if no legal issues are on the agenda. *[2.093]*
1(52) 2(107) 3(26) 4(12) 5(7)
11. Learning about the law outside my specialty will help me do a better job for my clients. *[1.782]*
1(77) 2(104) 3(19) 4(5) 5(1)
12. It is productive to allocate time to scan the environment of my command, installation or activity to seek new issues for lawyers to address. *[2.171]*
1(51) 2(97) 3(35) 4(15) 5(7)
13. I should set aside a portion of my limited time simply to get to better know my customers, their business and their problems. *[1.684]*
1(99) 2(86) 3(13) 4(3) 5(5)
14. Lawyers need leadership skills even if they are not supervisors. *[1.541]*
1(117) 2(76) 3(12) 4(3) 5(1)
15. TQM (Total Quality Management) involves getting continual feedback on processes in which one partakes is as to constantly improve them. TQM works if done properly. *[2.422]*
1(33) 2(90) 3(56) 4(12) 5(13)
16. Working in teams of lawyers can be the most effective way to achieve long term superior performance. *[2.467]*
1(40) 2(74) 3(64) 4(22) 5(10)
17. Using teams whose members are from varied functional areas can be the best way to achieve long term superior performance. *[2.130]*
1(53) 2(95) 3(42) 4(13) 5(4)
18. The new, changing work environment requires more interpersonal cooperation and personal leadership skills than the work environment of the past. *[1.952]*
1(73) 2(87) 3(39) 4(9) 5(2)
19. I am comfortable in leading a group through a complex project. *[1.782]*
1(82) 2(104) 3(13) 4(7) 5(3)
20. I am comfortable working in a group where there is no formal leader, the group sets its own goals and the group decides how to do the work. *[2.276]*
1(50) 2(95) 3(27) 4(33) 5(5)
21. I have the appropriate training to lead others in a project where team formation phenomena are key elements. *[2.357]*
1(48) 2(81) 3(39) 4(34) 5(5)
22. I would benefit from training that sensitizes me more fully to the communication and cognitive styles of those I deal with. *[2.268]*
1(47) 2(89) 3(40) 4(25) 5(4)
23. Other lawyers at my command, installation or activity would benefit from training that sensitizes them more fully to the communication and cognitive styles of those they deal with. *[2.176]*
1(52) 2(94) 3(43) 4(17) 5(4)

24. Change in the work place occurs too fast and should be slowed to a more reasonable pace. **[3.121]**
 1(19) 2(33) 3(74) 4(64) 5(16)
25. Change in the work place is a significant stress factor. **[[2.129]**
 1(51) 2(106) 3(30) 4(18) 5(4)
26. Stress management training would help me do my job. **[2.750]**
 1(23) 2(69) 3(68) 4(33) 5(15)
27. One should not be asked to actively create and manage change; just keeping up with change is difficult enough. **[3.800]**
 1(5) 2(12) 3(53) 4(84) 5(51)
28. I have the skills and training to make formal presentations at high level meetings. **[2.063]**
 1(69) 2(86) 3(28) 4(18) 5(6)
29. I have the training needed to make charts and slides needed for formal presentations or needed as exhibits to written communications. **[3.167]**
 1(32) 2(49) 3(24) 4(62) 5(43)

Analysis of Questionnaire for All AMC Attorneys

I. Summary - Main Points of the Analysis

This paper analyzes the results from the Questionnaire for All AMC Attorneys. It discusses the numerical scores for questionnaire responses and discusses some of the comments submitted on the questionnaire. Below are listed the main points of the analysis.

1. Some credible criticism is made of the questionnaire's technique. But with care, conclusions can be drawn from the questionnaire.

2. Selectively working on multidisciplinary teams is a viable way to for lawyers to gain non legal expertise and to become better at rendering practical advice.

3. Lawyers realize the need to market services to the extent that education in this area need not be a top priority. Some AMC attorneys may see a conflict between needing to gain customer appreciation and the need sometimes to render unpopular opinions.

4. Due to the time and money needed for effective team dynamics training, and given AMC lawyers' willingness and confidence re teaming, training in team dynamics is not a top priority.

5. A significant number AMC lawyers feel they or their colleagues will benefit from training in sensitivity to cognitive and communication styles of others. This may show where training is both desired and useful for most AMC lawyers.

6. There are AMC attorneys who believe Legal Office personnel are more immune from the effects of budget cuts than others.

7. AMC attorneys are, at least to some extent, leery about Command initiatives such as TQM, reinvention, and the Professional Development Plan. Thus the benefits of the Plan must be real, substantial and quite visible if we expect AMC attorneys to endorse it.

II. Quality of the Questionnaire

As a preliminary matter, there are comments made by respondents questioning the quality of the questionnaire. For convenience these comments are reproduced below.

I have a Bachelor of Science in Psychology with honors, with distinction and I attended classes about proper testing and survey methods. In my opinion, this questionnaire obviously favored lawyers marketing their services, and learning other functional areas/ other legal specialties/ leadership/ communication/ teaming/ TQM presentation skills.

Please make the questionnaire more neutral next time, so the questionnaire will provide a valid measurement of AMC Attorneys' opinions.

Did you consult with someone trained in formulating survey questions? I perceive the questions as leading to a desired response. Only questions 1, 24 and 27 are written so as to produce a "negative" response. Aside from these three obvious attempts to "balance" the survey, the correct "policy" response is also obvious.

This appears to be another useless exercise to pump up the image that AMC is out to help its "family" of employees. The poor response indicates that many others feel the same way.

Based on the tenor and wording of the questions, it seems that the designers of this survey have an agenda and are using the survey to justify their views and goals. Perhaps I'm wrong, but the questions are biased in one direction. The real problem I have is too much work, too many special projects to sell ourselves, and most importantly no competent support staff. At least in a private law firm you can get someone to send a fax or make a copy so that there is some time to do legal work.

Believe me, I know what the "right" answers are supposed to be.

Some of these are rhetorical questions. If you have followed the more recent thought modes and buzzwords about "teaming" and marketing your own program, then to some extent the answers are implied in the questions. My 12 years of experience here has been that nothing changes very much, if at all. (underlining added)

Are we sure this is confidential? Actually, most of the questions seem to have only one possible answer. Whether or not we have the time to implement that which we all know would be beneficial is an entirely different question. (underlining added)

The gist of the above comments is that the questionnaire is not neutral, it has an underlying agenda, and certain answers are expected. These comments are consistent with informal, "off the record" comments I've gotten verbally. Given also that the questionnaire was not authored by one trained for this, we should give some credence to the above comments. On the other hand, the respondents, being attorneys, were sophisticated and unlikely to be affected by patterns or tendencies in the questions. In any event, we should take care in drawing conclusions from the questionnaire's numerical responses. Too, if we do another questionnaire in the future, we might consider getting outside expertise.

Despite the questionnaire's imperfections, we can glean some conclusions from it to help design a Professional Development Program for AMC Attorneys. One way to do this is to analyze written comments of the questionnaire's respondents; the comments are numerous and often form consistent patterns. Another way to glean conclusions from the questionnaire is to find consistencies and relations in the numerical responses. Below are the conclusions drawn from the numerical responses together with the rationale for the conclusions. Following that is an analysis of some of the written comments from the questionnaires.

III. Remarks on the Questionnaire's Numerical Responses.

A connection exists between the answers 9 and 13 of the questionnaire, in that both questions relate to a lawyers gaining knowledge outside their own functional area. The text of these questions is reproduced below for convenient reference.

9. Knowing more about other functional areas (such as, for example, DOIM , logistics, counterintelligence, finance and accounting, personnel management and quality control) will make me a more valuable lawyer.

13 . I should set aside a portion of my limited time simply to get to better know my customers, their business and their problems.

Question 9 had an average score of 1.517 and question 13 had an average score of 1.684, both scores showing a fairly strong agreement with the statements in the questions. It thus appears that AMC attorneys generally think that clients benefit if lawyers cross train in non legal areas, particularly in the clients' business areas. This observation seems to be bolstered by the response to question 10, which indicates AMC lawyers agree with the idea that they should attend meetings of organizations other than Legal even if no legal issues are on the agenda; attending such meetings is one way to learn the clients' business and expand non-legal expertise.

The responses to question 8 tie in with the remarks above on questions 9 and 13. The statement in question 8 was

8. Lawyers are qualified to contribute common-sense, non legal inputs to planning or problem solving processes.

Question 8 received an average score of 1.474, the majority of respondents strongly agreeing with its statement. The tie-in is this: The ability of AMC lawyers to give common sense advice would logically be enhanced by training or increased knowledge in non legal functional areas.

The responses to question 11 have relevance to the responses to questions 8, 9 and 13.

Question 11 is

11. Learning about the law outside my specialty will help me do a better job for my clients.

Question 11 received an average score of 1.782, indicating agreement with its statement. The commonality of question 11 with the questions above, and particularly with question 9, is that the concept that cross training enhances the quality of service to clients.

A nexus exists between questions 9 and 17. Question 9 states that knowing more about non legal functional areas makes one a better lawyer; question 17 states that teams whose members are from varied functional areas can be the best way to achieve long term superior performance. Working in multidisciplinary teams and learning in non legal functional areas go together, the logic being that doing one enhances in the other . Hence, a viable training tool may be to selectively get more lawyers on multifunctional teams so as to increase their non legal knowledge. One should say "selectively" since many comments on the survey relate to a lack of time to do all expected of lawyers. Thus time spent on multifunctional teams must either (1) be more useful than time spent elsewhere or (2) replace the present way of doing existing work.

Questions 1 through 6 have a common aspect; the idea that clients must understand how very valuable lawyers are if the lawyers are to compete successfully with non lawyers for slots. The questions and their average scores in parentheses are listed below.

1. Legal Office personnel are more immune than others from the effects of budget cuts. (3.870)
2. It is necessary for me to market my services . (2.034)
3. Lawyers must be able to convincingly explain why clients should spend their own funds to pay for lawyers. (2.100)
4. There is a strong nexus between the perceived value of lawyers the funding for lawyer slots. (2.00)
5. Our Legal Office competes not only with potential outside contractors for legal work, but also competes with other legal groups within DoD. (2.970)
6. Our Legal Office competes for funds with other activities, such as, for example, R&D, logistics and acquisition. (1.990)

The answers to questions 1 through 6 show general agreement that lawyers must insure that clients know the lawyers' value if lawyers are to compete for slots. (The question 5 score arguably does not fit the pattern here.) What import does this general agreement have for designing an AMC professional development plan for lawyers? As an answer, it is submitted that educating lawyers about the need to compete for slots is either unnecessary or not sufficiently useful to spend increasingly precious time on doing so.

Some comments from the questionnaire are relevant here. For example:

“The nexus between perceived value of lawyers and funding for our slots is disturbing. Our value does not lie in how many friends we make, if we are doing our job protecting the Command, the Army, the Government as a whole, we might not make any friends. We could be penalized ,through loss of slots, for doing our job”

“Even though the need for ‘marketing’ is crucial, we can not afford to lose sight of the fact that sometimes the ultimate in ‘customer service’ requires us to inform people that they may not do something in the way in which they originally conceived, i.e. saying no”

These comments may indicate a problem perceived by the questionnaire’s respondents: On the one hand, we want customers to appreciate us so we have customer support when we are looking for funds. But on the other hand, we must sometimes take an unpopular position (lose customer appreciation) if we are to our job properly. Perhaps this problem, which arguably is seen by the respondents, is why the average responses to questions 2 through 6 aren’t closer to 1 (strong agreement).

The answers to questions 18, 22 and 23 form a pattern. These questions and their average scores are listed below.

- 18. The new, changing work environment requires more interpersonal cooperation and personal leadership skills than the work environment of the past. (1.952)
- 19. I would benefit from training that sensitizes me more fully to the communication and cognitive styles of those I deal with. (2.268)
- 20. Other lawyers at my command , installation or facility would benefit from training that sensitizes them more fully to the communication and cognitive styles of those they deal with. (2.176)

Arguably, the number of people who answered “1” (agree strongly) or “ 2” (agree) is significant. For question 18, over three-fourths of the responses were a 1 or 2. For questions 22 and 23, nearly two-thirds of the responses were 1 or 2. The significance is that a large pool of AMC attorneys feel they or their colleagues will benefit from training in sensitivity to the cognitive and communication styles of others. This may show an area where training is desired and useful for a most AMC lawyers. Given the response to question 18, such training may be important in our changing work environment.

Questions 16, 17 and 19 through 21 relate to working in teams.

- 16. Working in teams of lawyers can be the most effective way to achieve long term superior performance. (2.467)
- 17. Using teams whose members are from varied functional areas can be the best way to achieve long term superior performance. (2.130)
- 19. I am comfortable leading a group through a complex project. (1.780)
- 20. I am comfortable working in a group where there is no formal leader, the group sets its own goals and the group decides how to do its own work. (2.276)
- 21. I have the appropriate training to lead others in a project where team formation phenomena are key elements. (2.357)

The respondents agreement with the statements in 17 and 19 and somewhat milder agreement with the statements in questions 16, 20 and 21 may show AMC lawyers acceptance of working in teams and confidence in their ability to do so. Generally, effective training in team dynamics is costly and time consuming, typically occurring as part of courses two to three months long. Given the time and money costs of effective team dynamics training, and given the relative acceptance of and confidence in teaming among AMC lawyers, training in team dynamics need not be a top priority .

Question 16, which concerns working in teams of lawyers, elicited a number of comments. These are listed below.

Most areas of legal work are not conducive to teamwork,

If you have an environment where work is internal to a large legal office - maybe. Usually a lawyer works most effectively in a team of non lawyers.

No. Results in inconsistent advice and “power plays” on the “team.”

I agree with the “working in teams” bit, but I think that lawyers working in cross functional teams is a better concept than “teams of lawyers.” More than one lawyer in a room can scare people.

These comments indicate that AMC lawyers may have more misgivings about working in teams of lawyers than about working in teams generally. This could help explain the difference in scores between questions 16 and 17.

The foregoing comments all relate to patterns among responses to two or more questions. There is one question, standing alone, where the minority views are deemed significant. That is question 1, which has the statement,

Legal Office Personnel are more immune than others from the effects of budget cuts. 26 of the questionnaire’s 210 responses agreed with the statement and 41 responses neither agreed nor disagreed. Though the responses are minority views, they worry the Professional Development Committee members who have fought to save at-risk attorney slots in RIFs. This experience teaches that losing attorney jobs is a real, ongoing danger to which no one is immune. The worry is that attorneys’ belief in any immunity heightens their risk of job loss.

IV. Remarks re Written Comments on the Questionnaire

There were quite a few written comments submitted by the questionnaire’s respondents. Some of the comments were considered. In view of this, and in view of the previously mentioned criticism of the questionnaire’s neutrality and wording, the written responses, when properly analyzed, may be more valuable than the numerical responses to the questionnaire.

Assembled below is a set of comments from the questionnaire which relate to TQM, the questionnaire itself, reorganization, and reinvention. These comments have a common element in that they show an attitude toward Government directed quality improvement initiatives and organizational restructuring programs. Any numbers preceding a comment indicate the question with which the respondent associated the comment.

15. I think TQM may work if done properly. But, too much that is being done in the name of TQM seems to be change for the sake of change. The stated goal of “constantly improving” processes sometimes appears to motivate process review teams to recommend change with[out] appreciating the reasons the current process exists or the potential effects of the change on other processes. There are times when we are doing the best we can with the resources available and are using a process that has developed from years of experience. In those cases, tinkering with the process usually makes the process worse. (Bracketed word added.)

24. A constant complaint here is that we’re always reorganizing. We never seem to get into an efficient pattern. Keeping up with technology is different and desirable.

One should not be asked to reinvent while one is still being stepped on by higher HQ! **EITHER EMPOWER US OR DON’T .**

22. I am very impatient wit time-wasting “happy talk.”

24. The key to managing change is to only impose change that has a purpose. Change that is busyspeak, buzzword organizational power jockeying overloads individuals, produces cynicism. I don’t believe there is a limit to rate of change if people understand what is being changed, can endorse its objectives, and are empowered.

If any lawyer in AMC has time to tally surveys, send his/her slot to us!

15. Now, how would we know this if we’ve never seen TQM done properly?

15. TQM is a gimmick like so many other management buzz words – such as metrics.

15. Who knows? (Who cares?)

15. TQM, in my opinion, is a waste of time, energy and manpower with no discernible benefits. Trying to define/restructure processes in a non-manufacturing environment such as ours is a futile act.

Most of the above comments show a certain distrust or frustration with concepts like TQM, reinvention and initiative such as this questionnaire. This presents a challenge: the professional development program we create must not only have real and substantial benefits, but also we must convince a group of leery attorneys that the benefits are real and substantial. If the recipients of the program do not buy into it, how effective can the program be?

Many of the comments complain of a lack of time and the pressure of the work load. Few AMC attorneys would dispute that we have too few people and hours for all the work we are asked to do. Between one-third and one-half the comments about time were associated with question 7. That question relates to spending time on giving seminars or presentations for clients or publishing advice on electronic mail media. The comments specific to question 7 generally say there is no time for such activities or that such activities would be good to do if time permitted. One needs to view the response to question 7 (Average score of 2.548) in light of the written comments. Perhaps seminars, presentations and publications on electronic mail media are regarded by AMC attorneys as having less priority than other tasks.

“Good to do but not enough time” comments were made about activities other than those mentioned in question 7. These comments addressed activities such as learning about non legal functional areas (question 9), attending meetings of organizations other than Legal (question 10), actively seeking issues to address (question 12), getting to know one’s clients (question 13) and learning to make charts and graphs (question 29). Consequently, these activities, like those mentioned in question 7, may be regarded as having less priority than other tasks.

Assuming that we want to pursue activities such as those mentioned in questions 7, 9, 10, 12, 13 and 29, then we must do either or both of the following: make more efficient use of the time and personnel available or cut items from our work load to make time for such activities. The latter step especially would require real Command support.

Randolph- Sheppard Act: Many Questions - Few Answers

Implementation of the Randolph -Sheppard Act (R-SA) and applicable regulations presented a real challenge in a recent full and open competition for Full Food Services for a Troop Dining Facility at Redstone Arsenal. The requirement was for the contractor to provide all management, administration, labor, uniforms, supplies, materials, and equipment necessary to operate a full service cafeteria for one base year plus four option years. The RFP was identified as a "best value" procurement to be awarded in accordance with the R-SA.

The problems stemmed from trying to assign a priority to the State Licensing Agency (SLA), representing a blind vendor, as required in the Randolph-Sheppard Act, 20 USC 107(e), and implementing regulations, 34 CFR 395.33, DODD 1125.3, AR 210-25 and, at the same time, compete the effort in compliance with acquisition laws and defense regulations pertaining to "best value" awards. (In this discussion, "SLA" is used interchangeably with "the blind")

Our RFP went on the street and proposals were received before issuance of DA Memo re Military Dining Facilities Contracts, dated 1 August 1997, in which Dr. Oscar addressed the issue and stated : "The procedures established to implement the Randolph - Sheppard Act differ significantly from those established for appropriated fund contracting actions which our contracting activities are required to follow. For instance, the FAR does not authorize the contracting officers to solicit on an unrestricted basis when a set-aside for small or small disadvantaged business is required by that Regulation; nor does the FAR allow waiver of competitive procedures in order to award a contract to an offeror whose offer, although within the competitive range, does not represent the best value." (emphasis added) Further he stated that he does not believe the intent of the R-SA was ever to cover food service mess halls and he is seeking to get the R-S Act amended to specifically exclude military troop dining facilities. For now he requires notification to the Office of the Deputy Assistant Secretary of the Army (Procurement) prior to release of a solicitation for military troop dining facility in order to exchange information and provide specific guidance.

By way of background information, the R-SA, 20 USC 107d-3, authorizes the operation of vending facilities on Federal property (which by definition includes cafeterias) and gives a priority to blind persons licensed by a state agency in order to provide them with remunerative employment. It requires the Secretary of Education to insure that the Rehabilitation Services Administration is the principal agency for carrying out the statutory requirements for the priority and requires him, (through the Commissioner of the Rehabilitation Administration) to make annual surveys of concession vending opportunities for blind persons on Federal property and to designate the State agency in each State which is authorized to issue licenses to blind persons for the operation of vending facilities on Federal property. It also requires the State licensing agency to give a preference to blind persons in need of employment when issuing licenses.

In addition, the Statute requires the Secretary of Education, through the Commissioner, to prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees "when he determines, on an individual basis, and after consultation with the head of the appropriate installation, that such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or not."

34 CFR 395 requires that an application for designation as a State licensing agency be submitted only by the state vocational rehabilitation agency providing vocational rehabilitation services to the blind under an approved State plan for such services. The state licensing agency is required to establish objective criteria for licensing qualified applicants, including a provision for giving preference to blind persons who are in need of employment. The criteria must assure that licenses will be issued only to persons determined by the State agency to be blind, be US citizens, and be certified by the state agency as qualified to operate a vending facility. Section 33 requires that a priority be given blind vendors when the Secretary determines that the effort can be provided at a reasonable cost, with high quality food. In order to establish the ability of the blind vendors to operate a cafeteria in such manner, the appropriate State licensing agency shall be invited to respond to solicitations for offers when a cafeteria contract is planned. The CFR goes on to say that if the proposal from the State agency is judged "within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award" the Secretary shall be consulted to determine that such operation can be provided at a reasonable cost, with high quality food.

The words in the CFR in quotations above are not clear in the context of FAR 15. It is tempting to read the phrase "ranked among those proposals which have a reasonable chance of being selected for final award" as an inartful explanation of "being within the competitive range". However, a decision by the U.S. Department of Education, Matter of Mississippi Department of Rehabilitation Services vs. U.S. Department of the Air Force, Arbitration Case No. R-S/94-3, 27 Mar. 97, interpreted the words to impose a specific 2 part test as follows - a "judging" criterion which requires that the offer from the blind be "judged" competitive and a "ranking" criterion which requires that the blind proposal be "ranked among" those proposals which contend for final award.

To add to the confusion, the second part of the phrase does not appear in DODD 1125.3 or AR 210-25. Both simply require award to the blind if the offer is within the competitive range. There is no mention of the ranking business found in the CFR and while there are 2 exceptions to award when in the competitive range, neither of them applied in our situation (and probably rarely will apply). For general information, the exceptions are when the on-site official determines that award to the State Licensing Agency would adversely

affect the interests of the U.S. and the Secretary of Education approves the determination OR when the on-site official determines, after conferring with HQDA and the Secretary, HEW, agrees, that the blind vendor does not have the capacity to operate a cafeteria in such a manner as to provide good service at a comparable cost and of comparable high quality as that available from other providers of cafeteria services. (See Delegation of Authority Randolph-Sheppard Act, SARDA-96-5, 18 Jun 1996 which authorizes the PARC to act for OASA(RDA) in certain dealings with the installation commander)

Certainly offers properly included in the initial competitive range may not end up "ranked" among those which have a reasonable chance for final award, however those words are to be interpreted. As we well know, FAR 15.609 only requires the Contracting Officer to include those offers in the range that have a reasonable chance for award and when there is doubt, put them in. When the initial range is established nothing more is known about the merits of the proposals than that they have a reasonable chance for award. Clearly no conclusion concerning "best value" can be reached.

After the Contracting Officer makes the initial competitive range determination, he is left with an array of offers, some of which likely have Technical and Management deficiencies or disadvantages which ordinarily would be the subject of discussions and which may impact the proposed Cost. The KO could proceed with discussions and the evaluation (ratings) and then make a second competitive range determination. Presumably this would result in a group of offerors which are on equal footing, i.e. each has a proposal which has no deficiencies, has corrected disadvantages and is priced on that basis.

If the SLA is in this second range it would seem that the Contracting Officer is more justified in making the award to it than he was earlier. By being included in this second range, established after discussions, he could more reasonably determine that the offer was "ranked among those proposals which have a reasonable chance for award." (Of course, this presumes that the price is found to be fair and reasonable.)

However the KO, ever mindful of the pressures of ALT/PALT, may be reluctant to proceed this far in light of the words in the AR which simply require the SLA to be in the competitive range. This position is understandable. Continuing the competitive, "best value" process is very time consuming with no assurance that the outcome (i.e. the competitive range) will or should change after the added time and effort. On the other hand, what possible value can there be in expending the time and effort required to plan for and initiate a competition acquisition and then ending it just as an initial competitive range is determined? The only exception that comes to mind is when the Contracting Officer anticipated award without discussions and is in a position to do that - aside from any R-SA considerations.

It seems that the Randolph-Sheppard implementing instructions require the interruption of a statutorily created process, designed

for the sole purpose of identifying the proposal offering the "best value" to the Government, for a totally different statutory purpose - priority to the blind. These conflicting objectives are so difficult to achieve that it may become particularly important to consider carefully the sole source avenue of "direct negotiations" with the SLA as provided in the implementing regulations, see AR 210-25 (b)(2). This is permissible when the on-site official (HCA) with concurrence of HQDA, has determined that the SLA, through its blind licensee, can provide the cafeteria services required at a reasonable cost, with food of a high quality comparable to that available from other providers of cafeteria services.

Karolyn Voigt 9/29/30

MEANINGFUL DISCUSSIONS

Discussion of offerors' proposals for meeting the Government's needs provides at the same time one of the greatest opportunities and one of the most dangerous pitfalls for the Government in negotiated procurements. The FAR currently directs contracting officers to conduct discussions with all responsible offerors whose proposals are within the competitive range. (FAR 15.610(b)) The proposed FAR Part 15 rewrite (as revised, 62 F.R. 26640-82, May 14, 1997) provides more complicated guidance. (Prop. FAR 15.406) Neither version uses the adjective "meaningful" in connection with discussions or communications; that concept has been developed piecemeal in a long series of decisions of the General Accounting Office (GAO). This memorandum summarizes what must be discussed, what cannot be discussed, what may be discussed but does not have to be, and what the future may hold.

"Discussion" is defined at FAR 15.601 to mean—

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.

According to the GAO, although discussions need not be all-encompassing, an agency is required to point out weaknesses or deficiencies in a proposal as specifically as practical considerations permit so that the agency leads the offeror into areas of its proposal which require amplification or correction.

Up to a point, the FAR is clear on what the contracting officer must discuss with an offeror. (FAR 15.610(c)) He or she must advise of proposal deficiencies so that the offeror has an opportunity to satisfy the Government's requirements. (Para. (c)(2)) In addition, the contracting officer must try to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal (para. (c)(3)), and any suspected mistakes. (Para. (c)(4)), also FAR 15.607) The contracting officer must give the offeror a reasonable opportunity to submit proposal revisions resulting from the discussions (para. (c)(5)), and, finally, discuss past performance information on which the offeror has not had a previous opportunity to comment. (Para. (c)(6)) It goes without saying that a written record of all discussions must be prepared.

If a proposal contains no deficiencies, does the Government have to discuss negative aspects of the proposal that do not rise to the level of deficiencies, e.g., weaknesses? First, it is necessary to give some thought to what is meant by this term. As commonly used, a weakness is normally understood to be something less serious than a deficiency. The weak item in a proposal does meet the Government's minimum requirement, if only just barely, but it does not meet it very well. A weakness is often referred to as a risk or disadvantage. The difficulty for the evaluator or negotiator is that a weakness, or a combination of them, can result in nonselection of a proposal. Sometimes the term is used as if it were a synonym for deficiency; even the GAO seems to do this. If a particular weakness may result in the offer not being selected for award, the Government must discuss it at least briefly.

The FAR states what may not be discussed with greater clarity. Government personnel may not engage in technical leveling, i.e., helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion (FAR 15.610(d)) (this prohibited practice of "leveling" has been defined by the GAO as "coaching"); technical transfusion, i.e., disclosure of

technical information pertaining to a proposal that results in improvement of a competing proposal (FAR 15.610(e)(1)); or auction techniques, i.e., indicating to an offeror a price or cost it must meet, or advising of its price standing relative to another offeror, or generally providing information about others' prices. (FAR 15.610(e)(2)) Other limitations exist. For example, in resolving suspected mistakes in an offeror's proposal, Government personnel must do so without disclosing information about other proposals or about the evaluation process. (FAR 15.610(c)(4)) Also, names of individuals providing past performance information may not be disclosed. (FAR 15.610(c)(6))

Much more challenging is the large gray area of subjects that may be discussed but do not have to be. The FAR says little about this. "The content and extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition." (FAR 15.610(b)) Also, "it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic." (FAR 15.610(e)(2)(ii))

What if a proposal is considered acceptable and is within the competitive range, but contains several weaknesses, none of which by itself is sufficiently significant to require discussion? Under certain circumstances, it may be within the Contracting Officer's discretion to choose not to discuss these weaknesses. We strongly believe, however, that discussion of weaknesses, particularly those deemed to be significant, is the best practice. When some combination of weaknesses causes the offer to be found unacceptable, those weaknesses must be discussed.

Of course, all offerors must be treated the same. A weakness or other doubtful area that is discussed with one, must be discussed with all others to whom it is applicable. Such areas need not be discussed with offerors to whom they do not apply. That may seem obvious but has often led to misunderstanding and claims of favoritism.

What about the situation in which a proposal meets all requirements, and not only has no deficiencies, but also no weaknesses or disadvantages, and no other negative characteristics, and is merely less good than another proposal? Certainly, the Government does not have to discuss what is right with a proposal, even if that proposal is viewed with comparatively less favor than another. With a proposal of such quality, there may be nothing that the contracting officer is permitted to discuss.

Unlike the current FAR, the proposed FAR Part 15 Rewrite makes extensive use of the broad term "communications," preserving the term "discussions" for one narrow class of communications. Communications are—

all interchanges after receipt of proposals between the Government and an offeror, including discussions conducted after the competitive range is established.

(Prop. FAR 15.001) Three categories of communications with offerors are recognized: those taking place in conjunction with award without discussions (Prop. FAR 15.406(a)), those conducted prior to establishment of the competitive range (Prop. FAR 15.406(b)), and those taking place after the establishment of the competitive range (Prop. FAR 15.406(d)). The scope of the first two categories is narrow. The last category constitutes discussions, "tailored to each offeror's proposal," which, as under the present FAR, the contracting officer must conduct with each offeror within the competitive range. (Prop. FAR 15.406(d)(1)) The present FAR only allows a very narrow category of communications before establishment of the competitive range which it calls "clarifications". (FAR 15.607(a)) Under the proposed Rewrite, 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. (Prop. FAR 15.001. See Prop. FAR 15.407 for discussion of proposal revisions.)

Under the proposed Rewrite, after establishing the competitive range, the contracting officer must—

indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as, cost, price, performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered to enhance materially the proposal's potential for award. (Prop. FAR 15.406(d)(3)) The Rewrite does provide a definition for "weakness", including "significant weakness", as well as an expanded definition for "deficiency." (Prop. FAR 15.401)

The latter term now means—

a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

(Id.) A weakness is "a flaw that increases the risk of unsuccessful contract performance. A 'significant weakness' is a flaw that appreciably increases" that risk. (Id.)

With its clear direction concerning discussion of weaknesses, the proposed Rewrite represents a definite improvement over the present FAR.

In addition, before establishment of the competitive range, the Government must hold discussions for the limited purpose of addressing "adverse past performance information on which the offeror has not previously had an opportunity to comment." (Prop. FAR 15.406(b)(4))

Under the proposed Rewrite, Government personnel "shall not engage in conduct" that "favors one offeror over another." (Prop. FAR 15.406(e)(1)) Moreover, the Government's representatives are prohibited from engaging in what is presently known as technical transfusion, although that term is not used. (Prop. FAR 15.406(e)(2)) No mention is made of technical leveling. Also, Government personnel cannot reveal an offeror's price without that offeror's permission. (Prop. FAR 15.406(e)(3)) As in the present FAR (15.610(c)(6)), names of individuals providing past performance information may not be revealed.

The guidance regarding items which may be discussed with an offeror, but do not have to be, is complicated. Two categories of communications are recognized, those before and those after establishment of the competitive range. Communications before the competitive range is established may "only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain." (Prop. FAR 15.406(b)(1)) Under this proposed rule, communications may be conducted "to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process," or for "addressing issues that must be explored to determine whether a proposal should be placed in the competitive range." An offeror will not be allowed to revise its proposal as a result of such communications. (Prop. FAR 15.406(b)(2), (3)) Communications after establishment of the competitive range are a matter of contracting officer judgment. When a solicitation has "stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums," the Government may "negotiate with offerors for increased performance beyond" the minimums. As for offerors who have exceeded mandatory minimums, "the Government may suggest . . . that their proposals would be more competitive if the excesses were removed and the offered price decreased." (Prop. FAR 15.406(d)(3)) In prohibiting revelation of an offeror's price without

permission, the Rewrite advises, “the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion.” (Prop. FAR 15.406(e)(3)) “It is also permissible . . . to indicate to all offerors the cost or price that the Government’s price analysis, market research, and other reviews have identified as reasonable.” (Prop. FAR 15.406(e)(3))

Under the Rewrite, after establishment of the competitive range and commencement of discussions, if an offeror in the competitive range “is no longer considered to be among the most highly rated offerors,” that offeror may be eliminated from the competitive range “whether or not all material aspects of the proposal have been discussed, or the offeror has been afforded an opportunity to submit a proposal revision.” (Prop. FAR 15.407(a))

The exact meaning of some of the proposed new provisions, and the limits of Government authority thereunder are not entirely clear. We can do no more than speculate how they may be implemented, and how the GAO may interpret them. The FAR 15 Rewrite has been extensively revised once and is not yet in final form. Acquisition personnel must be alert for further changes, and for the opportunities and challenges they may present.

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**Ethics Through Green Eye-Shades:
Maintaining Your Agency's Fiscal Fitness**

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I. References.

- A. 31 U.S.C. § 1301; 1344; 1349.
- B. Pub. L. No. 101-94, sec. 503, Ethics Reform Act of 1989.
- C. Exec. Order No. 12674, *as amended by* Exec. Order No. 12731, Principles of Ethical Conduct for Government Officers and Employees (Oct. 17, 1990).
- D. Standards of Ethical Conduct for the Executive Branch, 5 C.F.R. Part 2635.
- E. Office of Management and Budget (OMB) Circular A-126, "Improving the Management and Use of Government Aircraft," 22 May 1992.
- F. 5 C.F.R. Part 251, Agency Relationships with Organizations Representing Federal Employees and Other Organizations (1997).
- G. 5 C.F.R. Part 3801, Supplemental Standards of Ethical Conduct for Employees of the Department of Justice (1997).
- H. 41 C.F.R. Subpart 101-6.4, Home-to-Work Transportation.
- I. 41 C.F.R. Subpart 101-20.4, Occasional Use of Public Buildings (1997).
- J. 41 C.F.R. Part 101-35, Telecommunications Management Policy (1997).

K. GAO, Principles of Federal Appropriations Law (2d ed. 1991), Volumes I-III.

II. Introduction. The purpose of this session is two-fold:

A. Review, from a fiscal law perspective, the Office of Government Ethics (OGE) regulations pertaining to use of government resources.

B. Propose methodologies for assessing the legal sufficiency of agency regulations that define the "authorized purposes" for which government resources may be used.

(1) Under what circumstances may federal agencies permit their employees to use government resources for personal purposes?

(2) Under what circumstances may federal agencies use official resources in support of non-federal entities?

III. The Roles of OGE and Individual Agencies in Regulating the Use of Government Property.

A. OGE's Regulation. Federal employees must protect and conserve Government property and refrain from using or allowing its use for purposes other than those for which it is made available to the public *or those authorized in accordance with law or regulation.* 5 C.F.R. 2635.704.

(1) The Standards of Ethical Conduct acknowledge that "there may be circumstances when an employee may properly use Government property or official time for activities other than the performance of the official duties of the employee's position." Office of Government Ethics (OGE) Letter to General Counsel, Office of

Personnel Management, dated March 21, 1997.

- (2) Thus, by definition, employees who use government property in accordance with applicable laws and regulations do not violate the Standards. OGE Informal Advisory Letter 95 X 13, 1995 WL 855438 (Dec. 1, 1995).

B. Individual Agencies' Role in Regulating the Use of Property.

- (1) The General Services Administration (GSA) and the Office of Personnel Management (OPM) are authorized to promulgate executive branch-wide regulations governing the use of government resources.
- (2) Except as limited by statute or regulation, federal agencies possess the discretion to promulgate departmental regulations governing the use of government resources. OGE Informal Advisory Letter 93 X 6, 1993 WL 721226, Mar. 10, 1993.
- (3) The Office of Government Ethics (OGE) does not have the authority to promulgate any expansion or limitation of other agencies' regulations governing the use of government property. OGE Informal Advisory Letter 95 X 13, 1995 WL 855438, Dec. 1, 1995.
 - a. OGE's authority is limited to implementing the principle of conduct stated in the Executive Order 12674 that "Employees shall protect and conserve Federal property and shall not use it for other than authorized purposes."
 - b. Thus, OGE's regulations only purport to define what is meant by "authorized

purposes" (i.e., purposes for which government property is made available to members of the public or *those purposes authorized by law or regulation*).

IV. General Restriction. Employees must protect and conserve Government property and use it (or allow its use) only for authorized purposes. 5 C.F.R. § 2635.704(a).

- A. This restriction is based on the general principle set forth at 5 C.F.R. § 2635.101(9) and Exec. Order No. 12674, April 12, 1989, as amended by Exec. Order No. 12731, October 19, 1990, Part I(i) ("Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.")
- B. "Government property" includes real or personal property in which the government has any property interest, and any right or other intangible interest (including contractor services) purchased with government funds. 5 C.F.R. § 2635.704(b)(1). Also, any benefit to which the government is entitled, resulting from expenditure of appropriated funds, belongs to the government, and may not be accepted for personal use. 5 C.F.R. § 2635.204(c)(3).
- C. "Authorized purposes" are purposes for which government property is made available to the public, or purposes authorized under law or regulation. 5 C.F.R. § 2635.704(b)(2).
- D. Duty to protect and conserve government property and to use it only for authorized purposes is attended by an obligation to disclose waste, fraud, abuse, and corruption to appropriate authorities. See 5 C.F.R. § 2635.101(11).

V. Relationship Between Fiscal Law and Ethics

Regulations.

A. The Nature of Fiscal Law.

- (1) Fundamental Axiom: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." United States v. MacCollom, 426 U.S. 317, 321 (1976).
- (2) Congressional "Power of the Purse". Congress is constitutionally vested with the power to appropriate funds and to prescribe the conditions governing their use. Article I, section 9, clause 7.
- (3) A "central theme underlying much of federal fiscal law and policy" is the "*natural antithesis of executive flexibility and congressional control.*" I GAO, Principles of Federal Appropriations Law (2d ed. 1991) 1-8.

B. The Fundamental Fiscal Law Principle:

Appropriated funds are available only for the objects for which the appropriations were made.
31 U.S.C. § 1301(a) (the "Purpose Statute").

- (1) Congress cannot specify every item of expenditure in agency appropriation acts. Thus, under the "necessary expense rule," appropriations made for particular objects, by implication, confer authority to incur expenses that are reasonably necessary or incident to the proper execution of those objects. See 71 Comp. Gen. 527 (1992).
- (2) Application of the "necessary expense rule" is a matter of agency discretion.

(3) In reviewing the propriety of an expenditure, the Comptroller General considers whether, under the circumstances, the relationship between the authorized function and the expenditure is so attenuated as to take it beyond the agency's legitimate range of discretion. See Ms. Comp. Gen. B-257488 (Nov. 6, 1995).

C. The Comptroller General of the United States retains authority under 31 U.S.C. 3529 to issue decisions to disbursing or certifying officers and heads of agencies on matters involving the use of appropriated funds that do not specifically involve settling a claim or other functions transferred to the Director of the Office of Management and Budget by section 211 of the Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, 109 Stat. 514, 535 (1995). Ms. Comp. Gen. B-275605 (Mar. 17, 1997).

D. Violations of the Purpose Statute may result in violations of the Antideficiency Act, 31 U.S.C. 1341, a criminal statute.

VI. Restrictions on Use of Particular Types of Government Resources.

A. *Official Time.* Employees must use official time in an honest effort to perform official duties, unless authorized under law or regulation to use official time for other purpose. 5 C.F.R. § 2635.705(a). Employees who are not under a leave system, including Presidential appointees, must expend an honest effort and a reasonable proportion of their time in the performance of official duties. OGE Informal Advisory Letter 95 x 9, WL 855435 (1995).

B. *Official Authority.* **"An employee shall not use his public office for his own private gain, for**

the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations." 5 C.F.R. § 2635.702. "Official authority" (i.e., position, title or any authority associated with public office) may not be used to:

- (1) Coerce or induce any person to provide any benefit to the employee or any person with whom the employee is affiliated in nongovernmental capacity. 5 C.F.R. § 2635.702(a).
- (2) Imply official endorsement of personal activities. 5 C.F.R. § 2635.702(b).
- (3) Endorse any product, service or enterprise except as statutorily authorized, or pursuant to agency programs that recognize accomplishments or compliance with agency standards.

C. *Nonpublic Information.* Information gained through federal employment that the employee knows or should know has not been made publicly available may not be used in financial transactions, or to further private interests. 5 C.F.R. § 2635.703.

D. *Subordinates.* **"An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation."** 5 C.F.R. 2635.705(b).

E. *Communication Systems.*

- (1) Telephone calls placed over Government-provided and commercial long distance systems that will be paid for or reimbursed by the Government, shall be used to conduct official business only. 41 C.F.R. 101-35.201(c)(1).
- (2) "Official business" calls may include emergency calls and other calls the agency determines are necessary in the interest of the Government.
- (3) Agencies may properly authorize telephone calls that:
 - (a) Do not adversely affect performance of official duties;
 - (b) Are of reasonable duration and frequency; and
 - (c) Could not reasonably have been made at another time; or
 - (d) Are provided for in a collective bargaining agreement.
- (4) Personal long distance calls may be made over the commercial long distance network if they meet the above criteria and are not charged to the Government.
- (5) Agencies must issue directives on using telephone services (including contractor-operated facilities). The directives may further define calls that are "necessary in the interest of the Government" and must include procedures for collecting reimbursement for unauthorized calls. 41 C.F.R. 181-35.281(d)(3). (Agencies must collect for unauthorized calls, if it is cost-effective to do so, and collections shall include the administrative costs of processing the collection, as well as the

value of the call. Reimbursing the Government for unauthorized calls does not exempt an employee from appropriate administrative, civil, or criminal action. 41 C.F.R. 181-35.282.

F. *Vehicles.*

(1) General Limitation. Appropriated funds may be expended for maintenance, operation, or repair of passenger carriers only if the carrier is used to provide transportation for official purposes. 31 U.S.C. § 1344(a)(1). Thus, government vehicles may only be used for official purposes. See Ms. Comp. Gen. B-275365 (Dec. 17, 1996).

(a) Employees who willfully use or authorize the use of a government vehicle or aircraft for other than official purposes violate 31 U.S.C. § 1344, and shall be suspended without pay for at least one month or, when circumstances warrant, for a longer period of summarily removed from office.

(b) This penalty is mandatory, and there is no authority to impose a lesser sanction. See *Fields v. Veterans Administration*, 21 M.S.P.R. 176, 177 (Merit Systems Protection Board 1984).

(c) Whether misuse of a government vehicle is "willful" is a question of fact to be determined by the employee's agency. The standard requires actual knowledge that the use would be characterized as "nonofficial" or reckless disregard as to whether the use was for nonofficial

purposes.

(2) Specific Rules on Use of Vehicles.

(a) Government vehicles may not be used to transport personnel over all or any part of the route between their domiciles and places of employment ("home to work"). Exceptions (for "field work," "clear and present danger," "emergency" and "compelling operational considerations") require Service Secretary approval.

(b) Rental car agreements are contracts between agency employees and car rental agencies. Thus, a rental car may be used like a personally owned vehicle, even if the government reimburses the employee for the costs attributable to official use.

VII. Personal Use of Government Resources. Agencies may authorize limited **personal** use of government resources (other than vehicles) by their employees. See, e.g., 28 C.F.R. 45.4 (authorizing personal use of government property by Department of Justice employees). Agencies should authorize personal use of government property by their employees only if such use:

- A. Does not interfere with official duty performance;
- B. Is of reasonable duration and frequency;
- C. Is in the agency's interest; and
- D. Creates no significant additional cost to the government.

VIII. Enforcement.

- A. The Merit Systems Protection Board regards misuse of government resources as a serious charge. The Board has upheld suspensions of 38 days or more for sustained charges of misuse of government resources. *Barcia v. Department of the Army*, 47 M.S.P.R. 423 (1991) (38-day suspension was reasonable for appellant's use of government computer to maintain private business records and contact computer firms by modem).
- B. The agency is not required to prove intent to sustain a charge of misuse of government property. *Sternberg v. Department of Defense, Dependents Schools*, 52 M.S.P.R. 547 (1992)
- C. Charge of misusing government property can be sustained regardless of whether the employee paid for such usage. *Wenzel v. Department of the Interior*, 33 M.S.P.R. 344 (1987).

IX. Support of Non-Federal Entities.

- A. General limitation. Federal agencies cannot use appropriated funds to supply services or manufacture products or materials for private parties in the absence of specific authority. 62 Comp. Gen. 323 (1983).
 - (1) The performance of services by government personnel for private entities constitutes an improper use of appropriated funds, even if the government is compensated therefor or reimbursed in kind. See 34 Comp. Gen. 599 (1955).
 - (2) The government is solely responsible for supervising and controlling the official performance of its officers and employees, and federal agencies may not delegate this responsibility to a private entity. 31 Comp. Gen. 624 (1952).

B. Authorized Categories of Support.

(1) 42 U.S.C. 1856a (mutual aid fire protection agreements).

(2) Charitable, Community Support and Public Affairs Activities.

(a) "While federal funds, facilities and employees' time are available only for purposes authorized by law, we believe it is not necessary that each and every authorized government employee activity, or for that matter, agency activity be specifically designated by statute." 71 Comp. Gen. 469 (1992).

(b) Agency heads may authorize limited use of appropriated resources in furtherance of recognized and publicly accepted charitable or community support activities. 71 Comp. Gen. 469 (1992).

C. Limitations on Support of Non-Federal Entities.

(1) *Impartiality.*

(a) DoD employees are generally prohibited from engaging in any official activities in which a non-Federal entity is a party or has a financial interest if the DoD employee is an active participant in the non-Federal entity or has been an officer in the non-Federal entity within the last year. 5 C.F.R. § 2635.402 and .502; 18 U.S.C. § 208.

(b) Agency Designees or travel approving authorities who are active participants in non-Federal entities

cannot act on requests to travel to or participate in activities of those entities. See 5 C.F.R. § 2635.402 and .502; 18 U.S.C. § 208.

(2) *Endorsement.*

(a) This restriction stems from general principle that employees must act impartially, and may not give preferential treatment to any private organization or individual. 5 C.F.R. § 2635.101(b)(8).

(b) When acting in a personal capacity, agency employees may not use their official titles, positions or organization names, except as authorized under 5 C.F.R. § 2635.807(b) (allowing limited use of official title or position in connection with off duty teaching, speaking or writing).

(3) *Competition with Private Sector.* The general policy of the federal government is not to compete with available commercial sources in performing commercial activities. See OMB Cir. No. A-76.

D. Forms of Support.

(1) *Distributing Information.* Agencies may permit the use of official information channels to disseminate information pertaining to professional development events; scientific, technical or professional events relevant to the agency's programs or policies; or employee morale and welfare.

(2) *Attendance.*

(a) In official capacity.

(i) Employees may not officially attend events in order to acquire or maintain professional credentials that are minimum requirements of the employee's position. 5 U.S.C. § 5946.

(ii) Events are not "official" if: invitation is extended on a social basis; the event is purely political; the event is one to which people are invited because of such things as their ethnic background, home state, religious or educational background, and not to carry out a function of their agency; the event is a private or non-profit fundraiser. OGE Informal Advisory Letter 85 x 9, WL 57326 (1985).

(b) Excused Absence. Agencies may authorize excused absence for employees who are willing to pay their own expenses to attend a meeting of a professional association or other organization from which an agency could derive some benefits. 5 C.F.R. 251.282(a)(3).

(3) *Participation in Conferences.*

(a) Federal employees may participate as uncompensated speakers, instructors or panelists at a luncheon or symposium when authorized to do so as part of their official duties (even though a registration fee is charged). OGE Informal Advisory Letter 98 x 1, WL 485679 (1998).

- (b) Standard: Employee's participation is in agency's interest and the event is an appropriate forum for the exchange of information relevant to agency programs, operations and responsibilities. (All relevant factors must be considered in determining whether forum is "appropriate", including whether registration fees charged government attendees are in line with the actual costs of the program to the sponsor.)
- (c) Agencies may permit employees to use agency equipment or administrative support services for preparing papers to be presented at conferences or symposia or published in journals. 5 C.F.R. 251.282(a)(1).

(4) *Membership.*

- (a) Appropriated funds may not be used to purchase a federal employee's membership fees or dues in any association or society. 5 U.S.C. 5946. An agency may use appropriated funds to purchase a membership in its own name, provided that such a membership will contribute substantially to the fulfillment of its mission. See, e.g., Ms. Comp. Gen. B-221569 (Jun. 2, 1986).
- (b) Federal employees may serve as liaisons to non-federal entities, and officially represent their agencies in meetings, provided they do not participate in managing or controlling the entity.
- (c) In accordance with agency regulations, federal employees may join organizations in their personal capacity. Note that there membership may create potential conflict of

interest issues under 18 U.S.C. 283, 285 and 288; and 5 C.F.R. 2635.582.

(5) *Management.*

- (a) Department of Justice has concluded that 18 U.S.C. § 208 prohibits management of non-Federal entities by federal employees, unless expressly authorized by federal statute, or non-Federal entity repudiates fiduciary duties owed to it under applicable state law.
- (b) Preferred means of conducting official business with non-Federal entities is through liaison. Service as liaison avoids conflict of interest and fiscal issues and minimizes DoD employee's potential personal liability.

(6) *Logistical Support.*

- (a) Occasional Use of Public Buildings Administered by General Services Administration (GSA).
 - (i) Any person or organization desiring to use a public area must apply for a permit with the GSA Buildings Manager. 41 C.F.R. Subpart 181-28.4.
 - (ii) Applications for permits will be disapproved if the proposed use is a commercial activity; interferes with access to the public area; disrupts official business; interferes with approved uses of the property; damages any property; is intended

to influence or impede a judicial proceeding; is obscene; or entails political solicitations in violation of 18 U.S.C. 687.

(b) Provision of agency facilities and equipment (and related personnel services). Agencies may provide limited logistical support, in the form of facilities, equipment, and agency employees necessary for proper use of the equipment), if:

(i) The support does not unduly interfere with the performance of official duties;

(ii) The support furthers the agency's interests;

(iii) The event is an appropriate forum for agency support;

(iv) The agency is willing and able to provide the same support to comparable events sponsored by similar non-Federal entities; and

(v) The support is not prohibited by other statute or regulation.

X. Conclusion. "The protection of the public fisc is a matter that is of interest to every citizen . . ."
Brock v. Pierce County, 476 U.S. 253, 262 (1986).

Gambling on the Natick Installation

1. Gambling questions have been raised. This message is posted for all employees to read and understand the extreme restrictions and potential penalties placed on government employees.

QUESTION: “What exactly is Natick’s policy on gambling?”

ANSWER: **Natick has no additional guidance other than that which is U. S. Government and DoD policy which is described below.**

QUESTION: Has the policy changed all that much, say since the mid-60's through today?

ANSWER: **The policy remains the same- no gambling on duty time.**

QUESTION: Have things become very ‘relaxed’ at Natick due to the recent trend in State Lotteries and the introduction of gambling trade in Connecticut?

ANSWER: **Not that we are aware.**

QUESTION: (1) Don’t we still consider gambling on company time illegal? (2) Is there a difference between work gambling and trips to FoxWoods? (3) Why do we turn a deaf ear to these activities?

ANSWERS: (1) Yes.

(2) **There is a difference between on and off post gambling. (a) Office betting pools are a violation of Massachusetts law which calls for punishment of up to three years in the state prison and a \$3000 fine. See Chpt. 271 M.G. L. § 17. The Natick installation is subject to state law in this matter. (b) DoD and Federal Regulations prohibit gambling. See paras. 2&3 below. (c) Trips to Foxwood are not on company time and are completely subsidized by those attending. The Civilian Recreation Fund Council only provides transportation and does not operate any gambling activities. Basic Community Programs are authorized by para. B-2.b., DoD 1015.10 (Encl 4 to above DoDD), which specifically include local or regional group tour recreational services. Trips to casinos are not excluded.**

(3) **The Command does not and will not ignore unauthorized and illegal gambling.**

QUESTION: Are not some coerced by others to ‘play along.’

ANSWER: **We hope not. If you don’t gamble, say so. Ask that you not be invited again**

2. The law and regulation is simple. In the past this installation has taken significant disciplinary actions against some employees who were caught gambling at Natick. All Army members have the responsibility to keep our premises free of prohibited activities and supervisors have the responsibility to discipline those who have been found to perpetuate such activities. Federal courts have found that gambling at a government facility can and does have a deleterious effect on the efficiency and morale of the workforce. The Merit Systems Protection Board (MSPB) has upheld the removal of employees with good

records who chose to gamble on the worksite. In one case, the Board wrote “In view of the nature and seriousness of appellant’s offense, particularly its effect upon the agency’s operation, the Board finds that the penalty of removal in this case was reasonable.” In the case of **Richard A. Luna v. Department of the Army**, 88 FMSR 5448 (Nov. 15, 1988), Mr. Luna, a career employee, operated a football pool and was removed by the Army. While an administrative law judge initially upheld his removal, the MSPB reduced his discipline to a 90 day suspension since he did not personally profit from gambling and was remorseful and accepted full responsibility for his conduct.

3. U. S. Government Employee Standards of Conduct list gambling on-the-job as its first prohibited conduct. See 5 CFR § 735.201, which provides:

(a) While on Government-owned or leased property or while on duty for the Government, an employee shall not conduct, or participate in, any gambling activity including the operation of a gambling device, conducting a lottery or pool, a game for money or property, selling or purchasing a numbers slip or ticket.

Further, DoDD 5500-7.R, Joint Ethics Regulations section 2-302.a. “Gambling” states,

“A DoD employee shall not participate while on Federally-owned or leased property or while on duty (for military members, in this context, present for duty) for the Federal Government in any gambling activity prohibited by [the above Code of Federal Regulations section] except . . . [three very limited situations except for those within the local law and government living quarters among those with whom you have a personal relationship].”

4. In addition, the Morale Welfare Recreation DoDD 1015.2, June 14, 1995, at para. D.(Policies) 10.a.&b. states that DoD Components shall not operate the following activities and programs: lotteries or sale of lottery tickets and pull-tab bingo. However, subject to the restraints stated in the Standards of Conduct and JER, certain gaming activities are allowed, i.e., slot machines in overseas locations and stateside bingo. Raffles are permitted when within compliance with Chapter 271, Mass. Gen. Laws, §§ 7A&8 and 18 U.S.C. § 1301, upon the written permission of the installation commander and legal review. In the past, the legal office has not recommended approval of any raffle games on the installation since stringent state laws must first be met before approving raffles. Monte Carlo events are not permitted where money is the prize, however, para. 8-8, AR 215-1, authorizes MWR activities to host four Monte Carlo events a year and authorized private organizations one event but para. 8-18, AR 215-1 prohibits lotteries. While the military is permitted to participate in limited gambling situations, none of the activities are permitted during duty time. Where MWR bingos, Monte Carlo’s, or raffles are conducted in the United States, it appears that such activities are located at military installations where a large military community resides and can support such activities during off-duty time. For this latter reason, it appears very unlikely that the Natick installation will participate in any on-installation gambling activities.

SUMMARY OF THE DEPARTMENT OF DEFENSE PROPOSED RANGE RULE

The Department of Defense (DoD) has developed a proposed Range Rule that identifies a process for initiating and conducting response actions on closed, transferred, and transferring military ranges. The regulation will address explosives safety, human health, and environmental concerns related to military munitions and other constituents on these ranges. DoD is promulgating this regulation pursuant to authorities set forth in the Defense Environmental Restoration Program (10 U.S.C. 2701-2707), Department of Defense Explosives Safety Board (10 U.S.C. 172), and the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601-9675).

This rulemaking is also based, in part, on the Environmental Protection Agency's (EPA) proposed (60 Fed. Reg. 56468, Nov. 8, 1995) and final Military Munitions Rule (62 Fed. Reg. 6622, Feb. 12, 1997). In EPA's rulemaking, EPA recognized DoD's legal authority to establish regulations for military ranges, as well as DoD's unique expertise in addressing the explosives safety risks inherent in military munitions. EPA stated in its proposed rule that the DoD rule must fully protect human health and the environment, and provide for public and regulatory involvement throughout the process. DoD believes it has met this challenge in the proposed Range Rule (62 Fed. Reg. 50795, Sept. 26, 1997) and looks forward to promulgation of a final Range Rule in 1998.

DoD is promulgating this regulation in accordance with the Administrative Procedures Act. It has sought to facilitate discussions with the public, regulators, and other federal agencies by publication of pre-proposal drafts. DoD published the proposed rule in the Federal Register in September 1997, and it includes a formal 90-day public comment period.

The proposed Range Rule sets forth a comprehensive process for identifying, evaluating, and addressing military munitions and constituents on closed, transferred, and transferring ranges. That process ensures not only public safety, but also the safety of response personnel, while addressing human health and environmental concerns. Important provisions of the proposal are summarized in the following pages:

DOD RANGE RULE OVERVIEW

The process for addressing closed, transferred, and transferring military ranges has five basic phases: (1) Range Identification, (2) Range Assessment/Accelerated Response (3) Range Evaluation/Site-Specific Response, (4) Recurring Review, and (5) Range Close-out.

RANGE IDENTIFICATION:

Under the Range Rule, the Department of Defense would identify all land and water closed, transferred, and transferring ranges subject to the rule. As defined in the proposed rule, a military range is any designated land or water area used for training with military munitions, or any area used for munitions research, development, testing, or evaluation. The proposed Range Rule also defines the following categories of ranges:

Closed Range: A closed range is one that is taken out of service by the military and put to a new use that is not compatible with range activities. A range is considered closed, for example, when construction of buildings in that area have made it unsuitable for range use. Closed ranges are typically under the control of the military.

Transferred Range: A transferred range is one that has been released from military control. These areas are a subset of Formerly Used Defense Sites. Some of these ranges have been transferred to other federal agencies such as the Department of Interior or Department of Energy. Others have been transferred to state or local governments, or to private citizens.

Transferring Range: A transferring range is a military range, or portions of a military range, that is being considered for transfer outside of military control. These include ranges under the Department of Defense Base Realignment and Closure program, as well as other property transfer agreements. Transferring ranges remain under military control until they have been officially transferred to another party.

The proposed Range Rule does not address the management of military munitions or constituents on Active or Inactive Ranges. Active Ranges are those that are being used by the military for training, research, development, testing, and evaluation. An Inactive Range is one that is not currently being used, but is held in reserve by the Department of Defense in the event DoD has a change in mission that requires its use. The management of active and inactive ranges comes under existing Defense Department and Service regulations. The proper safety-based management guidelines for unexploded ordnance at active and inactive ranges will be addressed in a forthcoming policy to be issued by the Department of Defense Explosives Safety Board.

During the Range Identification phase, detailed information about the ranges would be recorded in a centralized range tracking system. DoD would use this range inventory to assist in prioritizing ranges for subsequent response. For example, Transferred Ranges (those already outside of DoD control and in non-DoD use) would be addressed before Transferring or Closed Ranges, which are still within DoD's control. DoD will seek to ensure that a notice of the land's prior use as a military range is contained in official land records.

The Range Identification phase would also include public and state involvement in identifying the location of closed, transferred, or transferring military ranges. After

verifying the accuracy of information received, DoD would enter the information into its central range tracking system. DoD also plans to provide information on the identified ranges to federal agencies that develop and distribute official maps and charts.

RANGE ASSESSMENT/ACCELERATED RESPONSES:

Range Assessment. Once a range has been identified, DoD would assess the explosives safety, human health, or environmental risks the range might pose. This assessment would include collection of existing information on such factors as soils and geology, terrain, vegetation, climate, current and predicted land use, and other data useful in assessing risk. The Range Assessment would allow response personnel to distinguish between ranges where risks can be readily managed and those that warrant more detailed study and analysis. The Range Assessment may require a visual inspection of the range or some sampling of environmental media.

Accelerated Response. An Accelerated Response is any readily available, proven method of addressing the immediate risks, particularly explosive risks, posed by military munitions or other constituents on military ranges. When range conditions warrant a response, DoD would implement a readily available, proven method of addressing the immediate risk.

Some examples of Accelerated Responses include:

1. Posting signs warning of danger associated with a range.
2. Erecting fences or taking other measures to control access.
3. Starting community education and awareness programs.
4. Installing monitoring wells to determine if substances are in the groundwater.
5. Conducting surface sweeps for unexploded rounds.

This is by no means a complete listing of the types of responses available to address the risks posed by ranges.

DoD would use information collected during the Range Assessment phase to determine which Accelerated Response measures are warranted. Additionally, information about the types of munitions used, reported incidents involving munitions, and information about the environmental setting of the range will also be helpful in assessing the risks and selecting an appropriate Accelerated Response. The primary difference between this type of response and a more complex, site-specific response is the scope of this evaluation. Consultation with federal and state agencies and the public, and public access to information, as well as a formal comment period,

would play an important part in selecting an Accelerated Response or determining that a more in-depth Range Evaluation must occur.

RANGE EVALUATION/SITE-SPECIFIC RESPONSE:

Range Evaluation. Range Evaluations are detailed investigations into the types of munitions used on the range, materials associated with these munitions, and the environmental setting. Information collected during this phase would be far more detailed than that collected during the Range Assessment. The primary purpose of the Range Evaluation phase is to assess the level of risk posed by the site and make an informed risk management decision. The Range Evaluation would be used to determine whether a Site-Specific Response is required and to provide an estimate of the overall risk posed by the range conditions.

Site-Specific Response. The Site-Specific Response evaluation examines various alternatives that address risks that have not been reduced or eliminated by responses taken earlier in this process. Each alternative would be examined in light of explosives safety requirements and nine criteria established by the National Contingency Plan. These criteria are as follows:

1. Overall protection of human health and the environment.
2. Compliance with applicable requirements of federal and state law.
3. Long-term effectiveness and permanence.
4. Reduction in explosives safety hazards, toxicity, mobility, quantity, or volume.
5. Short-term effectiveness.
6. Implementability (i.e., how feasible it is to implement the option).
7. Cost.
8. Acceptability to appropriate federal and state officials.
9. Community acceptance.

It is important to note that safety is the overriding concern. Before taking any action on a range, an Explosives Safety Plan must be submitted to the Department of Defense Explosives Safety Board for approval. Consultation with state agencies and public access to information, as well as a formal comment period, would play an important part in decision-making. Restoration Advisory Boards or similar forums would be involved in the process leading to specific range response actions. Because this phase would involve a complex study, it would generally be a long-term action.

RECURRING REVIEWS:

The purpose of Recurring Reviews is to ensure that range response actions continue to ensure explosives safety and protection of human health and the environment. The Review would

also determine if additional evaluation is required. The focus of the Review would depend upon the original purpose and nature of the response. DoD proposes that the initial Recurring Review of closed, transferred, and transferring ranges be conducted three years after an Accelerated Response or Site-Specific Response is taken, or as necessary to ensure that the response action is still effective. Subsequent Recurring Reviews would be conducted in the 7th year and at five-year intervals thereafter. There would be an immediate review if an emergency situation is identified. Likewise, regulatory agencies and the public may request further consideration of the effectiveness of the response action outside the Recurring Review schedule. Consultation with federal and state agencies and the public, public access to information, and a formal comment period, would play an important part in drafting the final report and decision document within this phase.

CLOSE-OUT:

Following review to ensure that the range is unlikely to pose further risk, or that the response objectives were achieved, DoD would end the response action. If at some future date a problem is discovered, however, DoD would address the problem as appropriate. Consultation with federal and state agencies and the public, public access to information, and a formal comment period, would play an important part in this phase.

Presented by:
**AMC COMMAND COUNSEL
ENVIRONMENTAL
REAL ESTATE TEAM**

Army Materiel Command

**COMMAND COUNSEL
ENVIRONMENTAL
VTC
10 OCT 1997**



AMC – Relevant, Responsive & Ready!



AGENDA

- INTRODUCTION
- BRAC LEASING DELEGATION
- FOST/FOSL GUIDE STATUS
- LEAD BASED PAINT UPDATE
- NATURAL RESOURCE DAMAGES
- AMC ENVIRONMENTAL COUNCIL
- MUNITIONS RULE UPDATE



BRAC LEASING PROCEDURES

- NEW PROCEDURES EFFECTIVE 24 SEP**
- ELIMINATES FORMAL HQDA REVIEW**
- MACOMS HAVE APPROVAL AUTHORITY**
 - ❖ **FOST/FOSL**
 - ❖ **REPORTS OF AVAILABILITY**
- DETERMINATION OF AVAILABILITY EXECUTED BY MACOM**
- INFORMAL REVIEW BY BTT**
- PROCEDURES ONLY FOR BRAC LEASES**

Slide # 3 of ___



BRAC LEASING PROCEDURES

- COORDINATION OF ROA/FOSL**
 - ❖ **DOD ECP 1-3---FINAL COPY**
 - ❖ **DOD ECP 4-7--DRAFT FOSL**
- MACOM APPROVAL FOR FOSTS**
 - ❖ **DOD ECP 1-4**
- DASA MUST STILL APPROVE FOSETs**
- AMCEN RESPONSIBLE FOR DELEGATION**

Slide # 4 of ___



FOST/FOSL GUIDE

- AMC FOST/FOST GUIDE**
 - ❖ **DRAFT GUIDE 22 AUG**
 - ❖ **HAVE RECEIVED COMMENTS**
 - ❖ **INSTALLATIONS HAVE USED SELECTIVELY**
- FINALIZE AND PUT ON WEB PAGES**
- POSSIBLE TRAINING SESSION AT DOD BRAC CONFERENCE IN DECEMBER**

Slide # 5 of ___



Natural Resource Damages

- Government may be liable for Natural Resource Damages (NRD), CERCLA §107(a)(4)(C)**
- Under CERCLA Generators of Hazardous Waste shall be liable for damages to NRD, as well as clean up costs, and the cost of assessing such injury CERCLA §107(a)**

Slide # 6 of ___



Natural Resource Damages

- Claims for NRD limited to other Federal Agencies and States or Authorized Representatives
CERCLA § 107(f)(1)
- Texas and Mass. are exploring NRD.
- Air Force is negotiating Trustee Council Charter NOT NRD with Mass.
- If contacted by State concerning NRD advise AMC, DA ... ASAP.

Slide # 7 of ___



Natural Resource Damages

- CURRENT DEPARTMENT ARMY POLICY**
 - ❖ Per. Mr. Steve Nixon, ELD.
 - ❖ We are NOT authorized to negotiate NRD.
 - ❖ We are available for discussions on issues of common interest.
 - ❖ If asked, participate in Natural Resource Trustee Councils.
 - ❖ Discuss the establishment of Trustee Councils
 - ❖ Defer discussing NRD until Trustee Council is established. Then contact AMC for guidance.
 - ❖ All negotiations and agreements must be DA approved.

Slide # 8 of ___



Natural Resource Damages

- DA's Policy on NRD is based on:
 - ❖ CERCLA cleanup should cover any NRD issue.
 - ❖ If CERCLA cleanup does not cover NRD then separate NRD action is possible.
 - ❖ Until CERCLA cleanup is complete do NOT use NRD.
 - ❖ Each remedy is on a case by case basis.

Slide # 9 of ___



Overview of AMC EC

- AMC Environmental Council (EC) -
 - ❖ Quarterly Video Conference/Conference Calls (not to exceed 1 1/2 hours)
 - ❖ Participants - HQ AMC (including I&SA) and MSC Env and Legal representatives
 - ❖ Purpose - review AMC Env Program, identify common problems, and develop solutions

Slide # 10 of ___



Key Aspects of AMC EC

AMC EC is intended to -

- ❖ Address AMC wide issues; not installation specific issues
- ❖ Have flexible agenda based on MSC feedback/issues
- ❖ Develop initiatives/solutions to improve AMC Environmental Program

Slide # 11 of ___



Key Aspects of AMC EC (cont.)

AMC EC is NOT intended to be -

- ❖ A HQ AMC monologue
- ❖ A “Dog & Pony” show
- ❖ An engine for new data calls
- ❖ A forum for discussion of abstract environmental issues
- ❖ A substitute for existing staffing procedures to resolve installation specific problems

Slide # 12 of ___



Munitions Rule Update - WSS

- DDESB Waste Storage Standard (WSS) -**
 - ❖ Fill “gaps” in RCRA and DDESB storage requirements.
 - ❖ Encourage States to adopt Storage Conditional Exemption (C/E)
 - ❖ Provide uniform definition of Storage C/E
- Current Status -**
 - ❖ MRIC to submit proposed WSS to the DDESB on 16 Oct 97
 - ❖ DDESB not expected to vote on WSS until at least next meeting (Jan 98)

Slide # 13 of ___



Munitions Rule - MRIP Revisions

- Munitions Rule Implementation Plan (MRIP) -**
 - ❖ Interim Policy issued on 1 Mar 97
 - ❖ Establishes waste determination process & state implementation process
 - ❖ Interpretes EPA Munitions Rule
- Current Status**
 - ❖ Team to meet next week to revise MRIP
 - ❖ Clarify - Storage C/E checklist, amnesty boxes, misfired munitions, etc.
 - ❖ Goal - finalize MRIP by Dec 97

Slide # 14 of ___

**THE ENVIRONMENTAL LAW DIVISION
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**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.

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***CERCLA Section 113(h) Protects the Army From Challenges to
Ongoing CERCLA Remedial Actions - CPT David Stanton***

In an effort to allow Federal agencies to conduct cleanups without having to defend constantly their cleanup decisions in court, Congress enacted CERCLA Section 113(h) as part of the 1986 SARA amendments to CERCLA. CERCLA Section 113(h) deprives Federal courts of subject matter jurisdiction over ongoing CERCLA response actions. This somewhat controversial provision in CERCLA has caused a split in the Federal courts, and continues to be a key issue in litigating cases that relate to ongoing cleanups. Much of the controversy surrounding this provision has origins in the Tenth Circuit decision in *United States v. Colorado*.¹ In that case, the Tenth Circuit upheld a RCRA challenge to an ongoing CERCLA remedial action that was being conducted by the Army at Rocky Mountain Arsenal. As a result, the Army was required to obtain and comply with a RCRA Part B permit, even though the cleanup was a CERCLA response action. Despite Army arguments that this case is limited to its unique set of facts,² *United States v. Colorado* continues to be cited as authority for bringing non-CERCLA challenges to ongoing CERCLA cleanups.

More recent authority, however, suggests that *United States v. Colorado* is indeed a very limited precedent. In *McClellan Ecological Seepage Situation v. Perry*,³ for example, the Ninth Circuit held that “any challenge” to a CERCLA cleanup is subject to CERCLA Section 113(h), even if the challenge is brought under a statute other than CERCLA. In *McClellan*, a local environmental group brought an action to require the Air Force to comply with various environmental laws while conducting a CERCLA cleanup at McClellan Air Force Base, located near Sacramento, California. The Air Force asserted the CERCLA Section 113(h) defense, arguing that the court lacked jurisdiction to entertain challenges to an ongoing CERCLA cleanup. The plaintiffs argued in response that CERCLA 113(h) only operates as a bar to challenges brought under CERCLA. In holding for the Air Force, the Ninth Circuit concluded that “Section 113 withholds federal jurisdiction to review any of MESS’s claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute ‘challenges’ to ongoing CERCLA cleanup actions.”

While cleanups may be conducted under the authority of any of a number of statutes, including DERA, RCRA, and various BRAC statutes, CERCLA should, whenever possible, be cited as the primary authority under which environmental cleanups are conducted. This will increase the likelihood that the Army will be allowed to conduct its cleanup in relative peace, without repeated interruption by litigation.

¹ 990 F.2d 1565 (10th Cir.), cert. denied, 112 S. Ct. 922 (1993).

² For example, the Army had submitted the RCRA Part B permit application shortly before commencing the CERCLA cleanup, but subsequently decided that the Permit was no longer required),

³ 47 F.3d 325 (9th Cir.), cert. denied, 116 S. Ct. 51 (1995)

*Stakeholder Meetings on Resource Conservation and
Recovery Act Reform Legislation - MAJ Lisa Anderson-Lloyd*

Although Congress' focus is on Superfund reauthorization, the Clinton Administration is considering the potential for legislative reform of RCRA (42 U.S.C.A. §§ 6901-6992 (West 1995)). In both June and August 1997, the Council for Environmental Quality (CEQ) and the EPA convened meetings in Washington, D.C. to discuss with stakeholders the subject of amending RCRA to modify the regulation of remediation waste. Participants in the meetings included industry, State environmental agencies, national environmental groups, and local community groups. CEQ and EPA also invited congressional staff and Federal agency representatives to the meetings as observers.

The Clinton Administration identified remediation waste management as an area for RCRA reform in the 1995 RCRA Rifleshot Initiative. Last year's legislative proposals resulted in a great deal of debate on RCRA reform, but no consensus was reached. The June and August meetings emphasized that the Administration remains committed to pursuing legislative change in this area.

The first stakeholder meeting in June was structured around seven specific controversial issues that were posed as questions to elicit discussion of solutions on which reform policies could be based. There was not, however, agreement on even whether legislative reform was the preferred method of implementing changes to the remediation process. Although some stakeholders believed legislation was the most efficient means of addressing cleanup problems, environmental and community groups feared that changes to the statute could erode the protection currently provided by RCRA. These groups felt that the current statute provides the framework to develop regulations equipped to address the particular cleanup requirements of a site.

Other issues considered by the stakeholders at the June meeting included: how to structure oversight of alternative standards for RCRA remediation waste management and disposal; how to ensure community involvement in remediation waste management reform; what the minimum requirements should be for alternative remediation waste management and disposal standards; what types of remediation waste would be eligible for alternative management or disposal standards; how reform legislation should ensure adequate accountability and oversight for state remediation waste management programs; and how to ensure through legislation adequate enforcement of alternative remediation waste management and disposal standards.

The August meeting included a detailed discussion of public participation issues. The discussion addressed whether minimum public participation opportunities should be guaranteed at every waste remediation site and whether a variance from an established minimum should be granted in certain circumstances. The meeting also included a discussion of State authorization issues. The stakeholders considered what type of authorization model might be appropriate for authorization of an alternative remediation waste standard and to what extent it should be predicated on existing State authorization. No follow-on meetings on RCRA reform have been announced by CEQ or EPA.

Application of Joint and Several Liability for Natural Resource Damages under CERCLA and Determining Who Can Recover for Natural Resource Damages - Wan Sun Song⁴

Although joint and several liability is not expressly mandated by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁵ CERCLA liability is joint and several where two or more defendants have contributed to a single indivisible harm. The majority of courts adopt the rule found in the Restatement (Second) of Torts: damages should be apportioned only if the defendant can demonstrate that the harm is divisible.⁶ The defendant's limited degree of participation is "not pertinent to the question of joint and several liability, which focuses principally on the divisibility among responsible parties of the harm to the environment."⁷

Imposing the burden of proving divisibility of the harm on the defendant has resulted in defendants rarely escaping joint and several liability due to the difficulty of reasonably ascertaining the proportional causes of environmental harm.⁸ Therefore, a defendant may be responsible for paying an unequal share of the harm. Although the potential inequitable nature of joint and several liability has not gone unnoticed, the courts generally reason "that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty."⁹

CERCLA provides for the restoration or replacement of natural resources that have been injured, lost, or destroyed by the release of hazardous substances. CERCLA defines "natural resources" broadly to include "land, fish, wildlife, biota, air, water, groundwater, [and] drinking water supplies" that belong to, are managed by, or are held in trust by the federal government, a state or local government, a foreign government, or an Indian tribe.¹⁰ One may be liable for damages to natural resources pursuant to CERCLA § 107(a)(4)(C). It provides that generators of hazardous wastes "shall be liable for ... damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."¹¹ It extends liability for natural resource damages to the same classes of parties that are liable for cleanup. See CERCLA § 107(a). In addition, section 107(f)(1) of CERCLA expressly limits those who can assert a claim under Section 107(a)(4)(C). "[L]iability shall be to the United States Government and to any State" and "the President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages."¹²

Apparently, joint and several liability applies to both natural resource damages and response actions.¹³ One area of contention, however, is whether a municipality can bring an action pursuant

⁴ Mr. Song was an intern at the Environmental Law Division (ELD) during Summer 1997. While assigned to ELD, he worked with the Compliance Branch and the Restoration and Natural Resources Branch.

⁵ 42 U.S.C. §§ 9601 - 9675 (West 1995).

⁶ See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809-11 (S.D. Ohio 1983); *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988).

⁷ *Monsanto*, 858 F.2d at 171.

⁸ See, e.g., *Chem-Dyne*, 572 F. Supp. at 811; *Monsanto*, 858 F.2d at 172-73.

⁹ *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989).

¹⁰ CERCLA § 101(16), 42 U.S.C. § 9601(16).

¹¹ 42 U.S.C. § 9607(a)(4)(C).

¹² 42 U.S.C. § 9607(f)(1).

¹³ Charles de Saillan, *Superfund Reauthorization: A More Modest Proposal*, 27 E.L.R. 10201 (1997) ("As with liability for cleanup, liability for natural resource damages is strict, joint, and several").

ELD Bulletin
Page Four

to section 107 of CERCLA for natural resource damages. As noted above, section 107(f)(1) expressly limits to the President or an authorized representative of a State the power to assert a claim for natural resource damages. In *Boonton v. Drew Chemical Corp.*,¹⁴ the court held that governmental subdivisions, such as municipalities, are encompassed within the meaning of “State” or, alternatively, that a municipality is an “authorized representative of a State” and is entitled to bring an action for natural resource damages. The court reasoned that it was proper to expand the definition of “State” to effectuate the remedial purpose of CERCLA.¹⁵ Also, the court pointed out that since the definition of “natural resources” under CERCLA includes property belonging to local governments, it would be anomalous to deny relief to a local government when its natural resources are expressly listed within the protected coverage of section 107(a)(4)(C).¹⁶ The rationale and holding of the *Boonton* court were endorsed by the court in *New York v. Exxon Corp.*,¹⁷ where the court held that the City of New York could bring an action for natural resource damages under section 107(a)(4)(C).

This view was not adopted, however, in *Philadelphia v. Stepan Chemical Co.*,¹⁸ where the court disagreed with the holdings in *Boonton* and *New York*. Relying primarily on the plain meaning of the statute, the court held that political subdivisions are not included in the definition of “State.” The court found no support in the statutory language nor in the legislative history for the holdings in *Boonton* and *New York*. Furthermore, the court in *Bedford v. Raytheon Co.*,¹⁹ agreed with the *Philadelphia* court, noting that, since the decisions of the *New York* and *Boonton* courts, Congress has amended CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 (“SARA”). SARA permits States to appoint natural resources trustees to bring lawsuits seeking natural resource damages. The *Bedford* court stated, “Prior to SARA, a policy-driven, expansive interpretation of the word “State,” designed to include local governments, was the only way a municipality could bring natural resource damages action under CERCLA. In SARA, Congress provided an express means for states to bring natural resource damage actions by permitting the states to designate natural resource trustees.”²⁰ Interestingly, in *Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039 (D.N.J. 1993), Judge Ackerman, the same judge who wrote the *Boonton* decision, was persuaded by the arguments in the *Philadelphia* and *Bedford* decisions and concluded that “the approach of the [Philadelphia court] is the better one. I am, therefore, constrained to retreat from my earlier decision in *Boonton*.”²¹

In conclusion, joint and several liability applies to natural resource damages in the same manner it applies to response actions. Also, a few district courts have extended the definition of “State,” to include municipalities so that local governments can bring a natural resource damages action but with the enactment of SARA, which provides a procedural mechanism for municipalities to bring a natural damages action, the inclusive definition of “State” may no longer be necessary.

¹⁴ 621 F. Supp. 663 (D.N.J. 1985).

¹⁵ *Id.* at 666.

¹⁶ *Id.*

¹⁷ 633 F. Supp. 609 (S.D.N.Y. 1986).

¹⁸ 713 F. Supp. 1484 (E.D. Pa. 1989).

¹⁹ 755 F. Supp. 469 (D. Mass. 1991).

²⁰ *Id.* at 472.

²¹ *Id.*

*Regulation of Oil-Water Separators under
RCRA's UST Regime - MAJ Silas DeRoma*

The imminent approach of the 22 December 1998 underground storage tank (UST) upgrade deadline has prompted several questions regarding oil-water separators. One in particular concerns whether collection tanks for oil isolated by the separator are considered USTs or whether these collection tanks are exempt from the UST regulations. The answer to this question depends on the type of oil-water separator involved and the facts of each particular situation.²²

Underground storage tanks are regulated by the 1984 amendments²³ to the Resource Conservation and Recovery Act (RCRA).²⁴ The implementing regulations for the underground storage tank provisions of RCRA are at 40 C.F.R. part 280.²⁵ Under the regulations, an UST is defined as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground."²⁶ In the preamble to the Final Rule for USTs, EPA acknowledged that the statutory directive in the RCRA amendments was to "establish an UST program 'as may be necessary to protect human health and the environment,'"²⁷ and recognized that the statute provides "some flexibility for the [agency] to concentrate its resources on tanks that pose the greatest potential environmental threat."²⁸ EPA further explained that this flexibility allowed the agency "to define the universe of regulated facilities in a manner that focuses regulatory resources on the tanks posing substantial risk from storage of regulated substances and . . . fosters development of a program that most effectively protects health and the human environment."²⁹

Using this flexibility, the EPA created "regulatory exclusions"³⁰ to exempt four classes of tanks from the UST regulations, one of which was wastewater treatment systems permitted under the Clean Water Act.³¹ The EPA included in the universe of waste water treatment systems "any oil-water separators subject to regulation under either section 402 or 307(b) of the Clean Water Act."³² Most oil-water separators fall into this exemption. By virtue of these exclusions, therefore, if the oil-water separator collection tank is included in a "wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the Clean Water Act (CWA),"³³ the UST regulations are not applied.

²² This article examines this question in terms of the Federal UST program.

²³ Pub. L. No. 98-616, 98 Stat. 3221 (1984). The amendments added Subtitle I (codified at 42 U.S.C. §§ 6991-6991(i)).

²⁴ 42 U.S.C. §§6901-6991(i)(West 1995).

²⁵ Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks, 40 C.F.R. pt. 280 (1996).

²⁶ *Id.* at § 280.12.

²⁷ *Preamble to Final Rule for Underground Storage Tanks, Technical Requirements*, 53 Fed. Reg. 37082 (1988), available in LEXIS, Genfed Library, Allreg Files at *42 [hereinafter Preamble].

²⁸ *Id.*

²⁹ Preamble at *44.

³⁰ The EPA noted that "[u]nlike statutory exclusions, regulatory exclusions may be modified by the Agency in the future should new information show that regulations of an excluded tank type is necessary." Preamble at *42.

³¹ 33 U.S.C. §§ 1251-1387 (West 1995).

³² Preamble at *44.

³³ Preamble at *66. Under the CWA, section 402 imposes National Pollutant Discharge Elimination System (NPDES) permit requirements and section 307(b) imposes Pretreatment Standards upon discharges of pollutants.

ELD Bulletin
Page Six

In some, cases, however, the oil collection tank is located in close proximity³⁴ to the oil-water separator but is not covered by either CWA NPDES permit requirements or pretreatment standards. EPA chose to defer these tanks from the UST regulations. Specifically, the agency deferred from regulation tank systems that treat waste water, but are not subject to section 402 or 307(b) of the CWA.³⁵ Although the EPA did not specifically mention the collection tanks described above, these tanks presumptively are included in the deferred subset of tanks that includes oil water separators for several reasons. First, the regulations envisioned USTs being defined in terms of “tank systems.”³⁶ Second, EPA created the deferral in conjunction with the exclusion for waste water treatment “tank systems.”³⁷ Finally, a “tank system” is defined as an “underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.” Under these criteria, therefore, an oil-water separator with an immediately adjacent collection tank would qualify as a waste water treatment “tank system” composed of an underground storage tank designed to receive and treat an influent wastewater through physical, chemical, or biological methods, and would also include any connected underground piping, underground ancillary equipment, and containment system. In such a situation, the collection tank would be deferred from UST regulation.³⁸

Editor’s Note: Some readers have been unable to access the ELD web page. We regret any inconvenience this may have caused and are working to fix this problem. The web page should be active again by mid-October.

³⁴ In the question that prompted this article, “close proximity” is defined as two or three feet away.

³⁵ Preamble at *44. The tank systems, however, are exempt only from Subparts B through E and G, and are, therefore, subject to all remaining applicable provisions of the UST regulations. Preamble at *46. Furthermore, exclusion and/or deferral of an UST does not excuse noncompliance with other statutes, such as CWA or the Clean Air Act, 42 U.S.C. 7401 - 7671(q) (West 1995).

³⁶ Preamble at *7.

³⁷ Preamble at *42, *46.

³⁸ Thus, in this scenario, the answer regarding UST regulation of the adjacent collection tank under the Federal UST program is “probably not;” however, the more remote the collection tank is from the separator system, the more probable the answer is “yes.”

DoD Policy on Responsibility for Additional Environmental Cleanup after Transfer of Real Property

Background. This policy is instituted within the framework established by land use planning practices and land use planning authorities possessed by communities, and the environmental restoration process established by statute and regulation. The land use planning and environmental restoration processes - two separate processes - are interdependent. Land use planners need to know the environmental condition of property in order to make plans for the future use of the land. Similarly, knowledge of land use plans is needed in order to ensure that environmental restoration efforts are focused on making the property available when needed by the community and that remedy selection is compatible with land use. This policy does not supplant either process, but seeks to integrate the two by emphasizing the need to integrate land use planning assumptions into the cleanup, and to notify the community of the finality of the cleanup decisions and limited circumstances under which DoD would be responsible for additional cleanup after transfer.

Cleanup Process. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 USC 9601 et seq.) and the National Oil and Hazardous Substances Pollution Contingency Plan (NCP, 40 CFR 300) establish the requirements and procedures for the cleanup of sites that have been contaminated by releases of hazardous substances. CERCLA, furthermore, requires that a deed for federally owned property being transferred outside the government contain a covenant that all remedial action necessary to protect human health and the environment has been taken, and that the United States shall conduct any additional remedial action "found to be necessary" after transfer. Within the established restoration process, it is DoD's responsibility, in conjunction with regulatory agencies, to select cleanup levels and remedies that are protective of human health and the environment. The environmental restoration process also calls for public participation, so that the decisions made by DoD and the regulatory agencies have the benefit of community input.

Land Use Assumptions in Cleanup Process. Under the NCP, future land use assumptions are developed and considered when performing the baseline risk assessment, developing remedial action alternatives, and selecting a remedy. The NCP permits other-than-residential land use assumptions to be considered when selecting cleanup levels and remedies, so long as selected remedies are protective of human health and the environment. The U.S. Environmental Protection Agency (EPA) further amplified the role of future land use assumptions in the remedy selection process in its May 25, 1995, "Land Use in the CERCLA Remedy Selection Process" directive (OSWER Directive No. 9355.7-04).

Development of Land Use Plans. By law, the local community has been given principal responsibility for reuse planning for surplus DoD property being made available at Base Realignment and Closure (BRAC) installations. That reuse planning and implementation authority is vested in the Local Redevelopment Authority (LRA) described in the DoD Base Reuse Implementation Manual (DoD 4165.66-M). The DoD Base Reuse Implementation Manual calls for the LRA to develop the community redevelopment plan to reflect the long term needs of the community. A part of the redevelopment plan is a "land use plan" that identifies the proposed land use for given portions of the surplus DoD property. The DoD is committed to working with local land use planning authorities, local government officials, and the public to develop realistic assumptions concerning the future use of property that will be transferred by DoD. The DoD will act on the expectation that the

community land use plan developed by the LRA reflects the long-range regional needs of the community.

Use of Land Use Assumptions in the Cleanup Process. DoD environmental restoration efforts for properties that are to be transferred out of federal control will attempt, to the extent reasonably practicable, to facilitate the land use and redevelopment needs stated by the community in plans approved prior to the remedy selection decision. For BRAC properties, the LRA's redevelopment plan, specifically the land use plan, typically will be the basis for the land use assumptions DoD will consider during the remedy selection process. For non-BRAC property transfers, DoD environmental restoration efforts will be similarly guided by community input on land use, as provided by the local government land use planning agency. In the unlikely event that no community land use plan is available at the time a remedy selection decision requiring a land use assumption must be made, DoD will consider a range of reasonably likely future land uses in the remedy selection process. The existing land use, the current zoning classification (if zoned by a local government), unique property attributes, and the current land use of the surrounding area all may serve as useful indicators in determining likely future land uses. These likely future land uses then may be used for remedy selection decisions which will be made by DoD (in conjunction with regulatory agencies) in accordance with CERCLA and the NCP.

DoD's expectation is that the community at-large, and in particular the land use planning agency, will take the environmental condition of the property, planned remedial activities, and technology and resource constraints into consideration in developing their reuse plan. The February 1996 "Guide to Assessing Reuse and Remedy Alternatives at Closing Military Installations" provides a useful tool for considering various possible land uses and remedy alternatives, so that cost and time implications for both processes can be examined and integrated. Obviously, early development of community consensus and publication of the land use plan by the LRA or the land planning agency will provide the stability and focus for DoD cleanup efforts.

Applicable guidelines in EPA's May 25, 1995, "Land Use in the CERCLA Remedy Selection Process" Directive should be used in developing cleanup decisions using land use assumptions. For a remedy that will require restrictions on future use of the land, the proposed plan and record of decision (ROD) or other decision documents must identify the future land use assumption that was used to develop the remedy, specific land use restrictions necessitated by the selected remedy, and possible mechanisms for implementing and enforcing those use restrictions. Examples of implementation and enforcement mechanisms include deed restrictions, easements, inspection or monitoring, and zoning. The community and local government should be involved throughout the development of those implementation and enforcement mechanisms. Those mechanisms must also be valid within the jurisdiction where the property is located.

Enforcement of Land Use Restrictions. The DoD Component disposal agent will ensure that transfer documents for real property being transferred out of federal control reflect the use restrictions and enforcement mechanisms specified in the remedy decision document. The transfer document should also include a description of the assumed land use used in developing the remedy and the remedy decision. This information required in the transfer documents should be provided in the environmental Finding Of Suitability to Transfer (FOST) prepared for the transfer. The DoD Component disposal agent will also ensure that appropriate institutional controls and other implementation and enforcement mechanisms, appropriate to the jurisdiction where the property is located, are either in-place prior to the transfer or will be put in place by the transferee as a condition of the transfer. If it becomes evident to the DoD Component that a deed restriction or other institutional control is not

being followed, the DoD Component will attempt to ensure that appropriate actions are taken to enforce the deed restriction.

The DoD expects the transferee and subsequent owners to abide by restrictions stated in the transfer documents. The DoD will reserve the right to enforce deed restrictions and other institutional controls, and the disposal agent will ensure that such language is also included in the transfer documents. If DoD becomes aware of action or inaction by any future owner that will cause or threaten to cause a release or cause the remedy not to perform effectively, DoD also reserves the right to perform such additional cleanup necessary to protect human health and the environment and then to recover costs of such cleanup from that owner under the terms of the transfer document or other authority.

Circumstances Under Which DoD Would Return to do Additional Cleanup. A determination may be made in the future that the selected remedy is no longer protective of human health and the environment because the remedy failed to perform as expected, or because an institutional control has proven to be ineffective, or because there has been a subsequent discovery of additional contamination attributable to DoD activities. This determination may be made by DoD as a part of the remedy review process, or could be a regulatory determination that the remedy has failed to meet remediation objectives. In these situations, the responsible DoD Component disposing of the surplus property will, consistent with CERCLA Section 120(h), perform such additional cleanup as is both necessary to remedy the problem and consistent with the future land use assumptions used to determine the original remedy. Additionally, after the transfer of property from DoD, applicable regulatory requirements may be revised to reflect new scientific or health data and the remedy put in place by DoD may be determined to be no longer protective of human health and the environment. In that circumstance, DoD will likewise, consistent with CERCLA Section 120(h), return to perform such additional cleanup as would be generally required by regulatory agencies of any responsible party in a similar situation. Also note that DoD has the right to seek cost recovery or contribution from other parties for additional cleanup required for contamination determined not to have resulted from DoD operations.

Circumstance Under Which DoD Would Not Return to do Additional Cleanup. Where additional remedial action is required only to facilitate a use prohibited by deed restriction or other appropriate institutional control, DoD will neither perform nor pay for such additional remedial action. It is DoD's position that such additional remedial action is not "necessary" within the meaning of CERCLA Section 120(h)(3). Moreover, DoD's obligation to indemnify transferees of closing base property under Section 330 (of the Fiscal Year 1993 Defense Authorization Act) would not be applicable to any claim arising from any use of the property prohibited by an enforceable deed restriction or other appropriate institutional control.

Changes to Land Use Restrictions after Transfer. Deed restrictions or other institutional controls put in place to ensure the protectiveness of the remedy may need to be revised if a remedy has performed as expected and cleanup objectives have been met. For example, the specified groundwater cleanup levels have been reached after a period of time. In such a case, the DoD Component disposing of the surplus property will initiate action to revise the deed restrictions or other institutional controls, as appropriate.

DoD will also work cooperatively with any transferee of property that is interested in revising or removing deed restrictions in order to facilitate a broader range of land uses. Before DoD could support revision or removal, however, the transferee would need to demonstrate to DoD and the regulators, through additional study and/or remedial action undertaken and paid for by the transferee, that a broader range of land uses may be undertaken consistent with the continued protection of human health and the environment.

The DoD Component, if appropriate, may require the transferee to provide a performance bond or other type of financial surety for ensuring the performance of the additional remedial action. The transferee will need to apply to the DoD Component disposal agent for revision or removal of deed restrictions or other institutional controls. Effective immediately, the process for requesting the removal of such restrictions by a transferee should be specified by the disposal agent in the documents transferring property from DoD.

Making those revisions or changes will be considered by DoD to be an amendment of the remedy decision document. Such an amendment will follow the NCP process and require the participation by DoD and regulatory agencies, as well as appropriate public input.

Disclosure by DoD on Using Future Land Use in Remedy Selection. A very important part of this policy is that the community be informed of DoD's intent to consider land use expectations in the remedy selection process. At a minimum, disclosure shall be made to the Restoration Advisory Board (or other similar community group), the LRA (if BRAC) or other local land use planning authority, and regulatory agencies. The disclosure to the community for a specific site shall clearly communicate the basis for the decision to consider land use, any institutional controls to be relied upon, and the finality of the remedy selection decision, including this policy. In addition, any public notification ordinarily made as part of the environmental restoration process shall include a full disclosure of the assumed land use used in developing the remedy selected.

GIFTS TO SUPERIORS UPON DEPARTING STATION

by

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Standards of Conduct Office
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(U)

Introduction.

It's that time of year again when senior officers change their duty station and many retire. When that happens, their subordinates often wish to honor their service to the organization and, if they are retiring, to the Army and the United States. In addition to the ceremonies and other celebrations, gifts of refreshments, food, entertainment, plaques and other remembrances are often involved. These gifts create issues under the *Standards of Ethical Conduct for Employees of the Executive Branch* and the Department of Defense (DOD) *Joint Ethics Regulation* . The following article will help you deal with these gift issues.

What is the General Rule?

The general rule is two-fold. First, employees may not directly or indirectly give gifts to an official superior, or solicit other employees to contribute to or give a gift to an official superior. Second, employees may not accept gifts from employees who are paid less than they are unless there is a personal basis justifying the gift **and** there is no subordinate-official superior relationship between them.

Are There Any Exceptions?

The normal social interaction of the workplace requires these basic rules against gifts to protect junior employees, avoid coercion, and to ensure that senior employees do not abuse their official Government positions for their own gain or that of someone else. However, this same normal social interaction of the workplace requires some exceptions to the rule. These exceptions fall into two basic categories: the general "occasional basis" and the "special, infrequent occasions" exceptions.

Occasional basis: These are the common sense situations, most of which hardly seem to need an "exception." But, with the blanket prohibition, the exceptions are needed so as not to interfere with normal office social interaction. The exceptions are as follows:

- Food and refreshments shared in the office.
- Personal hospitality at home of a type and nature customarily provided by the employee to friends.
- Customary gifts given in connection with receipt of personal hospitality.
- Items, other than cash, with an aggregate market value of \$10 or less on any occasion on which gifts are traditionally given or exchanged.

This means that it is perfectly acceptable to bring a cake to the office, or to bring dishes of food for an office pot luck. Employees may invite their supervisors to dinner at their home (note, however, that under this exception an employee may *not* entertain his or her supervisor at the employee's favorite restaurant). When employees are invited to their supervisor's home for

dinner, they may bring a bottle of wine or flowers. Members of an office may participate in a holiday exchange of gifts as long as no one feels "pressured" to participate.

While the last exception listed above permits employees to give gifts to their bosses for many different types of occasions such as holidays, birthdays and other occasions, we suggest that it be used sparingly. Just because an exception permits a gift does not mean that it is necessarily appropriate, especially in a military environment.

Solicitation of contributions are not permitted under this "occasional basis" exception except for the occasional food and refreshments to be shared in the office among several employees. Accordingly, even though a birthday gift for the boss might be technically permissible, contributions may not be solicited for the gift.

Special, infrequent occasions. This category permits a "gift appropriate to the occasion," and solicitation of contributions in a "nominal amount" from Army employees in "donating groups," in the following two situations:

- Infrequently occurring occasions of personal significance such as marriage, birth of child, or illness (this does not include birthdays or other annual celebrations; it does not include official visits to commands or other organizations by a visiting Army or other DOD dignitary; and it does not include promotions).
- Occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

The latter exception often comes into play within the Department of the Army during the normal summer rotation cycle. Gifts from subordinates upon retirement and permanent change of

station (PCS) are permitted. However, note that a PCS gift is not permitted if the officer is merely moving up in the chain of command; such a "transfer" does not "terminate [the] subordinate-official superior relationship."

DOD has supplemented this rule in the Joint Ethics Regulation (JER) to require that any gift or gifts "appropriate to the occasion" should not generally exceed \$300 in value from any donating group. This general \$300 limit does not include the cost of food, refreshments and entertainment provided to the honoree and his personal guests to mark the occasion for which the gift is given. The JER also defines the "nominal amount" that may be solicited in the way of voluntary contribution as not exceeding \$10.

"Donating group" is not defined. This permits employees to do what make sense under the circumstances. However, they should work with their Ethics Counselor, because if their scheme stretches the limits of credulity, they will not only embarrass themselves, but also the person whom they are trying to honor. For example, it might be appropriate for each brigade to give a gift to a departing division commander (assuming that he is PCS'ing out of the chain of command); but it would be inappropriate for each battalion to give a gift. Similarly, while it might be appropriate for the general's staff group to give her a \$300 gift upon her retirement, it might be inappropriate for each staff section to do so. This does not, however, restrict various staff sections and other groups from presenting framed certificates of honorary membership, simple plaques reflecting the honoree's service, and similar presentation items of little intrinsic value.

There is a "technical" aspect to the DOD rule. If an employee contributes as part of more than one "donating group," the total value of all gifts given by both donating groups normally should not exceed \$300. For example, if the commander's Executive Officer (XO) contributes to both the gift from the staff group and the gift from his former battalion, the total value of the gifts from the staff and that battalion normally should not exceed \$300. This also means that, if the

XO's wife also contributes to the Officers' Spouses Club gift to the departing commander's spouse, the total value of the gifts from the staff and the spouses club may not exceed \$300 **unless** there is in fact a separate and distinct basis for the spouses club gift. For example, perhaps the commander's spouse was the president of the club, and cherished and loved by all the members for his or her good works; in such a case, the gift from the spouses club would be because of the spouse's personal stature within the military community, not just to honor the general's PCS or retirement, *i. e.*, an indirect gift to the departing officer.

Finally, "donating groups" may not band together to buy the departing commander one **large** gift that is intended to circumvent the normal maximum of \$300. For example, a print that costs \$250 paid for by the officers of the command, which is then framed for \$150 by the non-commissioned officers, could be an improper gift. A \$1,500 set of golf club, with bag, balls and other paraphernalia, would be improper even though a number of individual "donating groups" purchased individual parts of the set, none of them exceeding \$300.

Recently, the Department of Defense changed the *Joint Ethics Regulation* to permit the \$300 limit to be exceeded in certain cases for those special occasions where the superior-subordinate relationship is being terminated. However, we do not believe that this is an exception that should be exercised in the normal course of events.. The gift must still be "appropriate to the occasion." We advise and counsel that \$300 is a good test of what is "appropriate."

What to Do if You Receive an Improper Gift?

The obvious answer is to prevent improper gifts in the first place. The departing official should make it known that there are rules concerning gifts and he expects them to be followed. The members of the command should already have received training and other reminders

concerning the rules. The official's Ethics Counselor should be alert to potential problems and provide necessary guidance.

But, what about the gift? There are three options: refuse or return it; pay for it (in full); or accept it on behalf of the Army or the morale welfare fund, as appropriate. Accordingly, if someone received one of the following gifts that were “inappropriate to the occasion,” he or she might direct that a \$500 sword be displayed in the post museum; a \$400 clock might adorn the wall of the enlisted club; a \$1,500 set of golf clubs be returned to the donating group (or the officer might reimburse the donating group); and the \$200 coffee service from the local chamber of commerce might remain with the official's office and be used by his or her successors when they entertain official visitors.

Yes, even the \$200 coffee service mentioned above is improper. The JER \$300 figure is not applicable here because this is not a gift from other employees; rather, it is a gift from an outside source and given because of the employee's official position. Different rules apply to this gift; it exceeds \$20 in value and no other exception would permit the departing official to accept it.

IV. Conclusion.

One would instinctively think that the rules surrounding gifts in the office should be relatively simple. For the most part, they are. However, it's the facts that complicate things. For many different reasons, not all of them necessarily laudable, employees want to give their supervisors or other senior employees gifts. And, although the general rule is no gifts, they work really hard to force their situation into one of the exceptions. You are encouraged to seek the advice of your Ethics Counselor if you have the slightest concern about any gift that is offered to you. Finally, we have often found that departing or retiring general officers or senior employees are not interested in groups collecting money and buying them farewell gifts. In such cases, we

encourage them to issue such guidance to their personnel. Otherwise, before you PCS or retire, we recommend that you seek the advice and counsel of your Ethics Counselor and direct your Ethics Counselor to ensure that your subordinates are aware of the rules.

CONFIDENTIAL CERTIFICATE OF NO NEW INTERESTS (EXECUTIVE BRANCH)

IN LIEU OF ANNUAL OGE FORM 450

This optional form is to be used only by employees of the executive branch (other than special Government employees), in accordance with 5 CFR 2634.905(d). If you have a previous OGE Form 450 on file with your agency and can certify to all of the following statements, your agency may permit you to use this OGE Optional Form 450-A instead of filing an annual OGE Form 450. If you cannot certify to all of the following statements or otherwise do not wish to use this OGE Optional Form 450-A, you must complete a new OGE Form 450 as your annual report. Consult your agency ethics office for more information.

After examining a copy of my last confidential financial disclosure report (OGE Form 450), I certify to the following:

A. NO NEW INTERESTS. Since filing my last OGE Form 450:

1. I have no new reportable assets or sources of income, for myself, my spouse, or my dependent children;
2. Neither my spouse nor I have new reportable sources of income from non-Federal employment;
3. I have no new reportable liabilities (debts), for myself, my spouse, or my dependent children;
4. I have no new reportable outside positions for myself;
5. I have no new reportable agreements or arrangements concerning future, current, or past non-Government employment for myself;
6. I have no new reportable gifts or travel reimbursements for myself, my spouse, or my dependent children.

(For a description of what interests are reportable, see OGE Form 450 and its accompanying instructions, and/or other agency guidance.)

B. NO CHANGE IN POSITION/DUTIES. Since filing my last OGE Form 450, I have not changed jobs at my agency. (The term "changed jobs" includes a new position description or other significant change in duties.)

I certify that the above statements are true, complete, and correct, to the best of my knowledge.

Signature of Employee _____ Date _____

Printed Name _____ Work Phone _____

Position/Title _____ Agency/Unit _____

FOR AGENCY USE

Date received:

Notes:

Reporting Individual's Certification. The signature of reporting individual is a certificate that the interests represented in the attached report are not in conflict is with that individual's official duties.

Supervisor's Certification. I have reviewed the interests reported on this form in light of the duties required by the reporting individual's position. I m satisfied that there no actual or potential conflict of interest. (If remedial action is required or additional explanation is necessary, use reverse side.)

FILERS MUST ATTACH A COPY OF THEIR

FORM

(Check box if comments are continued on reverse side)

OGE OPTIONAL FORM 450-A
U.S. OFFICE OF GOVERN-
MENT ETHICS (4/97)

PRIVACY ACT STATEMENT

Pursuant to Title I of the Ethics in Government Act of 1978 (5 U.S.C. App.) and Executive Order 12674, the Office of Government Ethics regulations at 5 CFR Part 2634, Subpart I, permit the completion of this Certificate of No New Interests in lieu of an annual OGE Form 450, in appropriate cases.

The primary use of this form is for review by Government officials at your agency, to determine compliance with applicable Federal conflict of interest laws and regulations. Additional disclosures of this certificate may be made: (1) to a Federal, State, or local law enforcement agency, if the disclosing agency becomes aware of a violation or potential violation of law or regulation; (2) to a court or party in a court or Federal administrative proceeding, if the Government is a party or in order to comply with a judge-issued subpoena; (3) to a source, when necessary to obtain information relevant to a conflict of interest investigation or decision; (4) to the National Archives and Records Administration or the General Services Administration, in records management inspections; (5) to the Office of Management and Budget during legislative coordination on private relief legislation; and (6) in response to a request for discovery or for the appearance of a witness in a judicial or administrative proceeding, if the information is relevant to the subject matter.

This Certificate of No New Interests is confidential. No member of the public shall have access to it, except as authorized by law.

PENALTIES

Falsification of this certificate may subject you to disciplinary action by your employing agency or other authority. Knowing and willful falsification of the certificate may also subject you to criminal prosecution.

INFORMATION PAPER

AMCCC-G
24 September 1997

SUBJECT: Annual Filing of Confidential Financial Disclosure Reports (OGE Form 450)

1. **PURPOSE:** To provide information on the annual filing of the OGE Form 450.

2. **FACTS:**

a. Who Must File?

(1) Federal employees in the grade of GS-15 and below, or the rank of Colonel and below, with duties involving decision or the exercise of significant judgment concerning:

- (a) contracting or procurement;
- (b) administration of grants, subsidies, or licenses or other Federal benefit;
- (c) regulation or audit of any non-Federal entity; or

(d) other activities which will have a direct and substantial economic impact on a non-Federal entity.

(2) In addition, the DoD *Joint Ethics Regulation* (JER) requires filing of the report by commanders, heads and deputy heads, and executive officers of Army installations, bases, air stations or activities.

(3) The JER excludes certain DoD employees whose procurement responsibilities involve less than \$2,500 per transaction and less than \$20,000 per year, as long as they are not actually employed by a contracting office (*e.g.*, employees who make purchases with the IMPAC credit card). This does not prevent commanders and supervisors from determining that specific individuals in this category should file the form. Being excluded from the filing requirement, however, does not waive any conflicts of interest.

(4) The employee or soldier's immediate supervisor has primary responsibility to determine whether the duties of the position require the incumbent to file a financial disclosure report. If the supervisor is uncertain, he or she should consult with the supporting Ethics Counselor.

(5) The requirement for an incumbent to file a Confidential Financial Disclosure Report should be annotated in the position description (civilian) or support form (military), and should be reflected in job announcements recruiting for the positions.

b. Filing Time.

(1) Employees required to file the OGE Form 450, must file their **annual** report with their ethics official **NLT 30 November** Extensions are available from the HQ, USAMC Ethics

AMCCC-G

SUBJECT: Annual Filing of Confidential Financial Disclosure Reports (OGE Form 450)

Counselors, or the Chief of the Legal Offices at subordinate commands and offices upon written request from the filer. However, plenty of time is provided for filing and extensions should be the rare exception. Those who have not filed by 30 November, with or without an extension, are reported to Headquarters, Department of the Army. Ethics Counselors will normally establish earlier suspense dates (such as NLT 7 November to the supervisor and 14 November to the Ethics Counselor) to help employees to file timely.

(2) Exception: Employees who served less than 61 days in their position during FY 97 do not have to file an **annual** OGE Form 450 Report. But, they must have filed their **new entrant** OGE Form 450 Report within 30 days of assuming their position. Therefore, any employee who assumed a position on or after 2 August 1997 and who filed their **new entrant** report, are not required to file an **annual** report this year.

c. Filling Out the Form (There are lots of instructions in the regulation and on the form; filers should direct questions to their Ethics Counselors. Some helpful hints follow).

(1) Annual reports cover the entire preceding Fiscal Year. Even if an asset was sold or an employment situation terminated, it must be reported if it produced more than \$200 worth of income last year.

(2) Don't forget to report assets of spouse and minor children and the spouse's employment (unless it is Federal employment).

(3) Do **not** report bank accounts, CDs, money market mutual funds, FERS accounts, or U.S. Government bonds or securities.

(4) Merely reporting an account with a E-Trade, or an IRA account with Waterhouse Securities, a 401(k) account with a spouse's employer, or a trust at First National Bank is not sufficient. The filer must report the individual stocks, mutual funds and other investment products that are in these accounts.

(5) The nature of the business of a non-publicly traded stock, partnership, business venture, and similar investment must be fully identified.

(6) If real estate is reported as an investment asset, its location must be reported.

d. Reviewing the Report.

(1) The filer first submits the OGE Form 450 Report to his or her supervisor who ensures that the report is complete and that he or she understands the nature of assets, liabilities, positions, etc. reported by the filer. If there is uncertainty or ambiguity, the supervisor makes further inquiry of the filer.

(3) The supervisor compares the report to the filer's current and anticipated duties to determine whether there might be any potential for a conflict of interest, or other ethical issue.

(4) If the employee reports a financial interest in an AMC contractor or a position with an affinity organization (e.g., President of the local AFCEA Chapter), the supervisor has the employee issue a written notice of his or her disqualification from participating in official matters that affect the financial interests of the contractor or organization.

(5) If the supervisor does not believe that the written notice of disqualification is sufficient, he or she should discuss the matter further with the employee and the Ethics Counselor. Other options include change of duties, divestiture, or resignation.

(6) Once the supervisor is satisfied that there is no issue or that all issues have been resolved, the supervisor signs and dates in the appropriate block on the Report.

(7) Then the Report is filed with the Ethics Counselor (**NLT 30 November**) who does a separate and independent review for the Army before signing and approving the Report for file. The Ethics Counselor will discuss any issues with the filer and/or the filer's supervisor.

e. New Form. Next year, it is likely that employees will have the option of filing a certificate (OGE Optional Form 450A) stating that there has been no change to their previous report and no significant change in their official responsibilities, rather than completing a new OGE Form 450 Report. However, employees using the "no change" certification will be required to attach a copy of their prior OGE Form 450 Report. Accordingly, it is very important that they maintain a copy of this OGE Form 450 Report if they think that they will want to file the "no change" certificate next year.

Mr. Wentink/DSN 767-8003