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***President Clinton Signs Executive Order for Federal Support of Community Efforts
Along American Heritage Rivers - MAJ Allison Polchek***

On 11 September 1997, President Clinton issued Executive Order 13061, Federal Support of Community Efforts Along American Heritage Rivers. This Executive Order can be found at <http://www.epa.gov/rivers>. This Executive Order may have implications for installations under the National Environmental Policy Act (NEPA).

The Executive Order is an initiative to support community-led efforts relating to rivers that spur economic revitalization, protect natural resources and the environment, and preserve historical and cultural heritage. Communities can nominate, and the President will designate, several rivers as American Heritage Rivers. The first designations are expected in early 1998. This designation will commit the Federal government to focus the delivery of resources to support and restore these rivers and their adjacent communities.

Agencies will be required to commit to a policy that will ensure that their actions have a positive effect on the natural, historic, economic, and cultural resources of the designated rivers and communities. The agency will be required to consult with the communities, consider their objectives, and ensure that actions are compatible with the overall character of the community. Installations should use the NEPA process to examine the impact their actions will have on these designated rivers and communities.

***Resource Conservation and Recovery Act (RCRA) Resource Conservation and Recovery
Act (RCRA)
Rulemaking Update - MAJ Lisa Anderson-Lloyd Update - MAJ Lisa Anderson-Lloyd***

Hazardous Waste Identification Rule For Contaminated Media

The Environmental Protection Agency (EPA) issued a notice of proposed rulemaking for the Hazardous Waste Identification Rule for Contaminated Media (HWIR-media) on April 29, 1996.¹ As a part of the reinventing government effort, the rule was intended to streamline Federal rules under RCRA for cleanup of contaminated media and other remediation wastes. The proposed rule was the subject of an EPA and State workgroup that had been attempting to reach consensus on RCRA cleanup reform since 1993. The rule proposed a risk-based "bright line" scheme that would require Federal regulation of wastes with toxicity levels falling above the "bright line" and delegate to States cleanup control for wastes with toxicity levels below the "bright line." Due to opposition to this scheme from both environmentalists and industry, the EPA is considering other options to avoid the contentious issues surrounding the "bright line" proposal. The EPA has just recently decided to abandon the 1996 proposal and finalize only parts of the original proposal.

The EPA plans to focus on a few, more narrowly tailored regulatory changes to hazardous waste cleanup rather than pursue the comprehensive approach of the original HWIR-media proposal. It is likely that the method of distinguishing higher and lower risk contamination by use of the "bright line" scheme has been scrapped. In addition, the EPA will not withdraw the corrective action management regulations as earlier proposed, but will allow them to complement the revised rule. Possible targets of a more focused regulation include: alternative land disposal restriction treatment standards for hazardous contaminated soil; streamlined permitting for cleanup sites; options for remediation piles; and a RCRA exclusion for dredged materials managed under the Clean Water Act or Marine Protection Research and Sanctuaries Act. The EPA expects to finalize the rule in June 1998.

Hazardous Waste Recycling Rule

The EPA Office of Solid Waste has decided not to pursue a comprehensive rulemaking to reform the Federal hazardous waste recycling scheme. Since 1993, the agency has been studying ways to create a simpler, clearer regulatory system for hazardous waste recycling. In late 1996, the EPA began meeting with stakeholders to discuss a draft proposal for rewriting the RCRA definition of solid waste to clarify what materials would be subject to regulation and what materials would be exempt under recycling rules. The draft proposal offered two options for regulating and/or exempting the recycling of secondary materials. Under the "transfer-based" option, material is excluded from regulation if it is recycled "on-site" and meets certain requirements. The "in-commerce" option excludes material based on *how* it is recycled not on *where* it is recycled. These proposals have received widespread opposition from the States, industry, and environmental groups. As with the HWIR-media rule, the EPA has now decided to pursue some narrower regulatory initiatives rather than a wide-ranging reform. The original proposal was expected in early 1998, however, there may be some delay to address the concerns raised and craft the narrow regulatory fixes.

Corrective Action Rulemaking

EPA proposed a regulatory framework for implementing corrective action in July 1990 and issued a revised advanced notice of proposed rulemaking in May 1996.² Since the 1996 proposal, the EPA has been evaluating comments received from the public and working on a set of principles for reforming corrective action through possible legislative effort. The EPA now plans to release a notice of data availability early in 1998 that will incorporate changes suggested through the comment process. It may be that the corrective action rule will not be issued as proposed but will take the form of guidance or restatement of policy. The focus of the reform appears to be on streamlining cleanups without emphasizing the process. The rule would set technical and procedural requirements to expedite cleanups without forcing authorized States to undergo an additional review.

Hazardous Waste Management System: RCRA Post-Closure Requirements

EPA is forecasting the proposal of a rule in the winter or spring of 1998 to address RCRA post-closure requirements. The rulemaking will be an amendment of the regulations in two specific areas. First, the rule will address the necessity of a post-closure permit. Current regulations require a permit for facilities that need post-closure care. In some cases a permit is not appropriate due to the post-closure care being met through other mechanisms such as CERCLA actions or through consent agreements. The proposed change would remove the requirement to have a permit in all cases. States and the EPA Regions would have the flexibility to use other methods of assuring

post-closure care. The second area for amendment is that of State authority for compelling corrective action at interim status facilities. Some States have adopted corrective action authority for sites with interim status; however, it is not a requirement. Under this change, States would be required to adopt as part of their RCRA program the authority to compel corrective action at facilities with interim status permits. The EPA believes this amendment would provide a more consistent implementation of corrective action by the States.

Third Circuit Narrows Plaintiffs= Standing - MAJ Mike Egan

The debate over the role of citizen groups= standing to enforce environmental laws has been re-ignited by a controversial decision handed down by the United States Court of Appeals for the Third Circuit. In *Public Interest Research Group of New Jersey (PIRGNJ) v. Magnesium Elektron, Inc. (MEI)*, the Court of Appeals denied the legal standing of environmentalists to bring a citizen suit under the Clean Water Act¹ (CWA) because, according to the court, the plaintiffs were unable to demonstrate a direct link between MEI=s pollution and harm to the water body in question.

The court=s reversal of the lower court opinion set aside a judgment in excess of two million dollars based on one hundred fifty CWA permit violations. Crucial to the appellate court=s determination was the trial testimony of an expert witness called by MEI who opined that MEI=s permit violations had no impact on the water body. This testimony was not contradicted by PIRGNJ.

For an organization to have standing, a plaintiff-member must show: (1) injury in fact, an invasion of a legally protected interest which is concrete and particularized and actual or imminent; (2) a causal link between the defendant=s conduct and the injury; and (3) the likelihood that judicial relief will redress the plaintiff=s injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Court of Appeals found that unless there was a direct harm to the water body, there could not be a finding that the injury-in-fact prong of *Lujan* had been satisfied.

The implications of this case and its impact on satisfying the injury-in-fact prong of the standing doctrine theoretically can extend beyond the CWA and into other media such as the Clean Air Act (CAA). Future potential plaintiffs may find it more difficult to prove evidence of a direct harm under the CAA. The potential extension of *PIRGNJ v. MEI* has captured the attention of the environmental bar as it winds its way through the appellate process.

Nuclear Regulatory Commission Cites Firms for Violations Involving Transfer of Exit Signs B MAJ Mike Egan

The Nuclear Regulatory Commission (NRC) has issued a press release announcing that it has cited a New York company for a violation of agency requirements involving the transfer and disposal of AEXIT@ signs containing radioactive material. Although there was no fine imposed upon the company, installations involved in either the demolition or disposal of property should be aware and comply with the NRC requirements if they have any of these signs in their inventory.

The signs in question, which are illuminated without electricity, contain Tritium a substance regulated by 10 C.F.R. '31.5. The requirements of this section are not particularly onerous once the holder of these signs becomes aware of them. Primarily, the holder of these devices must

¹ Federal Water Pollution Control Act, 33 U.S.C. '1251 *et seq.*

ensure that original warning labels remain affixed.² Transfers of these devices can only be made when the device remains in that same particular location. In event of transfer, the transferor should provide the new holder copies of the regulatory provisions along with any safety documents provided on the label and notify the NRC within 30 days of transfer.³

The NEPA/NHPA Interface - MAJ Tom Ayres

The United States District Court for the Southern District of New York recently addressed the interface between the National Environmental Policy Act (NEPA)⁴ and the National Historic Preservation Act (NHPA)⁵ in Knowles v. U.S. Coast Guard.⁶ In the case, the plaintiffs alleged that the Coast Guard should have prepared an Environmental Impact Statement (EIS) rather than an Environmental Assessment (EA) when closing the Coast Guard Support Center on Governor=s Island, New York. Among other allegations of error, plaintiffs maintained that the Coast Guard was required to prepare an EIS rather than an EA because one of the alternatives considered in the Coast Guard=s EA would have resulted in significant adverse impacts to historic buildings on Governor=s Island. The court found, however, that production of an EIS was not warranted because the Coast Guard did not choose the alternative complained of and because the Coast Guard=s EA and Finding of No Significant Impact (FONSI) were conditioned upon implementation of mitigation measures. The mitigation measures included completion of standard maintenance measures that formed the basis for the FONSI conclusion that there would be no significant adverse impacts to the island=s historic buildings resulting from the closure of the facility.

The court also addressed the timing between the NEPA process and the NHPA consultation process. The plaintiffs claimed that the Coast Guard violated both the NHPA and NEPA when the Coast Guard issued the FONSI prior to completing consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council for Historic Preservation (ACHP) in accordance with the NHPA and its implementing regulations.⁷ The Court found that the Coast Guard was not required to complete the consultation process before issuing the FONSI. The Court=s finding, however, relies upon the fact that the Coast Guard discussed the publication of the FONSI with the ACHP prior to publication. The Court also noted that the Coast Guard ultimately entered into a Programmatic Agreement with the SHPO and ACHP wherein both the SHPO and ACHP concurred that the action would not significantly adversely impact historic properties. Installation Environmental Law Specialists should note that a FONSI should not normally be published in advance of SHPO and, if appropriate the ACHP, consultation. The installation should work to receive concurrence from the SHPO and, if appropriate the ACHP, that an agency action will not significantly adversely impact historic properties prior to issuing a FONSI.

d. Reg. 18,780 (1996).

d. Reg. 30,798 (1990); 61 Fed. Reg. 8658 (1996).

² 10 C.F.R. ' 31.5(b)(1)

³ *Id.* at 31.5(c)(9)(i)

⁴ National Environmental Policy Act, 42 U.S.C. ' ' 4321-4370d (1997).

⁵ National Historic Preservation Act, 42 U.S.C. ' ' 470 (1997).

⁶ Knowles v. U.S. Coast Guard, No. 96 Civ. 1018 (JFK), 1997 U.S. Dist. LEXIS 3820; 44 ERC (BNA) 2070 (S.D.N.Y. March 31, 1997).

⁷ 36 C.F.R. Part 800: Protection of Historic Properties (1997).

J.S. App. LEXIS 20846, 45 ERC (BNA) 1001.