



Office of Command Counsel Newsletter

June 1998, Volume 98-3

DA EEO Team Building Workshop---EEO, CPO and Legal Cooperation Encouraged!

Many thanks to **Luther L. Santiful**, Deputy for Equal Opportunity Policy, for chairing a very successful DA EEO Team Building Workshop, 19-24 April, in Pittsburgh, Pa. Mr. Santiful focused attention on the aspect of Teamwork by including members of the legal and civilian personnel communities in the planning and execution of the program.

Teamwork Defined

In his welcoming letter to the some 300 attendees, Mr. Santiful stated that "Teamwork is defined as the 'work done by a number of associates with each doing a clearly defined portion but all subordinating personal prominence to the efficiency of the whole'. Our three communities—EEO, Legal and Civilian Personnel, indeed to have separate and distinct responsibilities; however, our collective goal is the same. Together, we must strive to provide a work environment that is free of discrimination with equal opportunities for all employees. Hopefully, this week will provide you with the tools to meet those challenges successfully."

AMC Attorney Presence & Presentations

Highlights included plenary sessions on many important policy developments from the three communities and break out sessions focusing attention on significant issues. AMC attorneys actively participating as attendees included **Kathi Szymanski** and **Paula Pennypacker** from CECOM; **Mike Lassman**, STRICOM; **Sam Shelton**, ARL; **Jack Skeen**, Dugway Proving Ground; and **Jim Gilliam**, Rocky Mountain Arsenal.

AMC attorneys who made presentation were **Cassandra Johnson** on Developing Settlement Agreements and **Steve Klatsky** on Alternative Dispute Resolution.

More information on this important session is contained elsewhere in this Newsletter. ©

The DA Equal Employment Opportunity Vision:

The model employer with a diverse and effective workforce founded upon the principle of equality of opportunity for all.

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President Clinton on ADR:

MEMORANDUM FOR
HEADS OF EXECUTIVE DE-
PARTMENTS AND AGENCIES

SUBJECT: Designation
of Interagency Committees to
Facilitate and Encourage
Agency Use of Alternate
Means of Dispute Resolution
and Negotiated Rulemaking

"As part of an effort to
make the Federal Govern-
ment operate in a more effi-
cient and effective manner,
and to encourage, where pos-
sible, consensual resolution
of disputes and issues in con-
troversy involving the United
States, including the preven-
tion and avoidance of dis-
putes, I have determined that
each Federal agency must
take steps to:

(1) promote greater use of
mediation, arbitration, early
neutral evaluation, agency
ombuds, and other alternative
dispute resolution tech-
niques, and (2) promote
greater use of negotiated
rulemaking."

With these words Presi-
dent Clinton called for an
ADR Working Group com-
prised of the Cabinet Depart-
ments, and other agencies
with a significant interest in
dispute resolution, to facili-
tate and encourage agency
use of alternative means of
dispute resolution.

Specifically mentioned by
the Presidential order are dis-
putes involving personnel,
procurement, and claims.

The Working Group
shall facilitate, encourage,
and provide coordination for
agencies in such areas as: (1)
development of programs that
employ alternative means of
dispute resolution, (2) train-
ing of agency personnel to
recognize when and how to
use alternative means of dis-
pute resolution, (3) develop-
ment of procedures that per-
mit agencies to obtain the
services of neutrals on an ex-
pedited basis, and (4)
recordkeeping to ascertain
the benefits of alternative
means of dispute resolution.

...and ADR on Law Day:

In celebration of Law Day.
Attorney General Janet Reno
sent a letter to all governors
and state attorneys general,
saying: "I believe we have an
obligation to those we repre-
sent and to society as a whole
to serve as peacemakers and
problemsolvers. It is our job
to help resolve disputes in
ways that promote civility,
preserve relationships, and
minimize the burdens on our
court systems. Many ADR
programs serve these pur-
poses admirably".

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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.

Incidental Material: Buying Commercial On A Cost Reimbursable Basis

AMCOM's **Wil Rathbun**, DSN 788-0544, provides an article on incidental material, highlighting the definition, and outlining the AMCOM position supporting the view that commercial material may be purchased on a cost reimbursable basis(Encl 1)

AMCOM support contracts are services contracts not supply contracts. These service contracts can not be used to satisfy all service and supply requirements. Satisfying all requirements for material under support services contract would violate the stringent competition requirement imposed on the Government by the Competition in Contracting Act (CICA), 10 U.S.C. 2304. No list of material is provided under this type of contract for the offerors to bid on. Under CICA, a contracting agency must specify its needs in a manner designed to achieve full and open competition.

Many of the required material items are available in the commercial marketplace. FAR 12.207 requires that

agencies use fixed price contracts to acquire commercial items. AMCOM support service contracts are cost type contracts.

Merely Incidental

The AMCOM rationale supporting the purchase of some commercial material on a cost reimbursable basis is that it is merely incidental to the performance of cost reimbursable services. Therefore, Part 12 of the FAR does not apply. The purchase of commercial items beyond what is considered incidental under support service contracts would violate Title VII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) which Part 12 of the FAR implements.

In order to be considered incidental the material must be secondary or minor in comparison to the services being purchased. The fact that the material is required for the contractor to perform services under the contract does not necessarily make it incidental. If the cost of the material is significant (over 20%) you will need to justify the purchase in writing. ©

List of Enclosures

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5. Overarching Partnering Agreements—CECOM-EDS
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Acquisition Law Focus

Other Transaction Training Summarized

Thanks to SSCOM Intellectual property Counsel **Vin Ranucci**, DSN 256-4510, for providing a summary of training received on the use of Other Transactions (Encl 2). The course was called Cooperative Agreements and Other Transactions, sponsored by the National Contract Management Association (NCMA).

Contracting Based On Agreement

Instead of contracting based on "regulation", we should consider contracting based on "agreement". This is most important if we want to contract with commercial firms which don't deal with the Government very often. Many defense firms are satisfied with our usual "modus operandi" because those

firms are set up to handle our regulations conveniently. However, current emphasis is on dealing with commercial firms because (1) civilian technology is more advanced than military technology; (2) innovative civilian products are introduced rapidly; (3) civilian firms with big R&D budgets don't do business with DoD; and (4) there is a shrinking defense and industrial base. Bottom line: if appropriate, we must contract with these civilian firms with different provisions and conditions than those in our standard FAR/DFARS.

OT's are authorized under 10 U.S.C. 2371 for carrying out basic, applied, and advanced research projects. The paper addresses "things to consider for several different aspects of this important area. ©

Personal Liability for Y2K Certification?

As the millenium gets closer, or at least 1 January 2000, the issue of what happens to computers on that magic date is becoming critical.

One of the first legal issues faced on the Y2K problem concerns personal liability for those General Officers and Senior Executive Service personnel required to certify a computer system as Y2K compliant. **Steve Klatsky**, HQ AMC, DSN 767-2304, has opined that the qualified immunity doctrine should protect those officials who are "acting within the scope" of their government duties.

A GO or SES must certify a computer system as compliant. If the certification is made, but the system goes "haywire"--not the technical term, on 1 Jan 2000, those harmed may bring suit. In this case, we believe that the US will be substituted as the proper party if an individual is a named defendant.

Of course, if there is any doubt as to whether a specific computer system is compliant, no certification should be made, and, we should never coerce an official into certification. ©

**The New AMC
Web Site URL is...
www.amc.army.mil**

Acquisition Law Focus

GAO Rules on three \$\$\$\$ Issue Cases

Lisa Simon, HQ AMC, DSN 767-3117, provides a summary of three recent General Accounting Office decisions on appropriations law issues (Encl 3).

Economy Act

The first decision concerns interpretation of the Economy Act provision on overhead rate billing policies. The Treasury Department's method for computing hourly rates was deemed reasonable and consistent with the statute. The GAO found that agencies "possess some flexibility" in applying these standards.

Equip, Operate & Maintain a Golf Course

The second indirectly relates to the sport of golf, and whether appropriated funds can be used to install a

water pipeline in the face of 10 USC Sec 2246(a) restrictions. GAO ruled that Fort Sam could not, stating that the above statute took precedence over the more general language contained in 10 USC Sec 2866.

The Judgement Fund

The third relates to the use of the Judgement Fund, 31 USC Sec 1304, and whether that fund could be used to pay for the supervision of the court-ordered Teamsters election rerun. In this case, the GAO held that unless the government is directly ordered to pay a sum of money to an identified adverse party, the costs of complying with a court order are not considered payable from the Judgement Fund.

Visit the GAO web site: <http://www.gao.gov>, for these cases and lots more information about the agency. ©

Federal Employees Feel the Change in their Workplace

Federal employees have mixed feelings about changes in the workplace brought about by downsizing and reinvention. Budget cuts and reduced staffing have a negative impact on employee morale and mission accomplishment.

The Merit Systems Protection Board recently published a report revealing that employees think their agency employer has improved productivity as a result of giving employees more flexibility in performing their jobs.

Importantly, those employees working in agencies that have made National Performance Review goals a priority report increased productivity as against those agencies who have not made NPR a priority.

Since a similar study in 1992, employees overall job satisfaction remains at a solid 70%.

Check out the report: *The Changing Federal Workforce: Employee Perspectives*, at www.mspb.gov. ©

**Full AMC Command Counsel
CLE Report in August Issue**

Partnering Workshops at Roadshow VII

Roadshow VII is off to a great start. As this is being written we are in our third whistlestop tour--AMCOM, after successful ventures at STRICOM and TACOM-ARDEC in April.

One of the highlights of the Roadshow are two Partnering Workshops being conducted to expand the use of Partnering throughout AMC.

Contracts Identified

Each AMC major subordinate command has identified two contracts for which they wish to use Partnering. During the Roadshow, AMC has funded the use of a facilitator trained in Partnering and the AMC Partnering Model, to assist the contracting parties to use this excellent tool.

Thus far, we can report great success. The parties attending the Partnering Workshops report that they have benefited by the focus on open and honest communication to create a mission statement, Partnering Charter, identifying goals and objectives, and designing conflict escalation and resolution tools.

Participants report that Partnering builds on existing integrated process team approaches, by the wide variety of tools that characterize the Partnering Workshop.

Lessons Learned

Among the important lessons learned so far is that it is important to extend an invitation to the user community. Participant evaluations indicate that these Partnering Workshops have created a momentum to continue to view enhanced communications as a key to success.

We thank **Harlan Gottlieb**, of STRICOM and **Jerry Williams**, TACOM-ARDEC for the excellent work they did to prepare for the Partnering Workshops.

Ed Korte, introduces Partnering during the first morning executive session, showing the AMC Partnering Videotape, making the AMC Partnering Guide available to attendees, and reviewing the benefits and characteristics of Partnering.

On the last morning, there are report outs on each Partnering Workshop. ©

Education Partnership at AMCOM

As a result of a visit from AMC Commanding General **Johnnie E. Wilson**, AMC has entered into an Education Partnership agreement with Oakwood College. The agreement was entered into under the authority of Public Law 101-510, November 5, 1990, Section 2194 of Title 10, United States Code, as added by Section 247 of the National Defense Authorization Act for Fiscal Year 1991. The purpose of the agreement is to encourage and enhance study in scientific disciplines.

Under this agreement AMCOM is allowed to loan or transfer surplus equipment. Laboratory personnel may also be made available to teach science courses or to assist in the development of science courses and materials for the institution.

As a historically Black college, Oakwood College will receive assistance on a priority basis in accordance with Sections 2194(c) and(d) of Title 10 U.S.C.

Thanks to AMCOM's **Wil Rathbun** for this report. ©

CECOM A Leader In Executing Overarching Partnering Agreements With Industry---A Proven Method for Expanding Partnering

Industry Very Receptive to Future Commitment to Partner

CECOM is in the forefront of a vital means of expanding the use of Partnering throughout AMC—the execution of Overarching Partnering Agreements (OPAs). Appendix C of the AMC Partnering for Success Guide contains an early CECOM OPA, signed with Hughes Aircraft.

CECOM Lead Partnering Champion **Larry Asch** has provided the AMC ADR Manager, **Steve Klatsky**, with other examples of OPAs. We have included the OPA between CECOM and GTE (Encl 4) and CECOM-Electronic Data System Corporation (EDS) at Enclosure 5.

Preamble

The opening preamble to an OPA contains a mutual commitment on the part of the contracting parties: “We, the senior leadership of Team C4IEW&S and (contractor), are firmly committed to the utilization of the Partnering process in the performance and administra-

tion of each of our future contractual endeavors.”

Relationship Goal

Thereafter, the parties recite their underlying relationship goal. “We will serve as the champions for the establishment of positive and proactive relationships between our organizations based upon mutual trust and respect and the replacement of the “us vs. them” mentality of the past with a “win-win” philosophy and partnership for the future and dedicated to the accomplishment of mutually beneficial goals and objectives (i.e., the delivery of the highest quality products/services, on or ahead of schedule, at a reasonable price/profit).”

OPA Objective

The parties then shift to their overriding objective. “Our overriding objective shall always be providing America’s warfighters with the most technologically advanced and highest quality supplies and services in a timely manner in order to pro-

mote the swift, safe and successful accomplishment of their missions.”

Future Focus

The focus of the OPA is on the future as evidenced by this paragraph: “All contracts between Team C4IEWS and (contractor) awarded subsequent to the execution of this Agreement will include an individually designed and tailored Partnering Agreement based upon open, effective and continuous communication and dedicated to successful contract performance, the establishment of a true team spirit, the timely resolution/avoidance of problems, and continuous product and process improvement.”

The parties also commit to resolving issues at the lowest level, designing specific dispute escalation and resolution processes to prevent surprises and program delays.

For more information on OPAs contact **Steve Klatsky**, DSN 767-2304. ©

Labor Organization's Rights & Claims During Privatization

CECOM's **Lea Duerinck**, DSN 992-3188, has provided an outstanding memorandum discussing the possible rights or claims that a labor organization may assert when a determination has been made to privatize a governmental activity (Encl 6).

Specifically, it underscores a labor organization's rights or claims regarding the contracting out determination, impact and implementation rights, and the negotiability of a labor organization's contracting out proposals.

Federal Labor Law

The Federal Service-Management Relations Act, 5 U.S.C. § 7106 *et. seq.* (1998) specifies management rights concerning contracting out determinations. Specifically, it states that "nothing in this chapter [5 U.S.C. § 1701 *et. seq.*] shall affect the authority of any management official of any agency...to make determinations with respect to contracting out." However, this same section also establishes a labor organization's right to negotiate implementation of procedures and appropriate arrangements for employees who are affected

by management's exercise of statutory authority.

A-76 Case Law

In National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989), *cert.denied*, 496 US 936 (1990), the court held that a labor organization lacked standing to bring suit under Circular A-76, and the National Defense Authorization Act. The court held that determinations to contract out work are administrative and not reviewable under APA. The court concluded that nothing in Circular A-76's legislative history seemed to provide any basis to bring a suit to challenge a contracting out determination to protect an employee's job. Accordingly, the court held that the employees did not have standing under APA. Finally, the court rejected the union's claim that it had standing based on its rejected bidder's status (since neither the union nor its members bid on the privatization contract). *Id.* at 1052.

Wrongful Privatization

However, since Cheney, the sixth circuit has held

that the courts may review wrongful privatization cases under APA. Diebold v. U.S., 947 F.2d 787 (6th Cir. 1991), *rehearing denied*, 961 F.2d 97 (1992). In this case the union alleged that the government had wrongfully calculated the cost comparison data in its contracting out determination. The court held that failure to comply with requirements of a cost comparison "could support a claim that the agency was not complying with statutory directives to pursue economy and efficiency and to contract out commercial activities if contracting out will cost less than in house production - the law to be applied." *Id.* at 801-2.

Standing Found

The standing issue has been more recently addressed in National Air Traffic Controllers Association v. Federico Pena, et.al., 944 F. Supp. 1337, (N.D. OH 1996)., where the court ruled that the association had standing under Article III of the Constitution to bring the suit, continuing by outlining what an individual has to demonstrate to show standing. ©

Employment Law Focus

Civilian Personnel Litigation Trends & Lessons Learned

At the DA EEO Team Building Workshop, **Mike Meisel**, Chief, Civilian Personnel Litigation, OTJAG, made an outstanding presentation on several important lessons learned in recent civilian personnel litigation. Among the more significant trends included in the presentation were:

- New lawsuits have doubled since the Civil Rights Act (CRA) of 1991.

- An EEO case takes 3 times longer to resolve if it goes to a jury trial.

- The Army has had 27 jury trials under the CRA of 1991.

- DA is receiving increased pressure to settle from U.S. Attorneys.

- Emphasize the facts more than the law—an unsympathetic manager versus a sympathetic plaintiff can be a costly experience.

- NAF cases are especially scary as they cannot be settled using the judgement fund. ©

The FLRA, Financial Disclosure Statements OGE and Negotiability

The Federal Labor Relations Authority issued an important decision in HUD, 53 FLRA No. 115 concerning an arbitrator's authority in reviewing agency decisions as to whether individual positions are required to file financial disclosure documents. The Authority found that it was subject to the negotiated grievance procedure and arbitration.

The Office of Government Ethics issued a final rule clarifying that the agency review of confidential financial disclosure filing determinations provided at 5 CFR 2634.906 is intended to preclude all further review, including grievance procedures and arbitration. It was effective 6 April.

So, it appears that Authority decision should no longer be followed. ©

MSPB AJ's Testing Bench Decisions

The Merit Systems Protection Board, in still another attempt to streamline operations, has initiated a pilot project that will allow MSPB Administrative Judges to issue bench decisions—oral decisions delivered at the conclusion of a hearing,

In the first such case the AJ called a 15 minute recess after the hearing to collect thoughts and make notes.

Under the Board's proce-

dures, an AJ may issue a bench decision if he or she believes that the issues have been clearly delineated and addressed and is confident that he or she can decide without further review of the record. Additionally, a party may request a bench decision,

The pilot is in effective throughout all Board regional offices and will be in effect through January 1999. ©

Can EEOC Order Agencies to Pay Comp Damages?

The US Court of Appeals for the Seventh Circuit rules that the EEOC lacks authority to award compensatory damages at the administrative stage of EEO complaint processing. The case, Gibson v. Brown, CA7, No.96-3776, March 3, 1998, is at odds with an earlier decision of the Fifth Circuit, Fitzgerald v. Veteran's Affairs, in which the Court stated that administrative agencies, such as EEOC, may award compensatory damages for emotional injury. The Court in Gibson believes that the Civil Rights Act (CRA) of 1991 envisions that once a complaining party seeks compensatory damages, then either party, including the agency-defendant, can demand a jury trial on the issue.

FLRA Forms & Information On the Net

Forms needed to file unfair labor practice charges and representation petitions are now available electronically from the Federal Labor Relations Authority Web Site: www.flra.gov. The site also

The Court concludes by stating that the CRA contains no provision permitting EEOC to order a government agency to pay compensatory damages. Another reason behind the decision is the issue of sovereign immunity. Waiver of sovereign immunity must be explicit, with a waiver defined narrowly. The CRA contains no such waiver as to the awarding of compensatory damages against an agency without a jury trial.

The Gibson decision may be short lived in that there is legislation already introduced to overturn the decision.

The official HQ DA position is that we should follow the EEOC ruling permitting compensatory damage awards at the administrative stage. ©

contains checklists developed for use in negotiability and arbitration appeals, and provides information concerning all areas of FLRA practice. ©

Removal for Drug Use Upheld Despite 35 Year Unblemished Record

Illegal drug use can justify a removal action under a recent Merit Systems Protection Board decision, Patterson v. Air Force, 98 FMSR 5071, Feb 25, 1998. The employee held a drug testing designated position and, as an aircraft mechanic, one in which safety is a critical issue. The fact that he had 35 years of unblemished service did not change the penalty analysis under Douglas. The Board found that deference to the agency's primary discretion in managing its workforce was warranted. Thus, the Board supported the agency contention that a lesser penalty would cause an undue disruption. ©

DA EEO Goals

A work environment free of unlawful discrimination

A work force reflective of our nation's diversity

EEO institutionalized as an integral part of the Army mission

Army EEO professionals who are experts in their field.

Employment Law Focus

Why Teamwork?

During the DA EEO Team Building Workshop there were several presentations highlighting the benefits and essentiality of Teamwork in the labor and employment world. **Mike McClure**, DA Chief of Employee Relations and **Dave Helmer**, DA Chief of Labor Relations made some of the best arguments for Teamwork—with a logical and common sense set of benefits:

○ Teamwork helps the program

○ Lack of Teamwork can hurt a case

○ Teamwork reduces forum shopping

○ Teamwork leads to an improved work product

○ Teamwork maximizes ability to exercise newly delegated authority to create policy

○ If it impacts employees, everybody—Civilian Personnel, EEO and Legal are impacted

○ Commander's want consistency—lack of consistency threatens credibility of all three offices

Take a look at your practice, and your relations with the EEO and CPO offices. Are you a Team? ©

DA Values Highlighted in DA EEO Team Building Workshop

Loyalty: Bear true faith and allegiance to the U.S. Constitution, the Army and other soldiers

Duty: Fulfill your obligations

Respect: Treat people as they should be treated

Selfless Service: Put the welfare of the nation, the Army, and your subordinates, before your own

Honor: Live up to all the Army values

Integrity: Do what's right, legally and morally

Personal Courage: Face fear, danger, or adversity—physical and moral ©

The Cost of Reasonable Accommodation

At the DA EEO Team Building Workshop, Ms. **Dinah B. Cohen**, Director, Computer/Electronic Accommodations Program, TRICARE Management Activity, OSD gave an outstanding presentation on reasonable accommodation. Attorneys commonly hear presentations on this subject concerning legal developments. This presentation underscored the trends in accommodation, including the use of developing technology. Of particular interest is a section on the cost of accommodation:

Cost to Employer

No cost to employer...31%

Between \$1 and \$500...38%

Between \$500 and \$1,000...19%

Between \$1,000 and \$5,000...11%

More than \$5,000...1%

A thought-provoking end to the presentation was this memorable statement: "Access the Possibilities: For American's without disabilities, technology makes things easier. For American's with disabilities, technology makes things possible." ©

Environmental Law Focus

Lingo Speaks...to AMC Ammunition Plant Commanders Preventive Law Philosophy Highlighted

Bob Lingo, AMC Environmental Counsel, periodically speaks to new AMC Ammunition Plant Commanders, to brief them on what are likely to be new areas of responsibility for them. Applicable laws, regulations and DA and AMC policies are thoroughly discussed. More importantly, it expresses to these new commanders that the AMC legal community takes a preventive law approach and that we are available as a resource to assist them to be successful.

In April, Bob spoke to the newly named commanders of Hawthorne, Milan and Radford AAPs. ©

Cleaning Up the Old Range

Comprehensive Safety Policy Adopted

The Department of Defense has developed a proposed Range Rule that identifies a process for evaluating and conducting response actions on closed, transferred, and transferring military ranges. It sets forth a comprehensive process for identifying, evaluating, and addressing military munitions and constituents on these ranges which ensures not only public safety, but also the safety of response personnel. Encl 7 is a summary.

Military Munitions Not Addressed

The proposed Rule does not address the management of military munitions on Active or Inactive Ranges. This will be addressed in a separate policy to be issued by the DoD Explosive Safety Board.

Doing Well by Doing Good... Supplemental Environmental Projects

The EPA has issued a revised, final EPA Supplemental Environmental Projects Policy, published in the May 5, 1998 Federal Register at pages 24796 - 24804. EPA has refined and clarified its interim policy to better assist it in exercising its enforcement discretion to establish appropriate settlement penalties and supplemental environmental projects (SEPs) that secure significant environmental and public health improvements. The final policy is effective 1 May 1998. SEPs are, in many cases, a good way for the Army to reduce monetary penalties, and at the same time conduct beneficial environmental projects. Copies of the policy can be accessed through the Internet at: <http://www.epa.gov/oeca/sep/sepfinal.html>. Environmental attorneys should obtain and retain a copy of this policy. ©

FOSETs: A New Term & Document for Early Transfers

The Department of Defense has recently issued guidance for obtaining the approval of a Governor of a State to transfer DoD real property not on the National Priorities List (NPL) using the new Early Transfer Authority of CERCLA, which allows transfer prior to completion of all necessary remedial action (Encl 8). The process centers on the review and signing of a Finding of Suitability for Early Transfer (FOSET), a new term

and environmental review process for us. The Army will be responsible for preparing the FOSET, even in those cases involving non-BRAC property where the General Services Administration (GSA) is the property disposal agency. Separate guidance is being developed by the U.S. Environmental Protection Agency (EPA) for use of the ETA for property on the NPL. It will require a similar FOSET for NPL properties..^c

What Is In that Cloud of **Smoke?**

Reporting on Waste Munitions Activities--DOD Issues new Guidance

The Department of Defense has issued new Guidance requiring reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA) on munitions activities, including open burning and open detonation. Newlster 98-2 highlighted this issue.

A technical paper prepared by personnel from our own AMC Environmental Quality Division and the Army Environmental Center attempts to explain the complex rules on what is reported, and how (Encl 10).^c

Learning About Things that Glow In the Dark

Our installations and legal offices are becoming increasingly involved with issues concerning radiological materials and waste. The Nuclear Regulatory Commission has increased its oversight of the Army's NRC licensed commodity items, and

has imposed penalties against the license holder for improper management. It's time to learn more about radiological material, its effects, proper disposal, and the law and regulatory program. A list of available, relevant Web sites, compiled by **Robert Lingo** is at Encl 9. .^c

Raising Funds Raises Fundraising Issues

AMC Ethics Counsel **Mike Wentink**, DSN 767-8003, prepared an Ethics Advisory for the HQ AMC workforce, addressing various fundraising issues (Encl 11). The general rule is that we do not engage in fundraising in the Federal workplace, and we do not use our Federal office or position to raise funds whether on- or off-duty. Of course, there are exceptions. The primary ones are: The Combined Federal Campaign (CFC) and Army Emergency Relief (AER). Another exception are *ad hoc* type situations where a group of employees raises money among themselves for their own benefit, when authorized by the head of the organization in consultation with the ethics official (*e.g.*, the fundraisers to support

our annual organization day picnic).

Unless an exception applies, we may not solicit our fellow employees in the workplace for donations to support local schools, scouting activities, other youth programs, church activities, and other good causes. This means that, in the workplace, we may not sell candy, popcorn, cookies, raffle tickets, magazine subscriptions, *etc.* sponsored by these various organizations in an effort to raise money.

Also highlighted in the paper is fundraising outside the workplace—be careful regarding subordinates, and the DOD General Counsel policy regarding gifts to charities rather than specific individuals for special occasion circumstances. ©

Disclosing Nonpublic Information

The nature of the AMC mission often raises the issue of the rules concerning treatment and disclosure of nonpublic information. With the increase of contractor personnel in the Federal workplace it is important to remember that when we discuss it with, or give it to, a contractor employee, we have released it outside the government. HQ AMC Ethics Team Chief **Mike Wentink**, DSN 767-8003, has prepared an Ethics Advisory on this subject (Encl 12).

Statutes

The basic restrictions contained in the Procurement Integrity Act, the Trade Secrets Act and the Standards of Ethical Conduct for Employees in the Executive Branch are defined and outlined. Of growing importance are the rules concerning computer software and the purchase of technical data.

The risk of an improper disclosure includes barring a potential source from competing, having to fix a procurement or starting all over again. ©

Keeping Track of OTJAG Movement During Renovations in the Pentagon

Renovations in the Pentagon have caused many of those we routinely interact with to have their offices change--and their telephone numbers. Thanks to AMC Deputy Command Counsel/ Staff Judge Advocate, **COL**

Bill Adams for passing on a new roster containing current information on each Division with whom AMC attorneys routinely speak; this will keep the lines of communication open (Encl 16). ©

Certificate of Non-Disclosure: Ensuring Knowledge of Rules & Recipient Compliance

Once we decide that it is permissible to release nonpublic information we should not do so without some sort of promise by the contractor and its employee that they will not use or exploit the information in any way other than in furtherance of the contract.

Contract May Include

The contract might already provide for such a promise. If not, you should consider having the contractor employee sign a non-disclosure certification.

Mike Wentink also provides a copy of a sample Certificate of Non-Disclosure (Encl 13) for your consideration and use. The sample has an excellent definition of nonpublic information: includes such information as proprietary information (*e.g.*, information submitted by a contractor marked as proprietary), advanced procurement information (*e.g.*, future requirements, statements of work, and acquisition strat-

egies), source selection information (*e.g.*, bids before made public, source selection plans, and rankings of proposals), trade secrets and other confidential business information (*e.g.*, confidential business information submitted by a contractor).

Informing the Recipient

The recipient is advised as to certain restrictions and promises to abide by these as a condition of receipt. For example, the recipient agrees:

--shall not seek access to nonpublic information beyond what is required for the performance of the support services contract;

--will ensure that his or her status as a contractor employee is known when seeking access to and receiving such nonpublic information from Government employees;

--shall not use or disclose such information for any pur-

pose other than providing the contract support services, and will not use or disclose the information for any personal or other commercial purpose; and

--if recipient becomes aware of any improper release or disclosure of such nonpublic information, he or she will advise the contracting officer in writing as soon as possible.

--the recipient agrees to return any nonpublic information given to him or her pursuant to this agreement, including any transcriptions he or she made of nonpublic information to which recipient was given access, if not already destroyed, upon leaving the contract.

--any unauthorized use, release or disclosure of nonpublic information in violation of this agreement will subject the recipient to administrative, civil or criminal remedies as may be authorized by law. ©

Conflicts of Interest: A Back to Basics Advisory

We use the term "Conflict of Interest" in so many different circumstances that at times it seems that we do not really recall the basics. Simply put, a "conflict of interest" is a situation where an Army employee has a financial stake in the outcome of an official Army matter. But, it can be a daunting task to know and recognize when such a financial stake exists. **Mike Wentink**, DSN 767-8003, and **Alex Bailey**, DSN 767-8004, from the AMC Ethics Team have put together a paper for all HQ AMC employees that they share with you (Encl 14).

The paper addresses stock ownership, mutual funds, financial interests and professional affiliations, spouse and minor children rules, financial disclosure reports and job-hunting.

This excellent overview reminds employees to ask questions and get advice before you act, and that your Ethics Counselor is the best source for protecting yourself. ©

DAIG Concerned About Private Association Relationships

The DA Office of Inspector General recently expressed concerns about the Army's relationships with private associations. **Mike Wentink**, HQ AMC, DSN 767-8003, has shared these findings with the AMC Ethics Counselor community (Encl 15).

Among the important findings:

--Official settings are used frequently to promote PO membership and products.

--There still are cases where leaders serve as PO officers, directors and advisors because they inherited the responsibility from their predecessor in their official position (e.g., all commanders of X Brigade are appointed as President of the ABC Association, and each of the Battalion Commanders have specific jobs with the PO). As a result, they perform their new PO position as part of their official duties. (Note that JER 3-301 prohibits employees from accepting positions with a PO that are based on their official position.)

--Related to the above, Army personnel routinely perform PO business as part of their official duties (e.g., administer, set-up, coordinate, various PO events such as dinners, golf tournaments, bazaars, sporting events, displays, trade shows; tasked to sell souvenirs, raffle tickets, and other items) ... way beyond JER 3-211 support.

--Some installations have full-time AUSA offices operated by active duty personnel on Government time and report to the commander and staff.

--Co-sponsorship guidelines are not followed. Co-sponsorship is abused. More often than not, the Army gets little benefit, and the major benefit is to the PO.

--AUSA receives preferential treatment

--Many installations have established full-time AUSA offices to administer and promote AUSA activities, and these offices report to the commanders and staff.

All MSCs are supposed to be in receipt of the complete DAIG report. ©

Faces In The Firm

Hail and Farewell Goodbye and Best of Luck

HQAMC

The AMC Legal Community lost an outstanding counsel when **Dick Couch** retired in early May. After serving as an enlisted man in the Army, and contract specialist with TACOM, he worked as a procurement attorney at TACOM for several years. Dick then transferred to HQ AMC, later being named Chief, Protest Litigation Group.

For 10 years the group compiled one of the best records defending protests before the General Accounting Office. He was an outstanding representative of AMC, often called to speak on the AMC-Level Protest Program and other related topics.

Litigation is a demanding area and Dick provided exceptional leadership during the era of increasing challenges to contract decisions.

Because of **Dick Couch**, the AMC Protest Litigation Group has an outstanding reputation at HQDA legal and SARDA, and with the GAO.

Dick and his wife Janet have purchased a 100 year old home in the Upper Peninsula of Michigan.

LTC Paul Hoburg has ended his second AMC tour (ATCOM, HQ AMC) and has assumed a position as environmental counsel for US Army Ballistic Missile Defense Organization.

ARL

William E. Eshelman, Patent Attorney, Intellectual Property Law Branch, Office of Chief Counsel, Army Research Laboratory, left Government service to pursue career opportunities in the private industry.

Greetings

ARL

U. John Biffoni is working for the Intellectual Property Law Branch, Office of Chief Counsel, after departing CBDCOM.

AMCOM

Welcome to **ILT Andrew Sinn**, Office of SJA and **ILT Jeffrey Neurauter**, Acquisition Law Division, both arriving in May from the JAG School.

CECOM

Welcome to **1LT Walter Parker** assigned to the Legal Services Branch out of the JAG School.

Awards and Recognition

HQAMC

At the quarterly Office of Command Counsel Town Hall meeting the following special awards and recognition were observed:

Linda Mills: Meritorious Civilian Service Award, for a sensitive civilian personnel case. The nomination was from the DSC for Personnel.

Nick Femino: 25 years of Federal service.

Steve Klatsky: 25 years of Federal service

Cassandra Johnson: 20 years of Federal service.

Promotions

HQ AMC

Bill Medsger has been selected Chief, Business Operations Law Division, which consists of Acquisition Policy and Protest Litigation Branches.

Vera Meza has been chosen as Team Leader of the Protest Litigation Group.

CECOM

Congratulations to **CPT Sandy Bagett**, promoted in April.

INCIDENTAL MATERIAL

Our support contracts are services contracts not supply contracts. These service contracts can not be used to satisfy all of our service and supply requirements. Satisfying all of our requirements for material under our support services contract would violate the stringent competition requirement imposed on the Government by the Competition in Contracting Act (CICA), 10 U.S.C. 2304. No list of material is provided under this type of contract for the offerors to bid on. Under CICA, a contracting agency must specify its needs in a manner designed to achieve full and open competition.

Many of the required material items are available in the commercial marketplace. FAR 12.207 requires that agencies use fixed price contracts to acquire commercial items. Our support service contracts are cost type contracts. A detailed list of the required material would be required for a fixed price contract. Our rationale supporting the purchase of some commercial material on a cost reimbursable basis is that it is merely incidental to the performance of cost reimbursable services. Therefore, Part 12 of the FAR does not apply. The purchase of commercial items beyond what is considered incidental under our support service contracts would violate Title VII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) which Part 12 of the FAR implements.

In order to be considered incidental the material must be secondary or minor in comparison to the services being purchased. The fact that the material is required for the contractor to perform services under the contract does not necessarily make it incidental. If the cost of the material is significant (over 20%) you will need the approval of the contracting officer.

Customers should not be using our support services contracts to satisfy their hardware requirements. We should not be purchasing material under these contracts to allow customers to satisfy their training requirements or to conduct exercises.

The material must be incidental to services purchased under the same contract. We can not use services purchased under other contracts to justify the purchase of material as incidental under this contract, even if the services are in support of the same overall effort or project. When the material is being purchased to establish a future capability the cost of labor purchased prior to the material can not

be used to justify it as incidental. The same labor costs can not be used repeatedly to justify the purchase of material as incidental. For example, you could not use \$1M in labor cost to justify ten separate purchases of \$100K in materials as incidental. The contracting officer will want to know how much has been spent for labor and material for the entire effort. Labor that will be purchased under the contract in the future may be used in some cases to justify the purchase of the material as incidental.

After examining the list of material to ensure that it is incidental, the task will also be reviewed to determine whether it is covered by the scope of contract. We rely upon the technical personnel to tell us where the task falls under the scope of the basic contract. The contract was awarded based on the requirement set out in the basic scope of work. The GAO will review allegations that a contract modification is beyond the scope of the original contract. When determining whether a delivery order issued under an existing contract is beyond the contract's scope of work, the GAO will look to whether there is a material difference between the contract as modified, and the original contract. Lockheed Martin Fairchild Systems, B-275035, January 17, 1997, 97-1 CPD 28; Exide Corporation, B-276988; B-276988.2, August 18, 1997, 97-2 CPD 51.

POC is Will Rathbun, Attorney-Advisor, AMSAM-L-A-E, DSN 788-0544, E-mail is rathbun-wr@redstone.army.mil.

The following is a summary of training received on the use of "Other Transactions". The course was called Cooperative Agreements and Other Transactions and is sponsored by National Contract Management Association (NCMA).

1. Instead of contracting based on "regulation", we should consider contracting based on "agreement". This is most important if we want to contract with commercial firms which don't deal with the Government very often. Many defense firms are satisfied with our usual "modus operandi" because those firms are set up to handle our regulations conveniently. However, current emphasis is on dealing with commercial firms because (1) civilian technology is more advanced than military technology; (2) innovative civilian products are introduced rapidly; (3) civilian firms with big R&D budgets don't do business with DoD; and (4) there is a shrinking defense and industrial base. Bottom line; if appropriate, we must contract with these civilian firms with different provisions and conditions than those in our standard FAR/DFARS.

2. OT's are authorized under 10 U.S.C. 2371 for carrying out basic, applied, and advanced research projects. OT's apply as follows:

- A. OT's for Research
- B. OT's for Prototypes
- C. OT's for "Other"

3. OT's for Research:

A. Things to consider:

(1) This type of OT is for performing basic, applied, and advanced research. DAR-PA suggests that we may define research broadly to include some development.

(2) DoD guidance has not yet been issued, but general guidance is expected soon.

(3) Use an OT when a standard contract, grant or cooperative agreement (CA) is not feasible or appropriate.

(4) To the maximum extent practicable, (a) do not use an OT for research which duplicates research conducted under existing programs, and (b) funds provided by the Government should not exceed the total amount provided by other parties to the OT. Think of Government funding as an investment rather than the purchase of goods and services.

(5). Consider:

(a). Flexibility is permitted with OT's.

(b). Our multiple partners to an OT can perform in a partnership mode rather than as primes and subs.

(c). Minimal Government rights to intellectual property may be appropriate.

(d). Milestones or other methods of payment may be used instead of cost-reimbursement.

(e). For accounting and audits ,no DCAA is required. Use commercial standards.

(f). Virtually no regulations apply. There is freedom of contract.

Since we have virtually no regulations for a safety net, we must know what we want and require from the beginning. This means a team approach including contracts, . program, technical, and legal.

4. OT's for Prototypes:

A. 10 U.S.C. 2371 was enhanced by Section 845 (for DARPA) of the National Defense Authorization Act of 1994, and further by Section 804 (for DoD) so that DARPA and DoD may use OT's for Prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by DoD. This authority applies through 30 Sep 1999 and is to be very broadly interpreted. DARPA broadly defines "weapons", "weapon systems", „prototype", and "prototype projects".

(1). An OT for prototypes is permissible even if a procurement contract is feasible/appropriate.

(2). "Prototype" hasn't been defined by Congress. About the only thing certain about the definition is that a prototype or prototype project is not production. However, what is not production? An OT can be used for a pre-production prototype. A prototype can be more than one.

(3). DARPA defines prototype projects as an end product that reasonably evaluates the feasibility or operational military utility of a concept or system. Additional follow-on development may be required under an OT.

(4). The terms "directly relevant to weapons or weapon systems proposed to be acquired or developed" are broadly interpreted by DARPA. A weapons system can be offensive or defensive. It can include training, simulation, and/or support equipment.

(5). What does a Section 845/804 OT do for us?

(a). Relief from FAR and supplement regulations, i.e., cost accounting and reporting;

(b). Flexibility to use the best practices;

(c). Conducted outside of procurement laws and regulations;

(d). Competition only to the maximum practicable extent; and

(e). The following do not apply - Competition in Contracting Act; Truth in Negotiations Act; Contract Disputes Act; Procurement Protest System; and the Procurement Integrity Act. The Berry Amendment may not apply if it is a procurement regulation requirement.

5. OT's for Other:

These are instruments, other than a procurement contract, grant, CA, OT for research, or OT for prototypes, used to enter into relationships such as bailments, lease arrangements, lease-to-own agreements, etc.

We must get the job done by whatever means is best. If we must use an OT for research, prototype, or other effort, we can't rely on acquisition regulations to require our partner(s) to do things. We must decide what we require and then do our best negotiating to satisfy those needs.

22 May 1998

MEMORANDUM FOR AMC ATTORNEYS

SUBJECT: Recent GAO Appropriations Case Summaries

1. The GAO issued the following three appropriations law decisions this quarter:

a. B-257823, January 22, 1998

Facts: The Federal Mediation and Conciliation Service (FMCS) questioned certain overhead costs charged by Department of Treasury in a series of reimbursable Economy Act agreements. FMCS contended that the overhead costs were unreasonably high, and that, as a result, Department of Treasury's hourly rates were in excess of actual costs as required by 31 USC § 1535(b).

Relevant Conclusion(s): Department of Treasury's method for computing its hourly rates, including relevant costs for non-billable administrative labor-hours, was reasonable and consistent with the Economy Act. Agencies possess some flexibility in applying the Act's actual cost standard to specific situations, so long as there is reasonable assurance that the performing agency is reimbursed for its costs without the ordering or the performing agency augmenting its appropriation. Here, the Department of Treasury reasonably relied on historical data, as well as OPM guidance, and OMB Cir. A-76 to compute the rates, including the costs for non-billable administrative labor-hours.

b. B-277905, March 17, 1998:

Facts: Fort Sam Houston asked whether it could use appropriated funds to install a water pipeline for its golf course, notwithstanding 10 USC § 2246(a) prohibiting the use of appropriated funds to equip, operate, or maintain a golf course. Fort Sam Houston contended that the water pipeline would conserve significant amounts of water in furtherance of 10 USC § 2866 allowing and encouraging the DoD to participate in water conservation efforts.

Relevant Conclusion(s): GAO held that Fort Sam Houston may not use appropriated funds for the golf course water pipeline. The specific prohibition in 10 USC § 2246(a) takes precedence over the more general language in 10 USC § 2866. Rules of statutory construction presume that Congress amends or repeals a statute directly and explicitly.

c. : complying

2. These cases can be found at the GAO s web site: **HYPERLINK**
http://www.gao.gov http://www.gao.gov. I can be reached at (703)
617-3117 if you have any questions about this memorandum.

LISA R. SIMON
Associate CounselAMCCC-

PA

**Overarching Partnering Agreement Between
Team C4IEW&S and GTE Government Systems Corporation**

1. On December 10, 1997 we, the senior leadership of Team C4IEW&S and the GTE Government Systems Corporation (GSC), are firmly committed to the utilization of the Partnering process in the performance and administration of each of our future contractual endeavors.
2. We will serve as the champions for the establishment of positive and proactive relationships between our organizations based upon mutual trust and respect, a "win-win" philosophy and partnership for the future and dedicated to the accomplishment of mutually beneficial goals and objectives (i.e., the delivery of the highest quality products and services, on or ahead of schedule, at a reasonable price).
3. We are committed to the highest ethical and professional standards and the creation of a mutually supportive team-based environment. We believe that our commitment to Partnering will promote synergy, pride in performance, and quality workmanship leading to showcase projects and outstanding contract performance.
4. Our overriding objective shall always be providing America's warfighters with the most technologically advanced and highest quality supplies and services in a timely manner in order to promote the swift, safe and successful accomplishment of their missions.
5. All contracts between Team C4IEW&S and GSC awarded subsequent to the execution of this Agreement will include an individually designed and tailored Partnering Agreement based upon open, effective and continuous communication and dedicated to successful contract performance, the establishment of a true team spirit, the timely resolution/avoidance of problems, and continuous product and process improvement.
6. Immediately after the award of a contract, each of these Government/Contractor Teams will work together to identify and mutually agree upon the particular program's mission, goals and objectives; all potential obstacles to the timely and effective completion of the contract (i.e., "Rocks in the Road"); the establishment of a tiered conflict avoidance/resolution process; and milestones for assessing, on a periodic basis, the Team's success in overcoming these hurdles and successfully accomplishing the program's objectives. Existing contracts between Team C4IEW&S and GSC will each be reviewed to determine the feasibility and potential benefit of incorporating a Partnering Agreement during contract performance.
7. Although we anticipate the development of a tiered conflict avoidance/resolution process, we agree to empower our employees to jointly and expeditiously resolve all problems at the lowest possible level.

8. We agree to consider use of Alternative Dispute Resolution techniques to the greatest extent possible in order to facilitate the timely resolution of disputes and reduce the necessity for litigation.

9. It is recognized that notwithstanding the objectives of this Agreement, it shall not be used as a vehicle for the dissemination or exchange of any competition sensitive, source selection or proprietary information or for the premature or unilateral release of acquisition-related information prior to its publication to industry in general.

10. Neither this Overarching Partnering Agreement nor any Partnering Agreement(s) entered into between Team C4IEW&S and GSC shall be used to alter, supplement, or deviate from the terms of the contract(s). Any changes to the contract(s) must be ordered in writing by the Contracting Officer in accordance with and as provided under the terms of the contract.

11. Team C4IEW&S and GSC will share the costs associated with the implementation of the Partnering process as set forth in the individual Partnering Agreements executed pursuant to this Agreement.

12. We agree to discuss the status of Partnering initiatives between Team C4IEW&S and GSC on a quarterly basis, commencing in April 1998, in order to reinforce the Partnering commitment, share and build upon significant accomplishments, and identify and eliminate any perceived barriers to future success.

13. This Agreement does not waive or obviate any legal or equitable right or remedy or create any legally enforceable duties.

Armen Der Marderosian
Senior Vice President
Technology and Systems
GTE Corporation

GERARD P. BROHM
Major General, USA
Commanding
U. S. Army Communications-Electronics
Command and Fort Monmouth

DAVID R. GUST
Major General, USA
Program Executive Officer
Intelligence, Electronic Warfare
and Sensors

STEVEN W. BOUTELLE
Brigadier General, USA
Program Executive Officer
Command, Control and Communications
Systems

Overarching Partnering Agreement Between
Team C4IEWS and Electronic Data System Corporation
March 23, 1998

1. We, the senior leadership of Team C4IEW&S and Electronic Data System Corporation (EDS), are firmly committed to the utilization of the Partnering process in the performance and administration of each of our future contractual endeavors.
2. We will serve as the champions for the establishment of positive and proactive relationships between our organizations based upon mutual trust and respect and the replacement of the "us vs. them" mentality of the past with a "win-win" philosophy and partnership for the future and dedicated to the accomplishment of mutually beneficial goals and objectives (i.e., the delivery of the highest quality products/services, on or ahead of schedule, at a reasonable price/profit).
3. We are committed to the highest ethical and professional standards and the creation of a mutually supportive team-based environment. We believe that our commitment to Partnering will promote synergy, pride in performance, and quality workmanship leading to showcase projects and outstanding contract performance.
4. Our overriding objective shall always be providing America's warfighters with the most technologically advanced and highest quality supplies and services in a timely manner in order to promote the swift, safe and successful accomplishment of their missions.
5. All contracts between Team C4IEWS and EDS awarded subsequent to the execution of this Agreement will include an individually designed and tailored Partnering Agreement based upon open, effective and continuous communication and dedicated to successful contract performance, the establishment of a true team spirit, the timely resolution/avoidance of problems, and continuous product and process improvement.
6. Immediately after the award of a contract, each of these Government/Contractor Teams will work together to identify and mutually agree upon the particular program's mission, goals and objectives; all potential obstacles to the timely and effective completion of the contract (i.e., "rocks in the road"); the establishment of a tiered Conflict Escalation Procedure; and milestones for assessing, on a periodic basis, the Team's success in overcoming these hurdles and successfully accomplishing the program's objectives. Existing contracts between Team C4IEWS and EDS will each be reviewed to determine the feasibility and potential benefit of incorporating a Partnering Agreement during contract performance.
7. Team C4IEWS and EDS anticipate the development of a tiered Conflict Escalation Procedure wherein our employees will be empowered to jointly and expeditiously resolve all problems at the lowest possible level.
8. In the event an issue cannot be resolved through the Conflict Escalation Procedure, Team C4IEWS and EDS shall use Alternative Dispute Resolution techniques the greatest

extent possible in order to facilitate the timely resolution of disputes and eliminate the necessity for litigation.

9. It is recognized that notwithstanding the objectives of this Agreement, it shall not be used as a vehicle for the dissemination or exchange of any competition sensitive, source selection or proprietary information or for the premature or unilateral release of acquisition-related information prior to its publication to industry in general.

10. Any Partnering Agreement(s) entered into between Team C4IEWS and EDS shall not be used to alter, supplement or deviate from the terms of the contract(s) and the legal rights and obligations of the parties set forth therein. Any changes to the contract(s) must be executed in writing by the Contracting Officer.

11. Team C4IEWS and EDS will share the costs associated with the implementation of the Partnering process as set forth in the individual Partnering Agreements executed pursuant to this Agreement.

12. We agree to discuss the status of Partnering initiatives between Team C4IEWS and EDS on a semiannual basis, commencing in September 1998, in order to reinforce the Partnering commitment, share and build upon significant accomplishments, and identify and eliminate any perceived barriers to future success.

13. This Agreement does not create any legally enforceable rights or duties. It formalizes the commitment of Team C4IEWS and EDS to use the Partnering process in the performance and administration of current and future contractual efforts.

Mr. Albert J. Edmonds
President, Military Systems
Electronic Data Systems
U. S. Army Communications-Electronics

Command and Fort Monmouth

GERARD P. BROHM
Major General, USA
Commanding

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MEMORANDUM FOR Chief Counsel

SUBJECT: A Labor Organization's Rights & Claims During Privatization

1. The purpose of this memorandum is to discuss the possible rights or claims that a labor organization may assert when a determination has been made to privatize a governmental activity. Specifically, it shall address a labor organization's rights or claims regarding the contracting out determination, impact and implementation rights, and the negotiability of a labor organization's contracting out proposals.

2. It is well established that management has the statutory authority to make substantive contracting out determinations. Such determinations have occasionally been challenged by labor organizations, either through the federal courts or before the Federal Labor Relations Authority (hereinafter "FLRA"), often on the basis that an agency has failed to comply with applicable laws pertaining to privatization. Whether federal courts have jurisdiction over such issues or whether labor organizations have standing to bring such suits is not yet resolved. More frequently, labor organizations will request to negotiate contracting out proposals on the basis of their impact and implementation rights due to changes affecting conditions of employment. Generally, these proposals will be considered appropriate for negotiation provided they do not excessively interfere with management rights. Therefore, it is likely that after a determination has been made to privatize there will be a request from a labor organization to negotiate some impact and implementation matters. A discussion of these issues follows.

3. The Federal Service-Management Relations Act, 5 U.S.C. § 7106 *et. seq.* (1998) (hereinafter "Mgmt. Relations Act"), specifies management rights concerning contracting out determinations. Specifically, it states that "nothing in this chapter [5 U.S.C. § 1701 *et. seq.*] shall affect the authority of any management official of any agency...to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B) (1998) However, this same section also establishes a labor organization's right to negotiate implementation of procedures and appropriate arrangements for employees who are affected by management's exercise of statutory authority. The section states that "[n]othing in this section shall preclude any agency and any labor organization from negotiating...procedures which management officials of the agency will observe in exercising any authority under this section; or appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b)(2)-(3) (1998) Furthermore, the Mgmt. Relations Act stipulates "the duty to bargain in good faith (by both parties), shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." 5 U.S.C. § 7117 (1998) Finally, the Mgmt. Relations Act defines a grievance as "any complaint...by an employee, labor organization or agency concerning...any claimed violation, misinterpretation or misapplication of army law, rule or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9) (1998).

4. The majority of cases which involve disputes between government agencies and labor organizations have centered upon the application of procedures under Office of Management and Budget Circular A-76 (hereinafter "Circular A-76"), which pertains to the Commercial Activities Program. Although Circular A-76 is not being used for privatization in the present privatization matter, the Circular A-76 cases are still important since many of the issues raised are applicable to the present situation. The Mgmt. Relations Act established that the substantive determination

to contract out is clearly within the purview of management, and is solely within management's discretion. However, labor organizations have sought to challenge such determinations via negotiated grievance procedures, discussed *infra*, or by direct appeal to the federal courts under the Administrative Procedure Act (hereinafter "APA") 5 U.S.C. § 701 *et. seq.* (1988).

5. In National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989), *cert. denied*, 496 US 936 (1990), the court held that a labor organization lacked standing to bring suit under Circular A-76, and the National Defense Authorization Act. The court held that determinations to contract out work, are administrative, and are not reviewable under APA. Applying a "zone of interest" test, the court held that the purpose of Circular A-76, ((based upon its analysis of the Office of Federal Procurement Policy Act Amendments of 1979, as amended 41 U.S.C. § 401-420 (1998), and the Budget and Accounting Act of 1921, as amended 31 U.S.C. § 101 *et. seq.* (1998)), was to rely on the private sector and to be economical. *Id.* at 1050. The court concluded that nothing in Circular A-76's legislative history seemed to provide any basis to bring a suit to challenge a contracting out determination to protect an employee's job. Furthermore, the court held that the purpose of Circular A-76 was to promote efficiency within government service, not to protect government jobs. This purpose directly conflicted with the employees' interest of retaining their jobs. *Id.* Therefore, the court concluded that Circular A-76's purpose was outside the "zone of interest" of the employees. *Id.* Accordingly, the court held that the employees did not have standing under APA. Finally, the court rejected the union's claim that it had standing based on its rejected bidder's status (since neither the union nor its members bid on the privatization contract). *Id.* at 1052. It should be noted that another decision held that the Service Contract Act, 41 U.S.C. § 351 *et. seq.* (1998), also may not be used by labor organizations to assert standing. National Maritime Union of America, et. al. V. Military Sealift Command, et.al, 824 F.2d 1228 (D.C. Cir. 1987).

6. However, since Cheney, the sixth circuit has held that the courts may review wrongful privatization cases under APA. Diebold v. U.S., 947 F.2d 787 (6th Cir. 1991), *rehearing denied*, 961 F.2d 97 (1992). In this case the union alleged that the government had wrongfully calculated the cost comparison data in its contracting out determination. The court concluded that the matter may be reviewable in court under APA since a privatization decision would be an agency action within the meaning of APA. *Id.* at 787. The court acknowledged that when no law exists, an agency action "is considered committed to agency discretion." *Id.* The court stated:

[t]o decide this wrongful privatization case, we look first to the general procurement statutes, then to the statute dealing with DoD contracting-out and finally to the regulations issued pursuant to these statutes as sources of law and examine whether they create 'law to apply' and provide standards against which a court may judge whether an agency has complied with applicable law. *Id.* at 793.

The court held that failure to comply with requirements of a cost comparison "could support a claim that the agency was not complying with statutory directives to pursue economy and efficiency and to contract out commercial activities if contracting out will cost less than in house production - the law to be applied." *Id.* at 801-2. The court concluded that "wrongful privatization cases under procurement statutes and regulations like Circular A-76 are basically accounting cases. Courts have long dealt with disputes that required an accounting of one party or the other. Otherwise the cases are like other administrative review cases...Faulty cost comparisons, whether favoring bidders or in-house estimates, are contrary to the legislation governing procurement decisions." *Id.* at 810. Therefore,

the court held since there are statutes and regulations regarding contracting out or privatization and thus "there is law to apply" and these actions are reviewable under APA. Id. Cheney was not addressed by the court because it did not reach the issue of whether there the labor organization had standing and remanded this determination to the lower court. Id. The court's failure to discuss Cheney is discussed at length in the dissenting opinion. Id. at 811-813 (Wellford, J., dissenting)

7. The standing issue has been more recently addressed in National Air Traffic Controllers Association v. Federico Pena, et.al., 944 F. Supp. 1337, (N.D. OH 1996). The labor organization alleged the government violated the Circular A-76 because of the following reasons: the government was contracting out an inherently governmental function; impairing the national defense by giving up air traffic control responsibilities; improperly waiving a cost comparison; and failing to meet the cost/benefit requirements of the Circular A-76. The plaintiffs sought a declaration that the privatization decision was unlawful, as well as an injunction against implementation of the privatization. The court held that the association had standing under Article III of the United States Constitution to bring this issue before it. The court did not address whether it had the authority to review the decision. To establish standing the court held an individual plaintiff must demonstrate:

- (1) that he or she has suffered an "injury in fact";
- (2) that there is a causal connection between the injury and conduct complained of; and
- (3) that it is likely that the injury will be redressed by a favorable decision. Id. at 1342.

Additionally, an organization of such individuals suing on behalf of its members must meet these additional requirements; they must demonstrate:

- (a) its members would otherwise have standing to sue in their own right;
- (b) the interests it seeks to protect are germane to the organization's purpose; and
- (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. Id. at. 1346.

In Pena, the court found that the labor organization met all such requirements. Additionally, the court found that even though some members may have not lost their jobs yet, the loss of their jobs was "impending" and therefore the issue did not fail the test of ripeness. Id. at 1347. Based on the foregoing the Court ruled that the labor organization had standing to challenge an agency's contracting out determination.

8. Although the cases brought before the federal court were based on Circular A-76 contracting out determinations, these cases may still be relevant to non-Circular A-76 privatization determinations. The cases above discussed whether the federal courts had jurisdiction over wrongful contracting out determinations, as well as whether labor organizations had standing to bring such actions. If a labor organization may argue that the manner in which an agency complied with Circular A-76 was incorrect, then it is likely that a labor organization may argue that the failure to use Circular A-76, the Commercial Activities Program, is itself a violation of law and thus a wrongful privatization. Therefore, there is a risk that a labor organization may request review by the federal courts of a non-Circular A-76

privatization action, as well as an injunction to prevent such privatization. Additionally, the attempts by labor organizations, discussed *infra*, to contest contracting out determinations via the provisions of the Mgmt. Relations Act, should also be considered as a potential avenue where labor organizations may attempt to contest such determinations.

9. Another basis that labor organizations have used to contest contracting out determinations is to base their claims on the Mgmt. Relations Act provisions. These provisions provide that the union has bargaining rights and that the union may "grieve violations, misinterpretations or misapplications of any law, rule or regulation affecting conditions of employment." 5 U.S.C. § 7121 (1998). One of the most important cases in this area is Dept. of the Treasury, IRS v. FLRA, 494 US 922 (1990), which dealt with a union proposal to use its negotiated grievance procedure as the Circular A-76's administrative appeals process. The IRS refused to bargain over this proposal claiming its subject matter was nonnegotiable because it was a management right. 5 U.S.C. § 7106 (1998). This proposal would have allowed contracting out determinations to be contested on the basis of grievance and arbitration provisions, rather than the required administrative appeals procedure which the Circular A-76 requires agencies to establish. The FLRA argued that bargaining rights regarding conditions of employees were not "trumped" by the management rights provisions of the Act. The Supreme Court held that the FLRA's position was "flatly contradicted by the language of § 7106(a)'s command that 'nothing in this chapter,'... nothing in the entire Act--shall affect the authority of agency officials to make contracting out determinations in accordance with applicable laws. Section § 7121 (Grievance Procedures) is among the provisions covered by that italicized language." Id. at 1627. The court further held that "section 7106A(a) says that insofar as union rights are concerned, it is entirely up to the IRS whether it will comply at all with Circular A-76's cost comparisons requirements, except to the extent that such compliance is required by an 'applicable law' outside the Act." Id. at 1629. The FLRA argued that Circular A-76 was an "applicable law" as referenced in § 7106(a)(2) so management was not excused from negotiating over grievance procedures. However, the court did not decide whether Circular A-76 was an applicable law, but instead remanded the decision to FLRA. Id. at 1629. Also, the court chose not to rule on whether the union's proposal was "inconsistent with the 'no arbitration language' in OMB Circular A-76 and therefore was nonnegotiable under § 7117" providing that the bargaining duty does not extend when it is inconsistent with Government-wide rules or regulations and federal law. Id.

10. Upon remand to the FLRA, in NTEU and Dept of Treasury, IRS, 42 FLRA 377 (1991), *enforcement denied*, Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993), the FLRA concluded that Circular A-76 was an "applicable law" and therefore was an appropriate matter for negotiation. This issue was once again revisited in the federal courts in Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. 1993). The court stated that "Employees...could challenge management's contracting-out authority only by seeking to enforce applicable laws." Id. at 1248. The court chose not to examine whether Circular A-76 was an applicable law, but instead stated that "assuming *arguendo*, the Circular is an applicable law, it is also a government-wide rule or regulation under section 7117(a) of the Act....This section exempts from the duty to bargain any proposal inconsistent with a government-wide rule or regulation." Id. at 1250. The court further stated:

We hold that if a government wide regulation under section 7117(a) is itself the only basis for a union grievance - that is, if there is no pre-existing legal right upon which the grievance can be based and the regulation precludes bargaining over its implementation prohibit grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation.

When the government promulgates such a regulation it will not be hoisted on its own petard...Unlike the exemption in the management's rights section, the government-wide regulation exception to an agency's obligation to bargain is not conditioned by the need to bargain over 'appropriate arrangements.'" See 5 USC § 7117(a), Id. at 1252.

Therefore, the Court held that compliance with Circular A-76 is not a negotiable right under grievance procedures. The FLRA would eventually come to the same decision in AFGE Local 1345 and Dept. of Army, Fort Carson, 48 FLRA 1668 (1993). Specifically, the court held that the FLRA "adopt the Court's (previous decision in Dept. of Treasury, IRS v. FLRA) that Circular A-76 is a Government-wide regulation and that proposals subjecting disputes over compliance with the Circular to resolution under a negotiated grievance procedure are nonnegotiable. Previous decisions to the contrary will no longer be followed." Id. at 168.

11. One of the most important rights that a labor organization may assert concerning a contracting out determination are its impact and implementation rights. In Fort Carson, it was stated that these rights may not unnecessarily interfere or impose substantive limitations on management's right to contract out. Id. A labor organization may argue that a contracting out proposal is negotiable as an implementation, 5 U.S.C. § 7106(b)(2) (1998) or as an appropriate arrangement, 5 U.S.C. 7106(b)(3) (1998), for adversely affected employees. When examining proposals the court will examine whether they "establish substantive criteria governing the exercise of a management right which directly interferes with the exercise of that right." Id. The FLRA "has held when an agency makes a change affecting conditions of employment, even when it is privileged to make such a change, it is obliged to notify and, upon request, bargain with the collective bargaining representative of its employees concerning the impact and implementation change, when the foreseeable impact upon the unit employees is more than *de minimis*." Dept. of the Army, et. al. v. NAGE Local R14-22, 1991 FLRA Lexis 386 (1991). When there is a right to negotiate the impact and implementation rights of a contracting out determination a labor organization must be given adequate prior notice. Id. The test for determining whether a proposal is an appropriate arrangement is whether the arrangement "excessively interferes with the exercise of management's rights." NAGE Local R14-87 & Kansas Army National Guard (KANG), 21 FLRA 24 (1986). The court further stated:

In order to address this threshold question (whether the proposal is intended to be an arrangement) the union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. In other words, a union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right or rights. Id.

To determine whether the arrangement excessively interferes with management rights, the Authority shall examine such factors as:

- (1) What is the nature and extent of the impact experienced by the adversely affected employees, that is, what conditions of employment are affected and to what degree ?
- (2) To what extent are the circumstances giving rise to the adverse effects within an employee's control ?...

(3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved? ...

(4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement ?...and

(5) What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved? Id.

These factors are not considered "all-inclusive." Id. Instead, "the totality of facts and circumstances" and relevant and appropriate considerations shall also be examined. Id.

For example, using such a test the Board has found that prohibiting management from contracting out for a period of one (1) year after the effective date would excessively interfere with management rights. Additionally, many aspects of the Reduction-In-Force process associated with contracting out determinations are negotiable. Dept. of Air Force v. NAGE Local R7-23, et. al., 35 FLRA 844 (1990).

12. Implementation rights concern the procedures which management officials may use when exercising their rights. Two tests, the use of which is dependent upon circumstances, are generally applied in regards to implementation rights: the "Acting At All" and "Direct Interference Test." The "Acting At All" test applies if a proposal is "purely procedural" and "looks to the agency's ability to act under a given proposal of a labor organization. If the agency is not prohibited from 'acting at all,' then it is possible the proposal does not affront the agency's exclusive management rights." Dept. of Interior v. FLRA, et. al., 873 F.2d 1505 (D.C. Cir. 1989) at 1507. The test for "Direct Interference" is whether the proposal directly interferes with an agency's exercise of its management rights. Dept of the Army. v. FLRA, et. al., 890 F.2d 467 (D.C. Cir. 1989). For example, a union proposal allowing an employee to provide documentation regarding legitimate use of drugs to the agency was considered negotiable and did not directly interfere with management's rights. Id.

13. Therefore, at a minimum, it is highly likely that the labor organization will request to negotiate certain proposals involving contracting out implementation and impact rights. In particular, it is likely that the labor organization will request to negotiate any resultant reductions in force caused by the contracting out determination and the manner in which they are conducted. For instance, the labor organization may request such things as negotiating the competitive area or retraining to be used in the reduction in force. Furthermore, as discussed below, the union may refer to its Collective Bargaining Agreement to enforce certain rights.

14. The Collective Bargaining Agreement between USAMC Central Systems Design Activity and the National Federation of Federal Employees, Local 1763, dated January 1990, contains some provisions which relate to "contracting out." Specifically, Article II, Management Rights and Obligations, Sec. 2, provides that the Employer has the right "to make determinations with respect to contracting out." This language basically mirrors the language of the Mgmt. Relations Act. Additionally, in Article XXVI, Sections 1-4, "Commercial Activities Program," the employer agrees to provide written notification to the Union when considering contracting out work currently performed by employees, as well as to provide briefings and consider the union's views and recommendations prior to proceeding with a contracting out decision. Furthermore, under this section, the union may request negotiation regarding the employees' reassignment and retraining to

minimize adverse impact. Finally, the union is allowed to present its views regarding any commercial activities cost studies. While the privatization in the present matter may not be under the auspices of the Commercial Activities Program, there is some risk that the union may attempt to use these provisions in any contracting out determination.

15. Point of contact for this memorandum is Lea E. Duerinck, AMSEL-LG-B, Ext. 23188.

Lea E. Duerinck
Attorney Advisor

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 evaluating and conducting response actions on closed, transferred, and transferring military ranges. The regulation addresses 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 1999.

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 included 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.

MEMORANDUM FOR DEPUTY UNDER SECRETARY OF DEFENSE
(ENVIRONMENTAL SECURITY)
DEPUTY UNDER SECRETARY OF DEFENSE
(INDUSTRIAL AFFAIRS AND INSTALLATIONS)
ASSISTANT SECRETARY OF THE ARMY
(INSTALLATIONS, LOGISTICS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE NAVY
(INSTALLATIONS AND ENVIRONMENT)
ASSISTANT SECRETARY OF THE AIR FORCE
(MANPOWER, RESERVE AFFAIRS, INSTALLATIONS AND
ENVIRONMENT)
DIRECTOR, DEFENSE LOGISTICS AGENCY (D)

SUBJECT: Environmental Review Process to Obtain the Finding of Suitability Required for
Use of Early Transfer Authority for Property Not on the National Priorities List

The attached guidance establishes the process and documentation for obtaining approval from the Governor of a State to transfer DoD real property not on the National Priorities List (NPL) to a non-federal entity prior to completion of all necessary remedial action, and is effective immediately.

The authority to transfer property to a non-federal entity prior to completion of all necessary actions is contained in section 120(h)(3)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 USC 9620(h)(3)(C)). It is DoD policy that this authority be used to the maximum extent possible, upon a request by transferee, when doing so is beneficial both to DoD and the transferee. Use of this authority is not appropriate for transfers where the performance of cleanup and reuse activities will likely result in exposure to CERCLA hazardous substances above permissible levels, or where DoD would be assuming additional liability due to the early transfer. Although this authority allows property to be transferred prior to completion of required environmental cleanup, CERCLA continues to place primary cleanup responsibilities on the Component unless the transferee assumes these obligations. I ask for your support in implementing this policy and working with communities so that they can make informed decisions regarding use of this authority.

Attachment

**DoD GUIDANCE ON THE
ENVIRONMENTAL REVIEW PROCESS REQUIRED TO OBTAIN THE FINDING OF
SUITABILITY FOR USE OF EARLY TRANSFER AUTHORITY FOR PROPERTY
NOT ON THE NATIONAL PRIORITIES LIST
AS PROVIDED BY CERCLA SECTION 120(h)(3)(C)**

PURPOSE

This document provides guidance to the Department of Defense (DoD) Components on the process and documentation needed to obtain the environmental finding of suitability required for the early transfer of DoD property. Section 120(h)(3)(C) of CERCLA, commonly known as “Early Transfer Authority” (ETA), authorizes the deferral of the covenant that requires all necessary remedial action to be completed before federal property is transferred. Section 120(h)(3)(C) is included at the end of this guidance for information. Please note that ETA is not a conveyance authority; an existing conveyance authority, such as an economic development conveyance or a public benefit conveyance, will have to be used in conjunction with ETA for the transfer of property where cleanup has not been completed.

The DoD Components may develop implementation procedures based on their own specific needs and unique requirements but will, at a minimum, include the documentation and procedures specified in this guidance. Copy of the Component-specific guidance is to be provided to the Office of the Assistant Deputy Under Secretary of Defense (Environmental Cleanup) upon issue.

APPLICABILITY AND SCOPE

This guidance applies to transfers of real property not listed on the National Priorities List (NPL) from DoD to non-federal entities, including public benefit transfers where the DoD component assigns property to a sponsoring federal agency, who in turn transfer by deed, to a non-federal party. The guidance should be used in conjunction with any applicable State guidance. The Governor of the State where the property is located must concur with the deferral request for property to be transferred early. The process and documentation established by this guidance is solely for the purpose of obtaining the approval of the Governor of the State for the transfer of property. As such, it is inappropriate to use this guidance or process as the basis for establishing environmental cleanup milestones or to make environmental cleanup decisions. The appropriate legal and regulatory requirements will continue to be used for environmental cleanup efforts on real property prior to and after transfer using ETA.

Separate guidance is being developed by the U.S. Environmental Protection Agency (EPA) for use of ETA for property on the NPL. Any additional DoD guidance for early transfer of NPL property will be included in the DoD transmittal of the EPA guidance.

This guidance should be read to be compatible with and does not supersede other related DoD policy and guidance (such as Policy on Responsibility for Additional Environmental Cleanup After Transfer of Real Property). This guidance will be incorporated in the next revision of the appropriate DoD Instruction.

GUIDANCE

Process:

This section describes the ETA process and the role of the DoD Component. The environmental review process for ETA centers on the signing of the Finding of Suitability for Early Transfer (FOSET), i.e., the documentation package that provides the evidence that the subject property is environmentally suitable for early transfer. Because early transfer of DoD property cannot occur without the Governor's concurrence on the FOSET, it is essential to provide sufficient information in the FOSET package to support an informed decision.

The Governor's decision to concur with the FOSET and defer the CERCLA covenant must be, as required by CERCLA section 120(h)(3)(C), "based on a finding that

- (I) the property is suitable of transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;
- (II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii) [these are the Response Action Assurances specified in Section 120(h)(3)(C)(ii), and are provided later in this guidance];
- (III) the Federal agency requesting the deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and
- (IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property."

The DoD Component should not forward the FOSET packet to the Governor until the Component has provided evidence that supports all the above findings.

Pre-Transfer:

Once the Local Reuse Authority (LRA) or prospective purchaser has contacted the DoD Component and indicated their interest in obtaining property, the DoD Component should begin to assemble a review team for the FOSET package. It is anticipated that the prospective transferee will have coordinated with the Component to identify potential property that would be suitable for transfer using ETA prior to a formal request for property. In the request the prospective transferee needs to provide an intended use of the property. This intended use will be the basis of the FOSET.

For BRAC property, the team should consist of the BRAC Cleanup Team (BCT), the supporting real estate office, and the transferee. For non-BRAC property, the team should consist of installation-level representatives of the Component environmental cleanup office, State environmental regulatory agency, the supporting real estate agency and the transferee. Because property disposal authority for non-BRAC surplus real property is with the General Services Administration (GSA), the supporting real estate office should start coordination once it is known that such property will be transferred under ETA. Even though including GSA representatives as the property disposal agent on this team is appropriate for non-BRAC property, the Component will remain responsible for handling the environmental issues and preparing and submitting the FOSET.

The team should identify what information is currently available on the property and should determine what additional information is needed for the FOSET, based on the intended use of the property. The team should develop a plan and schedule for developing the draft FOSET and discuss post-transfer responsibilities. These include: when and how property use restrictions (e.g., institutional controls) will be applied and eventually discontinued during the cleanup period; the manner in which the warranty required by CERCLA section 120(h)(3)(A)(ii)(I) will be conveyed upon completion of the cleanup; and the development and implementation of any institutional controls required by the final remedy decision. It is anticipated that the Component will retain the right to impose any institutional controls required by the final remedy. DoD policy and guidance (such as the July 25, 1997, policy on Responsibility for Additional Environmental Cleanup After Transfer of Real Property) and published tools (such as the February 1998 Guide to Establishing Institutional Controls at Closing Military Installations), are to be used for developing and implementing any institutional controls required for transfer of both BRAC and non-BRAC property using ETA. The responsibility for the operation, maintenance and enforcement of any institutional controls, including any that may be required by the final remedy, should be negotiated between the Component and the transferee before the transfer and inserted in the deed or agreement governing the transfer.

The DoD Component should then notify the Governor of the intent to request a deferral of the CERCLA covenant and invite the State's participation in the development of the FOSET. The relevant parties (DoD, the State and the transferee) should prepare a schedule to coordinate the review of the FOSET. The schedule should include the proposed date to obtain the Governor's concurrence on the FOSET.

If the transferee will be performing the cleanup of the property, the DoD Component must provide prior notification to the Office of the Deputy Under Secretary for Environmental Security/Cleanup Office (ODUSD(ES/CL)) before submitting the ETA request to the Governor. This is in addition to the final notification after the transfer of property. In the initial notification, the DoD Component will provide the ODUSD(ES/CL) with assurance that the transferee has the financial and technical capabilities for performing the required remedial

actions, and explain how the Component intends to ensure that the transferee will meet environmental cleanup milestones and complete the required cleanup. The Component should also require the transferee to provide a surety bond, insurance, or other financial instrument to ensure that cleanup will be completed, without cost to the United States, if the transferee fails to do so. If the transferee is not performing the cleanup, the DoD Component need not notify the Cleanup Office until after the property is transferred.

Public Participation Requirements

A notice of the proposed early transfer should be placed in the local newspaper and the public must be given 30 days to comment on the suitability of the property for early transfer. This notification can occur concurrent with completion of the FOSET. At a minimum, this notification should include:

- the identity of the property proposed for transfer, the proposed transferee, and the intended use;
- a statement indicating that the proposed transfer is being pursued pursuant to CERCLA 120(h)(3)(C), and a summary of the ETA decision process requiring the approval of the Governor;
- a brief description of the environmental cleanup sites located on the property under consideration, and summary of past and current environmental cleanup efforts associated with those sites;
- the location of the administrative record for the installation restoration program and site specific information; and
- the address and telephone number for further site specific information and for obtaining a copy of the draft FOSET.

While the draft is being finalized, interested members of the public should be provided access to information that will provide the basis of the FOSET; this information includes the intended use of the property, the EBS, and environmental cleanup documents pertaining to the early transfer parcel. The draft FOSET should also be made available to the RAB, community groups or individuals expressing interest, and the State environmental regulatory agency.

After the comment period has ended, the DoD Component should respond in writing to the public comments received on the suitability of the property for transfer. The final FOSET and the responses to any public comments (known as the Responsiveness Summary) should be submitted to the Governor's Office. The local community should be informed through publication in a newspaper when the Governor has concurred on the FOSET and where it is available for review.

At Transfer:

Once the Governor has concurred on the FOSET, the property may be transferred. The property transfer documents containing the response action assurances will be provided to the transferee. The quitclaim deed for the property must contain the right of access clause (as

provided for in CERCLA section 120(h)(3)(A)(iii)) which preserves DoD's right to enter the property after transfer for purposes of environmental investigation, remediation or other corrective action. The response action assurances will indicate the restrictions on the property to ensure that environmental cleanup investigations, response actions, and oversight will not be disrupted.

The FOSET and the Responsiveness Summary will be included in the transaction file for the property that is maintained by the Real Estate office performing the disposal action.

The Component needs to notify ODUSD(ES/CL) that a property transfer using ETA has occurred, and that the Component has requested adequate funding and provided the required response action assurances.

Post-Transfer:

When remedial actions have been completed or when the approved remedy for the site has been implemented and is operating properly and successfully, the DoD Component shall provide a warranty document to the transferee which states that all remedial actions have been taken in satisfaction of the requirement in CERCLA section 120(h)(3)(A)(ii)(I). This warranty, amending the deed, will be recorded by the Component.

If the transferee has performed the cleanup of the property, the transferee must notify the DoD Component that all remedial activities have been completed and allow DoD to enter the property and inspect the site. The transferee must also give DoD access to all remedial action reports and sampling data. Once DoD has reviewed the available documentation, inspected the site, and agreed with the transferee's assessment, the DoD Component will record the warranty to amend the deed.

At this time, the DoD Component will also ensure, regardless of who performed the cleanup, that the institutional controls necessary for the implementation of the remedy (e.g., land and water use restrictions, structural controls) are incorporated in the deed or otherwise are in place. These institutional controls must be binding on the transferee and any future owner of the property. Other interim institutional controls or use restrictions that were necessary for remedial activities will be reviewed, and removed if no longer needed.

Documentation:

The final FOSET packet consists of a cover letter asking for deferral, a Finding of Suitability for Early Transfer (FOSET) which will contain the response action assurances, and the Responsiveness Summary. These documents are described in more detail below.

FOSET Packet

- 1. Cover Letter** to State asking for Deferral
- 2. Finding of Suitability for Early Transfer (FOSET)**
Component Finding of Suitability

Property Description
Nature and Extent of Contamination
Analysis of Intended Future Land Use
Response/Corrective Action & Operation and Maintenance Requirements

Deed Language

Notice
Covenant
Access Clause
Response Action Assurances
Other

3. Responsiveness Summary

1. Cover Letter: The cover letter should be addressed to the Governor or appropriate State official (if the Governor has delegated the early transfer authority) and request deferral of the CERCLA covenant requiring all remedial action to be performed before property transfer.

2. The FOSET is a short document, generally 6-7 pages, that focuses on the environmental condition of the property. The FOSET is not intended to fully define the nature and extent of contamination (because remedial activities may not have been completed, this may be unknown); rather, the FOSET should describe the areas of suspected contamination and the contaminants of concern. Supporting documentation that contains more detailed information on the site, such as the relevant extract from the environmental baseline survey (EBS) or supplemental EBS, should be attached. The FOSET must address the information described below:

Component Finding of Suitability: Finding by the Component that property is suitable for transfer for the intended use, and that Component believes that the requirements of CERCLA section 120(h)(3)(C) have been satisfied with the supporting evidence being provided in the FOSET package.

Property Description: A description of the real property to be transferred. A map should also be attached.

Nature and Extent of Contamination: A description of the nature and areal extent of contamination which impacts the property being transferred. The DoD Environmental Condition Category of the property should also be included. An extract from an existing EBS or a supplemental EBS, which more fully delineates the areas of contamination, should be attached to the FOSET packet.

Analysis of Future Use: A description of the intended use of the property and a determination of whether the anticipated reuse is reasonably expected to result in exposure to CERCLA hazardous substances. If it is determined that exposure to hazardous substances is likely, the

analysis must discuss restrictive measures (i.e., institutional controls) to prevent exposure during the cleanup of the property. These restrictions must also be included in the deed for the property.

Response/Corrective Action and Remedial Action-Operations Requirements: A description of any ongoing or planned remedial or corrective actions. The schedule for such actions, including the dates of certain milestones (e.g., the implementation of the remedy) should be included. The schedule should also contain the dates for the operation and maintenance of the remedy or response action.

Deed Language: The following environmental cleanup information that will be required in either the deed or contract for sale should be included in the FOSET packet for review:

Notice: a copy of the notice language required by CERCLA section 120(h)(1) and (3) that will be inserted in the deed identifying:

- _ the type and quantity of hazardous substances on the property,
- _ the time at which storage, release or disposal took place, and
- _ a description of the remedial action taken, if any.

This information may be displayed in matrix form for ease of use.

Covenant: a copy of the covenant language required by CERCLA section 120(h)(3)(A)(ii)(II) stating, with respect to hazardous substances existing on the property as of the date of transfer, that:

“any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States”

Right of Access: a copy of the language required by CERCLA section 120(h)(3)(A)(iii) granting the United States access to the property if remedial action or corrective action is found to be necessary after the date of property transfer; as well as providing access to the property to perform the cleanup for which the deferral is being sought.

Response Action Assurances: a copy of the response action assurances required by CERCLA section 120(h)(3)(C)(ii) (listed below) that will be included in the contract for sale. These assurances are included in the deed to ensure that the transfer does not delay remedial activities; the reuse does not pose a risk to human health and the environment; and that the Component will request adequate funds to address schedules for investigation and completion of all response actions.

CERCLA section 120(h)(3)(C)(ii) Response Action Assurances: “...the deed or other agreement that shall govern the transfer shall contain assurances that—

- (I) provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;
- (II) provide that there will be restrictions on the use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

- (III) provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and
- (IV) provide that the transferring Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately address schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations.”

To demonstrate that the Component has requested adequate funding for all response activities, a schedule and associated funding profile for response actions may be attached to the FOSET. Any specific language required to ensure that cleanup activities will not be disrupted, and to implement institutional controls or impose use restrictions during the cleanup period and that may be required for by the final remedy decision can either be included or attached to the FOSET.

Other: other language, such as Anti-Deficiency Act language, that may need to be included in the deed or contract for sale.

3. Responsiveness Summary: The Component’s written answers to each of the issues raised during the 30-day public review is called the Responsiveness Summary. The Responsiveness Summary shall be attached to the FOSET package that is submitted to the Governor.

In addition, to ensure a prompt response from the Governor on the FOSET, the DoD Component may also insert in the FOSET package a document containing the proposed findings for early transfer for the Governor to sign after review of the FOSET request and a quitclaim deed for the property.

**Comprehensive Environmental Response, Compensation, and Liability Act (42 USC
BB9620) Section 120(h)(3)(C)**

(C) Deferral

- (iii) IN GENERAL - The Administrator, with the concurrence of the Governor of the State in which the facility is located (in the case of real property at a Federal facility that is listed on the National Priorities List), or the Governor of the State in which the facility is located (in the case of real property at a Federal facility not listed on the National Priorities List) may defer the requirement of subparagraph (A)(ii)(I) with respect to the property if the Administrator or the Governor, as the case may be, determines that the property is suitable for transfer, based on a finding that—
- (I) the property is suitable of transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;
 - (II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii);
 - (III) the Federal agency requesting the deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and
 - (IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property.
- (ii) RESPONSE ACTION ASSURANCES-With regard to a release or threatened release of a hazardous substance for which a Federal agency is potentially responsible under this section, the deed or other agreement proposed to govern the transfer shall contain assurances that—
- (I) provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;
 - (II) provide that there will be restrictions on use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;
 - (III) provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and
 - (IV) provide that the Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation

and completion of all necessary response action, subject to congressional authorizations and appropriations.

(iii) **WARRANTY**- When all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the United States shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken, and the making of the warranty shall be considered to satisfy the requirement of subparagraph (A)(ii)(I).

(iv) **FEDERAL RESPONSIBILITY**- A deferral under this subparagraph shall not increase, diminish or affect, in any manner any rights or obligations of a Federal agency (including any rights or obligations under sections 106, 107 and 120 existing prior to transfer) with respect to a property transferred under this subparagraph.

RADIOLOGICAL MATERIAL WEB SITES

I. DoD Low Level Radioactive Waste Disposal Office

Error! Bookmark not defined.

II. DoE Environmental Management Office

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III. DoE National Low Level Waste Management Program

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IV. Low Level Waste Forum

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V. Nuclear Regulatory Commission

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VI. NRC Office of Enforcement

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VII. USAMC Logistics Support Activity

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VIII. TACOM-ACALA Radiation Safety Program

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Title: Emergency Planning and Community Right-to-Know Act (EPCRA)
Reporting of Munitions Demilitarization Operations

INTRODUCTION

Executive Order 12856 requires Federal facilities to comply with the Emergency Planning and Community Right-to-Know Act (EPCRA), including reporting releases and transfers of toxic chemicals through the Toxics Release Inventory (TRI). Munitions activities, such as open burning and open detonation (OB/OD), may result in reportable releases of EPCRA Section 313 chemicals. The Deputy Under Secretary of Defense for Environmental Security deferred TRI reporting on EPCRA Section 313 chemicals released or transferred from munitions activities, other than manufacture, until after the Military Munitions Rule was published and a mechanism to report was developed.

The Department of Defense (DOD) has signed EPCRA policy establishing criteria for TRI reporting on munitions waste management activities. These activities include resource recovery and recycling operations, disassembly, dismantling, and treatment. DOD will publish technical guidance that outlines threshold accounting procedures and provides munitions compositions and emissions data for TRI reporting.

The purpose of this paper is to inform the DOD demilitarization community on the new reporting requirements,

their implications, and the status of the technical guidance. This presentation does not represent DOD or Army policy or the position of either.

BACKGROUND

The Emergency Planning and Community Right-to-Know Act has four main parts, described below. Each part operates off different chemical lists and threshold values that trigger regulatory requirements. A further description and discussion of EPCRA requirements are provided in the Appendix.

Sections 301 to 303. Emergency Planning - Facilities must notify local and state emergency planning agencies of the presence of Extremely Hazardous Substances and assists in community emergency response planning.

Section 304. Release Notification Requirements - Facilities must immediately report off-site releases of hazardous substances.

Sections 311 and 312. Community Right-to-Know Reporting - Facilities are required to prepare or have available Material Safety Data Sheets (MSDS) for hazardous chemicals under the Occupational Safety and Health Act (Hazard Communication Standards) and to report annually hazardous substance inventories and locations.

Section 313. Toxic Chemical Release Inventory (TRI)- Facilities that manufacture, process, or otherwise use a listed toxic chemical must report annually their releases of such chemicals to any environmental medium.

EXECUTIVE ORDER 12856 AND DEPARTMENT OF DEFENSE POLICY

Federal agencies were not included in the definitions of "person" or "facility" in EPCRA. Only certain Government-Owned/ Contractor-Operated (GOCO) facilities were required to comply with all the provisions in EPCRA. The Executive Order required Federal agencies to comply with EPCRA by:

- o Changing the definition of "person" to include Federal agencies (Section 2-201).
- o Requiring the head of each Federal agency to comply with EPCRA Sections 301 through 312 (Section 3-305).

- o Requiring the head of each Federal agency to comply with EPCRA Section 313 without regard to the Standard Industrial Classification codes. All other existing statutory or regulatory limitations or exemptions on the application of EPCRA Section 313 remained in effect (Section 3-304).

DOD published guidance for the Services and Defense Agencies to implement the Executive Order. This guidance clarifies definitions and concepts related to the Executive Order, defines policy for EPCRA Section 313 TRI reporting and complying with the toxic chemical reduction goals, and provides specific direction for munitions related issues. Guidance is for Federal facility compliance with EPCRA. At contractor-operated facilities, the contractor is required to meet EPCRA requirements as required by the law and implementing regulations.

REPORTING MUNITIONS MANAGEMENT ACTIVITIES UNDER EXISTING AND PROPOSED EPCRA GUIDANCE

Current DOD policy excludes munitions activities, except for manufacturing activities, from threshold calculations and TRI reporting. Reporting on demilitarization activities begin in 1999 (reports submitted on July 1, 2000). Future DOD policy will establish EPCRA Section 313 reporting requirements for activities conducted on ranges. Munitions management activities includes:

Manufacturing. The "manufacture", "processing", or "otherwise use" of EPCRA Section 313 listed chemicals to produce munitions related items is covered by TRI reporting requirements. Federal facilities began reporting in 1994. Contractors at GOCO facilities have been reporting since 1987.

Training. Training activities using munitions and munitions related items include range firing (qualification, live firing and combined service live firing, familiarization), smoke operations, propellant bag burning, naval gunnery, aerial platform weapon system training/gunnery/bombing, and demolition training (including explosive ordnance disposal proficiency training). DOD policy exempts training activities from EPCRA Section 313 reporting through 1999.

Testing. DOD policy considers the "manufacture", "process", or "otherwise use" of toxic chemicals for the purpose of testing

munitions, weapons systems, or qualifying munitions by personnel under the Research, Development, Testing, and Evaluation (RDT&E) program as laboratory use. These activities conducted under the RDT&E program are excluded from EPCRA Section 313 reporting through the Laboratory Exemption. This policy interpretation will continue through 1999.

Demilitarization. The demilitarization of munitions and munitions related items is an activity that includes many operations. These operations may include: disassembly, dismantling, mutilation, recycling, recovery, reclamation, reuse, and treatment. The treatment of munitions and munitions related items includes: open burning and open detonation, incineration, chemical neutralization, and other methods of final treatment which alter the chemical composition of the munitions and/or its components.

The TRI Phase II rule, published in the May 1, 1997 Federal Register (62 FR 23834), expanded the types of facilities subject to reporting under EPCRA Section 313 and amended the definition of "otherwise use" to include: use through treatment for destruction, stabilization, and disposal if the facility receives the materials from other facilities for purposes of further waste management activities. TRI Phase II continued the exclusion for including the treatment of wastes generated on-site from threshold calculations. Only the treatment of wastes received from other facilities (off-site) counts towards the "otherwise use" threshold calculation (The Military Munitions rule and implementing guidance determines when munitions are received at an installation for further waste management). Any EPCRA Section 313 chemicals created in the treatment or destruction process, are counted towards the "manufacture" threshold (their formation meets the definition of "manufacture" under EPCRA). Depending on whether the waste originated on-site or off-site, the treatment of the incidentally manufactured chemicals is considered a use and its' treatment counts towards the "otherwise use" threshold.

How this expanded "otherwise use" definition is applied under DOD policy determines the reporting requirements. The main policy considerations are: (1) the definition of "processing" activities for munitions management activities; and (2) the application of the TRI Phase II definition for "otherwise use" for waste treatment activities. Table 1 shows existing guidance, TRI Phase II regulatory requirements, and DOD policy beginning in 1999 for reporting demilitarization activities. The main differences between the U.S. Environmental Protection Agency's (EPA) regulations and DOD policy is in how the treatment of munitions

on-site is counted towards reporting thresholds. Under all options:

- o Both the EPCRA Section 313 chemicals in munitions treated, recovered, or recycled and EPCRA Section 313 chemicals incidentally manufactured by demilitarization activities and their further waste management are counted toward appropriate reporting thresholds.
- o If any of the three reporting thresholds for a EPCRA Section 313 chemical is exceeded by an activity, all releases and transfers of the chemical from all uses of the chemical on the installation, including munitions reuse and treatment, must be reported.

Demilitarization activities need to be viewed in terms of removing the military offensive or defensive advantages of the ammunition and explosives, which may or may not include the disposal of the item. Under this scenario munitions management activities are arranged into three groups: (1) disassembly and dismantling; (2) recycling; and (3) treatment. Activities such as recovery, reclamation, and reuse fall into one of these categories depending on the operation performed.

Disassembly and dismantling activities are the mechanical separation of a munition into other end items or component parts. Under EPCRA this is the same as relabeling or redistributing a container of an EPCRA Section 313 chemical where no repackaging of the chemical occurs. This does not constitute "otherwise use" or "processing" of an EPCRA Section 313 chemical so these activities would not count towards a reporting threshold. Operations, such as pulling fuzes from munitions, will not expose the chemicals in the component items.

Recycling activities are operations where the EPCRA Section 313 chemical component of an end item is recovered or otherwise obtained for subsequent use, in the same or different state. Wash-out and steam-out activities fall into this category. Under EPCRA definitions, this form of recycling or recovery is considered "processing".

Treatment activities are operations where the item is destroyed. Incineration and OB/OD activities fall into this category. Under EPCRA this is considered as treatment for destruction where the EPCRA Section 313 chemical is destroyed. Threshold calculations are in accordance with DOD policy and considered an "otherwise use".

Treatment of munitions may incidentally manufacture some EPCRA Section 313 chemicals. These amounts would accumulate towards the 25,000 pounds "manufacturing" threshold. If these incidentally manufactured chemicals undergo further waste management, then these amounts would accumulate towards the 10,000 pounds "otherwise use" threshold

Under these definitions, munitions can first be separated into component parts without threshold accounting. TRI reporting is based on:

- o If a component part is treated, then threshold accounting is in accordance with DOD policy and the activity counts towards the "otherwise use" threshold.
- o If the component part is recycled to recover the explosive (such as wash-out), then the activity counts towards the "processing" threshold.

CONVENTIONAL MUNITIONS: EXAMPLE THRESHOLD ACCOUNTING

Conventional munitions demilitarization activities may involve the following activities:

- o Separation of components, energetics, and casings:
- o On-site treatment of energetics and propellants:
- o Recovery for reuse of energetics, propellants, casings, scrap, or other items is "processing".

The most common case involves the treatment of munitions by OD/OB without prior processing for recovery. As an example, consider a site performing open detonation on four types of hypothetical munitions during a calendar year. Table 2 lists the EPCRA Section 313 chemicals in each munitions type with the amount of each chemical treated during the year.

Under EPCRA regulations (TRI Phase II), the amounts of listed toxic chemicals (Section 313) contained in munitions designated as waste at the installation (generated on-site) would not count towards any reporting threshold. Unless the installation exceeds an activity threshold conducting other operations with the chemicals listed in the table below, an EPCRA Section 313 Form R TRI reporting would not be required for these chemicals.

Table 2: Estimated Annual Toxic Chemicals (pounds) treated in munition type Munition's Energetics and Casings.

Munitions	Aluminum powder	Dinitro-toluene	Hexa-chloro-ethane	Nitro-glycerin	White Phosphorus	Copper (casing)	Zinc (casing)
A	2,226	9,455	54,788	3,264	0	14,714	1,865
B	5,578	8,586	49,753	2,963	0	13,361	1,693
C	0	27,063	0	65,252	219,356	60,045	7,611
D	0	31,670	0	76,362	256,706	70,269	8,907
Annual Chemical	7,804	76,774	104,541	147,841	476,062	158,389	20,076

Use Totals							
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If the munitions were received by the installation from off-site for waste management (designated as waste before arriving at the installation), then the amounts of toxic chemicals in the munitions would count towards the 10,000 pounds "Otherwise use" reporting threshold. Release and transfer reporting would be required for all the chemicals in the table except Aluminum powder.

DOD policy considers all munitions treatment activities as the use of a toxic chemical and these activities count towards the 10,000 pounds "otherwise use" reporting threshold. Release and transfer reporting is required for all the chemicals in the table except Aluminum powder. This may cause an installation (using DOD policy) to file a different EPCRA Section 313 TRI report than the contractor operating a GOCO facility (using EPA guidance) even though both are conducting the same activities.

Regardless of the on-site/off-site designation (waste generation point), the installation must attempt to determine the EPCRA Section 313 chemicals created (incidentally manufactured) by the open detonation (treatment) of each munitions type. Facilities are required to use the best available information in making threshold determinations and release and other waste management calculations. These amounts accumulate towards the 25,000 pound "manufacturing" reporting threshold.

Threshold accounting for the treatment of incidentally manufactured EPCRA Section 313 chemicals generated from the treatment of the original waste is determined by where the original waste originated (identified as waste).

- o Under TRI Phase II the treatment of the incidentally manufactured EPCRA Section 313 chemicals are exempt from threshold accounting if the original waste was generated (created) on-site (at the installation). If the original material was shipped as a waste to the installation, then the treatment of incidentally manufactured EPCRA Section 313 chemicals are counted towards the "otherwise use" threshold

- o Under DOD policy the treatment of the incidentally manufactured EPCRA Section 313 chemicals are counted towards the "otherwise use" threshold. Under EPCRA

regulations, release is considered further waste management.

CONVENTIONAL MUNITIONS: EXAMPLE REPORTED RELEASES AND TRANSFERS

Once a reporting threshold is exceeded for an EPCRA Section 313 chemical, reporting releases to the air, water, and land and transfers off-site for disposal, treatment, energy recovery, or recycling is required. Based on the amounts treated in the example above, estimated releases and transfers are:

Land releases. (1) Energetic material not destroyed (incomplete reaction) by open detonation is reported as a land release. EPCRA chemicals produced by the reaction (detonation) count towards the 25,000 pound "manufacture" threshold and are reported for each EPCRA Section 313 chemical that exceeds the threshold. Metal casings are reported as sent off-post for recycling and as a land release for amounts not recovered.

Air releases. Assuming that air releases of toxic chemicals other than metals average 10^{-6} pound per pound of explosives, reported air releases should be negligible. (Air releases of metals as dust are assumed to fall to land and are counted as land release.)

Water releases. For this estimate, water releases are assumed to be zero based on OB/OD site location and management practices designed to prevent aquifer or surface water contamination. Some minor storm water releases may result.

Transfers off-site. Scrap metal recovered from the OB/OD site may be recycled off-site after further decontamination. All off-site transfers for recycling the metals would be reported. Off-site transfers for energy recovery, disposal, or further treatment are not anticipated, but would be reported if occurring.

Most detonations are initiated using other explosives or energetic material. Under EPCRA this is considered use and the EPCRA Section 313 chemicals contained in this material are counted towards the "otherwise use" reporting threshold. If this threshold is exceeded, then release reporting is primarily based on the amount of material not consumed in the detonation and the EPCRA Section 313 chemicals this material creates from the detonation (if the "manufacture" reporting threshold is exceeded for the created chemical). If identical EPCRA Section 313

chemicals are contained in the munitions being treated and the energetic material used to initiate the detonation, then these amounts are added together towards the "otherwise use" reporting threshold.

CHEMICAL MUNITIONS

The same example used for conventional munitions applies to the demilitarization of chemical munitions. The same EPCRA Section 313 chemicals contained in fuzes, bursters, and propellants for conventional munitions are in chemical munitions. For chemical agents, mustard is a listed EPCRA 313 toxic chemical.

- o Threshold Accounting:

Under TRI Phase II the treatment of EPCRA Section 313 chemicals contained in these munitions are exempt from threshold accounting because the waste was generated (identified) on-site (at the installation).

Under DOD policy the treatment of EPCRA Section 313 chemicals contained in these munitions are counted towards the "otherwise use" threshold.

EPCRA Section 313 chemicals created (hydrochloric acid) by incinerating the munitions is consider "manufactured" and these amounts accumulate towards the 25,000 pound "manufacturing" reporting threshold.

Under TRI Phase II the treatment of the incidentally manufactured EPCRA Section 313 chemicals is exempt from threshold accounting because the waste was generated (created) on-site (at the installation).

Under DOD policy the treatment of the incidentally manufactured EPCRA Section 313 chemicals are counted towards the "otherwise use" threshold (neutralization of an acid in the pollution control equipment).

Once a reporting threshold is exceeded for an EPCRA Section 313 chemical, reporting releases to the air, water, and land and transfers off-site for disposal, treatment, energy recovery, or recycling is required.

- o Release Reporting:

Air and Land Releases. This can be calculated based on either the destruction and removal efficiency of the incinerator or from monitoring data.

Transfers off-site. Metal scrap will be recycled off-site. Metal compounds generated from the incineration process would be reported as off-site transfers for disposal or further treatment.

APPENDIX

GENERAL REQUIREMENTS

For more detailed descriptions of EPCRA reporting requirements, consult the references listed below. A brief summary of EPCRA reporting requirements follows.

- o March 1996 DUSD(ES) Executive Order 12856 policy guidance and the July 1996 and March 1998 Supplemental Guidance.
- o Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. Sections 13101-13109.
- o Executive Order 12856, Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements.
- o U.S. Environmental Protection Agency (EPA) documents:

EPCRA Section 313 Questions and Answers, November 1997,
EPA 745-B-97-008

Guidance for RCRA C TSD Facilities and Solvent Recovery
Facilities, October 1997.

Guidance for Metal Mining Facilities, October 1997.

Addendum to the Guidance Documents for the Newly Added
Industries, February 1998.

Interpretation of Waste Management Activities:
Recycling, Combustion for Energy Recovery, Treatment for
Destruction, Waste Stabilization, and Release, April
1997.

- o Rules published in the Federal Register (FR):

April 22, 1987 (52 FR 13378)

October 15, 1987 (52 FR 38344)

February 16, 1988 (53 FR 4500)

May 24, 1989 (54 FR 22543)

July 24, 1990 (55 FR 30166)

July 26, 1990 (55 FR 30632)

May 1, 1997 (62 FR 23834)

Sections 301 to 303: Emergency Planning

Section 301 requires each state to establish an emergency response commission. The state commission is responsible for establishing emergency planning districts and appointing, supervising, and coordinating local emergency planning committees.

Section 303 governs the development of comprehensive emergency response plans by the local emergency planning committees and provision of facility information to the committee. Under Section 303(d), facilities subject to emergency planning must designate a facility representative who will participate in the local emergency planning effort as a facility emergency response coordinator. This section also requires facilities to provide the committee with information relevant to the development or implementation of the local emergency response plan.

Section 302 required the U.S. Environmental Protection Agency (EPA) to publish a list of extremely hazardous substances and threshold planning quantities (TPQs) for such substances. Any facility where an extremely hazardous substance is present in an amount in excess of the threshold planning quantity is required to notify the state commission. Such notification should be in writing and specify the name and an accurate current address of the facility. The list of extremely hazardous substance is defined in section 302(a)(2) as "the list of substances published in November 1985 by the Administrator in Appendix A of the Chemical Emergency Preparedness Program Interim Guidance". This list was established by EPA to identify chemical substances which could cause serious irreversible health effects from an accidental release. Section 302(a)(3) required EPA to initiate a rulemaking to revise the threshold planning quantities.

The total amount of each extremely hazardous substance present at any one time at a facility, regardless of location, number of containers or method of storage must be determined. Reporting is required for any extremely hazardous substance present at the facility that equals or exceeds the TPQ. The threshold planning quantities are intended to provide a "first

cut" for community emergency response planners where these extremely hazardous substances are present. This list of chemicals is published at Title 40 Code of Federal Regulations (CFR) 355 Appendices A and B.

Section 304: Release Notification Requirements

Section 304 establishes requirements for immediate reporting of certain releases of hazardous substances to the local emergency planning committees and the state emergency response commissions.

Section 304 also requires follow-up reports on the release, its effects, and response actions taken. Emergency release notification requirements are outlined at 40 CFR 355. Reportable quantities for extremely hazardous substances are located at 40 CFR 355 Appendices A and B. Reportable quantities for Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) hazardous substances are at 40 CFR 302.4.

Certain releases are exempt from this notification requirement: (a) "Federally permitted releases" as determined under the Comprehensive Environmental Response, Compensation and Liability Act of 1990 section 101(10); (b) releases which only result in exposure to persons within the facility boundaries; (c) releases from a facility which produces, uses, or stores no hazardous chemicals; (d) "continuous releases" as defined under CERCLA section 103(f); and (e) releases of a FIFRA registered pesticide, as defined under CERCLA section 103(e).

Section 304 reporting requirements are in addition to, not a substitute for, other reporting requirements under CERCLA and state laws.

Sections 311 and 312: Community Right-to-Know Reporting

Sections 311 and 312 provide a mechanism through which a community can receive material safety data sheets and other information on extremely hazardous substances as well as many other chemicals. Reporting thresholds are set at 10,000 pounds for non extremely hazardous materials and 500 pounds, or the threshold planning quantity (whichever is lower), for extremely hazardous substances. Applicability for this part of EPCRA is not

based on any list of specific chemicals, but on the definition of "hazardous chemical" under the Occupational Safety and Health Act's. This covers all materials required to have a MSDS under the Hazard Communication Standard (29 CFR 1910.1200). A "hazardous chemical" is defined as an element, chemical compound, or mixture of elements and compounds that is a physical or health hazard. The requirements for MSDS reporting and inventory form reporting are outlined at 40 CFR 370.

Section 311 applies to any facility that is required to prepare or have available a MSDS. The facility must submit individual MSDSs, or a list of chemicals for which the facility is required to have MSDSs, to the appropriate state emergency response commission, local emergency planning committee, and local fire department (one time notification).

Under Section 312, facilities covered by section 311 are required to submit additional information (annual report) on the presence, general quantity, health hazard, and location of hazardous chemicals at the facility.

To determine whether the facility has a hazardous material present in an amount which equals or exceeds a threshold value, the owner or operator must determine the total amount present at any one time at a facility, regardless of location, number of containers or method of storage. The amount of a hazardous material present in mixtures or solutions in excess of one percent (or 0.1 percent for carcinogens) are included in the determination.

Exemptions from the requirements to prepare or have available an MSDS is outlined at 29 CFR 1910.1200(b). The main categories of chemicals that are excluded from the threshold determinations and reporting requirements are:

- o Any substance present as a solid in a manufactured item (must meet specific conditions).
- o Any substance used in laboratories, hospital, or medical facility under the supervision of a technically qualified individual.

- o Any substance used for personal or household use (consumer product).
- o Any substance used in routine agricultural operations.
- o A hazardous waste regulated under the Resource, Conservation, and Recovery Act.

Section 313: Toxic Chemical Release Inventory

The Toxic Release Inventory consolidates data addressing toxic chemical releases to all environmental media (permitted and unpermitted releases) into an inventory system that is annually aggregated and readily available to the public. Reporting requirements and the list of chemicals and chemical compounds are outlined at 40 CFR 372. A facility that meets the following criteria is required to report under this provision.

- o The facility has 10 or more full time employees.
- o The facility is in the following Standard Industrial Classification (SIC) codes:

Major group codes 10 (except 1011, 1081, 1094), 12 (except 1241), or 20 through 39; or

Industry codes 4911, 4931, or 4939 (coal/oil power generation), 4953 (hazardous waste treatment), or 5169, or 5171, or 7389 (solvent recovery services).

- o The facility manufactured, processed, or otherwise used a toxic chemical in excess of an applicable threshold quantity during a calendar year. The "manufacture" or "process" threshold is 25,000 pounds. The "otherwise use" threshold is 10,000 pounds.

The use of the chemical is counted towards an applicable threshold. The releases and transfers are what is reported. The terms "manufacture", "process", and "otherwise use" are defined as follows.

Manufacture. To produce, prepare, import, or compound a toxic chemical. Manufacture also applies to a toxic chemical that is produced coincidentally during manufacture, processing, use, or disposal of another chemical or mixture of chemicals, including a toxic chemical that is separated from that other chemical or mixture of chemicals as a byproduct, and a toxic chemical that remains in that other chemical or mixture of chemicals as an impurity.

Process. The preparation of a toxic chemical, after its manufacture, for distribution in commerce: (1) In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substances, or (2) As part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

Otherwise use. Any use of a toxic chemical, including a toxic chemical contained in a mixture or other trade name product or waste, that is not covered by the terms "manufacture" or "process". Otherwise use of a toxic chemical does not include disposal, stabilization (without subsequent distribution in commerce), or treatment for destruction unless: (1) The toxic chemical that was disposed, stabilized, or treated for destruction was received from off-site for the purpose of further waste management; or (2) The toxic chemical that was disposed, stabilized, or treated for destruction was manufactured as a result of waste management activities on materials received from off-site for purposes of further waste management activities. Relabeling or redistributing a container of a toxic chemical where no repackaging of the toxic chemical occurs does not constitute use or processing of the toxic chemical.

EPCRA considers waste management activities to mean recycling, combustion for energy recovery, treatment for destruction, waste stabilization, and release, including disposal. Waste management does not include the storage, container transfer, or tank transfer of a Section 313 chemical if no recycling, combustion for energy, treatment for destruction, waste stabilization, or release of the chemical occurs at the facility. The EPCRA definition of these

terms has to be used in order to apply "otherwise use" to waste management activities. The terms "waste stabilization", "release", "treatment for destruction", "disposal" are defined at 40 CFR 372.3. The term "combustion for energy recovery" is defined in the guidance document for RCRA C TSD facilities listed in the references. The definition for "recycling" along with the definition for "recovery" is provided below. Recovery defines what recycling means under EPCRA. Recycling is the removal of an EPCRA Section 313 chemical from a waste stream where the chemical is returned to the process or is obtained for future use.

Recycling. Recycling is: (1) the recovery for reuse of a Section 313 chemical from a gaseous, aerosol, aqueous, liquid, or solid stream; or (2) the reuse or the recovery for reuse of a Section 313 chemical that is a RCRA hazardous waste as defined in 40 CFR 261.

Recovery. Recovery is the act of extracting or removing the Section 313 chemical from a waste stream and includes: (1) the reclamation of the Section 313 chemical from a stream that entered a waste treatment or pollution control device or process where destruction of the stream or destruction or removal of certain constituents of the stream occurs (including air pollution control devices or processes, wastewater treatment or control devices or processes, Federal or state permitted treatment or control devices or processes, and other types of treatment or control devices or processes); and (2) the reclamation for reuse of an "otherwise used" Section 313 chemical that is spent or contaminated and that must be recovered for further use in either the original or any other operations.

Certain applications and uses of toxic chemicals are exempt from threshold determinations and release reporting.

- o De minimis concentrations of a toxic chemical in a mixture (one percent for a listed chemical or 0.1 percent where the chemical is a carcinogen).
- o Toxic chemicals present in an article (must meet specific conditions).
- o Activities in laboratories under the supervision of a technically qualified individual.
- o Certain uses.

Use as a structural component of a facility
Use of products for routine janitorial or facility
grounds maintenance.
Employee personal use.
Use for motor vehicle maintenance.
Chemicals in intake water and air (background levels
present in the environment).

The thresholds for processing and use are based upon the total amounts actually used or processed at the facility, not the amount brought to the facility during the year. If the facility exceeds any threshold for a listed chemical, it must report all emissions of that chemical from the facility.

ETHICS ADVISORY -- Fundraising in the Federal Workplace

The general rule is that we do not engage in fundraising in the Federal workplace, and we do not use our Federal office or position to raise funds whether on- or off-duty. Of course, there are exceptions. The primary ones are:

The Combined Federal Campaign (CFC)

Army Emergency Relief (AER)

Other *ad hoc* type situations where a group of employees raises money among themselves for their own benefit, when authorized by the head of the organization in consultation with the ethics official (*e.g.*, the fundraisers to support our annual organization day picnic).

Unless an exception applies, we may not solicit our fellow employees here in the workplace for donations to support local schools, scouting activities, other youth programs, church activities, and other good causes. This means that, in the workplace, we may not sell candy, popcorn, cookies, raffle tickets, magazine subscriptions, *etc.* sponsored by these various organizations in an effort to raise money.

What about the situation where an employee's colleagues know that his or her daughter is in Girl Scouts and, during the cookie sale season, a colleague approaches the employee and asks to buy some cookies? In this case, the Girl Scout parent did not solicit and may sell the cookies to the colleague, but should do so before or after work, or during a break. But, if the employee puts sample boxes of cookies and a sign-up sheet on his or her desk, then the employee is improperly soliciting.

What about solicitations outside the Federal workplace; may an employee solicit fellow-employees outside the workplace as part of a school, church, or youth activity? Yes, as long as the employees being solicited are not subordinates. Also, the employee engaging in fundraising activities off-duty in a personal and private capacity, may not use his or her title or office in support of the fundraising, and may not solicit "prohibited sources" (*e.g.*, those doing business or attempting to do business with the Army).

What about soliciting for contributions among ourselves for a special occasion for a fellow-employee, especially one who is an official superior? This is different. This is not considered "fundraising." It is a "gift between employees" issue. For a special, infrequent occasion, we may do so as long as we do not solicit more than a "nominal" amount (no more than \$10) and the value of the gift does not exceed \$300.

The DoD General Counsel has stated that it generally is improper for an employee to suggest that a gift to a designated charity would be preferable than a gift to the employee for a particular special occasion, because this is really an improper solicitation. Notwithstanding, I believe it permissible when posting a death notice to

indicate that the family would prefer a donation in the deceased's name to a particular charity in lieu of flowers. However, it would not be permissible to solicit donations for the charity with a "HQAMC-All Personnel" message, indentifying the employees who are collecting the contributions for the charity.

If you have any questions, let me know.

Mike Wentink, Rm 7E18, 617-8003
Associate Counsel (Ethics)

ETHICS ADVISORY -- Protection of Nonpublic Information

There are a number of laws and regulations that protect nonpublic information, such as:

The procurement integrity law restricts the release of source selection and contractor bid and proposal information, and provides civil fines and criminal penalties for improper release.

The trade secrets act makes it a crime to improperly release contractor trade secrets and other confidential business information outside the Government.

The *Standards of Ethical Conduct for Employees of the Executive Branch* prohibits us from releasing, exploiting, or allowing others to exploit nonpublic information.

In addition, restrictions on our use of information can arise in other ways:

We often buy technical data and computer software with restrictions on our release outside the Government.

An improper release of information outside the Government could result in a contracting officer determining that a potential source is barred from competing for a requirement because the release of information.

An improper release of information outside the Government could result in having to re-do or fix a procurement as a result of a successful protest.

The important thing to keep in mind with respect to our use of information, is that, when we discuss it with, or give it to, a contractor employee, we have released it *outside* the Government. If we invite a contractor employee to a meeting, whatever we discuss during the meeting has been released *outside* the Government. When we give a contractor employee information to enter into a database or to prepare slides and charts, we have released the information *outside* the Government. None of the laws and regulations that restrict *our* use of sensitive and nonpublic apply to the contractor employees, except for the procurement integrity law and privacy act.

This does not mean that we can never release information to contractor employees. But, it does mean that we really need to be sensitive to the issues and make conscious decisions. First: can we? For example, if it is technical data to which we have only restricted rights, we probably cannot release the information without first obtaining permission from the source of the data. Second, even if it is legal, do we really need to/should we release the information?

Once we decide that it is permissible to release the nonpublic information and that we need or want to provide it to a contractor employee, we should not do so without

some sort of promise by the contractor and its employee that they will not use or exploit the information in any way other than in furtherance of the contract. The contract might already provide for such a promise. If not, you should consider having the contractor employee sign a non-disclosure certification. Even if the contract has a specific promise by the contractor not to disclose nonpublic information that it has access to during the performance of the contract, you still might want to use a non-disclosure certification with the contractor employees who are supporting your organization or effort.

A sample non-disclosure agreement is attached for your information. It should not be used without first consulting with the contracting officer.

Questions in this area should be directed to the contracting officer, the contract lawyer, or the ethics official (me), as appropriate.

Mike Wentink
Associate Counsel (Ethics)
Room 7E18, HQAMC Bldg, 617-8003, DSN 767-8003

CERTIFICATE OF NON-DISCLOSURE

I, _____, an employee and authorized representative of

_____, a contractor providing support services to Headquarters, U.S. Army Materiel Command (hereinafter HQAMC), and likely to have access to nonpublic information (hereinafter RECIPIENT), agrees to and promises the following:

WHEREAS RECIPIENT is engaged in delivering support services to HQAMC under contract; and

WHEREAS It is the intention of HQAMC to protect and prevent access to and disclosure of nonpublic information to anyone other than employees of the United States Government who have a need to know; but

WHEREAS HQAMC acknowledges that RECIPIENT will from time to time have or require access to such nonpublic information in the course of delivering the contract services; and therefore,

WHEREAS RECIPIENT may be given or otherwise have access to nonpublic information while providing such services; and finally,

WHEREAS "nonpublic information" includes such information as proprietary information (e.g., information submitted by a contractor marked as proprietary), advanced procurement information (e.g., future requirements, statements of work, and acquisition strategies), source selection information (e.g., bids before made public, source selection plans, and rankings of proposals), trade secrets and other confidential business information (e.g., confidential business information submitted by a contractor), attorney work product, information protected by the Privacy Act (e.g., social security numbers, home addresses and telephone numbers), and other sensitive information that would not be released by HQAMC under the Freedom of Information Act (e.g., program, planning and budgeting system information);

NOW THEREFORE, RECIPIENT agrees to and promises as follows:

RECIPIENT shall not seek access to nonpublic information beyond what is required for the performance of the support services contract;

RECIPIENT will ensure that his or her status as a contractor employee is known when seeking access to and receiving such nonpublic information from Government employees;

As to any nonpublic information to which RECIPIENT has or is given access, RECIPIENT shall not use or disclose such information for any purpose other than providing the contract support services, and will not use or disclose the information for any personal or other commercial purpose; and

If RECIPIENT becomes aware of any improper release or disclosure of such nonpublic information, RECIPIENT will advise the contracting officer in writing as soon as possible.

The RECIPIENT agrees to return any nonpublic information given to him or her pursuant to this agreement, including any transcriptions by RECIPIENT of nonpublic information to which RECIPIENT was given access, if not already destroyed, upon RECIPIENT leaving the contract.

RECIPIENT understands that any unauthorized use, release or disclosure of nonpublic information in violation of this CERTIFICATE will subject the RECIPIENT to administrative, civil or criminal remedies as may be authorized by law.

(signature) RECIPIENT: _____

PRINTED NAME: _____

TITLE: _____

EMPLOYER: _____

ETHICS ADVISORY -- Conflicts of Interests

What's a "conflict of interest?" Simply put, a "conflict of interest" is a situation where an Army employee has a financial stake in the outcome of an official Army matter. But, it can be a daunting task to know and recognize when such a financial stake exists.

Most of what USAMC does affects contractors, those trying to become contractors, and the alphabet soup of various professional, technical and scientific organizations that bring together various segments of the Federal and non-Federal communities (e.g., AUSA, AAAA, FBA, AFCEA, NDIA, IEEE, ASMC, etc.). There are a whole host of ways in which USAMC employees can end up with a financial stake in the official matters that affect these companies and organizations. Some of these are:

If you own stock in a company, you are a part-owner and you have a financial interest in whether your company gets a USAMC contract, or how some dispute might be resolved. However, if the amount of stock that you own (including any owned by your spouse and minor children) in this company does not exceed \$5,000, you are exempt from this conflict by Office of Government Ethics regulation. If more than one company is interested in the official matter (e.g., a statement of work or a request for proposals), the exemption applies only if the total amount of your financial interest in all the offerors does not exceed \$5,000.

If you own shares in a mutual fund, you are also part-owner in the companies that the mutual fund invests in and you have a financial interest in Army matters that affect these companies. However, if the mutual fund is "diversified," the OGE regulation exempts this conflict. But, this exemption does not apply to stock ownership in "sector" funds (a "sector" fund concentrates its investments in an industry, business, single country (other than the United States), or a single state). However, if the value of the sector fund shares does not exceed \$5,000, the exemption mentioned above applies.

If you are an officer or director of a professional organization, the law imputes the financial interests of the organization to you -- even if you are serving without pay. This means that you have a financial interest in whether USAMC provides a speaker or other support to an event sponsored by the organization, or whether USAMC intends to send employees to the event. There is no regulatory exemption for this conflict.

If your spouse or your minor child is employed by a contractor, you have a financial interest in their continued employment because the law imputes their financial interests to you. Therefore, if your spouse is affected by a

USAMC contract (*e.g.*, he or she works on it), then you have a financial interest in the issues involving this contract. There is no regulatory exemption for this conflict.

If you are job-hunting, law and regulation impute the financial interests of the prospective employer to you. Again, that means that you may not participate in official matters that affect that company, and there is no regulatory exemption for this conflict.

How do we find out about these potential conflicts and what do we do about it? Through training and advisories such as these, employees should become sensitive to the issues. This means that they seek the advice of their supervisor and Ethics Counselors before participating in any official matter affecting any non-Federal entity where there might be an issue. In addition, this is one of the purposes of financial disclosure reports. The reports provide a vehicle to identify and resolve potential conflicts. The resolution might be as simple as just not participating in the official matters affecting the financial interest and issuing a written notice of the potential conflict. If, however, the potential conflict will significantly affect your official duties, you might have to divest or your duties might have to be changed.

However, it is not a good idea to wait for the required time to file a financial disclosure report to deal with these issues. When an employee's duties change (*e.g.*, assigned to participate in the evaluation of proposals), whether or not the employee filed an annual report for last year, now is the time for the employee to examine his or her situation for a potential conflict. If unsure, the employee should seek the advice of his or her supervisor and Ethics Counselor.

If an employee is inclined to buy and sell stocks, options and other investment vehicles during the year, the employee would be wise to consider the potential conflicts of each purchase. For example, if the employee would really like to purchase Boeing, but the employee is currently involved in a matter involving Boeing, the employee probably should refrain from the purchase, or at least limit it to less than \$5,000. If an employee marries during the year, he or she should examine the financial interests that are now imputed to the employee from the new spouse and discuss any potential conflicts with the supervisor and Ethics Counselor.

Don't wait on these issues! You don't want to wait until you have already participated in a matter where you were disqualified by the law, a federal criminal law. In the recent past, an Army employee pleaded guilty to violating this law (he participated in the administration of a contract and he owned stock in the contractor) and received a one year probation and a \$1,000 fine. This employee even filed a financial disclosure report (OGE Form 450), but he neglected to list this particular stock.

All of this can be complicated. This is why you and your supervisors have an Ethics Counselor to help you deal with these issues. Let me know if I can help.

Mike Wentink, Room 7E18, 617-8003
Ethics Counsel

or

Alex Bailey, Room 7E18, 617-8004
Ethics Counsel

Private Organizations (POs) -- DAIG Concerns

Here are some DAIG concerns about the Army's relationships with private organizations. Even though the ethics and legal community works hard to ensure that our commanders, directors, supervisors, and employees know the Standards of Ethical Conduct/Joint Ethics rules, here is what REALLY is happening on a general, continuing and systemic basis throughout the Army.

1. OPDs, NCOPDs, inprocessing centers, and other official settings are used frequently to promote PO membership and products.

2. There still are cases where leaders serve as PO officers, directors and advisors because they inherited the responsibility from their predecessor in their official position (e.g., all commanders of X Brigade are appointed as President of the ABC Association, and each of the Battalion Commanders have specific jobs with the PO). As a result, they perform their new PO position as part of their official duties. (Note that JER 3-301 prohibits employees from accepting positions with a PO that are based on their official position.)

3. Related to number 2, Army personnel routinely perform PO business as part of their official duties (e.g., administer, set-up, coordinate, various PO events such as dinners, golf tournaments, bazaars, sporting events, displays, trade shows; tasked to sell souvenirs, raffle tickets, and other items) ... way beyond JER 3-211 support.

4. Related to numbers 2 & 3, some installations have full-time AUSA offices operated by active duty personnel on Government time and report to the commander and staff.

5. Co-sponsorship guidelines are not followed. Co-sponsorship is abused. More often than not, the Army gets little benefit, and the major benefit is to the PO.

6. Although DoD Liaisons to POs could describe their proper function as envisioned by JER 3-201a, too often they are performing unauthorized functions, such as active participation in PO management, running PO membership drives, assisting with fundraising events, and generally actively planning coordinating and supervising PO functions.

7. It is still a common situation where commanders establish PO membership goals, track progress and maintain membership statistics. Progress is briefed at staff meetings and during quarterly training briefs.

8. Incentives and disincentives are still commonly used to promote PO membership (primarily AUSA) and to participate in PO activities.

9. AUSA receives preferential treatment.

10. Many installations have established full-time AUSA offices to administer and promote AUSA activities, and these offices report to the commanders and staff.

Finally, it would seem that no commander, staff or DoD Liaison has ever seen the Chief of Staff pamphlet on private organizations issued in early 1995. The only ones who have them seem to be the Ethics Counselors who attended one of the Ethics Counselors Workshop at TJAGSA. While doing their study, the IGs distributed hundreds of this booklet.

I think that you will see much more on this. All the MSCs are supposed to have the DAIG report. When you review the report, you will note that there are many other issues in addition to "ethics." Many installations are not following the AR 210-1 and AR 405-80 regulations with respect to operating permits, revalidation of permits, licenses and leases.

We can expect formal taskers from HQDA. Now is the time to begin to work on the issues.

Mike Wentink

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