



Office of Command Counsel Newsletter

August 1998, Volume 98-4

Command Counsel Continuing Legal Education Program--*Review & Highlights*

The annual AMC Command Counsel Continuing Legal Education (CLE) Program is a highlight of our law firm, an opportunity to learn, meet colleagues, share ideas, and become more closely knit. Each year we recognize how important it is to work together, to keep each other informed of developments and to share experiences.

This year's CLE was held 8-12 June, and was attended by nearly 150 AMC attorneys, counsel from other DA and DOD legal organizations and some key non-attorney personnel.

I want to thank **Steve Klatsky** for again chairing the committee that planned and administered the program. The committee included **COL Bill Adams, Bill Medsger, Dick Couch, Vera Meza, LTC Paul Hoburg** and **Tom Cavey**. Program administration was handled expertly by **Tom Cavey, Holly Saunders** and **Elaine Basile**.

The theme of this year's CLE theme—"AMC Attorneys: Supporting the Total Army"—highlights the im-

portance of the change in the nature of our relationships: to the military, to the civilian workforce and the business community. The Army force structure is very different than that of just a decade ago. And, with change come both challenges and new opportunities to contribute to the success of the AMC mission. As a law firm we welcome those challenges.

The program was designed to provide our attendees with a mixture of plenary sessions, electives and a total of four hours of legal focus sessions devoted to acquisition law, environmental law, intellectual property law, and employment law.

Much thanks to those who planned and chaired the important legal focus sessions: **Bob Lingo, Bill Medsger, LTC Paul Hoburg** and **Cassandra Johnson**. These sessions are always a vital component of the CLE—a rare opportunity for practitioners of these disciplines to meet in an informal setting to discuss current legal issues,

cases and controversies. A great deal of work goes into the planning of this session.

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CLE
Special Report
Pages 16-19

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Tom Cavey To Retire

Command Counsel Executive Officer for 15 Years--40 Years of Government Service

All of us who worked with **Tom Cavey** during his 15 years as Office of Command Counsel Executive Officer are sad to see Tom and his wife Iris retire from the Federal service. **Tom Cavey** spent 20 years in the Army as an enlisted man and officer attaining the rank of Major. He then spent 20 years with the Office of Personnel Management, Health and Human Services, Ft. Belvoir, and AMC, first as a classification specialist and then as our XO. When you meet Tom you feel as if you are his friend--his jovial personality and sense of humor make friendships happen, and keep them alive.

At the annual CLE we surprised Tom with a luncheon in his honor, presenting him with many expressions of our feelings and emotions as we wish him well. Tom managed the career program, and, as such, was often the first person with whom our attorneys spoke concerning personnel actions. Careers are important to each individual, and Tom always knew the impor-

tance of his role in making us comfortable that fairness and equity were ingredients of every action.

Probably most important was the kindness and decency expressed by Tom towards every member of our AMC legal community. Headquarters organizations are always viewed with mixed emotions by those on the receiving end of ideas and taskers (sometimes not so mixed emotions). On his many trips to AMC field offices, Tom always took the time to walk around, meet and speak with every individual in the office. His one concern was asking how things were going,—asking “what do you need from us?” I truly believe that all of us will remember Tom as a person who was very honest and open, and was unafraid to hear bad news. He actually worked best when aggressively fixing problems.

Tom and Iris have not solidified retirement plans. We know that Tom will be actively involved with his church, family, and community. You really will be missed Tom. ©

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

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

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

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

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

Acquisition Law Focus

Fiscal Policy Development: Severable Services

Don't forget about the new authority to enter into contracts for severable services for a period beginning in one fiscal year and ending in another, as long as the contract period does not exceed one year.

This is a departure from the previous rule stating that severable service contracts represented the *bona fide* need of the fiscal year in which the services were performed; accordingly, the theory went, the contracts could not legally "cross" fiscal years. Now, in essence, severable service contracts can legally "cross" fiscal years, provided that the *bona fide* need exists for the services when the contract is awarded and provided the contract does not exceed one year. See 10 USC 2410(a) for more details.

This is a particularly "good news story" for our clients requiring routine, recurring support services, as it should give them more flexibility than in the past. POC is **Lisa Simon**, DSN 767-2552.©

CC Newsletter

Fraud Indicators: TACOM- ACALA Preventive Law Note: Keeping the Client Informed of Fraud

TACOM-ACALA's **Sue Allison-Hiebert**, DSN 793-8445, provides an excellent preventive law note informing clients as to what facts or circumstances may indicate fraud (Encl 1). The paper includes a description of potential fraud indicators at four distinct contracting stages: presolicitation, solicitation, pre award and post award. If an employee believes an impropriety exists, they are encouraged to contact the TACOM-ACALA Fraud Advisor or the Criminal Investigative Command Special Agent. It is interesting to note that since TACOM-ACALA is located with HQ IOC, fraud advisors at the IOC are also identified: **Marina Yokas-Reese** and **Tom McGhee**.©

List of Enclosures

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OPTION EXERCISE PROTEST POTENTIAL: What Might GAO Do and Not Do

The GAO will usually decline to review an agency's decision not to exercise an option. The matter is usually considered contract administration since it does not involve the failure to conduct a required competition and under the usual Government contract option clause the option is exercisable at the sole discretion of the Government. The GAO recognizes that a contractor has no legal right whatsoever to compel the Government to exercise an option. See, C. G. Ashe Enterprises, B-188043, March 7, 1977, 77-1 CPD 166; Interstate Equipment Sales, B-222213, March 19, 1986, 86-1 CPD 274; Digital Systems Group, Inc., B-252080.2, March 12, 1993, 93-1 CPD 228.

However, if the agency conducts a competition to determine which of the incumbent contractors should have their option exercised the GAO will review the failure to exercise an option. Fjellestad, Barrett and Short, B-248391, August 21, 1992, 92-2 CPD 118; Walmac, Inc., B-244741, October 22, 1991, 91-2 CPD 358; Digital, supra.

One of AMCOM's customers has awarded parallel development contracts under a Broad Agency Announcement. These contracts include a small basic effort and larger options. The customer hopes to receive sufficient funding to award all the options but may be limited to funding only one of the incumbents. Neither the RFP nor the contract mention any downselect procedures. If the customer does not receive sufficient funding to exercise each incumbents option, the customer plans to advise the incumbents whose options are not being exercised that due to funding limitations an administrative determination was made not to exercise their option.

Legal has advised that if it conducts even a limited competition in order to determine which option to exercise the GAO will review the action. See, Mine Safety Appliances Co., B-238597.2, July 5 1990, 90-2 CPD 11; Honeywell, Inc., B-244555, October 29, 1991, 91-2 CPD 390.

If the customers do not receive sufficient funding to exercise all of the options in parallel development contracts they must be cautioned not to convene an evaluation panel and conduct a competition in order to determine which option to exercise. The program manager or other appropriate official should review the performance of the contractors and the terms of the option in order to make a recommendation to the contracting officer on which option should be exercised. This procedure should be viewed as a matter of contract administration outside the scope of the GAO's bid protest function.

POC is **Will Rathbun**,
DSN 788-0544. ©

**Coming Soon:
Look for
Details on the
AMC A-76
Workshop**

Acquisition Law Focus

PARTNERING: It's Not Just Acquiring for Contractors Anymore Commercial Items

The AMC Partnering Program is quickly expanding, in part due to the excellent efforts of our cadre of AMC MSC Lead Partnering Champions (LPC). STRICOM LPC **Harlan Gottlieb**, DSN 970-3513, provides an excellent synopsis on a recent success story in using Partnering in a agency-agency Partnering Workshop (Encl 2).

The AMC Partnering for Success model was used successfully in a Partnering Workshop between the PM for Advanced Distributed

Simulation (ADS) and a TRADOC agency, the National Simulation Center (NCS), to define roles and responsibilities for each agency in the Warfighter's Simulation Program (WARSIM).

This is an example of the many potential uses of the Partnering process.

The paper walks you through the steps STRICOM took in reacting promptly when it identified a problem that could lead to failure: confusion over roles and responsibilities.[©]

CBDCOM's **Phil Hunter**, DSN 584-1299, provides an excellent treatise on acquiring commercial items (Encl 4). The paper underscores that commercial items is defined in eight different ways under the FAR, and provides an in-depth discussion of the term "of a type", and its importance to the acquisition of commercial items.

Several special commercial items acquisition requirements are highlighted, including the need to conduct market research before acquiring. Market research is an essential element of an effective acquisition strategy. establishing the foundation for the agency description of need.

The description of need is the vehicle by which the government agency provides sufficient information to the potential offerors. explaining how the agency intends to use the product, the performance requirement and essential physical characteristics.[©]

Potential Pitfalls for Product Center Personnel

TACOM-ACALA's Chief Counsel, **Kay Krewer**, DSN 793-8414, provides another great example of a preventive law note addressing several issues of import, cautioning against making unauthorized commitments, releasing proprietary information, and releasing information

without authorization (Encl 3).

For each item details are provided on applicable law and regulations, for example, the Procurement Integrity Act, and the Trade Secrets Act, with common sense comments and suggestions for the client.

Good work![©]

A-76 Steps & DOD CA Initiatives

Diane Travers, HQ AMC, DSN 767-, and **Cassandra Johnson**, HQ AMC, DSN 767-8050, report on a program they attended on OMB Circular A-76 (Encl 5).

A-76 Is...

A-76 provides a process for a cost comparison between the public and private sectors before converting from government performance of a function to contractor performance, or from contractor performance to government performance.

Functions that cannot be contracted for include inherently governmental functions, core functions (technical or scientific requirements for emergencies and mission), legally exempt functions (guards, firefighters, Crane and McAlester), and gray areas (non-exempt but that cannot be clearly separated from exempt functions.)

A-76 8 Basic Steps

The basic steps in the process are: (1) determining availability of commercial sources; (2) preparing comprehensive performance work statement; (3) developing cost estimate for government performance and most

efficient organization (MEO); (4) independent review of MEO (5) Issuing a solicitation, conducting an evaluating, and selecting the best commercial source; (6) conducting the cost comparison between the commercial winner and the MEO; (7) public review; (8) appeals.

DOD Initiatives

Representatives from the services discussed their CA initiatives. The Army is currently studying 12,000 FTE with an expected annual savings of \$120M, and plans to have completed studies on 44,000 FTE by FY 03, with a projected annual savings of \$440M. The Navy is planning to studies 80,000+ FTE over the next 5 years at an expected \$2.5B savings over POM with \$1.2B savings annually thereafter. Navy has awarded an IDIQ contract for consulting services to use for A-76 studies, and has completed streamlined A-76 studies in 12 months. The Air Force has reduced over 28,500 FTE as a result of A-76 studies, and on average 60% of competitions go contract while 40% stay in house (overall government average is 50/50). ©

The National Partnership for reinventing Government, chaired by **Vice-President Gore** issued a memorandum requiring government documents to use plain language.

The memorandum states that beginning 1 October 1998 all new documents and forms will be written in plain language. By 2002, all documents created before 1 October 1998 must undergo a rewrite. New regulations written after 1 January 1999 will have to be written in plain language.

Guidance as to what plain language is will be issued shortly. The active voice ("you") and brevity will be encouraged.

As an example OSHA currently has a 63 word narrative standard for "egress". In part it reads: "Ways of exit access and the doors to exits to which they lead shall be so designed and arranged as to be clearly recognizable as such."

The standard was converted to plain language: "An exit door must be free of signs or decorations that obscure its visibility." **Mr. Gore** suggests that the word "obscure" might confuse. So he suggests "Don't put up anything that makes it harder to see the exit door".

Understand? ©

The Lexicon of Revised FAR Part 15...and other provocative changes

CECOM's **Pat Drury**, DSN 992-, recently gave two presentations to about 80 CECOM Acquisition Center-Washington personnel. The presentation highlights the important revisions in the solicitation, evaluation and source selection sections of FAR Part 15.

Sixteen Charts

Included is information on best value, award without discussions, establishing the competitive range, deficiencies and weaknesses, exchanges after establishing the competitive range, oral presentations, past performance, and proposal revisions and modifications.

Several definitions are provided on important aspects of the FAR 15 process.

Many AMC acquisition attorneys are responsible for briefings and other types of FAR 15 training, so these slides may point you in the right direction.

Best Value Defined

The definition of best value under FAR 2.101 is provided: "The expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement."

Exchanges & Past Performance

With respect to exchanges leading to the establishment of a competitive range, the briefing underscores that they are required with offerors whose adverse past performance is determinative. Such "exchanges" are permitted with offerors whose inclusion in the competitive range is uncertain. These may address ambiguities, deficiencies, weaknesses, errors, omissions, mistakes, and the relevancy of past performance.

Call Pat for a copy of this briefing. ©

IRS: Burden Shift Still A Burden

On July 22, 1998 President Clinton signed into law the IRS Restructuring and Reform Act of 1998. This wide-ranging legislation includes many provisions aimed at making the IRS a more taxpayer-friendly operation and bolstering taxpayers' rights in disagreements with the IRS.

Among those provisions is a controversial section that shifts the burden of proof in court proceedings from the taxpayer to the government.

However, the taxpayer must still overcome some major hurdles before getting the protective shift of burden. Under the new law, the IRS bears the burden of proof only if the taxpayer: (1) introduces "credible evidence with respect to any factual issue relevant to ascertaining the taxpayer's income tax liability"; (2) complies with the laws' substantiation requirements; (3) maintains records as required by the law and regulations; and (4) cooperates with reasonable IRS requests for meetings, interviews, witnesses, information, and documents.

A nice preventive law paper from HQ AMC's **Alex Bailey**, Chief of Legal Assistance, DSN 767-8004 (Encl 6). ©

Employment Law Focus

MSPB Annual Report for 1997

Great Statistics!

Case receipts—8,721 new cases, down less than 2% from 96.

Cases decided—8,314 decided

Dispositions—Of the 7,223 initial appeals decided 46% were dismissed (715 for lack of jurisdiction, agency cancellation of action or withdrawal of the appeal)

Settlement Rate—Of the 3,879 not dismissed, 1957 were settled—overall settlement rate of 50%. The settlement rate for adverse actions—66%; performance cases, 64%; within-grade denials, 75%

Relief for Appellants—Considering the number of appeals settled (1,957) and those in which the agency action was reversed or mitigated (587), appellants received relief in 65% of the appeals not dismissed. Of the 1,922 appeals that were not dismissed or settled, 30% resulted in reversal or mitigation of the agency action.

Processing Time—The average processing time for initial appeals was 108 days, with 81% decided within 120 days.

Types of Actions Appealed—50% concerned agency adverse actions, 10% RIF appeals, 22% retirement cases, and 2% concerned performance-based actions.

Whistleblower Appeals—610 appeals and stay requests. 242 were individual right of action appeals, 276 were direct appeals to the Board that included allegations of reprisal for whistleblowing, and 93 were requests to stay an agency action allegedly based on whistleblowing.

Whistleblower Relief—Of the 518 whistleblower cases decided, 59% were dismissed. In the other 211 cases, appellants received relief—through settlement, reversal or mitigation—in 68% of the cases.

Mixed Cases—Allegations of discrimination were raised in 1,833 of the initial appeals decided. In 1,452 of those appeals, the discrimination issue was not decided because the case was dismissed (902) or settled (534) or the allegation was withdrawn (16). The remaining 381 resulted in a finding of no discrimination in 93% and discrimination in 6%.^c

Supreme Court Alignment for the 1997-8 Term

Justices **O'Connor** and **Kennedy** continue to be in the center, and speak for the Court on key close issues. Kennedy was most often the pivotal 5th vote. **Kennedy** was in the majority most—93%, with **O'Connor** second with 89%.

Aligned to the left are Justices **Souter**, **Breyer**, and **Ginsburg**, who voted together 62% of the time. Aligned to the right are **Kennedy**, **O'Connor**, and **Rehnquist** who voted together 64%.

Voting together in 82% of the cases are Justices **Scalia** and **Thomas**.

Alone again is Justice **Stevens**, dissenting in almost 50% of the cases.

15 cases were decided by a 5-4 vote. The 5 Justices most often making that alignment were **Rehnquist**, **Thomas**, **Scalia**, **Kennedy** and **O'Connor**.^c

Employment Law Focus

Sexual Harassment & Employer Liability

The U.S. Supreme Court issued two decisions in late June. The cases deal almost entirely with the issue of liability; i.e., when is an employer liable for the acts of a supervisor who creates a "hostile environment"? You may want to focus on the following quote from one of the cases, Burlington Industries v. Kimberly Ellerth, 1998 U.S. LEXIS 4217 (June 26, 1998):

"[T]he Court adopts, in this case and in Faragher v. Boca Raton, post, p. ___, the following holding: An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

While proof that an employer had promulgated an antiharassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.

And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action." POC is HQ AMC's **Linda B.R. Mills**, DSN 767-8049. ©

Workplace Violence is Rarely Reported...and the most dangerous jobs

The Department of Justice reports that it is rare for instances of workplace violence to be reported. Less than half of these offenses are reported.

More than 2,000,000 workers reported violent episodes for each year 1992-1996, although there is a 17% decrease when you compare 1992 with 1996.

The report also discloses that the most dangerous job is police officer, followed by private security personnel, taxi drivers, prison guards, bartenders, mental health professionals and gas station attendants. The most safe job is that of college or university teachers.

Other statistics:

-- 37% of the victims knew the offender.

-- More than 37% worked for the government, a high figure in that only 16% of the total workforce are public sector employees. ©

Employment Law Focus

Executive Order Prohibits Sexual Orientation Discrimination

On May 28, President Clinton signed an amendment to Executive Order 11478 providing a uniform policy for the federal government prohibiting discrimination based on sexual orientation in the federal workplace.

Sexual orientation is added to the "protected" list that includes race, color, religion, sex, national origin, disability and age. Although most federal agencies have a policy in place barring discrimination based on sexual orientation, a uniform policy is applicable government-wide.

The EO can not create any enforcement rights such as filing a complaint with the EEOC. Congress can only grant such rights as part of legislation that provides for enforcement methods and means.

August 1998

OPM

on Team Leaders...

The Office of Personnel Management (OPM) is seeking to establish order in what is becoming a fixture of the general schedule—the so-called "team leader" position. Agencies have been designating employees as pseudo-supervisors, who are not quite rank and file employees or full fledged supervisors, to try out the concept, and in some cases, to skirt limits on the number of supervisors.

OPM has issued a new classification guide that helps agencies define these "leaders." It says that they can help facilitate work but can not plan, assign, okay or reject work performed by a team. And supervisors, not team leaders, schedule training and approve funding, while leaders may only observe and ask for team training.

The guide also says that a team leader's grade generally should be a full grade higher than the work being performed by the team. Agencies should by now have received this guidance (Encl 7). POC is HQ AMC's **Linda B.R. Mills**, DSN 767-8049, ©

and on RIF

The OPM changes address four areas. They are: (1) the method for averaging actual ratings received if there are fewer than three during the four year look-back period; (2) the use of "modal" ratings for employees who have no ratings of record during the four year look-back period; (3) the use of performance evaluations given under appraisal systems not covered by 5 CFR Part 430, Subpart B; and (4) the system for assigning retention service credit when there are mixed rating patterns within the same competitive area.

As these changes affect bargaining unit employees' conditions of employment, there is an obligation to notify your union(s) of the changes and provide them an opportunity to request bargaining. As these changes stem from a government-wide regulation, they are generally outside the duty to bargain in accordance with 5 USC Sec 7117(a)(1).

DAPE's memorandum is provided (Encl 8).

POC is HQ AMC's **Linda B. R. Mills**, DSN 767-8049. ©

Environmental Law Focus

Thinking Green for Weapons Systems

The Department of Defense continues to stress that environmental considerations should be integrated into weapon systems development, maintenance, and fielding.

There now is a wealth of information from the Army and other services as to the environmental requirements as they pertain to the weapon system acquisition program.

A revised list of WWW sites for access to this information is provided by HQ AMC Environmental Law Team Chief **Robert S. Lingo**, DSN 767- 8082 (Encl 9).

Nineteen Web Sites are cited, including ones from DOD's Office of Under Secretary for Acquisition and Technology, the Army (Army Acquisition Pollution Prevention Support Office, Army Environmental Center), Air Force, Navy and the Environmental Protection Agency.^c

Does CERCLA Analysis Equal NEPA?

Do you have to do a NEPA analysis in support of CERCLA environmental remediation projects? **Peggy Giesking**, CBDCOM Environmental Attorney, DSN 584-4659, has provided a thorough examination of why the CERCLA process is the functional equivalency of NEPA, as part of her pursuing a Masters of Law. This also reflects the official Army position set forth in AR 200-2.

A copy of this paper may be obtained from Ms. Giesking.^c

ELD Bulletins for May & June

Environmental Law Division Bulletins for May and June 1998 are provided (Encl 10 and 11) for those who have not received an electronic version or who have a general interest in Environmental Law.

Giving It Away... While You're Cleaning It Up

Last year Congress provided the Early Transfer Authority, which allows Federal agencies to transfer land before all remediation is completed, with a reservation of the final deed covenant until cleanup is completed.

The Environmental Protection Agency (EPA) and the Defense Department have now provided guidance for application of this new authority at NPL sites, and non NPL sites.

The EPA guidance can be accessed at <http://www.epa.gov/swerffrr/doc/hkfin.htm>; the DoD guidance at <http://www.dtic.mil/envirodod/brac/publish.html>^c

Supreme Court Clarifies Corporate Liability for Parent Corporations

CERCLA Decision Will Impact Liability Analysis

On June 8, 1998, the Supreme Court issued an opinion in the case of *U.S. v. Bestfoods, et al*, 1988 LEXIS 3733, which a unanimous Court provided guidance on the issue of parent corporation liability for the actions of its subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court's decision in this case may affect the Third Circuit's analysis in *FMC Corp. v. U.S. Dept. of Commerce*, 29 F.3d 833 (3rd Cir.1994) which has been used to impose liability on federal agencies as an operator.

This opinion could have a substantial impact on federal agency CERCLA liability. First, the Court seems to have discarded the "actual control" test, which was used by the Third Circuit in *FMC Corp.*¹ to find the federal government liable as an operator. Of course, it is unclear how the Court's focus on the rela-

tionship between a parent corporation and a facility would apply in situations where federal agencies have been involved with a particular type of industrial operation.

Significantly, the Court sharpened the definition of "operator" to include only those activities specifically related to disposal of hazardous waste and environmental compliance. This definition presumes that many of the factors the Third Circuit found to be relevant to an agency's control — such as the government's ability to direct raw materials to the plant and the government's involvement in labor issues at the plant — would not play a role in any new analysis of a federal agency's operator status.

Although each future case will be decided on the basis of its unique facts, *Bestfoods* will certainly influence upcoming decisions concerning federal liability.^c

Review Before You Spray

Do lessees under Army agricultural leases need to get Army approval before conducting aerial pesticide spraying? And are other pesticide management activities of lessee subject to Army Pest Management Plan requirements.

In an example of joint legal efforts, **Geraldine Lowery**, DSN 793-5932, an IOC attorney, in cooperation with **Scott Farley**, AEC attorney, have prepared a thorough legal memorandum discussing the requirements for Army approval of aerial pesticide spraying (Encl 12).^c

Contacting Army Regional Environmental Offices

Regional environmental offices can be a great resource to determine if other DoD installations are facing the same issues as you are, or whether there is a DoD common policy. They are now easy to contact. Encl 13 is a list of names, telephones, and E-mail addresses, and of course the Army RECs can be accessed through the AEC website: <http://aec-www.apgea.army.mil:8080/>.

It's that time again--political activity and The Hatch Act

The Hatch Act and implementing OPM regulations (5 C.F.R. Parts 733 and 734) apply to civilian employees. The rules applicable to soldiers are more restrictive and are set out in DoD Directive 1344.10 and AR 600-20.

When the Hatch Act Reform Amendments went into effect on 3 Feb 94, greater latitude for participating in the political process was given to most Federal employees. With certain exceptions (career SES, for example), Federal employees may now participate in partisan politics. However, there are still limits. What follows are lists of what most Federal employees may or may not do.

Federal Employees May

- be candidates for public office in nonpartisan elections
- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues
- contribute money to political organizations
- attend political fundraising functions

-attend and be active at political rallies and meetings

-join and be an active member of a political party or club

-sign nominating petitions

-campaign for or against referendum questions, constitutional amendments, municipal ordinances

-campaign for or against candidates in partisan elections

-make campaign speeches for candidates in partisan elections

--distribute campaign literature in partisan elections

hold office in political clubs or parties

Federal employees may not

-use official authority or influence to interfere with an election

-solicit or discourage political activity of anyone with business before their agency

-solicit or receive political contributions (may be done in certain limited situations by federal labor or other employee organizations)

-be candidates for public office in partisan elections

-wear political buttons on duty

-engage in political activity while on duty. while in a government office. while wearing an official uniform, or when using a government vehicle.

Military Personnel

Active duty military personnel are under different and more restrictive rules than civilian employees. For example, they may not make campaign contributions to other members of the Armed Forces or Federal employees. They also may not run for elective office in the Federal government, or the government of a state, territory, the District of Columbia, or any political subdivision thereon. (10 U.S.C. Sec. 973).

AMC Ethics Team Chief **Mike Wentink**, DSN 767-8003, and ethics counselor **Alex Bailey**, DSN 767-8004, provide the complete Hatch Act story (Encl 14).

Only the Office of Special Counsel is authorized to render an advisory opinion on the Hatch Act. So, they invite you to the OSC webpage <http://www.access.gpo.gov/osc/>.

Gifts Between Employees: The general rule & the special occasion exception

A regular and recurring issue in the workplace is that of gifts between employees. HQ AMC Ethics Team Chief **Mike Wentink**, DSN 767-8003, provides a paper on this subject (Encl 15).

The basic rule is two-fold: **Employees may not:**

(1) directly or indirectly give a gift to, or make a contribution toward a gift for an official superior, or solicit a contribution from another employee for a gift to an official superior; or

(2) directly or indirectly accept gifts from employees who receive less pay than they do, unless there is no superior-subordinate relationship between them, and there is a personal rela-

tionship that would otherwise justify the gift.

There are **exceptions** to this rule. The primary one for departures and retirements is the "special, infrequent occasion." For occasions that terminate the superior-subordinate relationship, such as retirement, resignation or transfer, we may solicit nominal amounts to give a gift appropriate to the occasion.

The JER says that the "nominal amount" solicited may not exceed \$10, and that the total value of the gift generally should not exceed \$300. Note that a "promotion" is not considered to be a "special, infrequent occasion" unless the employee is also being transferred out of the supervisory or command chain.^c

Fundraising and Informal Funds

CECOM Deputy SJA **MAJ Marvin Gibbs**, DSN 992-4445 recently provided the workforce with an excellent preventive law note highlighting the various restrictions and rules applicable to

fundraising, describing what must be contained in requests to raise monies on a military installation, and providing monetary limitation rules, and points of contact for further information (Encl 16).^c

You Can't Always Speak

The relationship between AMC, DA and private associations raises many standards of conduct and ethics issues. One such recurring issue is that of speaking at private association events.

In short, giving the presentation must be something that we really want to do because it serves the Army's interests, and what we get out of it justifies our expenditure of resources, *i.e.*, we get "bang for the buck!"

The DoD *Joint Ethics Regulation* (JER) deals specifically with this issue and sets out the criteria for such support. Seven factors must be analyzed and met in order for speaker support to a private organization. These include:

-Must be no interference with performance of official duties or readiness.

-Community relations or other Army interests must be served.

-It must be appropriate to associate the Army with the event.

-We must be willing to provide same support for similar events.

AMC Ethics Counsel **Mike Wentink** provides an ethics advisory on this important subject (Encl 17).^c

Ethics & Private Organizations...

Membership and participation in private organizations enhance our professionalism as soldiers and Army employees, and in our life's work. In addition, participation in these organizations brings us into contact with the civilian community and it is a learning and sharing experience where we all benefit.

However, there are parameters that constrain our relationship with and participation in POs.

No matter how good the work is that they do or how well their goals and ideals complement those of the Army and AMC, they and their activities may not be organized, planned, administered and operated by and as an extension of the Army and AMC. They are non-Federal entities and must be treated as such. Like most things in life, there are rules!

AMCCC Ethics Counsel **Mike Wentink**, DSN 767-8003 and **Alex Bailey**, DSN 767-8004, provide a paper that highlights 6 rules, focused on financial interests, relationship to official duties, personal and private participation, and endorsement (Encl 18).

Three of the rules are:

Rule No. 1: If you are an officer, director, trustee, or employee of a PO, the financial interests of the PO are imputed to you. This means that you must not participate in official Army matters that affect that PO because you have a conflict of interest.

Rule No. 2: If you are an active participant in a PO, you probably should not participate in official matters involving the PO because of the appearances (a reasonable person with knowledge of the relevant facts would likely question your impartiality — for example,

Rule No. 3: As an officer, director, trustee, advisor or other active participant for a PO, you act in your personal and private capacity. This is not part of your job description. You are not authorized to organize, plan and run membership drives, fundraising campaigns, and other business of the PO from your AMC office. In appropriate cases, the “agency designee” (your boss) may authorize limited use of Government resources (e.g., your computer) and even some “excused absence” for professional development.

...and Gifts from outside sources

The basic rule is that we **must not** accept gifts from prohibited sources or which are offered to us because we are a Federal employee.

This sounds simple, but what's a gift? What's a prohibited source? **Mike Wentink** recently provided HQ AMC employees with an ethics advisory that defines gifts (and what is not a gift) and “prohibited sources (Encl 19).

A **gift** is anything of value (e.g., discounts, entertainment, training, favor, discount, forbearance, hospitality). Simple enough. However, the Office of Government Ethics specifically excludes some items from this definition, to include the following: coffee, donuts, and similar refreshments offered during a meeting (the “donut rule”). This does not include a working lunch.

A **prohibited source** includes anyone doing business with the Army, trying to do business with the Army, seeking official action from the Army, or is affected by how the Army employee performs or does not perform his or her duties. This includes on-site contractors and their employees. ©

Harvey Reznick Named AMC Attorney of the Year

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

During the annual CLE Awards Luncheon, **Harvey Reznick**, Chief Adversary Proceedings Division, was recognized as the AMC Attorney of the Year, presented with the Joyce I. Allen Award, in a ceremony presided over by **Ed Korte** and General Counsel of the Army **Bill Coleman**.

Mr. **Reznick**, an attorney with AMC since 1968, served in several important acquisition law positions at the St. Louis AMC legal office, which has moved to Huntsville, and designated the U.S. Army Aviation and Missile Command (AMCOM).

Harvey Reznick's significant work accomplishments include serving as systems attorney for the Advanced Attack Helicopter Program, which was then the largest

Army research and development program. During eight years as the Chief, Procurement Law and Chief Counsel, Aviation and Troop Command (ATCOM), the command lost only one bid protest, a remarkable achievement. He also made major contributions to the geographic merger of ATCOM into AMCOM, respecting the decisions of all ATCOM legal office employees, and actively assisting in placement and relocation efforts. The selection is particularly noteworthy in that **Harvey Reznick** served with **Joyce Allen** for many years. ©

Attorney of the Year Nominees

The other nominees for this year's prestigious award were **Thomas Carroll**, CECOM; **Timothy Connolly**, ARL; **Violet Kristoff**, TACOM; **Bernadine McGuire**, IOC; **Robert Parise**, ARDEC; **Jeanne Rapley**, TECOM; and, **John Seeck**, IOC. Congratulations to all of you, and thanks for your efforts and contributions to your commands, AMC and the Army. ©

CLE Handouts Disks & The AMC Website

Each organization represented at the CLE Program was provided disks with handout materials used during the week. It is important that you make these disks available to every member of your office. A list of the materials contained on each of the 3 disks is provided (Encl 20).

Additionally, AMCCC Web Master **Josh Kranzberg** has placed much of the handout material on the AMC Command Counsel Home Page. These can be accessed at www.amc.army.mil/amc/command_counsel/CLE/CLEinfo. The materials include acquisition, environmental, employment law documents, and QDR charts used by **Mike Sandusky** in his plenary session. ©

AMC Attorneys Honored

One of the highlights of the annual CLE Program is the recognition of AMC counsel who contributed significantly to their organization, AMC and the Army. This year, at the Awards Luncheon, it was a pleasure to have General Counsel **Bill Coleman** join **Ed Korte** in presiding over the awards presentation. We extend our congratulations to both nominees and recipients of these awards.

Achievement Award

The Command Counsel Achievement Award is presented to an AMC field counsel nominated by a member of the Office of Command Counsel, Headquarters, AMC.

Bernadine McGuire, from the IOC, is this year's recipient, recognized for her exceptional work on the contract for the construction, systemization, operation and closure of a chemical demilitarization facility at Pine Bluff Arsenal, and for her contribution to the successful defense of a related protest filed with the General Accounting Office.

The Pine Bluff contract was awarded as part of the effort under the Chemical Stockpile Disposal Program, by which the Defense Department is carrying out the destruction of the U.S. stockpile of lethal chemical weapons communities. The Pine Bluff Chemical Agent Disposal Facility is a _ billion dollar project that will lead to the destruction of 3,850 tons of nerve and mustard gas.

Team Project Award

Several Teams were nominated as representing significant achievements by a group of individuals, working together: **APG Military Justice Team, SSCOM Trademark Registration Team, AMC Partnering Team, ARL's REDS (ADR Employment) Team, TACOM's Scout Legal Team, TACOM's Colt License Dispute Defense Team, and AMCOM's BRAC Claims Team.**

The recipient of the Team Project Award is the **AMC Partnering Team**: Team Chief is **Mark Sagan**, Deputy Chief Counsel, CECOM. Other team members are **Dave**

DeFrieze, IOC; **Ken Bousquet**, TACOM Acquisition Center; and, **Steve Klatsky**, HQ AMC.

The AMC Partnering Team made vital contributions to the expansion of Partnering within AMC. They wrote the Partnering for Success Guide, designing the AMC Partnering Model; developed the syllabus for, and conducted the successful training of 80 AMC Partnering Training; originated the concept for including Partnering in Roadshow VII; and represented AMC in numerous important sessions that addressed Partnering.™

Managerial Excellence Award

The Management excellence Award is named for Francis J. Buckley, Jr., former Chief Counsel of the US Army Missile Command. This year the following were nominated for this important award: **Laura Haug**, TECOM; **Kay Krewer**, TACOM-ACALA; **John Metcalf**, CECOM-Belvoir Legal Branch; **Edward Scruggs**, AMCOM; and, **Peter Taucher**, TACOM.

This year's recipient is **Laura Haug**, TECOM, recognized for her superb work as the Deputy Chief Counsel, TECOM; her accomplishments in the Commercial Activity Study of Base Operations, at APG; the TECOM Legal Office Reorganization & Relocation Projects; as well as her office management during the Ordnance Center & School Investigations and Cases.

AMC Preventive Law Award "Leadership & Relationships: The Courage to Communicate"

The AMC Preventive Program Award recognizes that effort during the past year that best fulfills the Command Counsel's Preventive Law philosophy embodied in the Command Legal Program. That philosophy encourages each attorney to anticipate the needs of clients and commands, to identify areas of greatest vulnerability and to develop programs to address those needs. The Awards Committee identified the following nominees, in alphabetical order for this year's Preventive Law Program Award as deserving special recognition:

Nominees:

Kathleen Allen, IOC; AMCOM Personal Services Prevention Team (Francis Faraci, Bob Garfield, Tina Pixler, Diane Beam, Julia Cole, James McMurray, and Edward; Bob Chase, ARL; Dave DeFrieze, IOC; Margaret Gillen, CECOM; Ron Majka, TACOM; Tom McGhee, IOC; and, TACOM-ACALA Legal Group (Kay Krewer, Joseph Picchiotti,

Pamela Bailey, Susan Allison-Hiebert, Maria Bribriesco, Caridad Ramos, Carrie Schaffner).

TACOM's **Ron Majka** is the recipient of this year's award, recognized for his outstanding work in the FAR 15 Rewrite Training Program. In order to appropriately introduce the new procedures set forth in FAR 15, TACOM developed a training program for its workforce. The scope of the FAR 15 Rewrite changes was so broad that training had to be conducted throughout the acquisition community.

Ron served as the TACOM Business Law Division representative to the overall TACOM Acquisition Center effort to develop a successful training program. He prepared a script to accompany the charts that provided background information, details and other useful information to place in a proper perspective the specific changes in question. Each trainer used these charts and background information during the training sessions. More than 300 persons were trained in small group sessions of 20-25 employees, conducted over a 2-month period. ©

"Leadership & Relationships: The Courage to Communicate"

At the CLE we were treated to a presentation entitled "Leadership & Relationships: The Courage to Communicate", by **Dr. Norma Barr** of Barr & Barr Communication Consultants. The basic premise of this enrichment session is that balancing head and heart is critical to leadership.

The courage to communicate requires the balance of head and heart. **Dr. Barr** introduced us to the concept of emotional intelligence, also referred to as social or personal intelligence, but all converge to focus on the ability to act wisely in human relations. The important conclusion: Leaders build responsible relationships by communicating authentic presence through words, actions, and values. ©

Plenary Session Discussion Highlights

Notes from the Chief...and QDR Impact on AMC

AMC Chief of Staff **MG Jim Link** and Chief, Special Analysis Office **Mike Sandusky**, briefed us on the many significant events that will shape our future, including the Quadrennial Defense Review, budget developments, competitive sourcing, and the inherently government function exercise. ©

Competitive Sourcing Panel

Outsourcing and Privatization, a significant issue for all of AMC, was addressed in a plenary session conducted by **Elizabeth Buchanan**, **Cassandra Johnson** and **Diane Travers**. During this session, the DA perspective, AMC developments, and a discussion of process, policy and procedures were all covered in detail. ©

Contractors in the Workplace

An interesting session was Contractors in the Workplace, during which **Ed Korte**, **Nick Femino**, **Bill Medsger** and **Diane Travers** worked with AMCCC Ethics Team Chief **Mike Wentink**, in presenting real life fact situations concerning contractors and government personnel working together. This important issue is of growing importance, touching upon many different areas of our legal practice and work relations. ©

The JAGC Perspective

BG Mike Marchand, Assistant Judge Advocate General for Civil Law and Litigation, joined us and gave an interesting presentation focused on current developments and items of interest to the TJAG.

Additionally, this reminded us that we enjoy a very close working relationship with the JAG Corps. ©

DA Sexual Harassment Study & the DA Human Relations Climate

MG (Ret) Richard Siegfried, who chaired the Secretary of the Army's Senior Review Panel on Sexual Harassment, gave attendees an overview of the important work done in assessing the human relations climate in the Army. Relationships and how we treat each other are central to the unit and organizational cohesion necessary for mission success.

It is essential that the Army as an institution learn from the experiences of the Aberdeen Proving Ground Ordnance Center cases, to listen closely to what the troops are saying and feeling, and to be prepared to accept the challenge of the changing nature of the military workforce. ©

Faces In The Firm

Hello

HQ, AMC

MAJ Ed Beauchamp arrived in July and is working with the Business Operations Law Division.

HQ, TECOM

Mr. Michael K. Millard joined the office on 30 March 1998 as the Chief, Client Services Division. Mr. Millard is not new to the TECOM legal community, having worked in our office from 1990 through 1993 as the Deputy Staff Judge Advocate.

LT David M. Dalton arrived on 10 April 1998 from the JAG Officer Basic Course. He is a welcome addition to the Civil Law Division.

Mr. Billy Smith arrived in the Legal Office on 26 May 1998, under the JAGC Summer Intern Program. He will work for approximately 2 months and then return to law school. He is a 2nd year law student from Franklin Pierce Law School in New Hampshire.

Yuma Proving Ground

MAJ George A. Figurski, arrived on 15 July 1998 from the CID Command, Fort Belvoir, to become the the new Command Judge Advocate.

Mr. David Holbrook, arrived on 22 June 1998 from Fort Campbell, Kentucky. He's YPG's new environmental attorney. He and his wife, Mary reside in Yuma, Arizona.

White Sands Missile Range

The new SJA is **LTC Karl Ellcesser** who reported in June from The JAG School.

AMCOM

LTC Andy Hughes has joined the Acquisition Law Division as Chief, Branch E.

SSCOM

Welcome to **Ms. Srikanti Dixit** who worked as an SSCOM summer intern while attending Ohio Northern University. She will be primarily working in contract law. Additionally, Ms. Dixit is currently involved with the Indian Bar Association's endeavor to decrease domestic violence.

TACOM

CPT Karen Sue Weichmann is the new contract attorney intern. She is currently enrolled in the JAG School basic contract law program.

Promotions

HQ, TECOM

Ms. Barbara S. Owen, Claims Examiner, in the Client Services Division was recently promoted to GS-09. Congratulations, Barbara!

CPT Jeffrey M. Neurauter, Branch C, Acquisition Law Division, was promoted to his current rank on 1 July 1998. He hosted a fun promotion party for all Legal Office personnel.

WSMR

LTC John Long has been promoted to **Colonel**. Congratulations!

Awards

HQ, TECOM

On the departure of the APG Garrison Commander, **Colonel Roslyn M. Glentz** officially recognized several office members.

Ms. Laura Rothenberg Haug, Deputy Chief Counsel and **Ms. Janet R. Wise** both received Commander's Award.

Mrs. Katherine (Alene) Williams, **Ms. Jean Buckholtz** and **Mr. David H. Scott** received Certificates of Achievement.

MAJ Marie S.L. Chapa, Deputy SJA and **CPT Creighton Wilson**, Civil Law Attorney received Garrison coins.

Faces In The Firm

Goodbye & Best of Luck

TACOM-ARDEC

Marty Kane after 19 years with Picatinny was recently promoted to Business Manager for the Joint Light-weight 15.5mm Howitzer program, a Marine Corp weapon system being developed jointly with the Army at Picatinny. Marty's expertise in acquisition and international law is a great loss though he is still on post with the same e-mail and telephone number.

Francisco (Frank) Rodriguez recently accepted a promotion as the Labor attorney with EPA, in New York City. Frank will be missed by people from all over the arsenal because of his many activities, both professional and social.

Barry Dean retired after 30 years of service to Picatinny. Good luck as a private practitioner.

Tobyhanna Army Depot

Good luck and best wishes to **CPT James Butler** who recently departed the legal office.

HQ, TECOM

SPC Juan Cruz, Criminal Law Division, ETS'd 26 June 1998. He is residing in Havre de Grace, Maryland and is working as a medical malpractice paralegal.

SPC Stephen George, Criminal Law Division, ETS'd 1 July 1998. He is residing in Lebanon, Pennsylvania with his wife and family.

Yuma Proving Ground

A happy retirement for **MAJ Harry Longbottom**, now residing in Yuma with his family.

White Sands Missile Range

LTC John Long, Chief Counsel has been reassigned to the HQs, Defense Logistics Agency. He is also now COL John Long - congratulations!

TACOM

Kevin Story has accepted a position with the Corpus Christi Army Depot legal office.

CPT Armand Begun has departed the JAG for a position with the IRS in Detroit.

Births

AMCOM

Congratulations to Chief Counsel, **Bob Spazzarini**, who became a first-time grandfather on 14 July 1998 with the birth of Benjamin Joseph Aquila, son of Julia (Spazzarini) and Vince Aquila.

HQ AMC

Linda B.R.Mills is now the proud mother of Jennifer Amarilis Reisberg Mills. Jennie was born in Guatemala City on October 17, 1997 and was escorted to the US in February by her mom and her honorary aunt, Vera Meza-Dombkowski.

TACOM

CPT Armand Begun and his wife Tina are the proud parents of a baby Michael, born on June 26, 1998.

And...Another Award

HQ AMC's **Larry Anderson** received the Superior Civilian Service Award for his excellent work in the negotiation of a bilateral agreement between the US and Switzerland that required extensive coordination with the State, Commerce and industry.



POSSIBLE INDICATORS OF FRAUD IN FEDERAL CONTRACTS

Fraud is defined as deceit, trickery (for example: intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right), an act of deceiving or misrepresenting.

Why should we care about fraud in the Federal Government Procurement system?

As taxpayers, we care about where our tax dollars go and whether these tax dollars are being wasted. As Federal Government employees, we care about the integrity, reputation, and propriety of the Federal Government procurement process. We want the public and the contractors to have confidence in the fairness and integrity of the Federal Government procurement system.

At the bottom of this memo is a list of possible "fraud indicators" which was drafted by the TACOM-ACALA Legal Group Procurement Fraud Advisor. These fraud indicators by themselves do not establish the existence of fraud. Instead, the presence of any of these fraud indicators, when considered in each particular procurement situation, should cause us to be alert to the possibility of impropriety and should cause us to take appropriate actions to ensure the integrity of the procurement process.

If you notice one or more of the fraud indicators, and you believe that there an impropriety occurring in the procurement process, please contact the local Criminal Investigative Command (CID) Special Agent, Mr. Ellis, at extension 25999, or the Procurement Fraud Advisor for your command:

TACOM-ACALA: Sue Allison-Hiebert, ext. 28445, e-mail: salliso1

IOC: Marina Yokas-Reese, ext. 8458 or Tom McGhee, ext. 8432

Rock Island Arsenal: Mary Fuhr, ext. 8443

Fraud may occur at any stage of the Federal Government procurement process:

1. During the presolicitation stage, fraud indicators may include:

- a. the Government failing to perform market research to determine evaluation factors, contracting method, and whether commercial items or nondevelopmental items would meet the Government's needs.
- b. the Government failing to state requirements functionally to the maximum extent possible.
- c. the Government defining statements of work and specifications to fit products or capabilities of a single contractor.
- d. the Government splitting requirements to use simplified acquisition procedures in order to avoid review and approval procedures.
- e. the Government's approval of a justification for less than full and open competition based on improper reasons or inaccurate facts.

2. During the solicitation stage, fraud indicators may include:

- a. the Government selecting evaluation factors and subfactors that are not derived from the market place and do not accurately reflect the Government's requirements
- b. the Government selecting evaluation factors and subfactors that unfairly favor one potential offeror.
- c. the Government disclosing to one or more potential offerors specific information about a proposed acquisition that would be necessary for the preparation of proposals, and the Government failing to make this information available to the public as soon as practical.

3. During the preaward stage, fraud indicators may include:

- a. indicators of collusive bidding or bid-rigging by the bidders.
- b. favoritism or bias in the evaluation of proposals by the Government.
- c. the Government revealing to an offeror the identity of other offerors.

- d. the Government revealing to an offeror the content of another offeror's proposal.
- e. the Government revealing to an offeror the ranking of other offerors.
- f. the Government revealing the evaluation of other offerors.
- g. the Government revealing an offeror's solution, technology, or intellectual property to another offeror.
- h. the Government revealing an offeror's price without that offeror's permission.
- i. the Government knowingly furnishing source selection information to offerors.
- j. the Government evaluating offers based on criteria not stated in the solicitation.
- k. the Government failing to analyze the cost realism and reasonableness of each offeror's proposal when a cost reimbursement contract is anticipated.
- l. the Government eliminating offeror(s) from the competitive range before rating each offer against all solicitation evaluation criteria.
- m. the Government failing to hold communications with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range.
- n. the Government failing to document the competitive range determination and the supporting rationale in the contract file.
- o. the Government failing to notify offerors promptly in writing when their proposals are excluded from the competitive range.
- p. the Government failing to hold discussions with offerors in the competitive range when the solicitation states that discussions will be held prior to award.
- q. a Government source selection decision that is inconsistent with the stated solicitation evaluation factors and subfactors; or a Government source selection decision that fails to adequately explain the rationale for award.

4. During the postaward stage, fraud indicators may include:

- a. the Government failing to notify each offeror, whose proposal was in the competitive range but not selected for award, of the award within 3 days after the date of contract award.
- b. the Government failing to brief an unsuccessful offeror when the unsuccessful offeror has made a written request for debriefing within 3 days after the offeror received notice of the contract award.
- c. the Government modifying the contract shortly after award in order to make material changes in the requirements or scope of work.

- d. the Contractor failing to perform the contractually required testing, or the Contractor failing to perform such testing in the required manner.
- e. the Contractor submitting false invoices or claims to the Government.
- f. the Contractor using progress payments on one contract to fund another contract.
- g. the Contractor manufacturing nonconforming or defective items.
- h. the Contractor repeatedly shipping short to the Government.

PARTNERING: IT'S NOT JUST FOR CONTRACTORS ANYMORE

The AMC Partnering for Success model was used successfully in a Partnering Workshop between the PM for Advanced Distributed Simulation (ADS) and a TRADOC agency, the National Simulation Center (NSC), to define roles and responsibilities for each agency in the Warfighter's Simulation Program (WARSIM).

WARSIM is a computer based simulation to support training of commanders and staff from battalion through theatre-level in joint and combined scenarios. It will be designed to allow units worldwide to train in their command posts using organizational equipment, with a minimum of overhead. WARSIM will meet emerging distributed interactive simulation standards and protocols, thus providing a comprehensive joint environment capable of linking its simulation based constructive entities with virtual (simulator based) and instrumented vehicles.

PM ADS is the materiel developer and the NSC generated the requirement for WARSIM. As part of the AMC Roadshow the PM and the contractor, Lockheed Martin Information Systems (LMIS), partnered. One of the issues that arose as a rock in the road to successful contract performance was the confusion over the proper roles and responsibilities of PM ADS and the NSC. Both parties were providing input to LMIS with resulting confusion.

An action plan, which came out of that workshop, was the agency-agency Partnering workshop held on May 28. The two agencies and the contractor held a one-day partnering workshop to develop a charter and action plan. The goal is the development of an MOU between the two agencies to define roles and responsibilities.

The first step was for each agency and the contractor to brainstorm among themselves and determine what they thought their roles and responsibilities were and what it thought each other entities roles and responsibilities were. Each group was to also put up its ideas of the 'gray areas' that needed to be resolved. For example, we could look at what NSC thought it was responsible for and see what STRICOM thought NSC was responsible for and compare and contrast. When the groups compared their work, we found that all three parties were in agreement on about 85 percent of what each perceived the others roles and responsibilities were. The rest were the 'gray areas' which we then focused on.

There were 35 gray areas. These were prioritized and we took the top 4 and broke into working groups to look at ways we could resolve these areas of either overlapping responsibilities or conflicting ideas about the roles and responsibilities of the two agencies.

Each working group then put together an action plan to include suspenses and action leader. The four groups then presented their action plans to the rest of the attendees for comments and clarifications. Some changes were made to the action plans and then the parties reviewed the suspense dates to ensure they were realistic.

The three champions for this effort, the PM, NSC representative and the Project Director for LMIS will get monthly updates from the action leaders. Most actions will be completed by late July at which time we will draft a MOA between NSC and STRICOM for STRICOM's Commanding General and the head of the NSC to review and sign.

The workshop went very well. Instead of the infighting that characterized the previous working relationship between PM ADS and NSC, we had a cooperative, honest exchange

of ideas and dialogue. The agencies now have a much clearer idea of their respective roles and responsibilities.

Point of contact is Harlan Gottlieb, STRICOM Lead Partnering Champion, phone DSN 970-3513.



POTENTIAL LEGAL PITFALLS FOR PRODUCT CENTER PERSONNEL



As a result of teaming and technological access, we have more people in contact with contractors than before. To make sure everyone knows the rules about some potential problems that can develop, the TACOM-ACALA Legal Group offers the following for your guidance:

*** DON'T MAKE UNAUTHORIZED COMMITMENTS**

The Federal Acquisition Regulation (FAR) at Part 1.601 and 43.102 implements federal law by specifically providing that only Contracting Officers are empowered to make, change or modify contracts and other Government personnel shall not make commitments to buy supplies or services or "direct or encourage the contractor to perform work that should be the subject of a contract modification".

Unless you are a contracting officer, or are otherwise specifically authorized to buy goods and services for the Government (for example, through an IMPAC card), you may not bind the Government to pay for such things as software, training, or office supplies. With internet access, it has become increasingly easy to purchase these sorts of items, and it's important that you don't make such commitments. It's also important not to issue a direction under an existing contract. When Government personnel direct the contractor and the contractor acts on their direction in good faith, it may become a compensable "constructive change" to the contract. The contractor is required to notify the government of direction from a any Government official which should be added by amendment.

Paying for items outside normal contracting channels, or the action of adding the "constructive change" to the contract is subject to a very unpleasant process called a "Ratification". Because of the serious nature of a ratification, and the serious implications of a federal official exceeding his/her authority, only the Commanding General at TACOM-Warren has the authority to

approve it, regardless of dollar value. Even a simple request for additional reports or generating data could lead to the necessity for a ratification. Moreover, the contractor runs the risk that a ratification may not be approved and compensation may not be received.

All contracting actions or contract orders, no matter how small they may appear, are required to be executed by the Contracting Officer (or Contracting Officer's Representative, if one has been appointed) because they have the training to assure statutory compliance. One of the most serious statutory requirements is securing funds and assuring there is no violation of the Anti-Deficiency Act. Making a commitment on behalf of the Government in advance of obligating funds, or failure to obtain adequate funding required for any contract action, can result in administrative discipline, including suspension, removal from office, or reduction in grade. *In addition, a knowing and willful violation is punishable by a fine of up to \$5,000 and/or up to two years imprisonment, and violations must be reported to Congress.*

The bottom line is that any request, suggestion or direction to a contractor or any of its subcontractors must go through the contracting officer or the COR. The risks and consequences are simply too great. Neither you, the program, nor the contractor can afford to do otherwise.

*** DON'T RELEASE PROPRIETARY INFORMATION**

The Trade Secrets Act 18 U.S.C. 1905 provides that any officer or employee of the U.S. who releases proprietary information in any manner "not authorized by law" SHALL be fined not more than \$1,000, or imprisoned not more than one year, or both; and SHALL be removed from office or employment. (examples: a proprietary drawing or specification, or information about subcontractors, processes, equipment, financial standing, cost information, pricing or marketing strategy, or anything that's marked as proprietary (BUT it doesn't need to be marked proprietary to be protected))

*** DON'T RELEASE INFORMATION WITHOUT AUTHORIZATION**

There are statutes and regulations that permit parties who want Government-held information to go through proper procedures to get access. There are also statutes and regulations that limit what types of information can be released, and by whom, and provide penalties for violation. Unless specifically authorized

by someone who has the proper authority, you should never release information:

**that is procurement sensitive (for example, how a source selection is done, who the Government's testers and evaluators are, how testing is performed and what the results are, how competitors were scored in evaluation, details about technical proposals, prices)

**that is "pre-procurement" information-- the kind of information which, if given in advance, could result in a competitive advantage to a competitor. (examples: specific information about future requirements, what quantities the Government is going to buy, what type of performance the Government is looking for, what prices are expected) Remember, "advantage" can accrue simply by knowing these facts earlier and having more time to prepare a proposal.

** that is subject to privilege -- for example,

*** attorney-client privilege -- communications made to or from a Government attorney in deciding what course of action to take, or what the Government's position is with regard to a protest, claim, appeal or other action

*** pre-decisional privilege -- information, opinions, recommendations or communications to a person or group that has to make a discretionary decision

** that would contradict the Government's position in a dispute. You are always required to give full and truthful answers if you are called as a sworn witness in a legal proceeding; but outside the courtroom, you need never (and should never) volunteer information contrary to the Government's interest to vendors (or their counsel), to media, or to other non-Government personnel, either in private conversations or in public industry-Government conferences, etc.

Violations of procurement integrity provisions can result in criminal sanctions, including 5 years imprisonment, fines, or both; civil penalties of up to \$50,000, plus twice the amount of any compensation offered to or received by a federal employee; as well as administrative sanctions. In addition to penalties imposed by Army regulations, releasing information that is adverse

to the Government's interests may be construed as representational activities in violation of 18 U.S.C. 203 and/or 205, which carries a penalty of up to five years imprisonment and/or up to \$50,000 in fines.

*** that is subject to Privacy Act protection (for example, social security numbers, home addresses of other employees) or that is classified, "For Official Use Only", or is related to critical technology. (18 U.S.C. Sec. 793-794) Violation of these statutes can also result in civil, criminal, and administrative sanctions.*

Any questions concerning any of these pointers may be referred to the TACOM-ACALA Legal Group, either to your servicing attorney, or to K. Krewer, Chief, AMSTA-AC-GC, 28414, cc:mail kkrewer.

ACQUIRING COMMERCIAL ITEMS
Federal Acquisition Regulation (FAR) Part 12
by Phil Hunter, CBDCOM¹

Hey! Why are you so slow in acquiring supplies and services by the Commercial Items (CIs) route? Well, lets get on the CI bandwagon. FAR Part 12 (hereinafter, Part 12) controls the acquisition of CIs and should be immediately reviewed and used, as appropriate.

A Commercial Item is defined² eight (8) different ways in the FAR. See Attachment 1. This kaleidoscope of definitions permits a myriad of items to qualify as CIs. A CI is, amongst other definitions:

“Any item...that is **of a type** customarily used for nongovernmental purposes and that (1) has been sold, leased, or licensed to the general public; or (2) has been offered for sale, lease, or license to the general public”.

A CI may include an item that is not yet available in the commercial marketplace but will be available in time to satisfy delivery requirements under a Government contract. CIs includes modifications to existing items, Nondevelopmental Items (NDI), installation services, maintenance services, repair services, training services, and other services. There is a “catch all” definition at paragraph (h), which allows for a combining of all definitions, to aid in an item being qualified as CI.

One very important phrase that is commonly used in the FAR to describe a CI is “**of a type**”. “*Of a type*” doesn’t mean that an item to be acquired already exists. Instead, it means that it is “of a type” that exists and can be manufactured/fabricated to satisfy a government need/requirement. Attachment 1 also defines “Nondevelopmental Item” (NDI) and “simplified acquisitions”. These two terms are integral to CIs’ acquisitions.

Governmental agencies are required to perform market research to determine whether CIs or NDI are available that could meet an agency’s requirements. Agencies are required to acquire CIs or NDIs when they are available to meet the needs of the agency. Prime contractors and subcontractors at all tiers are required to incorporate, to the maximum extent practicable, CIs and NDIs as components of items supplied to an agency.

Highlights of CIs acquisitions.

¹ Phil Hunter is a Contract Attorney at The Chemical Biological Defense Command, Aberdeen Proving Ground, Md. 21010

² FAR 2.101

⟨The CI acquisition process is simple and expeditious.

⟨No dollar limits are imposed (except a \$5,000,000 limit exist if simplified procedures are used under FAR Part 13.5).

⟨Standard Form (SF) 1449 (consisting of 1 basic page) contains the minimally required information necessary to issue a solicitation and finalize a contract. It incorporates by reference most if not all required provisions and clauses, terms and conditions, etc.

⟨Some tailoring of clauses is permitted.

⟨When a policy in another part of the FAR is inconsistent with CIs acquisitions, Part 12 will take precedence³.

⟨The CI process allows months (and even years) to be shaved from acquisition cycles.

⟨Limitations. Part 12 does not apply to acquisitions of CIs: a) At or below the micro-purchase threshold (\$2500 or less); b) When Using Standard Form 44; c) When using imprest funds (\$500 or less); d) or when using the Governmentwide commercial purchase card.

The following are **special CI requirements**.

1. *Market research.* Market research must be performed before CIs can be acquired. Market research⁴ is an essential element of building an effective strategy for the acquisition of CIs and establishes the foundation for the agency description of need,⁵ the solicitation, and resulting contract.
2. *Description of agency need.* The description of agency need must contain sufficient detail for potential offerors of CIs to know which commercial products or services may be suitable. It should describe the type of product service to be acquired and explain how the agency intends to use the product or service in terms

³ FAR 12.102(c)

⁴ FAR 10.001. Techniques for conducting market research may include: Contacting knowledgeable individuals; reviewing the results of recent market research; publishing formal requests for information in technical or scientific journals or business publications; querying Government data bases; communicating with industry, acquisition personnel and customers; obtaining source lists; reviewing catalogs and product literature; conducting interchange meetings or holding presolicitation conferences, etc.

⁵ FAR Part 11

of function to be performed, performance requirement or essential physical characteristics.

3. *Solicitation, evaluation, and award.* Contracting Officers (KOs) must consider CI policies in conjunction with policies and procedures in parts 13 (Simplified Acquisition); part 14 (Sealed Bidding); or Part 15, (Contracting by Negotiation), of the FAR. The KO can use the **streamlined procedure**⁶ (combined Commerce Business Daily synopsis/solicitation) for acquisitions of CIs exceeding the simplified acquisition threshold (\$100,000) but not exceeding \$5,000,000, including options. This process allows government acquisition personnel to acquire CIs within 30 to 60 days (more or less).

4. *Solicitation/contract form.* The KO must use the Standard Form 1449, Solicitation/Contract/Order for CIs, if:

- (a) the acquisition is expected to exceed the simplified acquisition threshold (\$100K)
- (b) a paper solicitation or contract is being issued; and
- (c) procedures at FAR 12.603 (streamlined procedure) are not being used.

The KO may allow fewer than 15 days before issuance of the solicitation.⁷

5. *Offers.* Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing **product literature** generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, KOs must request existing product literature from offerors of CIs *in lieu of unique technical proposals*.

- < KOs should allow offerors to propose more than one product that will meet a Government need in response to solicitations for CIs. The KO must evaluate each product as a separate offer.
- < The KO may allow fewer than 30 days response time for receipt of offers for CIs.⁸

⁶ FAR 12.603

⁷ FAR 5.203(a) and (h).

⁸ FAR 5.203(b) and (h).

6. *Past Performance.* Past performance must be an important element of every evaluation and award⁹.

7. *Contract Type.* Agencies must use firm-fixed price (FFP) contracts or fixed-price contracts with economic price adjustment (FPWEPA). Indefinite Delivery¹⁰ contracts may be used where the prices are established based on a FFP or FPWEPA. *Use of any other type to acquire CIs is prohibited.*

8. *Quality Assurance.* Unless customary market practices for the CI being acquired include in-process inspection, contracts for CI must rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance. All in-process inspection by the Government must be conducted in a manner consistent with commercial practice.

9. *Price reasonableness.* When contracting by negotiation for CIs, the policies and procedures in Far Subpart 15.4 will apply.

10. *Contract financing.* The KO may offer Government financing in accordance with the policies and procedures in FAR Part 32.

11. *Technical Data.* Except as provided by agency-specific statutes, the Government will acquire only the technical data and the rights in that data customarily provided to the public with a CI or process.

12. *Computer software.* Commercial computer software or commercial computer software documentation will be acquired under licenses customarily provided to the public, to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs.

13. *Other commercial practices.* Commercial terms and practices may be incorporated into the solicitation and contract if the KO determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive Order.

14. *Cost Accounting Standards (CAS).* CAS generally will not apply to CIs.

The following minimum provisions and clauses should be included when acquiring CIs:

⁹ See FAR Subpart 9.1; 13.106; or 15.3, as applicable

¹⁰ FAR 16.5

- < 52.212-1, Instructions to Offerors—Commercial Items.
- < 52.212-3, Offeror Representations and Certifications—Commercial Items.
- < 52.212-4, Contract Terms and Conditions—Commercial Items.
- < 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (attach to solicitation and contract)

- < **When using evaluation factors, insert:**
 - < 52.212-2, Evaluation—Commercial Items.¹¹ Include a similar provision containing all evaluation factors required by FAR 13.106, Subpart 14.2 or Subpart 15.3, as an addendum (see 12.302(d)).

The KO may include other FAR provisions and clauses in solicitations and contracts **by addendum** when their use is consistent with the limitations contained in FAR 12.302. For example, the clauses prescribed at FAR 16.505 may be used for an indefinite- delivery type of contract; while FAR 17.208, should be consulted when option(s) are possible.

- < **Warranties**¹². Warranties must be considered in all CI acquisitions. Warranties are either implied or expressed.
 - < Implied Warranties.

The Government’s post award rights contained in 52.212-4, are the *implied warranty of merchantability*, the *implied warranty of fitness for particular purpose* and the remedies contained in the acceptance paragraph. The *implied warranty of merchantability* provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality, and must be comparable in quality to those that will pass without objection the trade or market for items of the same description.

The *implied warranty of fitness for a particular purpose* provides that an item is fit for use for the particular purpose for which the Government will use the item.

¹¹ FAR 12.602

¹² FAR 12.404

- ⟨ Express Warranties.
 - ⟨ KOs must take advantage of express commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.
 - ⟨ Express warranties must be included in the contract by addendum¹³.

The following laws are not applicable to executive agency contracts for the acquisition of CIs.¹⁴ Laws not applicable to subcontracts are found at FAR 12.504.

- ⟨ Wash-Healey Act
- ⟨ Contingent Fees
- ⟨ Minimum Response Time for Offers under Office of Federal Procurement Policy Act
- ⟨ Drug-Free Workplace Act of 1988
- ⟨ Requirement for a clause under the Federal Water Pollution Control Act
- ⟨ Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act
- ⟨ Requirement for a clause and certain other requirements related to the Anti-Kickback Act of 1986.
- ⟨ Requirement for a certificate and clause under the Clean Air Act
- ⟨ Requirement for a certificate and clause under the Fly American Provisions.

The below streamlined procedures can be followed when offers¹⁵ are **solicited and evaluated**.

- ⟨ *When evaluation factors are used*, the KO may insert a provision substantially the same as the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for CIs or comply with the procedure in FAR 13.106, if the acquisition is being made using simplified acquisition procedures.

¹³ FAR 12.302

¹⁴ FAR 12.503

¹⁵ FAR 12.602

- < When the provision at 52.212-2 is used, paragraph (a) of the provision must be tailored to the specific acquisition to describe the evaluation factors and *relative importance* of those factors.
- < When using the simplified acquisition procedures in part 13, KOs are not required to describe the relative importance of evaluation factors.
- < Offers must be evaluated in accordance with the criteria contained in the solicitation. For many CIs, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance. Technical capability may be evaluated by how well the proposed products meet the Government requirement instead of predetermined subfactors. Solicitations for CIs do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use.
- < A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions.
- < Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any tradeoffs considered.
- < Streamlined solicitation for Commercial Items.
 - < When a written solicitation will be issued, the KO can reduce the time required to solicit and award by combining the Commerce Business Daily (CBD) notice with issuance of the solicitation into a single document¹⁶:
 - < The solicitation and notice is limited to a maximum of 12,000 textual characters (approximately 3 _ single-spaced pages).
 - < Use when the solicitation is relatively simple. It is not recommended when lengthy addenda to the solicitation is necessary.
 - < When employing the combined synopsis/solicitation procedure, the SF 1449 is not utilized. See FAR 12.603(c) for additional details.

¹⁶ FAR 12.603(a)

CONCLUSION

In order to expedite the acquisition of CIs, Part 12 of the FAR is available for immediate utilization. CIs acquisitions requires minimal provisions and clauses in the solicitation/contract. The SF 1449 (consisting of one page) is used in CIs' acquisitions and it simplifies the process. Part 12 takes precedent over other chapters of the FAR relative to CI acquisitions. There is no dollar limit to CI acquisitions. It is in the government's best interest for acquisition personnel to take full advantage of this relative new acquisition tool because it is designed to save the Government both time and money.

On 27-28 April 1998, I attended a 2-day course on OMB Circular A-76 sponsored by ESI. A summary of key issues follows:

Overview of the A-76 Process. The session called "Commercial Activities Primer" provided a basic overview of the A-76 process. It was explained that by policy, commercial activities should be obtained from the private sector. OMB Circular A-76 provides a process for a cost comparison between the public and private sectors before converting from government performance of a function to contractor performance, or from contractor performance to government performance. Functions that cannot be contracted for include inherently governmental functions, core functions (technical or scientific requirements for emergencies and mission), legally exempt functions (guards, firefighters, Crane and McAlester), and gray areas (non-exempt but that cannot be clearly separated from exempt functions.) The basic steps in the process are: (1) determining availability of commercial sources; (2) preparing comprehensive performance work statement; (3) developing cost estimate for government performance and most efficient organization (MEO); (4) independent review of MEO (5) Issuing a solicitation, conducting an evaluating, and selecting the best commercial source; (6) conducting the cost comparison between the commercial winner and the MEO; (7) public review; (8) appeals.

DRID # 20. DOD explained the DRID # 20 inventory process from its perspective. DRID # 20 requires DOD to complete an inventory of all TDA positions to identify them as being inherently governmental, exempt, or available for competition. DOD provided guidance in the form of function and reason codes, but the individual departments can supplement the guidance on inherently governmental functions and core competencies. Any departmental supplemental guidance, as well as the actual inventories, will be reviewed by DOD for consistency and a sanity check. Exceptions to the codes can be justified on a case-by-case basis subject to OSD review. OSD wants to identify 200,000+ FTEs to study because that's what's in the budget. OSD expects to gain 20% savings gained by the A-76 competitions, but they don't care who wins the competitions.

Revised OMB Circular A-97 is in final signature. This circular sets limits on what services the federal government can provide to state and local governments on a reimbursable basis. Such services must be highly technical or specialized (which would exclude IT or financial services), must be provided to its own agency, and must be done IAW a completed cost comparison under A-76. The federal government must periodically re-certify that the services are not available in the private sector.

Applicability of A-76 to privatization and reinvention initiatives. Per Dave Childs, A-76 is inapplicable to privatization and reinvention initiatives. However, he considers reinvention initiatives to be internal restructuring activities. He said that reinvention activities that involve restructuring business processes and then contracting out some of those reengineered processes could implicate A-76.

Best Value A-76 Procedures. The A-76 process is essentially that the government makes itself efficient (MEO), develops and in-house bid, and develops a performance work statement (PWS) describing the work performed by the MEO, which is used as the basis for the competition among private sources. After the best private source is selected, there is a competition between the private winner and the MEO. The 1996 revised supplemental handbook appears to permit best value selections for both the private-private competition and the public-private competition. However, based on the discussions at the course, while some organizations are doing best value private-private competitions, best-value public-private competitions appear to be untried.

DOD A-76 studies. Representatives from the services discussed their CA initiatives. The Army is currently studying 12,000 FTE with an expected annual savings of \$120M, and plans to have completed studies on 44,000 FTE by FY 03, with a projected annual savings of \$440M. The Navy is planning to studies 80,000+ FTE over the next 5 years at an expected \$2.5B savings over POM with \$1.2B savings annually thereafter. Navy has awarded an IDIQ contract for consulting services to use for A-76 studies, and has completed streamlined A-76 studies in 12 months. The Air Force has reduced over 28,500 FTE as a result of A-76 studies, and on average 60% of competitions go contract while 40% stay in house (overall government average is 50/50). On average they save 34% as a result of conducting the studies, and their average competition takes 19 months. DLA believes that 2/3 of its jobs are subject to A-76, and they are currently competing 16 of 18 distribution depots, and they will compete 70 DRMOs. They will begin a pilot depot A-76 study in July, in which they plan to: grandfather pay and benefits for government employees transitioned to the private sector, encourage the use of underutilized facilities, and incorporate the best value approach into the A-76 competitions by allowing revision of the MEO to incorporate ideas from the private competition.

Competition in Commercial Activities Act of 1998. Last year's Freedom From Government Competition Act has been redrafted as the "Competition in Commercial Activities Act of 1998 (House version) and the "Fair Competition Act of 1998" (Senate version). These bills would legislate the A-76 process. Under the new law, agencies would be required to annually publish a list of commercial activities which are not inherently governmental and which are currently performed by government employees. Omissions from the list could be challenged by interested parties in the Court of Federal Claims. Activities on the original list must be competed within five years, and new items must be competed within two years after publication. Public-private competitions would utilize current procurement laws and regulations, and would be subject to bid protests filed with GAO or the CFC. The House bill was scheduled to be in mark-up during the conference, but it has stalled.

Electives and materials. The course included several electives, such as: work statements and surveillance plans, in-house cost estimates, MEOs, independent reviews, acquisition strategy, union's view, and appeals and protest issues for lawyers. The value of the sessions varied greatly depending upon the instructor. Cassandra and I have materials from all sessions offered.

Burden Shift May Still Be a Burden for the Taxpayer

On July 22 President Clinton signed into law the IRS Restructuring and Reform Act of 1998. This wide-ranging legislation includes many provisions aimed at making the IRS a more taxpayer-friendly operation and bolstering taxpayers' rights in disagreements with the IRS. Among those provisions is a controversial section that shifts the burden of proof in court proceedings from the taxpayer to the government.

But what exactly does this provision mean to the average taxpayer? Although this new "shift of burden" provision may sound as though the taxpayer needn't keep complete records or provide information to the IRS, that is not the case. The bottom line is the taxpayer must still overcome some major hurdles before getting the protective shift of burden.

The Old System. Prior to enactment of the new law, a legal presumption existed that the IRS's allegations of underpayment were accurate. If a taxpayer disagreed with the IRS, he had the burden of proving that the IRS was incorrect.

This burden of proof resulted in the perception that the taxpayer was "guilty until proven innocent". In the name of fairness, Congress sought to create a better balance for the generally law-abiding individuals and small businesses facing the IRS in tax litigation.

How the New Law Works. Under the new law, the IRS bears the burden of proof only if the taxpayer: (1) introduces "credible evidence with respect to any factual issue relevant to ascertaining the taxpayer's income tax liability"; (2) complies with the laws' substantiation requirements; (3) maintains records as required by the law and regulations; and (4) cooperates with reasonable IRS requests for meetings, interviews, witnesses, information, and documents. Basically, the taxpayer must comply fully with the IRS's investigation in order for the burden of proof to shift.

Additionally, the new law appears to require the taxpayer to be the first to go forward with evidence of why the burden should shift to the IRS. The law does not create a situation where the government proceeds first and the taxpayer may remain silent and still win the case.

Keep Those Records. The taxpayer must maintain complete records, cooperate fully with the IRS's investigation, and introduce evidence on issues for which he wishes to shift the burden; otherwise the burden of proof remains with the taxpayer. It is critical to note that the shift in burden is not automatic. The new law only makes a shift in the burden of proof possible.

Should you have questions regarding the burden of proof under the IRS Restructuring and Reform Act of 1998, you may contact the Headquarters, Army Materiel Command, Chief of Legal Assistance (Mr. Alex Bailey) at (703) 617-8004 or DSN 767-8004.

MEMORANDUM FOR SEE DISTRIBUTION

Subject: Application of the New General Schedule Leader Grade-Evaluation Guide, dated March 10, 1998

The new guide to classify team leader positions has been published. Our previous test application of this guide resulted in no significant number of increases in the grades of sampled positions. Since there are no major changes in the final version as compared to the draft, we expect there will be no increase in the grades of most existing positions covered by this new guide.

Commands should ensure fiscal prudence is used in applying this guide to ensure it is not used solely to justify the establishment of team leader positions. This guide will, in all probability, produce upgrades in such cases. Overuse of the team leader concept may, therefore, significantly increase the salary costs of commands and further exacerbate the shortage of funds the Department is facing. Any application of this guide that results in additional senior grade team leader positions must be accommodated within your assigned senior grade ceilings.

The enclosed position management guidance provides a brief discussion of general issues to consider before establishing team leader positions and specific clarification of duties that are reserved to supervisors only.

If you have any questions concerning these issues, please contact Mr. Edward Liverani at 703-325-1336 or DSN 221-1336.

Carol Ashby Smith
Deputy Assistant Secretary
(Civilian Personnel Policy)

Enclosure

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Guidance for the Establishment of Team Leader Positions

Purpose for Establishing the Position

The decision to establish a new team leader position should be based on the documented need for such oversight. The primary purpose of the position should be to provide leadership to the work group. If the primary purpose for the position is to lead others then these duties are expected to normally occupy significantly more than the minimum 25% of the employee's time cited in the guide. The span of control should be assessed to ensure that team leaders devote a preponderance of time (51% or more) to lead duties. The establishment of such positions should not be viewed as simply an opportunity to promote deserving employees but rather should be based on organizational need. Additional mission requirements or a significant increase in workload or other significant organizational changes should serve as the justification for a new team leader position.

Composition of the Organizational Unit

The level of experience of the employees in the organization is an important indicator of the relative merits of the decision to establish a team leader. Full performance employees in

two-grade interval occupations usually function independently. These employees, having developed expertise in the line of work, are responsible for planning and carrying out their assignments, resolving most of the conflicts that arise, coordinating the work with others as necessary, and interpreting policy on their own initiative in terms of established objectives. Situations of this nature would not usually require a team leader to devote a preponderance of time to lead duties for small groups of employees.

Organizations that experience high turnover rates or significant percentages of employees without a full knowledge of the work may require a team leader to provide on the job training and frequent checks of the work in progress. Similarly, when a substantial portion of the workload is regularly carried out at locations that are physically removed from the main unit where the supervisor is located, additional oversight provided by a team leader may be required.

Use of Project Leaders/Limited Role Team Leaders

In some cases organizations do not require full time leaders but do require special oversight of some work due to its complexity, the need for internal

or external coordination, or other factors. The temporary appointment of a project team leader may provide the oversight needed for that project without the need for a continuing role and a permanent increase in salary costs. Rotation of such team leader assignments fosters the concept of a team approach and provides the necessary temporary oversight without the constraints of assigning a permanent role to one individual.

You may also carefully construct positions that perform some of the functions of team leaders but do not perform the full range of duties sufficient to justify the permanent cost of an additional grade to the position.

Duties Reserved to Supervisors

Caution must be exercised that team leaders do not function as supervisors who simply function under a different title. In addition to the examples provided in the General Schedule Leader Grade Evaluation Guide, Part II, the following clarification is provided.

Only supervisors can serve as proposing or deciding officials in all formal disciplinary and adverse actions, i.e., letters of reprimands, suspensions, involuntary reductions in grade or pay, and removals. Only supervisors may give informal disciplinary actions (oral admonishments/reprimands, written warnings and letters of instruction). Only supervisors may issue Performance Improvement Plans (PIPs). Team Leaders can provide recommendations and input into the supervisor's decision-making process surrounding whether to take a formal or informal disciplinary action.

Only supervisors can sign as either the rater or senior rater under our performance management system, now and under the approved changes soon to be issued. Team Leaders can provide input, either formal or informal, into the setting of objectives and assessing performance.

Management may have Team Leaders approve short-term leave, but supervisors must approve long-term leave.

Only supervisors may approve incentive awards (honorary, monetary and time off). Team Leaders may serve as the Nominating Official. Team Leaders may not serve as the approving official, including Time Off Awards of one day or less.

Bargaining Unit Status

In addition to the guidance contained in the guide on determining the bargaining unit status of team leader positions, the Office of Personnel Management Labor-Management Relations Advisory #98-1, dated April 1, 1998 also contains useful information on this subject. A copy is enclosed for your information.

PAGE 1

Attached, for your information, is a copy of the RIF policy memo signed by the Deputy Assistant Secretary (Civilian Personnel Policy) on June 5, 1998. The memorandum advises the field of Office of Personnel Management government-wide regulations affecting how reduction-in-force (RIF) retention service credit is computed. The OPM final rules were published in the Federal Register at 62 Fed. Reg. 62495 (1997) which can be found on the OPM's web site at http://www.opm.gov/fedregis/html/nov_97.htm (November 24, 1997). The changes affect 5 CFR Parts 351, 430 and 531. The memorandum also issues Army policy on those areas of the new rules on which agencies were given discretion. The following discusses the scope of bargaining over those areas.

Briefly, the OPM changes address four areas. They are: (1) the method for averaging actual ratings received if there are fewer than three during the four year look-back period; (2) the use of "modal" ratings for employees who have no ratings of record during the four year look-back period; (3) the use of performance evaluations given under appraisal systems not covered by 5 CFR Part 430, Subpart B; and (4) the system for assigning retention service credit when there are mixed rating patterns within the same competitive area. The Federal Register and the attached memorandum provide details concerning these areas.

As these changes affect bargaining unit employees' conditions of employment, there is an obligation to notify your union(s) of the changes and provide them an opportunity to request bargaining. As these changes stem from a government-wide regulation, they are generally outside the duty to bargain in accordance with 5 USC ? 7117(a)(1). There are areas of the regulation, though, where management has been given certain discretion. Typically, these areas are open for collective bargaining, but in light of the Authority's decision in U.S. Office of Personnel Management, 51 FLRA 491 (1995) (OPM), this may not be true under the present circumstances. Briefly, in OPM, the Authority held that proposals, which establish conditions of employment for supervisory personnel, are outside the duty to bargain. I will discuss the scope of bargaining in more detail later in this note.

The following provides a description of the labor relations implications stemming from the changes to the CFR.

1. Method for averaging actual ratings. The method described in the Federal Register is non-discretionary and, therefore, proposals that violate the government-wide regulation are nonnegotiable.

2. The use of modal ratings for employees with no ratings of record. The OPM regulations provide that employees with no rating of record in the four year look-back period will receive a "modal" rating. The modal rating is the most frequent performance summary rating level given during the most recent appraisal period. The modal rating can be determined from all ratings within a competitive area, in a larger subdivision of the agency or agency-wide. Army has determined that installations will use the competitive area in which the RIF is being conducted in determining modal ratings. While this decision may be subject to negotiations, we do not believe the unions will object to this determination as it allows the most relevant performance rating for the employee who has not been rated. Additionally, it is the easiest to calculate.

Should a union, nevertheless, attempt to bargain for a larger area in determining the modal rating, we believe such a proposal would be outside the duty to bargain based on the Authority's OPM, decision.

3. The Use of Performance Evaluations Not Given Under 5 CFR Part 430. Again, management has no discretion under this procedure so there is no duty to bargain over proposals that conflict with this requirement.

4. System for Assigning Retention Service Credit When There are Mixed Rating Patterns. While there is some discretion here, such as the number of years credit given for a particular performance rating, Army's decision as to the number of years of retention service to be given for individual performance ratings should be acceptable to the unions. If not, the Authority's decision in OPM, would allow installations to decline to bargain over this matter.

One other area where management has been given discretion is in establishing the effective date of the new regulation (as long as it is implemented by October 1, 1998.) Army has chosen to implement on October 1st. This should give activities sufficient time to notify union(s) of the change and complete any requested bargaining. It also gives the parties sufficient time to become familiar with the new regulations and to have our computer systems capable of complying with the new requirements. Again, I don't foresee any strong union opposition to this determination. Should the union seek an earlier implementation date, the Authority's findings in U.S. Office of Personnel Management, should preclude the duty to bargain over such a proposal.

Let me briefly explain why I believe U.S. Office of Personnel Management, allows the activity to refuse to bargain over union proposals

conflicting with the above determinations. The new regulations must be applied, at a minimum, to everyone in a competitive area as they must be "uniformly and consistently applied in any one reduction in force." (See 5 CFR ? 351.201(c).) Competitive areas "must be defined solely in terms of the agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined." (5 CFR ? 351.402(b)) This includes bargaining unit employees as well as supervisors.

If a union submits a proposal that directly modifies any of the above determinations, the proposal would have to be applied throughout the competitive area. The proposal would not only apply to bargaining unit members, but would also impact directly on the conditions of employment of supervisory personnel. In U.S. Office of Personnel Management, the Authority found that a union proposal defining the competitive area was outside the duty to bargain as it established conditions of employment for supervisory personnel. (A more detailed discussion of U.S. Office of Personnel Management, can be found in Labor Relations Bulletin No. 390, Negotiability of Competitive Areas.) The Authority subsequently held that bargaining over supervisors' conditions of employment is a permissive matter which management may elect to bargain over, but is not obligated to do so. (See Labor Relations Bulletin No. 399, Negotiating Conditions of Employment of Supervisors and Management Officials.)

So, should a union proposal directly impact the discretionary determinations discussed above, you can argue that the proposal has to be applied throughout the competitive area and the competitive area includes supervisors. The proposal, therefore, directly impacts on the conditions of employment of supervisors and is outside the duty to bargain.

This does not mean that you shouldn't discuss these issues with your unions. Where unions are uncomfortable with management's determinations, explain why these decisions have been made and why they are in the employees' best interests. You should not use the fact that a union proposal may be outside the duty to bargain as a basis for cutting off discussions with your unions too early on in the negotiation process. If forced to, though, you may have to use the argument to avoid mediation and impasse...though I can't imagine it ever getting that far.

Of course, the union may submit other related proposals that do not directly conflict with the above guidance. In those cases, you have to bargain to completion before implementing these new regulations.

Further, in accordance with 5 USC ?7116(a)(7), it is an unfair labor

practice to enforce any rule or regulation which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. That is, if your agreement conflicts with these new regulations, and your union will not re-open the agreement, you can not implement the changes until they are re-negotiated at the expiration of the current agreement. Once the agreement comes up for renewal, you must then bring it into conformance with the government-wide regulation. If this describes your situation, please let me know as soon as possible.

Should you have any questions concerning the above, or should any questions arise in discussions with your unions over this matter, please contact me at DSN 225-4011 or (703) 695-4011.

ACQUISITION ENVIRONMENTAL WWW SITES

I. DoD Acquisition Environmental Sites:

- a. Office of the Undersecretary for Acquisition and Technology

www.acq.osd.mil/HomePage.html

- b. Office of the Undersecretary for Environmental Security

www.acq.osd.mil/ens

- c. DoD Directive 5000 Series

www.acq.osd.mil/api/asm/product.html

- d. Defense Supply Center Richmond

On-Line Catalog of Environmental and Energy Efficient Products

Hazardous Technical Information Service Bulletins

www.dscr.dla.mil/dscr1.htm

- e. National Defense Center for Environmental Excellence

www.ndcee.ctc.com

- f. Defense Environmental Network & Information Exchange (DENIX)

<http://denix.cecer.army.mil/denix/denix.html>

II. Army Sites

- a. Army Acquisition Pollution Prevention Support Office

www.aappso.com

- b. Army Environmental Policy Institute

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

- c. Army Environmental Center

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

III. Air Force Sites

- a. Air force Commitment to Environmental Excellence

www.af.mil/environment/index.html

- b. Air Force Center of Environmental Excellence

www.afcee.brooks.af.mil/

- c. Aeronautical Systems Center Acquisition Environmental Management

www.ascem.wpafb.af.mil

- d. AF Single Managers. Environmental Guide

www.ascem.wpafb.af.mil/single.htm#Environmental

IV. Navy Sites

- a. Navy Acquisition Environmental Policy

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

- b. Navy Environmental Programs-Pollution Prevention

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

- c. Navy Facilities Engineering Service Center (NFESC)

www.nfesc.navy.mil/index.html

V. Environmental Protection Agency Sites

- a. Office of the Federal Environmental Executive

www.ofee.gov/

b. EPA Office of Solid Waste

www.epa.gov/epaoswer/osw/index.htm

c. Enviro Sense

<http://es.epa.gov/index.html>

**THE ENVIRONMENTAL LAW DIVISION
BULLETIN**

May 1998

Volume 5, Number 8

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

***U.S. v. Hoechst Celanese Corp.*: Challenging Inconsistent Interpretations by EPA
Regions MAJ Lisa Anderson-Lloyd**

In a petition for certiorari that is attracting a great deal of interest, Hoechst Celanese Corp. is seeking reversal of a decision by the U.S. Court of Appeals for the Fourth Circuit¹ that found the corporation liable for violations of the Clean Air Act (CAA) and the National Emission Standard for Hazardous Air Pollutants (NESHAP) for benzene². The petition concerns interpretation of the CAA fugitive emission standard for benzene, which applies to a facility that “uses” more than 1,000 megagrams of benzene a year.³ Hoechst was cited for violations based on EPA Region IV’s interpretation of “use” that was contrary to the interpretation of Region VI that exempted a similar facility of Hoechst’s from the requirements.⁴

Region IV’s interpretation of benzene “use” was not limited to the amount consumed, but counted recycled benzene each time it cycled through two separate points in the system. Based on this, Region IV denied Hoechst an exemption from the regulations because its plant used more than 1,000 megagrams per year.⁵ Region VI had exempted a similar plant, taking the position that “use” was measured by the total quantity of benzene in use at the facility.⁶

An issue for the 4th Circuit was the consistency and availability of Region IV’s interpretation. The court found that despite previous contrary interpretations of “use” by other EPA offices and state agencies, Region IV put Hoechst on actual notice of its interpretation by a letter.⁷ The 4th Circuit decided that Region IV’s interpretation deserved deference because it was not inconsistent with the CAA or its regulations and was not created for litigation.⁸

Circuit Judge Niemeyer’s partial dissent recognized the problem with inconsistent EPA interpretations over a period of time and throughout different regions. The dissent asserted that Region IV’s notice of their interpretation should not constitute a definitive agency-wide EPA notice for which penalties could be assessed for noncompliance.⁹ The

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Corporate Environmental Enforcement Council and seven other national trade associations have picked up the dissent’s reasoning in an amicus brief supporting Hoechst’s certiorari

¹ United States v. Hoechst Celanese Corp, 128 F.3d 216 (4th Cir.1997))

² *Id.*

³ *Id.* at 219

⁴ *Id.* at 228

⁵ *Id.* at 222

⁶ *Id.* at 232

⁷ *Id.* at 229

⁸ *Id.* at 221

⁹ *Id.* at 233

petition. The brief filed April 22 says that EPA regional offices should apply consistent, publicly available interpretations of federal regulations. In addition, the brief supports the position that only published agency interpretations of nation-wide application should be given deference.¹⁰

This issue is of interest to any regulated entity that operates in more than one EPA Region. As different regulatory requirements are placed on facilities located in different parts of the country, the resulting confusion becomes a real operational impediment. When a federal appeals court upholds a regional interpretation that is then controlling in that circuit's jurisdiction, there may be a problem with conflicting regional interpretations because EPA's regions are not contiguous with federal judicial circuits.

ENFORCING EXECUTIVE ORDERS

Mr. Robert Lewis

Many Executive Orders contain the proviso that the order does not create a private right of action. See e.g. Executive Order 12898, Section 6-609, which states that "[t]his order is intended only for internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any persons. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."¹¹

Recently, there was a challenge of the Environmental Assessment (EA) regarding Army construction activities in support of the Border Patrol along the Rio Grande River where the plaintiffs sought to enjoin these activities alleging, among other things, that the Army failed to comply with Executive Order 11988, Floodplain Management, 3 C.F.R. 117 (1978) and Executive Order 119909, Protection of Wetlands, 3 C.F.R. 121 (1978).¹² These Executive Orders do not contain the limiting language on judicial review cited above. These Executive Orders, which are very similar, require federal agencies to make certain determinations regarding the necessity of undertaking a project in a 100-year floodplain or wetland. The EA, according to the plaintiffs, lacked these determinations.

The court in the Rio Grande did not rule on plaintiffs' assertion that the Army needed to comply with the Executive Orders. Instead, the court found that the non-compliance, if any, was minor and that the balance of harm tipped to the Army completing the project.¹³ The court, in a footnote, did, however, analyze whether a private right of action existed.¹⁴ The court expressed doubt that these Executive Orders could be enforced by private parties. It relied on Facchiano Constr. Co. v. U.S. Dep't of Labor,¹⁵ which held that generally there

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was no private right of action to enforce obligations imposed on executive branch officials by executive orders. The Rio Grande court noted that agency action would be reviewable only if the executive order in question had the force and effect of law and was intended to create a private right of action.¹⁶ Executive Orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation from Congress. The Rio Grande court gave two reasons for expressing doubt that the two Executive Orders could not be enforced

¹⁰ High Court Brief Argues Interpretation of EPA Rules Must Agree With one Another, 12 TOX.L. Rep. 48, 1407 (1998)

¹¹ Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, 59 Fed Reg. 7629 (Feb 11 1994),

¹²). See Rio Grande International Study Center et al., v. U.S. Department of Defense, et al., No. L-98-9 (S.D. TX, Feb 13, 1998).

¹³ *Id.*

¹⁴ *Id.* at No. L98-9, n8

¹⁵ Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1993)

¹⁶ See Independent Meat Packers Ass'n v. Butz, 526 F. 2d 228,236 (8th Cir. 1975).

privately. First, the court noted that both Executive Orders rely on the "the authority vested in [the President] by the Constitution and statutes of the United States of America and as President of the United States of America, in furtherance of the National Environmental Policy Act",¹⁷ which the court viewed as a broad invocation of the constitution and laws of the United States. Citing Independent Meat Packers,¹⁸ the court said that the force and effect of law is not conferred by such broad invocations. Second, relying on Watershed Assoc. Rescue v. Alexander,¹⁹ the Rio Grande court also noted that none of the statutes invoked by these Executive Orders directed the President to issue orders having the force and effect of law.

There is authority, however, in the Fifth Circuit contrary to the position expressed by the Rio Grande court in its footnote. Specifically Harris v. U.S.,²⁰ has held that Executive Order 11990 had the force and effect of law. This case was not addressed by the court even though plaintiffs cited to it. While Harris v. U.S. offers no analysis on why it finds this order has the force and effect of law, it certainly leaves open the question of its enforceability.

The lesson to be learned from Rio Grande International Study Center et al. v. U.S. Department of Defense, is that the enforceability of Executive Orders 11988 and 11990 is not settled. More importantly, in the NEPA context, it does not need to become an issue. Section 2 (a) (1) of Executive Order 11988 and Section 2(a) of Executive Order 11990 set out the findings an agency must make to proceed with activities in a floodplain or wetlands, respectively. Reviewers of EAs and EISs that involve activities in, or affecting, floodplains or wetlands, must ensure that these environmental documents articulate the requirements of Section 1(a)(1) and/or Section 2 (a) and how they are satisfied.

ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP RECONVENES Ms. Carrie Greco

The DOD Environmental Alternative Dispute Resolution Working Group has reconvened. The first action of the working group was to develop a charter. The members agreed upon the charter as follows:

To promote and encourage the understanding and use of Alternative Dispute Resolution (ADR) by Department of Defense components in environmental planning, compliance, restoration, and litigation matters in conjunction with development of partnering relationships with Federal, State, and local environmental regulators and stakeholders. To identify procedures for and barriers to: timely and efficient implementation of environmental

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ADR processes; effective oversight within DoD components of environmental ADR initiatives; and expanding availability and access among DoD components of information and training relating to environmental ADR initiatives.

After finalizing the charter, the working group attendees discussed the various ADR initiatives being undertaken by Department of Justice and EPA, and recognized a need to become more familiar with similar initiatives that might be underway within their own component.

You may review further how ADR can assist you in your work as well. Copies of the following can be provided upon request: DoJ's Policy on the Use of ADR and Case

¹⁷ Rio Grande International Study Center et al., v. U.S. Department of Defense, et al., No. L-98-9 (S.D. TX, Feb 13, 1998).

¹⁸ Independent Meat Packers Ass'n v. Butz, 526 F. 2d 228,235 (8th Cir. 1975).

¹⁹ Watershed Assoc. Rescue v. Alexander, 586 F. Supp. 978, 987 (D. Neb. 1982)

²⁰ Harris v. United States, 19 F. 3d 1090, 1093 (5th Cir. 1994)

Identification Criteria for ADR; EPA's Guidance on the Use of ADR in EPA Enforcement Cases; EPA's Status Report on Use of ADR in Enforcement and Site Related Action (1995-1996); EPA's Superfund Enforcement Mediation- Regional Pilot Project Results; DoD ADR Program Components DoD Directive 5145.5 (April 22, 1996) on ADR; Executive Order 12988 - Civil Justice Reform; and White House Memo, Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (1 May 1998). Please contact Carrie Greco at (703) 696-1566 if you would like a copy of any of these documents.

The Working Group is currently reviewing their components' initiatives and also on areas where barriers that may exist to broader use of ADR can be removed or lowered. If you have any questions about the use of ADR in your case or project you may call the Army Dispute Resolution Points of Contact Gary E. Bacher, Assistant to the General Counsel who may be contacted at (703) 697-5155 and Colonel Nicholas P. Reston, Chief, Contract Appeals Division, U.S. Army Litigation Center who may be contacted at (703) 696-1511, the Dispute Resolution Specialist Lawrence M. Baskir, Principal Deputy General Counsel who may be contacted at (703) 697-4807, or the Army's representative for the Working Group, Carrie Greco, who may be contacted at (703) 696-1566.

**CWA Services Steering Committee to Examine MP&M Survey
MAJ Silas DeRoma**

The Clean Water Act Services Steering Committee (SSC) is examining issues involving Department of Defense responses to a federal facility survey sent to DoD from the EPA. The purpose of the survey is to collect information and data to assist EPA as the agency drafts regulations that will set effluent limitations for metal products and machinery activities. EPA has advised the SSC that it is primarily concerned with gathering data pertaining to the following areas: process waste discharges, pretreatment units, pollution prevention, and costs. Members of the SSC have reviewed the survey and concluded that while it will help provide useful information to EPA, some modifications are required. For the most part, these changes will either tailor particular questions more closely to DoD activities or clarify what types of information may be used to answer the survey questions (e.g., rough estimates vs. detailed effluent sampling and analysis). SSC members will meet to begin drafting the DoD-proposed version of the survey late this month with the aim of sending it to selected installations in June 1998.

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**Emission Reduction Credit (ERC) Guidance
LTC Rich Jaynes**

The 1990 Amendments to the Clean Air Act (CAA) mandate that State Implementation Plans include market based incentive programs in order to meet National Ambient Air Quality Standards. ERC programs provide major market based incentives that allow the regulated community to acquire ERCs if sources reduce their air emissions lower than what is required by law. These sources can then sell, trade, or bank their ERCs. Other sources may acquire ERCs to meet CAA requirements, e.g., to use as offsets under the New Source Review program. Federal agencies may also take advantage of the ERC program. The federal property disposal statute, however, requires that proceeds from selling ERCs be deposited into the U.S. Treasury rather than going to the Service (or installation) that produced them. As a result, without special legislation, there would be little incentive for installations to reduce air emissions in order to obtain ERCs. DoD successfully pursued an ERC legislative initiative that allows proceeds from selling ERCs to go to the installation

that acquired the ERCs (to be used by the installation for its pollution prevention program). Section 351 of P.L. 105-85 (National Defense Authorization Act for FY 1998) authorizes a two-year pilot program that allows installations to be reimbursed for transaction costs to complete ERC sales, and may retain net sale proceeds as well. The ability to retain net sale proceeds is subject to a DoD-wide cap of \$500,000 per fiscal year.

The CAA Services Steering Committee prepared proposed DoD guidance for implementing the ERC sales program, and has staffed it through the Service Secretariats. The guidance document tracks closely with the statute, authorizes delegation of authority to approve ERC sales, and addresses how ERC sales are to be processed. Given the brief period that P.L. 105-85 authorized the pilot program, DoD is interested in implementing the guidance in the near future. Once the ERC policy is approved by the DoD Comptroller, it will be forwarded to the field. The Deputy Undersecretary for Defense (Environmental Security) has expressed interest in seeing that DoD's ERC sales program is implemented expeditiously. Installations are encouraged to explore opportunities to benefit from the ERC policy.

**THE ENVIRONMENTAL LAW DIVISION
BULLETIN**

July 1998

Volume 5, Number 9

Published by the Environmental Law Division, U.S. Army Legal Services Agency, ATTN: DAJA-EL, 901 N. Stuart St., Arlington, VA 22203, (703) 696-1230, DSN 426-1230, FAX 2940. The opinions expressed herein do not necessarily reflect the views of The Judge Advocate General or the Army.

SUPREME COURT CLARIFIES CORPORATE LIABILITY FOR PARENT CORPORATIONS

MAJ Scott Romans

On June 8, 1998, the Supreme Court issued an opinion in the case of *U.S. v. Bestfoods, et al.*,¹ in which a unanimous Court provided guidance on the issue of parent corporation liability for the actions of its subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court's decision in this case may affect the Third Circuit's analysis in *FMC Corp. v. U.S. Dept. of Commerce*,² which has been used to impose liability on federal agencies as an operator.

In *Bestfoods*, the Environmental Protection Agency (EPA) brought an action under CERCLA § 107 for cleanup costs at the site of Ott Chemical Company near Muskegon, Michigan. Ott Chemical Company began operations on this site in 1957.³ In 1965, Ott Chemical became a subsidiary of CPC International Corporation. CPC sold Ott Chemical Company to Story Chemical Company in 1972. Story operated the chemical plant until its bankruptcy in 1977.⁴ By 1981, EPA had started cleanup of the site, with the total cost estimated to be "well into the tens of millions of dollars."⁵ EPA filed the suit in 1989, naming CPC International and Arnold Ott (owner of the now defunct Ott Chemical Company), among others, as potentially responsible parties (PRPs).⁶

The district court found CPC liable as an operator, applying the "actual control" test used in *FMC Corp.*,⁷ and focusing on CPC's control over Ott Chemical Company.⁸ The Court of Appeals for the Sixth Circuit reversed the district court, ruling that a parent corporation could only be liable as an operator when the corporate form has been misused and the corporate veil can be pierced.⁹

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The Court analyzed parent corporation liability under two distinct legal theories: the derivative liability of a parent corporation for the activities of a subsidiary, and the direct liability of a parent corporation for its own activities towards the facility in question.

¹ No. 97-454, 1998 U.S. LEXIS 3733 (June 8, 1998) [hereinafter *Bestfoods*]. For information on CERCLA, see, 42 U.S.C. §§ 9601-9675 (1994).

² 29 F.3d 833 (3rd Cir. 1994).

³ *Bestfoods* at 11.

⁴ See, *Id.*

⁵ *Id.* at 13.

⁶ See, *Id.* During the course of the appellate process of this case, CPC changed its name to Bestfoods. *Id.* at n. 3.

⁷ See generally, 29 F.3d at 843-46.

⁸ *Bestfoods* at 15.

⁹ *Id.* at 16. Some circuits follow the rationale that parent corporations can only be liable when the corporate veil can be pierced, while other circuits have held that a parent actively involved in the affairs of a subsidiary can be liable as an operator (i.e. the "actual control" test) without regard for whether the corporate veil can be pierced. See, *Id.* at n. 8.

With regard to derivative liability, the Court determined that CERCLA did nothing to disturb the well-established principle of corporate law that a parent generally is not liable for the actions of its subsidiary unless the corporate form would be misused. Under those circumstances, the corporate veil can be pierced and the parent can be held liable.¹⁰

The Court then went on to address what may be a separate issue – namely, the extent to which a parent corporation may be directly liable as an operator for its activities at a facility. The Court first provided the following interpretation of what it means to be an “operator” under CERCLA:

[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.¹¹ (emphasis added)

The Court then rejected the district court’s use of the “actual control” test to determine liability. Under this test, adopted by many circuits,¹² a parent corporation can be liable under Superfund if it exerted actual control over the subsidiary responsible for the operation of the facility.¹³ The Court objected to the use of that test, however, because it confused direct and derivative liability by focusing on the relationship between the parent corporation and the subsidiary corporation. The correct focus, according to the Court, is the relationship between the parent corporation and the facility, as evidenced by the parent’s participation in the activities of the facility.¹⁴ In this case, the evidence indicated that an individual who was an officer of CPC, but who was not an officer or employee of Ott Chemical, played a significant role in the environmental compliance policy of the Muskegon facility.¹⁵ The Court remanded the case to the district court for further inquiry into this CPC employee’s role in light of the guidance provided in the opinion.¹⁶

This opinion could have a substantial impact on federal agency CERCLA liability. First, the Court seems to have discarded the “actual control” test, which was used by the Third Circuit in *FMC Corp.*¹⁷ to find the federal government liable as an operator. Of course, it is unclear how the Court’s focus on the relationship between a parent corporation and a facility would apply in situations where federal agencies have been involved with a particular type of industrial operation. Significantly, the Court sharpened the definition of “operator” to include only those activities

specifically related to disposal of hazardous waste and environmental compliance.¹⁸ This definition presumes that many of the factors the Third Circuit found to be relevant to an agency’s control -- such as the government’s ability to direct raw materials to the plant and the government’s involvement in labor issues at the plant -- would not play a role in any new analysis of a federal agency’s operator status.

¹⁰ *Id.* at 20-21. The Court discussed but did not resolve the issue of which law courts should use to decide veil-piercing, state law or federal common law. See, *Id.* at n. 9.

¹¹ *Id.* at 28.

¹² See *supra*, n. 9.

¹³ *Bestfoods* at 29-30.

¹⁴ *Id.* at 31.

¹⁵ *Id.* at 37-38.

¹⁶ *Id.* at 39.

¹⁷ 29 F3rd at 843-46.

¹⁸ *Bestfoods* at 28.

Although each future case will be decided on the basis of its unique facts, *Bestfoods* will certainly influence upcoming decisions concerning federal liability. (MAJ Romans/LIT)

NEW EXECUTIVE ORDER ON NATIVE AMERICAN CONSULTATION

Mr. Scott Farley, Army Environmental Center (AEC)

On May 14, 1998, President Clinton signed Executive Order 13084, "Consultation and Coordination With Indian Tribal Governments" (EO 13084).¹⁹ EO 13084 should not impose any new compliance requirements on individual installations.²⁰ However, read together with "Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments,"²¹ EO 13084 underscores the need for installations to develop proper consulting and coordinating procedures. These procedures should assist the installation in its communication with Federally recognized Indian tribes (tribes) on issues and activities affecting their land, resources, and governmental processes.

EO 13084 and the Executive Memorandum draw upon the United States Constitution, treaties, Federal statutes, and case law to establish the following principles:

1. Tribes are domestic dependent Nations. As such, tribes remain sovereign nations, exercising inherent sovereign powers over tribal members and territory.
2. Tribes have the right to self-government. The Federal government must recognize tribal sovereignty and should carry out its activities in a manner that is protective of tribal self-government, trust resources, and the full spectrum of tribal legal rights, including those provided by treaty.
3. Federal agencies ensure compliance with the foregoing legal mandates by establishing relationships with appropriate tribes on a government-to-government basis and consulting with such tribes in accordance with that relationship.

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Additional information and guidance on tribal consultation can be found in the Army "Guidelines for Consultation with Native Americans." These guidelines are included as Appendix G of the Draft DA Pamphlet 200-4 and at the US Army Environmental Center web page, Conservation section, at <http://aec-www.apgea.army.mil:8080>. (Scott Farley/AEC)

PROPOSED LEAD-BASED PAINT (LBP) RULE

LTC Allison Polchek

¹⁹ 63 Fed. Reg. 27,655 (1998).

²⁰ EO 13084 is primarily concerned with agency development of regulations and regulatory practices and policies that affect tribal communities in a significant or unique manner. It is not clear whether development of Integrated Cultural Resource Management Plans (or similar installation planning and management documents) fall within the ambit of agency policy.

²¹ 59 Fed. Reg. 22,951 (1994).

On June 3, 1998, the Environmental Protection Agency (EPA) issued a proposed rule²² under the authority of Section 403 of the Toxic Substances Control Act (TSCA).²³ Under Section 403, EPA is required to identify lead-based paint hazards. This identification is crucial, as federal facilities are obligated to abate, prior to transfer, hazards in target housing built before 1960.²⁴ The proposed rule establishes numerical levels to identify hazards. In the soil context, hazard levels are established as 2000 parts per million.²⁵ This level is considerably more stringent than current guidelines, which establish 5000 parts per million as the hazard level.²⁶ Adoption of the more stringent level could have important fiscal ramifications for installations transferring property, particularly in the Base Closure and Realignment scenario. Any ELS wishing to provide comments to this proposed rule should coordinate through this office. (LTC Polchek/RNR)

PROPOSED EXECUTIVE ORDER ON ALIEN SPECIES
MAJ Michele Shields

The Department of the Interior has proposed an Executive Order (E.O.), entitled "Invasive Alien Species." The E.O. defines "alien species" as any species or viable biological material derived from a species that is not a native species in that ecosystem. The definition of "invasive alien species" is an alien species that does or could harm the economy, ecology, or human health of the United States if introduced. If adopted, the E.O. will require federal agencies to implement measures to prevent the introduction and to control the spread of invasive alien species into the ecosystems. Information regarding final adoption of this E.O. will be published in future ELD Bulletins. (MAJ Shields/RNR)

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COLORADO CLEAN AIR BILL GOES UP IN SMOKE
LTC Richard Jaynes

The Governor of Colorado recently vetoed an attempt by the State Legislature to discriminate against federal agencies under its Clean Air Act (CAA)²⁷ authority. The Governor acted to strike down Senate Bill (SB) 98-004²⁸ at the urging of Ms. Sherri Goodman, Deputy Undersecretary of Defense for Environmental Security (DUSD-ES), the Department of Agriculture, and the Department of the Interior. The process whereby this result came about serves as a good example of how Army Regional Environmental Coordinators (RECs) and their staffs can be effective advocates for DoD interests.

²² Lead, Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30302 (1998) (to be codified at 40 C.F.R. Part 745) (proposed Jun. 3, 1998).

²³ 15 U.S.C. § 403 (1992). Section 403 was actually created by Title X of the Residential Lead-Based Paint Hazard Reduction Act as an amendment to TSCA. (See, The Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1021(a), 106 Stat. 3916 (1992)).

²⁴ 42 U.S.C. § 4822(a)(3). While the problem faced by most installations is primarily with LBP in the soil, this rule will also cover hazards associated with dust.

²⁵ 63 Fed. Reg. at 30353.

²⁶ U.S. Department of Housing and Urban Development, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (1995). Although this source is only guidance, it has served as the unofficial standard within most military departments.

²⁷ 42 U.S.C. §§ 7401, *et. seq.*

²⁸ S. 98-004 61st. Legis. Sess. 2 (Colo. 1998).

In early 1998, State senators began to push for the passage of SB 98-004, a measure that would direct the Colorado Air Quality Control Commission to ensure all federal facilities minimize air emissions to the maximum extent practicable. This requirement was intended to reduce the impacts of federal facilities on both the attainment and maintenance of national ambient air quality standards and the achievement of federal and state visibility goals. The bill requires each federal agency to submit its land management plans to the Commission for review and, after a public hearing, make any changes to the land management plans required by the Commission. As there is no similar set of requirements that apply to non-federal entities, SB 98-004 exceeds the limited waiver of sovereign immunity in the CAA.

SB 98-004 claims that significant contributions to regional haze and visibility impairment emanate from federal lands, particularly smoke from prescribed burning activities. The potential adverse impacts from the bill, however, also allow direct state regulation of virtually every source of airborne emissions at a federal facility from grounds maintenance to the timing and manner of DoD training operations, including obscurant use, weapons firing, and aircraft flights.

Throughout the limited lifetime of SB 98-004, the staff in the Army's Western Regional Environmental Office (also the DoD REC for EPA Region VIII) was vigilant in representing the interests of the Army and DoD, and in keeping higher headquarters and interested parties within the region informed. The REC ensured that the Army's concerns about the legal authority for SB 98-004 and the severe impacts on military Services were communicated to the Colorado Legislature and the Governor. In addition, close coordination with the Governor's Office, after passage of the bill, was instrumental in facilitating a timely request from the DUSD-ES for the Governor to veto the bill.

While the Colorado Governor did not explicitly credit his decision to veto SB 98-004 to the letters he received from DoD and other federal agencies, his public statements clearly echoed the concerns set out in the federal agencies' letters. Certainly the input from the REC's staff throughout the legislative process and the letter from the DUSD-ES were part of an important effort to influence the process as well as make DoD's concerns a part of the record. In contrast, failure to have participated in this process would have clearly indicated a lack of interest in the outcome. The REC's efforts in this case serve to illustrate how

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essential it is to have REC staffs throughout the Army identifying thorny regional issues and facilitating their diplomatic resolution. This REC's "ounce of prevention" is sure to net many "pounds of cure."

CALL FOR INPUT TO CIVIL/CRIMINAL LIABILITY HANDBOOK
LTC Richard Jaynes

Last year, ELD published the first edition of its *Environmental Criminal and Civil Liability Handbook* after many months of effort. Our intention was to create a resource for environmental law specialists (ELS) to use when grappling with thorny enforcement issues. The *Handbook* gave ELSs a kit containing the basic tools needed for successful negotiations of enforcement actions. We hope that it has become an important resource in your efforts to advocate your command's interests in this complex and sometimes contentious arena. If you do not already have the *Handbook*, you can download it from the Environmental Law Library on the LAAWS BBS.

This summer we will be employing the talents of our Reserve Component JAGs to help us update and revise the *Handbook*. We would appreciate your assistance to ensure that the *Handbook* remains relevant and responsive to your needs. This includes: identifying topics that are not addressed but should be; pointing out unclear statements or policies; and challenging the wisdom of recommendations or policies that are now in the *Handbook*. Simply put, the suggestion shop is open.

I also hope to focus on the *Handbook's* appendix portion, which is not presently located with the on-line version. To solve this problem, the next edition of the *Handbook* and its appendix will be on the BBS and e-mailed out to MACOM and installation ELSs. When revising the appendix, I intend to trim out items that are not essential to your practice and may include references to Internet web sites.

We expect to limit the revised *Handbook* to about 100 pages and will try to keep the appendix material to about the same size. Because you will be part of the revision process, I would like you to think about the sorts of issues that need to be addressed. To help get you started, I list several topics that will be added or updated in the revised *Handbook*:

- EPA's new policy on supplemental environmental projects;
- EPA's policy (revised in October 1997) on use of RCRA §7003 orders;
- EPA's use of RCRA §6003 authority to make onerous information requests;
- EPA's authority to issue punitive administrative fines under the Clean Air Act;
- EPA's efforts to issue punitive fines for underground storage tank violations;
- Regulator attempts to bring media enforcement actions for CERCLA operations.

If you have run into particularly helpful resources on enforcement actions, please e-mail or fax them in. Please e-mail me (jaynera@hqda.army.mil), write, or phone (703-696-1569; fax -2940) with your ideas on any aspects of the *Handbook* that could be strengthened. (LTC Jaynes/CPL)

MEMORANDUM FOR AMC Environmental Law (Lingo)

SUBJECT: AERIAL APPLICATION OF PESTICIDES ON ARMY AGRICULTURAL
OUTLEASES.

LEGAL OPINION

CONCLUSIONS:

The application of pesticides to lands leased to non-DoD entities for agricultural purposes on DoD installations requires both inclusion in the pest management plan and pre-validation. The provisions of the agricultural lease do not protect the Commander from Civil or Criminal penalties.

BACKGROUND:

I received an initial assignment to research an issue, concerning agricultural outleases, presented to AMC by Steven R. Bennett, U.S. Army Environmental Center, Pest Management Program. Dr. Bennett's issue was as follows:

The matter has to do with special DoD documentation/approval requirements for pest control operations that involve aerial applications of pesticides. DoD requires installations to prepare - and professional consultants like me to review - plans for all such operations (to include evidence that supporting NEPA documentation is in order).

The DoD position is that these "Aerial Validation Requests" are necessary to protect DoD commanders because of increased risks of off-post and/or unwanted environmental impacts that could occur and thus result in civil or criminal actions against installation commanders. At issue is whether operations of lessees under Army Ag outlease agreements need to

be covered within the scope of these validation plans.

My position is that aerial applications by private growers on Army lands are not exempted from this requirement. The Cdr remains at least partially responsible for (because he has the right to control or limit grower activities in a lease agreement) and thus can be at risk of legal challenges from adverse consequences of aerial pesticide applications by his lessees.

The other position is that Ag lease agreements are written in a way that protects Commanders from these risks, so that Lessee aerial applications of pesticides are exempt from the scope of the DOD validation requirement. I hope that you will be able to staff this matter in-house, but if not, I can raise with AEC or HQDA counsel. Again, please let me know your thoughts on this.

I spoke with Dr. Bennett by phone. He stated that one of the Army's three measures of merit is the reduction of pesticide use by 50%. He said that for this reason, the natural resource manager is already obligated to report applications of pesticides to leased areas. However, Commanders have not been seeking AEC pre-validation of aerial spraying done by Ag lessees.

Dr. Bennett stated that Sal Marici, AMSIO-ISR, has pointed out that there are practical difficulties with this requirement. He has also talked to Jerry Huff, AMC (stationed in Rock Island). Apparently installation Pest Management Plans are frequently completed by Contractors who have not contractually committed to include ag leases in the Plan. They are unwilling to do so (at least, without additional compensation). Apparently this would require additional information gathering as to what will be applied, by whom, when, and where. Dr. Bennett stated that there should be a "what if drill" in the plan because of the increased risk of off-post and/or unintended results associated with aerial application. He is not asking that

the lessee apply to AEC for permission, but rather that the Commander have Ag lease usage included in his Plan.

We discussed applicable law. According to Dr. Bennett, the 420 Regulations were initially installation management regulations. Later, AR 420-76 was deemed more an environmental regulation. However, the ag lease situation was not addressed in 420-76, nor has it been carefully considered. He stated that Army Regulation, 40-574, Aerial Dispersal of Pesticides, referenced in AR 420-76, was a joint regulation which is obsolete. It did not discuss agricultural leases either. The Army now relies on the new Air Force Instruction 32-1074, 1 May 1998 entitled Aerial Application of Pesticides. It also does not specifically mention agricultural leases.

THE APPROACH

I first reviewed applicable Department of Defense and Army and Air Force regulations for direct references or pertinent language. I then applied rules of construction. Finally, I looked to the Federal law and regulations which the Department of Defense and Army regulations were promulgated to implement.

REFERENCES AND DATA:

DOD Directive 4150.7;

AR200-2;

AR200-3, Section 2-14

AR420-76, Section 3; and Appendix H

AR40-5 Section 10.12;

Commander's Guide to Environmental Management;

ER405-1-12, Section 8-126.a &b

ER405-1-12, Figure 8-B-1(Ag lease);

DD Forms 1532 and 1532-1;

Office of Pesticide Programs internet page summarizing
the Worker Protection Standard,

CFR part 170 Standard for Workers and Standard for
Pesticide Handlers;

Pest Management Model Plan for U.S. Army Yucca
Proving Ground dated 1 Oct 94.

Air Force Instruction 32-1074

ISSUE I: WHETHER OR NOT AERIAL APPLICATIONS OF PESTICIDES TO LAND LEASED TO NON-DOD ENTITIES FOR AGRICULTURAL USE MUST BE INCLUDED IN PEST MANAGEMENT PLANS?

A. The Environmental Climate

Executive Order 12856, "Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements", requires federal agencies to develop goals to reduce releases of toxic chemicals into the environment by 50% (from 1993 levels) by December 31, 1999. The Department of Defense established the following measures of merit:

Measure of Merit 1 - Installation Pest Management Plans. By the end of FY 97, 100 percent of all DoD installations will have pest-management plans prepared, updated, and reviewed by their respective MAJCOM Entomologist.

Measure of Merit 2 - Annual Amount of Pesticide Applied. By the end of FY 2000, the amount of pesticide applied annually on DoD installations will be reduced by 50 percent from the FY 93 baseline in pounds of active ingredient.

Measure of Merit 3 - Installation Pesticide Applicator Certification. By the end of FY 98, 100 percent of all DoD installation pesticide applicators will be properly certified within two years of employment.

B. Statutory Harmony

DoD Instruction 4150.7. states that it implements policy, assigns responsibility, and prescribes procedures for the Department of Defense Pest Management Program. The Instruction contains a requirement for a pest management plan. The Instruction does not specifically address

agricultural leases. Notwithstanding the fact that agricultural use is neither addressed nor specifically exempted in DoD 4150.7, there are many indications in the far reaching scheme that make it unlikely that agricultural leases would be exempt whether based on leased status or agricultural status. One of the rules of statutory construction is that a statute will be construed to maintain harmony among its provisions. All parts *pari materi* will be construed together.

The following are some pertinent provisions of DoD 4150.7:

1. Heads of DoD components are tasked, among other requirements, to:

Maintain accurate and complete reporting and record-keeping of pest management operations and pesticide use.

Establish surveillance programs to assess potential adverse environmental or public health effects from pesticide use and to monitor the health and safety of persons who apply pesticides

Monitor the use of IPM (Integrated Pest Management) and reduction of pesticide use in installation pest management programs.

2. Heads of DoD components are tasked to ensure that installations:

Have all pesticide applications to DoD installations made only by properly trained and certified personnel in accordance with DoD Plan for the Certification of Pesticide Applicators of Restricted Use Pesticides or by State-certified applicators.

Use pesticides in accordance with applicable laws including FIFRA and the constraints of subsection B.5.,

Use only pesticides that have been approved by a DoD pest management consultant

Maintain complete daily pesticide application and pest management operations records as required by FIFRA and 7

U.S.C. 136i-1 or for pest management measures of merit, using DD Form 1532-1 or a computer-generated equivalent.

Produce a monthly summary, using DD Form 1532 or computer-generated equivalent, to provide data for regulatory, DoD, Federal, State, or local agency data calls; Component program review and oversight; and Measures of Merit. Installation commanders shall ensure these records are archived after two years for permanent retention.

3. The Components shall ensure that Installation Commanders:

Plan and budget for the development and maintenance of the **pest management plan**.

Ensure that qualified personnel develop and update the pest management plan annually.

Ensure that all pest management operations performed on the installation, except those for personal relief, are recorded, and ensure that all records are properly maintained and are reported to the cognizant component pest management consultant.

The above tasks all suggest **comprehensive planning, approval, monitoring, and record-keeping**. DoD 4150.7 is broad not only in its scope, but also in its applicability:

[It] Applies to all DoD operations, activities, and installations worldwide including appropriated fund activities; non-appropriated fund activities; contracted activities; and Government-owned, contractor-operated facilities.

Applies to all DoD buildings, structures, lands, public works, equipment, aircraft, vessels, and vehicles.

Applies to all DoD vector control and pest management operations performed worldwide during peacetime, wartime, and military deployments including those done by contract.

Only two exceptions are listed:

- a. The civil works function of the Army Corps of Engineers.
- b. State-owned or State-operated (funded) installations or facilities that the National Guard uses part-time or full-time.

There is no exception within the Instruction for any outleased agricultural parcels, nor for any outleased parcels .

C. Explicit Provisions

Another rule of statutory construction is that no provision shall be deemed superfluous. An indication that agricultural outgrants are not excluded can be found in the provisions concerning the pest management plan itself.

Outleases are specifically included. Pest management plans shall be comprehensive, long-range, narrative documents, as outlined in enclosure 8 (of the Instruction), and shall:

Describe all installation and satellite installation pest management requirements and programs, including those for contracts, natural resources, golf courses, and **out leases**, and identify minimum pest management staffing requirements.

Furthermore, the **aerial application** of pesticides is specifically mentioned:

Describe any pest management operation with special environmental considerations such as those that use any pesticide application that may contaminate surface or ground water or **involve aerial application of pesticides.**

Section 10 "Reports and records" includes outleases as well. The provisions are:

a. The DoD Components shall ensure that all DoD installations maintain complete daily records of pesticide applications and non-chemical pest management operations using DD Form 1532-1 or a computer-generated equivalent as stated in section E.3.v.(7) of the main body of this Instruction. These records shall account for all shop operations and shall provide a historical record of pest management operations and pesticide applications for each building, structure, or outdoor site.

(1) Records shall include information on kinds, amounts, uses, dates, places of application, and applicators names and certification numbers.

(2) The record shall include all pesticide applications performed on the installation, including work done on golf courses, by non-appropriated fund activities, by contract services, and **as part of out leases** and land management and forestry programs, as well as work performed by installation pest management shops.

b. DD Form 1532, "Pest Management Report," or an equivalent computer product, shall be produced monthly using DD Form 1532-1 information and shall be forwarded at least quarterly to major command headquarters for review and oversight.

c. Pest management consultants shall use this data to evaluate the efficiency of the overall installation pest management program and pest management operations.

d. Pesticides applied by installation personnel for their own relief are excluded from the record-keeping requirement.

Thus, though agricultural outleases are not specifically mentioned, the wide-ranging scope of the Instruction and the specific requirements for the contents of the Pest Management Plan and the records provisions are all indicative of the intent that agricultural leases be included. Note too that the only exclusion mentioned in the recording keeping provisions is for installation personnel for their own relief.

D. The Army Regulations

AR 420-76 is entitled "Pest Management". Chapter 3 is the Policy Guidance. The policy guidance addresses personnel and installation pest management programs, but not agricultural leases. Aerial applications are addressed in paragraph 3.10 which states that application will be in accordance with AR 40-574. An environmental assessment is required followed by an environmental impact statement if necessary. Paragraph 3.11 states that outgrant holders must comply with "all animal damage control laws, ordinances, specifications, and rules in land use regulations that are part of the outgrant document."

Concerning use and disposition, there is a catch-all provision. According to AR 420-76, paragraph 4.1.A, use of pesticides will also be in accordance with AR 40-5, AR 200-2 and appropriate Federal, State, and local regulations.

Under the recording requirements reports will include pest control operations conducted by the following: facilities engineer, contractors, Government-owned, contractor operated activities, nonappropriated fund activities, **all outgrant leaseholders**, and installation self-help pest control activities.

AR 40-574 is entitled Aerial Dispersal of Pesticides. It has not been updated since 1976. This is the regulation which Dr. Bennett said is obsolete. I could not find any evidence that it has been formally repealed.

E. The Statutory Basis

The Department of Defense Instruction was promulgated to carry out the requirements of the Federal Insecticide, Fungicide, And Rodenticide Act (FIFRA). FIFRA is a Federal

statute which pertains to the sale, distribution, and application of pesticides. FIFRA provides at 7 USC 136a(a), "[e]xcept as provided by this Act, no person in any State may distribute or sell to any person any pesticide that is not registered under this Act." Subsection(d) "Classification Of Pesticides", provides that as a part of the registration of a pesticide the Administrator [of the Environmental Protection Agency (EPA)] shall classify it as being for general use or for restricted use.

FIFRA also provides for the certification of persons who apply pesticides. Section 136i provides that if the Administrator approves a plan submitted under this paragraph, then each State shall certify applicators of pesticides with respect to such State.

The Administrator shall prescribe standards for the certification of applicators of pesticides. Such standards shall provide that to be certified, an individual must be determined to be competent with respect to the use and handling of pesticides, or to the use and handling of the pesticide or class of pesticides covered by such individual's certification. The certification standard for a **private applicator** shall, under a State plan submitted for approval, be deemed fulfilled by his completing a certification form. The Administrator shall further assure that such form contains adequate information and affirmations to carry out the intent of this Act, and may include in the form an affirmation that the private applicator has completed a training program approved by the Administrator **so long as the program does not require the private applicator to take, pursuant to a requirement prescribed by the Administrator, any examination to establish competency in the use of the pesticide...**7USC 136i (a) (1)

Agricultural lessees on Army installations would qualify as private applicators. Private applicator is defined at Chapter 7, Sec. 136(e) (2) as

a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of **producing any agricultural commodity** on property owned or **rented by** him or his employer or (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person.

This is to be distinguished from a commercial applicator defined at Sec.136(e) (3):

The term commercial applicator means an applicator (whether or not he is a private applicator with respect to some uses) who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property other than as provided.. [in the previous definition].

FIFRA has a provision for Federal certification in states where the Administrator has not approved a plan.

Sec.136i(a) (1) FEDERAL CERTIFICATION.-
In any State for which a State plan for applicator certification has not been approved by the Administrator, the Administrator, in consultation with the Governor of such State, shall conduct a program for the certification of applicators of pesticides. Such program shall conform to the requirements imposed upon the States under the provisions of subsection (a) (2) of this section and **shall not require private applicators to take any examination to establish competency in the use of pesticides.**

It is clear from these two provisions that private applicators are held to a less stringent qualification.

There is an additional exemption for private applicators under Sec 136I, Use of restricted use pesticides; applicators:.

(d) IN GENERAL.- NO regulations prescribed by the Administrator for carrying out the provisions of this Act shall require any private applicator to maintain any **records or file any reports or other documents.**

(e) SEPARATE STANDARDS.- When establishing or approving standards for licensing or certification, the Administrator [Environmental Protection Agency] shall establish separate standards for commercial and private applicators.

The next question is what standards the Administrator has set for licensing or certification. This requires referencing the regulations promulgated by the Environmental Protection Agency. Turning to 40 CFR part 171, definitions identical to FIFRA are used to define private vs. commercial applicators. The requirements for private applicators are again less stringent than for commercial. There is, however, an apparent conflict between the Regulation and FIFRA. Though FIFRA prohibits the testing of private applicators, the regulations provide that:

A certification system shall employ a written or oral testing procedure, or such other equivalent system as may be approved as apart of a State plan.

40 CFR Sec.171.5(a) (5) (b)

In summary, under the Federal statute, FIFRA, agricultural applications by private owners or those who are leasing agricultural lands are handled differently than commercial applications. Private applicators may not be required to either test for competency or to keep

records. Under the EPA regulations, private applicators may be required to test.

According to the publication Commander's Guide to Environmental Management, the Environmental Protection Agency (EPA) has authorized the Department of Defense DoD to specify training and certification requirements for personnel who apply pesticides on DoD property. The two agencies have entered into formal agreements to comply with the Executive order through a Pesticide Environmental Stewardship Program. The Memorandum of Agreement between EPA and DoD is Attachment #1.

Neither the DoD Instruction 4150.7 nor the Army Regulation AR 420-76 provide for a special status, less stringent requirements, or an exemption from recording/reporting for private agricultural applications. There is no legislative history available to indicate whether the lesser standard for agricultural applications in FIFRA and the supporting regulations was considered in the drafting of either DoD Instruction or the Regulation. The failure to exempt agricultural applications or set lesser standards could have been an oversight or could have been deliberate. Even though the EPA was directed to set separate standards for private applicators, the Department of the Army would not be prohibited from setting more stringent requirements for Army owned property.

ISSUE II: WHETHER OR NOT AERIAL APPLICATIONS OF PESTICIDES TO LAND LEASED TO NON-DOD ENTITIES MUST BE PRECEDED BY A PRE-VALIDATION.

Assuming from the above analysis that agricultural outleases are included within the scope of DoDI 4150.7 and AR 420-76, we must next examine the requirement for pre-validation. A key provision of AR 420-76 is found at paragraph 4.4d. It states, "Each year installations will prepare a report of anticipated installation pest management programs or projects that involve application of pesticides by aircraft. The report will describe all anticipated aerial application programs for a 1-year period(1 April through 31 March)...Appendix H provides guidance on the information needed to complete this report." This is the "Annual Approval Request for Aerial Application Projects." Again though

Agricultural leases are not specifically mentioned, they are not exempted in paragraph 4.4d.

Another pertinent regulation is AR 40-5. Section 10.12 states that "All aerial dispersal of pesticides must receive appropriate prior MACOM approval." This segment also states "Actual application will be conducted under the direct and continuing supervision of an applicator certified in the category of aerial dispersal of pesticides."

ISSUE III; WHETHER OR NOT THE PROVISIONS OF ARMY AGRICULTURAL OUTLEASES OFFER PROTECTION TO COMMANDERS FOR LIABILITY UNDER ENVIRONMENTAL STATUTES.

A. Contents of Agricultural Outleases

The Army Corps of Engineers is the Army's real estate agent. Therefore, I turned to the Engineer Regulations for the provisions concerning agricultural outgrants. ER 405-1-12, paragraph 8-126, is entitled "Agricultural and Grazing Purposes." Sub-paragraph a states that military or civil works lands may be leased concurrently or exclusively for agricultural and grazing purposes. According to paragraph b(1) all A&G leases will have land use regulations attached. There is nothing specific concerning environmental matters in the provisions. However, in the earlier general provisions, paragraph 8-49 states

The outgrant instrument may specifically require compliance with particular state and local laws, ordinances, and regulations; however all outgrant instruments will contain a general provision as shown in each approved outgrant format. Site specific environmental, cultural and historical requirements may be added. The standard condition shown in the applicable format for a specific outgrant type may include additional language tailored to the type of outgrant and shall not be deleted or modified.

Figure 8-b-1 is the format for a standard agricultural lease. (Attachment #1). Paragraph 22, Environmental

Protection, addresses environment duties and prohibitions. It requires the protection of the air, ground, and water from pollution to the extent of the lessee's legal powers. The lessee is required to obey all environmental rules and regulations, and must obtain written approval prior to the application of pesticides or herbicides. Therefore, data should be readily available for reporting requirements.

The lease does not specify how far in advance of application the request for permission must be. In order for Commanders to address these applications in an annual pest management plan, the lessee would have to follow an application plan covering a whole year rather than seeking permission only at the time of application.

Paragraph 6 is a general requirement to comply with all applicable laws and regulations. Paragraph 19, Prohibited Uses, concerns only soil conversation. There is no mention of environmental concerns. Paragraph 20, Protection of Natural Resources, contains a requirement to keep the premises free of weeds which are detrimental to the value of the premises for agricultural purposes. This would seemingly require the use of herbicides. (Herbicides are covered under FIFRA).

B. Commander Liability Under Pesticide Regulations

Concerning protection for Commanders, Paragraph 13 is an indemnity clause which indemnifies against damages to persons or property "not including damages due to the fault or negligence of the United States or its contractors." This paragraph would provide contractual protection for civil liability for damages. The lessee could be pursued for reimbursement of damages assessed. However, the Commander would not be protected from Civil or Criminal liability penalties under 1361.(b)(1). The indemnification provisions do not include penalties but rather actual damages.

I found some cases which indicated that contracts agreeing to indemnification for criminal penalties are permissible, at least in some jurisdictions. Contra is California Civil Code § 1668, which states that contracts that "have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against

the policy of the law." Cited in Bodell v. Walbrook Insurance Company, Et Al, United States Court Of Appeals For The Ninth Circuit, 119 F.3d 1411(1997)

Another interesting discovery was a Federal aiding and abetting statute for criminal liability, 18 U.S.C. § 2. This is of interest because the agricultural lease requires the Commander to give written permission for pesticide application and the contract itself requires the lessee to control weeds.

The aiding and abetting statute provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Based on the examination of the agricultural lease itself and liability under FIFRA, I conclude that there is no protection for Commanders notwithstanding assertions to the contrary.

ADDENDUM:

Scott Farley, an attorney for the Army Environmental Center, offered these additional thoughts for consideration:

1. AR 200-3, Section 2-14, contains a pretty detailed provision governing "agricultural leases."

a. This section makes clear that the installation commander is responsible for identifying in reports of availability of land for leasing all applicable environmental requirements and restrictions. All requirements and conservation measures should be carried forward in the lease.

b. With respect to application of pesticides the AR requires that such applications be carried out in accordance with the provisions of the installations

integrated pest management plan UNLESS the lease commits the lessee to assume full responsibility for such applications in accordance with applicable Federal laws and regulations. AR 200-3, Section 2-14.a.(4) citing AR 420-76.

2. Paragraph 1.b. above may provide a justification for allowing lessees who have assumed pest management responsibilities from complying with DA internal procedures such as prior notification and approval for aerial applications.

Prudential considerations, however, should discourage following such a path, primarily because the installation commander remains on the hook for compliance with other environmental laws that could be triggered by an aerial application.

For example:

a. an aerial application of pesticides will trigger NEPA compliance requirements, unless the EA supporting the outlease somehow anticipated the environmental impacts of such an activity. This is highly unlikely. Proceeding in the absence of a supporting document would result in a violation of law attributed to the installation commander.

b. if an aerial application of pesticides has the potential to effect threatened or endangered species or designated critical habitat, then proceeding in the absence of Section 7 would result in a violation of law. In a worst case scenario, such a violation could be criminal if the application somehow resulted in a "take" of a listed species without the requisite "incidental take" permit (obtained through the Section 7 process).

3. In short, the installation commander remains liable under several statutory and regulatory schemes for the

proper protection of the land and resources comprising the "installation" under his/her jurisdiction. An outlease of a portion of the installation does not eliminate those responsibilities.

Therefore, in addition to the [above]conclusions...,the installation commander is simply at risk of violating applicable legal requirements when he is not on notice of activities that have the potential to adversely affect environmental resources under his jurisdiction and control.

AR 200-3 contains this provision applicable to pest management on agricultural leases:

Excluded are outleases whose contract contains provisions for lessees to assume full responsibility for the application of pesticides and animal damage control on their leases according to the provisions of applicable federal laws and regulations. See AR 420-76. Supplemental agreements to existing leases should be negotiated to amend them to comply with this provision. All pesticide uses will be reported by the responsible installation in accordance with AR 420-76.

Though it provides a possible loophole, standard COE agricultural leases would have to be amended. As Mr. Farley states there is no NEPA protection. There is also the question whether "assuming full responsibility" may be equated with indemnification and whether criminal liability can be indemnified.

Geraldine Lowery
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EPA Regions VI, VII

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Bldg. 111, Rocky Mountain Arsenal	Diane Connolly RA	Ext. 0459 dconnoll
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EPA Regions VIII, IX, X

redgerto

DOD REC REGION VIII, JERRY OWENS

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ARMY REGIONAL ENVIRONMENTAL OFFICES PERSONNEL DIRECTORY, 8/5/98

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ETHICS ADVISORY 98-12 - Politics & the Federal Employee

Within the last month, I have received some inquiries about the ability of Federal employees to participate in the political process. Strictly speaking, the Hatch Act and the Office of Personnel Management Regulations implementing the Act are not Standards of Ethical Conduct issues. However, they do apply to employee conduct and may well have ethical implications, such as reporting positions on a financial disclosure report, gifts, and use/mis-use of Government resources and position. Accordingly, it seems appropriate to provide you with basic information about participation in the political process.

The Hatch Act and implementing OPM regulations (5 C.F.R. Parts 733 and 734) apply to civilian employees. The rules applicable to soldiers are more restrictive and are set out in DoD Directive 1344.10 and AR 600-20.

When the Hatch Act Reform Amendments went into effect on 3 Feb 94, greater latitude for participating in the political process was given to most Federal employees. Except for career appointees in the Senior Executive Service, Administrative Law Judges, and employees of specified agencies (e.g., FBI, CIA, NSA, IRS, and MSPB), Federal employees may now participate in partisan politics. However, there are still limits. What follows are lists of what most Federal employees may or may not do.

Federal employees covered by the 1993 amendments may

- be candidates for public office in nonpartisan elections
- register and vote as they choose
- assist in voter registration drives
- express opinions about candidates and issues
- contribute money to political organizations
- attend political fundraising functions
- attend and be active at political rallies and meetings
- join and be an active member of a political party or club
- sign nominating petitions
- campaign for or against referendum questions, constitutional amendments, municipal ordinances
- campaign for or against candidates in partisan elections
- make campaign speeches for candidates in partisan elections
- distribute campaign literature in partisan elections
- hold office in political clubs or parties

Federal employees may *not*

- use official authority or influence to interfere with an election
- solicit or discourage political activity of anyone with business before their agency

solicit or receive political contributions (may be done in certain limited situations by federal labor or other employee organizations)
be candidates for public office in partisan elections
wear political buttons on duty
engage in political activity while
on duty
in a government office
wearing an official uniform
using a government vehicle

Career employees of the Senior Executive Service are still covered by many of the pre-reform restrictions, *i.e.*, they may **not** participate in **partisan** political activities. They may voice opinions, sign a petition, and be politically active, but they may not be involved with partisan issues, groups and elections. They may be members of a political party and contribute money to it, and they may attend a political event. **but** they may **not** be actively involved in the management of a partisan organization, help organize or sell tickets to a fundraising event, or address a group in support of or in opposition to a candidate for a partisan political office.

Active duty military personnel are under different and more restrictive rules than civilian employees. For example, they may not make campaign contributions to other members of the Armed Forces or Federal employees. They also may not run for elective office in the Federal government, or the government of a state, territory, the District of Columbia, or any political subdivision thereon. (10 U.S.C. Sec. 973).

Finally, for those civilian employees residing in certain specified localities in Maryland (*e.g.* Bowie, Frederick County, Howard County, Prince George's County, Rockville), or Virginia (*e.g.* Arlington County, Fairfax County, Prince William County, Fairfax City, Vienna) or elsewhere (*e.g.* Benecia, CA, Elmer City, WA, Sierra Vista, AZ) there is some liberalization in the rules. If you live in one of these localities, and if you are not a career appointee in the SES (or a member of one of the specified agencies), you may:

run as an **independent candidate** for election to a partisan political office in elections for **local office**
solicit contributions for an **independent candidate** for election to a partisan political office in elections for **local office**
accept (but not solicit) contributions for a **partisan** political party candidate running for **local office**
solicit uncompensated volunteer service for a **partisan** political party candidate running for **local office**

There is some liberalization also for the career SES employees, but not as much.

If you are going to be politically active, you should have a copy of the regulations for your reference. Attached is 5 C.F.R. Part 734, *Political Activities of Federal Employees*. Subpart B sets out the permitted activities. Subpart C sets out the restrictions, except that, if you are an SES, then refer to Subpart D. Also attached is 5 C.F.R. Part 733, *Political Activity: Federal Employees Residing in Designated Localities*. Here again, you will find permitted activities (Section 733.103), prohibited activities (Section 733.104) and special rules for the SES'ers (Section 733.105).

I recommend that you let the political organization in which you intend to be active know about your status as a Federal employee. I think it is fair to expect the organization with which you are working to be sensitive to your status, to have a general understanding about the rules that apply to your status, and to help you with them. At the very least, the organization should refrain from specific expectations of you that would violate the rules. With respect to a particular issue, I or Alex Bailey can help you read through the rules so that you can arrive at a reasoned conclusion. However, note that *only* the **Office of Special Counsel** is authorized to render advisory opinions concerning the applicability of the rules to the political activity of Federal employees (5 C.F.R. Section 734.102). The OSC telephone number is (202) 653-7188 or 1-800-854-2824. The OSC address is:

Office of Special Counsel
1730 M Street NW, Suite 300
Washington, DC 20036

The OSC also has a webpage (<http://www.access.gpo.gov/osc/>) where you will find links to "Frequently Asked Questions," OSC's e-mail advisory opinion service, and other helpful information.

Let us know if we can help you further.

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

or

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

GIFTS TO SUPERIORS UPON DEPARTING STATION

by

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

(U)

Introduction.

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

What is the General Rule?

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

Are There Any Exceptions?

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

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

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

This means that it is perfectly acceptable to bring a cake to the office, or to bring dishes of food for an office pot luck. Employees may invite their supervisors to dinner at their home (note, however, that under this exception an employee may *not* entertain his or her supervisor at the employee's favorite restaurant). When employees are invited to their supervisor's home for dinner, they may bring a bottle of wine or flowers. Members of an office may participate in a holiday exchange of gifts as long as no one feels "pressured" to participate.

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

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

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

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

The latter exception often comes into play within the Department of the Army during the normal summer rotation cycle. Gifts from subordinates upon retirement and permanent change of station (PCS) are permitted. However, note that a PCS gift is not permitted if the officer is merely moving up in the chain of command; such a "transfer" does not "terminate [the] subordinate-official superior relationship."

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

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

There is a "technical" aspect to the DOD rule. If an employee contributes as part of more than one "donating group," the total value of all gifts given by both donating groups normally should not exceed \$300. For example, if the commander's Executive Officer (XO) contributes to both the gift from the staff group and the gift from his former battalion, the total value of the gifts from the staff and that battalion normally should not exceed \$300. This also means that, if the XO's wife also contributes to the Officers' Spouses Club gift to the departing commander's spouse, the total value of the gifts from the staff and the spouses club may not exceed \$300 **unless** there is in fact a separate and distinct basis for the spouses club gift. For example, perhaps the commander's spouse was the president of the club, and cherished and loved by all

the members for his or her good works; in such a case, the gift from the spouses club would be because of the spouse's personal stature within the military community, not just to honor the general's PCS or retirement, *i.e.*, an indirect gift to the departing officer.

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

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

What to Do if You Receive an Improper Gift?

The obvious answer is to prevent improper gifts in the first place. The departing official should make it known that there are rules concerning gifts and he expects them to be followed. The members of the command should already have received training and other reminders concerning the rules. The official's Ethics Counselor should be alert to potential problems and provide necessary guidance.

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

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

IV. Conclusion.

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

AMSEL-LG

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Fundraising and Informal Funds

1. Generally, Federal regulations allow only one fundraising event in the Federal workplace: the Combined Federal Campaign. However, organizations consisting of DoD employees and their dependents may conduct fundraising activities among their own members if the funds are for the benefit of their own members. This type of informal fundraising includes activities such as bake sales and car washes.
2. There are several important restrictions that apply to informal fundraising by DoD employees and their dependents:
 - a. DoD employee organizations and groups must raise the funds only among soldiers and DoD employees here at Fort Monmouth.
 - b. The funds must be for the benefit and welfare of the members of the group or organization.
 - c. DoD employee organizations and groups must obtain prior written approval from the Garrison Commander for each fundraising event held. These requests for informal fundraising activities may be routed through Alice Domenico (x29474) at Commander, U.S. Army Garrison, ATTN: SELFM-RM-R, Fort Monmouth, New Jersey, 07703-5102. Requesters should include a description of the fundraising event and the date, time, and place desired.
3. There are also monetary limitations on informal fundraising by DoD employees and their dependents:
 - a. DoD employee organizations and groups may not maintain more than \$1000 at any given time, unless the group spends the additional amount immediately for the welfare of the group.
 - b. Only one individual is to be responsible for fund custody, accounting, and documentation. The fund custodian must administer fund business during off-duty time. The custodian must make an annual report to his or her military rater or civilian supervisor

AMSEL-LG

SUBJECT: Fundraising and Informal Funds

concerning the fund's existence, purpose, and financial status. The custodian is also required to make a report if there is suspicion or occurrence of irregularities associated with the fund.

c. Use of fund finances is limited to expenses consistent with the purpose and function of the fund and is not to be used in any way that appears to be contrary to Army interests.

4. Any questions regarding fundraising activities or policies may be directed to the Legal Office at x24444.

KATHRYN T.H. SZYMANSKI
Chief Counsel

DISTRIBUTION:
M, O, & R

ETHICS ADVISORY 98-10 - Providing Speakers at Private Organization Events

Private Organizations (POs) like AUSA, AAAA, AFCEA, IEEE, NDIA, etc. often request AMC employees to speak at their seminars, symposia and similar events. We might be asked to give a speech, participate as a member of a panel, or even to bring our own panel members. Our participation might be the primary presentation (e.g., luncheon speaker) or one of many presenters during a two or three-day conference. Can we use taxpayer dollars (official time and resources) to provide this support to the PO?

Perhaps.

The DoD *Joint Ethics Regulation* (JER) deals specifically with this issue and sets out the criteria for such support to a PO event. All the following must be present:

- Must be no interference with performance of official duties or readiness.
- Community relations or other Army interests must be served.
- It must be appropriate to associate the Army with the event.
- Event must be of interest and benefit to local civilian or military community as a whole.
- We must be willing to provide same support for similar events.
- The requested support must not be restricted by law or regulation (e.g., improper release of procurement information).
- The PO must not charge an admission fee beyond recouping reasonable costs for sponsoring the event (*i.e.* we do not provide taxpayer support to an PO money-maker event).

In short, giving the presentation must be something that we really want to do because it serves the Army's interests, and what we get out of it justifies our expenditure of resources, *i.e.*, we get "**bang for the buck!**"

There are a number of reasons that do *not* justify providing speakers for a PO event, such as:

- The PO was counting on us.
- We did it last year.
- This is the PO's primary defining annual event and we need to support it.
- If we don't do this, no one will show up.
- This is a great Association and we need to show our support!
- Well, the PO asked, so I thought that I had to.

If you are asked to be a presenter at a PO event, you and the head of your organization must decide that it is in AMC's interests for you to make this presentation and participate in this event, and that the expenditure of AMC resources required for this

participation is worth it. You need to ask some questions about the PO and the event of the person inviting you, such as: what is the nature of the organization, what is the purpose of the event, who are the other presenters, who are the attendees, and how much are they being charged to attend the event? These will help you determine such things as:

Whether this is an appropriate and effective forum for an official presentation.

Whether it is appropriate to associate ourselves with the event. For example, if the PO excludes women from participating, it is probably not appropriate to associate AMC and the Army with the event. Or, if the purpose of the event is to provide for-profit training, it is probably not appropriate to associate ourselves with this commercial venture.

Whether the fees charged are to cover the reasonable costs of the event or to make money. If you are to be a luncheon speaker for which the PO is charging \$20 to attend in a Washington, DC hotel, the PO is probably just trying to break even. If the PO is charging \$50 to attend a one-day conference in a Washington, DC hotel, the PO is probably is not making money off of the event. If, however, the PO is charging \$100 to attend the luncheon or \$1,000 for a two day conference in a Washington, DC hotel, you probably need to ask some more questions, such as: why so much? is the PO trying to finance its operations for the next six months? who are the other presenters? (if 95% of the presenters are DoD employees presenting in their official capacities (at no cost to the PO), why are the attendance fees so high?)

Money, resources, fees, and expenditures should be a major consideration in your decision-making process. Nothing seems to rankle people more, in and outside the Government, including Congressional subcommittees, than to see scarce taxpayer resources used to support private enterprises, which should be self-sustaining. Think about how it looks for a PO to sponsor an event, charge high fees for people to attend, but have most of its product (speakers, information, ideas) provided at no cost (actually, at the cost of the taxpayer) to the PO. It is even worse when taxpayer funds are used to pay the high fees for Federal employees to attend the same event!

Let's assume that you and your boss decide that your participation as a presenter is important to AMC and the Army, the benefit that we receive is commensurate to the resources that we will expend ("**bang for the buck**"), and all the criteria are met. The PO now tells you that there will be no charge for you to attend the event, to receive a copy of the conference materials, and for the conference luncheon. Are these gifts to you? to the Army? Can you accept them?

In its rules on gifts from outside sources, the Office of Government Ethics determined that this free attendance on the day of presentation is permissible when provided by the sponsor of the event. Your participation in the various aspects of the event on the day of presentation is considered a necessary part of the speaking engagement and is not considered a gift to you or the agency. This includes meals or other refreshments that are furnished to all attendees as part of the event. It does not include a meal for a select few away from the event.

If you are asked to be a presenter at an event, and you think it might be a good idea, find out all that you can about the event (sponsor, purpose of event, attendees, number attending, fees, other presenters, etc.), and discuss it with Alex Bailey or me.

Mike Wentink, 7E18, 617-8003
Ethics Counselor
Office of Command Counsel

Alex Bailey, 7E18, 617-8004
Ethics Counselor
Office of Command Counsel

ETHICS ADVISORY 98-08 -- The Ethical Parameters of Participating in Private Organizations (POs)

Many HQAMC employees are members of professional associations, such as the Public Administration Forum, the American Society of Military Comptrollers, the Armed Forces Communications and Electronics Association, the Society of American Military Engineers, the Federal Bar Association, the Association of the United States Army, the Senior Executive Association, the Field Artillery Association, etc. **That's good!**

Some HQAMC employees are officers, directors, advisors, and active participants in these and similar organizations. **That's even better!**

Membership and participation in such organizations enhance our professionalism as soldiers and Army employees, and in our life's work. In addition, participation in these organizations brings us into contact with the civilian community and it is a learning and sharing experience where we all benefit.

However, there are parameters that constrain our relationship with and participation in POs. No matter how good the work is that they do or how well their goals and ideals complement those of the Army and AMC, they and their activities may not be organized, planned, administered and operated by and as an extension of the Army and AMC. They are non-Federal entities and must be treated as such. This does not mean that we can't work or cooperate with them in appropriate situations, but, like most things in life, there are rules! Some of the more important ones follow.

Rule No. 1: If you are an officer, director, trustee, or employee of a PO, the financial interests of the PO are imputed to you. This means that you must not participate in official Army matters that affect that PO because you have a conflict of interest. You may not recommend support to an event sponsored by your PO or sign TDY orders authorizing an employee to travel to a training seminar sponsored by your PO.

Rule No. 2: If you are an active participant in a PO, you probably should not participate in official matters involving the PO because of the appearances (a reasonable person with knowledge of the relevant facts would likely question your impartiality -- for example, Jane or John Q. Public might think that you, as the chair of the PO's finance committee could be more interested in the PO's financial welfare than AMC's interests when deciding whether to support an event sponsored by the PO).

Rule No. 3: As an officer, director, trustee, advisor or other active participant for a PO, you act in your personal and private capacity. This is not part of your job description. You are not authorized to organize, plan and run

membership drives, fundraising campaigns, and other business of the PO from your HQAMC office. In appropriate cases, the "agency designee" (your boss) may authorize limited use of Government resources (*e.g.*, your computer) and even some "excused absence" for professional development.

Rule No. 4: We may not use officer professional development sessions (OPDs), staff meetings, or other official settings to promote a particular PO, its activities or products. Even outside official settings, we may not use our official position to promote the PO, and we may not personally solicit membership or funds from subordinates or prohibited sources (*e.g.*, those doing business or trying to do business with the Army).

Rule No. 5: In our official capacities, we may not promote membership in a particular PO, appoint subordinates as points of contact (POCs) for membership drives, establish membership goals, track, maintain and report on membership statistics in official staff meetings, or give incentives or disincentives to encourage membership in a particular PO.

Rule No. 6: We may not act as agent for any PO before AMC (or any part of the Federal Government) unless a majority of the members are Federal employees or their family members, the representation is uncompensated, and does not involve a contract, grant or similar money matter.

The point is that we need to keep our official life separate from our personal endeavors. Even though the Army benefits from our membership and participation in these organizations, and generally encourages this membership and participation, we must not allow the use of the Army and its resources, to include its leaders, commanders, directors and supervisors, to endorse or promote a particular organization, or to induce or coerce another employee to join or support a particular organization.

Does that mean that we can never have an official relationship with a PO? Does this mean that we can never give official speeches at PO events or provide official Army support to PO events. No! Of course we can; we do it all the time. But, those AMC employees who are officers, directors, advisors, and active participants in the PO need to stay out of the decision process as to whether to have this official relationship or to provide support. In addition, there are rules for this official relationship and for providing support to ensure that we are not playing favorites and that there is a good "official" reason for such relationship or support (*e.g.*, we can't be doing it just because we like the PO's support of Army programs or the support is necessary to make a PO event a success). I will discuss these rules in future ETHICS ADVISORIES.

If you have any questions at all on this, let me or Alex Bailey know.

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

or

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

Last month, I issued an ETHICS ADVISORY to explain the rules about gifts between employees, concentrating on the exception that permits us to solicit for and give a gift to departing employees. One of the responses that I received said that this was all well and good, but what about gifts from contractors -- could I provide an ETHICS ADVISORY concerning this? So, what follows is an explanation about the rules concerning gifts from outside sources.

The basic rule is that we **must not** accept gifts from prohibited sources or which are offered to us because we are a Federal employee.

This sounds simple, but what's a gift? What's a prohibited source?

A gift is anything of value (e.g., discounts, entertainment, training, favor, discount, forbearance, hospitality). Simple enough. However, the Office of Government Ethics specifically excludes some items from this definition, to include the following:

Greeting cards, plaques and similar items with little intrinsic value that are meant for presentation purposes.

Coffee, donuts, and similar refreshments offered during a meeting (the "donut rule"). This does not include a working lunch.

Something offered to **all** Federal employees or **all** uniformed military personnel (may be restricted on a geographic basis).

Rewards or prizes given in contests or other events open to the general public, unless the employee entered the contest as part of his or her official duties (for example, if you attend a seminar, symposium or exposition as part of your official duties and you win a computer as a door prize, that computer belongs to the Government).

A prohibited source includes anyone doing business with the Army, trying to do business with the Army, seeking official action from the Army, or is affected by how the Army employee performs or does not perform his or her duties. This includes on-site contractors and their employees. Even if they work in the Federal workplace along side other Federal employees, they are "outside sources," "prohibited sources" delivering goods and services pursuant to a contract.

Sometimes private professional, scientific or technical associations argue that a proffered gift should be permissible because they are not a "prohibited source." They may or may not be correct about being a "prohibited source" at that particular time. But, it usually

does not matter whether the PO is a prohibited source because, in all likelihood, the gift would not have been offered if the recipient had not held his or her position as a Federal employee.

Of course, there are exceptions to the basic rule of "no gifts." Some of the exceptions are as follows:

1. If the fair market value of the gift is \$20 or less, you may accept it as long as you don't accept more than \$50 from the same source during the year using this exception. If the gift is a ticket, the fair market value is the price on the ticket. If the ticket price is \$25, you may **not** pay merely the difference (\$5) to keep within the exception -- you must pay the full price of the ticket (\$25). If you are offered two \$18 tickets, you may accept just one; or you may accept one as a gift and pay \$18 for the other one. If offered a five course dinner in a fancy restaurant downtown, you may **not** accept based on reciprocity (i.e., you intend to return the favor at a later date).

2. You may accept an award for outstanding public service as long as it is not coming from someone who is affected by how you perform your official duties. In most instances, before you accept, you must obtain a written Ethics Counselor determination that the award meets certain criteria.

3. You may accept an honorary degree in most cases. But, again, an Ethics Counselor determination will be required.

4. You may accept gifts based on outside business or employment relationships. For example, if your spouse works for an Army contractor and, as employee of the year, your spouse is given an all-expense paid trip to a resort in Cleveland, Ohio, you may accompany your spouse at the contractor's expense. Similarly, if you are seeking employment with a contractor who wants to bring you and your spouse to its home office in Indianapolis, you may accept this trip assuming that this is way that the company treats others at the level that you are interviewing.

5. You may accept free attendance at a social, dinner, seminar, or other event that is a "widely attended gathering" (a large number of persons with a diversity of views will attend) **if** your supervisor determines that there is "agency interest" in your attending (your attendance will further agency programs or operations). This determination requires Ethics Counselor concurrence and, if the person inviting you has interests that can be affected by how you perform or do not perform you duties, it must be in writing. If you attend such an event, you attend on your own time and at your own expense (*e.g.*, you may not use an AMC metro card or an official car and driver).

Assume for a moment that you are offered a gift that meets one of these exceptions. Does your analysis end here? It does not! There still are times when we cannot accept a gift, such as:

If it is offered as a "quid pro quo." What if a contractor sent you a \$20 ticket to an Oriole's game as a "thank you" for providing some requested information in a timely manner. You should not accept something where it looks like it is in return for being influenced to perform an official act.

If it was solicited. For example, if an employee solicited \$20 gift certificates from a local restaurant to use as prizes for the office golf tournament, we may not accept them even though each would fit into the first gift exception.

If the employee receives gifts with such frequency that it looks as if the employee is abusing his or her official position. For example, if an ordering officer constantly receives lunches from various vendors during the year, he or she should refrain from accepting such gifts even though most of them are well under \$20 and the maximum of \$50 is never exceeded for any one source.

Finally, remember, it is never wrong to decline a gift. And, oft-times, a polite declination is the way to go, even if the rules say that you can accept it.

If you receive gifts from a source that are valued \$250 or more during a year, you must report the gifts if you file a public (SF 278) or confidential (OGE Form 450) financial disclosure report.

What if you receive a gift that you are not sure about? It might come in the mail, or someone may have left it on your desk. Ask your Ethics Counselor! Don't wait for the Inspector General to begin an inquiry... ask your Ethics Counselor about it right away. If it is an improper gift, there are a number of options. You can pay fair market value of it (now, it's no longer a gift). You can return it (at Government expense). If it's perishable (e.g., flowers or food) and not practical to return, with the concurrence of your supervisor or ethics counselor, you might give it to an appropriate charity, share it within your office, or destroy it.

If you are offered a gift and you have any doubts, decline it or tell the person offering it that you will have to check with your Ethics Counselor.

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

or

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

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acquisit.doc	Acquisition for Foreign Military Sales	Larry Anderson HQ, AMC
armyprs1.ppt	General Services Administration Public Buildings Service Office of Property Disposal	John Kelly GSA
ltracct.doc	Letter of Offer and Acceptance	Larry Anderson HQ, AMC
privnepa.doc	MEMO - Appropriate National Environmental Policy Act (NEPA) Documentation for Utility Distribution System Privatization	MAJ Allison Polchek DAJA-EL
privweb.doc	Utilities Privatization – Where to Go on the Web for Information	Robert Lingo HQ, AMC
risk.doc	Risky Business – Risk and Responsibilities	Sharon Hill AMCOM
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anderson.ppt	Foreign Military Sales and Acquisition	Larry Anderson HQ, AMC
carroll.ppt	Oral Proposals and The Electronic Submission of Proposals	Tom Carroll CECOM
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Utility Privatization at Active
Installations

John Nache
HQ, AMC