



Office of Command Counsel Newsletter

October 1998, Volume 98-5

AMC Command Legal Program for 1999-2000

The Command Legal Program (CLP) is a two-year plan initiated by the Command Counsel. The Command Counsel in conjunction with the MSC Chief Counsels determines the categories that will comprise the CLP. Then, each AMC legal organization develops initiatives under each category that are unique to each legal organization.

Five CLP Categories Chosen

This year during the Chief Counsels' Workshop held at White Sands Missile Range, the Chief Counsels identified five CLP categories for 1999-2000:

- **Communication and Automation**
- **Quality of Life**
- **Professional Development**
- **Preventive Law**
- **Service to the Client**

Each AMC Major Subordinate Command is, of course, free to use its own methodology to identify components of the CLP.

In the Office of Command Counsel, we held a management off-site to develop a draft list of items under each of the five-categories.

Developing Initiatives

Because we believe it essential that each employee actively participate in the development of initiatives, each member of the management team will meet with their respective groups to jointly discuss this draft list to develop a list that will be used as the final CLP package of initiatives.

I know the MSC Chief Counsel are actively engaged in developing their unique Command programs.

Creativity

The CLP process permits

us to capture the work our people do in support of the AMC mission. It also focuses our attention on creative initiatives that improve our business processes, streamline procedures, define our roles and responsibilities, and assist us in establishing and maintaining progressive relationships with our clients. ©

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COL Demmon F. Canner New AMC Deputy Command Counsel/Staff Judge Advocate

COL Demmon F. Canner arrived at Headquarters, AMC in August, to assume the position of Deputy Command Counsel/Staff Judge Advocate. "DC" comes to AMC from the Pentagon where he served for three years as Chief, Legal Assistance Policy Division, Office of The Judge Advocate General. He has a BBA from Temple University, a JD from Dickinson School of Law, and a LLM in Law, Psychology and Criminology, from the National Law Center, George Washington University.

Previous positions include SJA, Fort Sill, Oklahoma; Deputy Desert Storm Assessment Team, Falls Church; SJA, Fort Meade, Maryland; and Deputy Crimi-

nal Law Division, Office of The Judge Advocate General.

COL Canner is the recipient of numerous awards including the Meritorious Service Medal with five Oak Leaf Clusters.

DC's passion for auto racing may come in real handy as he negotiates those turns and curves that often characterizes the practice of law at the Headquarters. One person with whom DC is very familiar is **Nick Femino**—they were both in the same JAG basic class.

We extend a warm AMC welcome to DC, his wife, Beverly, and daughter, Jeannette.

The Canner's reside in Falls Church, Virginia. ©

**October is Combined
Federal Campaign Time**

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

Acquisition Law Focus

WATCH THOSE OBLIGATIONS: The *Bona Fide Needs* Rule

Maria Esparraguera, CECOM Acquisition Counsel, DSN 992-9818, provides an excellent article on the Bona Fide Need Rule, including its ancient 1789 origin.

A fiscal year appropriation must be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made.

The DFAS

The statute has been interpreted to require that the contractor will “start work promptly and perform under the terms and conditions of the contract without unnecessary delay.” See DFAS-IN 37-1 para.9.5c (3)(n). The rule is now codified at 31 USC Sec 1502(a).

Anti-Deficiency Violation

The failure to comply with the bona fide need rule can result in an anti-deficiency violation under 31 USC Sec 1341. The article also

cites General Accounting Office precedent. For example, in United States Department of Agriculture Forest Service, B-235086, April 24, 1991, the Forest Service contracted to have two (2) bridges painted at the end of FY 1984, and because of environmental concerns, chose not to issue a “Notice to Proceed” to the contractor until May 1985. In that case, it was determined that the agency did not have a bona fide need for the services until FY 1985.

GAO Precedent

Therefore, the General Accounting Office determined that FY 1984 appropriations should not have been used to fund the action.

The article also contains an interesting suggestion from the JAG School fiscal law course recommending that weather conditions be taken into consideration in determining the existence of the rule (Encl 1)^c

List of Enclosures

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Acquisition Law Focus

GOCO Post-Retirement Benefits (--Other than Pensions): A \$270 Million Unfunded Liability

Post-retirement benefits other than pensions (PRBs) are health and life insurance benefits which contractors offer to their retirees. At the Government-owned, contractor operated (GOCO) Army ammunition plants, the industry practice for 40 years was to account for PRBs on a pay-as-you-go basis.

The Army under GOCO cost reimbursement contracts reimbursed these costs as the costs were incurred. No fund was set aside to pay future PRB costs. With the downturn in the defense budget, many GOCO plants were closed or the operating contractors changed. This resulted in large contractor claims for the unfunded PRB costs.

The Army's policy is that once the GOCO contract ends, there is no Government liability for the unfunded PRB costs. However, because of their strong equitable claims, many contractors

obtained extraordinary contractual relief from the Army Contract Adjustment Board (ACAB) pursuant to Public Law 85-804.

It is currently estimated that the unfunded PRB liability at the GOCO plants is approximately \$270 million. AMC has advised that any future ACAB rulings for PRBs will come out of procurement funds.

In order to remedy this situation, the IOC has submitted proposed legislation to make unfunded PRBs an allowable contract termination cost at the GOCO plants and requests \$270 million in appropriations.

If approved, this legislation would eliminate the administrative burden of the Public Law 85-804 process and provide a special appropriation that would give some relief to the Army's limited budget. POC is IOCs **Bernadine McGuire**, DSN 793-8436. ©

Seen at
Roadshow
VII:

Acquisition Reform Guiding Principles

1. Empower people to manage—not avoid risk.
2. Operate in integrated product teams.
3. Reduce Cycle Time by 50%.
4. Reduce cost of ownership.
5. Expand use of commercial products and processes.
6. Use performance specifications and non-government standards.
7. Issue solicitations that reflect the quality of a world class buyer.
8. Procuring goods and services with “best value” techniques.
9. Test and inspect in the least obtrusive manner to add value to the process or product.
10. Manage contracts for end results. ©

The Telecommunications Act of 1996: The Competitive Bell Is Ringing

The Telecommunications Act of 1996 (the Act) is the first major statutory change to Communications law in over 60 years. The primary purpose of the Act is to increase competition in various communications markets and to reduce regulation of those markets. The law addresses telecommunications, cable and broadcast services.

The new law opens all telecommunications markets to competition, with particular emphasis on the local exchange market. Currently, in

most places, this market is a monopoly dominated by the Bell Operating Companies (BOCs) or other Local Exchange Carriers (LECs).

The Act allows cable television companies, interexchange companies (IXCs), subsidiaries of utility companies, Competitive Access Providers (CAPs) and others to enter and compete in the local exchange market.

In order to encourage competition in the local exchange market, the Act has a number of provisions requiring LECs to open their networks to their competitors in

a fair, non-discriminatory way. Since most new competitors do not have facilities-based networks in the local exchange market, access to and interconnection with the LECs' networks, facilities, service and equipment is key to developing competition in that market.

CECOM's **William Kampo**, DSN 992-6561, has prepared an excellent overview of the Act with specific emphasis regarding Bell operating companies, broadcasting, cable TV, and telecom competitive opportunities (Encl 2)^c

Appropriations, Availability, Obligations and Expirations

AMCOM's **Dayn Beam**, DSN 746-8195, provides an interesting paper that speaks to an administrative "swap" of FY 94 for FY 96 dollars on an existing obligation, and explains this process as it arose in an AMCOM acquisition program. Research does not reveal any statutory restriction for this type of ac-

tion, and Resource Management representatives were unaware of any regulatory limitations. Mr. Beam is unaware of any case directly on this point. However, the GAO's Principles of Federal Appropriations Law (hereafter referred to as "the Redbook"), Second Edition, Volume 1, Chapter 5, Section

7, concerning contract modifications, supports this analysis.

Three statutes and legal principles appear to be relevant to the appropriate use of this swap, and each is discussed in the article: type of funds-purpose statute, year of funds-bona fide needs rule and the amount of funds-Anti-Deficiency Act (Encl 3)

One Neutral's View: *Goin' Mobile* Suggestions for New (and Not So New) Mediators with AMC's Civilian Employee Deployment Guide

Steve Klatsky, DSN 767-2304, recently was an adjunct faculty member for the Defense Equal Opportunity Management Institute (DEOMI) Mediation Course.

Steve made presentations on the Background and History of Alternative Dispute Resolution; Mediation: Premise, Process and Principles; and, ADR Program Design. He also observed and commented on mock mediation sessions conducted by the students.

As part of his feedback to the students, Steve provided information that DEOMI officials asked him to reduce to writing. A copy of his paper is provided (Encl 4).

1. Be Yourself
2. Describe the Benefits of Mediation in Your Introduction
3. Listen Carefully to Positive Comments Made By One Party About the Other
4. Pick Up An Expression

of Willingness to Change Requested Remedies

5. Don't Dominate the Conversation—"Direct Traffic" Between the Parties

6. Describe the Purpose of A Caucus In General, NOT Specific Terms

7. The First Caucus Question: "Is There Anything Else I Need to Know?"

8. Firmness Has Its Place—But Not In Your Opening

9. Room Design Is Important to the Mediation Process

10. Summarize Regularly

11. Keep At the Parties to Create Options and to Raise Ideas

12. "Are there Other Issues?"—The Loaded Question

13. Keep the Process Informal

14. Congratulate the Parties!

This paper has also been distributed by the Federal Mediation and Conciliation Service throughout the Federal ADR Network (FAN).[©]

Cassandra T. Johnson, DSN 767-8050, attended the DA Mobilization Planning and Contingency Operations Workshop. DA DCSPER gathered the DA subject matter experts to assist in writing draft changes to AR 690-11, Planning and Use and Management of Civilian Personnel in Support of Military Contingency Operations, as well as DA PAM 690-47, DA Civilian Employee Deployment Guide. You may recall that DA adopted the AMC Civilian Deployment Guide for its use.

The Workshop concentrated on a review of the AR.

DA asked AMCCC (Cassandra) and AMCPE's **Diane Blakeley**, to review the DA Guide and make draft changes, since they recently participated in the rewrite of the AMC Guide. [©]

Employment Law Focus

Workers Immune from Supervisor's Defamation Suit

The Court of Appeals for the Seventh Circuit has ruled that nine Federal employees who filed discrimination complaints against their supervisor, and later complained about his behavior to senior agency leaders, can not be sued by their supervisor for defamation. See Taboas v. Mlynczak, 7th Cir., No.97-3592, July 6, 1998.

The Court ruled that filing a discrimination complaint, and raising concerns about possible retaliation for

doing so, were legitimate actions of Federal employees acting within the scope of employment.

The plaintiff argued that these individuals acted in bad faith and the actions were made in malice and ill will. The Court said, however, that even acts of ill will could fall within one's legitimate scope of actions.

The US successfully removed the case to Federal court and substitute itself as the sole defendant. ©

MSPB Regs on Atty Fees, Comp Damages and Consequential Damages

On Aug 3 the MSPB issued new regulations providing practitioners with guidance on how to proceed on requests for attorney fees, consequential and compensatory damages, as well as legal requirements on the choice of procedures in cases involving both an appealable action and a prohibited personnel practice. These provisions can be found at 63 Federal Register 41177.

MSPB said the new rules were issues to serve four pur-

poses: to implement the compensatory damage provisions of the Civil Service Reform Act of 1991; to implement the attorney fee provisions of the Uniformed Services Employment & Reemployment Act of 1994; to implement the attorney fee, consequential damage and choice of procedure provisions of PL 103-424 of 1994 reauthorizing the MSPB and the Office of Special Counsel; and, to amend existing rules governing attorney fees to change the time limits for filing requests. ©

Tape Record those Conversations ...and Get Attorneys Fees

The Merit Systems Protection Board awarded attorney fees to a clerk who tape-recorded conversations with her supervisor during work-related meetings. In Capeless v. Department of Veteran's Affairs 98 FMSR 5221, June 24, 1998, the Board reduced a removal to a 45-day suspension against an employee charged with insubordination for failing to stop tape-recording when requested by her supervisor.

The Board ruling highlights that the agency knew or should have known that it would not prevail on the merits. Thus, the request for attorney fees is granted under the "warranted in the interest of justice" standard. ©

Employment Law Focus

Purge those Records...Or A Breach May Be Found

In Mullins v. Department of the Air Force, 98 FMSR 5276, Aug 4, 1998, the MSPB ruled that an agency failure to timely expunge records from the appellant's personnel folder constitutes a material breach of a settlement agreement between the parties. The settlement agreement permitted the employee to resign his position. The agreement required that his official personnel records be cleared so that there is no reference to "any disciplinary action...or removal."

The agency position was that there was no material breach, in part, because the individual was hired for another position.

The Board ruled that the breach was material, not because it resulted in a monetary loss, but because the breached provision was material to the settlement agreement. As a remedy the appellant has the option of seeking enforcement of the breached provision or to rescind the agreement and reinstate his appeal. ©

Frivolous Discrimination Claim Must Have Hearing

In Currier v. U.S. Postal Service, 98 FMSR 5261 (July 29, 1998), the Merit Systems Protection Board ruled that it was improper for an Administrative Judge to dismiss a discrimination claim as frivolous, without providing a hearing. Citing Bennett v. National Gallery of Art, 98 FMSR 5259, and 5 USC Code Sec 7702, the Board stated that the law does not distin-

guish between frivolous and nonfrivolous allegations. An appellant who has a right to an MSPB hearing because he or she has filed an appeal from an action that is appealable to the Board, also has a right to have the Board decide an allegation of discrimination raised in that appeal, based on evidence presented at the hearing. ©

FECA & Rehab Act & FTCA go to the Fed Circuit

An injured employee who is not satisfied with the outcome of his Federal Employee Compensation Act decision can not then bring suit under the Rehabilitation Act of 1972 seeking a more favorable result.

In Meester v. Runyon, 8th Cir.; No.97-1580, July 16,1998, the Circuit Court majority ruled that an employee dissatisfied with a FECA decision can appeal the Labor Department's rul-

ing, but can not file suit under the Rehabilitation statute. FECA is the exclusive remedy for federal employees who are injured on the job.

The dissent suggests that FECA does not bar suit under the Rehab Act because the two statutes provide for very different remedies. Interestingly, the majority and the dissent both conclude that FECA would bar suit under the Federal Tort Claims Act. ©

FLRA on the Scope of Bargaining...

The General Counsel of the Federal Labor Relations Authority (FLRA) recently issued an important Guidance Memorandum to Regional Directors discussing the concept of the scope of bargaining under the Federal Service Labor-Management Relations Statute.

Scope of Bargaining

Regional Directors are frequently required to make decisions on the negotiability of union proposals in situations where management is seeking to make a change in a condition of employment.

The Memorandum serves as guidance to the Regional Directors in investigating, resolving, litigating and settling unfair labor practice charges where negotiability is an issue. It also is intended to assist parties in improving their labor-management relationship and avoiding litigation.

The Guidance Memorandum is available to the public to assist union officials and agency representatives in working together to develop productive labor-management relationships, to avoid negotiability disputes and to obtain a better understanding, and take advantage, of the entire scope of bargaining under the Statute.

Four Parts

The Guidance is divided into four parts. **Part I — “Ways to Engage in Collective Bargaining In the Federal Sector”** — discusses how proper utilization of a pre-decisional involvement process and interest-based problem-solving techniques limits dramatically negotiability disputes. **Part II — “Differences Between the ‘Duty to Bargain’ and the ‘Scope of Bargaining’”** — describes these two different statutory

concepts and explains: when there is a duty to bargain; what constitutes good faith bargaining; and what the concept of negotiability means. **Part III — “Approaches to Obtaining the Benefits From the Scope of Bargaining Under the Statute”** — presents approaches which allow the parties to improve the effectiveness of bargaining within the current statutory scope of bargaining. In particular, this Part explains the concept of “appropriate arrangements” and suggests a protocol for parties to follow to develop meaningful, negotiable appropriate arrangement proposals. **Part IV — “Negotiability Disputes Should Not Impede Collective Bargaining”** — suggests some techniques to avoid negotiability disputes and not disrupt the collective bargaining process by filing unfair labor practice charges in unilateral change situations. ©

...and Unfair Labor Practices

The General Counsel (GC) of the Federal Labor Relations Authority has proposed revisions to the regulations regarding the preven-

tion, resolution, and investigation of ULP disputes (5 CFR Part 2423, subpart A) The purpose of the changes is to facilitate dispute resolution

and to simplify and improve the processing of ULP charges. AMCCC has sent these materials through the labor counselor E-Mail list. ©

Corporate Liability, Fines & Penalties, Geronimo at Ft. Sill and ELD Assignments

The L O N G Reach of Institutional Controls

Environmental Law Division Bulletins for July, August, Sept, and October 1998 are provided (Encl 5,6,7,and 8).

The **July** bulletin highlights the Supreme Court's decision in U.S v. Bestfoods, et al, 1998 U.S. LEXIS 3733 (June 8, 1998), concerning corporate liability for parent corporations arising in an environmental context.

The **August** bulletin has an update on the status of fines and penalties. Since 1993, the Army has been assessed with 172. The Response Conservation and Recovery Act (RCRA) accounts for 96, the Clean Air Act 44, and the Clean Water Act 23.

The **September** bulletin highlights a recent United States District Court for the District of Columbia decision dismissing a suit by *pro se* individual and organization plaintiffs to compel repatriation of the remains of Geronimo, an Apache leader who is buried at Fort Sill, Oklahoma. Idrogo and Americans for Repatriation of Geronimo v. United States Army and William Clinton,

No. 97-2430, slip op. (D.D.C. Aug.6, 1998).

Plaintiffs also demanded that Geronimo be given full military honors and that his prisoner-of-war status be removed. The court concluded that the plaintiffs lacked standing to maintain such a suit.

Plaintiffs based their claim on the Native American Graves Protection and Repatriation Act (NAGPRA), which requires federal agencies to return human remains upon request from a lineal descendant or Native American tribe.

The court found that the plaintiffs did not fall into the class given repatriation rights under NAGPRA. The individual plaintiff did not allege that he was a descendant of Geronimo, and the organizational plaintiff was not a Native American tribe.

The **October** bulletin sets forth the issues and roles assigned to the various office attorneys. ©

Institutional controls restricting property use or activities are a recognized measure to reduce cleanup costs consistent with anticipated land use decisions. However, they are difficult to document and to ensure effective compliance.

The Army has issued Guidance on Using Institutional Controls (ICs) in the CERCLA Process, 4 September 1998. The guidance applies to both BRAC and active military installations. If you need a copy, contact **Bob Lingo**, DSN 767-8082.

An extensive study of Institutional controls for Future Land Use at Active Installation Restoration Program (IR) Sites recently appears in Summer 1998 edition of the *Federal Facilities Environmental Journal*. ©

Environmental Law Focus

Get the BRAC Facts

The Department of Defense has published three important BRAC Environmental Fact Sheets on the following topics: "CERCLA/RCRA Overlap in Environmental Cleanup," "Early Transfer Authority," and "National Priorities List Reform: A More flexible Approach to Federal Facilities." Although the fact sheets were developed for use by BRAC cleanup Teams, and distributed at BRAC cleanup Team Workshops during the summer, the information is also applicable for cleanups being conducted at Army operational installations. These are available at the BRAC cleanup page on the World Wide Web, as follows: <http://www.dtic.mil/envirodod/brac>.

Do you have a RCRA hazardous waste issue?

EPA has a complete explanation of the RCRA Subtitle C Hazardous Waste Regulatory Program, including references to corrective action, military munitions, radioactive waste, and waste minimization and pollution prevention at <http://www.epa.gov/epaoswer/osw/hazwaste.htm>.

Greening the Government

Here is a new Executive Order to add to the list provided in previous Newsletters. Executive Order 13101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition, was signed on September 14, 1998.

While the order repeats many of the requirements of the prior Executive Order 12873, which the new Order revokes, it does contain several new requirements, including a provision that inspections pursuant to RCRA and the Federal Facilities Compliance Act should include evaluations of facility

compliance with section 6002 of RCRA, and implementing regulations, regarding the Federal program for affirmative procurement of EPA designated items containing recovered materials.

The DAR Environmental Committee is working on FAR implementation. A copy of the Executive Order may be obtained at <http://www.ofee.gov>. If you need additional information about affirmative procurement, the Army Environmental Center has an area under pollution prevention dedicated to this topic, at <http://aec-www.apgea.army.mil:8080/>

Preserving Our Military Heritage

Many of our Army installations and BRAC facilities have properties of historical significant. It is important that these properties are identified and proper coordination conducted with the State Historical Preservation Officer (SHPO) concerning any undertaking which might ad-

versely affect the properties.

A good summary of the National Historical Preservation Act Section 106 consultation process, by **Valerie DeCarlo** of the Advisory Council on Historic Preservation is available by contacting **Bob Lingo**, DSN 767-8082.

Cleaning Up the Range: The Military Range Rule

The Army Environmental Center has prepared an excellent briefing on the substance and current status of the proposed Military Range Rule for addressing UXO and other constituents at Closed, Transferring (BRAC), and Transferred (FUDS) military ranges. You may obtain a copy by contacting **Bob Lingo**, DSN 767-8082 or **Stan Citron**, DSN 767-8043.

The paper describes the applicability of the range rule to the US and US Territories (Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands). The range rule does not apply to active or inactive ranges, ranges with prior agreements (unless all parties agree), air maneuver areas, and historic battlefields.

The overall range rule

process consists of five phases: range identification, range assessment/accelerated response, range evaluation/site-specific response, recurring review, and administrative close-out of response action.

The overall process consists of nine steps:

1. Developing the draft proposed rule.
2. Internal and Federal agency consultation.
3. Stakeholder consultation.
4. OMB review.
5. Publishing the proposed rule in the Federal Register.
6. Public consultation--90 days,
7. Revise rule per comments received.
8. Internal and Federal agency re-coordination.
9. Publish revised "final" rule in the Federal Register. ©

Special Veteran's Benefits Note

Veterans who separated under special separation benefits programs and who were subsequently determined to be eligible for VA disability pay may be entitled to a refund from VA.

Title 10, United States Code, section 1174, authorizes separation pay for those who are involuntarily separated prior to becoming entitled to retired pay. If the VA subsequently determines that the member is entitled to VA disability compensation, VA must withhold disability compensation monthly until the amount paid as separation pay is recouped.

Even though VA disability compensation is tax-free and military separation pay is taxable, section 1174 required the VA to recoup gross, not net, separation pay. Service members complained that the Government was recouping too much.

VA will administer this program and is working with DOD to identify those eligible for a refund. Anyone affected by this recent change should contact the nearest VA Office or call the VA's toll free number: (800) 827-1000). POC is **Alex Bailey**, DSN 767-8004. ©

Solicitations in the Federal Workplace

There are some limited exceptions, but the starting point and general rule is that there is no solicitation in the Federal workplace. The general rule is that employees may not solicit the sale of magazine subscriptions, cosmetics, household products, hair replacement systems, vitamins, candy, cookies, insurance, weight loss programs, etc. while on the job or in their offices.

Even if off the job and outside the workplace, they may not knowingly solicit DoD employees who are junior to them.

Fellow Employees

For a fellow-employee for a special, infrequent occasion such as wedding, birth or adoption of a child, transfer out of the supervisory chain, and retirement. A promotion is not considered a “special, infrequent occasion.” [Yes, I know, promotions are “special,” and they certainly are “infrequent;” but the fact of the matter is that they are not

“special, infrequent occasions” for purposes of the ethics rules unless the promotion is accompanied by a transfer outside of the supervisory chain.] We can solicit no more than \$10 from other employees, and contributions must be entirely voluntary. The value of the gifts usually may not exceed \$300.

Keep In Mind...

Even if the solicitation fits one of the exceptions, be careful. Voluntariness is the key. It should not be a senior employee who does the solicitation. Don't make repeated entreaties. Don't require the employee who declines to explain him or herself. Always make a provision for an employee to “opt out” of the gift contribution that is included in the price of the luncheon.

An excellent Ethics Advisory on this subject is provided by POCs **Mike Wentink**, DSN 767-8003, and **Alex Bailey**. DSN 767-8004 Encl 9).^c

More on Private Organizations and AMC

HQ AMC Ethics Counsel **Mike Wentink**, DSN 767-8003 and **Alex Bailey**, DSN 767-8004 provide another in a series of papers on AMC and AMC employee relations with private organizations (POs) (Encl 10).

There are general ethics rules that apply. For example, employees who are officers, directors or active participants in POs, are disqualified from participating in official Army matters that affect their PO. We may not use our official position to endorse or promote a PO, encourage employees to join specific POs. We must also avoid bias or preferential treatment in our dealings with POs.

But, does this mean that we cannot have any sort of “official relationship” with POs? The answer is “yes,” there is room for an “official relationship” with such organizations.

What we can do is this: in those cases where there is a strong and continuing DoD interest, heads of commands and organizations may assign an employee as an “official liaison” to a PO. As an “official liaison,” the employee acts in his or her official capacity and represents the command and agency's interests to the PO. ^c

Special Attention: Widely Attended Gatherings--OGE and DA SOCO Guidance; AMC CG Wants You to Know!

The Army Standards of Conduct Office prepared an article on when and under what circumstance employees may accept free attendance at an event. **General Wilson** read this article and directed that it be passed “to all senior folks in the command.” **Mike Wentink** prepared a paper on the subject as a “Special Edition” ETHICS ADVISORY.

General Gift Rule

The Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch and DOD Joint Ethics Regulation, DOD 5500.7-R, generally prohibit Executive Branch employees from accepting any gift offered by a prohibited source or because of the employee’s official position.

Exception: Widely Attended Gatherings

However, OGE has established several exceptions to this general prohibition, where gifts may be accepted

without undermining government integrity. One of these is attendance at a “**widely attended gathering.**”

OGE has identified “widely attended gatherings” as events in which the Army has interest, but which are not necessarily official. Acceptance of free attendance at a widely attended gathering is a personal gift, but a gift which may be accepted because it offers an opportunity to represent the Army’s interests or share information on matters of mutual interest. Typically, the event will be a conference or a seminar, but it could also be a social event, such as a cocktail party. The consistent feature of these events is that they are of sufficient size and diversity to promote the Army’s interests.

Definition

To qualify as widely attended, the event (or the relevant portion of the event) must either be open to interested parties from throughout a given industry or profession, or be attended by a

number of persons with diverse views or interests. For example, a gathering with a large number of employees of a particular defense contractor, where some Government employees are invited, is not sufficiently diverse. Similarly, a small gathering of 12 individuals with diverse interests is not sufficiently large. Typically, an event must have at least 20 or more individuals attending to qualify under this exception.

Determining Factor

The determining factor is whether the event will give the employee an opportunity to exchange views or information with a sufficient number of people who represent a variety of views or interests.

There are rules regarding attendance depending on whether your participation is official or personal, differing rules when someone other than the sponsor of the event bears the cost of the employee’s attendance. The best advice is to meet early with your Ethics Counselor (Encl 11). ©

Ethics Focus

GIFTS: *Ethics & Fiscal* *Wrapped Up Together*

Issues concerning use of funds and the color of money often also involve ethics questions. One interface between fiscal law and standards of conduct is in the gift area (Encl 12).

The general rule is that appropriated funds may not be used to purchase or make gifts for employees, or to honor employees, even for those who are being reassigned or retiring after many years of honorable service. Certainly, there are official aspects of a transfer or retirement such as award and retirement ceremonies, and appropriated funds are often available in support of these official functions.

However, when it comes time for the gift, the taxpayer does not underwrite it. If we want to give a gift to honor the employee's service, then we pay for it using our personal funds, but keeping within the rules (e.g., the value generally may not exceed \$300 and we may not solicit more than \$10 each from other employees).

In general, appropriated funds are not available to buy or craft plaques, framed me-

mentos, or other items to give to employees **unless** the presentation item is part of an officially approved awards program. These Army awards programs are set out in AR 672-5-1 and AR 672-20. There is also an AMC supplement to AR 672-5-1 and a number of AMC regulations governing awards.

Using Installation Crafts and Supplies

This issue comes up in a number of different ways. For example, a group of employees at one installation purchased a military print for the retiring commander. Although the print was less than the \$300 gift limit, to have it properly matted and framed would take it over the \$300 limit. The employees thought that the answer would be to have the post engineer use his carpenters, tools and materials to frame the print.

Ethics Counsel **Mike Wentink** and **Alex Bailey** are joined in an article addressing this relationship by AMC Fiscal Law counsel **Lisa Simon**, DSN 767-2552. ©

Savings Deposit Program for Overseas Contingency Operations

Under section 1035, title 10, United States Code, and in accordance with Chapter 51, DoD Financial Management Regulation (FMR), Volume 7, Part A, members serving in contingency operations outside the United States are permitted to deposit unallotted pay and allowances with the Government in the Savings Deposit Program (SDP). As set by Executive Order 11298, deposits earn interest at 10% for amounts up to \$10,000.

On 14 August 1998, the Assistant Secretary of Defense (Force Management Policy) signed a memorandum extending the SDP to service members participating in Operation Joint Forge

If you are entitled to Legal Assistance and you have questions, contact your local legal assistance officer or **LTC Thomas K. Emswiler**, Executive Director, Armed Forces Tax Council, Office of the Assistant Secretary of Defense, Force Management Policy (Military Personnel Policy), Telephone (703) 693-1066; DSN 223-1066. Thanks to Chief, Legal Assistance, **Alex Bailey**. ©

Faces In The Firm

WELCOME

IOC

Captain Marc Howze joins the IOC Law Center from Ft. Lewis, specializing in the Acquisition Law area.

Summer Blakney is participating in a minority college intern program through the end of the summer. She is attending Central State University in Ohio and will be a junior this fall, studying foreign business. Best of luck Summer as you continue your education and thanks for your help.

ARL

Effective 19 July 1998, **Mr. Mark D. Kelly** started working for the Intellectual Property Law Branch. He left a position in a private sector law firm located in Milwaukee, WI, to assume the position at ARL.

CECOM

LTC Diana Moore reported for duty as the Staff Judge Advocate, 3 August 1998. She comes to us from Falls Church, VA.

Jeffrey Smith reported for duty as a patent attorney in the Intellectual Property Law Division on 6 July 1998. He comes to us from the US Patent and Trademark Office in Alexandria, VA.

CPT Syc Hussain reported for duty in the SJA Division of the CECOM Legal office in Tobyhanna in September 1998. He comes to us from Ft. Leavenworth, Kansas.

FAREWELL

CECOM

Best wishes to two departing administrative personnel **Dolores Howell** and **Janet Cugini**.

Michelina LaForgia, currently the Competition Management Division Chief has received a promotion to the CECOM Acquisition Center. She will be a Division Chief.

IOC

Captain Brian Weber and his family - wife Mary and daughter, Katherine - have left military service and moved to Massachusetts. Mr. Weber will be handling legal assistance at Fort Devens. Best of luck to you - we'll miss you. We'll be anxiously awaiting news on the arrival of their second child this November.

Brian Klinkenberg, an intern working in the Law Center since December 1997, left the office in August to begin the college studies at the University of Iowa. Brian will be majoring in the computer field. He did a lot of work with the scanning equipment and workgroup manager duties while in the Law Center.

CPT Doug Faith left for Turkey. CPT Faith has been the Judge Advocate General at Pine Bluff Arsenal for the past couple of years.

ARL

Mr. Ben Roberto, Patent Attorney, Intellectual Property Law Branch, retired from Government service effective 11 August 1998. Best wishes to Ben who also served many years at HQ, AMC.

Faces In The Firm

AWARDS

MARRIAGES & BIRTHS

IOC

Angela Keel (Legal Assistant, IOC Environmental/Safety Law) and **John Davila** were married on May 30. We wish Mr. And Mrs. Davila, and their three boys, the best in their new lives together.

Bill Bradley (Attorney Advisor, IOC Environmental/Safety Law) and **Linda Tyler** were married on June 6. Mr. and Mrs. Bradley make their home in Davenport, Iowa. We offer congratulations and best wishes for a wonderful future together.

Congratulations Grandpa Sam!! **Mr. Sam Walker** (Acquisition Law) and his wife, Chris, celebrated the birth of their first grandchild, Kira Paige, on 1 Sep 98. Congratulations, too, to daughter and son-in-law, Anna and Adam Copp!

Mr. Rick Murphy (Environmental/Safety Law) and his wife, Janene, were blessed with a baby boy on 3 Sep 98 - Scott James. This is their second child. He weighed in at 8 pounds, 15 ounces and was 21 1/2 inches long. Congratulations to Rick, Janene, and big sister, Robin.

AMCOM

CPT David Dahle and his wife, Jodie, are the proud parents of Elizabeth Corrine, who was born on 30 July weighing in at 7 pounds and 1 ounce.

CPT Scott Gardiner and his wife, Renae, welcomed Theresa Rose on 16 August. She weighed 8 pounds and 15 ounces.

CPT Erika Cain birth to Erik Deshaun on 7 September. He weighed 9 pounds and 7 ounces and was 22 inches long.

PROMOTIONS

AMCOM

CPT Andrew J. Sinn was promoted on 1 September 1998. He is assigned to the Office of Staff Judge Advocate as the Legal Assistance Officer.

Rick Murphy has been promoted to GS-13, Attorney Advisor. Rick has done fine work in the environmental law area.

Mary Ernat has been promoted to GS-12, Management Analyst.

IOC

Congratulations to **Mr. John Seeck** who recently received the Commander's Award for Civilian Service.

Captain Brian Weber received the Defense Meritorious Service Award before his departure.

WSMR

Willie Smith, Claims Clerk, was selected as the WSMR Civilian of the Year (admin category). This is the first time in White Sands history that a member of the JAG office has received such an honor.

SGT James Mersfelder, our Claims NCOIC, has just returned from an 8-month, all expenses paid, TDY in beautiful downtown Bosnia. He served as a NCOIC, Operational Law, for 1AD's Task Force Eagle.

SGT Christopher Buscarini, NCOIC for military justice and claims, was selected as the White Sands Noncommissioned Officer of the Year. He then followed this exceptional accomplishment by competing for and being selected as the TECOM NCO of the Year. SGT Buscarini is now at AMC competing for AMC NCO of the Year. To my knowledge, this is "first" for a JAGC NCO to receive such recognition

The Bona Fide Needs Rule

The Anti-Deficiency Act, 31 United States Code (USC) § 1341(a), provides that the Government shall not enter into a contract or create an obligation for the payment of money in advance of the appropriation of funds for such purpose, or in excess of the amount available in the appropriation. The Bona Fide Needs Rule has its origins in a funding statute which first appeared in 1789, now codified at 31 USC §1502(a), which states:

... an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability.

A fiscal year appropriation must be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made. The statute has been interpreted to require that the contractor will “start work promptly and perform under the terms and conditions of the contract without unnecessary delay.” DFAS-IN 37-1 para.9.5c(3)(n).

In the case of maintenance and repair contracts, current year appropriations may be used for contract actions:

... awarded near the end of the FY even though contractor performance may not begin until the next FY. However, ... [c]ontracts awarded near the end of the FY must contain a specific requirement that work begin before January 1 of the following calendar year.

DFAS-IN 37-1, Table 9-1, footnote 6.

Guidelines for determining whether work has commenced by 1 January on a contract are 1) actual performance of work as determined by an on-site inspection, or 2) documentary evidence that costs have been incurred. DFAS-IN 37-1, Table 9-1, footnote 6. The requirement to commence work by 1 January of the following fiscal year has been termed the “90 Day Rule.”

Further interpretation of the Bona Fide Needs Rule has been provided by the General Accounting Office. For example, in *United States Department of Agriculture Forest Service*, B-235086, April 24, 1991, the Forest Service contracted to have two (2) bridges painted at the end of FY 1984, and because of environmental concerns, chose not to issue a “Notice to Proceed” to the contractor until May 1985. In that case, it was determined that the agency did not have a bona fide need for the services until FY 1985. Therefore, the General Accounting Office determined that FY 1984 appropriations should not have been used to fund the action.

The Army’s Judge Advocate General’s School, in its yearly fiscal law course, specifically recommends taking into consideration weather conditions in determining the existence of a bona fide need. The example used is that of a paving contract slated to commence on 15 October in Fairbanks, Alaska . In that situation, it was recommended that prior fiscal year appropriations not be used because of the likelihood that work would not commence before 1 January. *Fiscal Law Deskbook*, Chapter 4, para.IV.H., The Judge Advocate General’s School, Charlottesville, VA.

Acquisition personnel must ensure that the requirements of the Bona Fide Needs Rule are met. The failure of an agency to comply with the terms of the Bona Fide Needs Rule can result in a violation of the Anti-Deficiency Act and the imposition of civil and/or criminal penalties, to include disciplinary action under the Army Table of Penalties, AR 690-700.

THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 (the Act) is the first major statutory change to Communications law in over 60 years. The primary purpose of the Act is to increase competition in various communications markets and to reduce regulation of those markets. The law addresses telecommunications, cable and broadcast services.

The new law opens all telecommunications markets to competition, with particular emphasis on the local exchange market. Currently, in most places, this market is a monopoly dominated by the Bell Operating Companies (BOCs) or other Local Exchange Carriers (LECs).

The Act allows cable television companies, interexchange companies (IXCs), subsidiaries of utility companies, Competitive Access Providers (CAPs) and others to enter and compete in the local exchange market.

In order to encourage competition in the local exchange market, the Act has a number of provisions requiring LECs to open their networks to their competitors in a fair, non-discriminatory way. Since most new competitors do not have facilities-based networks in the local exchange market, access to and interconnection with the LECs' networks, facilities, service and equipment is key to developing competition in that market.

The Act requires all telecommunications carriers to interconnect with the facilities/equipment of others, as well as requiring them to refrain from installing network features that do not comply with Federal Communications Commission (FCC) standards.

State and local governments may not enact laws, regulations or rules which act as barriers to market entry.

Telecommunications carriers that wish to have access to an interconnection with a LEC's facilities may achieve such access by negotiation of a voluntary agreement for interconnection and access with the LEC. Such agreements must include a detailed schedule of itemized charges. A party to the negotiation may petition for State Public Utility Commission arbitration of disputes over interconnection and access. If arbitration is sought, the decision of the State Commission arbitrator is binding. An agreement reached through binding arbitration must include all of the Act's requirements for interconnection, access, and pricing.

The State Commission is the approval authority for both voluntarily negotiated agreements and those reached through binding arbitration. The State Commission must act to approve or disapprove the agreement within 90 days after it is filed or it is deemed approved. State courts do not have jurisdiction to review the State Commission's action; jurisdiction rests solely with the federal courts.

If it receives no request for interconnection and access, a BOC may file a general statement of its terms and conditions for interconnection and access with the State Commission. The State Commission will approve this general statement only if the statement complies with statutory requirements for interconnection, access, and pricing. The BOC has a duty to negotiate individual agreements with requesting carriers even if a general statement of terms and conditions has been filed and approved.

BELL OPERATING COMPANIES

From 1984 until 1996, the AT&T Consent Decree imposed a number of restrictions on the activities of the BOCs. The Act allows development of competition in the local exchange market by lifting many of these restrictions. The BOCs may offer InterLATA (long distance) service, video programming, electronic publishing and alarm monitoring, or manufacture equipment, subject to a variety of conditions and time lines found in the Act.

A BOC may provide in-region InterLATA service when it has entered into interconnection and access agreements with a facilities-based competitor for telephone exchange service to residential and business subscribers, met the requirements of a "competitive checklist" found in the Act and received FCC approval. The FCC must consult with the Department of Justice and affected State Commissions before approving in-region InterLATA service. The Department of Justice evaluation is not binding on the FCC but will be given substantial weight. Approval will be on a state-by-state basis.

BROADCASTING

The Act liberalizes limits on the number of radio and television stations one person or company can own. It allows broadcast stations to own or control cable networks and addresses the length of license terms. There are also provisions dealing with advanced television.

CABLE TV

The Act deregulates all cable rates, except rates for basic tier services by 1999. It exempts small cable companies from rate regulation completely and abolishes all rate regulation if a LEC begins to offer comparable services in competition with a cable operator. Competition in the local exchange market and within DOD should reduce prices and provide new services. However, whether the promise of the Act is met in this regard will depend on many factors, including the activities of the industries involved and the implementation of the law's provisions by the FCC and State Commissions.

TELECOM COMPETITIVE OPPORTUNITIES

The Act eliminated Sole Source contract authority based on "regulated" services (Communication Service Authorization), thereby requiring CICA "full and open" competition for the award of contracts. However, the fact that competition may now be solicited in the local exchange market does not mean that there will be any competitors other than the local BOCs. Infrastructure costs and interconnection and access fees may preclude competition from other than the local BOCs. Competitive Local Exchange Carriers (CLECs) may not have the full range of products and services that a DOD site needs. Even though there are significant impediments to competition in the telecommunications market, e.g., excessive litigation over FCC findings regarding intercommunication and access fees, DOD has developed competitive opportunities. The Army has the Digital Switched Systems Modernization Program (DSSMP) which consists of multiple Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts for telecommunications equipment and services. The Navy has its voice video and data (VIVID) telecommunications contracts with Lucent and GTE. While these programs have established the availability of telecommunications products and services, they cannot ensure competition between the BOCs and CLECs for a particular site's telecommunications requirements.

What more can be done? Developing competitive opportunities for telecommunications requirements can be accomplished by using established FAR policies e.g., market research analysis. This would entail contacting the State Public Utility Commissions (PUCs) to determine if the State PUCs allow for competition of services. If they do, the Contracting Officer should obtain a listing of authorized CLECs within the state that could provide the required services and then communicate with these CLECs to determine their level of interest and possible participation. Where multiple CLECs respond, the Contracting Officer can then prepare competitive RFPs. Such a course of action would implement the Act and comply with CICA. Developing multiple service providers should result in lower prices and service improvements for DOD activities.

The Point of Contact on this matter is Mr. William Kampo, x76561.

MAXIMIZING THE USE OF APPROPRIATIONS AFTER THEIR PERIOD OF AVAILABILITY FOR NEW OBLIGATIONS HAS EXPIRED.

BACKGROUND AND ISSUE. MLRS has \$1 million (plus) in FY 94 PA dollars being deobligated due to partial resolution of a reopener clause. I have informally advised MLRS/Acquisition Center/Resource Management that it is permissible under law to adjust a more recent contract (awarded in FY 96 with FY 96 funds) with those FY 94 funds. The adjustment is essentially an administrative "swap" of FY 94 for FY 96 dollars on an existing obligation. The deobligated FY 96 dollars then may be used for a new obligation prior to 30 Sep 98.

LEGAL THEORY. The reasoning below indicates that there is no statutory restriction on this type of administrative swap, and Resource Management representatives were unaware of any regulatory limitations. The undersigned is unaware of any case directly on this point. However, the GAO's Principles of Federal Appropriations Law (hereafter referred to as "the Redbook"), Second Edition, Volume 1, Chapter 5, Section 7, concerning contract modifications, supports this analysis. The analysis of this issue is somewhat complicated by the involvement of two (and possible three) statutes. Each statute must be separately applied to the facts to assure consistent legal theory and valid analysis. However, the simplest way to look at the situation is to recognize that if we knew at the beginning of each contract the exact amount of funds required to complete it, we could achieve initially the very same end result as that accomplished by the administrative swap of funds later in time. Therefore, unless the process or timing of implementing the swap contains a procedure or step prohibited by law, the result certainly is not prohibited.

1. TYPE OF FUNDS - PURPOSE STATUTE. 31 USC 1301(a) addresses the things (i.e., purposes) for which the appropriation may be obligated. In case analysis one must be careful not to assume that the reference to a specific "appropriation" implies a specific year. For example the phrase "appropriation obligated on the original contract" would refer to the type of appropriation and not the year. One must also be careful not to confuse the conclusion of a case (i.e., application of pure theory to the specific facts or the question asked), which often references a specific year appropriation, with the actual legal theory.

2. YEAR OF FUNDS - BONA FIDE NEEDS RULE. The rule is based in law and summarized by the GAO as follows: "A [time limited] appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal [years] for which the appropriation was made." This rule determines which year or years of the correct appropriation (i.e., type of funds) are available for the bona fide need.

a. Generally, an obligation made in FY 96 with a one-year appropriation must be paid for with only that FY appropriation. Exceptions include: severable services which must be funded in the year of actual service regardless of when awarded; certain discretionary price adjustments under cost contracts; as specifically authorized by law; etc.

b. An obligation made in one FY (e.g., FY 96) with a three year appropriation (e.g., PA funds) may be funded with three years of that type of appropriation (e.g., FY 94, 95 or 96) or any mix of those three years.

c. For completeness, it should be noted that a three year appropriation, e.g. FY 94 PA funds, is available for obligation for FY 94, 95 and 96 requirements. What often is overlooked is that those FY 94 funds can be obligated in FY 94 for the future FY 95 and FY 96 bona fide needs. This is known as making a multi-year contract with multiple-year funds. See the Redbook at page 5-36.

3. AMOUNT OF FUNDS - ANTI-DEFICIENCY ACT. 31 USC 1341(a)(1) prohibits (in relevant part) the making or authorizing of an expenditure or obligation exceeding (or in advance of) an amount available in an appropriation or fund for the expenditure or obligation.

CONCLUSION. By applying, singularly and carefully, the relevant statutes the proposed administrative swap appears to be legally permitted.

1. PURPOSE. If the funds contain the same accounting classification (but for the year), and allowing for any changes to such classifications, then the purpose is the same.

2. YEAR/TIMING. The only other question is whether using the FY 94 appropriation for the contract awarded in FY 96 meets the bona fide needs rule. Here we must distinguish between two uses of the same term: obligation. A contract award creates a new obligation, and such an award must occur during the period of availability for new obligation. A modification swapping funds creates no new obligation, although it does "obligate" funds on the contract. Clearly, the obligation of funds on prior contracts after expiration of their availability for new obligations (e.g., price increases under a change order to a FFP contract) is permitted and establishes that this proposed obligation in FY 98 of FY 94 funds on the FY 96 bona fide need/contract is not prohibited merely due to timing. As previously noted, a FY 94 PA appropriation may be properly obligated for a FY 96 bona fide need.

3. AMOUNT. The present situation does not raise any issues concerning the amount is sufficient.

POC: Dayn T. Beam/DSN 476-8195

ONE NEUTRAL'S VIEW: SUGGESTIONS FOR NEW (AND NOT SO NEW) MEDIATORS

1. Be Yourself:

You can not transform your personality just because you put on a mediator's cap. Your true self will show ultimately, so why not be yourself from the outset. There is no one mediator "type" or "style". Pay attention and stay attuned to the Mediation process and your personality will adjust naturally to the process.

2. Describe the Benefits of Mediation in Your Introduction:

Sure, you want to describe your experience and announce your credentials to the parties. But, spend a few moments describing what your experience tells you about mediation as compared to traditional dispute resolution and litigation:

"In litigation and formal complaint processes, the decision making official has no stake in the outcome of the dispute and does not focus on the parties' relationship or the future. In Mediation the decision-maker is--You! You design your own solution that focuses on your relationship and the future.

"In litigation you speak to a Judge or an agency official. In Mediation you speak to each other. Open and frank communication, and respecting each person's right to say what is on their mind, is crucial to the Mediation process."

Attribute previous Mediation success to the process and the parties' willingness to communicate and listen carefully. Don't highlight yourself as the reason for success.

3. Listen Carefully to Positive Comments Made By One Party About the Other:

Often one party says something nice about the other, such as "I could not grant leave because X is the 'vital cog in my work group'." When you hear this repeat it and direct it to the subject of the compliment. Ask, "How does that make you feel?" This reveals that there are good feelings about the relationship even if there is a dispute.

4. Pick Up An Expression of Willingness to Change Requested Remedies:

A party often sends a signal as to their true interest, which may indicate a willingness to change a previously stated position. Often these are expressed in very general terms. When you hear this, concentrate on asking the party to suggest specific alternatives or options based on this expression of change. Then ask the other party an open-ended question such as: "What do you think about these alternatives/options."

5. Don't Dominate the Conversation--"Direct Traffic" Between the Parties:

You want the parties to communicate to and with each other. Keep your conversation to a minimum--directing traffic--comments to the parties. Keep track on the process, and when the parties deviate, bring them back.

6. Describe the Purpose of A Caucus In General, NOT Specific Terms:

Tell the parties in your opening that you may call a caucus with one of them. Advise them that the purpose of the caucus is to clarify information that has surfaced. That is, describe it as your need to seek clarification.

Never say: "I would like to caucus to see if there is any information that you want to share with just me." Never say: "I want to caucus now to discuss relationships."

7. The First Caucus Question: "Is There Anything Else I Need to Know?"

It is guaranteed that you will receive very important information in response to this question. It is a human trait not to reveal all information to a party with whom you have a dispute. So, open the caucus with this question and be ready to listen carefully and actively.

8. Firmness Has Its Place--But Not In Your Opening:

Firmness is an important trait if the parties are not cooperating in the process, such as interrupting when the other is speaking. However, your opening is the place where you want to develop the parties' trust in the Mediation process, and with you. Empathy, understanding (different than acceptance/agreement), expressions of feeling are very important as "trust-builders". Firmness is not.

9. Room Design Is Important to the Mediation Process:

The **shape of the table** is important. You as the Mediator want a table shaped to permit you to see the other parties, and especially to see their non-verbal reactions to comments made. Remember an important component of communication is to hear what is **not** being said! A narrow, rectangular table may prevent this. A round table may accelerate observing the communication.

10. Summarize Regularly:

Regularly summarize issues that have surfaced and agreements made. Record these and repeat them for the parties to hear. Reciting areas of agreement becomes

important for those times when an issue remains unresolved, and the parties start to think that they won't solve the problem.

11. Keep At the Parties to Create Options and to Raise Ideas:

"Brainstorming"--looking for any idea or thought on an issue is a great tool that often leads to creative solutions. Encourage openness by reminding the parties that evaluation of each idea will come later--after all thoughts are raised. Early evaluation, especially negative reaction, will stifle desire to volunteer other ideas.

12. "Are there Other Issues?"--The Loaded Question:

The Mediator will get a great deal of information from asking each party "Why are we here today?" or "What are the issues from your point of view?" However, after the first round of information sharing, it will be important to ask: "Are there any other issues?"

But, be careful about asking that follow up question ("Are there any other issues?") too often. Ask it once and perhaps a second time. If you keep asking the question, you risk raising a "minor" point, or you risk having an issue "created" because the individual thinks you want more information.

13. Keep the Process Informal:

You've gone to great lengths to describe Mediation as a better means of dispute resolution than formal litigation. So, keep the process informal. Encourage informality by reminding the parties that there are no rules of evidence, technicalities that prevent information from being surfaced and no regulations that guide the process.

Describe the only "rule" as a commitment to listen careful, to allow each person to speak uninterrupted, and to respect the viewpoint taken.

14. Congratulate the Parties!:

At the beginning of the Mediation it is important to make sure you applaud the willingness of the parties to try Mediation, and to ask them to keep open-minded about the process.

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**THE ENVIRONMENTAL LAW DIVISION
BULLETIN**

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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

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.

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. 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

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.

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.

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.

¹⁸ *Bestfoods* at 28.

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).

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

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)

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.

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.

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

²⁷ 42 U.S.C. §§ 7401, *et. seq.*

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

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)

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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.

DEBATE OVER EPA UST PENALTY AUTHORITY CONTINUES

CPT William Richards

The Environmental Protection Agency (EPA) has been assessing fines against several Department of Defense (DoD) installations for alleged violations of the underground storage tank (UST) provisions of the Resource Conservation and Recovery Act (RCRA).¹ This action was fueled by an opinion from the Justice Department's Office of Legal Counsel (OLC) which defined the EPA's Clean Air Act (CAA) enforcement authorities. The DoD is now challenging the EPA's enforcement actions, while engaging in discussions over EPA's authority to assess punitive penalties against Federal agencies. This debate, however, has no effect on installations' inability to pay state-imposed fines for alleged UST violations.

In early 1997, EPA began issuing Notices of Violation (NOVs) to Army, Air Force, and Navy installations for alleged "minor" violations of the RCRA UST requirements. The EPA requested payment of relatively small (i.e., generally less than \$1,000) punitive penalties. All DoD Services protested, questioning EPA's authority to impose such punitive fines on other Federal agencies, as well as the agencies' statutory authority to pay such penalties. EPA responded by telling the Services that if they did not promptly pay these "field citations," then the affected installations would be assessed inflated penalties as part of formal enforcement actions. The Army and Navy chose to pay their fines, but made it clear that these payments were made "under protest." The Air Force declined to pay a \$600 field citation and soon afterward was assessed a \$70,734 administrative fine. The Air Force and Army have each received an additional NOV assessing over \$90,000 for alleged UST violations. The authority of EPA to issue UST NOVs is now being challenged in three pending enforcement actions against Air Force and Army installations.

EPA's shift toward assessing UST fines was a spin-off from a debate with DoD over EPA's CAA penalty authorities. This discussion led the OLC to write an opinion in July of 1997, which was favorable to the EPA.² In reaching its conclusions, OLC relied upon the language of certain CAA provisions³ granting EPA with authority to impose penalties against

¹ 42 U.S.C. § 6991, *et seq.*

² See, DoJ, Memorandum for Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, Judith A. Miller, General Counsel, Department of Defense, from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, Re: Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (July 16, 1997).

³ See, 42 U.S.C. § 7413; 42 U.S.C. § 7602(e).

“persons” -- a definition that includes Federal agencies. OLC further examined CAA legislative history to conclude that Congress had made a sufficiently “clear statement” of its intent to allow EPA to penalize other agencies. EPA’s power could be exercised constitutionally because sufficient controls existed to preclude the need for litigation between agencies.

Relying on OLC’s CAA opinion, EPA now asserts that a sufficiently “clear statement” of EPA’s authority exists under the RCRA UST statutes. Specifically, the EPA asserts that it is authorized to include penalties in compliance orders issued for UST violations,⁴ that these compliance orders apply to any “person,”⁵ and the definition of “person” includes, for purposes of the UST statutes, “the United States Government.”⁶ The EPA further argues that RCRA expressly provides it with authority to commence an administrative enforcement proceeding against any Federal agency “pursuant to the enforcement authorities contained in this Act.”⁷ EPA asserts that these “authorities” include the RCRA’s UST sections.

DoD’s Office of General Counsel takes the position that the CAA situation does not track with UST statutory provisions. Congress amended RCRA via the Federal Facilities Compliance Act (FFCA)⁸ to address the limitations of RCRA recognized in *U.S. Department of Energy v. Ohio*.⁹ There, the U.S. Supreme Court had ruled that RCRA did not sufficiently express an intent to allow state regulators to enforce punitive penalties against Federal agencies.¹⁰ In amending RCRA, Congress targeted the language of 42 U.S.C. § 6961(a), which relates only to RCRA requirements involving “disposal or management of solid waste or hazardous waste.” Congress did not similarly amend the related provision under the RCRA UST section.¹¹ In the UST-specific language, RCRA’s applicability to Federal facilities is more limited. In *U.S. Department of Energy v. Ohio*, the U.S. Supreme Court found that the imposition of punitive penalties was improper in the face of language that limits legal applicability. The DoD concludes that the RCRA UST section does not contain the “clear statement” of the Congressional intent that would allow EPA to assess punitive fines against other agencies. Thus, the RCRA example is distinct from its CAA counterpart.

The DoD has also expressed concern over whether it can legally authorize its components to pay punitive penalties for alleged UST violations, citing Comptroller General authority, the requirements of 31 U.S.C. § 1301, and Article I of the U.S. Constitution. Finally, DoD has raised sovereign immunity issues. It contends that by imposing punitive UST penalties, EPA has violated the FFCA requirement that grants federal agencies the opportunity to confer with the EPA Administrator before an administrative order or decision (such as a penalty) becomes final.¹²

⁴ 42 U.S.C. § 6991e(c).

⁵ 42 U.S.C. § 6991e(a).

⁶ 42 U.S.C. § 6991(6).

⁷ 42 U.S.C. § 6961(b)(1).

⁸ 42 U.S.C. § 6961, *et seq.*

⁹ 503 U.S. 607 (1992).

¹⁰ The Court was looking to the language in 42 U.S.C. § 6961(a).

¹¹ 42 U.S.C. § 6991(f).

¹² 42 U.S.C. § 6961(b)(2).

At present, the question of EPA's authority to impose punitive sanctions on other Federal agencies for UST violations has not been submitted to DoJ's OLC. If an installation receives an NOV (or other notice of an EPA administrative action) seeking to impose penalties for UST violations, the Environmental Law Specialist (ELS) should immediately consult the servicing MACOM ELS and ELD for further assistance. (CPT Richards/CPL).

CONTRACTING-OUT INITIATIVE

LTC Allison Polchek

The DoD is engaged in the process of examining all employee positions for opportunities to contract out those positions to the private sector.¹³ All positions are to be examined, and must be coded in one of three ways: as inherently governmental in nature, a commercial activity exempt from competition under OMB Circular A-76, or a commercial activity eligible for competition. Even installation environmental staffs, normally considered governmental in nature, are being coded during this process.

Environmental Law Specialists (ELs) should be aware of current statutory and regulatory authority which designate many positions on environmental staffs as governmental in nature. Under the Sikes Act, positions responsible for the implementation and enforcement of integrated natural resource management plans cannot be contracted out.¹⁴ This interpretation is further supported by explicit legislative history that states that fish and wildlife management and policy related activities are inherently governmental responsibilities.¹⁵ Department of Defense Instruction 4715.3 and Army Regulation AR 200-3 also reiterate this point.¹⁶ ELSs should ensure that responses to the DoD tasker accurately code these positions. (LTC Polchek/RNR).

FINES AND PENALTIES UPDATE

MAJ Mike Egan

At the close of the third quarter of FY 1998, four new fines had been assessed against Army installations. Of the 172 fines assessed against Army installations since FY 1993, Response Conservation and Recovery Act (RCRA) fines (96) continue to predominate, followed

¹³ As part of the Defense Reform Initiative Directive (DRID) #20, the services are directed to submit an inventory of inherently governmental and commercial activities not later than 31 Oct 98.

¹⁴ Sikes Act: Extension and Amendments, Pub.L. No. 99-561, § 3, 100 Stat. 3149, 3150-51 (1986) (codified as amended at 16 U.S.C. § 670a (d)).

¹⁵ H.Rep.No. 129(I), at 6 (1986), reprinted in 1986 U.S.S.C.A.N. 5254, 5257.

¹⁶ DODI 4715.3 states that functions regarding the management and conservation of natural and cultural resources shall not be contracted. U.S. Dep't of Defense, Inst. 4715.3, Environmental Conservation Program (3 May 1996). Similarly, paragraph 2-7 of AR 200-3 states that management and conservation of natural resource functions are inherently Governmental functions. U.S. Dep't of Army, Reg. 200-3, Natural Resources-Land, Forest and Wildlife Management, para. 2-7a (28 Feb 95).

by the Clean Air Act (44), the Clean Water Act (23), the Safe Drinking Water Act (6), and, finally, the Comprehensive Environmental Response and Compensation and Liability Act (3).

Interestingly, in the latest reporting quarter, fines have been assessed under the Clean Air Act (CAA) almost as frequently as those assessed under RCRA. Because these two statutes have differing waivers of sovereign immunity, the scope of Federal liability also differs. The fact that an installation can pay punitive fines and penalties assessed under RCRA, but not the CAA, can create some confusion for state regulators. Installation Environmental Law Specialists must get involved with state agencies early in the process to ensure that they are aware that payment of fines and penalties by Army installations is governed by, *inter alia*, the Supreme Court decision of *U.S. Department of Energy v. Ohio*.¹⁷ (MAJ Egan/CPL).

HOW TO TELL ONE SUPERFUND PRELIMINARY ASSESSMENT FROM ANOTHER

Ms. Kate Barfield

This is a quick guide to help you distinguish two documents that bear similar names – the Preliminary Assessment (PA) and the Preassessment Screen (PAS). Each consider different aspects of a hazardous substance cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.¹⁸ A PA supports the selection of a cleanup remedy. The second document, a Natural Resource Damage (NRD) PAS, is an initial examination of environmental damages that may remain after cleanup. Both the PA and PAS can dovetail. For example, the CERCLA Response PA can focus on remedying environmental concerns caused by contamination. Conversely, the NRD PAS uses the CERCLA remedy as a baseline when determining residual damages to natural resources. With so much overlap, confusion naturally arises. So, here is a run-down on how to tell your PAs from your PASs.

A **CERCLA Response Preliminary Assessment** is the initial screening device used to determine the level of cleanup needed to counter a hazardous substance release.¹⁹ The EPA uses the Response PA to determine if a site should be placed on a list for priority cleanup. A lead agency uses this PA to determine whether cleanup is needed at a particular site, and whether it should initiate a removal or remedial action.²⁰ The PA provides a review of existing data, including management practices and information from potentially responsible parties (PRPs) and this information forms the basis for later response actions.²¹

There are two types of CERCLA Response PAs: the Remedial PA and Removal PA. Both are prepared at the beginning of a cleanup and involve an initial assessment of a site.²² The Remedial PA looks at available facts to determine the level of cleanup. This includes information on the source and nature of the release, exposure pathways and targets, and

¹⁷ 503 U.S. 607 (1992).

¹⁸ 42 U.S.C. §§ 9601-9675 (1994).

¹⁹ 40 C.F.R. § 300.5 (1996).

²⁰ 42 U.S.C. §§ 9616(b) (1994); 40 C.F.R. §§ 300.410(a); 300.420(a),(b) (1996).

²¹ See, 40 C.F.R. § 300.410(c)(2) (1996).

²² See generally, 40 C.F.R. §§ 420(b); 300.410(a),(b) (1996).

recommendations on further action.²³ The Removal PA examines the same sort of information, but focuses on immediate threats to health or the environment to determine if quick action is needed. When a response action is unclear, the PA provides the first informational round-up for a decisionmaker who will later choose between a removal or remedial action. All of these PAs have one thing in common, though -- they focus on public health concerns posed by a release.²⁴

Like the PA, an **NRD Preassessment Screen (NRD PAS)** is an initial information screen. It is generally compiled for the benefit of the NRD Trustee -- usually a federal/state official or Native American tribe.²⁵ (A PA is generally used by a lead agency.) According to the Department of Interior's regulations, the NRD PAS provides a Trustee with data about the natural resources affected by a hazardous substance release, identifies other potential Trustees, and gives guidance on whether a CERCLA response remedied environmental injuries.²⁶ The PAS also states whether a Trustee could maintain a successful legal claim²⁷ which would justify undertaking a more rigorous damage assessment.²⁸

Unlike the CERCLA Response PA, the NRD PAS is primarily focused on environmental injuries, rather than matters of human health. Likewise, it does not focus on a risk assessment, but examines whether contamination at a site exceeds specific concentration levels for pollutants.²⁹ Another key difference is timing. The NRD PAS follows the remedy that the Response PA helped to define. This is because the NRD PAS looks to residual damages -- environmental damages not corrected by the CERCLA remedy -- though it may use relevant information gathered in the Response PA.³⁰

Five Similarities Between the PA and the PAS: Both documents...

1. Look to existing data, including exposure pathways and initial sampling.
2. Seek to detect and quantify a potential hazardous substance release.
3. Identify some of the key players (lead agencies, trustees, PRPs).
4. Provide the first compilation of information for later documents.
5. Act as a screen to determine subsequent action, including emergency responses

²³ 40 C.F.R. § 300.420(a),(b) (1996).

²⁴ 40 C.F.R. §§ 410; 415(a) (1996).

²⁵ 42 U.S.C. § 9607(f)(1),(2) (1996). For more information on NRD Trustees, see, 40 C.F.R. §300.615 (1996).

²⁶ 43 C.F.R. §§ 11.23(b); 11.23(e)(1)-(5) (1996).

²⁷ 43 C.F.R. § 11.23(b) (1996).

²⁸ For general guidance on assessments, see, 43 C.F.R. §§ 11.30-11.84 (1996).

²⁹ 43 C.F.R. §§ 11.25(e); 11.22(b); 11.23(e)(3) (1996).

³⁰ 43 C.F.R. §§ 11.23(e)(5) (1996). See also, *In Re Acushnet River and New Bedford Harbor*, 712 F. Supp. 1010, 1035 (D. Mass. 1989).

Five Differences Between the PA and the PAS:

1. The CERCLA Response PA concerns multifaceted elements of a cleanup action, while the NRD PAS examines restoration of the environment.
2. The CERCLA Response PA focuses on how to respond to any potential threats to human health and environment. The NRD PAS examines the environmental damages remaining after that response action is complete.
3. The CERCLA Response PA is more action-oriented than its NRD counterpart. The Response PA guides the lead agency's decision to undertake a removal or remedial action, or it justifies no-action. The NRD PAS informs the Trustee on whether to write another document -- the NRD Assessment.
4. The CERCLA Response PA focuses on potential human and environmental risks. The NRD PAS does not examine risk *per se*, but predetermined exposure levels.
5. A CERCLA Response PA focuses on cleanup, not subsequent legal claims. The opposite is true for the PAS. The NRD Trustee uses the PAS, in part, to demonstrate the likelihood of success in making a claim for damages.

If you have any further questions about PAs or PASs, contact this office. (Kate Barfield/RNR).

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D.C. DISTRICT COURT DISMISSES GERONIMO SUIT FOR LACK OF STANDING

LTC David Howlett

The United States District Court for the District of Columbia dismissed a suit¹ by *pro se* individual and organization plaintiffs to compel repatriation of the remains of Geronimo, an Apache leader who is buried at Fort Sill, Oklahoma. Plaintiffs also demanded that Geronimo be given full military honors and that his prisoner-of-war status be removed. The court concluded that the plaintiffs lacked standing to maintain such a suit.

Plaintiffs based their claim on the Native American Graves Protection and Repatriation Act (NAGPRA),² which was enacted to protect Native American burial sites and the removal of human remains on Federal, Indian, and Native Hawaiian lands. The Act requires federal agencies to return human remains upon request from a lineal descendant or Native American tribe.³

The court found that the plaintiffs did not fall into the class given repatriation rights under NAGPRA. The individual plaintiff did not allege that he was a descendant of Geronimo, and the organizational plaintiff was not a Native American tribe. The court concluded that the plaintiffs could not claim injury even if it were proven that the Army is somehow violating NAGPRA by harboring Geronimo's remains at Fort Sill.

Although it was not cited by plaintiffs, the court considered a provision of NAGPRA which gives district courts jurisdiction over "any action brought by any person alleging a violation of this chapter."⁴ Although this provision would seem to grant standing to the plaintiffs, they must also satisfy Constitutional standing requirements for an injury-in-fact necessary to establish an Article III case or controversy. The court relied on the decision in *Lujan v. Defenders of Wildlife*,⁵ in which the Supreme Court reviewed a similarly broad

¹ *Idrogo and Americans for Repatriation of Geronimo v. United States Army and William Clinton*, No. 97-2430, slip op. (D.D.C. Aug.6, 1998).

² Pub. L. No. 101-877, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001-3013).

³ 25 U.S.C. § 3005(a).

⁴ 25 U.S.C. § 3013.

⁵ 504 U.S. 555 (1992).

grant of jurisdiction in the Endangered Species Act. In *Lujan*, the Supreme Court held that although Congress could grant broad substantive rights to plaintiffs, it could not do away with the requirement that "the party seeking review must himself have suffered an injury."⁶

The district court found that the plaintiffs had only the "generalized interest of all citizens" in seeing that the Army complies with NAGPRA. Because they had suffered no injury, plaintiffs did not have standing and the court accordingly dismissed their suit. (LTC Dave Howlett/LIT)

DISTINGUISHING YOUR USTs FROM YOUR ASTs

Mr. Bernard Schafer

To most reasonable people, the terms "underground storage tank" (UST) and "aboveground storage tank" (AST) would seem separate and distinct. For the most part, they are right. USTs are regulated under the Solid Waste Disposal Act.⁷ ASTs are regulated under the Clean Water Act (CWA).⁸ The definitions are also distinct. A UST is a tank (including connected underground piping) used to contain "regulated substances" (i.e., CERCLA hazardous substances and petroleum products), the volume of which is 10% or more beneath the ground's surface.⁹ Regulations governing USTs are found at 40 C.F.R. § 280. In contrast, an AST is basically a storage tank that is not buried and is regulated under 40 C.F.R. § 112. Both USTs and ASTs that store hazardous wastes are regulated under 40 C.F.R. §§ 264; 265.

ASTs are sometimes regulated by the UST program and vice versa. For example, a given tank system could appear to be completely above ground and yet have an extensive underground piping system. For example, if 10% or more of the combined volume of tank and pipe are underground, the apparent AST can be considered a UST. Also, certain USTs are regulated by the AST program. For example, a tank that has a buried storage capacity of more than 42,000 gallons of oil is regulated under 40 C.F.R. § 112. (This means you need a Spill Prevention Control and Countermeasures Plan).

These distinctions between USTs and ASTs can come into play when state regulators attempt to deal with ASTs through their UST program. Because of the limited waiver of federal sovereign immunity under the UST statute,¹⁰ state laws that attempt to regulate tanks beyond the reach of the UST statute are not merely "more stringent" but are in fact "broader in scope." Thus, serious sovereign immunity questions are raised when regulators cite UST provisions with regard to our ASTs. However, when ASTs are regulated under state CWA authority, the efforts of state regulators may likely be upheld. This is because the waiver of sovereign immunity extends to any requirements related to the

⁶ *Id.* at 578, quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

⁷ 42 U.S.C. § 6901, *et. seq.*

⁸ Also known as the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et. seq.*

⁹ USTs storing hazardous wastes, however, are regulated by 40 C.F.R. §§ 264; 265.

¹⁰ 42 U.S.C. § 6991(1).

prevention of releases into "waters of the U.S."¹¹ The CWA waiver is, in a sense, broader than that for USTs, but it still does not extend to fines or penalties -- whether the penalty is imposed by federal, state, or local regulators. (In contrast, as noted by last month's *ELD Bulletin*, the federal EPA has unilaterally asserted that its UST penalties can be paid. This is a determination that DoD is working to appeal.) So again, if a state regulator attempts to apply its UST rules against your AST, it is important to remember that they may not have the authority to do so. (Mr. Bernard Schafer/Guest Contributor, Navy. An earlier version of this article appeared in the Washington Environmental Newsletter, July, 1998.)

CIRCUIT COURT DECISION ON ATTORNEY FEES

Ms. Carrie Greco

In an issue of first impression, the Ninth Circuit Court of Appeals ruled that the EPA's assessment of CERCLA response costs could include reasonable attorney's fees incurred in enforcement activities.¹² In the facts of this case, Harold Chapman refused to comply with the EPA's order to remove hazardous substances that presented an imminent and substantial endangerment. The Court found that the EPA's claim for attorney's fees was warranted because the government is not limited to the reasoning of earlier cases concerning attorney's fees in private actions.¹³ Rather, the Ninth Circuit was persuaded by the Second Circuit holding in *B.F. Goodrich v. Betkoski*,¹⁴ which stated that in Superfund cost recovery actions, the government's ability to recover attorney's fees is broader than that of private parties. Specifically, the Ninth Circuit noted that CERCLA Section 107(a)(4)(A)'s definition for the government's response costs was broader than a parallel definition for private parties' response costs.¹⁵ Policy considerations also supported the Court's ruling. If responsible parties were charged with reasonable attorney fees, they may be encouraged to perform a remedial action on their own. The Court then remanded the case to determine which fees were "reasonable." (Ms. Carrie Greco/LIT).

¹¹ See, the CWA definition for the term "navigable waters" at 33 U.S.C. § 1362(7).

¹² *U.S. v. Chapman*, No. 97-15215 (9th Cir. 1998).

¹³ For example, see, *Key Tronic v. U.S.*, 511 U.S. 809 (1994).

¹⁴ 99 F.3d 505 (2d Cir. 1996).

¹⁵ 42 U.S.C. § 9607(a)(4)(A). The CERCLA section relating recovery of attorney costs among private parties is 42 U.S.C. § 9607(a)(4)(B).

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HEIGHTENED SCRUTINY ON ENFORCEMENT MATTERS

COL Lawrence Rouse

Practitioners should be aware that we are seeing increasingly expansive interpretations by the Environmental Protection Agency (EPA) of their enforcement authority over federal agencies. Last year, EPA began fining federal agencies for Clean Air Act violations through its Field Citation Program. DoD's challenges to these actions were rejected by the Department of Justice (DOJ) in a far broader interpretation of EPA authority than had previously been issued from DOJ. More recently, EPA has interpreted its authority under RCRA Subtitle I to include authority to fine federal agencies for violations of Underground Storage Tank (UST) requirements, although the legislative history of Subtitle I varies from that of the remainder of RCRA. DoD is conducting internal discussions with EPA on this issue while EPA continues to pursue UST enforcement actions. As we near the December 22, 1998 deadline for UST compliance, several installations across DoD have received voluminous requests for UST data, including requests for information developed during internal audits. Such requests are often a prelude to enforcement actions. Environmental Law Specialists should be aware of these increasing efforts by EPA and advise their installation environmental staffs accordingly. (COL Rouse/Chief Army ELD)

THE PLAINTIFF AS POLLUTER: APPLICATION OF CERCLA AND RCRA

LTC David Howlett

In a recent decision,¹ the Seventh Circuit Court of Appeals decided a case that pitted a current owner of property against a former owner, both of whom had contributed to polluting the property in question. The opinion, by Chief Judge Richard Posner, addressed questions of whether tort law could provide recovery under circumstances not permitted by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)² and

whether a property owner who contributed to pollution could recover under the Resource Conservation and Recovery Act (RCRA).³

In 1985, PMC purchased property from Sherwin-Williams on which the latter had been making paints, insecticides, and other chemicals for a century. The Illinois environmental protection agency required extensive actions at the property beginning in 1992, to include a site assessment and five separate clean-ups. Although PMC had disposed of toxic wastes at the property itself, it sought recovery against Sherwin-Williams

¹ *PMC, Inc. v. Sherwin-Williams*, Nos. 97-2884, 97-3773 (7th Cir. July 30, 1998).

² 42 U.S.C. § 9601 *et seq.*; CERCLA §101 *et seq.*

³ 42 U.S.C. § 6900 *et seq.*

based on its prior ownership and waste disposal. The district court granted PMC recovery of its costs under CERCLA and imposed an injunction on Sherwin-Williams, requiring it to take responsibility for cleaning the property under RCRA.

The court began by reviewing the contract terms between the parties⁴ and concluded that PMC retained statutory recovery rights against Sherwin-Williams. PMC sued Sherwin-Williams for contribution under CERCLA §113(f)(1).⁵ Despite PMC's admissions that it had dumped toxic wastes at the site, the district judge found Sherwin-Williams 100% liable for clean-up costs. The Court of Appeals found this allocation within the judge's equitable discretion; PMC's spills may have been too inconsequential to affect the overall cost of the clean-up. To the argument that this could encourage purchasers of polluted sites to pollute the property themselves, Judge Posner concluded that this could backfire: "[I]t might induce the judge to exercise his equitable discretion against the wise guy."⁶

PMC was not entitled under CERCLA to recover clean-up costs it had already incurred because it had not submitted its plans for public comment in accordance with the EPA's national contingency plan.⁷ The district court, however, awarded these costs to PMC under the Illinois Contribution Act, a general statute governing contribution among joint tortfeasors (with no public notice requirements). Sherwin-Williams argued that this result circumvented CERCLA's limitation on contribution. PMC replied that application of the Illinois law was allowed under CERCLA's savings clause, which preserves common law remedies.⁸

The Court of Appeals began its analysis with the purpose of the savings clause: to preserve to victims of toxic wastes the other remedies they may have under federal or state law. PMC, which bought the property knowing it contained toxic wastes and contributed wastes itself, was not a victim in any real sense. "That PMC may have rights against other, more culpable responsible parties does not change PMC into the victim of a tort; it is merely the less guilty of two tortfeasors."⁹ Finally, the court found that allowing recovery under the Illinois Contribution Act would frustrate the intent of Congress to encourage compliance with the national contingency plan. "PMC's invocation of Illinois' contribution statute is an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed."¹⁰ Accordingly, the court reversed the award of past clean-up costs.

The reviewing court then turned its attention to Sherwin-Williams' appeal of the RCRA requirement, about which it claimed that "the RCRA tail should not be allowed to wag the CERCLA dog." While noting the irony of a joint tortfeasor recovering under a pollution

⁴ The parties were both liable under CERCLA but were free to allocate expenses between themselves by contract. See 42 U.S.C. § 9607(e)(1); CERCLA §107(e)(1).

⁵ 42 U.S.C. § 9613(f)(1); CERCLA § 113(f)(1).

⁶ *PMC, Inc. v. Sherwin-Williams*, U.S. App. LEXIS, at *6.

⁷ 42 U.S.C. § 9607(a)(4)(B); CERCLA § 107(a)(4)(B). Recoverable costs must be "consistent with the national contingency plan."

⁸ 42 U.S.C. § 9652(d); CERCLA § 302 states "Nothing in this in his chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."

⁹ *PMC, Inc. v. Sherwin-Williams*, U.S. App. LEXIS 17563, at *8.

¹⁰ *Id.*

control law, the court said this was no stranger than the recovery afforded under CERCLA in the same circumstance.¹¹ The court held that PMC was entitled to relief under RCRA if it could show that the pollution caused by Sherwin-Williams created an imminent danger to human health or the environment.¹² Although the evidence of imminent danger was conflicting, it was sufficient to uphold the district judge's finding.

The allowance of recovery under RCRA can be reconciled with the disallowance of relief under the Illinois Contribution Act. The latter is designed to protect tort victims and, for that use, was designed to be saved by CERCLA. RCRA's imminent danger provision, on the other hand, is supposed to protect the health of the general population and the environment as a whole; PMC, a non-victim, could therefore obtain relief.

This case again demonstrates the broad coverage of CERCLA and RCRA and the extent to which they have taken the place of traditional tort law. (LTC Dave Howlett/LIT)

THE PRICE OF VICTORY

Major Scott Romans

On 11 August 1998, the United States District Court for the Central District of California issued an opinion in the case of *United States v. Shell Oil Company, et al.*,¹³ (the McColl case) involving the allocation of CERCLA liability between the federal government and other potentially responsible parties (PRPs) at the McColl Superfund Site in California. In this decision, the court allocated 100% of the clean up costs at the McColl Superfund Site to the federal government. This decision could potentially expand the scope of government CERCLA liability under *FMC Corp. v. U.S. Department of Commerce*.¹⁴

The facts of the McColl case are as follows. During the World War II, four oil companies entered into contracts with the United States to produce aviation fuel (avgas).¹⁵ The companies in turn entered into contracts with Mr. Eli McColl to dispose of the acid wastes that resulted from aviation fuel production. Mr. McColl accomplished this disposal by dumping the wastes on a 22 acre parcel of property that later became known as the McColl Site.¹⁶ The Environmental Protection Agency and the State of California brought an enforcement action under CERCLA § 107 to recover cleanup costs. The Court had previously held that both the oil companies and the United States were liable under § 107 as arrangers.¹⁷ The Court then conducted a trial in February, 1998 to determine the percentage of cleanup costs allocable to each party.¹⁸

¹¹ The court cited recent precedent for this conclusion. *AM International v. Datacard Corp.*, 106 F.3d 1342, 1349 (7th Cir. 1997).

¹² 42 U.S.C. § 6972(a)(1)(B).

¹³ No. CV 91-0589-RJK, 1998 U.S. Dist. LEXIS 12704 (C.D. Cal. Aug. 11, 1998).

¹⁴ 29 F.3d 833 (3d Cir. 1994).

¹⁵ 1998 U.S. Dist. LEXIS 12704, at *6.

¹⁶ *Id.* at *17.

¹⁷ *U.S. v. Shell Oil Co. et al.*, 841 F.Supp. 962 (C.D. Cal. 1993) (holding oil companies liable), *U.S. v. Shell Oil Co. et al.*, No. CV-91-0589-RJK, 1995 U.S. Dist. LEXIS 12704 (C.D. Cal. Sept. 18, 1995) (holding United States liable).

¹⁸ The total cost of the cleanup has not yet been determined, but is estimated to be between \$70-100 million.

The Court determined that 100% of the costs should be allocated to the federal government, relying on 3 primary factors. First, the Court found that holding the government liable for 100% of the cleanup costs would place the cost of a war on the United States as a whole.¹⁹ The Court noted similar reasoning in *FMC Corp.* case,²⁰ where the Third Circuit found that placing the cost of war on society as a whole was consistent with the underlying policy of CERCLA.²¹ According to the Court, "it stands to reason that just as the American public stood to benefit from the successful prosecution of the war effort, so to must the American public bear the burden of a cost directly and inescapably created by the war effort, the production of avgas waste."²²

The second factor in the Court's decision concerned the options available to the oil companies to dispose of the waste. According to the Court, the decision to dump the waste on the McColl property was directly related to the fact that there were no tank cars available to the companies to transport the waste to another facility for recycling.²³ The Court found that the War Production Board diverted the tank cars for other uses and so the oil companies had no choice but to dump the waste at the McColl Site.²⁴

Finally, the Court found that the government had not provided the necessary priorities to the oil companies to allow them to construct regeneration plants to reprocess the acid and acid waste.²⁵ Apparently, two of the companies had made requests to the WPB to receive the materials required to construct these regeneration plants. Since the WPB did not grant these priorities, the Court again came to the conclusion that the companies had no choice but to dump the wastes at the McColl Site.²⁶

The government argued at the allocation trial that the economic benefits the oil companies received as a result of these contracts should weigh in the government's favor. Not only did the companies profit from these contracts, but they also received tax benefits from their ability to accelerate the amortization of new facilities constructed during the war.²⁷ The Court, however, did not find this reasoning persuasive. The Court noted that after the war, Congress enacted two statutes, called Renegotiation Acts, designed to allow the government to demand repayment of excessive profits obtained by companies during the war. According to the Court, since the oil companies were never required to repay any money to the government, their profits were not excessive and therefore the profits they realized were not an equitable factor to be taken into account in the allocation process.²⁸

This case potentially represents an extension of the reasoning of *FMC Corp.* case. *FMC Corp.* determined operator liability under CERCLA § 107, based on the amount and type of control over the facility involved. The McColl case determined allocation. The issue was the application of equitable factors to determine costs between two liable parties

¹⁹ 1998 U.S. Dist. LEXIS 12704 at **29-30.

²⁰ 29 F.3d 833 (3d Cir. 1994).

²¹ 1998 U.S. Dist. LEXIS 12704 at *31. See *FMC Corp.*, 29 F.3d at 846.

²² 1998 U.S. Dist. LEXIS 12704 at **31-32.

²³ 1998 U.S. Dist. LEXIS 12704 at **32-33.

²⁴ *Id.*

²⁵ *Id.* at *34.

²⁶ *Id.* at *35.

²⁷ *Id.* at *36.

²⁸ *Id.* at *38.

FMC Corp. does not provide guidance in making this allocation decision.²⁹ Also, the McColl court ignored the independent decisions the oil companies made that led to the creation of the CERCLA site, such as choosing to enter into contracts with Eli McColl for waste disposal, expanding their plants and actively competing for aviation fuel contracts at the outset of the war.³⁰ By not considering these factors, the Court ignored an important principle underlying CERCLA: requiring the persons responsible for pollution to pay for the damage they cause.

Argument on the United States' motion for a new trial will occur in October. (MAJ Romans/LIT)

Announcement of Present ELD Staff

We have had many hails and farewells here in the Environmental Law Division, so we take this opportunity to provide you with a list our current staff, along with their areas of expertise.

U.S. ARMY ENVIRONMENTAL LAW DIVISION
 AREAS OF RESPONSIBILITY
 as of 15 SEP 98

<u>AREA/POSITION</u>	<u>PRIMARY</u>	<u>ALTERNATE</u>
Chief	COL Rouse 1230/1570	LTC Howlett 1563
Chief, Compliance	LTC Jaynes 1569	LTC Grant 1592
Chief, Litigation	LTC Howlett 1563	Mr. Lewis 1567
Chief, Restoration & Natural Resources	Mr. Nixon 1565	LTC Polchek 1562
Executive Officer	LTC Polchek 1562	
Alternative Dispute Resolution (General)	MAJ Cotell 1593	LTC Jaynes 1569
Alternative Dispute Resolution (Litigation)	Ms. Greco 1566	LTC Howlett 1563
Asbestos	LTC Jaynes 1569	MAJ Egan 1623
BRAC/CERFA	LTC Polchek 1562	Mr. Wendelbo 1597
CERCLA	Mr. Nixon 1565	Ms. Barfield 1572
Chemical Weapons Demilitarization (Genl)	MAJ Egan 1623	LTC Grant 1592
Chemical Demilitarization (Litigation)	MAJ Zolper 1624	MAJ Romans 1596
Clean Air Act	LTC Jaynes 1569	LTC Grant 1592
Clean Water Act	MAJ Cotell 1593	LTC Grant 1592
Criminal Liability	MAJ Cotell 1593	LTC Jaynes 1569
Cultural Resources	MAJ Shields 1568	LTC Polchek 1562

²⁹ The United States has filed a motion for a new trial, which will be argued in October. The United States raised this issue in its motion, as well as a number of factual issues related to the Court's second and third reasons for its decision (the lack of tank cars and the WPB's refusal to grant priorities).

³⁰ The motion for new trial raises this issue as well.

ECAS	Mr. Nixon 1565	MAJ Shields 1568
ELD Bulletin	Ms. Barfield 1572	MAJ Cotell 1593
Enforcement Actions	MAJ Cotell 1593	LTC Jaynes 1569
EPCRA	Mr. Nixon 1565	LTC Polchek 1562
ESA/Natural Resources	MAJ Shields 1568	LTC Polchek 1562
Fee/Tax	MAJ Cotell 1593	LTC Jaynes 1569
Legislation	MAJ Cotell 1593	LTC Jaynes 1569
Litigation	LTC Howlett 1563	
Litigation	Mr. Lewis 1567	
Litigation	MAJ Zolper 1624	
Litigation	MAJ Romans 1596	
Litigation	MAJ DeRoma 1648	
Litigation	CPT Bergen 2516	
Litigation	Ms. Greco 1566	
LL.M. Program Liaison	LTC Grant 1592	MAJ Egan 1623
Military Munitions	LTC Grant 1592	MAJ Egan 1623
NEPA	LTC Polchek 1562	MAJ Shields 1568
OSHA	Mr. Nixon 1565	LTC Polchek 1562
Overseas & Deployment Issues	MAJ Shields 1568	LTC Polchek 1562
PCBs	LTC Jaynes 1569	MAJ Egan 1623
Pollution Prevention	Mr. Nixon 1565	Ms. Barfield 1572
Radiation	LTC Jaynes 1569	MAJ Egan 1623
Range Rule	LTC Grant 1592	MAJ Egan 1623
RCRA (includes OB/OD)	MAJ Egan 1623	LTC Grant 1592
Reserve Component	MAJ Egan 1623	MAJ Cotell 1593
Safe Drinking Water Act	MAJ Cotell 1593	LTC Grant 1592
Safety	MAJ Cotell 1593	MAJ Egan 1623
TSCA	LTC Jaynes 1569	MAJ Egan 1623
USTs	MAJ Egan 1623	LTC Grant 1592
Water Rights	MAJ Cotell 1593	LTC Grant 1592

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Announcements

The Air Force Environmental Law Courses at Maxwell AFB in Montgomery, Alabama are:

Advanced Course, 7-9 December 1998
 Update Course, 22-24 February 1999
 Basic Course, TBD

ELD serves as the POC for Department of Army slots only.

Solicitation in the Federal Workplace

The general rule is that employees may not solicit the sale of magazine subscriptions, cosmetics, household products, hair replacement systems, vitamins, candy, cookies, insurance, weight loss programs, etc. while on the job or in their offices. Even if off the job and outside the workplace, they may not knowingly solicit DoD employees who are junior to them. A specific provision of the *Joint Ethics Regulation* says that "[a] DoD employee may not knowingly solicit or make solicited sales to DoD personnel who are junior in rank, grade or position, or to the family members of such personnel, on or off duty." JER 2-205. In addition, employees may not solicit money to give gifts to nice people or good causes. There are some limited exceptions, but this is the starting point: **no solicitation in the Federal workplace!**

Does this mean that you cannot discuss cars, mechanics, home maintenance problems, and the like with your colleagues and tell them what products, services or service providers you particularly like? Of course not! We do this all the time with our friends and colleagues. We pass on personal experiences as to what we think was helpful and what was not; how we were scammed; or where we found a particularly helpful product or service provider. The problem begins when you bring your business cards, brochures, or advertisements or other offers to sell good or services to fellow-employees. It is also a problem to "hawk" the wares for someone else while on the job.

It would be permissible for a co-worker to approach you and ask that, if you are still selling collectible sports cards in your part-time business, he or she would like to buy the latest Topps Gallery Baseball set from you; and the next day you bring in this set and complete the transaction at your car at the end of the work day. But, it would **not** be permissible for you to keep a few boxes of various Topps sets in your desk and let it be known that you are selling them. A fine distinction? Perhaps... but, it is an important distinction. The latter case represents improper solicitation.

If a co-worker has a toothache but no dentist, it would be permissible for you to provide the name, address and phone number of your dentist with whom you are very satisfied. However, it would not be permissible to pass out your dentist's card (with your name on the back) to all your co-workers so that you can obtain a \$25 credit for every referral.

It would be permissible for you and a co-worker to decide to sign up for a tour together with a travel agency. However, it would not be permissible for you to "pitch" the trip to each of your co-workers so that you could get 50% off your tour price for signing up four other travelers.

It would be permissible for you to do a favor at the request of a co-worker by obtaining a particular shade of cosmetic from your neighbor who sells the particular brand, order and buy it for your friend, and deliver it to your friend and accept reimbursement. But, it would not be permissible for you to bring in to the office various samples, color charts, and order forms; and then take orders, accept payments and make deliveries at the office to help your neighbor expand his or her business.

There can be a fine line between what is and is not permissible. Hopefully, the examples will help you evaluate the situations that you might be faced with.

Yes, there are some exceptions to the rule of **no solicitation in the Federal workplace**, but they are limited. Employees may solicit in the Federal workplace in the following circumstances:

For a fellow-employee for a special, infrequent occasion such as wedding, birth or adoption of a child, transfer out of the supervisory chain, and retirement. A promotion is not considered a "special, infrequent occasion." [Yes, I know, promotions are "special," and they certainly are "infrequent;" but the fact of the matter is that they are not "special, infrequent occasions" for purposes of the ethics rules unless the promotion is accompanied by a transfer outside of the supervisory chain.] We can solicit no more than \$10 from other employees, and contributions must be entirely voluntary. The value of the gifts usually may not exceed \$300.

For food and refreshments to be shared in the office. Again, participation must be voluntary.

For the Combined Federal Campaign and Army Emergency Relief. Again, whether to contribute and how much must be entirely voluntary.

To raise money among ourselves for our own benefit when approved by the commander or head of the organization (e.g., selling shirts and hats to subsidize the AMC organization day picnic).

If it doesn't fit one of the above situations, don't solicit. Not only will you be in compliance with the ethics rules, but your colleagues will appreciate it. In more cases that you might realize, your co-workers are just too nice to tell you that they do not want to be subjected to solicitations in the workplace. They often feel compelled to buy something to maintain "peace," especially if they work for you. Workplace solicitation can create a lot of resentment and bad feelings.

Even if the solicitation fits one of the exceptions, be careful. Voluntariness is the "key." It should not be a senior employee who does the solicitation. Don't make repeated entreaties. Don't require the employee who declines to explain him or herself. Always make a provision for an employee to "opt out" of the gift contribution that is included in the price of the luncheon.

If you aren't sure or think that a particular situation might or should fit an exception, discuss it with your Ethics Counselor before you engage in the solicitation.

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

or

Alex Bailey, Rm 7E18, 617-8004
Ethics Counselor
Associate Counsel

ETHICS ADVISORY 98-13 - Official Relationships with Private Organizations (POs)

As explained in previous ETHICS ADVISORIES, there are a number of ethical issues that we must consider when we deal with POs. For example, employees who are officers, directors or active participants in POs, are disqualified from participating in official Army matters that affect their PO. We may not use our official position to endorse or promote a PO, encourage employees to join specific POs, or to help sell a PO's insurance or other products. We must also avoid bias or preferential treatment in our dealings with POs.

But, does this mean that we cannot have any sort of "official relationship" with POs? After all, there are quite a number of POs that were created by Army and/or other DoD employees to help themselves in their professional development and to better perform their duties; POs whose ideologies, views, and goals track with the Army. These are organizations that have developed credibility within their respective professions, Government and industry over a period of time. Often, they are a great resource for training. They also establish standards, positions and the like with respect to issues that we deal with in such areas as auditing, law, accounting, engineering, testing and electronics. Accordingly, there is often much to be gained by having an official "presence" with these organizations.

The answer is "yes," there is room for an "official relationship" with such organizations. But, there is a right way and a wrong way to do this.

An employee may ***not*** be assigned to be an officer, board member, or otherwise involved in the management or operation of a PO as part of his or her official duties. Employees can do this only in their personal and private capacities, and then they are disqualified from participating in official matters that affect these organizations. There are exceptions, but they are based in statute. For example, the Commandant of West Point is authorized to sit on the Boards of sports leagues under whose aegis the Military Academy plays various sports.

Along the same lines, an employee may ***not*** be directed by his or her supervisor or commander to be an officer, director or other active participant in a PO in his or her personal and private capacity. This means that we may not designate the command position of a particular battalion as having the "extra duty" of being president of the local chapter of a PO. Even if the officer wants to assume the presidency of the local chapter, the officer may not accept a position that is bestowed upon a particular official position. Employees may be encouraged to join and actively participate in professional and community organizations. But, whether they join and the level of their participation are entirely up to them.

What we can do is this: in those cases where there is a strong and continuing DoD interest, heads of commands and organizations may assign an employee as an "official liaison" to a PO. As an "official liaison," the employee acts in his or her official capacity

and represents the command and agency's interests to the PO. The "official liaison" attends board and other meetings for information and as an active participant with respect to matters of mutual interest. The "official liaison" may even vote on matters of mutual interest; however, the PO must understand that such votes in no way binds the Army or the Federal government.

But, those who are appointed as "official liaisons" need to exercise caution. What has happened in the past is that the "official liaison" loses his or her focus, and begins to identify with the PO. They begin to work with the board on matters concerned with management of the PO or they are voted to chair a committee. All of a sudden, they find themselves as a POC for a membership drive or some fundraising campaign. POC for whom? They certainly cannot be a POC for the command or installation for a PO membership drive (remember, the command may not endorse, promote or encourage employees to join and participate in the organization). When the "official liaison" becomes a POC for a membership drive, or chair person of the upcoming dinner-dance, or otherwise involved in the management of the PO, the "official liaison" now has a special relationship with the PO (called a "covered relationship"), meaning that he or she probably can no longer act as an "official liaison" because of the appearances created by this "covered relationship."

Thus, if we determine that AMC has a strong and continuing interest in the substantive work being done by a particular PO, the head of the appropriate AMC organization may appoint an AMC employee, who is not otherwise an active participant with the PO in his or her private capacity, to be AMC's "official liaison" to the PO. But, this "official liaison" need to maintain focus on his or her true status and responsibilities. Specifically, the "official liaison" attends meetings as a Federal employee and represents at all times the interests on his or her employer. This is not an "outside position" and is not reported on the employee's financial disclosure report.

Commanders, directors or supervisors should seek the advice and counsel of their Ethics Counselors before assigning an employee to be an "official liaison" to a PO. "Official liaisons" also should seek the advice and counsel of their Ethics Counselors concerning their liaison activities.

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Ethics Counselor
Associate Counsel

or

Alex Bailey, Rm 7E18, 617-8004
Ethics Counselor
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ETHICS ADVISORY 98-16 -- Special Edition (Widely Attended Gatherings)

The Army Standards of Conduct Office prepared an article on when and under what circumstances employees may accept free attendance at an event. **General Wilson read this article and directed that it be passed "to all senior folks in the command."** I am doing that in this "Special Edition" ETHICS ADVISORY. Everyone should have a familiarity with the issue.

The Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch and DOD Joint Ethics Regulation, DOD 5500.7-R, generally prohibit Executive Branch employees from accepting any gift offered by a prohibited source or because of the employee's official position. However, OGE has established several exceptions to this general prohibition, where gifts may be accepted without undermining government integrity. One of these is attendance at a "widely attended gathering."

Attendance in Your Personal Capacity

The Office of Government Ethics has identified "widely attended gatherings" as events in which the Army has interest, but which are not necessarily official. Acceptance of free attendance at a widely attended gathering is a personal gift, but a gift which may be accepted because it offers an opportunity to represent the Army's interests or share information on matters of mutual interest. Typically, the event will be a conference or a seminar, but it could also be a social event, such as a cocktail party. The consistent feature of these events is that they are of sufficient size and diversity to promote the Army's interests.

If an event is "widely attended," an employee may be authorized to accept free attendance at all or part of the event. To qualify as widely attended, the event (or the relevant portion of the event) must either be open to interested parties from throughout a given industry or profession, or be attended by a number of persons with diverse views or interests. For example, a gathering with a large number of employees of a particular defense contractor, where some Government employees are invited, is not sufficiently diverse. Similarly, a small gathering of 12 individuals with diverse interests is not sufficiently large. Typically, an event must have at least 20 or more individuals attending to qualify under this exception. The determining factor is whether the event will give the employee an opportunity to exchange views or information with a sufficient number of people who represent a variety of views or interests.

There is an additional requirement that applies when someone other than the sponsor of the event bears the cost of the employee's attendance. In that case, the employee may only accept free attendance if either of the following is true:

- (1) The sponsor (not the person bearing the cost) decides who to invite; or
- (2) More than 100 persons are expected to attend the event, and the value of free attendance (including the employee's spouse's attendance, if applicable) does not exceed \$250.

This rule often comes into play when a DOD contractor asks the sponsor of an event to invite certain DOD officials and pays for their attendance. This rule is designed to prevent special interests from buying access to DOD employees. To avoid accepting an offer that violates this rule, employees need to know who is really inviting them, as well as who is paying for their attendance.

Before accepting free attendance at an event under this exception, the employee must always obtain approval from his supervisor. This approval may be verbal or written, but must include a determination that the employee's attendance at the event is in the Army's interest because it will further Army programs or operations. Such interests may include promoting community relations or providing the opportunity to exchange views or technical information with members of a specific profession. If the person or organization that invited the employee to attend has interests that could be affected by the performance of the employee's official duties, the supervisor must make a further written finding that the agency's interest in the employee's attendance outweighs the appearance of improper influence. Supervisors should make this finding in coordination with their Ethics Counselor. The supervisor may also authorize acceptance of free attendance for an accompanying spouse or guest if others in attendance will generally be accompanied, and if the offer to the spouse or guest is from the same source as the offer to the employee.

In some cases, supervisors may issue a blanket determination that attendance by all or a specific category of employees and their guests is in the Army's interest. This determination does not, however, eliminate the need for the written finding described above for those employees whose duties could affect the donor's interests. When a blanket determination of interest in an event has been made, supervisors should nevertheless review requests to accept free attendance to ensure that no conflicts of interest exist and to ensure there is value in having that specific employee attend.

This exception does not apply to travel or lodging expenses, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees. In fact, the employee must personally pay for or provide his own transportation to and from the event. It does allow acceptance of conference materials, and meals and entertainment that are integral to the event. Gifts accepted under this exception are personal gifts. When spouses are customarily included in an event, the cost of their participation may also be accepted. Employees who file financial disclosure

reports must report the gift on that report if the total value of all gifts (including any gift of free attendance for an accompanying spouse) from the donor is \$250 or more.

Attendance in Your Official Capacity

An Army employee who is assigned to speak, participate on a panel, or to otherwise present information on behalf of the Army in an official capacity may accept free attendance at the conference or other event where the activity will take place, provided the gift is extended by the sponsor of the event. This exception recognizes that free attendance is necessary to performance of the employee's duties, and, therefore, is not a gift to the employee.

This exception is limited to free attendance at the event on the day of the employee's presentation. The employee may accept waiver of the conference or other fee for attendance, as well as certain items (food, refreshments, entertainment, instruction, and materials) furnished to all attendees as an integral part of the event. The employee may not accept, under this exception, travel or lodging expenses or items such as food and entertainment that are collateral to the event. (There is separate statutory authority for acceptance of offers to pay official travel expenses for employees and accompanying spouses. Consult with your Ethics Counselor on the rules governing such an offer. **[See ETHICS ADVISORY 98-01 -- Gifts of Travel and Related Expenses for Official Travel]**)

When on official Army business, the employee may be reimbursed from appropriated funds for meals and other travel-related expenses necessary to the employee's temporary duty assignment; however, the employee must generally use personal time and funds to participate in any collateral entertainment, such as golf tournaments, associated with the event. Such events will rarely justify the use of appropriated funds or meet the requirements of the widely attended gathering exception. Employees who are offered free attendance at entertainment events should always seek their Ethics Counselor's advice before accepting the offer.

If you have any questions, please consult with me (617-8003), Alex Bailey (617-8004), or Stan Citron (617-8043).

Mike Wentink
Associate Counsel/Ethics Counselor
Office of Command Counsel, Room 7E18

ETHICS ADVISORY 98-15 - Use of Government Resources for Employee Gifts

By now, we should all be familiar with the rules about gifts between employees. Generally, we may not give a gift to an official superior, and we may not accept a gift from another employee who makes less money than we do. However, there are exceptions that permit us to give some gifts in appropriate situations, such as a bottle of wine as a hospitality gift, entertaining our boss in our home, contributing to a gift for a retirement, and bringing in food to be shared in our office.

The additional issue that occurs from time to time is the use of appropriated funds to make or buy a gift for a fellow employee. In general, we cannot use appropriated funds for such purposes.

This issue comes up in a number of different ways. For example, a group of employees at one installation purchased a military print for the retiring commander. Although the print was less than the \$300 gift limit, to have it properly matted and framed would take it over the \$300 limit. The employees thought that the answer would be to have the post engineer use his carpenters, tools and materials to frame the print. In another case, a Pentagon office suggested that nice gold-plated frames from GSA supply could be used for prints to be given to all departing employees.

Although the issue seems to come up most often with respect to framing mementos for departing employees, there are also other types of situations. In one case, an installation audio-visual department received a work order to make a "This Is Your Life" video as a gift for the retiring commander. In another, the superintendent of a national cemetery presented the retiring installation commander with a shiny nickle-plated, nicely engraved, shovel, and its value did not exceed \$300. In addition to the issue of what the retiring commander would do with a cemetery shovel, he was faced with the problem that it was purchased using appropriated funds.

Finally, although they are not gifts given to the employee, there are related instances of improper use of appropriated funds when an employee leaves an organization. For example, there was the situation where a command wanted to use appropriated funds to prepare and landscape around a large granite rock in a public area of the installation, inlay a plaque into the rock, and build a shelter around the rock in honor of a retiring commander.

The general rule is that appropriated funds may not be used to purchase or make gifts for employees, or to honor employees, even for those who are being reassigned or retiring after many years of honorable service. Certainly, there are official aspects of a transfer or retirement such as award and retirement ceremonies, and appropriated funds are often available in support of these official functions. However, when it comes time for the gift, the taxpayer does not underwrite it. If we want to give a gift to honor the

employee's service, then we pay for it using our personal funds, but keeping within the rules (e.g., the value generally may not exceed \$300 and we may not solicit more than \$10 each from other employees).

In general, appropriated funds are not available to buy or craft plaques, framed mementos, or other items to give to employees *unless* the presentation item is part of an officially approved awards program. These Army awards programs are set out in AR 672-5-1 and AR 672-20. There is also an AMC supplement to AR 672-5-1 and a number of AMC regulations governing awards.

If you believe that your situation is different and permits the use of appropriated funds because of special circumstances, you should check with your Ethics Counselor or fiscal law lawyer *before* you commit any funds. When dealing with fiscal issues, innovation and creativity can lead to trouble which often comes in the guise of an Anti-Deficiency Act (ADA) violation. In addition to the criminal aspect of ADA violations, there are investigations that need to be done, reports to Congress that have to be made, and they certainly do not enhance one's career prospects.

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