



# Office of Command Counsel Newsletter

June 1999, Volume 99-3

## CLE 1999: An Investment for the Future      New AMC Slogan

The AMC Continuing Legal Education Program for 1999 was held during the week of 24 May 1999. Evaluations indicate that the program was very successful in bringing together nearly 130 counsel from AMC legal organizations and others with whom we do business. We thank all of you who actively participated in the spirited dialogue during our plenary sessions, 15 electives and legal focus sessions.

This year we take a deep breath as we offer the hand-out materials to all AMC counsel through our Command Counsel Web Site.

[http://www.amc.army.mil/amc/command\\_counsel/index.html](http://www.amc.army.mil/amc/command_counsel/index.html)

Additionally, we ask that those of you who attended the program make your hard copy material available to all office members.

Newsletter 99-3 will focus on several aspects of the CLE Program, including the Command Counsel Awards Program, and other tidbits of information.

### Thanks To...

A special thanks to those who planned and administered the CLE. **Steve Klatsky** served as chairperson of the planning committee for the third year. Other members included **COL DC Canner, Bill Medsger, Vera Meza, Ed Stolarun** and **Holly Saunders**. administrative support included **Debbie Reed** and STRICOM's **Martha Zukos** and audio-visual support from **Ed Frazier**. Additional HQ AMC support came from **Debbie Arnold, Billy Mayhew** and **Elaine Timberlake**.

## CLE 99 Coverage

...Includes comments from AMC Chief of Staff **MG Norm Williams** and a recap of the Command Counsel Awards Ceremony, presided over by **Ed Korte** and General Counsel of the Army **Bill Coleman**

After many years of "AMC - America's Arsenal for the Brave", we have a new slogan, effective 1 June 1999. On all correspondence the last paragraph should read as follows:

**AMC -- Your Readiness Command ... Serving Soldiers Proudly!**

### In This Issue:

<i>CLE &amp; AMC Chief of Staff</i> .....	2
<i>IOC &amp; A-76 Case Study</i> .....	3
<i>Partnering Refresher</i> .....	4
<i>Privatization v. Outsourcing</i> .....	5
<i>Civilian Deployment Legal Issues Roundtable</i> .....	6
<i>Rating Environmental Mngmt</i> .....	8
<i>Taking Care of the Homeless</i> .....	9
<i>Frequent Flyer Policy</i> .....	10
<i>Ethics Lessons Learned</i> .....	11
<i>CLE: Attorney Awards</i> .....	12-14
<i>CECOM-Legal Office Profile</i> .....	16-17
<i>Faces in the Firm</i> .....	18

# CLE 99: Comments from the Chief of Staff

**If the Soldier...fights with it, wears it, or eats it, AMC does it!**

That is a keen observation from our Chief of Staff, **MG Norm Williams** as to what AMC is responsible for providing the American Soldier.

## The Political Picture

-The political environment faced by AMC includes the following: 40 states, 70 congressional districts, 130 representatives, with 682 formal congressional inquiries in 1998.

**\$**

- AMC "touched" 19.5 billion dollars, one-third of the Army's TOA.

## Size

- AMC is much smaller today than in 1989. Our military population decreased 82% from 8,937 to 1,506. Our civilian workforce decreased 58% from 102,595 to 43,131. Our Ammunition Plants went

from 17 to 9 and our Depots from 19 to 9.

## \$ Part II

- Our money has gotten much smaller. From 1989 to the present, our procurement money has decreased by 90%, OMA by 60% and Ammunition by 71%.

## We're Getting Older

- We are getting older and closer to retirement. In 1989 15% of the workforce was retirement eligible; in 2004 50%. Our average age was 42 in 1989. Today that average is 48.

## The "Greening" Program

Soldier Systems Center counsel **Srikanti Dixit**, DSN 256-5971, shares her experience participating in the Ft. Polk greening program." It is coined a "greening" because participants experience total immersion in the soldiers' environment. The article could be subtitled "An AMC Attorney meets the Soldier." (Encl 9).

## Newsletter Details

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Check out the Newsletter on the Web at [http://www.amc.army.mil/amc/command\\_counsel/](http://www.amc.army.mil/amc/command_counsel/)

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

# Acquisition Law Focus

## IOC & A-76: A Case Study in Preparation

The IOC is currently conducting A-76 commercial activity studies of all of its conventional ammunition demilitarization operations located at depots and munitions centers. In addition complete studies are being made of all three arsenals: Rock Island, Pine Bluff, and Watervliet.

The IOC headquarters legal center is supporting these studies through an A-76 oversight committee composed of Ms. **Marina Yokas-Reese**, Mr. **William Bradley**, and Mr. **Sam Walker**. Additionally, the office is providing two lawyers in support of each individual study.

Presently, Production Work Statements (PWS) are being prepared by each of the sites with the assistance of support contractors. The sites are in the process of submitting initial draft PWS's for headquarters review and coordination. Many unique questions are presented requiring input from areas as diverse as environmental, personnel, specialized technology, small business, resource management, and acquisition.

The Source Selection process and strategy is taking shape; Selection Boards are being organized. Thought is being given to selection plans.

A transition plan is developed and executed. This plan covers equipment turnover, personnel actions, training, inventory and procedural changes.

The new operation is continually monitored to ensure the acceptable levels of performance (ALPs) set in the performance work statement (PWS) are met. The quality assurance surveillance plan (QASP), developed by the study team while working on the PWS, sets procedures for conducting surveillance of the new operation. The QASP is used to monitor the performance of the new operation, whether in-house MEO, contract, or IGS.

See Enclosure 1 for further information on the process.

For more information if you are getting ready to proceed with an A-76 action, the POC is **Sam Walker**, DSN 793-8421.

## List of Enclosures

1. A-76 & IOC Case Study in Preparation
2. Partnering for Success-- A Refresher on Partnering
3. Inherently Governmental Functions: A Primer
4. Privatization v. Outsourcing
5. Civilian Deployment Legal Issues Roundtable-Agenda
6. CDLI Roundtable Point Paper
7. FLRA & ADR
8. DA Labor Relations Program Evaluation
9. The Army "Greening Program"
10. April 99 ELD Bulletin
11. May 99 ELD Bulletin
12. Tearing Down Old Buildings
13. AU Says NO to UST Penalties
14. Taking Care of the Homeless
15. Frequent Flyer Policy
16. Ethics Lessons Learned-- Penalties ARE Imposed

# AMC's Partnering for Success Program: An article to refresh your recollections

AMC Partnering Team chief **Mark Sagan** and team member **Ken Bousquet** had an excellent article published on the AMC Partnering Program in the Contract Management magazine. It is enclosed for those of you who are unfamiliar with the AMC Partnering Program (Encl 2).

In April 1997, the U.S. Army Materiel Command (AMC) published the "*Partnering for Success*" guide to assist and encourage Army Contractors, Program Managers, Contracting Officers, and all contract stakeholders to improve the manner in which contracts are performed and administered.

The guide contains an overview of what Partnering is all about and why it is critical for Army programs to consider implementing a Partnered approach to post-award efforts. The guide promotes a clear four step process to make Partnering an

invaluable asset to any program. The guide also includes numerous samples and 32 answers to commonly asked questions regarding Partnering to help the reader better understand the process and its potential benefits for their program.

AMC is now utilizing the Partnering concept in research & development, materiel acquisition, base operations, and engineering/support services contracting. Partnering has become an integral part of the AMC Alternative Dispute Resolution (ADR) program which is focused upon the avoidance of contract disputes before they impact contract performance.

The second edition of the AMC Partnering Guide will be published in early October. It will make reference to the AMC Partnering experiences gained from the nearly 70 acquisition programs that have utilized this contract administration tool.

## Inherently Governmental Functions--A Primer

The cornerstone of the Government policy regarding the performance of commercial activities is Office of Management and Budget (OMB) Circular No. A-76 (revised) dated 4 August 1983. As set forth in the Circular, it is the policy of the Government to rely on commercial sources to supply products and services that the Government needs.

The major exception is the performance of activities/functions that are considered to be inherently Governmental in nature; that is, when they are "so intimately related to the public interest as to mandate performance only by Federal employees." Inherently Governmental activities/functions cannot be performed by the commercial sector. These activities/functions require either the exercise of discretion in applying Government authority or the use of value judgments in making decisions for the Government.

CECOM's **Jim Scuro**, DSN 992-9801, provides an excellent article addressing many of the key aspects of the "inherently governmental function" analytical framework (Encl 3).

## Privatization v. Outsourcing--from the ASA (I & E) Viewpoint

**M**any of you still have difficulty defining the differences between outsourcing and privatization. Well, here are comments from the Honorable Mahlon Apgar IV, ASA for I&E, spoken on April 9 to an AUSA meeting (Encl 4).

### Outsourcing

Outsourcing has been standard practice in the Army for some years, as it has in corporate America. It is the process of contracting with outside, independent organizations which can provide support services faster, better or cheaper than we can, mainly because those services are **their** core business, but they're not ours. Outsourcing does not shift the responsibility for performance or change the nature of the service. It merely changes the organization and methods of supplying or delivering the service. For example, when we outsource

trash collection or publication of the garrison newsletter, we still retain the responsibility for ensuring that the service is accomplished on time and on budget — and that it meets our service quality levels and other requirements that we have defined and agreed with the vendor.

### Privatization

Privatization, on the other hand, goes much deeper than outsourcing. It means shifting some or all of the responsibility for planning, organizing, financing and managing a program or activity from the Army to private contractors and partners, while retaining some interest in the operations, services and profits of the program. It may also mean transferring some or all of the ownership of Army assets, such as land, buildings and equipment, from the Army to a private entity. The bottom line is that any military func-

tion or activity that is mirrored by a large, diverse, competitive market in the private sector is a candidate for privatization. This concept is new to the Army and to DoD as a whole, so it is especially important to clarify what we mean as we develop new doctrine and new applications in this strategic redirection of the way we do business.

### Privatization Means Partnership

To Mr. Apgar privatization means partnership and can be accomplished only through partnership. Partnership is, by definition, a two-way street — whether it's among individuals, within organizations, or between business and government. It is characterized by mutual interests, mutual understanding, mutual respect, and mutual responsibilities throughout the partnership's life.

For additional comments we invite your attention to the full presentation (Encl 4).

# Employment Law Focus

## Civilian Deployment Legal Issues Roundtable Hosted by AMCCC

To ensure that there is consistency and clarity in current and emerging DA deployment policies concerning civilians (Department of the Army civilians (DACs) and contractor employees), AMCCC hosted a Civilian Deployment Legal Issues Roundtable on 3 May 1999 at the HQ AMC Building.

The recent staffing of numerous civilian deployment related draft Army regulations and field manuals and issues raised during recent

field visits by and on behalf of the AMC Command Group had highlighted the need to hold the Legal Issues Roundtable. The legal community must ensure that there is consistency and clarity in current and emerging deployment policies so that affected DACs and contractor employees are aware of their rights and responsibilities during our deployments. Some of these deployment issues are controversial and sensitive to those affected

individuals. Thus, it is imperative that the legal basis for these policies is sound and that we speak with one voice when advising our clients on matters that impact these deployments.

To facilitate discussion, a resource notebook was provided to all attendees.

A copy of the agenda is provided (Encl 6) as well as a Point Paper (Encl 7) written by POC **Cassandra Johnson**, DSN 767-8050.

## Lautenberg Amendment held Constitutional--again

On 28 August 1998, the US Court of Appeals for the DC Circuit held that a portion of the Lautenberg Amendment was unconstitutional. Fraternal Order of Police v. US, 152 F 3d 998(D.C. Cir, 1998). After granting the government's petition for rehearing, the

Circuit Court reconsidered its position and rejected all of FOP's constitutional challenges. The April 1999 decision affirms the original dismissal by the district court. Fraternal Order of Police v. US, 159 F 3d 1362 (D.C. Cir, 1999).

## DOD Anthrax Policy Revised

DoD has issued a revised policy on anthrax immunizations. The policy, issued through medical channels affects emergency essential civilians as well as contractors and military. The policy provides guidance on your labor relations obligations. Additional guidance will be forthcoming concerning the employee relations aspects of this policy. Remember our guidance and this policy only affect emergency essential employees going into high threat areas identified .

# Employment Law Focus

## Union Membership Increases-- first rise in 5 Years

For the first time in five years, union membership has increased, with the most growth in the public sector. The percentage of public sector workers that are unionized is now 37.5%. Although the number of unionized workers has increased, the percentage of the workforce that is unionized fell from 14.1% in 1997 to 13.9% in 1998.

- o Workers in protective services, such as police and firefighters have the largest percentage of unionization—41%. The least organized are those in the fishing, farming and forestry industries—4.5%, and sales 4.1%.

- o Men are more likely than women to be unionized—16% as against 14%.

- o African-Americans are more likely to be unionized (17.7%) than whites (13.5%), or Hispanics (11.9%).

## FLRA and ADR--CADR

The FLRA is actively engaged in labor-management collaboration and other alternative dispute resolution efforts dedicated to reducing the costs of conflict in the federal service. Here is a brief summary of these activities called Collaboration and Alternative Dispute Resolution.

This agency-wide program, launched in January, 1996, provides overall coordination to support and expand FLRA labor-management cooperation and alternative dis-

pute resolution efforts. CADR is the first unified program within the FLRA exclusively dedicated to targeting collaboration and alternative dispute resolution to every step of the labor-management dispute — from investigation and prosecution to the adjudication of cases and resolution of bargaining impasses. A complete information package is provided at Enclosure 7. POC is **Steve Klatsky**, DSN 767-2304.

## DA Labor Relations Program Evaluation

For the last five years, the Department of the Army's labor relations indicators have shown steady improvement. There were fewer unfair labor practice (ULP) charges and negotiated grievances than the previous year.

In FY 98, this trend changed. Compared to FY 97, there was a 10 percent increase in the number of negotiated grievances filed and the number of ULP charges filed against the agency doubled.

The number of cases taken to arbitration remained constant from the previous year as did the number of ULP complaints issued by the General Counsel (GC) of the Federal Labor Relations Authority (the Authority.)

The enclosed bulletin describes in greater detail the Army's labor relations program in FY 98 and forecasts areas of focus for FY 99 (Encl 8).

# Environmental Law Focus

## Learning from Our Critics?

Sometimes we can learn a lot from listening to our critics. An example is the Center for Public Environmental Oversight (CPEO), an organization that promotes and facilitates public participation in the oversight of environmental activities, including but not limited to the remediation of federal facilities, private "Superfund" sites, and Brownfields.

CPEO was formed in 1992, in response to the large number of military base closures in California. CPEO claims to be an independent voice and channel of communication supporting public stakeholders on range remediation and munitions disposal issues. It informs and empowers the people who live or work near former military bombing and shelling ranges or munitions disposal facilities to protect themselves and their property from explosive and toxic hazards. Its Website, <http://www.cpeo.org/> has a wealth of information on remediation issues.

## How Does Your Environmental Management Rate?

A good environmental management program can promote environmental compliance and awareness and reduce costs. The EPA has recognized this, and created an Environmental Management Review Program. After a three year pilot program, EPA has issued final policy and guidance. An Environmental Management Review is a review of a facility's program and management systems to determine the extent to which a facility has developed and implemented specific environmental protection programs and plans, which, if properly managed, should ensure compliance and progress towards environmental excellence. EPA will conduct a limited number

of voluntary reviews at federal facilities. While EPA is focusing its efforts on civilian federal facilities, military facilities can also request a review. Information about the policy and program is available from the EPA Office of Enforcement and Compliance Assistance, <http://es.epa.gov/oeca/fedfac/policy/emrpolicy.html>. Even without requesting a review from EPA, implementing an environmental management system for an installation as a systematic approach will ensure that environmental activities are well managed. EPA and the Department of Energy have prepared a guide for such a program, <http://es.epa.gov/oeca/fedfac/emsprimer.pdf>.

## April & May Environmental Law Division Bulletins

Environmental Law Division Bulletins for April and May 1999 are provided (Encl 10 and 11) for those

who have not received an electronic version or who have a general interest in Environmental Law.

## What's Required to Tear Down Those Old Buildings Taking Care of the Homeless

Want to tear down some of those old, ugly buildings on your installation. But what environmental documentation is required. An Environmental Baseline Survey (EBS) is not required, but how to take care of the as-

bestos containing material, lead based paint, and other concerns. Stan Citron and our AMC Environmental Quality Office have the answers (Encl 12). **Stan Citron** can be reached at DSN 767-8043.

Congress enacted the Stewart B. McKinney Homeless Assistance Act in 1987 with the intent "to use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless." Accordingly, installations are responsible for assuring that appropriate screening of owned and under-utilized, unutilized, or excess property has occurred before any leasing or disposal action.

## Tinker AU Opinion Says No to UST Penalties

An Administrative Law Judge has held that EPA is without authority to issue penalties against federal facilities for violations of the Underground Storage Tanks (UST) regulations. The ALJ rendered an opinion, even though the DoD General Counsel, Judith A. Miller, has referred to the issue to the DoJ/Office of Legal Counsel(OLC) for resolution pursuant to an Executive Order which provides that DoJ shall decide legal issues between federal agencies. EPA has been asserting a right to assess administrative penalties against federal facilities

for violations of UST requirements.

The Complaint charges the United States Air Force, Tinker Air Force Base with four counts of violating Section 9003 of the Solid Waste Disposal Act, 42 U.S.C. § 6991b, and the Oklahoma Corporation Commission's General Rules and Regulations Governing USTs.

The Complaint proposes a compliance order, requesting documentation verifying correction of the alleged violations, and proposes a civil administrative penalty of \$96,703 for the alleged violations.

The full opinion is at Encl 13.

Enclosed is a excellent description of the requirements and procedures under the "McKinney Act." (Encl 14).

The paper identifies the responsibilities of four different agencies: US Army Center for Public Works, General Services Administration, Housing and Urban Development and Health and Human Services, as well as Army MACOMs and installations.

More information can be obtained by contacting the U.S. Army Installation Support Center, at <http://www.usacpw.belvoir.army.mil/>

# Gift Rules Are Alive and Well

There have been newspaper articles concerning the former Agriculture Secretary Mike Espy and the culmination of years of investigation and trial for accepting thousands of dollars of illegal gifts. Although a number of the companies involved settled with the special prosecutor and paid millions of dollars worth of fines, Mr. Espy enjoyed success in the courts and was found not guilty of receiving unlawful gratuities.

The most recent headline involved Sun-Diamond Growers of California. Sun-Diamond was convicted of giving illegal gratuities (meals, tickets, luggage, framed print, and crystal bowl) to the Agriculture Secretary.

The Court of Appeals reversed the conviction, and the U.S. Supreme Court recently agreed with this reversal.

The Supreme Court ruled that it is not a crime to provide public officials with gifts or free meals unless they are aimed at rewarding a specific

action by the official. The mere fact that the recipient is a Federal official is not sufficient. There has to be some connection between the gift and an official act or matter.

However, this does not mean that the *Standards of Ethical Conduct* rules prohibiting gifts from outside sources, with some exceptions, are no longer enforceable. They are alive and well

In response to a *Washington Post* article anticipating the Supreme Court decision, Mr. Potts, the Director of the Office of Government Ethics, pointed out that a "Supreme Court decision upholding the Appeals Court would not affect these standards of conduct which prohibit Federal officials from using their public office for their own personal gain...". He emphasized that, subject to some limited exceptions, the Standards of Ethical Conduct continue to prohibit employees from accepting gifts from prohibited sources, or gifts that are given because of their official position.

# New DA Frequent Flyer Policy Issued

The Secretary of the Army has issued a new travel policy memorandum, as prepared by his Administrative Assistant. The Honorable Louis Caldera signed the memorandum on 8 April 1999, superseding the policy issued on 8 December 1995. The policy contains a **significant change** concerning the use of frequent flyer mileage and related promotional mileage credits (FFMs). The new 1999 SECARMY policy permits the use of FFMs earned from official travel to be redeemed for premium-class (less than first-class) travel upgrades in **only** the two following situations:

1. When the JTR or JFTR authorizes such premium-class (less than first-class) travel in the first place (see below for when a TDY traveler may travel in premium-class (less than first-class)).
2. When the FFMs may only be redeemed for upgrades.

A copy of the policy is provided by HQ AMC's **Mike Wentink** (Encl 15).

# Professional Responsibility-- Confidentiality of Information

## Lessons Learned-- Ethics Violations and Penalties

**T**he Army Rules of Professional Conduct for Lawyers, AR 27-26, include Rule 1.6, Confidentiality of Information. This rule, like all the Army rules are based on the American Bar Association (ABA) Model Rules of Professional Conduct.

Within the area of confidentiality, issues have arisen as to whether a lawyer may transmit confidential client information using unencrypted e-mail without violating this rule. The ABA has issued Formal Opinion 99-413, dated 10 Mar 99, concluding that this mode of transmission, albeit not perfect, provides a reasonable expectation of privacy, and may be used to transmit con-

fidential client information. However, if dealing with extremely sensitive information, the attorney should consider alternative methods of transmission. Some information might be so valuable that we would not think of sending it by regular post office mail — we might register it, or even hand-carry it. Similarly, we might encrypt it, or use some other mode of transmission. In such cases where extraordinary protective measures are required, the attorney is expected to consult with the client.

The link to this Formal Opinion follows:

<http://www.abanet.org/cpr/fo99-413.html>

AMC Ethics Team Chief **Mike Wentink** provides an outstanding preventive law note highlighting that ethics requirements are taken seriously, and that violations can lead to imprisonment (Encl 16).

The paper addresses several recent real life cases including:

- o An SEC attorney sentenced to a one-year jail sentence for “switching sides”, violating 18 USC Sec207(a).

- o A former Postmaster General of the United States who agreed to end a conflict of interest investigation by agreeing to settle by paying more than \$27,000.

- o Three former Air Force civilian employees were convicted of improper use of the government charge card--purchasing personal items. One sentenced to 1-year and the other 2 to six months in a half-way house.

Other cases involve violations of the financial disclosure rules, and accepting payment for speeches.

# pecial CLE edition

## AMC Attorneys Recognized at the CLE

A highlight of the annual CLE Program is the recognition of extraordinary performance by AMC attorneys. All nominees and award recipients will receive a Department of the Army Certificate of Achievement signed by the AMC Commander, General John Coburn.

Our recipients will receive a personal memento that they may keep, in addition to having their names engraved on the award plaques that are kept in the recipient's legal office until next year's CLE. This year's recipient of AMC Achievement Award will receive a crystal eagle on a walnut base, appropriately engraved.

### Achievement Award

The individual selected this year to receive the Command Counsel Achievement Award was **Richard Murphy**, of the Industrial Operations Command.

Mr. Murphy performed outstanding assistance to the IOC, HQ AMC, and the Department of the Army, in connection with the Early Transfer of the Base Realignment and Closure (BRAC) portion of Tooele Army Depot to the Local Reuse Authority (LRA) in January 1999.

Tooele Depot was authorized to be a DOD test case for utilizing new authority to allow transfer of contaminated land with a deferred covenant while continuing environmental remediation.. As the lead Army attorney on the Team negotiating the early transfer,

**Richard Murphy** was instrumental in resolving difference between the parties and coordinating with the State of Utah, U.S. Environmental Protection Agency, HQDA/AMC, the Army Corps of Engineers, the LRA, and the developer. A measure of his success is that the Tooele Early Transfer has been adopted as the model for all DOD Early Transfers.

### Team Project Award

Each Team member on the selected team received a Certificate of Achievement signed by General Coburn and a gold plated coin from the US Supreme Court.

Three Teams were nominated this year that the Awards Committee felt deserve special recognition.

**CECOM Wholesale Logistics Modernization Program**

**Land Disposal Restriction Utah Group Team**

**IOC Chemical Demilitarization Team.**

The recipient was the **LOGMOD Team.**

This team included representation from DA OGC and HQ AMC as well as CECOM.

From **CECOM: Kathi Szymanski, Mark Sagan, Vincent Buonocore, Mike Zelenka, Thomas Carroll and Lea Duerinck.** From **DAOGC: Vate Norsworthy and Gary Bacher,** and from **HQ AMC Nick Femino and Bill Medsger.**

The WLMP or LOGMOD will revolutionize the manner in which the Army conducts its wholesale logistics business through a fundamental reengineering of its supply processes. The cornerstone of the LOGMOD strategy will be the Army's long term partnership with a commercial market leader to provide both the needed business process reengineering as well as flexible information technology services needed to support these modern processes.

The planning and execution of this ambitious strategy has been ongoing since mid-1997. The planned source selection takes advantage of most, if not all, acquisition streamlining initiatives, including early and open communications with

industry, extensive use of the internet and electronic bulleting board, cost as an independent variable, oral presentations, and a performance oriented statement of work. Additionally, the Team has used creative intellectual property arrangements and successfully resolved the daunting fiscal implications of moving from an in house approach to a commercial service orientation.

Moreover, the strategy involves the use of a unique "soft landing" technique that should be a model for future government downsizing. Essentially, the approach places much of the burden caused by the government downsizing upon the private sector, requiring the successful commercial entity to offer jobs to all Federal workers displaced by the conversion at comparable pay and benefits, and without geographic upheaval.

The LOGMOD Legal Team's detailed and thorough knowledge of all aspects of OMB Circular A-76, the supplemental handbook, implementing Army Regulations, and the law, primarily 10 USC 2461, and its eloquent articulation of the business strategy resulted in the first cost comparison waiver granted within DA.

## Preventive Law Program Award

The selectee received a Certificate of Achievement signed by General Coburn and an engraved marble paper weight.

The Awards Committee identified the following nominees, for this year's Preventive Law Program Award as deserving special recognition:

**Carrie Schaffner,**  
TACOM-ACALA

TECOM's Client Services Division, chaired by **Michael Millard**

AMCCOM's Client Services Division, led by **CPT Erika Cain and CPT Andrew Sinn.**

The recipient was **Carrie Schaffner.**

Ms. Schaffner was recognized for her outstanding planning and execution of the TACOM-ACALA Ethics training program and education program for some 500 employees who file Confidential Financial Disclosure Reports—OGE Form 450s.

In previous years the Form 450 filing process was impersonal, with little face-to-face contact, with training conducted in large group sessions. Ms. Schaffner saw opportunities to improve the process, and she did. She sent detailed written instruc-

tions to each individual filer via e-mail, encouraging those with questions to call her. She prepared a checklist for supervisors to use in reviewing the forms. She scheduled "office hours" to go into each office and directorate to answer questions and to review the forms. This enabled her to meet with the filer or supervisor immediately when spotting an issue.

Regarding Ethics Training, Ms. Schaffner conducted the training in small group settings in or near the organizational work unit. The small group sessions permitted an increased dialogue and sharing of information and concerns, improving the educational process.

By going out into the workplace and meeting personally with employees, Ms. Schaffner sent a message that ethics issues are important to TACOM-ACALA, and that it is easy to get help. She has established a rapport with the employees, who feel comfortable calling on her with ethics concerns, large and small. Her efforts directly implement the AMC philosophy of preventive law by encouraging her clients to seek her advice early to better enable her to assist them.

# Special CLE edition

## Buckley Managerial Excellence Award

The selectee received a Certificate of Achievement signed by General Coburn, and an engraved marble paper weight.

This year we recognized the following nominees in alphabetical order:

**COL Roger Cornelius**, AMCOM

**K Krewer**, TACOM-ACALA

**Mark Sagan**, CECOM

The recipient was **Mark Sagan**

Mr. Sagan's nomination was based on the sustained exceptional performance of his myriad duties and responsibilities as CECOM Deputy Chief Counsel and for his performance as the Chairperson of the AMC Partnering Team.

Since assuming the position of Deputy Chief Counsel in 1996, Mark has ensured that the CECOM excellence in source selection has continued. Illustrative of his significant contributions in this area are his Herculean efforts as counsel to the Source Selection Advisory Council for the multimillion dollar High Capacity Line of Site radio

program. He guided the evaluation and negotiation process, ensuring the completeness, clarity and defensibility of the final source selection decision, which resulted in a timely award without litigation.

As Chairperson of the AMC Partnering Team, Mr. Sagan played a major role in the drafting of the AMC Partnering Guide, the filming of the AMC Partnering Video-Tape, and the planning and execution of the January 1999 Lead Partnering Champion Workshop—during which he was “master of ceremonies”. He also authored articles on Partnering for the NCMA Contract Management and RD&A magazines, which resulted in numerous inquiries from government and industry for more information on the AMC Partnering Program.

Significant contributions to the management of the CECOM Legal Office include the coordination and execution of the Consideration of Others program, resulting in the office having the best CO2 training completion rate within CECOM.

## Editor's Award Goes to CECOM Legal Office

In a ceremony presided over by AMC Command Counsel **Ed Korte**, the CECOM Legal Office was recognized for significant contributions to the success of the bi-monthly AMC Command Counsel Newsletter.

CECOM contributed twice as many articles to the AMC Newsletter than any other AMC legal organization.

This award ends two years in which the award was received by individual attorneys: **CPT Joe Edgell and Lisa Simon**.

In prior years TACOM received the award on two occasions, and the Natick Legal Office also took honors one year.

Our editor **Steve Klatsky** thanks all of those who take the time and make the effort to submit articles for publication.

During the course of the year we get many positive comments from other legal organizations and clients regarding the quality of this work product.

## Bob Parise: AMC Attorney of the Year for 1999--Receives Joyce I. Allen Award

The AMC Attorney of the Year Award is called the **Joyce I. Allen Award**. Joyce Allen was an attorney with the AMC legal office in St. Louis. This year's nominees selected for special recognition, in alphabetical order, were:

**Howard Bookman**, CECOM

**Maria Bribriesco**, TACOM-ACALA

**Melinda Finucane**, Letterkenny Army Depot—CECOM

**Robert Parise**, TACOM-ARDEC

**Janet Wise**, TECOM

This year's recipient was **Bob Parise**.

**Bob Parise** is the Associate Chief Counsel and Chief of the Business Law Team of the TACOM-ARDEC Legal office. He has been with AMC and Picatinny for 17 years. Mr. Parise has promoted acquisition reform and achieved exemplary results in numerous, complex acquisition matters.

The Crusader system is 1 of only 2 major defense acqui-

sition programs currently under development by the US Army. As legal advisor to this program, Bob has made several significant contributions to the development of this program's acquisition strategy. Bob was part of the management team that developed the program documentation, including an Acquisition Strategy Report and Justification & Approval for the Crusader to enter into a \$5 billion EMD phase.

The innovative agreement with the prime contractor, which Mr. Parise helped negotiate, has received wide acclaim throughout the DOD acquisition reform community.

Mr. Parise was also instrumental in negotiating a significant program restructuring for the 155MM Joint Lightweight Howitzer Program. This joint Army-Navy (Marine) program suffered from many early technical problems and contractual issues. Mr. Parise, together with other senior counsel, formulated an innovative ap-

proach to resolve the contract and management problems encountered under the original contract. A novation arrangement was negotiated among the prime and the major sub contractor, which allowed the 2 to essentially "switch roles".

Mr. Parise has also promoted an increase in technology transfer efforts at TACOM-ARDEC. For example, under his leadership, TACOM-ARDEC expanded its use of selling authority under 10 USC 2439b, by working with the Picatinny Tech Transfer Office in developing a training and marketing strategy. As a result, during FY 1998, arrangements with private industry and the academic community resulted in numerous testing agreements for TACOM-ARDEC services with a total value over \$500,000. This has allowed for greater technology transfer opportunities, as well as increased utilization of state of the art modeling, simulation, and diagnostic test equipment.

# *AMC Legal Office Profile*

Communications-Electronics Command, Fort Monmouth, NJ

## **PART II**

(Part I of the CECOM office Profile appeared in Newsletter 99-2, April 1999).

### **Office Structure**

The Legal Office is comprised of the Office of Chief Counsel, which includes two Project Counsels, along with six operating Divisions: Business Law Divisions A, B and C; Intellectual Property Law Division; Staff Judge Advocate Division; and Competition Management Division.

### **Office of the Chief Counsel/Project Counsel**

The primary responsibilities of the **Chief Counsel/Deputy Chief Counsel** are to serve as the final authority on all legal matters pertaining to CECOM and its resident and satellite activities; to manage and oversee the execution of the Legal Office's mission; and to serve as the Alternative Dispute Resolution (ADR) senior advisor for CECOM.

The **Project Counsels** provide the full spectrum of legal support to the CECOM Deputy for Systems Acquisition/Systems Management Center (SMC) and the Project Manager, Warfighter Information Network-Terrestrial (WIN-T).

### **Business Law Divisions A, B and C**

The principal focus of Business Law Divisions A, B and C is the full spectrum of Government contract law, including all pre and post-award matters.

The Business Law Division attorneys are routinely involved in the most highly visible and complex CECOM acquisitions, play a preeminent role throughout the source selection process and have successfully utilized all current acquisition streamlining initiatives, including cost as an independent variable (CAIV), Requests for Information, oral presentations, broad use of the internet, performance oriented specifications, etc.

Another main focus of

these Divisions involves appearing as Agency counsel in EEO/labor cases before the EEOC, MSPB, FLRA, etc., as well as playing an active role in all GAO, ASBCA, U.S. Court of Federal Claims and District Court actions.

### **Intellectual Property Law Division**

The Intellectual Property Law Division (IPLD) is responsible for handling all matters that deal with patents, copyrights, or trade secrets.

Included in this group are patent filing and prosecution matters; claims and suits against the Government for patent or copyright infringement; rights in technical data; and the licensing of patents, copyrights, or computer software.

In addition, IPLD is the primary point of contact in the office for matters dealing with contracts outside the FAR and DFARS, including those related to technology transfer (i.e., Cooperative Research and Development Agreements, Cooperative Agreements, and Other Transactions); and those matters

# AMC Legal Office Profile

Communications-Electronics Command, Fort Monmouth, NJ

## PART II

dealing with international memoranda of understanding.

### Staff Judge Advocate Division

The mission of the Staff Judge Advocate (SJA) Division is to advise the Commanding General, CECOM organizations, and resident units on matters relating to military justice and military personnel law, and to supervise the administration of military justice; to provide legal advice on, and manage CECOM programs on claims, legal assistance, environmental law, ethics, the Freedom of Information Act and Privacy Act, and general administrative law; to manage the Magistrate's Court operations; and to develop Legal Office plans, programs, and policies on mobilization and deployment.

The SJA Division is divided into two Branches: (1) Legal Services which deals with legal assistance and claims and (2) Military Law which deals with general administrative law and military justice and the Magistrate's Court program.

### Competition Management Division

One nontraditional feature of the CECOM Legal Office is the fact that in December 1966, the CECOM Competition Advocate's Office became one of the Divisions within the Legal Office.

The CECOM Special Advocate for Competition, **Theodore Chupein**, joined the Government in 1977 as an Army Quartermaster Officer, and began his acquisition career as a contract specialist in CECOM in 1980, where he worked in the Acquisition Center through 1985. He then worked with the Joint Tactical Command and Control Agency and most recently for the Defense Information Systems Agency (DISA), where he administered multiple award task order contracts for the DISA Joint Interoperability Engineering Organization. He returned to

CECOM in January 1999 as the Competition Advocate.

The Competition Management Division (CMD) is responsible for the review of all Justifications and Approvals (J&As) for Other than Full and Open Competition over \$500,000, and the Competition Advocate approves J&As up to \$10M. In addition to the processing of J&As, CMD reviews a multiplicity of other acquisition documents including Acquisition Plans, Management Decision Documents, and Acquisition Requirements that are subject to review by the Functional Requirements Authentication Board

**TACOM Profiled in  
Newsletter 99-4**

# Faces In The Firm

## Departures

### Letterkenny

**Danny Moye** has departed Letterkenny Army Depot to work for the FBI in West Virginia. LEAD wishes Danny good luck. LEAD's loss is the FBI's gain. He will be missed.

### Watervliet Arsenal

**Ted Hilts** has accepted a VERA and retires this summer with 28 years of service, over 21 with WVA. He will engage in private practice and teaching at the college level

### TECOM

SJA COL **Jim Currie** will be departing shortly. Jim has been a superb leader in coordinating the reorganization of TECOM as it becomes part of the Army Test Command in the fall.

### SBCCOM--Soldier Systems Center

Tin Soldier Loses Two More Limbs! Paralegal Specialist **Jessica Niro**, and Attorney **Richard Mobley** recently left the SBCCOM legal office at the Soldier Systems Center (Natick). Ms. Niro is working for the Commonwealth of Massachusetts Human Resources Department. Mr. Mobley traded quality of life for quantity of pay in his new position as procurement attorney on the JSTARS program at Hanscom Air Force. Best of luck to the two of them. Will someone scrape John Stone off the ceiling.

## Arrivals

### Letterkenny

**Everett Bennett**, formerly a term employee for LEAD, has filled a permanent position.

### HQ AMC

**Michael Lassman**, recently of STRICOM, and formerly with TACOM-Warren, has joined the General Law Division to do employment law litigation work.

## Awards & Recognition

### HQ AMC

In a ceremony presided over by AMC Commander **General John Coburn**, **Steve Klatsky** and **Cassandra Johnson** were recognized for their outstanding work in de-

veloping and evaluating the REDS Program--Resolving Employment Disputes Swiftly, our model ADR program for workplace disputes.

## U.S. Army Industrial Operations Command (IOC) A-76 Studies

In 1983, the Office of Management and Budget issued OMB Circular A-76, establishing federal policy regarding the performance of commercial activities. In 1987, President Ronald Reagan signed Executive Order 12615, directing all executive agencies to, among other things, study 3 percent of their civilian personnel spaces under the criteria of OMB Circular A-76 until all commercial activities have been studied. Congress wrote CA Policy into law as 10 USC 2461 on July 19, 1988. DOD Directive 4100.15 and DOD Instruction 4100.33 provide implementing guidance for the Department of Defense, and AR 5-20 provides guidance for managing and carrying out the CA Program with the Department of Army. The OMB Circular A-76 Revised Supplemental Handbook, which updates guidance and procedures, was issued in March 1996. The concept of CA apparently dates back to 1955 when the Bureau of the Budget announced a national policy to rely on the private sector for goods and services whenever proper and economical to do so.

The IOC is currently conducting A-76 commercial activity studies of all of its conventional ammunition demilitarization operations located at depots and munitions centers. In addition complete studies are being made of all three arsenals: Rock Island, Pine Bluff, and Watervliet.

The IOC headquarters legal center is supporting these studies through an A-76 oversight committee composed of Ms. Marina Yokas-Reese, Mr. William Bradley, and Mr. Sam Walker. Additionally, the office is providing two lawyers in support of each individual study.

Presently, Production Work Statements (PWS) are being prepared by each of the sites with the assistance of support contractors. The sites are in the process of submitting initial draft PWS's for headquarters review and coordination. Many unique questions are presented requiring input from areas as diverse as environmental, personnel, specialized technology, small business, resource management, and acquisition.

The Source Selection process and strategy is taking shape; Selection Boards are being organized. Thought is being given to selection plans. In the near future, draft documents may be submitted to industry for comment and input. Briefly, the A-76 study process is as follows:

First, a function is identified for review and a study plan is developed, Congress is notified of the intent to conduct the study if the CA is performed by more than 45 civilian employees (IAW 10 USC 2461). After announcement of the study to Congress (more than 45 employees) or MACOM approval (45 or fewer employees), the local work force is notified of the study and what to expect.

Next, a Performance Work Statement (PWS) is developed which describes what work is to be accomplished to successfully deliver the required levels of service. The PWS lists required tasks without specifying the method of performing them. Data are gathered on past workload levels to project future workload requirements, and performance requirements standards are developed to ensure that an acceptable level of performance (ALP) of service is maintained. The PWS also includes the nature and extent of government-owned facilities, equipment, and other property available to use in accomplishing the work.

A management study is then performed to analyze the existing Army organization and operation. This study develops the Most Efficient Organization (MEO) to perform the work in the PWS. It does this by identifying improvements, thus reducing the resources required to perform the work in the PWS. The MEO is the basis for the in-house cost estimate in the cost comparison.

Bids or proposals from prospective contractors or non-DOD Intragovernmental Support (IGS) providers are then solicited based on the requirements contained in the PWS. The solicitation provides for a common standard of performance upon which to base an equitable comparison of in-house costs with contract or IGS costs for performing the same work. From this solicitation, the Army identifies the bidder/offeror to compete against the government MEO.

Costs the Army will incur to convert the function to contract and administer the contract are also calculated. An Independent Review of all costs is then conducted -- usually by the US Army Audit Agency (USAAA) or the installation Internal Review Office (IRO) -- to ensure that the cost estimates are accurate and based on the work set forth in the PWS. Following the Independent Review, the in-house cost estimate is submitted to the Contracting Officer in a sealed envelope before the deadline for submission of bids or proposals from private industry.

After receipt of bids or selection of the one offeror with the most advantageous proposal, the cost of contract or IGS is compared with the in-house cost estimate. For a contract or IGS to be selected as more cost effective than the government, the cost of contract or IGS operations must be less than the in-house cost estimate by at least the amount of the "conversion differential," which is the lesser of 10% of the personnel cost portion of the in-house cost estimate or \$10,000,000, whichever is less

The results of the cost comparison bid opening are announced locally and in the Commerce Business Daily. This "initial decision" is subjected to a review period that allows interested parties to examine the decision documents and appeal portions that do not appear to be in accordance with AR 5-20 procedures. After appeals are resolved (by a

MACOM-level Administrative Appeals Board - AAB), the "final decision" is announced to Congress if the CA is performed by more than 10 civilian employees. If the in-house proposal was determined to be more cost effective, the solicitation is canceled. If the cost comparison results in a contract decision, a contract is awarded

A transition plan is developed and executed. This plan covers equipment turnover, personnel actions, training, inventory and procedural changes. The new operation is continually monitored to ensure the acceptable levels of performance (ALPs) set in the performance work statement (PWS) are met. The quality assurance surveillance plan (QASP), developed by the study team while working on the PWS, sets procedures for conducting surveillance of the new operation. The QASP is used to monitor the performance of the new operation, whether in-house MEO, contract, or IGS.

Any questions in this regard may be directed to Mr. Samuel J. Walker, Acquisition Law, Law Center, U.S. Army Industrial Operations Command, DSN 793-8421, E-Mail [walkers@ioc.army.mil](mailto:walkers@ioc.army.mil).

# **PARTNERING FOR SUCCESS: A Blueprint for Promoting Government-Industry Communication & Teamwork**

By Kenneth Bousquet and Mark Sagan

**Procuring Contracting Officer (PCO):** The reason we've called this meeting is to discuss the program delays. We were told six months ago in a program review that everything was on schedule. Last week we heard from the Quality folks that the program is six months behind schedule. What's going on?

**Contractor:** WHAT?! We NEVER said, "everything was on schedule." Who said that? What day was that review?

**Program Manager (PM):** It doesn't matter anymore. Why are you six months behind?

**Contractor:** Well, based upon previous discussions with the engineers, we thought updated requirements would be provided soon that would significantly improve the system with only a minimal cost impact. Although no one ever told us to stop performing, it sure seemed like the smart thing to do.

**Chief Government Engineer:** WHAT?! We NEVER said we were updating the requirements. Who said that? You guys know we can't afford to lose any time and we sure don't have any extra money...Do we?

**PM:** No, we don't have any extra money. Now, how can we get back on schedule?

**Contractor:** Well, we learned a few weeks ago that a couple of your specifications are conflicting. We put in a lot of time and money on the affected subsystem so we'll have to redesign it and run another test.

**Chief Government Quality Representative:** WHAT?! When did that happen? Which specs? Which subsystem?

**PM (to Contractor):** Look, you guys are responsible for this mess. The contract clearly says you must build a system that meets the requirement and deliver it by a certain date. If you can't do that, we'll find another firm to do the job.

**Contractor:** Your contract is poorly written. Our lawyers tell us the ambiguities and lack of clarity, in addition to the poor direction from government representatives, places the responsibility with you.

**PCO:** Not so fast! Our lawyers say the contract is very clear and you simply failed to comply with the terms and conditions.

**PM:** Now what?

**Contractor:** We'll submit a proposal to clean up the requirements, together with a revised delivery schedule and the total cost impact of those changes - which I can assure you will be significant.

**PCO:** Your firm must comply or the contract will be terminated.

**Contractor:** If the contract is terminated the settlement will cost the government a great deal.

**PM:** (Audible Groan.)

Unfortunately, most of us have been confronted with this exact scenario when contract administration breaks down and the program suffers, sometimes with dire consequences. No single individual or organization is to blame, but it's apparent that communication has failed and a cooperative team approach to resolving issues is nonexistent. The obvious, or perhaps not-so-obvious, bottom-line to all of this is that we fail to meet the needs of the user (our ultimate customer) and the U.S. taxpayer.

Is there a better way to deal with post-award issues? Absolutely!

## **AMC'S NEW PARTNERING GUIDE**

In April 1997, the U.S. Army Materiel Command (AMC) published the "*Partnering for Success*" guide to assist and encourage Army Contractors, Program Managers, Contracting Officers, and all contract stakeholders to improve the manner in which contracts are performed and administered. The guide contains an overview of what Partnering is all about and why it's critical for Army programs to consider implementing a Partnered approach to post-award efforts. The guide promotes a clear four step process to make Partnering an invaluable asset to any program. The guide also includes numerous samples and 32 answers to commonly asked questions regarding Partnering to help the reader better understand the process and its potential benefits for their program.

## **WHAT IS PARTNERING?**

Partnering is a commitment between government and industry to improve communications and facilitate contract performance. It is accomplished through an informal process, with the primary goal of providing our customers with the highest quality supplies and services, on time, and at reasonable prices. It is primarily an attitude adjustment in which the parties mutually commit to form a relationship of teamwork, cooperation, and good faith performance.

Partnering is not a new concept. It has been used successfully since the early 1980's in construction contracting by both the private sector and the U.S. Army Corps of Engineers. The results of implementing Partnering have been extremely impressive. Cost overruns, performance delays/delinquencies, claims, and litigation have essentially been eliminated. In a contracting environment that was historically plagued with these types of problems, this is indeed a monumental accomplishment.

AMC is now utilizing the Partnering concept in research & development, materiel acquisition, base operations, and engineering/support services contracting. Partnering has become an integral part of the AMC Alternative Dispute Resolution (ADR) program which is focused upon the avoidance of contract disputes before they impact contract performance.

## **IS IT LEGAL?**

Understandably, there is a great deal of apprehension on the part of both contractor and government personnel when they first learn about the Partnering process. We in the contracting field have been taught to maintain an "arms length" relationship with our contracting counterparts and to avoid any appearance of being "too close" to one another. Unfortunately, in all too many instances this has led to adversarial relationships as each party strives to achieve its own individual, program, or corporate goals and objectives.

The AMC Model Partnering Process has been endorsed by the AMC legal community with great enthusiasm. In fact, Mr. Edward Korte, the AMC Command Counsel, was an active participant on the AMC Partnering Committee which published the Partnering guide.

The Partnering process is not inconsistent with any acquisition-related statute or regulation, nor does it replace any requirements contained in the contract. It is not a contractual agreement and does not create, relinquish or conflict with the parties' legally binding rights and obligations. Simply put, the contract spells out the legal relationship of the parties, while the Partnering Agreement establishes their business/working relationship.

## **PARTNERING BENEFITS**

Experience in the Corps of Engineers, and in AMC programs already utilizing the Model Partnering Process, has revealed numerous attributes of the Partnering process which facilitate contract performance. Some of these benefits are:

- Establishment of mutual goals and objectives. The parties recognize that their success is dependent upon their ability to work together as a team throughout contract performance. They agree to replace the traditional "us vs. them" mentality of the past with a "win-win" philosophy and partnership for the future.
- Concentrating on the mutual interests of the parties rather than individual positions or agendas. Partnering engenders a team-based approach to issue identification and problem resolution, which is focused on the accomplishment of the parties' mutual objectives.
- Building trust and encouraging open, honest and continuous communication throughout contract performance.
- Through enhanced communication, elimination of surprises that result in program delays and increased costs, as well as claims and litigation.
- Enabling the parties to proactively anticipate, avoid and expeditiously resolve problems through the development of Action Plans which identify the problem as well as its cause, the best alternative for avoiding/resolving it, the individual(s) within the government and contractor organizations responsible for resolving the issue, and a timetable for accomplishing that objective.
- Reduced time and cost of contract performance by adhering to a clear method of raising, discussing, and expeditiously resolving issues.

- Resolving disputes through the use of a clearly defined Conflict Escalation Procedure, a three-tiered process which includes the essential participants in the Partnership, all of whom are fully empowered with the requisite authority and responsibility to make binding decisions in their areas of expertise. Each of the participants know that they will have a fixed number of days within which to resolve any issue with which they are confronted. If they fail to do so, the issue will be automatically escalated through the second and third organizational levels. This procedure avoids inaction and precludes allowing problems to fester. Most importantly, however, experience has shown that almost all issues are successfully resolved at the lowest organizational level.
- Avoiding the expense, delay and mistrust caused by formal litigation through the implementation of an ADR procedure.
- Reduced paperwork and necessity for “documenting the file”. The reduction in paperwork is facilitated by the “real time” simultaneous review of contractual documentation such as Technical Data Package changes, Engineering Change Proposals, and Contract Data Requirements List submissions in lieu of the traditional, sequential review process often necessitating multiple drafts, revisions and supplements over the course of weeks or months.
- Reduced administration and oversight.
- Improved safety at the work site or manufacturing location with all parties taking joint responsibility for ensuring a safe working environment for all contract stakeholders.
- Improved/streamlined engineering activities.
- Improved employee morale and enhanced professionalism in the workforce through the empowerment of team members to formulate and cooperatively accomplish common goals and objectives. The result is that the participants develop a personal stake in the ultimate contractual outcome.
- A far more harmonious business relationship.

## **THE AMC MODEL PARTNERING PROCESS**

AMC reviewed the processes used by the Corps of Engineers and AMC field offices on Partnered contracts. The Partnering Committee conducted interviews with numerous government and contractor representatives experienced in Partnering. As a result of this review and analysis, together with considerable assistance/input from acquisition professionals at several AMC major subordinate commands, a Model Partnering Process was developed. This simple four step process can be easily implemented on a wide variety of contracts and can be tailored by government/contractor teams as necessary to achieve the objectives of their programs.

Notwithstanding the flexibility of the process, each of the four steps are very important and should not be overlooked. The four steps are:

1. Getting Started
2. Communicating with Industry
3. Conducting the Workshop & Developing the Charter
4. Making It Happen

### **• STEP ONE: GETTING STARTED**

#### Making the Decision to Partner

This first segment of Step One is critical. Although Partnering may be used on any contractual action, it is up to the contracting parties to decide where it can provide the greatest benefit. Any one of the many stakeholders in a contractual arrangement can suggest the use of Partnering by bringing this concept to the attention of the Procuring Contracting Officer (PCO) or the Program Manager (PM). Partnering is most beneficial on high dollar, complex contracts of at least two years’ duration. Partnering is particularly beneficial in contracting arrangements where there is a history of adversarial relationships or poor performance or problems are anticipated on an ensuing contract. Partnering has proven to be extremely valuable in conjunction with acquisition streamlining and cycle time reduction efforts and within those organization that are receptive to new ways of doing business.

#### Making the Commitment to Partner

To succeed, Partnering requires the total commitment of not only each of the participants, but also senior management within both government and industry who must be visible and vocal advocates for this process. A fundamental component of the Partnering process is to empower participants with the requisite responsibility and authority to make binding decisions within their designated areas. Senior managers must lead the Partnering process by reinforcing the team approach to contract administration, breaking down barriers, actively participating in the resolution of issues escalated to their level, celebrating successes and maintaining a positive image for the project. In short, they must “Champion” the process.

#### Obtaining Resources

An initial investment in both time and money is imperative in order to make the Partnering process work. The senior managers’ commitment to Partnering will be severely tested when these two items are put on the table. Time is needed for each of the participants to learn about Partnering and attend scheduled workshops. Money is needed to cover the cost of the Partnering Workshop which includes hiring a facilitator, renting a facility and any necessary travel-related expenses. This up-front investment will yield significant benefits during contract performance. If your organization is unable or unwilling to make this commitment, Partnering isn’t for you.

### • STEP TWO: COMMUNICATING WITH INDUSTRY

#### Extending the Invitation to Partner

Normally, we would expect to see the government contracting office notifying industry that it wishes to utilize Partnering on a contract. It should not, however, surprise PCOs and PMs to find contractors asking their government counterparts to use Partnering in the near future. As this process is being used more frequently, a growing number of contractors have found it to be the best way to maximize effective contract performance. It is strongly recommended that the government’s interest in Partnering be expressed as early in the acquisition as possible and be reflected in draft solicitation documents issued on Electronic Bulletin Boards or the World Wide Web.

Solicitations should contain a clause informing offerors of the government’s desire to use Partnering on the resulting contract. The AMC Partnering guide should be made available to potential offerors to ensure they fully understand the process. If copies of the guide are not available, the clause should reference the following AMC internet address where a copy of the guide can be found: <http://www.dtic.mil/amc/>. A full explanation of Partnering should be made at the pre-solicitation conference for competitive programs and at the pre-proposal meeting in sole source acquisitions.

#### Mutual Agreement to Partner

Implementation of the Partnering process should be discussed with the successful offeror immediately after award. The Post-Award Conference can provide an excellent opportunity to conduct the Partnering Workshop.

### • STEP THREE: CONDUCTING THE WORKSHOP & DEVELOPING THE CHARTER

#### Selecting a Facilitator

In most cases, a facilitator-directed Partnering Workshop will accelerate the successful implementation of the Partnering effort. The facilitator is neither a contractor nor government employee, but a neutral individual acting as the workshop instructor and “honest broker” throughout the Partnering process. The facilitator leads the participants in building their team, designing their Charter, identifying potential problems, and developing the Conflict Escalation Procedure. The government and contractor should work together to secure the services of the facilitator. Assistance is available by contacting any of the members of AMC’s Partnering Team listed in the guide.

#### Preparing for the Workshop

Preparation for the workshop is critical. The facilitator's help at this stage of the process will ensure that the maximum benefit is derived by all parties during this session. These preparatory meetings will provide information regarding the Partnering process to the contractor and government participants and afford the facilitator an opportunity to learn the personalities and concerns of the individual team members. Additionally, the facilitator will be introduced to the contractual requirements and program objectives from both the contractor and government perspectives and be able to identify significant issues for discussion at the joint workshop.

Everyone who will play a critical role in achieving contract success must participate in the workshop. Anyone not attending the workshop will not fully understand the Partnering philosophy and this can hinder the implementation of the Partnering process on that program.

The workshop should be conducted at a neutral site away from the workplaces of all the stakeholders. This should ensure a continued focus on learning the Partnering process by avoiding interruptions and conflicting demands on the participants' time and assist in building the contractor/government team.

### Conducting the Workshop

Workshops will vary in length depending upon the unique needs of each contract and the experience of the participants with Partnering. Some may need a one or two day workshop while others may need four or five days. What happens at the workshop will create the momentum that drives the partners in the same direction toward the successful accomplishment of mutual goals and objectives throughout contract performance.

Examples of subjects/tasks performed at the workshop are: bringing the players together through one or more team-building exercises; developing the Partnering Charter; identifying the roles and responsibilities of each of the participants; identifying program issues/concerns together with an Action Plan for each; building the Conflict Escalation Procedure; agreeing upon an ADR procedure; listing the metrics for assessment of accomplishments; and, determining appropriate reinforcement techniques.

The Partnering Charter or Agreement is the focal point of the parties' relationship and a blueprint for their success. The parties set forth their mission statement, mutual goals and objectives, and commitment to the Partnering relationship.

A critical component of the workshop is the discussion of problem resolution and the development of a Conflict Escalation Procedure. In traditional contract administration, the parties rarely discuss how they will manage and resolve conflicts. Usually they just struggle through the issues. Sometimes they are successful. Unfortunately, all too often the result is strained relationships, program delays, cost overruns, and increased paperwork. This can lead to disputes, claims and litigation, a costly scenario for everyone. The use of a clearly identified Conflict Escalation Procedure will ensure the efficient resolution of issues by specifically identified individuals.

### • **STEP FOUR: MAKING IT HAPPEN**

Once the participants learn about the Partnering process and complete the workshop, it is up to them to change the way they've been doing business and implement the tools, techniques and processes that they all agreed upon. They must trust the product of the workshop and follow the Partnering procedures. The participants must continuously communicate with their counterparts, at their respective levels, to overcome any obstacles blocking the accomplishment of the identified goals and objectives.

It is very important for senior managers to receive periodic updates on the Partnering process and provide encouragement and support to the participants. They must assess the Partnering relationship to ensure that actions taken are consistent with the Charter objectives. If necessary, a follow-up workshop should be held to refocus the participants on the Partnering process and educate new stakeholders. It is senior management's responsibility to celebrate the team's successes and continuously reinforce the use of the Partnering tools.

## **CONCLUSION**

With downsizing straining all of our resources, it is imperative that we take full advantage of any process that eliminates non-value added activity. Adversarial relationships lead to an extraordinary waste of time, money and effort. Partnering has proven to be an outstanding tool for overcoming these problems and will maximize the likelihood of your program's success.

The AMC Partnering guide provides additional details to assist your organization or company.

As General Johnnie E. Wilson, Commanding General, Army Materiel Command, stated in endorsing Partnering, "Accomplishment of AMC's mission depends on our ability to work effectively with our partners in industry. Partnering helps us to do this successfully and deliver the very best products to our ultimate customers - the soldiers."

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## **INHERENTLY GOVERNMENTAL FUNCTIONS**

1. With the increasing emphasis on the competitive sourcing (i.e., contracting out or privatization) of commercial activities/functions performed by the Government, it is important to understand that not all activities/functions presently performed by Government employees can be contracted out or privatized. Conversely, although each of us likes to believe that the services we render the American taxpayer are “inherently Governmental”, that may not necessarily be true. In fact, it often is not.
2. The cornerstone of the Government policy regarding the performance of commercial activities by either the private commercial sector or in-house by Government employees is Office of Management and Budget (OMB) Circular No. A-76 (revised) dated 4 August 1983. As set forth in the Circular, it is the policy of the Government to rely on commercial sources to supply products and services that the Government needs. If the Government is performing an activity that the commercial sector has the ability to perform, then as a matter of policy, that activity generally should be considered for conversion to private performance.
3. The major exception to the policy that the Government should rely on commercial sources to supply products and services is the performance of activities/functions that are considered to be inherently Governmental in nature. According to OMB, activities/functions are considered to be inherently Governmental when they are “so intimately related to the public interest as to mandate performance only by Federal employees.” Inherently Governmental activities/functions cannot be performed by the commercial sector. These activities/functions require either the exercise of discretion in applying Government authority or the use of value judgments in making decisions for the Government.
4. The OMB Circular sets forth two categories of activities/functions that are normally considered to be inherently Governmental. The first includes activities/functions that are considered to be acts of governing and the discretionary exercise of Government authority such as criminal investigations, prosecutions and other judicial functions. The second category includes monetary transactions and entitlements such as tax collection and revenue disbursements.
5. In the Supplemental Handbook to Circular No. A-76, dated March 1996, OMB expressly states that inherently Governmental activities/functions are not subject to the requirements of Circular A-76 or the Supplemental Handbook.

The decision as to whether an activity/function is inherently Governmental is dependent on a number of factors, including the level of Federal control required and the nature of the function. Although neither Circular A-76 nor the Supplemental Handbook specifically identifies any activity/function as being inherently Governmental, OMB refers to the guidance provided by the Office of Federal Procurement Policy (OFPP) Policy Letter 92-1, dated 23 September 1992, for assistance in identifying inherently Governmental activities.

6. In Appendix A to Policy Letter 92-1, OFPP provides an illustrative list of functions that are considered to be inherently Governmental. Additionally, OFPP indicates that inherently Governmental functions involve the following types of actions:

a. The interpretation and execution of the laws of the United States so as to bind the United States to take or not take some action by contract, policy, regulation, authorization, order or otherwise;

b. Actions that determine, protect and advance the Government's economic, political, territorial, property or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management or otherwise;

c. Activities that significantly affect the life, liberty or property of private persons;

d. Actions that commission, appoint, direct, or control officers or employees of the United States; or

e. Actions that exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

7. According to OFPP, inherently Governmental activities/functions do not normally include gathering information for or providing advice, opinions, recommendations or ideas to Government officials. Inherently Governmental functions also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, the operation of cafeterias, and housekeeping; facilities operations and maintenance; warehouse operations, motor vehicle fleet management or mechanical services. Further illustrations of non-inherently Governmental functions are included in Appendix B. It is clear, based on this guidance, that many Government activities/functions would not be considered inherently Governmental in nature.

8. In determining whether an activity/function is inherently Governmental, one of the key factors to consider is whether the activity/function involves the exercise of discretion. The greater the amount of discretion involved in performing the activity/function, the more likely it would be considered "inherently Governmental". However, not every activity/function that involves the exercise of discretion is inherently Governmental. The use of discretion must have the effect of

committing the Government to a course of action. Therefore, although a position that includes the authority to set or change regulatory policy would be considered inherently Governmental, a position that involves providing advice or recommendations on implementing such a regulatory policy would not be considered inherently Governmental. In determining if an activity/function is inherently Governmental, OFPP states that the totality of the circumstances must be considered.

9. The guidance issued by OMB and OFPP was incorporated into the Federal Acquisition Regulation (FAR), however, the FAR provides little additional illumination on the subject. Part 7 of the FAR sets forth the Government's policy on the use of private commercial sources and the limitations regarding inherently Governmental functions. FAR 7.301 states that the Government's policy is to rely on private commercial sources for supplies and services except for functions that are inherently Governmental. Additionally, FAR 7.503 specifically prohibits contracting out the performance of inherently Governmental functions.

10. FAR 7.503(c), however, does provide specific examples of inherently Governmental functions in the area of Federal procurement:

- a. Determining what supplies or services are to be acquired by the Government
- b. Participating as a voting member on any source selection board
- c. Approving any contractual document
- d. Awarding contracts
- e. Administering contracts, including ordering changes
- f. Terminating contracts
- g. Determining whether contract costs are reasonable, allocable, and allowable
- h. Participating as a voting member on a performance evaluation board
- i. Determining budget policy, guidance, and strategy

11. FAR 7.503(d) sets forth a non-exclusive list of functions that are considered not to be inherently Governmental. Among the listed functions are services that involve or relate to budget preparation; reorganization and planning activities; analyses, feasibility studies, and strategy opinions used by agency personnel in developing policy; the evaluation of regulations or another contractor's performance; acquisition planning; and the providing of assistance in the development of statements of work or the technical evaluation of contract proposals.

12. As the above discussion demonstrates, there is no clear definition as to what is or is not an inherently Governmental activity/function. Any final determination as to whether an activity/function is inherently Governmental and, therefore, exempt from the requirements of the OMB Circular and FAR Part 7 must be based on the totality of the facts and the guidance set forth in the FAR, the Circular and the OFPP Policy Letter.

13. The point of contact in the Legal Office for this matter is Mr. James V. Scuro, DSN 992-9801.

KATHRYN T.H. SZYMANSKI  
Chief Counsel

## "PRIVATIZATION THROUGH PARTNERSHIP"

### REMARKS BY THE HONORABLE MAHLON APGAR, IV ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS AND ENVIRONMENT)

ASSOCIATION OF THE UNITED STATES ARMY – ALAMO CHAPTER SAN ANTONIO, TEXAS

APRIL 9, 1999

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#### INTRODUCTION

Thank you, Mr. Mosely, for your kind introduction, and for all of your efforts in arranging this meeting. I'm pleased to join you in your beautiful and historic city, and to share our common interest in a strong and vital United States Army.

Before I begin, I'd like to ask all of you to join me in a moment of silent prayer for our troops in the Balkans and in other areas around the world where our Army is serving courageously and selflessly. **PAUSE**

As Mr. Mosely mentioned, I was appointed to this position after 32 years in the private sector, and my mission is to apply that experience to several major challenges in the Army -- how to improve the quality-of-life of our soldiers and their families; how to introduce "best business practices" in supporting the warfighting mission; how to reduce our infrastructure and overhead costs; and how to retain and enhance posts like Fort Sam that symbolize the Nation's and the Army's heritage. So long as there is an Army, I hope there is a Fort Sam -- and I will help in every way I can to ensure that result.

One of our most important assets in meeting these challenges is you -- you in the AUSA understand the Army's importance to the Nation, you are leaders in your communities, and most of you who aren't in the Army are in the private sector. During and since World War II, the "defense industry" has been integral to the Defense Department in providing the tools and systems of warfighting. But the Army's support activities -- from housing and utilities to supplies and distribution to hundreds of other functions -- have begun only recently to tap the capital and the capabilities of American business and local enterprise in a significant, transforming manner.

In the short time we have together today, I'd like to share with you some highlights of initiatives we are beginning in the Army's Installations and Environment office to do just that. We've adopted the theme of "Privatization through Partnership" to convey the overarching aim of partnering both with American business and with dynamic organizations in the non-profit sector to help us become more efficient and more effective in our core business: the design, construction,

operations, maintenance and management of Army installations; and the conservation, compliance, clean-up, and site disposal functions that are part of our environmental stewardship responsibilities.

### **THE MEANING OF PRIVATIZATION**

Privatization is an oft-quoted but little understood term. In fact, I find that outsourcing and privatization tend to be used synonymously in government. But they are very different. Outsourcing has been standard practice in the Army for some years, as it has in corporate America. It is the process of contracting with outside, independent organizations which can provide support services faster, better or cheaper than we can, mainly because those services are *their* core business, but they're not ours. Outsourcing does not shift the responsibility for performance or change the nature of the service. It merely changes the organization and methods of supplying or delivering the service. For example, when we outsource trash collection or publication of the garrison newsletter, we still retain the responsibility for ensuring that the service is accomplished on time and on budget -- and that it meets our service quality levels and other requirements that we have defined and agreed with the vendor.

Privatization, on the other hand, goes much deeper than outsourcing. It means shifting some or all of the responsibility for planning, organizing, financing and managing a program or activity from the Army to private contractors and partners, while retaining some interest in the operations, services and profits of the program. It may also mean transferring some or all of the ownership of Army assets, such as land, buildings and equipment, from the Army to a private entity.

The bottom line is that any military function or activity that is mirrored by a large, diverse, competitive market in the private sector is a candidate for privatization. This concept is new to the Army and to DoD as a whole, so it is especially important to clarify what we mean as we develop new doctrine and new applications in this strategic redirection of the way we do business.

In my judgement, privatization *means* partnership and can be accomplished only *through* partnership. Partnership is, by definition, a two-way street -- whether it's among individuals, within organizations, or between business and government. It is characterized by mutual interests, mutual understanding, mutual respect, and mutual responsibilities throughout the partnership's life.

Further, privatization has two components -- attracting private *capital* to help fund our programs and operations, and enlisting private *enterprise* in designing, managing and executing programs. Some of the Army's initial privatization efforts during the past few years, including utilities, family housing and land clean-up, have been driven by the principle of leveraging the Army budget with new sources of funds. But capital alone is not enough. In fact, we have recently renamed the Army's housing privatization program from "Capital Ventures Initiative", which focused on financing, to "Residential Communities Initiative", which emphasizes the end-state result we are seeking of attractive, affordable and sustainable communities for Army families that include not only housing but the amenities that most Americans enjoy in their neighborhoods and communities.

We want to leverage industry's ideas, knowledge and capabilities in community development and homebuilding, in project management, in "best business practices", in the use of

technology, and in the art and science of preparing property for reuse and redevelopment. In short, we want to benefit from what I call the "4 Es" of private enterprise -- the entrepreneurship, the energy, the efficiency and the expertise that industry can bring to a partnership with government.

Why are we focusing on privatization? Because we have to, for two reasons. First, we must reduce our vast infrastructure. We simply can't afford to carry the huge inventory of land, buildings and other facilities that we've inherited because they divert scarce resources from critical needs to modernize the force and improve our soldiers' quality-of-life. Privatization can help to create value from these illiquid real estate assets that can be redeployed for other purposes.

The second reason is specific to the Army's housing, facilities and environmental programs -- reducing the costs and leveraging the investments we make in construction, compliance, clean-up, disposal and base operations. Consider our resources. We now spend \$2.9 billion per year, or 4.6 percent of our total budget, on military construction; \$1.6 billion, or 2.5 percent, on real property maintenance; and another \$1.6 billion, or 2.5 percent, on environmental operations. For a time, the rate of increase in parts of our budget was greater than in most other major cost categories in the total Army budget. In an era of scarce resources, this alone is cause for concern because we cannot afford to shortchange the "tooth" by overspending on the "tail".

Yet we face acute problems that overshadow these budgets. We have a \$6.5 billion backlog of substandard family housing that would take 130 years to clear under current budget limits and procedures, or \$600 million a year of new funding for 10 years -- money we just don't have and simply will not get.

And while we are careful stewards of the lands and environments entrusted to us, environmental operations are not our basic mission. So we have to find innovative ways to cut the cost, contain the cost and control the cost of such support services. We have no other choice.

Other forces propel our interest, such as the Administration's Reinventing Government and National Performance Review platforms, and the Defense Reform Initiative. They call for fundamental changes in government's traditional role, with increasing reliance on the private sector to accomplish our goals. The National Defense Panel views outsourcing and privatization as key ingredients in DoD's transformation strategy over the next 20 years. And having entered government from the private sector only nine months ago, I already realize that this is a profound, but inevitable, change in the way the government does its business -- a "paradigm shift" in today's management jargon.

#### **INCENTIVES -- THE KEYS TO PUBLIC-PRIVATE PARTNERSHIPS**

To attract partners in the private sector, we must provide incentives. The firms we seek as partners -- those with the talent, the technology and the treasure we need -- will not engage with us just because we're big and we're here. But I believe that they will respond to four incentives we can offer -- and to an aggressive marketing program that shows we're serious.

The most obvious incentive is profit. There must be opportunities for real profit in every venture we seek to privatize; otherwise, it will not be a sustainable business proposition for the long-term.

With profit comes risk, so the second incentive is enabling the industry to balance the risks and rewards of partnering with us. Some of the Army's capital and operating risks can be

shifted to the private sector in return for potential profits. For example, the availability of relatively low cost environmental insurance to supplement contractor's equity and reduce risk makes the investment in land clean-up more attractive. And the provision for guarantees against base closures and major deployments in housing privatization reduces those extraordinary, uncontrollable risks for the developer.

Third, the Army offers scale, scope and sustainability to prospective industry partners. We have an enormous backlog of housing and other types of buildings to be revitalized and thousands of sites to be cleaned-up. From a business perspective, the size and diversity of our real estate portfolio enables companies to plan entry strategies in new markets for the long haul. Moreover, few organizations in the American economy can aggregate and structure programs in multi-million and multi-billion dollar packages as we can. If we do our job well, we should be able to attract many prospective partners and broaden the base of competition.

Consider land cleanup. It is not an Army core competency, yet we expect to invest \$18 billion in it over the next 20 to 30 years. This represents an enormous potential market for an industry with substantial technological and managerial competence. Indeed, privatization is the *only* means of accelerating cleanup consistent with planned investment levels to meet the Defense Planning Guidance goals for closing out sites.

Finally, we can – in fact, we must -- use innovative procurement methods, such as qualifications-based selection, performance-based contracting and incentive fee contracting. These stretch industry to use its ingenuity to find better, cheaper ways to meet our objectives, and ensure that we engage better quality partners to work with us.

#### **THE ARMY'S INFRASTRUCTURE INITIATIVE**

We're launching a series of initiatives to design, test and implement various approaches to privatization. They run the gamut of our installation and environmental responsibilities, from historic properties, family housing, and land clean-up and reuse, to utilities, energy management and environmental technology, to procurement reform. To give you a glimpse of privatization at work in the Army, here are several examples.

##### **Privatizing Utilities**

In utilities privatization – our earliest initiative -- we transfer ownership, operation and maintenance of our water, electricity and sewage treatment facilities to a private firm or special authority. So far, we have privatized 66 systems out of 1,100, and project an additional 800 systems for conversion between Fiscal Year 2001 to 2003.

A powerful tool in this is the energy performance contract in which private firms invest capital and provide energy enhancement equipment such as high efficiency boilers, heat pumps and new windows. In return, they share in cost savings from reduced energy consumption. In addition to cost savings, there are environmental benefits from lower emissions of greenhouse gases.

##### **Preparing Army Land for Reuse**

In preparing contaminated land for reuse, the Army traditionally has cleaned up properties *before* their transfer to local communities for redevelopment. We are now promoting a broad strategy that employs our early transfer authority in partnership with the private sector.

At one Army plant, a private developer wants our property to develop an entertainment theme park. The developer has proposed to conduct the cleanup in exchange for receiving credit

against the property's purchase price, using an early transfer authority. If this arrangement can be negotiated, the Army will not have to invest additional funds in cleanup. By taking risks, the developer stands to profit. A major incentive for the developer is tax exempt financing. This would be a win-win situation for both the Army and the developer.

### **The Army's Historic Properties Initiative**

Close to home for you, we are addressing the challenge of preserving and enhancing our historic posts and properties like Fort Sam by selective but proactive privatization.

The Army has the Nation's largest portfolio of historic properties by far -- some 12,000 historic buildings; 12 of our posts, including Fort Sam, are National Historic landmarks; and we face the prospect that 70,000 more buildings may be determined eligible for the National Register of Historic Places in the next 30 years.

The scale and diversity of this portfolio is a daunting challenge to all of us involved in the Army's installation management. But it also presents an extraordinary opportunity for creative ways to re-use old buildings and to recapitalize our real estate.

Fort Sam -- with over 900 historic buildings -- has one of our largest concentrations of historic properties, and an exemplary Historic Property Management program. Successive command teams have done a comprehensive inventory of historic buildings and have a solid compliance history with the National Historic Preservation Act.

The efforts of the Command, the Director of Public Works and the staff historic architect have enhanced the post noticeably. The Post Exchange and Commissary are sympathetic to the Spanish architecture of Fort Sam. A historic landscape plan provides texture, visual enhancements and drought resistant plantings. The design of a visitor information kiosk in the Quadrangle echoes a former hitching post documented by historic photographs.

Partnerships have played a significant role in the reuse of notable buildings. The historic band barracks, partially destroyed by fire, was rehabilitated through a partnership between the Army and the National Park Service's training program for the maintenance and repair of historic buildings. The building has now been returned to its original function as the home of the Fort Sam Houston band.

The Stillwell House, a former family housing unit, has been rehabilitated through the excellent work of the Friends of Historic Fort Sam Houston which restored the home through a unique arrangement where the rehabilitation work was a gift to the Army, and have made it available for both installation and community functions.

These innovative approaches to design, construction and operations result in compatible buildings that truly complement the historic nature of this post. And they are the types of actions that I envision for the rest of the Army. But to extend them both at Fort Sam and elsewhere, we have to change the way we manage historic properties. So we are forming an Office of Historic Properties to provide a focus for action, facilitate awareness, address the tough real estate and economic opportunities and constraints that we face with hard business analysis, and test innovations in how we do business in various locations.

We will be analyzing the rules associated with budgeting, leasing and renovating properties with a goal of "preservation and privatization through partnership", and evaluating the potential for an Army Historic Properties Trust to recapitalize these special properties and to provide needed funds for preservation. We have established Cooperative Agreements with the

President's Advisory Council on Historic Preservation and the National Trust for Historic Preservation. As our program matures, we will be seeking public and private sector partners to address specific preservation needs, such as the rehabilitation of notable buildings, such as BAMSI, and the privatization and preservation of historic family housing units.

### **Reforming the Procurement Process**

As we pursue partnerships to preserve and privatize the real estate, we have to make it easier and cheaper for the private sector to partner with us. So I have also pressed with great urgency to streamline the procurement process. We have developed a Request for Qualifications, known as an RFQ, in which the Army defines the qualifications for selecting the partner instead of detailing our plan for the project. Qualifications include the business vision for the project, demonstrated experience, financial resources and management capabilities. Once the partner is selected, we will jointly prepare the project development and management plan. The plan will set forth the terms of the partner's relationship with the government over the life of each project. This contrasts markedly with the traditional Request for Proposals process which forecloses the private firm from applying its ingenuity in creating the project before the bid is completed.

### **CONCLUSION**

I hope these examples will stimulate your interest and your ideas. And in closing, I leave you with this message: the Army is pursuing privatization with vision and vigor. We want to partner with the private sector, harnessing its entrepreneurship, its experience, its energy and its efficiencies wherever we can. These must be true partnerships, recognizing the benefits that derive from a balanced relationship with shared goals and expectations.

We are looking for successful models within the Army, elsewhere in DoD and the federal government, and in state and local government as well. We are also meeting with business executives to learn more about how they are managing public-private partnerships. As you leave today's meeting, I hope you will think about our theme -- "privatization through partnership" -- and about opportunities to serve the Army through public-private partnerships.

Thank you again, Mr. Mosely, for inviting me to join you today.

**END**

To develop and promote an overall privatization strategy, I have set up various task forces to identify and test pilot demonstration projects.

### **The Residential Communities Initiative**

The Army's housing privatization program is a major Administration priority, and it is one of the main reasons I was asked to take this office.

As I mentioned earlier, the Army has an acute family housing problem That we must solve to contract and retain soldiers and their families. I consider this basic institutional responsibility as my most important professional and personal challenge, and I have pressed forward with great urgency in the past eight months to design and test an Army housing privatization program. I am pleased to report that the industry has shown great interest in the program, and the Army leadership has expressed its support.

Our overriding goal is to enhance the quality of life for soldiers and their families by creating and sustaining attractive, affordable residential communities on Army Posts. The Army's Residential Communities Initiative is designed to maximize the Army's advantage of scale and use the privatization tools Congress has given us to attract the world's most effective homebuilding and real estate industry in housing the world's best Army in the quality communities they deserve.

As part of our pilot program, we are pursuing three changes in policy and practices. First, our management focus is shifting from *housing production* to *community development*. Each project will include the features and amenities that most Americans enjoy in their neighborhoods, such as extensive landscaping, community centers, recreation facilities, and ongoing maintenance of public space, as well as housing renovation and construction. The second change is transforming our business relationships from *contracting* to *partnering*, in which the developer will arrange the project financing from private investors, take the business risks, hire and manage the contractors, and provide ongoing services with specific performance measures that align the developer's goals with the Army's.

#### **Managing a Remediation Partnership -- The Army's Rocky Mountain Arsenal**

The Army's Rocky Mountain Arsenal, or ARMA, near Denver, is a superb illustration of privatization through partnership. The Army, the US Fish and Wildlife Service and Shell Oil Company created a unique partnership called the Remediation Venture Office (or RVO) to accomplish DoD's largest clean-up effort. Secretary of Defense William Cohen visited ARMA last June, and declared it a "national model."

A contractor manages over 36 separate projects. Contracting with a single firm to manage the entire cleanup has increased efficiency in three ways -- by ensuring that personnel with the appropriate job skills are matched to the task, by compressing the cleanup timetable considerably, and by reducing the cost of cleanup.

The contract fosters a true Government-Industry partnership. It is a blend of "Time and Materials" and "Cost plus Award Fee" contract types, and is predicated on a "pay for performance" concept; all money set aside in the fee pool is at risk and subject to the government's assessment of performance. The prime contractor does not directly perform the cleanup, but designs the projects and manages a cadre of sub-contractors, with responsibility for ensuring that the Army meets the cleanup schedule and stays within cost guidelines.

We have achieved remarkable success in the first year of the contract that translates into dollars to be applied elsewhere in the Army budget. The key success factor is that the Remediation Venture Office and contractor staffs complement each other; each organization leverages the strengths to achieve success; and they have a shared vision of the future of ARMA as the nation's largest urban wildlife refuge.

### **Applying Environmental Science and Technology**

Environmental science and technology open other prime opportunities for industry partnerships. In bio-remediation, for example, the Army is remediating contaminated soils at several ammunition plants through composting, using naturally occurring microorganisms to degrade organic wastes. We partnered with industry to conduct the bench-scale and full-scale tests. The results showed 99 percent destruction efficiency of explosive compounds. The modest equipment and monitoring requirements makes composting a cost-effective technology. The technology has been used at several locations at costs many times lower than conventional incineration techniques.

Similarly, phyto-remediation uses plants which can absorb contaminants from soil and ground water. The Army is working with the Tennessee Valley Authority and a firm that specializes in phyto-remediation to take this technology to the field. Studies have shown surprising results: phyto-remediation can remove lead and explosives residues at a lower cost than excavation and landfill. It also minimizes site disturbance and can eliminate long-term monitoring requirements.

Composting technology is also helping the Army to contain the spread of plastic pollution. Nearly 40 billion pieces of disposable tableware and 113 billion plastic cups are used annually in the US, and the EPA estimates that plastic takes up 24 percent of available space in a landfill. Biodegradable cutlery, trash bags and other "bio- based" products are being tested to comply with the President's Executive Order 13101. They result in complete organic composting, 50 percent lower collection and tipping fees, and reduced landfill.

**2. Redefining the doctrine of historic military properties from a cultural program to a mainstream policy.** While historic buildings are sometimes important solely because they are historic, more often they serve a basic purpose in the mission and functions of the installation, as headquarters and administrative buildings, family housing, barracks, clubs and other facilities and they are major tools in strengthening Army heritage, and maintaining attractive Army posts and communities. Historic buildings *are* mainstream assets in executing elements of our mission.

**3. Driving historic property decisions by economic fundamentals instead of accounting rules.** Budget procedures focus on annual costs and benefits instead of lifecycle costs and long-term benefits. The rules also ignore potential economic values that can be created in real estate. Intangibles, such as the positive impact of attractive home and work environments, and the sense of Army history and discipline provided by the built environment, also are given short shrift, even when private market evidence in support of these benefits is compelling. Initial renovation costs tend to be higher even when their long-term operating and maintenance costs are comparable or lower.

**U.S. ARMY MATERIEL COMMAND  
DEPLOYMENT LEGAL ISSUES ROUNDTABLE  
ALEXANDRIA, VIRIGNIA  
3 MAY 1999**

**AGENDA**

- 0830            Welcome
- Edward J. Korte  
                 Command Counsel  
                 Office of the Command Counsel  
                 U.S. Army Materiel Command
- 0845            Introduction
- Cassandra Tsintolas Johnson  
                 Associate Counsel  
                 Office of the Command Counsel  
                 U. S. Army Materiel Command
- 0900            Historical Background - Law of War Status of Civilians Accompanying  
                 the Military Forces in the Field - Traditional and Evolving Theories
- Hays W. Parks  
                 Special Assistant to The Judge Advocate General  
                 International and Operational Law Division  
                 U.S. Department of the Army
- 0930            Logistics Assistance Program
- William Vaughan  
                 Logistics Assistance Program  
                 Chief, Logistics Assistance Division  
                 AMC Logistics Support Activity
- 1000            Break

- 1030            Contractors on the Battlefield
- MAJ Peggy Devereux  
                 Combat Developer  
                 Directorate of Combat Developments for Combat Service Support  
                 Combined Arms Support Command
- 1100            Lessons Learned Form Recent Operations - Identification of Issues
- Jon Schandelmeier  
                 Logistics Management Specialist  
                 Operations Division  
                 AMC DCSLG
- 1130            Civilian Deployment Realities
- Lill Gravatt  
                 Acting Chief  
                 Civilian Personnel Policy  
                 AMC DCSPER
- 1200            Lunch
- 1300 - 1600    Issues for Discussion
- Uniforms  
                 Tactical/Military Vehicles and Aircraft  
                 Force Protection  
                 Weapons and Ammunition

UNCLASSIFIED

AMCCC-B

POINT PAPER

21 May 1999

SUBJECT: AMC Command Counsel's (AMCCC's) Civilian Deployment Legal Issues Roundtable - 3 May 1999

Purpose: To provide information to the CG concerning the genesis of and discussion summary during AMCCC's Roundtable

FACTS:

o To ensure that there is consistency and clarity in current and emerging DA deployment policies concerning civilians (Department of the Army civilians (DACs) and contractor employees), AMCCC hosted a Civilian Deployment Legal Issues Roundtable on 3 May 1999 at the HQ AMC Building.

oo The recent staffing of numerous civilian deployment related draft Army regulations and field manuals and issues raised during recent field visits by and on behalf of the AMC Command Group had highlighted the need to hold the Legal Issues Roundtable.

oo Given the broad scope of the session and to foster a substantive discussion of the myriad of deployment legal issues concerning Department of the Army civilians (DACs) and contractor employees, AMCCC had to limit the list of attendees to a number smaller than the number of interested parties from the legal, personnel, acquisition and logistics communities at large from DA, AMC, TRADOC, CASCOM and DLA. The invitees were limited primarily to the legal community and a minimum number of representatives from the DA and AMC Civilian Personnel, Acquisition, Logistics and Inspector General communities who provided their subject matter expertise to enhance the discussion of the legal issues with factual and background information.

o This was a significant gathering for the Legal Community that had been long overdue. For many years, we had been working Civilian Deployment legal issues but never had the opportunity to meet and engage in a substantive discussion of the myriad of legal issues surrounding the deployment of our DACs and our contractor employees.

- oo The development and establishment of deployment policies for our DACs and contractor employees have been evolving through the years. In providing appropriate legal advice to our clients on such matters, it is important that we be fully engaged in the policy development process and provide clear and meaningful legal advice to help shape these policies.

- oo The legal community must ensure that there is consistency and clarity in current and emerging deployment policies so that affected DACs and contractor employees are aware of their rights and responsibilities during our deployments. Some of these deployment issues are controversial and sensitive to those affected individuals. Thus, it is imperative that the legal basis for these policies is sound and that we speak with one voice when advising our clients on matters that impact these employees.

- o To facilitate discussion, a resource notebook was provided to all attendees containing relevant regulations, current and draft versions.

- O Presentations were provided by AMCCC's Cassandra Tsintolas Johnson on Overview of the Development of AMC Deployment Policies for DACs and Contractors; DAJA-IO's Hays Parks on Law of War Status of Civilians Accompanying the Military Forces in the Field - Traditional and Evolving Theories; AMC LOGSA's William Vaughan on AMC Logistics Assistance Program; CASCOM's MAJ Peggy Devereux on Contractors in the Battlefield; AMCLG's Jon Schandelmeier on Lessons Learned From Recent Operations - Identification of Issue; and AMCPPE's Lill Gravatt on Civilian Deployment Realities.(Att 1.)

- o The work product of the Roundtable will be shared with the AMC DCSPER and the deployment community at large to assist in their resolution of related policy questions. A Memorandum of Law on "The Law of War Status of Civilians Accompanying Military Forces in the Field" prepared by Mr. Parks (Att. 2) and a summary matrix chart of the key issues discussed during the Roundtable (Att. 3) are some of the key work Roundtable products.

- o Given the strong support expressed for a wider discussion of policy issues, AMCCC will explore with the AMC DCSPER the feasibility of conducting a general session in which more members of the deployment community can participate.

Additionally, AMCCC is contemplating holding a follow-up  
Civilian Deployment Legal Issues Roundtable for Fall 1999.

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## FLRA COLLABORATION AND ALTERNATIVE DISPUTE RESOLUTION ACTIVITIES

The FLRA is actively engaged in labor-management collaboration and other alternative dispute resolution efforts dedicated to reducing the costs of conflict in the federal service. Here is a brief summary of these activities and where to call for more information:

### Collaboration and Alternative Dispute Resolution Program -- "CADR"

This agency-wide program, launched in January, 1996, provides overall coordination to support and expand FLRA labor-management cooperation and alternative dispute resolution efforts. CADR is the first unified program within the FLRA exclusively dedicated to targeting collaboration and alternative dispute resolution to every step of the labor-management dispute -- from investigation and prosecution to the adjudication of cases and resolution of bargaining impasses. ADR initiatives at the FLRA include:

#### Office of the General Counsel:

The FLRA's Office of the General Counsel uses a number of innovative approaches to resolving unfair labor practice and representation disputes, short of costly and time-consuming litigation. These alternative approaches include facilitation, training and education services delivered jointly to both management and union representatives on the Statute, interest-based bargaining and alternative dispute resolution; and relationship building and intervention. Over the last several years, the OGC has targeted frequent filers for these sessions and conducted hundreds of such sessions to thousands of federal employees nationwide.

#### Office of Administrative Law Judges

The FLRA's Office of Administrative Law Judges operates an Unfair Labor Practice Trial Settlement Project dedicated to promoting the efficient and voluntary settlement of unfair labor practice complaints. The project calls for the Chief Administrative Law Judge to assign a judge (other than the trial judge) or a settlement attorney to conduct settlement conference negotiations with the parties before trial.

#### The Federal Service Impasses Panel:

The Federal Service Impasses Panel uses a wide variety of

informal and formal procedures to resolve impasses in collective bargaining agreement negotiations. These procedures, which include mediation, fact finding, written submissions and arbitration by Panel Members, staff and private providers, are designed to move the parties toward voluntarily resolving the impasse short of a written decision and order from the Panel.

For more information about any of the FLRA's alternative dispute resolution services, contact:

Federal Labor Relations Authority  
Collaboration and Alternative Dispute Resolution Program  
607 14th Street, NW  
Washington, DC 20424-0001  
Telephone: (202) 482-6503



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
200 STOWALL STREET  
ALEXANDRIA, VIRGINIA 22322-0300



April 28, 1999

MEMORANDUM FOR LABOR RELATIONS SPECIALISTS AT MACOMS, CIVILIAN  
PERSONNEL OPERATIONS CENTER MANAGEMENT AGENCY,  
OPERATING CIVILIAN PERSONNEL OFFICES, CIVILIAN  
PERSONNEL ADVISORY CENTERS, INDEPENDENT REPORTING  
ACTIVITIES AND CIVILIAN PERSONNEL OPERATIONS CENTERS

SUBJECT: FY 98 Labor Relations Program Evaluation—Labor Relations Bulletin #410

For the last five years, the Department of the Army's labor relations indicators have shown steady improvement. There were fewer unfair labor practice (ULP) charges and negotiated grievances than the previous year. In FY 98, this trend changed. Compared to FY 97, there was a 10 percent increase in the number of negotiated grievances filed and the number of ULP charges filed against the agency doubled.

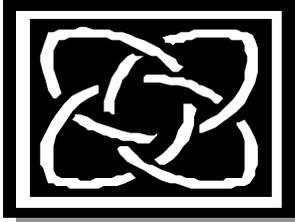
The number of cases taken to arbitration remained constant from the previous year as did the number of ULP complaints issued by the General Counsel (GC) of the Federal Labor Relations Authority (the Authority.)

The enclosed bulletin describes in greater detail the Army's labor relations program in FY 98 and forecasts areas of focus for FY 99.

Please share this bulletin with your civilian personnel officer, your labor attorney and other interested management officials.

Elizabeth B. Throckmorton  
Acting Director for Civilian Personnel  
Management and Operations

Enclosure



# ***Labor Relations Bulletin***

**No. 410**

**April 28, 1999**

## **FY 98 Labor Relations Program Evaluation**

Each year around this time we take a look at Army's labor relations program; at least from a limited statistical perspective.

From an Army-wide perspective, two issues appeared to dominate the labor relations program in FY 98 - partnership and downsizing.

### Partnership

The partnership trend continues to flourish within Army. Anniston Army Depot was a recipient of the 1998 John N. Sturdivant National Partnership Award. For each year the award has been given by the National Partnership Council (NPC), an Army installation has been a recipient. Based on a survey conducted for the National Partnership Council, approximately 60% of our bargaining unit employees are in bargaining units that are members of local labor-management partnership councils.

We continue to be impressed with the strides taken by many Army installations in creating and furthering partnership arrangements.

### Downsizing

Downsizing, rightsizing, privatizing, outsourcing, contracting out, BRACing -- they all mean the same thing to the union - employees losing their jobs and the union losing its union members. There is probably nothing that agitates a union official as quickly as downsizing. In Army, unfortunately, the end still isn't quite

in sight. Given the continued downsizing in Army, we can expect to see additional challenges and increased requests for negotiation from the unions. The uncertainty of downsizing also creates significant stress within the workforce. To help alleviate some of the employees' and union's concerns, consideration should be given to increasing partnership efforts where appropriate. Keep your unions informed of the status of possible changes, share information with them and involve the union early in the decision making and problem solving stages. Doing so should generally improve employee morale and agency efficiencies.

Now let's take a look at how Army fared, statistically speaking, in FY 98.

### **Negotiability Disputes**

Appeals - The relatively high number of negotiability appeals involving the Army belies the good year we had in this area. **In FY 98, there were 12 negotiability petitions filed with the Authority.** (See Chart A.) **The 12 cases involved 20 proposals.** This is an increase of nine cases and seventeen proposals from last fiscal year. So, you may be wondering, "What's the good news?" Well, the good news is that all twelve cases came from a single union at one installation. Every other installation in Army either did not face any nonnegotiable union proposals or the parties cooperatively resolved proposals alleged to be nonnegotiable by the activity. That's very good news.

The 12 cases covered a number of topics. The first four cases, involving ten proposals, stemmed from management's decision to reassign an employee and assign him certain new duties that did not affect his series or grade. The proposals submitted by the union all centered around competitively filling the job to which the employee was reassigned. (The union filed individual appeals for each proposal even though all the proposals stemmed from a single management action.)

The next four cases, involving four proposals, stemmed from a single reduction-in-force. The proposals required that the job duties of particular positions be performed only by employees in those positions. Management argued that the proposals violated their right to assign work as they require the assignment of certain duties to specifically identified unit positions.

Three cases, involving four proposals, were raised when the agency implemented a new electronic mail system. These proposals dealt with who could raise computer complaints and the type of software to be used. Management alleged one proposal violated its right to assign work. The union stated the other three proposals violated management's permissive rights and the agency agreed; therefore, there was no basis for the negotiability dispute. (There must be disagreement between the parties over the negotiability of a proposal in order for there to be a valid negotiability dispute.)

The last case, covering two proposals, stemmed from the activity's plan to establish separate Information Management organizations at two different geographic locations. Management advised the union that there was no duty to bargain as the change was de minimus. As management did not claim that the proposals violated law, rule or regulation, there was no basis for the filing of the negotiability appeal. Nevertheless, the union filed the appeal.

Decisions - All 20 proposals described above were either found nonnegotiable, dismissed by the Authority or withdrawn by the union. A number of the union withdrawals were aided by Authority intervention and the election of a new union president. The proposals which management alleged violated our right to assign work were found nonnegotiable. In addition to the dozen cases filed in FY 98, the Authority issued a negotiability decision on a case filed in FY 97. It found the union's proposal addressed a classification matter and dismissed the union's petition.

### Impasses

The Federal Service Impasses Panel (the Panel) received 175 requests for assistance in FY 98; an increase of 27 (18%) from last fiscal year. Unions submitted approximately 78% of the requests. Management submitted 16% and the remainder (6%) were joint submissions. **Army installations accounted for 16 (9.1%) of the Panel's 175 requests--this is up 7 (78%) from last year's 9 requests,** but 9.1% requests for Panel assistance is typical for Army. For the last ten years, our portion of the panel's overall case load typically fluctuates between 8 and 14 percent. On the unions' side, 91 (52%) requests to the Panel involved AFGE; NAGE was a party to 13 (7.4%) requests.

As typically occurs, the vast majority (81%) of the cases stemmed from mid-term bargaining. Similarly, the majority of issues raised to the Panel concerned personnel matters (e.g., reassignments, RIF, merit promotion, reorganizations, etc.) In second place were institutional matters such as permissive bargaining, official time, etc.

A brief history of the Panel's cases in FY 98 show that 174 cases were disposed; up 13 (8.1%) from FY 97. The majority of the cases (70 or 40%) were withdrawn prior to the Panel accepting jurisdiction. The Panel declined to accept jurisdiction (e.g., questions of duty to bargain were raised) in 34 (20%) of the cases. Thirty-one (18%) were settled or withdrawn after procedural determinations but prior to an actual Decision and Order by the Panel. These cases could have been settled during written submissions, resolved as a result of mediation efforts by a Panel or staff member or settled based on acceptance of a Panel recommendation.

The Panel issued 33 decisions in FY 98. That's four fewer than last year. Private arbitrators (which we no longer count as part of the Panel's decisions) decided six cases. (In these cases, the Panel either approved a joint request for an outside arbitrator, the parties accepted the Panel's recommendation that an outside arbitrator be used, or the Panel directed outside arbitration.) Twenty-four Opinions and Decisions (72%) were Panel Decisions and Orders; nine (27%) of the 33 decisions were issued by Panel or staff members serving as arbitrators.

**Six (18%) of the Panel's 33 decisions involved Army installations.** The six cases involved a number of different issues. Two cases involved management's efforts to terminate a 5-4/9 schedule. In one decision, management proved the adverse agency impact which allowed the termination of the schedule. In the other, it did not. Another case involved a number of proposals addressing smoking, official time, leave, health and safety, performance appraisals, training, merit promotion and adverse weather conditions. One case addressed tours of duty and lunch hours. The agency argued that the union's proposal was nonnegotiable and the Panel directed the parties to withdraw the proposal "to permit the Union to request a written declaration of nonnegotiability from the Employer." Another case involved a RIF that had already taken place. In the final

decision, management wanted to convert a break room to an office. The Panel sided with management noting there were other break rooms available for the employees.

Army continues to have a limited presence before the Impasses Panel, which is good. When we do go before the Panel, we typically do well with regard to the outcome of the decisions.

### Grievances and Arbitrations

Grievances - **There were 1181 negotiated grievances filed by Army bargaining unit employees in FY 98. This is an increase of 110 (10%) from last year, but is the second lowest number of negotiated grievances since FY 79.** This appears to be a minor blip in the downward trend of grievances filed under negotiated procedures. (See Charts A and B.) While one of the major commands (MACOMs) saw a 50% increase in its grievances, most MACOMs experienced a decrease in the number of grievances filed under negotiated procedures compared to last fiscal year.

There are approximately 117,715 appropriated fund bargaining unit members in the Department of the Army. This number was developed by subtracting all employees with bargaining unit status codes of 7777 and 8888 from the entire appropriated fund population as reported in ACPERS. *We are not using OPM's Union Recognition in the Federal Government data since the latest data is from 1997 and a lot of changes (e.g., downsizing) have occurred since then.* With an Army bargaining unit member population of 117,715, there were 10.0 negotiated grievances filed per 1,000 appropriated fund bargaining unit members. While slightly up from last year's 8.6 per 1,000 bargaining unit members, it is well within the normal range of 10 to 12 negotiated grievances per 1,000 bargaining unit members. (For example, the rates for FY 96 and 95 were 10.6 and 11.7, respectively.)

Arbitration - **Seventy-nine of the 1181 grievances were raised to arbitration. That is identical to the number filed last fiscal year.** (See Charts A and C.) The percentage of arbitrations to grievances was 6.7%. That is 6.7% of the grievances filed under the negotiated grievance procedure were raised to arbitration. This compares favorably to last year's rate of 7.4%, though, statistically, the improvement can be attributed to the higher number of grievances filed, it is encouraging that resolution was achieved short of arbitration in spite of the increased volume of grievances.

Thirty-seven arbitration awards were issued in FY 98. That is 56 fewer (60%) than FY 97. While we continue to maintain this data, it is hard to explain. Though we had the same number of arbitrations as last year, we saw a lot fewer arbitration awards issued. Maybe arbitrators are taking a longer time in issuing awards; we should see an increase in the number of awards next year. **Of the 37 awards, management was sustained in 19 (52%) of the decisions. This is an increase from last year's 44% rate. The union was successful in 9 (24%) decisions and 9 (24%) were either split or mitigated.** (See Charts A and D.) Management's success rate remained within its typical range. Normally, management is persuasive in 45 to 60 percent of the cases with the union's success rate around 20 to 30 percent.

Exceptions - **Management did not file any exceptions to arbitrator's awards involving Army installations in FY 98.** Last fiscal year, we filed two.

In FY 1998, the Authority issued two decisions on agency exceptions filed the previous year. The first case concerned an arbitrator that awarded hazardous duty pay for work not identified in the CFR. The agency argued that the award violated the CFR and did not specify the period of time for which the hazardous duty pay was authorized. The Authority accepted the arbitrator's finding that the work in question performed by the grievants fell within the CFR for hazardous duty pay. However, the Authority found the arbitrator did not outline with particularity the periods of time for which the grievants were eligible for the hazard pay.

According to the Authority, an arbitrator must make a finding as to when hazardous materials are present or when the employees are in close proximity to them. This finding can be as detailed as an hourly basis finding or as broad as a percentage of time, e.g, 60% of the time the employees were entitled to HPD. The case was remanded for a more detailed finding by the arbitrator.

In the second case, management established two competitive levels. The union grieved that only one level was necessary. The arbitrator found management relied on an outdated position description in determining the competitive levels and, therefore, violated the CFR. He directed combining the two competitive levels. The agency argued this violated our right to assign and select as well as the CFR. The Authority remanded the award back to the parties for resubmission to the arbitrator, absent settlement,

since it could not determine whether the arbitrator's decision was in compliance with 5 CFR 351.403. Specifically, the Authority could not determine whether the arbitrator intended his finding that the engineers worked in teams (and therefore were interchangeable) to mean that the "similar enough in duties" requirement in 5 CFR 351.403(a)(1) was satisfied.

Oppositions - **Army filed six oppositions to union filed exceptions. The Authority denied three of the six union exceptions; three are still pending.** The Authority also issued seven decisions on union exceptions filed in previous years. Four cases were denied and three were remanded back to the arbitrator, absent settlement by the parties.

In the first of the three remanded cases, the arbitrator had sustained a grievance over a 2-day suspension, but denied the union's request for attorney fees finding that the union was not the prevailing party. (The arbitrator found the employee partly at fault and mitigated the penalty.) The Authority found the arbitrator's denial of attorney fees based on the grievant not being the prevailing party was incorrect. The award of back pay was an indicator that the grievant was the prevailing party. The award was remanded to the parties for a determination on the attorney fees request.

In the second remanded case, the arbitrator denied a grievance alleging the agency discriminated against the grievant on the basis of race when it hadn't selected him for promotion and, instead, selected a non-qualified individual. The Authority remanded the case finding that the record was insufficient to determine whether the selected employee was minimally qualified for the position. In the final remanded case, the arbitrator's refusal to award attorney fees was found deficient. The union had not requested attorney fees as part of the merits of the award. Rather, the union requested that the arbitrator retain jurisdiction to hear the attorney fee arguments. The arbitrator denied the fees in his initial award. As the union had not requested fees during the case, the arbitrator's denial was premature. The Authority noted that its actions were without prejudice to the arbitrator's consideration of a timely request for fees by the union.

The following is our exception experience for the past 19 years:

	<u>FY</u>	<u>80-88</u>	<u>89</u>	<u>90</u>	<u>91</u>	<u>92</u>	<u>93</u>	<u>94</u>	<u>95</u>	<u>96</u>	<u>97</u>	<u>98</u>	<u>Total</u>
Excepts Filed		45	10	8	3	8	7	2	1	2	2	0	88
Award Modified		23	0	6	5	5	4	2	0	1	2	2	50
Reversed or Remanded By FLRA													
Exceptions Remaining		-	-	-	-	-	-	-	-	-	-	-	0

Summary - While the number of negotiated grievances rose slightly, they remained at a relatively low number. The 1181 grievances were the second fewest number of grievances filed under a negotiated procedure since we began maintaining this data. Tied with last year, FY 98 had the fewest number of grievances taken to arbitration. There was a dramatic decrease in the number of arbitration awards issued. **Management was sustained in whole or in part in 76% of the awards.** This compares with the 70% success rate of last fiscal year. We're pleased to see the continued limited number of grievances filed under negotiated procedures. This can probably be attributed to labor-management partnerships, a reduced work force and an increase in the use of alternative dispute resolution processes.

### Unfair Labor Practices

Charges - This was a surprising statistical find. **There were 759 charges filed against Army activities; an increase of 391 (106%) from FY 97.** (See Charts A and E.) The 759 ULP charges were the highest number since FY 93. Comparing the number of ULP charges with the unit data in ACPERS shows a rate of approximately 6.45 ULP charges filed per 1,000 bargaining unit members. This is dramatically higher than the 2.49 rate in FY 97 and slightly higher than the FY 96 rate of 4.15. It appears that the high numbers are concentrated in a limited number of installations. One installation accounted for over 25% of all the ULP charges filed against Army installations in FY 98.

Government-wide, the General Counsel received 5747 charges. Army received 13% of the charges, which isn't too bad given it accounts for approximately 20% of the government-wide bargaining unit population.

Complaints - Consistent with the increase in the number of ULP charges, there was an increase in the number of ULP complaints issued by the General Counsel. **Army activities received 41 ULP complaints in FY 98. That is an increase of 10 (32%) from last year.** Complaints equated to 5.4% of charges filed. A ULP complaint was issued for every 18.5 ULP charges filed against Army installations. Last year, a ULP complaint was issued for every 11.87 charges filed. Government-wide, the General Counsel issued a complaint for every 19.6 charges filed. Using our ACPERS data, there were 0.35 complaints issued per 1,000 bargaining unit members within Army. Last year's rate was 0.21.

Decisions - **Of the 41 complaints, two resulted in ULP decisions being issued by the Authority. There were no decisions issued by Administrative Law Judges (ALJs) involving Army installations.** In the first decision, the Authority found no ULP when management transferred the grievant's job duties and changed her rating official; management showed there was legitimate, work-related reasons for the change. It was a ULP, though, for the supervisor to make statements that jobs could be at risk for pursuing grievances. In the second case, the Authority held that the activity did not commit a ULP when it denied a union official from being a personal representative for a staffing specialist. The agency successfully argued that allowing a union official to serve as a personal representative for the staffing specialist would be a conflict of interest.

Summary - While we have experienced the highest number of ULP charges and complaints since FY 93 and 92, respectively, we remain well within the government-wide averages. A single year's data is not sufficient to identify actions outside those ongoing in the Army's labor relations program. Army will continue to promote labor-management partnerships and encourage parties with faltering relationships to consider joint labor-management team building or other related training. Such training is available from the General Counsel of the Authority, FMCS, Field Advisory Services or other similar providers. We will continue to monitor the numbers in the coming months and report back to you with any findings.

### Union Representation

OPM did not issue an updated *Union Recognition in the Federal Government* this year. It is currently gathering data for the report and an update should be issued in FY 99.

Based on ACPERS data, there are 127,781 (117,715 appropriated fund and 10,066 nonappropriated fund) bargaining unit employees in Army. This represents an approximate reduction of 20,000 (18,000 appropriated and 2,000 nonappropriated fund ) bargaining unit members since 1997. *Keep in mind that this comparison is based on two different sets of numbers, ACPERS and the OPM Union Recognition book.)*

### What's Next

For each of the last six years, we have seen fewer and fewer grievances and ULPs. This year, the trend stopped. While it is important not to place too much emphasis on one year's data, FY 98 does serve as a reminder of just how tenuous labor-management relationships can be.

We encourage management to reassess its relationship with its unions and determine what efforts, if any, could be undertaken to improve and enhance how the parties work together in identifying problems and crafting solutions.

We continue to place emphasis in labor-management partnerships as tools for involving employees and union representatives in improving the functions of the activity and in creating a richer and more fulfilling environment for the employees.

Management representatives are also encouraged to consider, with their unions, instituting alternative dispute resolution mechanisms for resolving complaints. Such options as mediation or peer panel reviews are viable alternatives to negotiated grievances or can serve as processes for addressing alleged unfair labor practices.

Another reason for working towards a more cooperative relationship with union officials is the possibility of an expanded scope of bargaining. As has been reported in the press, labor organizations are looking to expand the scope of bargaining by either Executive direction or legislation. An expanded scope

of bargaining provides the parties in a poor labor-management relationship additional areas of dispute. For those in a positive, cooperative relationship, an expanded scope of bargaining provides opportunities for the parties to work together in solving a broader scope of issues affecting the activity and the bargaining unit members.

In addition to partnership efforts, an area of interest for us is the impact downsizing may have on installations' labor relations programs. As a result of downsizing and other related factors, many of the Civilian Personnel Advisory Centers (CPACs) have moved away from having a dedicated labor/employee relations specialist position. This, tied in with the retirement of many seasoned labor relations specialists, has resulted in a loss of labor relations expertise at some installations. Labor relations is often difficult enough for experienced labor practitioners; arranging for generalists to become experts in this field is proving to be a challenge. Continuity in performance of these duties will best assure quality results.

Both regionalization and modernization are effecting the area of collective bargaining. Now, activities must consider the impact a negotiated change to conditions of employment may have on the operations of the servicing Civilian Personnel Operations Center (CPOC). Where negotiations may impact on the CPOC's operations, the activity must ensure proper coordination between the CPOC and the negotiating team. If appropriate, the CPAC can ask that a representative of the CPOC attend the negotiations as a subject matter expert.

Tied to our regionalization/modernization efforts is the need for achieving more standardization with our civilian personnel processes, especially as they relate to streamlining CPOC and CPAC operations. To this end, we will be reviewing personnel policies, such as pay setting and merit promotion plans, to develop common concepts and bargaining goals to help achieve these "Army-wide" processes.

This analysis forecasts that FY 99 will present new opportunities to excel for Army's labor relations practitioners!

## Army Labor Relations Statistics FY 88 - FY 97

	<u>FY88</u>	<u>FY89</u>	<u>FY90</u>	<u>FY91</u>	<u>FY92</u>	<u>FY93</u>	<u>FY94</u>	<u>FY95</u>	<u>FY96</u>	<u>FY97</u>	<u>FY98</u>
Grievances	2758	2785	2662	2738	2653	2434	1808	1575	1357	1071	1181
# to arb	183	154	237	135	233	242	177	114	135	79	79
% to arb	6%	5.5%	8.9%	4.9%	8.8%	9.9%	9.8%	7.2%	9.9%	7.4%	6.7%
Arb Awards	149	138	226	178	176	132	106	92	66	93	41
Arb Results*	65M 26U 58S	66M 27U 45S	130M 60M 36S	83M 30U 65S	83M 55U 38S	81M 23U 28S	60M 25U 21S	38M 27U 27S	37M 16U 13S	41M 28U 24S	19M 9U 9S
ULP Charges	952	768	1047	1207	1347	972	679	607	530	368	759
ULP Complaints	50	69	84	84	89	30	19	29	23	31	41
% of Charges	5.3%	9.0%	8.0%	7.0%	6.6%	3.1%	2.8%	4.8%	4.3%	8.4%	5.4%
Negotiability	19	19	16	18	8	8	1	15	20	3	12

\*M-Management

\*U-Union

\*S-Split or mitigated

Chart A

## **An AMC Attorney Meets the Real Army!**

“Your hair is touching your collar!” “A button is undone!” “Your boot laces are hanging down!” I heard these comments, and more, while participating in the “greening” program at Ft. Polk, Louisiana. The “greening” piqued my interest because it looked like an extraordinary opportunity to bridge the gap between my role as a civilian Attorney working for a military, research and development installation and the end users of our products, the soldiers. It is coined a “greening” because participants experience total immersion in the soldiers’ environment.

The first morning, SSG. Haddad, our team advisor, reviewed procedures on proper assembly of the rucksack and harness. The equipment weighed approximately fifty (50) pounds after assembly and insertion of three days worth of supplies including canteens with water and Meals, Ready-to-Eat (MREs). Initially, I insisted on bringing a sleeping bag in addition to the fifty-pounds of equipment. I was skeptical about SSG. Haddad’s comments that I did not need it. His exact words were “pack light, freeze at night.” I refused to concede to his assertion. “After all, it is only an extra eight pounds.” However, after lifting the rucksack with the eight-pound sleeping bag inside, I acquiesced and adopted SSG. Haddad’s philosophy. His assurances that he “knew the warning signs of hypothermia” were cold comfort to me.

We marched three miles with the equipment to experience the weight on our bodies and the wear and tear of the Battle Dress Uniforms (B.D.U.s) and boots. The boots were the subject of copious advice, mainly, “Break them in before you go!” I wore my boots for several days before the “greening.” In addition, I wore sock liners upon hearing John Stone, Chief Counsel at SBCCOM, Natick, comment that liners decrease the likelihood of blisters. I did not get blisters while marching although another participant had several of them. I believe the Medical Team qualified his feet as a “disaster area” by the end of the greening. My appreciation of soldiers increased every step that I took walking those three miles. There is no better method of learning than walking in someone else’s shoes, literally in this case.

The soldiers at Ft. Polk inquired about our motivation. I explained my role as an Acquisition Attorney and Natick SBCCOM’s part in researching and developing products that they use on a daily basis including MREs, clothing, and other equipment. The soldiers appreciated our willingness to experience their lifestyle and shared their thoughts candidly with us. They talked about heating MREs by placing them inside their t-shirts and eating when they have an opportunity. Time is crucial for soldiers. Others boycotted MREs because of a price increase. Apparently, inflation affects everyone. Others noted that Kevlar helmets are “heavy” and wondered if we can modify that feature. There were numerous mutually enlightening conversations.

We had many opportunities to eat Meals, Ready to Eat. I was anxious to prepare and taste these well-known Natick products. SSG. Haddad demonstrated proper procedures on heating the MREs. I tried a variety of the vegetarian MREs including the pasta with vegetables and tortellini, and found them tasty. Upon hearing that I enjoyed these meals, several soldiers requested that I seek immediate medical attention.

We drove to neutral areas for both nights in the woods since Ft. Polk is a combat training area. As we set up for the night, SSG. Haddad said to look for a “flat area” on the ground. That essentially equated to, “drop your gear wherever you are standing and prepare to sleep.” It was difficult to accomplish any tasks after the sun went down since there were no streetlights and our eyes had to adjust to the darkness. Anything routine became difficult, including walking. I had to accept that my “bed” for the next two nights would be bumpy, hard, and cold.

I put on several layers of additional clothing and increasingly appreciated the warmth of the sun. I treasured all the warm weather gear including the neck gator. SSG. Haddad said to wrap the neck gator around our heads to conserve body heat. I laid down to sleep, or so I thought. Unfortunately, earlier in the day, I noticed a display featuring a variety of snakes and the corresponding bite treatments while in the medical van. Those thoughts remained in my head until I fell asleep. I fared better the second night because I was fatigued from all the activities.

We engaged in many exhilarating activities during the days. We had a thrilling ride on a MI-17 Hip, Russian Helicopter where the entire rear section was open to the environment. We wore helmets and/or earplugs to protect our ears from the noise. I also entered a Sheridan tank and spoke with its operators. I drove a humvee through rugged terrain, which reminded me somewhat of driving through the potholes of Boston. We trudged through a claustrophobic, underground sewer system at a simulated urban site.

When the greening was over, we went to our lodging facility and, I ran to the shower. I had to scrub my face vigorously to rub off the camouflage that we had applied and reapplied throughout the greening. Despite the vigorous scrubbing, a tinge of green hue remained on my face. That was acceptable since St. Patrick’s Day was around the corner and I could pass myself off as a holiday reveler. Or, maybe I could go to a Celtics game. The possibilities were endless.

We drove back to the airport and while heading home, I felt I had an insightful experience. The “greening” was an indispensable learning tool that allowed me to glance into the soldiers’ world. I not only learned about assembling the gear, carrying equipment, and “living” in the woods, but learned first hand about the soldiers’ way of life and their thoughts. The “greening” was an extraordinary opportunity that surpassed my expectations.

## THE ENVIRONMENTAL LAW DIVISION BULLETIN

April 1999

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### Not All Trash Disposal Creates CERCLA Liability

Ms. Carrie Greco

A recent case involving the disposal of hazardous substances at landfills held that if your waste does not contain the hazardous substances found at the site, you are not liable.<sup>1</sup> This case concerned the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>2</sup> CERCLA liability at a third party site can no longer be acceded upon a showing of a manifest that states the Army contracted with the landfill (or a waste hauler connected to the landfill.) Instead, the determination of whether wastes contain hazardous substances will require a closer examination of the type of waste sent and the substances in that waste.

In *Prisco v. A & D Carting Corp.*, the owner of a landfill brought suit against four transporters who were alleged to have transported hazardous substances to the site. The Second Circuit affirmed a District Court's dismissal of the landfill owner's CERCLA claims against these defendants, concluding that for the landfill owner to impose liability against a transporter, she must prove the items the transporter shipped to the site contained hazardous substances.<sup>3</sup> Earlier, the District Court had held that the material transported by the four transporters (pipes, wire, carpets, and stained and painted wood) did not contain hazardous substances.<sup>4</sup> Applying the standard for CERCLA liability, the District Court stated: "[i]n order to make out a prima facie case, a plaintiff must first have made a showing that a defendant transporter actually brought hazardous substances to the site."<sup>5</sup>

On appeal, the plaintiff did not address the District Court's finding that the pipes, wire, carpets, and wood shipped by three of the defendant transporters did not contain hazardous substances. Rather, the plaintiff appealed the District Court's holding that the painted and stained wood sent by the fourth transporter did not contain hazardous

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<sup>1</sup> *Prisco v. A & D Carting Corp.*, No. 97-9405, 48 ERC 1097 (2d Cir. Feb 17, 1999),

<sup>2</sup> 42 U.S.C. § 9601, *et. seq.*

<sup>3</sup> *Id.*

<sup>4</sup> *Prisco v. State of New York*, No 91 Civ. 3990, (RLC), 1996 WL 596546 at 1, 1996 U.S. Dist. LEXIS 14944 (S.D.N.Y. Oct 16, 1996).

<sup>5</sup> *Id.* at 9.

substances. To address the issue, the Second Circuit reviewed the evidence provided to the District Court. The plaintiff's expert testified before the District Court that the contaminants at the site could have been attributable to these sort of materials. DEC provided an affidavit to the District Court confirming that these types of materials can result in the leaching of various contaminants. After reviewing this evidence, the Second Circuit agreed with the District Court's conclusion, noting that the items shipped to the site, in fact, did not contain these contaminants. The Second Circuit concluded that:

CERCLA... is not so far-reaching that anyone who has ever transported waste material to a site becomes a potentially responsible party within the meaning of section 107(a)(4)... To impose liability on a defendant, a CERCLA plaintiff must prove more than that a defendant transported material to the site; he or she must show that the material contained a hazardous substance.<sup>6</sup>

The Second Circuit's holding gives the Army a new foothold in CERCLA landfill cases. In many cases, the plaintiffs cannot provide evidence that identifies the type of waste the Army may have sent to the landfill. Rather, the plaintiffs point to documents showing a contract with the Site owner, or other waste hauler who has a connection with the site, or the plaintiffs provide documents that only identify the type of waste in general terms such as "garbage" or "refuse." This flimsy evidence does not specifically identify the waste, or hazardous substances in that waste, that were taken from the Army to the site. An investigation is necessary to identify more carefully the types of waste and the types of hazardous substances that could have been sent to the site. Without the proof that the waste Army shipped to the site contained hazardous substances, the plaintiff cannot prevail.

So the next time you see a CERCLA claim regarding some regular trash disposal operations, take a second look. Those items disposed of may not contain hazardous materials and may not give rise to CERCLA liability. (Carrie Greco/LIT)

### **Supreme Court Adds to *Daubert* Analysis of Expert Testimony**

Major Scott Romans

In *Kumho Tire Co., LTD., et al., v. Carmichael et al.*,<sup>7</sup> the Supreme Court provided an application of its significant decision regarding expert testimony, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>8</sup> *Daubert* held that, under Federal Rule of Evidence 702, the trial judge serves as a "gatekeeper," ensuring that expert testimony is not only relevant, but reliable. *Kumho Tire* provides further interpretation of that decision, and may have a significant impact on environmental litigation, which frequently involves expert testimony. Federal Rule of Evidence 702 allows for the admission of expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact."<sup>9</sup> Under the rule, in such situations

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<sup>6</sup> *Prisco v. A & D Carting Corp.*, No. 97-9405, 48 ERC 1097, 1105 (2d Cir. Feb 17, 1999).

<sup>7</sup> No. 97-1709, 1999 U.S. Lexis 2189.

<sup>8</sup> 509 U.S. 579 (1993).

<sup>9</sup> Fed. R. Evid. 702.

a witness “qualified as an expert by knowledge, skill, experience, training, or education may testify... in the form of an opinion or otherwise.”<sup>10</sup> *Daubert* imposed the requirement on trial judges to ensure that expert testimony was not only relevant, but reliable as well. The opinion provided four factors for trial judges to consider in performing its “gatekeeper” function with regard to expert testimony: testing, peer review, error rates, and acceptability in the relevant scientific community.<sup>11</sup>

In *Kumho Tire*, plaintiffs brought suit against a tire manufacturer and distributor to recover for one death and several injuries that occurred as a result of a tire blow-out.<sup>12</sup> Plaintiffs intended to offer the testimony of an expert who would testify that the blow-out was caused by defective design and manufacture of the tire.<sup>13</sup> The District Court initially applied the four factors specifically cited by the Supreme Court in *Daubert* and decided that the expert testimony at issue in the case was inadmissible.<sup>14</sup> On reconsideration, the District Court determined that the four factors from *Daubert* should be applied with flexibility, and that other factors may be relevant to determine admissibility of expert testimony in a particular case. Applying this more flexible interpretation, the District Court again ruled that the plaintiffs’ expert lacked reliability and refused to allow the testimony.<sup>15</sup> On appeal, the Eleventh Circuit held that *Daubert* applied only to scientific testimony. Since the testimony at issue in *Kumho* was based on “skill or experience-based observation” as opposed to scientific principles, the District Court should not have applied *Daubert*.<sup>16</sup> *Kumho Tire* appealed this decision to the Supreme Court.

The Supreme Court first stated that *Daubert* applied to all expert testimony, not just such testimony based on scientific principles. The Eleventh Circuit’s distinction between “scientific” knowledge and “technical or other specialized knowledge” was incorrect. Rule 702 specifically addresses “scientific, technical, or other specialized knowledge” that will assist the trier of fact. According to the Court, the rationale for the *Daubert* should not be limited to expert testimony considered to be “scientific.”<sup>17</sup> Furthermore, the Court noted that it would be difficult to differentiate between “scientific” testimony and other types of expert opinion, such as engineering testimony, which is based on scientific foundations.<sup>18</sup>

The Court then turned to the issue of what factors a trial court should use in performing the “gatekeeper” function mandated by *Daubert*. The Court agreed with the proposition that trial courts may use the four specific factors stated in *Daubert* (testing, peer review, error rates, and acceptability in the relevant scientific community), but that trial courts may consider other relevant factors as well:

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 593-94.

<sup>12</sup> *Kumho Tire*, *supra* note 1, at \*10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*\*14-15.

<sup>15</sup> *Id.* at \*\*15-16.

<sup>16</sup> *Id.* at \*17.

<sup>17</sup> *Id.* at \*19.

<sup>18</sup> *Id.*

We agree with the Solicitor General that “the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” Brief for United States as *Amicus Curiae* 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.<sup>19</sup>

The Court concluded that the list of factors from *Daubert* was meant to be “helpful, not definitive.”<sup>20</sup> Applying an abuse-of-discretion standard, the Court then reviewed the trial court’s decision to exclude the expert testimony in this case, and concluded that the trial court’s decision was proper.<sup>21</sup>

This case is relevant to environmental litigation in its discussion of the expert testimony subject to a *Daubert* analysis, and the manner in which that analysis is conducted. Engineering and other types of expert opinion that are not purely “scientific” often play an important role in environmental cases. Furthermore, since the factors to determine admissibility are case-specific, the parties must think carefully about their case and the unique factors present in order to support their position on admission or exclusion of the expert testimony in question. (MAJ Romans/LIT)

### **Microbes Not Small Enough to Evade NEPA**

Lieutenant Colonel David Howlett

A recent decision by the District Court for the District of Columbia ruled against the Interior Department’s reliance on a categorical exclusion from the National Environmental Policy Act of 1969 (NEPA).<sup>22</sup> The opinion represents a cautionary tale for Army practitioners who invoke categorical exclusions for projects.

The case, *Edmonds Institute v. Babbitt*,<sup>23</sup> involves the Department of the Interior’s decision to enter into an agreement that allows a private biotechnology company to “bioprospect” for microbial organisms in geysers and other thermal features in Yellowstone National Park. The agreement, officially called a Cooperative Research and Development Agreement (CRADA), was the first of its kind to involve a national park. In return for payments and royalties, the contractor could search for genetic and biochemical information found in wild plants, animals, and microorganisms. The CRADA was announced at Yellowstone in a public ceremony that included Secretary of Interior Babbitt and Vice President Gore.

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<sup>19</sup> *Id.* at \*23.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*\*27-37.

<sup>22</sup> 42 U.S.C. § 4321, *et. seq.*

<sup>23</sup> *Edmonds Institute v. Babbitt*, No. 98-561(RCL), 1999 U.S. Dist. LEXIS 4168 (D.D.C., March 24, 1999) at \*26-27.

Plaintiffs, representing both environmental and technology interests, filed suit against the project, alleging that Interior had not complied with NEPA.<sup>24</sup> Interior moved to dismiss most claims based on standing and failure to state a claim on which relief could be granted. Both sides moved for summary judgment on the NEPA claim.

The court found that because the collection of microbial specimens is an actual invasion of plaintiffs' recognized aesthetic and recreational interests, plaintiffs had established injury in fact for standing purposes. The court also denied Interior's other motions to dismiss.<sup>25</sup>

The opinion then turns to the NEPA claim. Interior prepared neither an EA nor an EIS before entering into the Yellowstone CRADA. Instead, it argued that it was entitled to summary judgment because (1) the activities performed under the CRADA fell under a categorical exclusion for "day-to-day resource management and research activities"<sup>26</sup> and (2) approval of the CRADA was not a "major federal action" subject to NEPA.

First, the opinion notes that Interior, while relying on a categorical exclusion before the court, could point to no evidence that it had considered application of the exclusion before entering into the CRADA. The court found this "practically determinative" -- a post hoc invocation of a categorical exclusion during litigation cannot justify a failure to prepare an EA or EIS.<sup>27</sup> On this basis alone, the court found the failure to prepare an EIS or EA to be arbitrary and capricious.

The court noted that did not intend to establish a requirement that an agency prepare a full-blown statement of reasons for invoking a categorical exclusion. "Such a requirement would detract from the legitimate governmental interest in avoiding unnecessary paperwork for actions that legitimately fall under a categorical exclusion and do not require an EA or EIS."<sup>28</sup>

The court then noted that even if there were some evidence of a contemporaneous adoption of a categorical exclusion for the Yellowstone CRADA, it would probably not survive the arbitrary and capricious review. The court explained its doubt with reference to Interior's NEPA regulation:

First, commercial exploitation of natural resources does not strike the Court as logically equivalent to "day-to-day resource management and research

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<sup>24</sup> Plaintiffs also alleged violations of the *Technology Transfer Act of 1986*, 15 U.S.C. § 3701 *et seq.*, the *National Park Service Organic Act of 1916*, 16 U.S.C. § 1 *et seq.*, the *Yellowstone National Park Organic Act*, 16 U.S.C. § 21, *et seq.*, and the so-called public trust doctrine, as well as the *Administrative Procedure Act*, 5 U.S.C. §§ 702; 706. This note deals solely with the NEPA violation.

<sup>25</sup> *Edmonds Institute v. Babbitt*, No. 98-561(RCL), 1999 U.S. Dist. LEXIS 4168 (D.D.C., March 24, 1999) at \*26-27.

<sup>26</sup> See, Department of the Interior Department Manual, 516 DM 7, App. 7, § 7.4(E)(2).

<sup>27</sup> *Edmonds Institute v. Babbitt*, 1999 U.S. Dist. LEXIS 4168 at \*47, quoting *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 481 (D.D.C. 1994) and *Fund for Animals v. Espy*, 814 F. Supp. 142, 149-51 (D.D.C. 1993).

<sup>28</sup> *Edmonds Institute v. Babbitt*, 1999 U.S. Dist. LEXIS 4168 at \*47.

activities." Second, and frankly more weighty in terms of arbitrary-and-capricious review, the DOI's own Department Manual identifies several exceptions applicable to all categorical exclusions. These exceptions include actions that may have adverse effects on such unique geographic characteristics as ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks, have highly controversial environmental effects, have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks, establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects, be directly related to other actions with individually insignificant but cumulatively significant environmental effects. Even had the defendants complied with the initial determination procedures mandated by the NEPA, the CEQ regulations, and their very own department manual, the Court finds that they could not reasonably have found none of the exceptions listed above to apply. The defendants themselves proclaim the ecological significance of Yellowstone's thermal features, and Old Faithful at least must be on the Department's National Register of Natural Landmarks. Likewise, there can be no debate that the Yellowstone-Diversa CRADA is a precedent-setting agreement within the National Park System and the DOI in general. The first agreement of its kind, the CRADA was announced in the presence of the Vice-President, the Secretary of the Interior, the Director of the Park Service, and the Superintendent of Yellowstone. As many as eighteen other entities have already discussed similar agreements with the defendants. Finally, the very Solicitor of the DOI has called for a reevaluation of all research permits on lands controlled by the Department and recommended insertion of a provision prohibiting commercial development of the fruits of such research without a CRADA. Any argument that [the exceptions] do not apply here cannot possibly pass muster even under the deferential arbitrary-and-capricious standard of review.<sup>29</sup>

The court ordered suspension of the CRADA pending preparation of NEPA documentation. The court did not feel that it had enough information to know whether an EIS was required or whether an EA might be appropriate.

Like the Department of Interior, the Army has published a list of categorical exclusions to NEPA and has also established screening criteria, that is, exceptions to the applicability of those exclusions.<sup>30</sup> Adoption of most of the categorical exclusions requires preparation of a Record of Environmental Consideration or "REC."<sup>31</sup> Decision-makers must also determine the proposed action does not involve any extraordinary circumstances or special resources.<sup>32</sup> These "screening criteria" are very similar to the ones adopted by the Department of the Interior in its regulation.

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<sup>29</sup> *Id.* at \*48-50. Quotation marks and citations omitted.

<sup>30</sup> Army Regulation 200-2, *Environmental Effects of Army Actions*, 23 December 1988.

<sup>31</sup> *Id.* at ¶ 4-2d.

<sup>32</sup> *Id.* at ¶ 4-2b and appendix A, ¶ A-31.

For Army practitioners, the *Yellowstone Microbe* case under discussion reinforces two points. First, use of a categorical exclusion requires that the REC be prepared before the decision is reached. Although the REC does not have to be lengthy, it must reflect basic information about the exclusion being adopted and the reasons for doing so.<sup>33</sup> If the proposed action is at all controversial, the REC should specifically address the screening criteria and state why they do not apply. This might be required if the action will occur at an installation with environmental problems or fragile resources. This will show that the decision-maker considered these issues and will make it more likely that he or she will be given deference by a reviewing court.<sup>34</sup> Finally, if you plan to say later that the proposed action is not controversial or significant, avoid having the Vice President of the United States present when you announce the action to the public. (LTC Howlett/LIT)

### American Indian and Alaska Native Policy

Lieutenant Colonel Jill Grant

On 20 October 1998, Secretary of Defense William Cohen signed the Department of Defense's (DoD) *American Indian and Alaska Native Policy*. The policy was promulgated to carry out President Clinton's mandate, as expressed in his 1998 Executive Order 13084,<sup>35</sup> that federal agencies provide Indian tribes a "meaningful and timely opportunity" to comment on agency policies with significant or unique effects on tribal interests.

The policy establishes a framework for working with federally recognized American Indian and Alaska Native governments<sup>36</sup> to ensure these governments receive timely notice and meaningful opportunity to be heard before DoD takes action that may significantly affect protected tribal resources,<sup>37</sup> tribal legal rights,<sup>38</sup> or tribal lands<sup>39</sup> as required by the Executive Order.

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<sup>33</sup> See, *Id.*, figure 3-1.

<sup>34</sup> The Army environmental community refers to the resulting document as a "Mayfield REC," named after an Army lawyer who initiated use of expanded RECs for a post that was subject to frequent environmental litigation.

<sup>35</sup> Executive Order 13084, *Consultation and Coordination with Indian Tribal Governments*," dated May 14, 1998.

<sup>36</sup> The policy refers to these federally-recognized American Indian and Native Alaskan governments as "tribes."

<sup>37</sup> The policy defines protected tribal resources as: "Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained be, or reserved by of for, Indian tribes through treaties, statutes, judicial decisions, or executive order, including tribal trust resources."

<sup>38</sup> Tribal rights are defined as: "Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies."

<sup>39</sup> Indian lands are defined as: "Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual, or 2) held by an Indian tribe or individual subject to restrictions by the United States against alienation."

In order for the policy to apply, two criteria must be met. First, the policy applies only to those American Indian and Native Alaskan governments that are "federally-recognized." These are tribal entities recognized by the Department of the Interior' Bureau of Indian Affairs, as listed in the Federal Register pursuant to section 104 of the *Federally Recognized Indian Tribe List Act*. Second, the policy applies only where the action DoD contemplates "may significantly affect protected tribal resources, tribal legal rights, or tribal lands. "

Once these criteria have been met, DoD must follow the four principles outlined in the policy. First, DoD must meet its trust responsibilities to the tribes. These responsibilities are derived from the federal trust doctrine, treaties, statutes, executive orders, and other legally binding agreements between the Federal government and the tribes. Next, the policy requires DoD to build "stable and enduring" government-to-government relationships with these federally recognized tribes, treating them as another foreign sovereign. These relationships are to be maintained through the following: (1) communication at both the leadership and staff levels; (2) establishment of liaisons throughout DoD to respond to tribal inquiries; and (3) providing information about opportunities for tribes within DoD. Perhaps most important, DoD must determine the effect its proposed "significantly affecting" actions may have on protected tribal resources, tribal rights, and Indian lands before decisions are made.

The policy then requires DoD to consult and negotiate with federally-recognized tribes about these "significantly affecting" actions, providing tribes "an opportunity to participate in the decision making process that will ensure these tribal interests are given due consideration." Finally, it requires DoD to recognize and respect tribal natural resources and properties of traditional or customary religious or cultural importance by acting consistent with the principle of conserving protected tribal resources and protecting Indian treaty rights; enhancing tribal capabilities to protect and manage tribal trust resources that may be significantly affected by DoD's actions; and, where practical, accommodating tribal member access to tribal sites on the installation.

The DoD policy is intended only to memorialize existing rights. It is not intended to create or change any legally enforceable rights, benefits, or trust responsibilities; nor is it intended to change tribal sovereignty, treaty rights or other rights of any Indian tribes or the exercise of those rights. Nevertheless, it is important to note that the policy makes clear that, even where there is a strong military interest, tribal rights must be respected and accommodated. As stated by Secretary Cohen, "[i]f tensions arise between these principles and the principles that guide the military mission, components will develop, as necessary, appropriate means to ensure tribal interests are given 'due consideration' and such tensions resolved." (LTC Grant/CPL)

### **EPA's Year 2000 (Y2K) Enforcement Policy**

Major Robert J. Cotell

Recently, the Environmental Protection Agency (EPA) has done extensive research and analysis into possible problems and environmental damage that may result from the potential Year 2000 (Y2K) Computer problem. If not handled properly, many adverse effects could occur through accidental contamination of the drinking water or release of pollutants into the air.

As a result of these concerns, EPA's Office of Environmental Compliance and Assurance (OECA) has announced an enforcement policy for violations that occur due to Y2K problems. The policy is designed to encourage regulated facilities to conduct Y2K testing well in advance of 1 January 2000. Under the policy, facilities are encouraged to conduct Y2K tests under existing regulatory and permit procedures. Such procedures might include those found in Resource, Conservation and Recovery Act (RCRA)<sup>40</sup> regulations providing for trial burn testing of hazardous waste<sup>41</sup> and land treatment demonstrations.<sup>42</sup>

In the absence of applicable existing procedures (or timely use of existing procedures) the OECA policy states that EPA may exercise its discretion to waive 100% of civil penalties that may apply to violations that occur as a result of testing. Likewise, the policy allows that EPA will recommend against criminal prosecution for violations resulting from testing.

In order to qualify for the waiver or the non-prosecution recommendation, a facility must meet several criteria:

- a) Test protocols must have been designed in advance of the testing period;
- b) the Y2K testing must have been the cause of any potential violations where penalty waiver is sought;
- c) The testing was needed to assess Y2K compliance status or test the effectiveness of Y2K modifications; was conducted before the Year 2000; and conducted for the shortest possible period of time, not to exceed 24 hours in duration;
- d) Violations must not have created a potentially imminent and substantial endangerment;
- e) All violations ceased at the end of the test or were corrected within 24 hours thereafter;
- f) The facility expeditiously remediated any releases or other adverse consequences as specified by EPA.

In addition, the policy requires that a facility meet all violation reporting requirements. In the absence of reporting requirements the facility must notify EPA of testing violations expeditiously (ordinarily no later than 30 days, and in all cases, no later than 1 February 2000). All re-testing must also comply with the policy. Finally, a facility must provide all information requested by EPA to determine the waiver or non-prosecution recommendation.

In addition to testing violations that occur prior to 1 January 2000, EPA will also recognize a facility's good faith in connection with violations occurring after the date. Facilities that test in accordance with the policy will be treated more favorably than those that make no effort.

In light of this, installations are encouraged to begin immediate Y2K testing in accordance with the OECA policy. Installations should contact EPA regional representatives to establish protocols and receive guidance. Installations that have more contact and interaction with EPA will likely receive more protection. EPA's Y2k enforcement policy is at **Error! Bookmark not defined..** (MAJ Cotell/CPL)

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<sup>40</sup> 42 U.S.C. § 6901, *et. seq.*

<sup>41</sup> 40 C.F.R. § 266.102.

<sup>42</sup> 40 C.F.R. § 270.63.

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### Understanding Risk-Based Clean Closure Under RCRA

Ms. Karen Heckelman<sup>1</sup> and Ms. Kate Barfield

The Army's remediation is conducted in accordance with the Defense Environmental Restoration Program (DERP) guidance.<sup>2</sup> This DERP guidance is intended to work in coordination with the requirements of the law governing "Superfund" cleanup – the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>3</sup> But in some instances, cleanup is conducted in accordance with the law that governs hazardous waste – the Resource, Conservation and Recovery Act (RCRA).<sup>4</sup> RCRA generally provides for two types of cleanup – *RCRA Closure* and *RCRA Corrective Action*. Our discussion will examine the concepts of RCRA closure, RCRA corrective actions, and RCRA risk-based "clean" closure.

#### ***What the Terms Mean***

RCRA Closure principles generally apply to the closing of a hazardous waste facility that is, was (or should have been) an "interim status" or permitted treatment, storage and disposal (TSD) unit.<sup>5</sup> The regulations governing RCRA closure<sup>6</sup> tend to be less flexible than RCRA corrective action requirements.

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<sup>1</sup> Ms. Karen Heckelman of the Army Environmental Center is among the Army's foremost RCRA experts.

<sup>2</sup> See, Office of the Deputy Under Secretary of Defense (Environmental Security), *Management Guidance for the Defense Environmental Restoration Program*, p. 1, March 1998.

<sup>3</sup> CERCLA, 42 U.S.C. § 9601 *et. seq.*

<sup>4</sup> RCRA, 42 U.S.C. § 6900 *et. seq.*

<sup>5</sup> See, 42 U.S.C. § 6925 for information on interim status and RCRA permitting.

<sup>6</sup> General closure requirements can be found at 40 C.F.R. Subpart G of Part 264 (permitted) or 265 (interim status). Additional closure requirements are found in the unit-specific requirements of Part 264 and 265.

RCRA Corrective Action generally applies to the remediation of hazardous waste<sup>7</sup> or hazardous constituent<sup>8</sup> releases from “solid waste management units” (SWMUs).<sup>9</sup> RCRA corrective action guidance tends to be a bit more flexible, than the approach taken with RCRA closure. This article provides a quick overview of these matters.

### ***RCRA Closure***

The clean-up standard for RCRA closure requires the Owner/Operator of a RCRA interim status or permitted TSD unit to close in a manner that:

- Minimizes the need for further maintenance;
- Controls, minimizes or eliminates post-closure escape of hazardous waste and other hazardous constituents into soil or water;
- To the extent necessary to protect human health and the environment.<sup>10</sup>

Generally, only two types of closure are allowed:

1. Closure by removal or decontamination (clean closure).
2. Closure-in-place (also called “dirty” closure).

Removal or Decontamination: These terms form the basis of “clean” closure. “[R]emoval or decontamination” often means that: (a) hazardous wastes should be *removed* from a TSD unit, and (b) any releases (including contaminated equipment, structures or soils) should be *decontaminated* so that further regulatory control is unnecessary.<sup>11</sup> RCRA clean closure is called “clean” because – in an ideal world – no contamination would remain.

Closure-in-Place: We don’t live in an ideal world. So, we also have the option of closing a unit with waste in place. Should hazardous waste remain, it will be dealt with under RCRA’s “post-closure care” requirements which call for future

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<sup>7</sup> The statutory definition of hazardous waste at § 1004(5) applies in this context, which is broader than the regulatory definition at 40 C.F.R. Part 261.

<sup>8</sup> Hazardous constituents are listed at Appendix VII to 40 C.F.R. Part 261. EPA has also proposed that hazardous constituents include those substances listed in Appendix IV to 40 C.F.R. Part 264. See, *Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities*, 55 Fed. Reg. 30798, July 27, 1990.

<sup>9</sup> See, 42 U.S.C. § 6924(u) and 40 C.F.R. § 264.101. Note that corrective action requirements for interim status units under 42 U.S.C. § 6928(h) are slightly different.

<sup>10</sup> The clean-up standard for RCRA closure is found at 40 C.F.R. § 264.111.

<sup>11</sup> See, 40 C.F.R. §§ 264.112; 264.114.

monitoring, maintenance and security measures, generally over a thirty-year period.<sup>12</sup> EPA has recently attempted to increase flexibility in this process.<sup>13</sup>

Recognizing the practical difficulties incumbent upon RCRA closures, the EPA developed a new policy that would essentially allow use of RCRA corrective action cleanup standards during a RCRA closure.<sup>14</sup> (Authorized state RCRA regulators may decide to adopt the EPA guidance as well.) To better understand the EPA guidance, we should first look at the requirements for RCRA corrective actions.

### ***RCRA Corrective Actions***

If the installation has or had an interim status or permitted TSD, corrective action may apply. Corrective action procedures generally apply to the cleanup of releases of hazardous waste or hazardous constituents from solid waste management units (SWMUs).<sup>15</sup> As with CERCLA areas of concern, SWMUS can include landfills, surface impoundments, land-treatment units, wastewater-treatment units, and other areas at which systematic releases occurred.<sup>16</sup> Note that only one regulatory authority, either federal or state, would possess RCRA corrective action authority. It is important that an installation determine whether the state has received authorization for a RCRA corrective action program.

**Media Cleanup Standards:** The goal of corrective action is to control or eliminate risks to human health and the environment.<sup>17</sup> Risk-based decisionmaking is used to ensure protection of human health and the environment. RCRA corrective actions tend to be governed by media cleanup standards, which can be similar to CERCLA "applicable or relevant and appropriate requirements" (ARARs).<sup>18</sup> Media cleanup standards are the concentrations of a hazardous constituent that a remedy must achieve in regards to a

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<sup>12</sup> 40 C.F.R. § 264.117.

<sup>13</sup> Under a new EPA regulation, alternatives to post-closure permits and the typical closure process may be allowed. See, *Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-Closure Permit Requirement; Closure Process*, 63 Fed. Reg. 56710, October 22, 1998, (to be codified at 40 C.F.R. §§ 264; 265; 270; 271).

<sup>14</sup> EPA Memorandum, *Risk-Based Clean Closure*, p. 2-3, March 16, 1998.

<sup>15</sup> The SWMU concept was introduced in 1985 by the EPA at *Hazardous Waste Management System; Final Codification Rule*, 50 Fed. Reg. 28702, July 15, 1985. Isolated spills or passive leaks are generally excluded from this SWMU concept. Note that the SWMU and hazardous constituent terminology do not appear in the interim status corrective action requirements of 42 U.S.C. § 6928(h).

<sup>16</sup> For more information, see, 40 C.F.R. § 264.101.

<sup>17</sup> See, *Corrective Action for Releases from Solid Waste Management Facilities*, 61 Fed. Reg. 19432, 19441, May 1, 1996.

<sup>18</sup> CERCLA, 42 U.S.C. § 9621(d)(C)(4).

specific media – soil, water, etc.<sup>19</sup> A cleanup standard may be based on promulgated federal or state standards (e.g., maximum contaminant levels and state cleanup standards) or developed through a site-specific risk assessment.<sup>20</sup>

### ***RCRA Risk-Based Clean Closure***

In the past, corrective action closure have been distinct RCRA programs. Risk-based closure, however, is a blend of the two RCRA cleanup programs.

**What is it?** Under recent *federal guidance*,<sup>21</sup> a RCRA TSD unit could be considered clean closed<sup>22</sup> if it meets the risk-based standards appropriate under CERCLA cleanup or a RCRA corrective action.<sup>23</sup> To understand risk-based closure, it helps to revisit the basic requirement for closure – “removal” and “decontamination.”<sup>24</sup> The idea of “removal” remains much the same – EPA requires that hazardous waste and liners be removed during cleanup of a TSD facility.<sup>25</sup> But, the agency does not require that all contamination be removed. Limited amounts of hazardous constituents may remain in media, provided those constituents are below a concentration that would pose a risk to human health and the environment.<sup>26</sup> Here is where “decontamination,” the second element of RCRA “clean”

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<sup>19</sup> See, *Corrective Action for Releases from Solid Waste Management Facilities*, 61 Fed. Reg. 19432, 19449, May 1, 1996 and proposed 40 C.F.R. § 264.525(d); see also, *Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities*, 55 Fed. Reg. 30798, July 27, 1990.

<sup>20</sup> *Corrective Action for Releases from Solid Waste Management Facilities*, 61 Fed. Reg. 19432, 19449 (May 1, 1996).

<sup>21</sup> The term “federal guidance” is highlighted to remind the reader that authorized states are free to develop their own, similar approaches to risk-based clean closure.

<sup>22</sup> This “clean” closure would still be in accordance with 40 C.F.R. §§ 264.111; 264.112(b)(4). Note that the concept is viewed as clean closure (rather than closure-in place) because “wastes” are removed, although contaminated media may remain.

<sup>23</sup> EPA Memorandum, *Risk-Based Clean Closure*, March 16, 1998; EPA Memorandum, *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, September 24, 1996.

<sup>24</sup> See, 40 C.F.R. §§ 264.112(b)(4); 264.114. The term “remove or decontaminate” is confusing because it implies that a facility may opt for one type of remediation (decontamination), rather than to “remove” wastes. The EPA sees these processes as working in tandem – a facility is generally required to engage in a certain level of contamination removal before moving onto decontamination.

<sup>25</sup> EPA Memorandum, *Risk-Based Clean Closure*, p. 2, March 16, 1998.

<sup>26</sup> Specifically, the EPA states that the regulations governing clean closure “...do not require one to completely remove all contamination, i.e., to background, at or from a closing unit. Rather, some limited quantity of hazardous constituents might remain in environmental media after clean closure provided they are at concentrations below levels that may pose a risk to human health and the environment.” *Id.* at 2.

closure, comes into play. As a practical matter, you use risk-based standards to determine your cleanup levels – which, in turn, will tell you the level of “decontamination” required.<sup>27</sup>

**What are the Closure Standards?** Risk-based standards for a RCRA “clean” closure may be derived from RCRA corrective action procedures, CERCLA requirements or from site-specific risk data.<sup>28</sup> These standards are chosen during negotiations with the appropriate federal or state regulators. Once the applicable set of standards is established, the installation would consider – in coordination with the applicable RCRA regulator – the risks involved with closing a site with remaining constituents. When assessing risk, you may consider practical issues, such as the remoteness of a location, engineering controls and land use.<sup>29</sup> For example, an industrial site need not be cleaned to a residential standard. If the risks for closure with remaining constituents fall below designated standards, the installation may assert that it has undertaken (as EPA puts it) the “appropriate level of decontamination” required for RCRA “clean” closure.<sup>30</sup>

**Emphasis on Risk Analysis:** RCRA “clean” closures, RCRA corrective actions and CERCLA cleanups should be founded on risk. So, the risk-based considerations used in RCRA corrective actions and in CERCLA clean-ups may be applied in RCRA closure to determine the level of “decontamination” required. This means your risk analysis will help an installation determine the amount of hazardous constituents that may remain on-site after a RCRA “clean” closure. The EPA stresses the principle of reciprocity between RCRA and CERCLA standards, stating:

Generally, cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs ...a remedy that is acceptable under one program should be presumed to meet the standards of the other.<sup>31</sup> (emphasis added)

The EPA also emphasizes that RCRA “clean” closure can be conducted in accordance with these standards. The agency states:

...site specific, risk-based media cleanup levels developed under RCRA corrective action and CERCLA cleanup programs are appropriate levels at which to define clean closure.<sup>32</sup> (emphasis added)

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<sup>27</sup> The installation’s risk analysis could take future land use – including industrial uses – into account when developing risk-based standards. *Id.* at 4-6.

<sup>28</sup> EPA Memorandum, *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, p. 7, September 24, 1996.

<sup>29</sup> EPA Memorandum, *Risk-Based Clean Closure*, p. 4-6, March 16, 1998.

<sup>30</sup> EPA Memorandum, *Risk-Based Clean Closure*, p. 4, March 16, 1998. *See also*, EPA Memorandum, *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, p. 2, September 24, 1996.

<sup>31</sup> EPA Memorandum, *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, p. 6-8, September 24, 1996.

<sup>32</sup> EPA Memorandum, *Risk-Based Clean Closure*, p. 2-3, March 16, 1998.

The EPA specifically encourages facilities to use risk-based cleanup standards, stating:

To avoid... inconsistency and to better coordinate between different regulatory programs, we encourage you to use risk-based levels when developing clean-closure standards.<sup>33</sup> (emphasis added)

Although differences may arise between the three approaches of CERCLA, RCRA closure and RCRA corrective action, such variations should not be an impediment. The EPA recommends that a facility examine the end result of remedial activities. If the approaches taken under RCRA or CERCLA are substantively similar, one regulatory process can be selected as the cleanup standard.<sup>34</sup> It is important to remember that this action is not unilateral – the installation must negotiate the site-specific application of risk-based principles with the appropriate federal or state RCRA regulator.

**When can I use these standards?** Installations should discuss the application of risk-based closure principles with the appropriate federal or state regulator at sites where some contamination will remain or when it is inappropriate to use strict “clean” closure standards. Risk-based standards may be used to avoid:

- Creating an island of purity within a “dirty” area.<sup>35</sup>
- Imposing different standards of cleanup – particularly when a facility is required to meet RCRA closure, RCRA corrective action and CERCLA requirements.
- Applying higher cleanup standards in the absence of risk.<sup>36</sup>

While risk-based clean closure is mostly discussed in federal guidance, EPA recently promulgated a federal *regulation* that substitutes corrective action (or, when appropriate, the CERCLA cleanup process) in place of closure at certain facilities. This approach is very similar to that of risk-based clean closure.<sup>37</sup> This approach can be used when a TSD is: (1) situated among SWMUs or areas of concern (AOC), and (2) the TSD and the SWMUs/AOCs are likely to have contributed to the release.

**Summary:** Given new EPA rules and guidance, procedures do exist for increased flexibility under RCRA closure. The application of these principles is highly site-specific and will likely involve close negotiating with either the EPA or the appropriate state RCRA regulator.

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<sup>33</sup> EPA Memorandum, *Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, p. 7, September 24, 1996.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> See, *EPA Memorandum, Risk-Based Clean Closure*, p. 5-6, March 16, 1998.

<sup>36</sup> See, *Id.* at 2-3; *EPA Memorandum, Coordination Between RCRA Corrective Action and Closure and CERCLA Site Activities*, p. 2-3; 6-8, September 24, 1996.

<sup>37</sup> *Standards Applicable to Owners and Operators of Closed and Closing Hazardous Waste Management Facilities; Post-Closure Permit Requirement; Closure Process*, 63 Fed. Reg. 56710, October 22, 1998.

Accordingly, the installation's environmental staff should work with its Environmental Law Specialist (ELS) when crafting the documents required to justify these forms of cleanup acceleration. The ELS will then be at the forefront of subsequent negotiations with RCRA regulators.

If you have further questions, please contact the authors, Karen Heckelman, at the Army Environmental Center, (410) 436-1553 or Kate Barfield at the Environmental Law Division, (703) 696-1572. (Karen Heckelman/AEC; Kate Barfield/RNR).

**De Las Milicias Celestiales**  
**(c.f. Paradise Lost)**

*By Jose Emilio Pacheco, 1999*

*En la guerra perpetua  
entre los Hijos de la Luz y los Hijos  
de las Tinieblas,  
me afilié con el bando de las Tinieblas.  
Pero cómo elogí su claridad,  
su transparencia, su brillo.  
De qué manera impuse la veneración  
hacia lo oscuro, que llamé luminoso.  
Y los obligué a sangre y fuego  
a decir que veían el sol  
cuando era noche profunda.*

The Celestial Bands  
In the perpetual war  
between the Sons of Light and  
the Sons of Darkness  
I affiliated myself with the side of darkness.  
My, how I praised its clarity,  
its transparency, its brightness.  
The way I inspired the veneration  
of the dark, which I called luminous.  
By blood and fire, I persuaded them  
to say that they saw the sun  
when it was darkest night.  
*Translated by LTC Howlett/LIT*

1. Reference memorandum, AMCEN-R, 25 Sep 98, Subject: Environmental Baseline Survey Requirements to Support Disposal of Buildings/Facilities Without Underlying Land.
2. The above memorandum provides guidance on Environmental Baseline Survey Requirements to Support Disposal of Buildings/Facilities Without Underlying Land. This memo specifically addresses the EBS and NEPA requirements associated with the DA Form 337.
3. There is no requirement to do an EBS to support the DA form 337. However, the guidance notes that an installation must generate sufficient information to make a determination on the DA Form 337 that ACM, PCB, or other hazardous substances are not present in the building. If these types of hazardous substances are present the DA Form 337 should "describe procedures for eliminating or controlling them during demolition and confirm compliance with applicable Federal standards". See AR 405-90, para B-7h.
4. The guidance also recommends that contractor demolition operations should require contract performance in accordance with the law. In particular, the solicitation and contract should advise about the potential or actual knowledge of hazardous conditions, such as lead-base paint, asbestos containing material, etc, which require special handling. It may be advisable to prepare an environmental building assessment (EBA) to summarize the various hazardous substances known to be contained in each building. In such case, the DA Form 337 should describe the use of the EBA as part of the description of procedures for eliminating controlled hazardous substances during demolition but it is not necessary to submit the individual EBA's as part of the DA Form 337.
5. Appropriate NEPA document is also required to support the building/facility disposal action. This could be an Environmental Assessment or Categorical Exclusion, or even a CERCLA ROD if it adequately addresses the demolition of the buildings.

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF</b>	)	
	)	
<b>UNITED STATES AIR FORCE</b>	)	<b>DOCKET NO. UST-6-98-002-AO-1</b>
<b>TINKER AIR FORCE BASE,</b>	)	
	)	
	)	
<b>RESPONDENT</b>	)	

**ORDER ON RESPONDENT'S MOTIONS TO DISMISS  
AND FOR ACCELERATED DECISION**

The Complaint in this matter was filed on January 13, 1998, by the Director of the Multimedia Planning and Permitting Division for Region VI of the United States Environmental Protection Agency ("EPA" or "Complainant") under the purported authority of Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e, commonly referred to as RCRA.<sup>1</sup> This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. Part 22.

The Complaint charges the United States Air Force, Tinker Air Force Base ("Respondent") with four counts of violating Section 9003 of the Solid Waste Disposal Act, 42 U.S.C. § 6991b, and the Oklahoma Corporation Commission's General Rules and Regulations Governing Underground Storage Tanks. The alleged violations concern Underground Storage Tanks ("USTs") at the Respondent's facility located at 7701 Arnold Street, Tinker Air Force Base, Oklahoma. The Complaint proposes a compliance order, requesting documentation

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<sup>1</sup> The Complaint does not specify which subsection(s) of Section 9006 of RCRA provides the EPA's authority in this matter but the Complainant's proposal of the penalty may reasonably be inferred as assessing the penalty pursuant to Section 9006(d) of RCRA.

verifying correction of the alleged violations, and proposes a civil administrative penalty of \$96,703 for the alleged violations.

The Respondent filed an Answer to the Complaint on February 11, 1998, responding to the factual allegations in the Complaint, setting forth six affirmative defenses, seeking dismissal of the Complaint, and requesting a hearing. Pursuant to the Prehearing Order dated March 24, 1998, the Complainant filed its prehearing exchange on June 11, 1998, and the Respondent submitted its prehearing exchange on July 10, 1998, and a supplement to its prehearing exchange on September 8, 1998.

With its prehearing exchange, the Respondent filed a Motion to Dismiss Complainant's Administrative Complaint ("Motion to Dismiss") on grounds that this forum lacks jurisdiction to resolve a legal dispute between two Federal agencies and that the Office of the Attorney General is the mandatory forum for resolution of this legal dispute under Executive Order 12146. In the alternative, the Respondent moved for summary judgment ("Motion for Summary Judgment") on the basis that the waiver of sovereign immunity in Section 9007 of RCRA, 42 U.S.C. § 6991f, does not authorize the EPA to impose administrative penalties against Federal facilities.

The Complainant filed a Response in Opposition to Respondent's Motion to Dismiss and in Opposition to Respondent's Motion for Summary Judgment ("Opposition") on July 23, 1998, disputing the Respondent's assertions that this forum lacks jurisdiction over the matter and that summary judgment is warranted.

For the reasons discussed below, the Respondent's Motion to Dismiss will be denied. The Respondent's Motion for Accelerated Decision (Summary Judgment) will be granted.

## **I. Motion to Dismiss**

### **A. Arguments of the Parties**

The Respondent's second and third affirmative defenses, reflected in its Motion to Dismiss, are as follows: that this tribunal lacks jurisdiction over the subject matter of the Complaint; and that the subject matter of the Complaint is not ripe for review.

The Respondent acknowledges that the EPA's Office of General Counsel has declared the EPA's position that it has authority to assess

administrative penalties against another Federal agency for UST violations, presenting as an attachment to its Motion to Dismiss the opinion of the EPA's Office of General Counsel, entitled, "EPA Authority to Assess an Administrative Penalty Against Another Federal Agency Under RCRA Subtitle I," dated June 16, 1998 ("OGC Memorandum"). However, the Respondent presents letters from Robert S. Taylor, Deputy General Counsel of the Department of Defense ("DoD") (Environment & Installations) to Mr. Craig Hooks, Director of the EPA's Federal Facilities Enforcement Office, dated January 20, 1998, and March 18, 1998, expressing the contrary opinion, that the EPA has no such authority. The Respondent's position is reiterated in the April 16, 1999, letter and supporting memorandum from the General Counsel of the DoD to the Department of Justice's Office of Legal Counsel ("DoD Memorandum to OLC"), requesting a legal opinion on this matter.

In its Motion to Dismiss, the Respondent argues that sovereign immunity is a jurisdictional issue in this case and that the Administrative Law Judge cannot resolve disputes about sovereign immunity. According to the Respondent, the United States Attorney General's Office is the mandatory and appropriate forum for resolution of legal disputes between Federal agencies. In support of this argument, the Respondent cites the following provisions of Executive Order 12146:

1-401: Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular problem or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

1-402: Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is a specific statutory vesting of responsibility for a resolution elsewhere.

The Respondent points out that the EPA, in its OGC Memorandum, recognizes that whenever two or more Executive agencies are unable to resolve a legal dispute they are required to

submit the dispute to the Attorney General pursuant to Executive Order 12146. OGC Memorandum, p. 2, footnote 2. Consistent therewith, the EPA in the past has submitted questions to the Department of Justice as to its enforcement authority against Federal agencies. *See*, "Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act" (July 16, 1997) ("OLC CAA Memorandum"); "Ability of the Environmental Protection Agency to Sue Another Government Agency," 9 Op. OLC 99 (December 4, 1985). The Respondent believes that the dispute between the EPA and the Respondent over whether penalties can be imposed against the Respondent for UST violations cannot be resolved except by the Attorney General, and must be resolved before the issue of the appropriateness of the penalty can be adjudged. Thus, the Respondent concludes that the Complaint is premature and must be dismissed.

The Respondent asserts that an EPA Administrative Law Judge "cannot adjudicate constitutional issues pertaining to his authority to entertain such suit," citing *Harmon Electronics, Inc.*, 1993 RCRA LEXIS 274 (Order, August 17, 1993) ("an ALJ is generally precluded from passing on the constitutionality of the very procedure he is called upon to administer, in that federal agencies have neither the power nor the competence to pass on the constitutionality of the administrative action"), subsequent Initial Decision (ALJ, December 15, 1994), *aff'd*, (EAB, March 24, 1997), *rev'd*, *Harmon Industries, Inc. v. Browner*, 19 F.Supp.2d 993 (W.D. Mo. 1998), appeal docketed, No. 98-3775 (8th Cir., December 24, 1998); and referring to *Social Security Administration v. Nierotko*, 327 U.S. 358, 369 (1946) ("[a]n agency may not finally decide the limits of its statutory power.").

The Respondent asserts that an interpretation of a waiver of sovereign immunity is a matter of constitutional law. See *United States Department of Energy v. Ohio*, 503 U.S. 607, 619 (1992). The Respondent asserts further that administrative venues are not appropriate to resolve questions of constitutional law, and that the Environmental Appeals Board readily recognizes its lack of authority to rule on the constitutionality of a statute. The Respondent urges dismissal of this proceeding on the basis that the Administrative Law Judge cannot proceed unless it has been settled that Congress has waived the Federal Government's immunity from suit in this matter.

Finally, the Respondent argues that proceeding on the merits in this action would violate fiscal law, on the basis of the Purpose Statute providing that appropriations of funds to Federal agencies

"shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a).

In its Opposition, the Complainant contends that the OGC Memorandum clearly establishes the EPA's authority to issue an administrative order to another Federal agency in the same manner it has to issue such order to a private person. In support of this position, the Complainant presents as Complainant's Prehearing Exhibit 13 the OGC Memorandum, which concludes that Congress has clearly stated that the EPA has authority, under Sections 6001(b), 9001(6), 9006(a) and (c), and 9007(a) of RCRA, to assess administrative penalties against Federal agencies in the same manner as against private persons. The Complainant asserts that the Respondent is not being deprived of due process rights contemplated by the Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, as the Respondent will have the right to appeal the Administrative Law Judge's ruling to the Environmental Appeals Board and will have the opportunity to confer with the EPA Administrator before an administrative order becomes effective. According to the Complainant's argument, the Respondent can contest the administrative order within the Executive Branch after exhaustion of the appeals process and the DoD has had the opportunity to confer with the Administrator.

The Complainant maintains that the Administrative Procedure Act empowers Administrative Law Judges and the Environmental Appeals Board with the predisposition to hear and decide cases on their merit whenever possible. See, Jay's Auto Sales, TSCA-III-373 (ALJ, June 5, 1996); Environmental Control Systems, Inc., I.F.&R.-III-432-C (ALJ, July 13, 1993).

In response to the Respondent's argument that the administrative hearing is inappropriate and that Executive Order 12146 requires a mandatory referral to the Department of Justice, the Complainant asserts that no formal mandate exists. In this regard, the Complainant asserts that Executive Order 12146 does not remove jurisdiction from an administrative forum. Finally, the Complainant asserts that a ruling on the Motion to Dismiss at this late stage in the proceeding "would be unfair and prejudicial to Complainant as Complainant has never heard many of these arguments from Respondent, despite regular communication with Respondent." Opposition at 6.

## **B. Discussion**

## **I - Prejudice**

Initially, I address the Complainant's argument that a ruling on the Motion to Dismiss would prejudice the Complainant because the Respondent raised the argument of jurisdiction late in the proceeding. I find no merit to this argument. While the raising of last minute arguments is not encouraged, such is not prohibited. The Complainant has had ample opportunity to respond to the Respondent's argument and there is no element of prejudice or surprise.

## **II - Third Affirmative Defense - Executive Order 12146**

Administrative Law Judges have authority, delegated from the Administrator of the EPA, under Section 9006 of RCRA to conduct a public hearing upon request of a respondent named in a complaint and compliance order. The Respondent, in its Answer, requested a hearing under 40 C.F.R. Part 22, the Rules of Practice. Under the Rules of Practice, the presiding judge has the responsibility to conduct a hearing, inter alia, to "[h]ear and decide questions of facts, law, or discretion." Section 22.04(c)(7) of the Rules of Practice, 40 C.F.R. § 22.04(c)(7). The question of law at the center of this case, and presented in the Respondent's Motion for Summary Judgment, is whether the EPA has authority to assess penalties administratively against another Federal agency for violations of the UST provisions of RCRA. The Respondent believes that this question of law cannot be determined by an Administrative Law Judge, but instead must be addressed by the United States Attorney General.

Although the Department of Defense recently requested the Office of Legal Counsel to provide a formal opinion as to the EPA's authority to assess penalties against Federal agencies for violations of UST regulations (DoD Memorandum to OLC), the Attorney General has not rendered an opinion on this issue. The Assistant Attorney General for the Office of Legal Counsel has been charged with, among other things, "rendering informal opinions and legal advice to the various agencies of the Government." 28 U.S.C. § 510; 28 C.F.R. § 0.25(a). The Justice Department "has a very specific responsibility to determine for itself what [a] statute means, in order to decide when to prosecute." *Crandon v. United States*, 494 U.S. 152 (1990) (Scalia, J., concurring). Thus, the Attorney General's authority to conduct litigation on behalf of the United States necessarily includes the

exclusive and ultimate authority to determine the position of the United States on the proper interpretation of statutes before the courts." (emphasis added) 1988 OLC LEXIS 44, 12 Op. O.L.C. 89 (June 6, 1988).

Congress has given the EPA the primary responsibility for interpreting RCRA, e.g., through promulgations of regulations and administrative adjudication, although Executive Order 12146 confers on the Attorney General, at the request of appropriate officials, the authority to resolve disputes between Executive agencies. See, "Reconsideration of the Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities," 1994 OLC LEXIS 12 (May 23, 1994) ("We believe that, read together, the Davis-Bacon Act, the Reorganization Plan, 28 U.S.C. §§ 511 and 512, and Executive Order No. 12146, while granting the primary responsibility for interpreting Davis-Bacon to Labor, also confer on the Attorney General, at the request of appropriate officials, the authority to review the general legal principles of the Secretary's decisions under the Act.")

An Administrative Law Judge's ruling in this proceeding on the issue of the EPA's authority to impose on a department of the Federal Government penalties for UST violations is not contrary to President Carter's directive in Executive Order 12146. Such a ruling within the Executive Branch does not preclude the EPA or DoD from seeking an opinion from the Attorney General at the relevant time. First, I observe that an administrative order issued by an Administrative Law Judge against a Federal agency does not become final until the appeal process is exhausted and the agency affected has had the opportunity to confer with the EPA Administrator. Section 6001(b)(2) of RCRA; Section 22.30 of the Rules of Practice, 40 C.F.R. 22.30. Thus, the Administrative Law Judge's order, in itself, does not obtain sufficient finality so as to constitute the point at which the agencies may be deemed "unable to resolve a legal dispute" within the context of paragraph 1-402 of Executive Order 12146.

Second, I observe that Paragraph 1-402 of Executive Order 12146 requires Executive Branch agencies, such as the EPA and DoD,<sup>2</sup> to submit a dispute "prior to proceeding in any court," (emphasis added). A proceeding before an Administrative Law Judge

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<sup>2</sup> The Office of Legal Counsel has deemed the head of the EPA to "serve at the pleasure of the President." 9 Op. O.L.C. 119, 1985 OLC LEXIS 42 (December 4, 1985).

generally is not deemed a "court." *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 219 (3d Cir.), cert. denied, 441 U.S. 961 (1979)("generally the word 'court' in a statute is held to refer only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers"). In *Baughman*, supra at 217, the Third Circuit stated that an "administrative board may be a 'court' if its powers and characteristics make such a classification necessary to achieve statutory goals." Thus, in some contexts, an administrative tribunal may be deemed a "court" if it has the power to accord relief which is the substantial equivalent to that available in federal courts, and if the procedures of the administrative tribunal are comparable to the procedures applicable to federal court suits. *Id.* (holding that Pennsylvania Environmental Hearing Board is not a "court" within the context of barring citizen suits under Section 304 of the Clean Air Act, because it could not enjoin violators, could impose a maximum penalty of only \$10,000, and did not permit intervention as of right); cf. *Texans for a Safe Economy Education Fund v. Central Petroleum Corp.*, 1998 U.S. Dist LEXIS 16146, 28 ELR 21563 (S.D. Tex. 1998) (Texas administrative agency held substantially equivalent to a court for purposes of Section 304 of the Clean Air Act); *SPIRG v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131 (3d Cir. 1985) (EPA administrative enforcement action on permit, where there was no authority to impose penalties, did not qualify as court action for purposes of barring citizen suit under Section 505(b)(1)(B) of the Clean Water Act).

In the instant case, the Administrative Law Judge's powers are limited as compared to those accorded a state or federal court under RCRA. In particular, the Administrative Law Judge cannot grant injunctive relief. As such, an administrative tribunal under an Administrative Law Judge within the EPA does not appear to meet the definition of "court" as that term is used in Paragraph 1-402 of Executive Order 12146.

I further observe that in the context of Paragraph 1-402 of Executive Order 12146, the concern appears to be the constitutional problem of justiciability of a suit in an Article III court between two Federal agencies. See, "Ability of the Environmental Protection Agency to Sue Another Government Agency, 9 Op. O.L.C. 119, 1985 OLC LEXIS 42 (December 4, 1985). The Office of Legal Counsel maintains that "the constitutional scheme established by Article II and Article III calls for achieving compliance with RCRA...within the Executive Branch and not in a judicial forum." As the Office of Legal Counsel explains:

[A] court must . . . assure itself that it is not being asked to decide a question that is properly addressed to the branch of government to which those agencies belong. Where two Executive branch agencies appear on opposing sides of a lawsuit, and where the issue in litigation involves both agencies' obligation to execute the law, the principle of separation of powers makes these inquiries particularly sensitive. Accordingly, the courts must insist that the "real party in interest" challenging the Executive's position in court not itself be an agency of the Executive. If it is, the court is not only faced with a potentially collusive lawsuit, it is also being asked to perform a function committed by the Constitution to the President.

*Id.*

In an administrative tribunal, however, this Constitutional concern does not arise. The Administrative Law Judge and the administrative tribunal are not part of the Federal judiciary under Article III of the Constitution. The dispute between the two Federal agencies remains within the Executive Branch. As such, there is no violation of the separation of powers principles.

For the foregoing reasons, I find that an EPA enforcement proceeding before an Administrative Law Judge does not fall within the purview of paragraph 1-402 of Executive Order 12146. The Administrative Law Judge's order is not the final EPA administrative order ripe for submission to the Attorney General as the "dispute" between two Federal agencies, and the administrative tribunal is not a "court" as contemplated by Executive Order 12146.

### **III. Complainant's Opposition - The OGC Memorandum**

To establish the EPA's and Administrative Law Judge's jurisdiction over this matter, the Complainant simply relies on the OGC Memorandum, dated July 16, 1998, interpreting RCRA to allow the EPA to assess civil administrative penalties against Federal agencies for UST violations (Complainant's Prehearing Exhibit 13, "OGC Memorandum"). However, the General Counsel's opinion is not binding on the Administrative Law Judge, as it is an intra-agency memorandum from the EPA's General Counsel to the EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance, in effect providing support to a party to this case.

Moreover, the EPA's administrative tribunals do not accord deference to statutory or regulatory interpretations advanced by a component of the EPA. *Lazarus, Inc.*, TSCA App. No 95-2, n. 55 (September 30, 1997) ("Parties in cases before the [Environmental Appeals] Board may not ordinarily raise the doctrine of administrative deference as grounds for requiring the Board to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA. This rule applies because the Board serves as the final decisionmaker for the EPA in cases within the Board's jurisdiction"); *Mobil Oil Corp.*, 5 EAD 490, 509 n. 30 (September 29, 1994) ("Because the Board serves as the final decisionmaker for the Agency, the concepts of Chevron and Skidmore deference do not apply to its deliberations."); see also, *Environmental Defense Fund, Inc. v Costle*, 657 F.2d 275 (D.C. Cir. 1981) (memorandum of EPA General Counsel interpreting a statute does not constitute a formal Agency position).

As to the weight to be accorded to the OGC Memorandum, I note that it was written after the Complaint in this matter was issued. As such, its persuasive authority is diminished. *Nordell v. Heckler*, 749 F.2d 47, 48 (D.C. Cir. 1984) ("To carry much weight . . . the interpretation must be publicly articulated some time prior to the agency's embroilment in litigation over the disputed provision").

Thus, neither the EPA nor the Attorney General has issued any binding statement as to the EPA's authority to assess civil administrative penalties against Federal agencies under the UST provisions of RCRA. The next question to be addressed is whether the Administrative Law Judge may interpret statutory provisions of RCRA in light of the Respondent's claim that such interpretation involves constitutional law.

#### **IV. Second Affirmative Defense - Administrative forum cannot resolve sovereign immunity issue**

The Respondent is correct that questions as to whether or not a provision of a statute or regulation is constitutional cannot be entertained in administrative enforcement proceedings. *Public Utilities Commission of California v. United States*, 355 U.S. 534, 539 (1958). However, questions as to constitutional applicability of legislation to particular facts may be addressed in administrative enforcement proceedings. *McGowan v. Marshall*, 604 F.2d 885 n. 18 (5th Cir. 1979); 3 K. Davis, *Administrative Law Treatise*, § 20.04, at 74 (1958).

In the instant matter, the Administrative Law Judge is being called upon not to address whether particular provisions of a statute are unconstitutional, but to address whether the EPA's application of certain statutory provisions to the context of administrative penalty assessments against Federal facilities is consistent with the Constitution. However, the Office of Legal Counsel, as discussed below, has laid this issue to rest.

The Respondent believes that the issue of sovereign immunity from a suit by the EPA to impose civil administrative penalties against another Federal agency is a constitutional issue. Before such an issue is reached, however, a determination must be made as to whether Congress has stated that the EPA has the authority to impose penalties against Federal facilities for UST violations. See, "Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies," 1994 O.L.C. LEXIS 11 at \*7 (May 17, 1994) ("OLC HUD Memorandum") ("The initial question presented is whether the [Fair Housing] Act's government enforcement scheme may be construed to apply to executive branch agencies . . . [i]f we conclude it may not be, then there is no need to resolve the Article II and Article III constitutional issues raised").

If Congress has stated that the EPA has authority to impose penalties against Federal facilities for UST violations, the next question is whether constitutional issues are raised. As to Article III of the Constitution, which limits Article III courts to resolving actual cases and controversies, a constitutional issue arises where the Executive Branch is attempting to sue itself in an Article III court. Another constitutional issue, under Article II, arises where litigation of a dispute between Executive Branch agencies conflicts with the constitutional grant of Executive power to the President to direct and supervise the Executive Branch agencies.

However, these issues need not be decided where no litigation in an Article III court is involved and where the President's power over the Executive Branch is not disturbed. See, OLC HUD Memorandum 1994 OLC LEXIS at \*7 ("the sovereign immunity issue . . . would only arise if the judicial enforcement aspect of the enforcement scheme were found applicable."); OLC CAA Memorandum at 3 (separation of powers concerns arise where statute contemplates judicial intervention into an executive branch function, authorizing civil litigation proceedings between federal agencies). The Office of Legal Counsel has stated, "construing a statute to authorize an

executive branch agency to obtain judicial resolution of a dispute with another executive branch agency implicates 'the President's authority under Article II of the Constitution to supervise his subordinates and resolve disputes among them.'" (emphasis added) OLC HUD Memorandum, 1994 OLC LEXIS 11 at \*11, quoting "INS Review of Final Order in Employer Sanctions Cases," 13 Op. O.L.C. 446, 447 (1989) (preliminary print). The Office of Legal Counsel also has stated that Article II does not mandate that the President review decisions made in the Executive Branch, as long as he is not deprived of his opportunity to review the matter, as his "subordinates may make decisions pursuant to the statutory duties that Congress has entrusted to their respective offices." "Constitutionality of the Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force," 13 Op. O.L.C. 131, 1989 OLC LEXIS 94 (June 8, 1989) ("OLC NRC Memorandum"). Both Article II and III constitutional issues arise only where judicial enforcement, not administrative enforcement, is concerned.

This proceeding, brought under Section 9006 of RCRA, involves administrative rather than judicial enforcement, and may be resolved fully within the Executive Branch. Congress authorized the EPA to bring administrative enforcement actions in Sections 6001(b) and 9006 of RCRA. Section 6001(b)(2) provides that before any EPA administrative order becomes final, the respondent shall have the opportunity to confer with the Administrator. If not thereby resolved, the dispute may be resolved within the Executive Branch, either by the Department of Justice pursuant to Executive Order 12146, or by the Office of Management and Budget pursuant to Executive Order 12088.<sup>3</sup>

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<sup>3</sup> In the OLC HUD Memorandum, the Office of Legal Counsel noted that another constitutional issue may arise even if the statute were construed to remove from the courts any role in enforcement against Federal agencies: interference with the President's Article II authority would be implicated where a dispute resolution mechanism within the Executive Branch would be determined by Congress. However, for conflicts between Executive Branch agencies as to violations of RCRA, President Carter set up a dispute resolution procedure within the Executive Branch in Executive Order 12088. As to any claim that under Article II a Federal agency may not unilaterally impose civil penalties against another Federal agency, the Office of Legal Counsel has laid such claim to rest: "it is not inconsistent with the Constitution for an executive agency to impose a penalty on another executive agency pursuant to its statutory authority so long as the President is not deprived of his opportunity to review the matter." OLC NRC Memorandum, 1989 OLC LEXIS 94 at \*12.

Indeed, RCRA does not provide for judicial review of administrative enforcement orders or for collection of enforcement penalties in Federal court for RCRA violations, unlike the Fair Housing Act addressed in the OLC HUD Memorandum (providing for judicial review), the Atomic Energy Act addressed in the OLC NRC Memorandum (providing for referral to U.S. Attorney General for collection of penalties in Federal district court), and the Clean Air Act addressed in the OLC CAA Memorandum (providing for judicial review and for enforcement or recovery of penalty in Federal district court). See, RCRA §§ 3008, 7006, 9006; but see, *Chemical Waste Management v. U.S. EPA*, 649 F.Supp. 347 (D. D.C. 1986) (District court reviewed EPA final order assessing penalties under RCRA Section 3008(a), citing to 28 U.S.C. § 1331); *United States v. Rogers*, 685 F.Supp. 201 (D. Minn. 1987) (Federal district court action to order compliance with terms of Administrative Law Judge's Initial Decision on default, including compliance order and penalty assessment under RCRA § 3008, citing 28 U.S.C. § 1331); *Beazer East, Inc. v. U.S. EPA*, 963 F.2d 603 (3d Cir. 1992) (Administrative Law Judge's civil penalty assessment and compliance order under RCRA 3008 upheld by EPA Administrator in Final Order, which was held not arbitrary or capricious by district court, and affirmed by Third Circuit). Thus, constitutional issues under Articles II and III are not before me in this proceeding. See, OLC NRC Memorandum, 1989 OLC LEXIS 94 at \*25 ("this constitutional issue need not arise, because the framework of the [Atomic Energy] Act clearly permits this dispute over civil penalties to be resolved within the executive branch, and without recourse to the judiciary").

The fact that the Respondent questions the authority of the Administrative Law Judge to entertain the dispute does not prohibit an Administrative Law Judge from ruling on it. Administrative Law Judges may rule on their authority under a statute to adjudicate an issue. *CFTC v. Schor*, 478 U.S. 833 (1986) (Court upheld Administrative Law Judge's ruling, which was based on long-held agency policy, that he had authority to adjudicate common-law counterclaims).

The cases cited by the Respondent in support of its argument that the Administrative Law Judge cannot address her own authority to entertain this proceeding are unavailing. In *Social Security Administration v. Nierotko*, 327 U.S. at 369, the Supreme Court stated, "An agency may not finally decide the limits of its statutory power" (emphasis added), which is a judicial function, and concluded that an administrative interpretation of a statute that went beyond

the boundaries of the statute exceeded the permissible limits of administrative interpretation. The opinion did not prohibit an Administrative Law Judge from ruling on such an issue, but merely clarified that such a ruling is not binding on the judiciary. See also, *Adams Fruit Co. v. Barrett*, 494 U.S. 368, 650 (1990) (agency determinations within the scope of delegated authority are entitled to deference, but an agency may not bootstrap itself into an area where it has no jurisdiction). The passage in the *Harmon Electronics* opinion, quoted by the Respondent, is followed by the following citations: *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (plain wording of statute alleged to be unconstitutional), *Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974) (challenge administrative procedures as unconstitutional), and *Frost v. Weinberger*, 375 F.Supp. 1312, 1320 (E.D. N.Y. 1974) (same). These decisions are not controlling here, as the Respondent is not challenging the EPA's administrative procedures or the plain wording of RCRA as unconstitutional.

In conclusion, I find that there is no persuasive authority that would bar the Administrative Law Judge from addressing the issue of whether the EPA has authority under RCRA to impose penalties administratively against the Respondent, a part of another Federal agency, for alleged violations of the UST provisions.

## **V. Fiscal law**

In its Motion to Dismiss, the Respondent argues that if Congress has not waived the Federal Government's immunity from suit in the instant case, then logically it could not have intended to provide the EPA with funds to prosecute and adjudicate this action. The Respondent characterizes the EPA's pursuit of this action as a violation of "fiscal law." In support of this argument, the Respondent quotes the following language from the Purpose Statute, "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law" (emphasis added). 31 U.S.C. § 1301(a).

First, I point out that under Section 6991i of RCRA Congress specifically authorized appropriations to carry out Subchapter IX of the Solid Waste Disposal Act, Regulation of Underground Storage Tanks. Although the instant order in this matter ultimately finds that the EPA lacks authority to impose punitive penalties against the Respondent for alleged UST violations under RCRA, this finding does not disturb the validity of the EPA's attempt to assert its position. In

other words, the EPA's position is sufficiently arguable to warrant its prosecution. Otherwise, any time a party is contesting the authority or propriety of the underlying cause of action, that party could raise the argument that there never was an intention to fund the prosecution and/or adjudication of the action. Further, I note that there is no cited authority to support the Respondent's argument.

Later, the Respondent, in its DoD Memorandum to OLC, raises the more difficult question of whether Article I of the Constitution or the Purpose Statute prohibits appropriated funds of the Department of Defense from being used for the payment of administrative penalties. In other words, may the President, through the Executive Branch, reallocate funds appropriated in legislation enacted by Congress for a specific purpose, such as operations and maintenance of the military departments, and redirect such funds to the Treasury for the payment of a fine imposed by another Federal agency?

With regard to the Purpose Statute, I note that an exception for the intended use of appropriated funds is permitted "where otherwise provided by law." Thus, where Congress specifically authorizes penalties in a law, such as RCRA, then the exception is met and there is no violation of the Purpose Act.

With regard to the Article I concerns raised by the Respondent, I note that Congress considered the impact of the FFCA resulting from penalties imposed on Federal facilities by the States and the EPA. Congressional criticism of the FFCA focused on the appropriations of the Federal agencies as affected by the authority of the States to assess penalties. See, e.g., 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14901 (daily ed. October 17, 1991) (Remarks of Senator Chafee: "The Bush administration opposed that legislation [FFCA]. In particular, the Departments of Defense and Energy expressed serious concerns that devoting Federal funds to fines and penalties would divert scarce Federal resources away from the most important goal . . . .In addition, those Departments stated their belief that aggressive State attorneys general would disrupt Federal budgets and cleanup priorities by imposing enormous fines and penalties."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 15122, 15128 (daily ed. October 24, 1991) (Remarks of Senator Nunn: "This bill also has a downside potential to create an unproductive situation and undermine the Federal budget process. The ultimate success of this bill will turn on the manner in which this new enforcement authority is used. I hope the States will use the authority judiciously so as to achieve the shared goal of making the Federal facilities a good environmental neighbor."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14900

(daily ed. October 17, 1991) (Remarks of Senator Johnston: "Federal agencies should not be subject to fines and penalties for noncompliance where adequate funding has not been provided by Congress specifically for that purpose."); 101st Cong. 1st Sess., S. Rep. No. 553 (daily ed. October 24, 1990) (Additional views of Senators Chafee, Simpson, Symms, Durenberger and Warner: "The problem is that this bill would subject the United States to fines and penalties for failure to clean up these old sites as quickly as each State or local government official demands that the cleanup be accomplished."); 101st Cong. 1st Sess., 135 Cong. Rec. H 3893, 3925 (daily ed. July 19, 1989) (Remarks of Congressman Lancaster: the FFCA "would give State and local authorities the authority to impose fines and penalties as a means to compel not just compliance . . . but corrective action as well . . . . This bill will permit State and local authorities to accelerate cleanups of hazardous waste sites in a way that will reshuffle defense spending priorities without Congressional approval.")

A review of the relevant legislative history indicates that Congress did not appear particularly troubled by the effect of penalties imposed administratively by the EPA. The Congressional Budget Office reported in a letter dated June 11, 1991, to Congressman John D. Dingell, Chairman of the Committee on Energy and Commerce, that "Penalties imposed by the EPA would be paid through intra-governmental transactions and would have no net budget impact." H.R. Rep. No. 111, 102nd Cong., 1st Sess. (June 13, 1991). Despite the views opposing the FFCA, and in light of the amendment in Section 6001(c) of RCRA limiting the State's use of funds to benefit the environment, Congress decided in enacting the FFCA that the factors supporting the assessment of penalties and fines against Federal facilities outweigh the concerns expressed above.

## **VI. Conclusion**

In view of the foregoing discussion, it is concluded that this tribunal has jurisdiction over the subject matter of the Complaint and that the Administrative Law Judge is not precluded from addressing the Respondent's Motion for Summary Judgment on its merits. Accordingly, the Respondent's Motion to Dismiss is denied.

## **II. Motion for Summary Judgment**

## **A. Arguments of the Parties**

The Respondent's First Affirmative Defense is that the EPA lacks authority to impose punitive civil administrative fines against another Federal agency under Section 9006 or 9007, 42 U.S.C. § 6991e or 6991f. The Respondent asserts that the clear intent of Congress was not to subject Federal agencies to civil or administrative penalties in Section 9007 of RCRA. Conceding that the EPA has administrative enforcement authority under Section 6001(b) of RCRA, the Respondent asserts that there is no grant of authority for the EPA to impose monetary penalties against Federal agencies for violation of the UST provisions in RCRA. Moreover, according to the Respondent, the EPA has not provided the procedural right mandated by RCRA Section 6001(b)(2) to confer with the EPA Administrator before a UST penalty becomes final.

In its Opposition, the Complainant points out that "summary judgment" does not exist as a procedural device in this administrative forum. Assuming that an accelerated decision is requested, the Complainant asserts that genuine issues of material fact exist which would prohibit an accelerated decision. Specifically, the Complainant asserts that a motion for accelerated decision is inappropriate because the Respondent has argued that fact issues as to the penalty amount, appropriateness of the penalty policy, and use of proper guidance are at issue.

In the Complainant's Opposition to the Motion to Dismiss, the Complainant relies on the OGC Memorandum as clearly establishing the EPA's authority to issue an administrative order to another Federal agency in the same manner as it has to issue such order to a private person. Therefore this argument, and the OGC Memorandum, will be taken as the Complainant's substantive opposition to the Respondent's Motion for Summary Judgment.

## **B. Discussion**

### **I. Accelerated Decision**

The Respondent correctly cites Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20, as the authority for its motion for summary judgment, more appropriately referred to as accelerated

decision. The issues of fact as to the amount of penalty are not material to the issues raised in the Respondent's motions. While recognizing that the issues of law presented in the motion for summary judgment are heavily contested and are issues of first impression, such does not render the issues inappropriate for accelerated decision. In fact, the mechanism of accelerated decision provides an excellent means for adjudicating the legal issues presented. Both parties have had ample opportunity to argue and brief their positions. Therefore, the Complainant's assertions as to the Respondent's authority to file a motion for accelerated decision (summary judgment) are not persuasive.

## **II. Clear statement standard**

There is no dispute by either party that the governing standard for determining whether RCRA authorizes the EPA to assess penalties administratively against the Respondent for alleged UST violations minimally is the "clear statement" rule of statutory construction. The clear statement rule is applicable where constitutional concerns are raised. See, OLC CAA Memorandum; OLC HUD Memorandum. The OGC Memorandum states that the "clear statement" standard is appropriate for determining whether a statute authorizes an agency to assess administrative penalties against another agency, based on the Office of Legal Counsel's use of that standard where such a determination potentially raises constitutional issues such as separation of powers concerns. I agree with the Respondent's position that the EPA's interpretation of RCRA authorizing the EPA to assess civil penalties administratively against the Respondent raises separation of powers concerns warranting, at a minimum, the application of the clear statement rule standard.

The finding that the clear statement rule standard is for application here, however, does not mean that the Administrative Law Judge lacks authority to entertain this matter or that the EPA is barred from asserting its authority to assess penalties. As discussed above, the Office of Legal Counsel has concluded that a Federal agency can exercise its administrative enforcement authority against another agency, including the imposition of penalties, consistent with Articles II and III of the Constitution, so long as the President is not deprived of his opportunity to review the matter and the relevant Act does not require either agency to bring a civil action in federal court. See, OLC CAA Memorandum; OLC HUD Memorandum; OLC NRC Memorandum.

In the instant matter, RCRA does not preclude the President from authorizing any process he chooses to resolve the dispute between the EPA and the DoD concerning the assessment of administrative penalties and neither agency is required to bring a civil action. As previously mentioned, RCRA does not provide for judicial review of administrative enforcement orders or for collection of enforcement penalties in federal court for RCRA violations.

Next, I turn to the Respondent's remaining argument, set forth in the DoD Memorandum to OLC, that under cited case law, the doctrine of sovereign immunity can apply to an order by one Federal agency against another that requires payment from that agency's funds. See, *United States Department of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *Department of Army v. F.L.R.A.*, 56 F.3d 273, rehearing and suggestion for rehearing en banc denied (1995); *Franchise Tax Bd. Of California v. U.S. Postal Service*, 467 U.S. 512 (1984); *In re Newlin*, 29 B.R. 781 (E.D. Pa. 1983).<sup>4</sup> The Respondent further suggests that if traditional sovereign immunity analysis is applicable in the interagency setting, then the outcome of the application of the "clear statement" analysis should be no different than the outcome of applying the Supreme Court's presumption that sovereign immunity exists in the absence of an unequivocal expression of congressional intent to the contrary.

It is a common rule that "any waiver of the National Government's sovereign immunity must be unequivocal." *U.S. Dep't of Energy v. Ohio*, supra; *Irwin v. Veterans Administration*, 498 U.S. 89, 95 (1990). Congress' expression of waiver must appear on the face of the statute and "it cannot be discerned in (lest it be concocted out of) legislative history." *Department of Army v. F.L.R.A.*, supra at 277 (citing *United States v. Nordic Village*, 503 U.S. 30, 37 (1992)). A waiver of the Federal Government's general immunity from suit, "must be construed strictly in favor of the sovereign" and "not enlarged . . . beyond what the language requires." *U.S. Dep't of Energy v. Ohio*, supra (citations omitted).

The cases cited by the Respondent in support of its argument that sovereign immunity analysis is applicable in the interagency

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<sup>4</sup> It is noted that in *Department of Army v. F.L.R.A.*, supra, the D.C. Circuit found that the Army enjoyed sovereign immunity unless waived by Congress but there was no finding that the existence of such issue deprived the FLRA of jurisdiction over the matter.

setting are distinguishable from the instant matter. The instant case concerns one Federal agency assessing a penalty against another Federal agency and directly presents the question of "interagency immunity", whereas the Respondent's cited cases concern a Federal agency acting for the benefit of private parties, a state, a governmental corporation, or a court. None of the cited cases is directly on point or controlling here. Regardless of the standard applied, assuming that there is any significant difference between the two standards, it does not change the disposition of the motion for accelerated decision. Thus, this issue is not addressed further.

### **III. UST Provisions of RCRA**

In construing a statute, the question is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-3 (1984). The language of the statute is analyzed first. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Where statutory language is clear and unambiguous it must ordinarily be regarded as conclusive as there is a strong presumption that Congress expresses its intent through the language it chooses. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12 (1987); *North Dakota v. United States*, 460 U.S. 300, 312 (1983). Words are to be interpreted as taking their ordinary, contemporary meaning. See, *Perrin v. United States*, 444 U.S. 37, 42 (1979). Legislative history is examined to determine only whether there is "clearly expressed legislative intention" contrary to statutory language, which would require the questioning of the strong presumption that Congress expresses its intent through the language it chooses. *United States v. James*, 478 U.S. 597, 606 (1986) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Examination of the governing statutes begins with Subtitle I of RCRA, Subchapter IX of the Solid Waste Disposal Act, entitled "Regulation of Underground Storage Tanks."<sup>5</sup> The underground

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<sup>5</sup> It is noted that the EPA cites Section 9006 of RCRA in the Complaint as providing its authority for issuing the Complaint against the Respondent. The EPA, in the OGC Memorandum, cites Sections 6001(b), 9006(a),(c), 9001(6), and 9007(a) of RCRA as the governing statutory provisions in this matter. The EPA, in its Penalty Guidance for Violations of UST Regulations, cites Section 9006(d) of RCRA as providing authority for a Section 9006 compliance order to assess a civil penalty.

storage tank (UST) provisions, found at Sections 9001 through 9009 of RCRA, were added to the Solid Waste Disposal Act by the Hazardous and Solid Waste Amendments of 1984. Pub. L. 98-616, Title VI, 601(a), 98 Stat. 3286; 42 U.S.C. 6991-6991i ("UST provisions"). Section 9006 of RCRA, in pertinent part, provides:

(a) Compliance Orders

(1) . . . whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance within a reasonable specified time period or the Administrator may commence a civil action in the United States district court in which the violation occurred for appropriate relief . . . \* \* \* \*

(3) If a violator fails to comply with an order under this subsection within the time specified in the order, he shall be liable for a civil penalty of not more than \$25,000 for each day of continued noncompliance.

\* \* \* \*

(c) Contents of order

Any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

(d) Civil penalties

\* \* \* \*

(2) Any owner or operator of an underground storage tank who fails to comply with --

\* \* \* \*

(B) any requirement or standard of a State program approved pursuant to section 6991c of this title;

\* \* \* \*

shall be subject to a civil penalty not to exceed \$10,000 for each tank for each day of violation.

Section 9001 of RCRA defines "owner" and "operator" in terms of "any person . . ." and "person" has "the same meaning as provided in Section 6903(15) [the definition of "person" in the general definitions section of RCRA] of this title, except that such term includes . . .

the United States Government." Sections 9001(3), (4), and (6) of RCRA, 42 U.S.C. §§ 9001(3), (4), and (6). Those terms were so defined since RCRA was amended by the Hazardous and Solid Waste Amendments of 1984, inter alia, to add Subchapter IX. Pub. L. 98-616, Title VI, 98 Stat. 3277 (November 8, 1984). At that time, however, the definition of "person" in the general definitions section of RCRA did not include the following phrase, later added by the Federal Facilities Compliance Act of 1992 ("FFCA"): "and shall include each department, agency and instrumentality of the United States." Section 1004(15) of RCRA. Nevertheless, this phrase later added by FFCA is not a significant change in light of the existing express statement of Congress that "for purposes of this subchapter [IX-UST provisions]" the term "person" includes the "United States Government."

The Supreme Court in *U.S. Dep't of Energy v. Ohio*, supra, at 618, quoted the definition of "person" in RCRA Subchapter IX as an example of a definition that expressly defines that term "for purposes of the entire section in which the term occurs." The "entire section" of RCRA for which "person" is defined includes Sections 9006(a) and (c) of RCRA, which authorizes the EPA to issue compliance orders against "persons," and authorizes the assessment of a penalty in such orders. Similarly, the authority to assess civil penalties against any "owner or operator" under Section 9006(d), by virtue of the definitions of "owner" and "operator," involves the Subchapter IX definition of "person."

Thus, it would appear that since 1984 Congress has allowed administrative penalty assessments against the Federal Government for UST violations. However, also since that time, Section 9006(a) has permitted the EPA to commence an action in federal district court when any "person" is in violation of a UST requirement. An interpretation of Subchapter IX that simply relies upon the definition of "person" as including the Federal Government would authorize the EPA to initiate civil penalty actions in federal court which, as discussed below, would be inconsistent with Congress' apparent intent to limit the EPA's authority to injunctive relief in Section 9007(a). Also, the EPA's authorization to seek penalties in federal court raises substantial separation of powers concerns. Such an interpretation cannot be adopted without further analysis. Before proceeding, however, it is emphasized that no reliance has been placed on the Respondent's observation that the EPA brought no actions for civil administrative penalties against another Federal agency for alleged UST violations before 1997 as such is not

determinative of the question of whether the EPA has had authority to do so.

Since the UST provisions of RCRA were enacted on November 8, 1984, they have included the following waiver of sovereign immunity, at Section 9007(a), which affects the interpretation of "person" as including the Federal Government:

**Federal facilities**

**(a) Application of subchapter**

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

Pub. L. 98-616, Title VI, 98 Stat. 3277 (November 8, 1984).

The general waiver of sovereign immunity for RCRA is in Section 6001 of RCRA. Prior to the FFCA amendments to RCRA in 1992, Section 6001(a) was virtually identical to Section 9007(a).<sup>6</sup> The

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<sup>6</sup> Before the FFCA, Section 6001(a) in Subchapter VI of RCRA provided as follows, in pertinent part:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the

Supreme Court held that Section 6001(a) as it existed prior to the FFCA did not waive sovereign immunity from civil punitive fines imposed for past violations of RCRA. *U.S. Dep't of Energy v. Ohio*, supra. The Court stated that the provision is most reasonably interpreted as "including substantive standards and the [coercive] means for implementing those standards, but excluding punitive measures." *Id.* at 627-628. The Court noted that the terms "sanction" and "all . . . requirements" may encompass both punitive fines (for past violations) and coercive fines (pending compliance), but do not necessarily imply that punitive fines were intended. *Id.* at 621, 628. The Court explained that the "statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future." *Id.* at 628. The Court found such interpretation confirmed by the phrase "sanction . . . with respect to the enforcement of any such injunctive relief," noting that the drafter's only specific reference to an enforcement mechanism describing "sanction" as a coercive means of injunction enforcement bars any inference that punitive fines were intended to be included. *Id.*

The penalties proposed in the Complaint are for violations alleged to have occurred prior to and on the dates of inspection, April 30 and May 1, 1997. Such proposed penalties are not "coercive" but "punitive." The question is whether Section 9007(a) of RCRA encompasses punitive penalties.

Similar to Section 6001(a) prior to the FFCA, the text of Section 9007(a) of RCRA does not provide any support for finding that Congress intended to encompass the assessment of punitive penalties for past or existing violations in an EPA administrative enforcement action. Further, such lack of Congressional intent is illuminated by the Court's analysis in *Dep't of Energy v. Ohio*. The text of Section 9006 shows that the EPA may only issue orders, and potentially conduct a hearing thereon, requiring compliance and a penalty if the "person is in violation" of a requirement. Compare, Sections 3008(a) and 11005(a) of RCRA (allowing an order and penalty

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payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.\* \* \* \*

assessment for past or current violations) (Section 3008(a) existed before UST provisions enacted and Section 11005(a) enacted after UST provisions). The Section 9007(a) language "shall be subject to and comply with all Federal . . . requirements, both substantive and procedural, in the same manner and to the same extent, as any other person is subject to such requirements . . .," even if construed to encompass sanctions such as penalties, does not necessarily include punitive penalty assessment for past or existing violations of UST requirements under 9006(d), where the language could also encompass coercive penalties under Section 9006(a)(3) for failure to comply with a compliance order.

Moreover, the fact that Congress specified in Section 9007(a) "injunctive relief" and "service charges," but not "penalties," which is referred to in the immediately preceding sections of 9006(c) and (d), provides a strong inference that Congress did not intend to subject the Federal Government to assessment of punitive penalties for past or existing violations under Section 9007(a). This inference is further supported by the fact that the EPA has a choice of issuing a compliance order or commencing a civil action in Federal district court, either of which could include civil penalty assessment. Again, it is noted that serious separation of powers concerns would be raised if the EPA chose to commence a civil penalty action in a Federal court against a Federal agency. Therefore this interpretation is not adopted. See, *Jones v. United States*, 119 S.Ct. 1215, \_\_ U.S. \_\_ (March 24, 1999) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") These facts also weigh heavily against finding that Congress intended the definition of "person" in Subchapter IX (Subtitle I), which includes the Federal Government, to be the nexus between penalty assessment and enforcement against Federal facilities.

The legislative history of Subchapter IX does not indicate that Congress intended Section 9007(a) to authorize the EPA to assess penalties against Federal facilities for past or existing UST violations (punitive penalties). On March 30, 1984, Senator Durenburger introduced legislation to regulate USTs, which included provisions for Federal enforcement and Federal facilities. Those provisions remained virtually unchanged when they were enacted as Sections 9006 and 9007 of RCRA. See, 98th Cong., 103 Cong. Rec. 7215 - 7218 (March 30, 1984) (Senator Durenburger's introduction of Senate Bill No. 2513 to amend the Safe Drinking Water Act to protect groundwater and prevent leaks from USTs); 98th Cong., 103 Cong.

Rec. 20826-20832 (July 25, 1984) (Senator Durenburger's Amendment No. 3408 to Senate Bill No. 757 to regulate USTs under the Safe Drinking Water Act); 98th Cong., House Conference Report No. 1133, reprinted in 1984 U.S.C.C.A.N. 5649 (Oct. 3, 1984) (Senator Durenburger's proposed UST provisions included in the Hazardous and Solid Waste Amendments of 1984).

The Federal facilities provision introduced by Senator Durenburger appears more limited or restricted than that which existed in the Safe Drinking Water Act, to which he intended to add the UST provisions. 42 U.S.C. § 300j-6(a) (1984), Pub. L. 95-190, 91 Stat. 1396, 1397 (Nov. 16, 1977):

Each Federal agency . . . shall be subject to , and comply with, all . . . requirements, administrative authorities and process and sanctions . . . in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement . . . and any other requirement whatsoever), (B) to the exercise of any Federal . . . administrative authority, and (C) to any process or sanction, whether enforced in Federal, State or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies . . . . No officer, agent or employee of the United States shall be personally liable for any civil penalty under this subchapter . . . .

However, legislative history indicates that Congress was not focused on problems involved with the EPA's enforcement against Federal facilities, as Senator Durenburger remarked in introducing the legislation, "it is our expectation that this [UST] program will be run by the State governments with very little Federal involvement." 103 Cong. Rec. at 7216 (March 30, 1984).

In view of the foregoing, it is concluded that Congress has not expressed an intent in enacting Subchapter IX to subject a Federal agency to assessment of punitive penalties by the EPA for past or existing violations of UST requirements. Therefore, examination of the governing statutory provisions turns to the effect of the Federal facilities provisions found in Subchapter VI of RCRA.

#### **IV. Federal Facilities Subchapter of RCRA**

The FFCA amended, inter alia, Subchapter VI of RCRA, entitled Federal Responsibilities. The FFCA was enacted by Congress on October 6, 1992, in direct response to the Court's holding in *Dep't of Energy v. Ohio* earlier in 1992. The principal amendment was to Section 6001, which provides as follows:

##### **Application of Federal, State, and local law to Federal facilities**

###### **(a) In general**

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent or recurring violations. The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge). . . . Neither the United States, nor any agent, employee or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

\* \* \* \*

###### **(b) Administrative enforcement actions**

(1) The Administrator may commence an administrative enforcement action against any department, agency or instrumentality of the Federal Government pursuant to the enforcement authorities contained in this chapter. The Administrator shall initiate an administrative enforcement

proceeding against such a department, agency or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person. Any voluntary resolution or settlement of such action shall be set forth in a consent order.

(2) No administrative order issued to such a department, agency or instrumentality shall become final until such department, agency or instrumentality has had the opportunity to confer with the Administrator.

A basic principle of statutory construction is that the statute should be read as a whole. 2A N. Singer, Sutherland on Statutory Construction § 46.05 (5th ed. 1992). As concluded above, the language of Subchapter IX of RCRA (Subtitle I) does not reveal an intent of Congress to subject the Federal Government to assessment of punitive penalties for past or existing violations of UST provisions of RCRA. The question now is whether Congress intended the FFCA to authorize the EPA to assess penalties for past or existing violations of UST requirements.

Section 6001(a) clearly expresses a waiver of sovereign immunity as to penalties, both coercive and punitive. Such expansive waiver is acknowledged by the DoD in its January 20, 1998, letter to the EPA wherein Mr. Taylor states: "The detailed and explicit language in subsection (a) [of Section 6001] is what is required to provide EPA with the authority to impose civil or administrative penalties and fines on a federal agency..."

However, the application of Section 6001(a) to EPA administrative enforcement actions for violations of Subchapter IX is not apparent.<sup>7</sup> First, I observe that the Complaint does not specifically allege that the Respondent owns or operates a solid waste management facility or disposal site, or that it engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste. There is no allegation that solid or hazardous waste was involved. Second, the EPA places no reliance on the applicability of Section 6001(a). Specifically, it is noted that the

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<sup>7</sup> The EPA in a guidance document entitled "Federal Facilities Compliance Act: Enforcement Authorities Implementation," 58 Fed. Reg. 49044, 49045 (September 21, 1993), Respondent's Prehearing Exchange, Exhibit 6 (EPA Memorandum dated July 6, 1993), cited Section 6001(a) in discussing the EPA's authority to assess penalties, but did not refer to penalties for UST violations. See footnote 11.

OGC Memorandum does not rely on Section 6001(a),<sup>8</sup> and that in the DoD's January 20, 1998, letter to the EPA, the Respondent notes the EPA's cited reliance on Section 6001(b). Moreover, the EPA has not contested or challenged the DoD's statements contained in its January 20, 1998, letter to the EPA that "... the authority in subsection (a) is itself very clearly limited to the 'requirements referred to in this subsection' and those requirements are with respect to the 'control and abatement of solid waste or hazardous waste disposal and management.' The management of product, such as gasoline, other petroleum products, and nonwaste solvents, in underground storage tanks does not fall within the scope of the requirements referred to in subsection (a)." This DoD position is reiterated in the DoD Memorandum to OLC.<sup>9</sup>

Section 6001(b) specifically addresses EPA enforcement actions, authorizing such actions "pursuant to the enforcement authorities contained in this chapter." The "chapter" referenced is Chapter 82 of Title 42 of the U.S. Code, i.e. the Solid Waste Disposal Act in its entirety, as amended, which includes Subchapter IX. Thus, Section 6001(b) applies by its terms to Subchapter IX. Legislative history

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<sup>8</sup> The OGC Memorandum, however, states in a footnote therein: "Because the judicial aspect of RCRA's enforcement scheme does not apply to administrative actions brought by EPA against other Federal agencies, RCRA's waiver of sovereign immunity does not determine the scope of EPA's administrative enforcement authority." OGC Memorandum n. 4.

<sup>9</sup> It is noted, however, that petroleum that is spilled or leaking from a UST is no longer a useful product and is thus deemed a "solid waste." *Zands v. Nelson*, 779 F. Supp. 1254, 1261-64 (S.D. Cal. 1991); *Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F.Supp. 1091, 1094-5 (N.D. Ill. 1995); *PaineWebber Income Properties Three Limited Partnership v. Mobil Oil Corp.*, 902 F.Supp. 1514 (M.D. Fla. 1995); *Waldschmidt v. Amoco Oil Co.*, 924 F. Supp. 88 (C.D. Ill. 1996); EPA Proposed Rule preamble, 57 Fed. Reg. 61542 (December 24, 1992). Arguably, the UST requirements for release detection, prevention and corrective action in response to releases could be deemed "requirements . . . respecting the control and abatement of solid waste." Nevertheless, the OGC Memorandum did not rely on Section 6001(a) to provide a clear statement of the EPA's authority in an administrative action to assess penalties against a Federal agency for UST violations. However, this question need not be addressed as the EPA has not raised this argument in its pleadings or response to the motion for summary judgment.

supports this conclusion, as Congressman Eckart, sponsor of the bill H.R. 2194, the "FFCA of 1991" in his remarks in support of the FFCA. 102nd Cong. 1st Sess., 137 Cong. Rec. H 4878, 4883 (daily ed. June 24, 1991) specifically referred to USTs containing petroleum:<sup>10</sup>

Leaking underground storage tanks . . . cause as much damage whether that gasoline leaked from a Federal government facility or from a neighborhood gas station. Yet, that small business owned on the street corner in anywhere, U.S.A. would be subjected to the harshest environmental penalties this Nation can bring to bear, whereas that same gas pump located at a Federal facility can ignore the Nation's Federal environmental laws. That will end with the passage of this bill. What we are talking about is compliance. We are not talking about the problems that have been suggested by those who will oppose this bill but are simply saying that the Nation's environmental laws which make sense for business and for cities and towns and villages all across the country, that they make sense to us as the Federal Government as well, and that the taxpayer so America should not be financing pollution, and the cost of cleaning up that pollution all at the same time.

*See also*, 101st Cong. 2nd Sess., 136 Cong. Rec. H 1170, 1199 (daily ed. March 28, 1990) (Remarks of Congressman McMillen as to amending the proposed Department of Environmental Protection Act with the FFCA, referring to a series of USTs that were in danger of leaking).

The Respondent acknowledges that Section 6001(b) reaches Subchapter IX, but it persuasively argues that the EPA's authority to "commence an administrative enforcement action" against a federal agency pursuant to the UST provisions does not provide the EPA with plenary authority to impose a monetary punitive penalty against a federal agency. In support of this position, the Respondent points out that the detailed and explicit language in Section 6001(a), which clearly provides the EPA with the authority to impose civil and

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<sup>10</sup> USTs containing petroleum are regulated under Subchapter IX, whereas USTs containing hazardous waste are regulated under Subchapter III.

administrative penalties and fines, both coercive and punitive, on a federal agency, is not found in Section 6001(b). The Respondent notes that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); see also, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

Aside from the statutory construction of Sections 6001(a) and (b) set forth by the Respondent, it may be argued that if Congress meant Section 6001 to authorize the EPA to assess punitive penalties for UST violations, then Section 9007(a) should have been amended to be consistent with Section 6001.<sup>11</sup> Indeed, on July 13, 1995, House Bill H.R. 2036 introduced in the House by Congressman Oxley to amend land disposal provisions in RCRA, included a proposal to amend Section 9007 to appear virtually identical to RCRA Sections 6001(a) and (b). The portion of the bill to amend Section 9007 did not survive, although other portions of the bill were enacted on March 27, 1996 as the Land Disposal Flexibility Act of 1996, Pub. L. 104-119.

This proposed amendment to Section 9007 reflects Congress' general trend in attempting to make authorities to enforce the environmental statutes against Federal facilities more explicit and broad in scope. See, proposals to amend RCRA to regulate above-ground storage tanks, Senate Bill No. 674, 101st Cong. 1st Sess., 135 Cong. Rec. S 3124 (daily ed. March 17, 1989) (virtually identical to Section 9007) and Senate Bill No. 588, 103rd Cong. 1st Sess., 139 Cong. Rec. S 2925 (daily ed. March 16, 1993) (expressly waiving immunity); proposal to amend the Clean Water Act, H. R. 961, 104th Cong. 1st Sess., 141 Cong. Rec. H 4690 (daily ed. May 10, 1995) (providing that EPA "may commence an administrative enforcement action against any department, agency or instrumentality of the . . . Federal Government pursuant to the enforcement authorities contained in this Act . . . . The amount of any administrative penalty imposed under this subsection shall be determined in

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<sup>11</sup> In addition, a doubt arises in the EPA's early interpretation of the FFCA, by the fact that the EPA issued a guidance document in 1993 to notify all Federal agencies of how the EPA would implement its new enforcement authorities under the FFCA but referred only to enforcement actions under Section 3008 of RCRA and not to actions under Section 9006 of RCRA. Respondent's Prehearing Exchange, Exhibit 6, 58 Fed Reg. 49044 (September 21, 1993).

accordance with section 309(d) of this Act."); amendment to the Safe Drinking Water Act, 42 U.S.C. § 300j-6(b) Pub. L.104-182, 110 Stat. 1660, 1662 (August 6, 1996) (providing that EPA "may issue a penalty order assessing a penalty against the Federal agency."). As to this trend, Congressman Schaeffer remarked:

Under common law, in order for the federal government to be sued, it must first unequivocally waive its sovereign immunity. . . .The present waiver in Superfund [Section 120] does not meet that test. Although it's clear that Congress meant to waive the government's sovereign immunity, the actual statutory language is inadequate. Consequently, while states can theoretically apply environmental standards to Federal facilities, they often encounter endless litigation . . . and often lose in the end . . . . Anyone who looks at this law would say, why should not Federal facilities have to abide by the same laws as private. And the history shows that Congress wants to fix this inequity. For example, in 1992 I, along with then-representative Eckart . . . authored the [FFCA] . . . In 1996 I sponsored similar provisions for the Safe Drinking Water Act amendments, which also became law, waiving the federal government's sovereign immunity . . . . This Congress I have introduced the Federal Facilities Superfund Compliance Act to extend the same waiver of sovereign immunity . . . .

Hearing of Finance and Hazardous Materials Subcommittee of the House Commerce Committee, (September 4, 1997) (available on LEXIS in LEGIS library, HEARINGS file).

Representative Schaeffer's remark reflects the views of several members of Congress that amendments to the Federal facilities provisions of environmental statutes merely clarified Congress' original intent. See, 100th Cong. 1st Sess., 133 Cong. Rec. H 11614 (daily ed. December 17, 1987) (Remarks of Congressman Miller: "clarifying existing waivers"); 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14898, 14902 (daily ed. October 17, 1991) (Remarks of Senator Mitchell: In 1976, when Congress enacted [RCRA], the intention was to waive sovereign immunity so everyone would be treated equally. . . . We waived sovereign immunity in 1976. However, some courts have held that Congress has not yet found the magic words to effect such a waiver . . . . We are today clarifying what the courts have blurred: that sovereign immunity is completely waived under existing section 6001 of RCRA.") (Remarks of Senator Lautenberg: "Unfortunately some misguided courts and the

administration have concluded that the law creates a double standard. And they have suggested that States can obtain fines and penalties against private parties that violate RCRA, but not against Federal agencies. I think the law is clear on this point. But to assure that courts universally follow the law's original intent, this bill clarifies that principle."); See also, 102nd Cong. 1st Sess., S 14883 (daily ed. October 17, 1991) (Remarks of Senator Baucus).

It may be argued that, inasmuch as Section 6001(b), by its terms, applies to Subchapter IX, further "clarification" of Section 9007(a) is unnecessary to authorize the EPA to initiate administrative enforcement actions against Federal facilities for UST violations. It is reasonable to infer that mere clarification, which was the basis for the FFCA amendments to RCRA, was also the basis for the attempted amendment of Section 9007 in H.R. 2036. However, in order for Congress' intent to waive sovereign immunity for Federal facilities as to UST violations to meet the unequivocal standard set forth by the Court in *U.S. Dep't of Energy v. Ohio*, or the "clear statement" standard, it would be necessary for Section 9007(a) to be amended.

Finally, I look at the language of Section 6001(b). The terms "administrative enforcement action" and "enforcement authorities" are broad and general terms which may encompass compliance orders, consent orders, corrective action orders, coercive penalties, and punitive penalties for current and past violations. In contrast, Section 6001(a) specifically refers to "punitive fines."

Legislative history of Section 6001(b) does not include many references to "penalties" or "fines," but there are some indications in the conference and Senate reports that Congress may have contemplated that Section 6001(b) authorized the EPA to assess penalties and fines. Next to the language of the statute itself, conference reports, representing the final statement of terms agreed to by both houses of Congress, are the most persuasive evidence of Congressional intent. *Davis v. Luckard*, 788 F.2d 973, 981 (4th Cir. 1986).

For example, the following passages are excerpted from a Conference Report, 101st Cong., Senate Report 553 (October 24, 1990) and Senate Report, 102nd Cong., Senate Report 67 (May 30, 1991):

The purpose of the [FFCA] is to make the waiver of sovereign immunity contained in Section 6001 of the Solid Waste Disposal Act clear and unambiguous with regard to the imposition of civil and administrative fines and penalties. \* \* \* \*

[T]he EPA reports difficulties with Federal facility compliance. \* \* \* \*

The ability to impose fines and penalties for violations of the Nation's environmental statutes is an important enforcement tool. As the EPA testified before the Committee, "penalties serve as a valuable deterrent to noncompliance and to help focus facility managers' attention on the importance of compliance with environmental requirements."

\* \* \* \*

EPA administrative order authority

The clarification of this authority is necessary because, in the past, other Federal agencies, including DOJ, have disputed EPA's authority to issue administrative orders against other Federal agencies. The Reagan administration sought to invoke the "unitary executive" theory to prevent EPA from issuing administrative orders against other Federal agencies. . . . Accordingly, the language contained in the [FFCA] . . . clarifies existing law, so as to provide the EPA with clear administrative enforcement authority sufficient to ensure Federal facility compliance.

Also, the remarks of some Senators and members of Congress, in legislating the FFCA, indicate that the FFCA possibly authorizes the EPA to assess penalties against Federal facilities.<sup>12</sup> Although "statements by individual legislators should not be given controlling effect . . . at least in instances where they are consistent with the plain language [of the statute], they are 'an authoritative guide to the statute's construction.'" *Grove City v. Bell*, 465 U.S. 555, 566-67 (1984), quoting, *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982).

For example, Senator Dodd remarked: "[The FFCA] will clarify EPA's authority to fine and to take administrative enforcement action against Federal facilities that are in violation of hazardous waste requirements." 102 Cong. 1st Sess., 137 Cong. Rec. S 15789 (daily ed. November 1, 1991). Congressman Synar, chairman of

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<sup>12</sup> It is noted that the sponsor of the bill to enact the FFCA, Representative Eckart, emphasized "compliance" rather than specifying authority of EPA to assess penalties in referring to UST violations at Federal facilities, in his remark, "[w]hat we are talking about is compliance," quoted more fully, *supra*. However, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

Subcommittee on Environment, Energy and Natural Resources, remarked, "The Eckart Amendment [FFCA] will end the double standard for hazardous waste regulation where states, municipalities, and private corporations are subject to civil penalties levied by EPA for RCRA violations, but not other agencies of the Federal Government" and Congressman Fazio remarked as follows:

The Eckart Amendment [FFCA] . . . gives Federal and State regulatory authorities access to all of the compliance and enforcement tools available under RCRA, something they have not had access to in the past. The most important of these tools is the authority to levy penalties and assess civil fines. This has proven to be a critical lever for EPA to induce compliance and deter future misconduct in the private sector and with State and local governments. If we are to encourage greater compliance and improve the management of hazardous waste by our Federal agencies, EPA must also have this authority in its dealings with Federal facilities.

101st Cong. 2nd Sess., 136 Cong. Rec. H 1170, 1198 (daily ed. March 28, 1990).

Before looking further to legislative history, I make two observations. First, the legislators quoted above may have been referring only to solid waste and hazardous waste covered by Section 6001(a) and not the regulation of USTs under Subchapter IX pursuant to Section 6001(b). Second, many of the legislators' comments appear to refer to penalties for noncompliance with compliance orders, which is not at issue in the instant motion. The Respondent accepts that the EPA has administrative enforcement authority over Federal agencies for UST violations under RCRA but maintains that such authority does not encompass monetary punitive penalties for past or existing UST violations.

Other remarks of Senators and members of Congress hint at the EPA's authority to impose penalties in general, but not specifically punitive fines for UST violations. See, 101st Cong. 1st Sess., 135 Cong. Rec. H 3893, 3923 (daily ed. July 19, 1989) (Remarks of Congressman Skaggs: ". . .this is what the Eckart bill [FFCA] would solve. It would give EPA and the States the power Congress originally meant them to have to make sure DOE and other Federal agencies comply with the law. Without the authority to

impose sanctions, that power would be enormously diminished."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 15122, S 15134 (daily ed. October 17, 1991) (Remarks of Senator Durenberger: ". . . my instinct is to give EPA and the States every tool available to force action at these sites."); 102nd Cong. 1st Sess., 137 Cong. Rec. S 14897, 14899 (daily ed. October 17, 1991) (Remarks of Senator Lieberman: ". . .the EPA has reported difficulties with Federal facility compliance . . . .[W]ithout the threat of penalties for failure to obey the law, an enforcement program collapses."); 102nd Cong. 1st Sess., 137 Cong. Rec. 4748 (daily ed. June 24, 1991) (Remarks of Congressman Richardson: "[The FFCA] would make it clear that Federal facilities are subject to requirements of Federal, State and local government under the Resource, Conservation and Recovery Act, including administrative orders and civil and criminal penalties.")

Clearly, Congress was on notice of the need for the EPA to assess penalties against Federal facilities, not only from the EPA, but also from State governors, who expressed to the Congress the need not only for States, but also for the EPA, to impose penalties. See, H.R. Rep. No. 111, 102nd Cong. 1st Sess.(June 13, 1991) ("It is essential that Congress . . . clarify the waiver of sovereign immunity . . . . It is also important to empower the Environmental Protection Agency to collect fines from and impose penalties against Federal facilities.") Congress was also aware of the problem of the EPA suing Federal agencies to enforce compliance with EPA orders in Federal court. See, Letter from Griffin B. Bell, King & Spalding, dated April 5, 1989, to Congressman Ray, reported in 101st Cong. 1st Sess., 135 Cong. Rec. H 3893, 3905 (daily ed. July 19, 1989) ("The proposed legislation [H.R. 1056] would . . . permit the EPA to sue other parts of the Executive Branch to force compliance with EPA orders. I am opposed on both Constitutional and policy grounds to allowing the Executive Branch to sue itself in Federal court.")

Upon examination of the language of the pertinent sections of RCRA discussed above, and considering Congress' intent as expressed in legislative history of those sections, it is concluded that Section 6001(b) of RCRA could be construed as authorizing the EPA to assess penalties in administrative enforcement actions against Federal agencies for existing violations of RCRA's UST requirements. Such plausible construction, however, does not meet the requisite standard requiring a "clear" or "express" statement of Congressional intent authorizing the EPA to administratively assess civil penalties against a Federal agency. Such constrained conclusion does little to assuage the frustration of dealing with the problematic question of separation of powers or accepting the well-established principle of

sovereign immunity especially when applied to the EPA's daunting task of protecting the environment.

Finally, it is noted that this order is distinguishable from the July 16, 1997, opinion of the Office of Legal Counsel concerning the EPA's authority to administratively assess civil penalties against Federal agencies under the Clean Air Act (OLC CAA Memorandum). First, the pertinent statutory text of RCRA and the UST provisions does not provide a strong basis for finding a clear statement of Congressional intent to authorize the EPA to administratively assess punitive civil penalties against Federal agencies for existing UST violations. Second, the relevant legislative history does not adequately support the conclusion that Congress expressed such authority. Third, the Court's opinion in *U.S. Dep't of Energy v. Ohio*, compelled Congress to have enacted clear and express language that addresses fully the issues and concerns raised by the Court as to the governing RCRA provisions. It is concluded that Sections 6001, 9001, 9006, and 9007 of RCRA do not contain clear and express language of Congress authorizing the EPA to administratively assess punitive penalties against Federal agencies for alleged UST violations under RCRA.

## **V. Opportunity to Confer with the Administrator**

In addition, the Respondent raises the argument that the process for assessing penalties, which is being employed by the EPA to enforce field citations, fails to afford the President a meaningful opportunity to exercise his supervisory authority under Article II of the Constitution. Specifically, the Respondent points out that the EPA has failed to provide the opportunity for Federal agencies to confer with the EPA Administrator before an administrative order or decision becomes final as required by Section 6001(b)(2) of RCRA.

The Rules of Practice, 40 C.F.R. Part 22, provide in the Supplemental Rules governing RCRA, at Section 22.37(g), that a conference with the EPA Administrator may be requested before an order becomes final. However, as correctly pointed out by the Respondent, Section 22.37 governs "all proceedings to assess a civil penalty conducted under section 3008," for hazardous waste violations of RCRA, and thus does not govern proceedings for UST violations under Section 9006 of RCRA.

On February 25, 1998, EPA proposed amendments to the Rules of Practice. 63 Fed. Reg. 9464 (February 25, 1998). Section 22.31, which governs final orders of the Agency, is proposed to include a paragraph (Section 22.31(f)), providing that a final order of the EAB issued to an Federal agency becomes effective thirty (30) days after service unless a conference is requested with the Administrator. This proposed paragraph applies to any proceeding brought under the Part 22 Rules of Practice against a Federal facility, and thus applies to proceedings for alleged violations of UST requirements.

Although the proposed rules have not yet been finalized, it is very likely that they will be published as a final rule and effective before any final order is issued by the EAB in this proceeding. Thus the issue likely will be moot, and at this point in the proceeding is unripe for decision. However, in any event, the EPA has stated its policy in the proposed rule, providing the Respondent with an opportunity to confer with the Administrator before a final order issued by the EPA becomes effective.

### **ORDER**

The Respondent's Motion for Dismissal is Denied.

The Respondent's Motion for Accelerated Decision, requesting judgment that EPA has no statutory authority to impose the proposed administrative penalties against Respondent, is Granted.

### **Appeal Rights**

The Complainant reported in a status report, filed on May 13, 1998, and in its rebuttal prehearing exchange, dated July 23, 1998, that the Respondent has submitted evidence of its compliance with the Compliance Order. Because the Respondent has so complied, this Order disposes of all issues and claims in the above-cited proceeding, and thus constitutes an Initial Decision. See Sections 22.20(b) and 22.27(a) of the Rules of Practice, 40 C.F.R. §§ 22.20(b), 22.27(a). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, an Initial Decision shall become the Final Order of the Agency, unless an appeal is filed with the Environmental Appeals Board within twenty (20) days of service of this Order, or the Environmental Appeals Board elects to review this decision sua sponte.

Original signed by undersigned

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Barbara A. Gunning  
Administrative Law Judge

Dated: 5-19-99  
Washington, DC

## GUIDANCE - STEWART B. MCKINNEY HOMELESS ASSISTANCE ACT

### I. BACKGROUND

This guidance is intended to assist Major Commands (MACOMs) and Installations in understanding the McKinney Homeless Assistance Act to comply with its' provisions:

- Congress enacted the Stewart B. McKinney Homeless Assistance Act on 22 July 1987. The intent of the McKinney Act is "to use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless."
- Numerous organizations representing the homeless brought suit against five federal agencies, including the Department of Defense. The suit claimed that the federal agencies had failed to comply with the Act and sought a preliminary injunction to prohibit the agencies from selling or other-wise disposing of any property eligible for use under Section 501 of the Act until its' provisions were properly implemented. Section 501 of the Act establishes a process by which surplus Federal property is to be made available to assist the homeless.
- The District Court upheld that the injunction was appropriate; this injunction remains in effect today. As a result of the injunction, Title V of the McKinney Act was amended. Public Law 101-645, 104 Statute 4673 (effective February, 1991) provided that; "Suitable Federal properties categorized as underutilized, unutilized, excess, or surplus may be made available to States, units of local government, and non-profit organizations for use as facilities to assist the homeless in accordance with several guidelines and processes."

### II. ORGANIZATIONS' RESPONSIBILITIES

Assisting the homeless under Title V is divided among four agencies:

1. U.S. Army Center for Public Works (USACPW) - responsible for collecting Title V checklists of unutilized, underutilized, and excess property and reporting it to Department of Housing and Urban Development (HUD). Accountable for informing the install-ations of homeless

providers interested in property published in the Federal Register screened by HUD. Accountable to Health and Human Services (HHS), for property published in the Federal Register that is no longer available for homeless providers. Also, responsible for quality assurance to the installations, HHS, and HUD. Finally, responsible for submitting change of status of real property to HUD.

2. General Services Administration (GSA) - responsible for collecting information for excess property and reporting it to HUD to assist the homeless.

3. Department of Housing and Urban Development (HUD) - responsible for collecting and advertising information from federal landholding agencies regarding federal real property that is excess or surplus or is described as unutilized or underutilized in property surveys which are performed annually by landholding agencies. HUD is also responsible for developing suitability criteria to determine which if the properties are suitable for use as facilities to assist the homeless. Only HUD has the authority to determine whether a property is suitable or unsuitable.

4. Health and Human Services (HHS) - responsible for accepting and evaluating applications from States, local government agencies, or private non-profit organizations which provide services to the homeless for use of unutilized, underutilized, excess and surplus properties. In the case of unutilized or underutilized property, HHS will process applications for the use of the property, but the individual landholding agency will enter into the lease or permit agreement with the successful applicant.

5. Major Army Commands (MACOMs) - responsible for authorizing and collecting a copy of checklists submitted for disposal by installations. At their discretion, copies may be received from the installations and then forwarded to CPW

6. Installations - responsible for compiling checklist and submitting to USACPW (thru MACOM if directed) for processing of real property (land/facilities) that are owned and are under-utilized, unutilized, or excess.

### III. GUIDANCE

The McKinney Homeless Assistance Act is one of several administrative processes associated with facility disposal and outgranting. To ensure that the McKinney Homeless screening process does not delay disposals, installations should submit checklists when the facilities are identified. It is required that all landholding agencies report the planned disposition property status of facilities and land within a one-year time period of the disposal (Congressional as well local projects).

The McKinney Homeless Assistance Act requires both annual and quarterly reports of underutilized, unutilized, or excess real property set forth in 41 CFR 101-47.801. Installations should continue to survey all real property assets to determine those that are underutilized, unutilized, excess, or surplus. If these assets have not been previously reported to HUD for screening, you must report them. You need not report/send the same checklists in each quarter. The checklist only needs to be reported once. If there has been and change on previously reported properties, submit a new checklist or a copy of the old checklist with the new information marked in red (or otherwise readily identifiable). HUD will make a new suitability determination based on the revised information.

Three copies of the completed Title V checklist should accompany each reported building/land area. One copy should go to your MACOM and two copies should go to the USACPW, unless otherwise directed by MACOM. You may consolidate similar assets into one questionnaire, but ensure each facility is identified separately. If multiple facilities are submitted on the same checklist, and there is not enough room on the front page, you may attach a list of the facilities at the end of the checklist. Checklists are continuously received all year long, and must be received on or before the suspense date, or they will be held until the following quarter submission.

The dates for the quarterly updates are 1 January, 1 April, 1 July, and 1 October. MACOMs and Installations must track all properties that HUD has determined to be suitable or unsuitable, and report any changes in status to USACPW within 15 days following the first day of each quarter. The quarterly updates allow the installations to add or withdraw property from the McKinney Homeless Assistance Act database. Negative reports are required and may be provided by e-mail, fax, or memo. Negative reports are considered to be one of

the following: No change in status, no new properties to report, no disposal, leases, or transfers.

If an agency wants to lease the property, the property must be reported through the McKinney Act before the lease is executed. The checklist submitted by the installation cannot state that the property is unavailable to homeless providers makes this property unavailable to everyone else also. If property is to be used for any other use than a federal use, it must be processed through the McKinney Homeless Assistance Act.

Base Realignment and Closure (BRAC) - Installations being realigned must continue to report property that is underutilized, unutilized, or excess. If property is to be used for any other use other than a federal use, it has to go through the McKinney Homeless Assistance Act.

#### IV. PROCESSING

If you request a checklist to be removed from the McKinney Homeless Assistance Act database, it must accompany one of the reasons above. Properties that have been removed from the database, and are being resubmitted, are subject to the same reporting requirements as newly reported facilities, even if the properties were previously screened.

HUD determines suitability of all reported underutilized, unutilized, and excess real property, then notifies USACPW within 30 days of collecting the information. Only HUD has the authority to make suitability determinations. The exemption of dilapidated buildings are no longer valid. Installations determine the availability of the property.

If properties are determined as unsuitable, you are prohibited by Title V from taking any disposal action for a period of 20 days from date of publication in the Federal Register. The holding period starts the date of publication in the Federal Register. During this 20-day holding period, homeless providers may appeal HUD's determination for a reversal decision. Properties advertised in the Federal Register may not in any way be disfigured, destroyed, or demolished until after the time period determined by Public Law 101-645.

Once HUD screened all properties, USACPW has 45 days to verify if the property screened as suitable is available or unavailable for the homeless provider use. If the property is unavailable, the landholding agency must submit justification to USACPW.

HUD published the property in the Federal Register within 15 days of receiving verification of suitability from USACPW.

For properties determined as suitable and available, MACOMs/Installations are prohibited by the McKinney Homeless Assistance Act from taking any disposal action for a period of 60 days from date of publication in the Federal Register. During this holding period, eligible entities may notify HHS of their interest to apply for use of the property. Properties advertised in the Federal Register may not in any way be disfigured, destroyed, or demolished until after the time period determined by Public Law 101-645.

Any homeless provider that expresses a written interest in a particular property/ies listed in the Federal Register, will be mailed an application from HHS. HHS will collect and approve/disapprove the applications/s. The landholding agency and their MACOM will then receive a copy of the homeless provider's intent to apply for a specific property/ies from USACPW during the 60-day advertisement period. The landholding agency is then prohibited by McKinney Homeless Assistance Act from taking any disposal action for a period of 90 days from the date of the written request. The time line starts when HHS receives the expression of intent.

Once the application is returned, HHS will have 25 days to approve or disapprove the application/s. The homeless provider can withdraw their interest in the property at any time.

If the applicant withdraws their interest in the property and the property has met the 60-day time period, the landholding agency may dispose of the property.

If the applicant's application/s is/are not approved, the landholding agency may proceed with disposal procedures in accordance with applicable Federal law.

If a provider is approved by HHS, the landholder (Army) will grant a lease or assign to HHS to convey title under authority 10 USC 2667 and 10 USC 2546 (the McKinney Homeless Assistance Act). The facilities are made available at not cost to the lessee. Before a landholder may lease real property to any entity (private organization) for non-Army purposes they must first go through McKinney Homeless Assistance Act.

Army property will be offered for non-Army purposes in the order of preference below:

- Other DoD agencies
- Other federal agencies
- McKinney Act applicants
- State and local government agencies
- private organizations

We encourage you to maintain complete files to justify your actions in the event of scrutiny by others (i.e., higher headquarters, the courts, or Congress).

The McKinney Homeless Assistance Act is a statutory requirement. The process within the act is mandated by law. The 30-day HUD review, the 60-day Federal register advertisement, and the 90 days for the homeless provider to complete the application time lines are fixed. The only portion of the process that can be controlled is the submission to HUD.

## V. DETERMINATIONS

The determinations rendered by HUD screening are as follows:

1. Suitable/Available - Property screened by HUD to be safe, not possessing and health or harmful risk to anyone of the environment, and available for homeless providers' use.
2. Suitable/Unavailable - Property screened by HUD to be safe, not possessing any health or harmful risk to anyone or the environment, and available for homeless providers' use. (Ex.: property in the process of being demolished, transferred from one government agency to another, transferred to the city or another entity bypassed by Public Law. Also, property that is located in a Secure Area, for National Defense Purposes).

3. Suitable/To Be Excessed - Real Property to be excessed to GSA. Property not needed to support current or future mission requirements. Property screened by HUD to be safe, not possessing and health or harmful risk to anyone or the environment, and not available for homeless providers' use.

4. Unsuitable - Property screened by HUD to be inappropriate to safety, possessing health and harmful risk to the environment and others.

Reasons for Unsuitability - Not Accessible by Road, within an Airport Runway, secured Area, floodway, extensive deterioration, within 2000 feet of Flammable Explosive Material and contaminated.

#### VI. EXCEPTIONS TO THE MCKINNEY HOMELESS ASSISTANCE ACT

1. Machinery and Equipment, Government-owned, Contractor-operated machinery, equipment, land and other facilities reported excess for sale only to the using contractor and subject to a continuing military requirement.

2. Properties subject to special legislation directing a particular action:

a. As mobilization is an Army mission, facilities that are set aside for mobilization and are vacant are not considered unutilized and underutilized and need not be reported under the McKinney Homeless Assistance Act.

b. Facilities that are set aside for Reserve Training and are vacant awaiting Reserve units are not reportable under the McKinney Homeless Assistance Act.

c. Facilities within a one year time period which stand in the way of Congressionally approved as well as local construction projects.

d. Properties under easement which are to be transferred to local governments.

e. Properties to be conveyed to landholders adjoining military installations where the landholders currently use the property.

f. Intrabranch property transfers where the branch to receive title already uses the property.

g. Properties to be leased to private entities which provide services to the military. (Ex.: Utilities, waste water treatment, solid waste disposal, and sewage disposal.)

h. "Structures/Buildings Damaged Beyond Repair" - These are facilities utilized and underutilized and damaged beyond repair for some unforeseen reason, causing safety and health hazards. The underlying real property is not designated as underutilized or unutilized. (Ex.: Government building bombed in Oklahoma, or facilities destroyed by hurricane.) HUD is the only one that will make a determination on these facilities suitable or un-suitable, not subject to McKinney Homeless Assistance Act. DA is the only one that can authorize the disposal of these facilities.

4. Properties subject to a Court Order, property not subject to survey requirements of Executive Order 12512 (29 April 1985), Mineral right and Air/Space interests, Indian Reservation land subject to section 202(a)(2) of the Federal Property and Administrative Service Act of 1949, as amended. In addition, property interests subject to revision (i.e. withdrawn land), easements, property purchased in whole or in part with Federal funds if title to the property is not held by a Federal landholding agency as defined in this part.

5. BRAC:

a. Once property is surplus, installations that are being closed are to forward their information to their local districts and Local Redevelopment Authority (LRA).

b. All pre-1995 BRAC Commission installations are exempt from the provisions of Title V of the McKinney Homeless Assistance Act.

c. All 1995 BRAC Commission installations are exempt, that elect to be treated under the new community-based process wherein representatives of the homeless and other community groups participate in local reuse planning.

Installations approved for closure before 25 October 1994, that did not elect to be treated under the Act continue to be

covered by the provisions of Title V of the McKinney Homeless Assistance Act, as amended.

VII. DEFINITION

Lease - An agreement between either the Department of Health and Human Services for surplus property, or landholding agencies in the case of non-excess properties or properties subject to the Base Closure and Realignment Act (Public Law 100-526; 10 USC 2687), and the applicant, giving rise to the relationship of lessor and lessee for the use of Federal real property for a term of at least one year under the conditions set forth in the lease document.

## ETHICS ADVISORY 99-02 - SECARMY's New Travel Policy

The Secretary of the Army has issued a new travel policy memorandum, as prepared by his Administrative Assistant. The Honorable Louis Caldera signed the memorandum on 8 April 1999, superseding the policy issued on 8 December 1995. Although the Secretary's new policy is probably still being distributed through channels, I have obtained a copy of it. In my review of the policy, I note that there is a **significant change** concerning the use of frequent flyer mileage and related promotional mileage credits (FFMs) that I should bring to your attention.

**The 1995 SECARMY policy** stated that first consideration should be given to redeeming FFMs earned during official travel to defray official travel costs; and that FFMs may also be used for accommodation upgrades to premium-class (less than first-class) while on official travel.

**The new 1999 SECARMY policy** permits the use of FFMs earned from official travel to be redeemed for premium-class (less than first-class) travel upgrades in **only** the two following situations:

1. When the JTR or JFTR authorizes such premium-class (less than first-class) travel in the first place (see below for when a TDY traveler may travel in premium-class (less than first-class)).

2. When the FFMs may only be redeemed for upgrades. There are three examples:

- a. The airline does not permit the use of the FFMs for anything other than an upgrade.

- b. If the traveler has enough FFMs for an upgrade, but not enough for a ticket or other reduction in travel costs, the traveler is expected to let the FFMs accrue until there are enough FFMs to apply to future travel requirements.

- c. If the traveler has enough FFMs for an upgrade, but not enough for a ticket, but absent a redemption for an upgrade, the FFMs will expire and go unused, the traveler may redeem the FFM for an upgrade.

### Other important guidance:

1. FFMs earned while in official travel belong to the Government and may not be used in any manner for personal travel or personal purposes (e.g., donating to a charity).

2. Official FFM accounts should be maintained separate from personal FFM accounts. Where government-earned FFMs and personal FFMs have been commingled into a

single FFM account, all FFMs within the account will be considered to be property of the US Government absent a clear accounting of FFM to the contrary.

3. When an airline flight only has two classes of accommodations, the higher class, regardless of the term used for that class, is considered to be first-class -- which means premium-class (other than first-class) TDY travel, whether authorized by the JTR or JFTR or by use of FFMs, is not permitted on that flight.

4. All first-class travel must meet the stringent criteria of the JTR or JFTR and requires SECARMY approval, except that:

(a) Employees may upgrade to a premium-class using personal FFMs or other personal resources.

(b) Employees may accept "on the spot" type upgrades that are *not* offered because of their official position (for example, an employee arrives at the check-in, and learns that the aircraft is overbooked and full except for a first-class seat; if offered, the employee may accept that seat).

(c) Employees may use a coupon received because of their membership in an airline "club" by virtue of the number of miles that they have flown with the airline, even if some or all were flown on TDY. However, this must be a "no cost" upgrade, meaning that the employee does not cash in official mileage point to gain membership in the club, or exchange official points for the coupon.

(d) Military members flying first-class in accordance with the above, must not travel in uniform.

Requirement for premium-class (less than first-class) air travel:

The traveler, regardless of rank or grade, must provide a written justification for each instance of such travel to the travel orders approving authority, who may authorize premium-class (less than first-class) when:

(a) Regularly scheduled flights provide only premium-class seats;

(b) No space is available in coach, and travel is so urgent it cannot be postponed;

(c) Necessary to accommodate a traveler's disability or other physical impairment substantiated in writing by a competent medical authority;

(d) Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate;

(e) Overall savings to the Government result by avoiding additional subsistence costs, overtime, or lost productive time that would be incurred while waiting for available coach seats;

(f) Travel costs are paid by a non-federal source (but special conditions, approvals and reports are required before such costs can be accepted);

(g) Obtained through the redemption of FFMs (but, very limited -- see above); or

(h) Travel involves an OCONUS destination or departure point, crossing several time zones, and the scheduled flight time exceeds 14 hours (including stopovers (as opposed to layovers) between flights), gate to gate. If this authority is used, the traveler is not authorized a rest period upon arrival, although he or she is permitted a short, reasonable time to check into a hotel and freshen up if necessary. However, this exception is not to be used in lieu of scheduling coach-class accommodations that allow for authorized rest stops. On the return flight, premium-class (less than first-class) travel will not be authorized simply because the total flight time (including stopover) exceeds 14 hours.

(i) Security concerns or exceptional circumstances make such travel essential to the successful performance of the mission.

If you have any questions, please contact one of the HQ AMC Ethics Team:

Mike Wentink, Rm 7E18, 617-8003

Alex Bailey, Rm 7E18, 617-8004

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During the annual ethics training, many of you asked about the consequences of violating ethics rules. The real-life examples below answer those questions in a graphic manner. The lesson for all of us is: if we are not sure of a rule, or not sure as to how to apply the rule to a particular situation, we must seek the advice of our Ethics Counselors before we act because the rules are enforced, sometimes by the criminal process. In various places, you will find my editorial comments in brackets [ **like this** ].

### **U.S. Government IMPAC Credit Card Abused by Air Force Employees**

Three former civilian employees from Barksdale Air Force Base, Louisiana, were charged with conspiracy to defraud the Government (18 U.S.C. 371) and conversion of U.S. property for personal use (18 U.S.C. 641).

The employees used the U.S. Government IMPAC credit cards to purchase personal items which included extensive home improvement products, and car-related materials. One of the employees certified on official documents that purchases on the IMPAC credit card were properly used by members of the reserve unit.

One of the employees was sentenced to one year and one day, and the other employees were sentenced to six months in a Federal halfway house and were required to make full restitution.

**[Other ways that an employee can go wrong with the IMPAC credit card include: the employee buys merchandise from a company in which the employee owns more than \$5,000 worth of stock, e.g., Office Depot; or the employee purchases merchandise from a store employee who is his or her spouse; or the employee accepts bonus points or some other discount or benefit for the AMC purchases made at a particular store.]**

### **Government Maintains Tough Stance on Improper Use of Frequent Flyer Miles [the "everybody else does it" excuse doesn't fly!]**

A Department of Justice employee received a one month suspension for using frequent flyer miles that he earned through his official Government travel to permit him, members of his family, and an acquaintance to take 17 trips on Continental Airlines. The trips were valued at \$31,534.

In the employee's appeal he did not deny the trips were taken but argued that there was no intent to misuse Government property. Additionally, he alleged that it was an unofficial policy in the Guam office which allowed personal use of frequent flyer miles accrued on official business [ **the "everybody else does it" argument** ]. The employee

cited two younger employees who had used frequent flyer miles but had no action taken against them by the Department of Justice.

The Merit Systems Protection Board upheld the one month suspension imposed by the Department of Justice, and concluded that the circumstances surrounding the misconduct of other employees were not sufficiently similar, and that the rationale that others had used frequent flyer miles did not constitute a mitigating factor.

### **SEC Attorney Sentenced for Switching Sides after Leaving Government**

A former attorney with the Securities and Exchange Commission (SEC) was convicted for violating 18 U.S.C. 207(a), which prohibits former Government employees from communicating with the Government with regard to matters they worked on as a Government employee.

The SEC attorney was responsible for investigating stock promoters who were promoting Integrated Resources Technologies, Inc. (IRTI). Upon departure from the SEC, the attorney was hired by the stock promoters to perform legal work for companies owned by them, including IRTI. The attorney, in his capacity as counsel for, and director of IRTI, responded to a subpoena, and communicated with SEC officials on behalf of IRTI.

The attorney was sentenced to one year of imprisonment for this post-employment violation of a criminal statute. [ **This law applies to all former officers and employees. It does not prohibit them from going to work for anyone, even if they had worked on, or were responsible for, a particular matter involving this company. What they cannot do, however, is represent that company back to the Federal government on the same particular matter. ]**

### **Former Postmaster General Pays Settlement to End Conflict of Interest Investigation**

A former Postmaster General of the United States agreed to pay a \$27,550 settlement to end a complaint brought by the Department of Justice pertaining to a conflict of interest because of his holdings in Coca-Cola.

The complaint arose while the Postal Service was exploring a potential strategic alliance between the Postal Service and Coca-Cola. The Postal Service Board of Governors had the authority to approve the strategic alliance, and the Postmaster General's role was to advise the Board of Governors with regard to their consideration of strategic alliances. The Postmaster General rendered advice to the Board even though he owned shares of Coca-Cola stock and therefore had a personal financial interest in the decision.

The Postmaster General was charged specifically with violating 18 U.S.C. 208, a criminal statute that prohibits an employee from participating personally and substantially, as a Government official, in a particular matter in which he or she has a financial interest. [ **The PMG argued that no decision was ever made to benefit Coca-Cola, and he never benefited from this. But, that is not what the law prohibits -- it prohibits personal and substantial participation on official matters that affect one's financial interests. The PMG participated in meetings where this proposed alliance or partnership with Coca-Cola was discussed. He violated the law. ]**

### **Former EEOC Chairman Pays Settlement Regarding Financial Disclosure Form**

The former chairman of the Equal Employment Opportunity Commission settled a lawsuit brought by the Department of Justice for \$4,000. The lawsuit alleged that the chairman did not file a financial disclosure report for the 1992 calendar year and the portion of 1993 that he was in Government service (his position terminated in April 1993) [ a combined annual and termination report ]. After leaving Government service, the former chairman did not respond to four requests to file his financial disclosure report.

### **Official Prosecuted for Accepting Payments for Speeches**

A high-ranking official at the National Science Foundation (NSF) agreed to pay \$24,900 to settle a complaint alleging that he supplemented his Federal salary by accepting payment for presenting speeches he made as the official representative of the NSF. From 1993 to 1996 the official received \$500 from Loyola University, \$2,000 from Michigan State University (\$600 for travel expenses), \$2,000 from a research society, and \$1000 from The City University of New York. He would not have been invited to speak had it not been for his Government position. [ **The "Standards of Ethical Conduct" prohibit us from accepting compensation for speaking, teaching and writing that relates to our official duties. The activity is considered to "relate to our official duties" if we would not have been invited but for our Governmental position, or if it deals in significant part with a matter to which we are currently assigned, or to which we were assigned within the last year, or any ongoing policies, programs or operations of the agency. ]**

The Department of Justice charged that the NSF official failed to disclose the four honoraria payments on his annual public financial disclosure report. In addition, the NSF official allegedly failed to disclose and process reimbursements for travel paid by non-Government sources. [ **Another financial disclosure report violation - If you file an SF 278 or OGE Form 450 financial disclosure report, sources of income in general, and honoraria in particular, must be reported.]**

### **Admiral Forced to Retire After Steering Military Contracts to Lover**

A Navy admiral was formally reprimanded, fined, and forced to retire as a Captain after steering military contracts to a woman with whom he was having an affair. The officer was charged with violating the Uniform Code of Military Justice as well as other Federal ethics rules.

The Navy admiral improperly directed \$150,000 worth of training contracts to the woman and also supplied nonpublic information to her for use in obtaining other Government contracts.

### **Civilian Army Employee Sentenced for Theft of Government Property**

A former civilian employee of the Fort Jackson Post Exchange in South Carolina was convicted of stealing Government property. The employee concealed and retained \$2500 worth of electronic equipment stolen from the exchange where he worked. The employee pleaded guilty to violating 18 U.S.C. 641, and was sentenced to four months imprisonment, to be followed by three years probation.

### **Making Inquiries on Behalf of a Father-in-Law Can be Injurious to a Federal Employee's Financial Health**

The father-in-law of a Department of Commerce employee owned a medical supply company, and was having problems with the Department of Veterans Affairs (DVA) with delays in obtaining a change to his contract. The father-in-law sent the Commerce employee a letter detailing the problems and delays with this contract modification, and asked if he would intervene on his behalf with the DVA. The Commerce employee contacted a colleague at DVA and asked if it would be appropriate for him to forward a copy of this letter to him. According to the stipulation, the DVA employee thought that there would be nothing inappropriate about this, and the Commerce employee did not request any specific action by DVA. Nevertheless, the DVA employee made inquiries about the matter, and the DVA contracting officer gave this matter priority over other pending contract matters and executed the change.

The Department of Justice charged the Commerce employee with a violation of 18 U.S.C. 205, which prohibits officers or employees from acting as an agent for a non-Federal entity to any official of the Federal Government. The Commerce employee denied any wrongdoing, but entered into a civil settlement and agreed to pay \$5,000 to the U.S. Treasury for the telephone call and transmittal of his father-in-law's letter.

If you have any questions raised by any of the above situations, you are invited to contact one of your Ethics Counselors.

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Associate Counsel/Ethics Counselor

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