



Office of Command Counsel Newsletter

August 1999, Volume 99-4

REDS Adopted As AMC As Model ADR Program for Workplace Disputes

AMC Commander **General John G. Coburn** announced in June that he supports the adoption of **REDS**--Resolving Employment Disputes Swiftly, as the AMC Alternative Dispute Resolution (ADR) model for workplace disputes.

Successful One-Year Test

The 1998 one-year test program at ARL, TACOM-W and Anniston proved very successful in the early identification of issues and the attempt to reach resolution before litigation. Unions have been very supportive of the program, which is essential for full implementation.

The next step in the execution of **REDS** is the identification of **REDS** Teams at each AMC installation. Each **REDS** Team is chaired by EEO with membership from the civilian personnel and legal community.

On June 22, **General Coburn** sent a memorandum to the MSC Commanders announcing support for **REDS** and asking that they designate a **REDS** Team. This memorandum was then forwarded by the MSCs to subordinate activities (Encl 1).

REDS Training

A 1-1/2 day **REDS** Training program will be conducted during September.

The curriculum will be finalized in August, and **REDS** Team members will receive further information shortly.

The Department of Army has approved **REDS** as meeting the requirements to offer ADR at the EEO pre-complaint stage.

Further information on **REDS** can be obtained from **Steve Klatsky**, DSN 767-2304 or **Linda Mills**, DSN 767-8050.

AMC Forum Debuts--Law Firm Intranet

The **AMC Forum**, part of the JAGCNet is up and running. Please access it and you will find a host of information contained in nearly a dozen subject matter categories. Plus, you can initiate a dialogue or contribute to an existing discussion. POC is **Steve Klatsky**, DSN 767-2304.

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CG Reappoints Korte: AMC ADR Senior Advisor-- MSC Chief Counsel's Also to be Redesignated

AMCCG

25 June 1999

MEMORANDUM FOR Mr.
Edward J. Korte, Command
Counsel

SUBJECT: Appointment of the
U.S. Army Materiel Command
(AMC) Alternative Dispute
Resolution (ADR) Senior Advisor

1. I hereby reappoint you as the
AMC ADR Senior Advisor,
recognizing the significant
achievements you have made in
introducing and implementing
ADR programs throughout AMC
since your original appointment of
10 September 1993.

2. AMC is recognized by the Army
ADR Specialist, the Principal
Deputy General Counsel, as a
leader in ADR. The AMC-level
Protest Program, Resolving
Employment Disputes Swiftly, and
the AMC Partnering Program, are
vital program components that seek
to design and implement initiatives
that avoid traditional litigation.
Additionally, the AMC ADR
Pamphlet, will be a great tool for
educating both the AMC workforce
and our customer community on
the benefits of ADR.

3. Through separate
correspondence to the Major
Subordinate Command (MSC)
Commanders, I will provide
notification of my appointment of
you, and my expectation that they
will reappoint their Chief Counsel
as Senior Advisor for ADR.

4. As I visit AMC installations and
activities, I will emphasize ADR as
a critical component of AMC's
ability to create initiatives to save
the costly expenses and program
delays that characterize litigation.

5. You have briefed me on the
status of ADR within AMC and I
look forward to your periodic
updates to me on this vital
program.

6. AMC — Your Readiness
Command ... Serving Soldiers
Proudly!

JOHN G. COBURN
General, USA
Commanding

Newsletter Details

Staff

Command Counsel

Edward J. Korte

Editor

Stephen A. Klatsky

Layout & Design

Holly Saunders

Administrative Assistant

Fran Gudely

Typist

Billy Mayhew

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tronically as a Microsoft®
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sklatsky@hqamc.army.mil

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

Contractor Self-Oversight Program

The TACOM-ARDEC Legal Office recently had occasion to advise a contracting officer on the impact of a recent Defense Contract Management Command (DCMC) Acquisition Reform initiative, the Contractor Self-Oversight Program (CSO). This article summarizes the program and its impact on contract administration.

One of the key goals of Acquisition Reform was to improve contract administration within the DOD.

The CSO program allows "quality contractors" the opportunity to have their personnel perform surveillance functions in lieu of DOD personnel. Under CSO, routine manufacturing and product assurance surveillance is provided by contractor personnel, in lieu of direct DCMC in-plant surveillance.

This is accomplished by empowering contractor personnel to perform the majority of Government Source Inspection (GSI) activities thereby eliminating the time DCMC personnel spend on processes with good performance history and allowing

the refocusing of DCMC resources into areas requiring more intensive oversight

Designated contractor personnel serving in this capacity are referred to as Technical Compliance Designees (TCDs). CSO is only used when the DCMC Contract Administration Office (CAO) and the customer(s) have confidence in the contractor's ability to provide the necessary surveillance and when it will not result in additional cost to the Government.

The scope of the CSO agreement is dependent upon the concurrence of the contractor, the responsible DCMC Commander, and the affected customers. Specific facilities, programs, processes, product lines and/or test and development processes covered under the CSO agreement are defined in the applicable CSO Memorandum of Agreement (MOA). Adoption of CSO always requires the agreement of customers, the contractor, and DCMC.

POC is TACOM-ARDEC's **Kenneth J. Hanko**, DSN 880-6587 (Encl 2).

List of Enclosures

1. REDS-ADR for Workplace Disputes
2. Contractor Self-Oversight Program
3. Avoiding Personal Services Contracts
4. IP Protections for Software-Related Inventions
5. Clean Air Immunity Waiver--6th Circuit Case
6. Disposal of Army Real Estate
7. Non-BRAC Disposals
8. BRAC Transfer Case Study
9. Environmental Requirements Affecting Real Property
10. June 99 ELD Bulletin
11. Commander's Statement on Ethics
12. Invitational Travel Orders & Contractors
13. Prohibited Sources
14. Use of Motor Vehicles and Drivers
15. Election 2000 Public Affairs Guidance

Avoiding Personal Services and Contractors in the Workplace

CECOM's **Pat Terranova**, DSN 992-3210, provides an excellent article on personal services contracts, with an emphasis on that doctrine's relationship with the issue of contractors in the workplace (Encl 3). In this regard, it is of the utmost importance that Government personnel avoid violating the express prohibition against "personal services" contracts.

In order to avoid a personal services contract it is necessary to be able to recognize one. A personal services contract is a contract that, either by its express terms or as administered, makes contractor personnel appear to be Government employees. The Government is required to obtain its employees by direct hire under competitive appointment or other procedures established by the appropriate civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents these laws.

A personal services contract is characterized by the employer-employee relationship it creates between the

Government and the contractor's personnel. Federal Acquisition Regulation (FAR) 37.104(c)(2) states that the key question in determining whether an employer-employee relationship is created between the Government and the contractor is: "Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" Simply stated, although they may be working side-by-side, contractor employees cannot be supervised by Government personnel. An arms-length relationship must exist between the Government and contractor.

Additionally, contractor personnel cannot perform "inherently Governmental functions," that is, any functions which require the exercise of personal judgment and discretion on the part of a Government official. Work assignments and taskings to a contractor must be issued by the Government's point of contact, usually the Contracting Officer or the Contracting Officer's Representative, not by Government supervisors.

CG Supports Partnering-- Urges Further AMC MSC Efforts

By memorandum of 4 June 1999, **General Coburn** underscored his support for the AMC Partnering Program, asking his MSC Commanders to include Partnering as a briefing subject during MSC orientations,

In part the CG stated "I am very impressed by the AMC Partnering Program and the many benefits that have already been accomplished. I ask each of you to continue to take a personal interest, and to work with your MSC Lead Partnering Champions, in expanding the implementation of our Partnering efforts so that we will realize the full potential of this outstanding acquisition reform initiative."

These MSC Partnering briefings will be based on the Partnering Self-Assessments developed during the January 1999 Lead Partnering Champion Workshop, and subsequently completed at the MSCs.

Acquisition Law Focus

Contract Options--Court of Appeals Decision in IOC Case for IP Protections for Software-Related Inventions

The IOC recently received a decision from the United States Court of Appeals for the Federal Circuit on one of our contracts that all contracting officers and contract specialists need to be aware of.

The generic facts are that the IOC had a contract in place for a basic quantity and a 100% evaluated option. The delivery schedule for the basic contract quantity that was in the original contract required deliveries to be made on a monthly basis at a flat rate.

The contract contained a standard option provision that stated that "Delivery of the items added by exercise of this option shall continue immediately after, and at the same rate as delivery of the like items called for under the contract, unless the parties agree otherwise." The contracting officer and the contractor executed a bilateral modification revising the delivery schedule for the basic contract quantity. The United States Court of Appeals for the Federal Circuit disagreed with the District Court and

held that the option had not been validly exercised. The Court of Appeals held that because the delivery rate imposed by the contracting officer departed from the terms of the contract option clause, the exercise of the option was invalid. The Court of Appeals declined to state what the rate should have been under these circumstances, but only concluded that the rate that was unilaterally imposed was not the correct one. The Court went on to state that notwithstanding the invalidity of the option exercise, the contractor was nonetheless, obligated to continue with the performance of the option exercise under the Disputes Clause.

The important lesson to be taken from this decision is that when we revise contract delivery schedules, we must address the delivery schedule applicable to the option quantity as well. Our failure to do so may result in invalid option exercises where we have to exercise an option on a unilateral basis.

POC is **John W. Seeck**, DSN 793-8462.

AMCOM IP counsel **Hay Kyung Chang**, DSN 746-5109, has provided an excellent treatise on the law of patentability of software inventions (Encl 4).

The article also provides an excellent introduction on the basic objectives of the laws that protect intellectual property: "...to encourage private endeavors and investment in the development, production and public dissemination (in the cases of patents and copyrights) of various forms of new technology and information.

With respect to patentability of computer software, the basic principle "Whoever invents or discovers any new and useful process, machine manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title--35 U.S.C. Section 101.

EEOC Has the Authority to Order Compensatory Damages

In the case of West v. Secretary of Veteran's Affairs, No. 98-238, June 14, 1999, the United States Supreme Court held 5-4 (opinion by Breyer; dissent by Kennedy) that the Equal Employment Opportunity Commission (EEOC) has the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII, 42 USC s 2000 et seq.

Although Title VII does not explicitly mention compensatory damages, it states the EEOC has authority to enforce "through appropriate remedies, including reinstatement or hiring of employees with or without back pay."

The Court emphasized the term "appropriate" broadened the EEOC's power in the statute and further relied on the term "including" in determining the EEOC's power was not limited to the remedies specifically mentioned. Additionally, in 1991 Congress passed the Compensatory Damages Act (CDA), 42 USC s 1981, which explicitly gives a petitioner the possibility of compensatory damages when

he has been the subject of unlawful intentional discrimination in the workplace. The court found that when read in tandem with the CDA, Title VII gives the EEOC the power to award compensatory damages.

To deny that an EEOC compensatory damages award is, statutorily speaking, "appropriate" would undermine the remedial scheme. This point is reinforced by the CDA's history, which says nothing about limiting the EEOC's ability to use the new damages remedy or in any way suggests that it would be desirable to distinguish the new Title VII remedy from the old ones.

The Supreme Court on Union Representation and IG Investigations

On June 17, 1999, the Supreme Court issued a ruling (5-4) in NASA v. FLRA which affirms the lower court and the Federal Labor Relations Authority's finding that an employee subject to an Inspector General investigation is permitted to have union representation at an examination conducted by a representative of the agency, if the employee believes that the examination will result in disciplinary action and requests such representation.

The full decision can be downloaded in text or PDF formats at <http://supct.law.cornell.edu/supct/html/98-369.ZS.html>.

Supreme Court Clarifies Definition of Disability Under the ADA

On 22 June, in Albertsons, Inc. v. Kirkingburg, the Supreme Court clarified the definition of a disability for purposes of the ADA. This decision will have a significant impact on complaints of handicap discrimination filed under 29 CFR 1614. The key issue is summarized below:

ADA Requirements

The ADA requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation on a major life activity caused by their impairment is substantial. The Ninth Circuit made three missteps in determining that Kirkingburg's amblyopia meets the ADA's first definition of disability, i.e., a physical or mental impairment that "substantially limits" a major life activity, 42 U.S.C. §12101(2)(A).

Ninth Circuit: 3 Missteps

First, although it relied on an Equal Employment Opportunity Commission regulation that defines "substantially limits" as requiring a "significant restrict[ion]" in an individual's manner of performing a major life activity, see 29 CFR § 1630.2(j)(ii), the court actually found that there was merely a significant "difference" between the manner in which Kirkingburg sees and the manner in which most people see.

By transforming "significant restriction" into "difference," the court undercut the fundamental statutory requirement that only impairments that substantially limit the ability to perform a major life activity constitute disabilities. Second, the court appeared to suggest that it need not take account of a monocular individual's ability to compensate for the impairment, even though it ac-

knowledged that Kirkingburg's brain had subconsciously done just that. Mitigating measures, however, must be taken into account in judging whether an individual has a disability, Sutton v. United Airlines, Inc., ante, at ___, whether the measures taken are with artificial aids, like medications and devices, or with the body's own systems. Finally, the Ninth Circuit did not pay much heed to the statutory obligation to determine a disability's existence on a case-by-case basis. See 42 U.S.C. §12101(2).

Some impairments may invariably cause a substantial limitation of a major life activity, but monocular vision is not one of them, for that category embraces a group whose members vary by, e.g., the degree of visual acuity in the weaker eye, the extent of their compensating adjustments, and the ultimate scope of the restrictions on their visual abilities.

Employment Law Focus

Penalty Not Necessarily Reduced If Agency Charges Fail--new Federal Circuit Decision

Thanks to **Susan Bennett**, Anniston Army Depot, DSN 571-6334, for directing our attention to an important recent Federal Circuit decision which affects the MSPB's ability to mitigate agency-imposed penalties when one or more of the agency's charges is not sustained. In LaChance v. Devall, Fed. Cir. No. 98-3213 (May 20, 1999), the Court rejects the notion that a penalty must automatically be reduced if one of several charges falls by the wayside. Although the full text of the decision is attached, the critical portion follows:

"When the Board sustains all of an agency's charges the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as

the agency has not indicated either in its final decision or during proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges. Such a procedure ensures that the agency retains its authority under the Reform Act to serve as employee disciplinarian on the basis of its sustained charges: when the Board mitigates to the maximum reasonable penalty under such circumstances, the Board's action appropriately presumes that it is acting in conformity [*42] with the agency's penalty choice, either because the agency explicitly has made clear its desire that the maximum reasonable penalty be imposed or implicitly has done so by virtue of its silence. If the Board discerns from the record or the proceedings that the agency desires imposition of a lesser penalty the Board must accord the agency an opportunity to institute such a lesser penalty.

OPM's ADR Guide

The new Office of Personnel Management Alternative Dispute Resolution Resource Guide is available from their website: <http://www.opm.gov/adrguide/adrhome.html-ssi>.

The Guide provides an overall picture of how the most common forms of ADR are being implemented in Federal agencies. It summarizes a number of current ADR programs, including alternative discipline programs, and it describes the shared neutrals program where agencies have collaborated to reduce the costs of ADR. It also has links to other ADR-related websites.

OPM Guidance on EO Prohibiting Discrimination Based on Sexual Orientation

OPM issued guidelines on June 24th implementing EO 13087, which prohibited discrimination on the basis of sexual orientation. The policy statement is in the form of a resource guide available at www.opm.gov.

Environmental Law Focus

New EPA **Yellow Book** on Enforcement

After many years, the US Environmental Protection Agency has revised and published a new “**Yellow Book**”. This revision should be very helpful to all. EPA’s explanation is: THE YELLOW BOOK: Guide to Environmental Enforcement and Compliance at Federal Facilities has been written to meet the needs of a diverse audience. The Yellow Book’s primary purpose is to provide individuals with Federal Facility environmental responsibilities with an informational tool to help comply with environmental requirements and to clearly explain the compliance and enforcement processes used by EPA and States at Federal Facilities. It can be accessed in PDF format from EPA at: <http://es.epa.gov/oeca/fedfac/yellowbk/index.html>. Or if you have trouble obtaining a copy, contact: **Robert S. Lingo**, DSN 767-8082.

A New CROP for EPA Administrative Hearings

Are you thinking about appealing an EPA enforcement action. You need to know the rules. The EPA has recently revised its Consolidated Rules of Practice, otherwise known as “CROP”). It expands the procedural rules to include certain permit revocation, termination and

suspension actions, and new rules for administrative proceedings not governed by section 554 of the Administrative Procedure Act. The CROP had not been Substantially revised since 1980. The new, revised CROP is available from the AMCCC Environmental Law Team.

Could Your Affirmative Procurement Pass Inspection?

On September 14, 1998, President Clinton signed Executive Order 13101: “Greening the Government Through Waste Prevention, Recycling and Federal Acquisition.” Section 403 of the Order directed that EPA develop guidance for inspections of Federal facilities for compliance with the buy-recycled program established under section 6002 of the Resource Conservation and Recovery Act (RCRA).

On May 12, 1999 EPA issued its guidance. The guidance is to be used by EPA whenever the Agency conducts RCRA inspections or multi-media regulatory compliance inspections where RCRA compliance is a component of the inspection. The guidance may also be used by States authorized to conduct inspections under RCRA.

This guidance should be distributed to Army procurement officials, as well as environmental offices, since they need to be aware of the affirmative procurement requirements and potential for EPA and or State inspections. A copy is available from the Environmental Law Team.

Environmental Law Focus

What's the Status on Clean Air Act Immunity Waiver?

The 6th Circuit recently ruled against the Federal Government and found a waiver of sovereign immunity in the Clean Air Act, allowing the state's to impose punitive penalties. The case involved our Milan Army Ammunition Plant. The 6th Circuit opinion is at enclosure 5. Stay tuned for further developments. **Stan Citron** at DSN 767-8043.

ELD Bulletin for June 99

Environmental Law Division Bulletin for June 1999 is provided for those who have not received an electronic version from ELD or who have a general interest in Environmental Law (Encl 10).

AMC Works Hard on Real Estate Management & Disposal at Iowa Workshop

On 2-6 August 1999, AMC held a Real Estate/Real Property Management Workshop at Bettendorf, Iowa. A main focus of the Workshop was on procedures to identify and dispose of excess installations. For those who were not able to attend, we provide several significant items from the Workshop.

First, the briefing presentation by **Robert Lingo** on General Disposal Issues (Encl 6). The role of the GSA as the federal agency responsible for property disposal is outlined. Also highlighted is the relationship between DA, AMC and the Army Corps of Engineers. Further, the system for reporting property excess is described.

This is followed by Bob's briefing charts on Non-BRAC

Procedures (Encl 7). This presentation identifies the 20 AMC excess installations, describes the excessing process and highlights the applicability of NEPA.

Next is a briefing by **Stan Citron** on Transfer Case Studies (Encl 8). This presentation gives the background of and salient points related to the Red River, Letterkenny and Tooele cases.

We also provide a presentation on Environmental Requirements Affecting Real Property Activity, by **Stan Lowe**, of the AMC Environmental Office (Encl 9).

A presentation by IOC's **Rick Murphy**, DSN 793-8422, outlining the work related to the Tooele Depot Early Transfer is available if you contact Rick.

General Coburn On Ethics- Commander's Guidance Statement

On 10 June, General **John G. Coburn** issued a Commander's Statement on Ethics (Encl 11). Among the important principles enunciated in this document are the following:

- AMC has an "enviable reputation of institutional integrity.

- Readiness requires that our actions reflect the highest principles of "honesty, loyalty and selfless service".

- The Standards of Ethical Conduct for Employees of the Executive Branch and the DOD Joint Ethics Regulation

set the "minimum expectations".

- All must have a basic knowledge of the various ethics issues faced by military and civilian personnel.

- "When an ethics issue arises, seek the advice of your Ethics Counselor before you act."

The statement concludes with the following "I expect my commanders, directors, and supervisors to set the example and ensure that ethical issues are resolved while they are still issues and before they become problems."

Prohibited Source--Dirty Word? No!

HQ AMC Ethics Team Chief **Mike Wentink**, DSN 767-8003, provides a paper outlining what it means to be a "prohibited source: means, and what it does not mean(Encl 13).

The paper addresses gift rules and restrictions with respect to engaging in activi-

ties of private organizations (PO), obtaining the prior approval of their supervisors before they can engage in compensated off-duty activity with a prohibited source.

Lastly, the important rules with respect to supporting PO activities by the Army are outlined.

ITOs and Contractor Personnel

Effective October 1, 1999, the Joint Travel Regulation will prohibit the issuance of invitational travel orders ("ITO's") to contractors. This change was originally scheduled to take place on June 1, 1999, but has now been postponed until October.

DFAS will not pay contractor travel vouchers for any contractor ITO's issued after October 1, 1999.

Many AMC contracts already "direct fund" contractor travel through the fixed contract price, through a reimbursable contract line item, or through contractor overhead rates.

These contracts already comply with the change and require no action.

However, many AMC contracts rely on ITO's to fund contractor travel.

For those contracts that rely on ITO's, we recommend that requiring activities contact their contracting officers as soon as possible to direct fund all contractor travel after October 1, 1999. This will likely require a modification to the statement of work.

POC is **Lisa Simon**, DSN 767-2552. A Point Paper on this development is provided (Encl 12).

DOD Guidance on Ethics Issues in Government-Contractor Teambuilding

DoD issued guidance on Government-Contractor Teambuilding on 15 July 1999. **Mike Wentink** posted it to the AMC Info Repository in the AMC Forum on the JAGCNet. To whet your appetites, here is a quote from the introduction to this 45 page document:

“This memorandum begins with a general discussion of Integrated Product Teams (IPTs). This section

addresses the structure of these teams, which are the basis of many DoD initiatives. It then generally discusses the various subject areas of the chapters of the DoD Joint Ethics Regulation (JER). These sections are:

1. Conflicts of Interest
2. Gifts
3. Job Hunting and Post-Government Employment
4. Use of Government Resources

5. Misuse of Government Position and Endorsement

6. Support for Non-Federal Entities

7. Travel and Transportation

8. Training

In each of these sections, there is a general discussion, a statement of the rules for DoD employees, and illustrative examples.

Use of Official Motor Vehicles and Drivers

Mike Wentink, recently provided information on this repeating issue (Encl 14). With very few exceptions, home-to-work transportation is not allowed. Those exceptions include the Secretary of the Army and the Army Chief of Staff.

Rank or grade alone does not justify use of an official administrative use vehicle.

Within the NCR, official vehicles generally may not be used to and from commercial terminals because “Public

and commercial transportation to commercial terminals in the NCR is considered adequate for all but emergency situations, security requirements, and other unusual circumstances.” DoDI 4515.7, para. D.2. This restriction applies to Reagan National, Dulles, BWI, and downtown DC bus and rail terminals.

Official attendance to after hours functions may be approved as an exception to policy. Travel is expected to

begin and end at the employee’s normal place of duty.

If the employee’s spouse is attending a meeting or event with the employee, the spouse may accompany the sponsor in the official vehicle subject to space available (no other employee is displaced and a larger vehicle is not required). There can be no deviation to pick up the spouse, and the spouse may not ride unaccompanied.

Common Sense At Root of Public Affairs *Reebok Rules*

A few days after joining Reebok International, **John B. Douglas III** witnessed a small thing that made a big impression: CEO **Paul B. Fireman** was at the coffee machine making coffee. Today, "Make the coffee" stands as No.11 on Douglas' "Reebok Rules", a list of items he believes are important for the operation of the Reebok legal department.

Douglas does not say that these fit all law firms or legal organizations, but could serve as a springboard for other general counsel who seek to draw their own lists reflecting their companies' own values.

Again, we are not saying these apply to AMC, and you are free to disagree with any particular item:

1. Lawyers should attend all key business and staff meetings.
2. Eliminate the "no" word from your vocabulary.
3. Corporate counsels are business people. None and use your business judgement.
4. Return phone calls promptly.

5. Learn about problems early.

6. Get to know your clients as people.

7. Learn the business.

8. Try spending a portion of your day wandering the halls.

9. Avoid memos. Communicate orally.

10. Integrity is crucial.

11. Make the coffee.

12. Be a problem solver.

13. Stay focused on what is truly important.

14. Be a general practitioner.

15. Do the "legal thing."

16. Be available.

17. Legal work and the bell curve: Not every job requires an "A" effort.

18. Avoid titles.

19. Be proactive. Educate your client groups.

20. Move routine work outside the department.

21. Be enthusiastic.

22. Give answers. Get to the point.

23. Hire people better than you are.

Thanks to **Peg Giesecking** from SBCCOM for this article (with an assist to **Lisa Simon**).

Election 2000--DOD Public Affairs Policy Guidance

DOD's Office of Public Affairs recently issues Election 2000 guidance (Encl 15).

As a matter of long-standing policy, the Department of Defense does not engage in activities that could be interpreted as associating the Department with any partisan political causes, issues, or candidates.

The political activities of individual military members are regulated by DOD Dir 1344.10.

The political activities of civilian employees are restricted by the Hatch Act amendments, 5 U.S.C.. 7321 - 7326 (ref c).

Civilian officers and employees with questions regarding the propriety of prospective political activities, or concerns about possible violations, may be directed to the Hatch Act hotline at the U.S. Office of Special Counsel, (800) 854-2824.

Inquiries from political campaigns should be considered as queries from the general public and should be responded to accordingly.

AMC Legal Office Profile

Tank-automotive & Armaments Command, Warren, MI

Background & History

The command was formed in 1942 and called the Tank-Automotive Center (T-AC). Its mission was tank automotive development, procurement, and maintenance. Over the years, the command has had nine names to reflect changes in mission. The command's latest name change, from the Tank-Automotive Command to the Tank-automotive and Armaments Command, may only be a difference of one word, but reflects a profound change in mission and size. TACOM's mission is to generate and sustain the warfighting capability and readiness for the Army; manage the Army's investment in Science and Technology; Research and Development; and Sustainment; and serve as the life cycle manager and integrator for group equipment.

The Legal Office

The TACOM Legal Office fully supports this mission and is prepared to assist the

command into the next millennium. Like the command, the Legal Office has also grown in size and responsibility: from thirty attorneys and support staff in Warren, Michigan, to sixty-eight attorneys and support staff spanning five states and three time zones.

TACOM is organized into five locations, all managed by the Chief Counsel, Ms. **Verlyn Richards**. Those locations are the Warren, Michigan office, TACOM-Rock Island Legal Group in Illinois, the TACOM-Anniston Legal Group in Anniston, Alabama, the TACOM-ARDEC Legal Group in Picatinny, New Jersey, and the TACOM-Red River Legal Group in Texarkana, Texas. Although the TACOM Legal Office has become larger, it's focus on early, active involvement in the command's legal matters remains unchanged. Team work, among not only the far-flung attorneys, but our clients as well, is our goal.

TACOM Legal Teamwork

Ms. Richards continues to emphasize the importance of one, "TACOM of the Future" and one "TACOM of the Future" Legal Office. One method of ensuring communication among all five sites is the TACOM Intranet. The TACOM Intranet links all five sites and provides a quick and easy mechanism to share information. The TACOM Legal Intranet was the first of its type to link multi-site offices. **John Klecha**, of the TACOM-Warren office, created this Intranet site for all of us here at TACOM as well as serving as Assistant Chair of the command-wide AMC Automation Committee.

At the past two CLE conferences in Orlando, we have gathered together for dinner at one of the local restaurants. Which restaurant will we meet at next year?

Teambuilding-Communication

Last month, we all got together for a team building exercise at the University of

AMC Legal Office Profile

Tank-automotive & Armaments Command, Warren, MI (Continued)

Michigan's Center for Creative Development, Dearborn, Michigan. **Bill Kovacic**, a professor at George Mason University Law School, led our exploration into effective communication and the catastrophic effects of a communication breakdown. Most of TACOM-Warren was able to attend this team building exercise as well as TACOM-ARDEC (**Bob Parise, Denise Scott, Ken Hanko and Dean Brown**), TACOM-Rock Island (**K. Krewer and Joe Picchiotti**), and TACOM-Anniston (**Les Mason**).

Recent Efforts

A prime example of resource leveraging has occurred on the TACOM-Rock Island Colt license dispute. **Peter Taucher's** Intellectual Property Law Division, supports not only Warren, but Rock Island too. During the past three years, **Gail Soderling** has provided his IP counsel, and **Maria Bribriescio**, of the Rock Island Legal Group, has brought her Business Law

expertise and program knowledge to bear on this difficult dispute. Working closely with TACOM-Rock Island and ARDEC engineers, Maria and Gail negotiated a modification to the Colt license to allow future competitive procurement of Colt's carbine variant of the M-16 rifle.

Caridad Ramos, also of the Rock Island Legal Group, has been jet setting to all of the major subordinate commands as one of the AMC Roadshow facilitators.

In the arcane world of Other Transactions, **Sue Lewandowski** and **Betsy Burt** of TACOM-Warren have teamed with **Denise Scott** of TACOM-ARDEC to share lessons learned. This teaming not only takes place between the legal offices but, within each office, the attorneys share their knowledge and experience with each other to deal more effectively with the issues of our clients.

At TACOM-ARDEC, **John Moran, Denise Scott, Bob Parise, and Jerry Williams**, representing all divisions of the legal group (Business, General, and Intellectual Property Law), participated in

panel sessions aimed at informing both the workforce and industry of the many and varied teaming opportunities. A wide range of topics were touched upon from leases to CRADAs to Other Transactions.

IPTs

At TACOM, in addition to the attorneys teaming to provide more efficient legal services to our clients, the attorneys also work on Integrated Process/Product Teams (IPTs). A complete list of every example of successful team work would be too numerous to list so, like the tip of the iceberg, only a few will be mentioned while the bulk will remain hidden below the surface

Christine Kachan and William Reed, from TACOM-Warren, and **K. Krewer**, from TACOM-Rock Island, worked hard as members of the Paperless Acquisition Team to make the five-site TACOM acquisition process completely paperless, effective June 14, 1999. Each received

AMC Legal Office Profile

Tank-automotive & Armaments Command, Warren, MI (Continued)

a Two Star Note and Coin from **MG Beauchamp**, and a Certificate of Achievement and Award of Excellence from both **MG Beauchamp** and **MG Michitsch**. It is interesting to note that these awards were not paperless. In fact, the awards were printed on some very nice looking paper. Perhaps the scope of the paperless team should be expanded?

Bob Vollmar and **Violet Kristoff**, of TACOM-Warren worked tirelessly along with some former ATCOM representatives, AlliedSignal, the Acquisition Center, the BRAC Coordinator, Resource Management, and AMC Legal Office in order to respond to the multitude of issues arising from the process of closing the Stratford Army Engine Plant. The team worked together to respond Connecticut congressional concerns, a variety of fiscal law concerns, tax issues, Small Business Administration appeals, environmental concerns, as well as an Intra-Service Support Agreement with Anniston Army Depot (Les

Mason), and a complex set of interlocking contract actions and acquisitions.

The Focus Sustainment contract is an excellent example of command-wide teaming. **Joe Picchiotti** of TACOM-Rock Island was instrumental in the successful award of a ten-year, multiple award, IDIQ contract for one-stop shopping for maintenance and sustainment of TACOM equipment worldwide.

The Scout program, as an international cooperative R&D project with the United Kingdom for a common armed reconnaissance vehicle, represents a challenging teaming effort. As the lead attorney, **Verlyn Richards** tackled the tough cost and benefit sharing issues for the MOU negotiated between the two countries. She also guided **Ronald Majka** and **Dave Kuhn** through the program's many difficult and often times complex IP and contract issues. Dave worked a controversial authorization and consent

issue while Ron advised the PM office on a variety of source selection concerns.

Awards & Recognition

Several attorneys at TACOM have received the Acquisition Reform Award for Excellence as recognition of their efforts as part of a successful IPT: **Betsy Burt**, **Sue Lewandowski**, and **Bob Maskery**.

Also noteworthy, **CPT William Schmittel** received the Chief of Staff Legal Assistance Award.

At the 1999 Continuing Legal Education Program **Bob Parise** was named the Joyce I. Allen AMC Attorney of the Year, and **Carrie Schaffner** was presented with the Preventive Law Award for her significant efforts in the ethics area.

Thanks to Betsy Burt for her efforts in preparing this Profile.

Faces In The Firm

Hello

CECOM

MAJ Kevin P. Fritz, formerly the Officer in Charge of the Joint Service Pentagon Legal Assistance Office, has been assigned as the Deputy Staff Judge Advocate, CECOM and Fort Monmouth, effective 15 July 1999.

Ms. **Carol Brewer**, a rising third-year law student at Newark-Camden, will be interning from May until July. The summer intern program is sponsored by the U.S. Army Judge Advocate Recruiting Office.

TACOM-W

CPT Bradley J. Jan, our new TACOM Command Judge Advocate arrived Jul 99 from Ft. Monroe.

CPT Philip C. Mitchell arrived Jul 99 from Ft. Irwin. He is assigned to our Business Law Division as the AMC Contract Law Attorney.

AMCOM

Welcome to **Major Wade Brown**, joining Branch D, Acquisition Law Division.

TACOM-ARDEC

Ronald D. Brown - Attorney-Advisor joined the General Law Section on April 25th. Dean graduated from Rutgers University School of Law and joins ARDEC from private practice. Dean also has experience as a United States Attorney, prosecuting under both civil and criminal laws.

Kenneth J. Hanko - Attorney-Advisor joined the Business Law Section on April 24th. Ken came to ARDEC from the Defense Contract Management Command. A graduate of Western New England Law School, Ken also commands the 153d Legal Support Organization (JAG Detachment).

John P. McCambridge - Attorney Advisor with the Business Law Section joined ARDEC on May 5th from the Military Traffic Management Command, Office of the Staff Judge Advocate in Bayonne, New Jersey. Jack graduated from St. John's Law School, Queens, New York and has 25 years of service with the government.

WSMR

CPT Justin Tade arrived from Schofield Barracks, Hawaii.

Goodbye

CECOM

Major Marvin K. Gibbs, Deputy Staff Judge Advocate, is leaving the Army and has accepted a job as a contracts attorney with the Military Traffic Management Command in Falls Church, Virginia.

WSMR

MAJ Bradford B. Byrnes PCS'd to TJAGSA 6 Jul 99 for the JAG graduate course.

SGT James Mersfelder PCS'd to FT Irwin, CA.

TACOM-W

CPT William Schmittel, TACOM's Command Judge Advocate will be departing for his new assignment will be at Heidelberg, Germany.

IOC

Gail Fisher, Paralegal Specialist, moved to the TACOM Rock Island legal office in July after 18 years with the IOC family.

Student aide, **Brian Klinkenberg** and student intern **Juanita Winfrey** will be heading back to school soon.

Jo Pietrobbon is retiring from Pine Bluff after 17 years with the legal office. Best wishes to you.

Faces In The Firm

Awards & Recognition Promotions

CECOM

Hazel Smock has been chosen the Ft. Monmouth Secretary of the Year. She was selected from 24 candidates and was recognized at an award ceremony presided over by MG Nabors. The award program is sponsored by EEO and the committee making the selection is comprised of other secretaries within the Command and the resident activities.

IOC

Amy Armstrong, IOC General Law/Installation Support, has been selected as a member of the Department of Defense Executive Leadership Development Program Class of 2000.

AMCOM

Jim McMurray received the Meritorious Civilian Service Award, nominated by his acquisition clients.

Dayn Beam received an award from General Johnnie Wilson for Outstanding Achievement in Value Engineering.

WSMR

WSMR received the 1998 Judge Advocate General's Award for Excellence in Claims. The Claims Service received 35 applications from among the 151 eligible offices, of which nine were named as winners. The Claims Service determined the winners by looking at each office's performance during the 1998 fiscal year.

There were a number of factors which contributed to WSMR being selected for the award. The White Sands JAG Office is the sole activity responsible for processing all claims for the Army within the state of New Mexico. Specifically, the Range command group has recognized the importance of the Army claims mission and has taken affirmative steps to ensure it is adequately staffed. Additionally, the White Sands claims office has processed small and large personnel and tort claims in an exceptional timely manner, and the staff write numerous articles about claims.

The claims mission is handled by **CPT Van Hardenbergh, Bill Fugelso, Bobbie J. Salas** and **Willie J. Smith** of the JAG Office.

Major Eugene Baime was promoted to his current rank in a ceremony 30 July. Colonel Pulscher, Chief of Staff, officiated. Major Baime has been in the IOC Law Center, Environmental/Safety Law, for just over a year. Congratulations on your promotion.

Births

Angie Davila (Legal Assistant, Environmental/Safety Law) is a gramma! Angie, her husband, John, and daughter, Heather, celebrated the birth of Alexxis Anjeliqua Rodriguez! Alexxis, born two months early, is a doll! Our congratulations to the family.

More Farewells

AMCOM

A happy and healthy retirement is what we wish to long time acquisition counsel **Hugh Nicholson**.

Major Scott Gardiner has departed the acquisition law division for assignment to the Judge Advocate General's School.

S: 1 July 1999

22 June 1999

AMCEE (690-12a)

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: REDS--ADR for Workplace Disputes

1. During 1998, you periodically received briefings and other information on REDS--Resolving Employment Disputes Swiftly, a one-year test program conducted at the U.S. Army Research Laboratory, the U.S. Army Tank-automotive and Armaments Command and the Anniston Army Depot. I recently received an excellent briefing from the HQ AMC REDS Team on the impressive results of the test.
2. It is my decision to adopt REDS as the AMC Model for using Alternative Dispute Resolution (ADR) for workplace disputes. Traditional employment litigation cases are very expensive in terms of time and money. Additionally, they take a long time to resolve, contribute to a breakdown in relationships, and distract people from concentrating on the mission of AMC. ADR and our AMC REDS Program provide methods for identifying and resolving disputes early, focusing on open communications and building healthy future employment relationships.
3. REDS has been successful in large part due to an outstanding team effort, with EEO in the lead and active participation and representation from the civilian personnel and legal communities. To maximize the benefits of REDS, I ask each addressee to appoint a REDS Team, with EEO leading the team and supported by your CPAC and legal offices. Additionally, I ask each MSC to endorse this memorandum, forwarding it to your subordinate installations for appointment of REDS teams at the activity level.
4. Please provide AMCEE with the name, duty position, telephone number and e-mail address of your EEO POC and for each member of your designated REDS team **NLT 1 July 1999**. Installation REDS team information should be provided directly to AMCEE with a copy furnished to the appropriate MSC EEO office.

AMCEE

SUBJECT: REDS--ADR for Workplace Disputes

5. These teams will participate in a REDS training program conducted by members of the HQ AMC and pilot program REDS team members. More information will be provided on this program in the near future.

6. I appreciate your cooperation in the effort to expand REDS and export it throughout AMC.

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

signed

JOHN G. COBURN
General, USA
Commanding

DISTRIBUTION:

B1

AMC LEGAL NEWSLETTER

The TACOM-ARDEC Legal Office recently had occasion to advise a contracting officer on the impact of a recent Defense Contract Management Command (DCMC) Acquisition Reform initiative, the Contractor Self-Oversight Program (CSO). This article summarizes the program and its impact on contract administration.

One of the key goals of Acquisition Reform was to improve contract administration within the DOD. The CSO program allows "quality contractors" the opportunity to have their personnel perform surveillance functions in lieu of DOD personnel. Under CSO, routine manufacturing and product assurance surveillance is provided by contractor personnel, in lieu of direct DCMC in-plant surveillance. This is accomplished by empowering contractor personnel to perform the majority of Government Source Inspection (GSI) activities thereby eliminating the time DCMC personnel spend on processes with good performance history and allowing the refocusing of DCMC resources into areas requiring more intensive oversight

Designated contractor personnel serving in this capacity are referred to as Technical Compliance Designees (TCDs). CSO is only used when the DCMC Contract Administration Office (CAO) and the customer(s) have confidence in the contractor's ability to provide the necessary surveillance and when it will not result in additional cost to the Government.

The scope of the CSO agreement is dependent upon the concurrence of the contractor, the responsible DCMC Commander, and the affected customers. Specific facilities, programs, processes, product lines and/or test and development processes covered under the CSO agreement are defined in the applicable CSO Memorandum of Agreement (MOA). Adoption of CSO always requires the agreement of customers, the contractor, and DCMC. CSO does not reduce any contractual obligations of the contractor, nor does it reduce the rights of the Government under the inspection, property, or other clauses of the contract. CSO cannot be used for formal acceptance of the DD250, nor surveillance of flight critical/safety of flight characteristics.

DCMC technical specialists (QARs) retain the following Quality Assurance activities:

- Modification of the DCMC Product and Manufacturing Surveillance Plan to indicate which processes, surveillance tasks, or functions will be subject to CSO. The DCMC Surveillance Plan must specify how DCMC will monitor contractor activities to ensure they are providing the necessary assurance of contract compliance, for example, periodic reviews of TCD work products, analysis of contractor audits, and so forth.

- Final sign-off of DD250. This activity is withheld to assure proper processing of deliveries for payment.
- Ammunition Data Card sign-off
- Post-review sampling of Material Review Board activities
- First Article Tests
- Flight critical, safety of flight products
- Naval Nuclear products
- Level 1 subsafe products
- Life support equipment

The TCD is responsible for implementing a process-based oversight evaluation plan and serves as a Government designee and Quality Assurance Technical Specialist at a defense contractor facility. The TCD is an employee of the respective contractor and performs certain tasks related to the production verification area. The TCD is assigned to work on all contracts currently active and future awards as agreed to in the MOA. Using established DCMC contract administration procedures, the TCD is expected to be capable of understanding, identifying, proofing, measuring, and analyzing contractor processes in relation to contractual requirements to determine adequacy and to promote continuous quality improvement.

The TCD's may conduct a variety of roles previously performed by DCMC personnel. These include, but are not limited to: process audits, witnessing of tests, production reliability acceptance test sample selection, Product Quality Deficiency Report (PQDR) tracking and corrective action follow-up, special test equipment certification, Government Industry Data Exchange Alert Program (GIDEP) tracking and reporting, Class II engineering change proposal review (for concurrence only), DD250 review, ammunition data card review, Government-furnished property quality activities, purchase order review and identification of Government Source Inspection (GSI) needs, schedule tracking as applied to shipment signoffs, and review of test equipment software change authorization. A major benefit of the CSO Program is the elimination of duplications in oversight which is currently conducted by both the contractor and DCMC.

Mandatory inspections (sometimes referred to as Quality Assurance Letters of Instruction (QALIs)) are specific quality assurance activities required by the customer. Also, instructions can be contained in contractual Statements of Work (SOWs), performance specifications, or other contractual documentation directing the technical specialist to perform specific tasks. When QALIs or other mentioned instructions are received, the tasks must be diligently performed by the TCD until relief is provided by the agency requiring the mandatory task.

Initial confidence in the Contractor's ability to provide self-oversight is established by the signing of a CSO Memorandum of Agreement. Continued confidence is maintained by periodic DCMC evaluations and by contractor, customer, and DCMC communications in Management Councils and PROCAS meetings. Continuation of a CSO program is accomplished by the signing of CSO MOA extensions.

TCD personnel may not certify material offered by the contractor as meeting contact requirements unless there is a basis for confidence in conformance to those contract requirements; where no such confidence exists and it cannot be derived from credible data, TCDs must escalate the issue to the DCMC QAR for resolution with the contractor or customer.

When the DCMC specialist has confidence that the TCD has properly determined the product and packaging are in compliance with contractual requirements, the DCMC specialist will sign and stamp the DD250 or other necessary shipping documents when specifically required by contract, inspection instructions, or letters of delegation. Where appropriate, the DCMC technical specialist may be authorized to release deliverables using Alternate Release Procedures (ARP) or Certificate of Conformance (CoC).

The DD250 form must be completed in accordance with DFARS Appendix F. The TCD will review the DD250 or acceptance document for compliance with the contract. The intensity of this review will be based on the level of risk associated with the processing of a DD250 or acceptance document containing errors and the contractor's demonstrated past performance. After review and any necessary corrections, the DD250 or acceptance document will be made available for DCMC specialist signature. The DCMC specialist will sign and return the signed/dated DD250 or acceptance document certifying inspection and/or acceptance to the contractor for distribution.

Each deliverable will be accepted based on each individual certification which will include the following certifying statements contained in the DD250:

Block 21A, "Contractor Self-Oversight Plan"

Block 23, "Release of this material was accomplished via the Contractor Self-Oversight Plan dated _____. Deliverable items conform to all contract requirements, including required supporting documentation."

To meet the requirements of DCMC Memorandum No. 98-05, Contractor Self Oversight (CSO) in Product and Manufacturing Assurance and Property Management (POLICY) dated Oct. 22, 1997, the following statement shall be included in all CSO MOAs:

"The parties acknowledge and understand that this CSO agreement does not modify or change the terms and conditions of any contract(s). This CSO agreement shall not be used to alter, supplement, or deviate from the

terms and conditions of the contract(s) and the legal rights and obligations of the parties set forth in those contracts. Any changes in the contract(s) must be executed in writing by the Government Contracting Officer."

In summary, it is clear from the above description of the CSO Program above, that acceptance by the government, by virtue of signing a DD250, remains with a government employee (i.e. the QAR). The provisions of FAR 46.502, which places responsibility for acceptance with the contracting officer, as well as DFARs Appendix F, have not been changed or modified by the CSO, and their provisions remain binding.

Kenneth J. Hanko
Counsel

AVOIDING PERSONAL SERVICES AND OTHER PROBLEMS ASSOCIATED WITH CONTRACTORS IN THE WORKPLACE

As we are all well aware, the emphasis upon downsizing the Government has led to an increase in the use of service contractors to support mission requirements. In this regard, it is of the utmost importance that Government personnel avoid violating the express prohibition against "personal services" contracts.

In order to avoid a personal services contract it is necessary to be able to recognize one. A personal services contract is a contract that, either by its express terms or as administered, makes contractor personnel appear to be Government employees. The Government is required to obtain its employees by direct hire under competitive appointment or other procedures established by the appropriate civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents these laws.

A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. Federal Acquisition Regulation (FAR) 37.104(c)(2) states that the key question in determining whether an employer-employee relationship is created between the Government and the contractor is: "Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" Simply stated, although they may be working side-by-side, contractor employees cannot be supervised by Government personnel. An arms-length relationship must exist between the Government and its contractor employees. Additionally, contractor personnel cannot perform "inherently Governmental functions," that is, any functions which require the exercise of personal judgment and discretion on the part of a Government official. Work assignments and taskings to a contractor must be issued by the Government's point of contact, usually the Contracting Officer or the Contracting Officer's Representative, not by Government supervisors.

The FAR provides guidance to Contracting Officers with regard to avoiding personal services contracts. Foremost in that guidance is the requirement to obtain the review and opinion of legal counsel in doubtful cases. All employees, not only acquisition personnel, should seek advice from legal counsel when confronted with a situation they feel may be a violation of the prohibition against personal services.

Perhaps the contracted function that causes the most controversy is that of contractor employees performing clerical/administrative support services. Most often, the contractor performs these services on-site, using Government furnished facilities, equipment and supplies. As a result of the proximity of the parties and human nature, the arms-length relationship between Government personnel and the contractor is sometimes diminished to the point that contract performance is converted from non-personal to personal in nature. A contractor secretary, administrative clerk or key entry operator should not be given direction, receive assignments from or be supervised by Federal employees. The fact that the Government has limited resources is not a valid reason

for using contractor personnel to perform personal services or for Government officials to treat contractor personnel as Government employees.

The following are actual, real-life situations that have occurred at Fort Monmouth and/or within the Federal Government that have been determined to be violations of the prohibition against personal services. Please remember that the list is not intended to be all-inclusive, but rather merely representative of circumstances where a personal services relationship was created by the actions of the Government and contractor personnel.

- During a three-month period of time, the Government issued six hundred task orders to a support service contractor. This equates to one task order being issued every hour! Clearly, in this case, the Government was exercising continuous supervision and control over the contractor's employees. Hence a prohibited personal services relationship was created by the manner in which the Government administered the contract. Additionally, it is apparent that the Government misused the task ordering process established in the contract.
- A contract for what was purported to be stenographic reporting services was, in fact, a contract for secretarial work performed under Government supervision (in order to overcome a shortage of funds and personnel). The GAO determined that the contract as performed was for personal services and that the work should have been accomplished by Government personnel. Further, it was held that the Government could not make payment to the contractor for the unauthorized personal services performed under the contract. Accordingly, this situation also created the issue of whether the Government supervisor who ordered the work would be liable in his private capacity to pay the contractor for the (personal) services performed.
- A contractor secretary was required by a second-line Government supervisor to perform timekeeper duties for Government employees. This is a violation of the prohibition against personal services because the Government supervisor was exercising direction and control over the contractor's employee. Furthermore, the supervisor violated the Privacy Act by releasing protected personnel information to the contractor.
- At a Government test site, contractor personnel assisted in the testing of equipment. During a lull in the testing, the Government Test Director directed the contractor's employees to wash and wax the Government employees' POVs (figuring that the Government was paying for their time anyway). The Government supervisor created a personal services violation as well as contractual problems by directing the contractor to perform work outside the scope of the contract. His actions also created ethical and fiscal law problems because Government funds were improperly used to pay the contractor for cleaning privately owned vehicles.
- A PM requested a contractor to provide contract administration services, including issuing task orders and conducting negotiations on behalf of the Government. The contractor in this

situation was being directed to perform inherently Governmental functions, that is, functions that require the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Only Government employees can properly perform these functions, hence this work cannot be contracted out.

- A contractor was improperly directed by a PM to purchase ADP equipment for the Government. This equipment was intended for use by Government employees in the normal course of their work and was to be included as part of the organization's property inventory. This function is inherently Governmental in nature, cannot be contracted out and must be performed by Government employees. Furthermore, the PM's actions circumvented the FAR requirements regarding competition and the proper procedures applicable to the acquisition of ADP equipment.
- A PM appointed a contractor employee to act as his agent and take actions on behalf of the Government regarding business matters, including the commitment of funds. Again, this was a situation where the contractor was being directed to perform inherently Governmental functions which cannot be contracted out.

As a direct result of the increase in the use of support services contracts, many more contractor personnel are now integrated with and work among Federal personnel at Government work sites. In addition to the personal services issues discussed above, this situation causes potential ethical problems that we must recognize and strive to avoid. The overriding principle that must be remembered is that contractor employees are not Government employees and should not be treated as such. In this respect we must recognize that it is common for varying degrees of relationships to develop in the workplace, ranging from acquaintances, to good friends, to intimate relationships, to marriage. When such relationships develop between Government personnel and contractor employees, we must be careful to maintain proper ethical behavior in the workplace and avoid even the appearance of unethical or improper conduct.

The following examples are representative of improper situations that have occurred as a result of contractors in the workplace.

- Contractor personnel and their workspace were not clearly identified, hence Government employees did not know that they were not Federal employees.
- Contractor employees did not identify themselves as such when attending meetings or answering Government telephones. To prevent the improper disclosure of procurement sensitive or proprietary information, Government personnel should always request meeting participants to identify themselves at the beginning of the meeting and ensure that they know with whom they are speaking on the telephone or during VTCs.
- Contractor badges were not clearly distinguishable from Government badges.

- Contractors were allowed to bill the Government for time that the Commander administratively determined to be non-work hours (i.e., participating in Organizational Day festivities).
- A contractor was directed by the Government to plan and set up an organization's picnic and holiday party. The contractor then billed the Government both for the work done as well as for the period of time the contractor employees were in attendance at these functions. Under no circumstances should contractor personnel be directed to and/or be reimbursed for organizing such functions. Nevertheless, depending upon the circumstances, it may be appropriate for contractor employees to attend these types of functions. In these situations, it is imperative that the matter be discussed with the Contracting Officer and legal counsel to determine if contractor attendance is proper.
- Contractor employees were solicited for contributions to gifts for departing and retiring Army employees.
- Government personnel did not require contractor employees to sign non-disclosure statements (to protect procurement sensitive and proprietary information).

Remember, the situations outlined above are not all-inclusive. Government personnel, particularly supervisors and Contracting Officers' Representatives, must guard against the temptation to utilize contractor employees in a manner as if they were in the civil service and be vigilant in avoiding problems which can arise as a result of having contractors in the workplace. Everyone is responsible and accountable for ensuring, especially in the administration of support service contracts, that they exercise the utmost care to both avoid the violation of the prohibition against personal services and comply with all other applicable contractual, ethical, fiscal and legal requirements.

If you have any questions or require any additional information regarding this subject, the point of contact in the Legal Office is Patrick Terranova, DSN 992-3210.

KATHRYN T. H. SZYMANSKI
Chief Counsel

Intellectual Property Protection for Software-Related Inventions

“The inventor ranks ‘highest in the scale of useful beings,’ followed by the farmer and mechanic.”¹ – attributed to Newengland [sic] Association of Inventors and Patrons of Useful Arts, 1807.

I. Introduction

In the United States, the laws that protect intellectual property (fruit of the mind) exist to encourage private endeavors and investment in the development, production and public dissemination (in the cases of patents and copyrights) of various forms of new technology and information. This objective is achieved by allowing individuals and businesses to acquire property rights in the technology and information they produce, sometimes for limited time duration, which enables them to engage in monopolistic or other commercial exploitation of the value of the technology and information. The intellectual property laws seek to establish a balance between these private incentives for gain and the public access to the new technology and information for the general improvement of life.

The intellectual property laws in the United States stem from a Constitutional mandate to Congress, namely Article 1, section 8, clauses 3 and 8:

(3) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes---

(8) To promote the Progress of Science and useful Arts², by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries---

There are four categories of intellectual property, namely; trade secret, trademark, copyright and patent. Each is briefly commented upon below. However, it is the intention of the author to concentrate on patents, more specifically the patentability of computer software-related inventions which are becoming more and more numerous as well as more relevant to modern life and business.

(A) Trade Secret:

- i) Definition: any formula, device, method or collection of information which is used in one’s business and which gives him a commercial advantage over competitors who do not know it or use it.

¹ “Patents and Manufacturing in the Early Republic,” by Edward C. Walterscheid, Journal of the Patent and Trademark Office Society, Vol. 80, No. 12 (December 1998), page 887.

² According to Professor Paul Goldstein in Copyright, Patent, Trademark and Related State Doctrines, Cases and Materials on the Law of Intellectual Property-Revised Third Edition, (The Foundation Press, Inc., 1993) at page 20, study of the colonial usage and syntax indicates that in speaking of “Science” and “useful Arts” in clause 8, the framers of the Constitution meant the works of authors and inventors, respectively.

- ii) Must be kept secret to maintain validity.
 - iii) Is protected by pertinent state law and contract law.
 - iv) Computer software, like any other item, may be protected by trade secret if it is kept as a qualified secret and affords commercial advantage to the owner.
- (A) Trademark:
- i) Definition: A distinctive mark of authenticity through the use of which particular manufacturers' or particular merchants' goods or services may be distinguished from those of others. Such a mark can be words, pictures, colors, shapes or any other mark but cannot be any sign or form of words that, because of their primary meaning, others may use with equal truth and right for the same purpose. (i.e. One cannot trademark words that describe the product).
 - ii) Protects consumers against confusion as to the sources of the goods and services. In cases of goods, such confusion may arise due to the fact that sellers or manufacturers typically have more and better information than the consumer-buyer does as to the internal aspects of an item for sale. Observable exterior features of an item can be imitated to the minutest degree by a competitor even though his imitation product may be vastly different in quality. Without trademark, the consumer's selection of the product with the desired qualities between products of identical or near-identical appearance is left to random chance.
 - iii) Is acquired through use in connection with a business.
 - iv) Protects the goodwill and reputation of a company from being eroded by a competitor.
 - v) Protected by 15 U. S. C. section 1051 et seq. (Lanham Trade-Mark Act, section 1 et seq.).
 - vi) May be used to protect against the copying of inherently distinctive and non-functional aspects of graphical user interface elements of a computer software if those non-functional aspects have developed secondary meanings in the market place (i.e. The non-functional aspects enable an ordinary user of the computer software immediately to associate the software with its source).
- (A) Copyright:

- i) Definition: The exclusive right to reproduce, distribute copies of, prepare derivative works of and publicly display or perform an original work of authorship.³
- ii) Copyright subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.⁴
- iii) Copyright law protects not idea itself but the form of expression of the idea.
- iv) Generally, copyright in a work subsists from its creation and endures for a term consisting of the life of the author and seventy (70) years after the author's death.
- v) Protected by 17 U. S. C.
- vi) Notable Exceptions to exclusive right:
 - a) Under 17 U. S. C. section 105, no copyright can subsist in any work prepared by an officer or employee of the United States Government as part of that person's official duties. However, the U. S. Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise.
 - b) Fair use doctrine under 17 U. S. C. section 107 allows use of copyrighted work by reproduction for purposes such as criticism, comment, news reporting, teaching, scholarship or research without the reproduction being considered infringement of the copyright.
- i) Copyright notices do not need to appear on publicly-distributed copies to afford copyright protection.⁵ Affixing the copyright notice on works is optional rather than mandatory.
- ii) 17 U. S. C. section 101 defines a "computer program" as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.
- iii) Computer software programs, in general, are considered to be works of authorship subject to copyright protection. Copyright protects literal aspects of computer

³ 17 U. S. C. section 106

⁴ 17 U. S. C. section 102(a)

⁵ The Berne Convention Implementation Act of 1988, P. L. 100-568, 102 Stat. 2853 (Oct. 31, 1988) implementing the United States' adherence to the Berne Convention for the Protection of Literary and Artistic Works, effective March 1, 1989.

programs but may extend beyond the programs' literal codes (both source and object) to their structure, sequence, organization and user interface when they constitute expression, rather than mere ideas or concepts. However, copyright does not offer protection for the functional aspects of software, such as the underlying algorithms and protocols of multimedia technology (ex. computer icons – but new ornamental computer icons may be protected by design patents). Further, copyright protection is not available against independently-developed software products.

(D) Patent:

- i) Definition: Letters Patent granting the patent owner the right, for a limited period, to exclude others from making, using or selling the invented product or process.
- ii) 35 U. S. C. is the patent law passed by Congress in accordance with their Constitutional mandate and authority.⁶
- iii) Purposes of affording patent protection:
 - a) Provides an incentive to develop and market new technology by offering the possibility of reward to the inventor, thus encouraging the expenditure of time and private capital in research and development efforts.
 - b) Encourages public disclosure of new technology which may otherwise be kept secret to maintain commercial advantage. Early disclosure brings early benefits to the public from the use of the new technology and reduces the possibility of wasteful duplication of efforts by others.
- i) Subject to the payment of maintenance fees, a patent is valid for a period of 20 years from the effective filing date of the application that matured into the patent.⁷ (The filing date of any properly-filed provisional application is basis for claiming domestic priority but the 20-year period of the issued patent is not calculated from the filing date of the provisional application.)
- ii) There are three types of patents: Utility, Design and Plant.

⁶ U. S. Constitution, Article 1, section 8, clause 8.

⁷ 35 U. S. C. section 154 (a) (2)

- iii) A utility patent must meet the requirements of novelty, usefulness and non-obviousness.
- iv) Subject to evolving requirements, a computer software-related invention may present a patentable subject matter under 35 U. S. C. section 101.

II. Patentability of Computer Software

(A) Statutory Subject Matter under 35 U. S. C. section 101:

Before the determination can be made as to whether a software-related invention meets the requirements of novelty and non-obviousness set forth in 35 U. S. C. sections 102 and 103, respectively, as well as the requirements of full and enabling disclosure of 35 U. S. C. section 112, first a determination must be made whether the invention is statutory subject matter at all under 35 U. S. C. section 101.

35 U. S. C. section 101 provides as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. (emphasis supplied)

Even though the United States Supreme Court has made a sweeping declaration that inventive subject matter includes “anything under the sun that is made by man,”⁸ the scope of what is patentable is limited by the text of 35 U. S. C. section 101. Restrictions on what may come within the patentable subject matter of inventions, including software-related inventions, as meant by 35 U. S. C. section 101 have been interpreted by the United States Patent and Trademark Office and the courts over the years. After much melee at the judicial front as well as at the PTO, it can safely be said that there are three remaining judicially-created categories of invention claims that are considered to be non-patentable, i.e. non-statutory subject matter: abstract ideas, laws of nature and natural phenomena.⁹ “Mathematical algorithms” and “methods of doing business,” two other judicially-created exclusions, used to be considered non-statutory subject matter. But decisions have been rendered that, for all practical purposes, did away with any rationale for these exclusions.^{10, 11}

A significant hurdle to overcome in the dash to the goal of patentable subject matter determination is the requirement that the subject matter sought to be patented be a “useful” process, machine, manufacture or composition of matter. Accordingly, a complete definition, one that reflects the Congressional intent, of statutory subject matter is that any new and useful process, machine, manufacture or composition of

⁸ *Diamond v. Chakrabarty*, 447 U. S. 303, 206 USPQ193 (1980) quoting S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952)

⁹ *Diamond v. Diehr*, 450 U. S. 175, 209 USPQ 1 (1981)

¹⁰ *In re Freeman*, 573 F.2d 1237, 197 USPQ 464 (C.C.P.A. 1978); *In re Walter*, 618 F.2d 758, 205 USPQ 397 (C.C.P.A. 1980); *In re Abele*, 684 F.2d 902, 214 USPQ 682 (C.C.P.A. 1982)

¹¹ *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368, 47 USPQ 2d 1596 (Fed. Cir. 1998)

matter under the sun that is made by a person is the proper subject matter of a patent. The three exclusions mentioned above recognize that subject matter that is not a practical application or use of an abstract idea, a law of nature or a natural phenomenon is not patentable. However, a machine, process, article of manufacture or composition of matter employing an abstract idea, law of nature or natural phenomenon may very well be patentable even though the underlying idea, law or phenomenon, by itself, is not patentable.¹² Practical application generally equates to usefulness. According to the Manual of Patent Examining Procedure (MPEP), this requirement of “usefulness” is made to limit patent protection to inventions that possess a certain level of concrete “real world” value, and not something that represents nothing more than an idea or concept or is merely a starting point for future investigation, as laudable as it may be. Therefore, it is highly critical to distinguish between abstract ideas and a practical application of such ideas. Hence a complete disclosure of an invention should contain some indication of the practical application for the claimed invention. In other words, the invention disclosure must contain some indication of why the inventor believes the invention is “useful.” The inventor is in the best position to explain why his invention is deemed to be useful.

The claimed utility must derive from technological arts of applying science and engineering principles to the development of machines and processes that tend to improve the conditions of human existence. A small degree of utility, even a partial success at performing a function that benefits humanity, suffices to demonstrate patentable utility. However, an invention that is “inoperative” (i.e. does not produce the result claimed by the inventor and is totally incapable of achieving any useful result) has “incredible” utility and is not useful in the sense contemplated by 35 U. S. C. section 101. But such cases are indeed rare. A computer-related invention lies within the technological arts and meets the utility requirement and is statutory subject matter if it has a “practical application.”¹³

(B) Computer Software:

- i) Software is based on mathematical algorithms that are defined as procedures for solving particular mathematical problems.
- ii) Mathematical formula, by itself, in the abstract, is not statutory subject matter.
- iii) Pure manipulation of numbers (ex. converting binary-coded decimal numerals into pure binary numerals for use with general-purpose computers) without any particular practical application is deemed an abstract idea.¹⁴
- iv) Obvious or insignificant post-solution activity such as storing or modifying a value that had been calculated using the

¹² *In re Alappat*, 33 F.3d 1526, 31USPQ 1545 (Fed. Cir. 1994) (*en banc*)

¹³ See footnote 11 above

¹⁴ *Gottschalk v. Benson*, 409 U. S. 63 (1972)

software cannot turn a non-statutory subject matter into a statutory subject matter without practical application.

- v) Application of a known mathematical calculation as steps to a known process which is traditionally considered to be statutory subject matter does not render the process as a whole non-statutory.¹⁵
- vi) A general-purpose computer that is programmed to perform particular functions pursuant to instructions from program software becomes a special-purpose computer, in essence becoming a new machine. Such a programmed computer is statutory subject matter and claims directed to the software are statutory.¹⁶ Hence, there is no need to show contrived circuit diagrams that represent the software. To make the claims statutory, it suffices to disclose how the software program flows in the general-purpose computer to perform the described functions.
- vii) Data structures *per se* are non-statutory.¹⁷
- viii) A memory containing a data structure is a statutory article of manufacture.¹⁸
- ix) A computer-readable medium containing the software for performing an invention is a statutory article of manufacture.¹⁹

¹⁵ *Diamond v. Diehr*, 450 U. S. 175, 209 USPQ 1 (1981). Four Justices dissented. The known formula in this case was an equation for calculating the cure time in the process for molding precision synthetic rubber products. The interior temperature of the molding press was constantly measured and these measurements were fed to a digital computer which constantly recalculated the cure time and indicated when the press should be opened to end the curing process.

¹⁶ *In re Alappat*, 33 F.3d 1526, 31 USPQ 2d 1545 (Fed. Cir. 1994)(*en banc*). The invention relates to a means for creating a smooth waveform display in a digital oscilloscope. An input signal to the oscilloscope is sampled and digitized to provide a waveform data sequence where each successive element of the sequence represents the magnitude of the waveform at a successively later time. Following processing to provide a bit map, the waveform is ultimately displayed on a CRT screen which typically contains a finite number of pixels. The appearance of jaggedness in the rapidly rising and falling portions of a waveform is overcome by Alappat's anti-aliasing system wherein, using mathematical formulas, each vector making up the waveform is represented by modulating the illumination intensity of pixels having center points that bound the trajectory of the vector. The result is the presentation of a waveform showing no jaggedness but a smooth continuous form.

¹⁷ *In re Warmerdam*, 33 F.3d 1354, 31 USPQ 2d 1754 (Fed. Cir. 1994)

¹⁸ *In re Lowry*, 32 F.3d 1579, 32 USPQ 2d 1031 (Fed. Cir. 1994). The invention sought to optimize both structural and functional expressiveness of data models to provide an efficient, flexible method of organizing stored data in a computer memory. The disclosed data structure is based on the "Attributive data model" and is accessible by many different application programs. Claims are directed to a memory containing a stored data structure, a data processing system executing an application program, and to methods for creating a data structure and for creating and erasing non-hierarchical relationships between attribute data objects and referent attribute data objects within the data structure.

¹⁹ *In re Beauregard*, 53 F.3d 1583, 35 USPQ 2d 1383 (Fed. Cir. 1995). The invention was related to a method of filling polygons being displayed on a graphical display system.

x) Inventions that contain mathematical algorithms are patentable statutory subject matter when they apply the algorithm to produce a useful, concrete, tangible result without pre-empting all other uses of the algorithm.²⁰ An affirmative statutory subject matter determination of process claims directed to the algorithm does not necessarily require a showing of physical transformation of the input data. Such a transformation is merely an example of how a mathematical algorithm may be useful and may, therefore, assist in the determination of statutory or non-statutory subject matter.

(A) So, is a computer software-related invention patentable or not? Yes and no. Software or data structure, *per se* (as a disembodied representation of a fundamental physical truth), will probably continue to be non-statutory subject matter. However, if that software or data structure is used in a practical application, then it is likely to be patentable subject matter. Of course, the application for patent must also meet the requirements of novelty, non-obviousness and full and enabling disclosure.

III. Drafting Patent Application Based on Software-Related Invention

(A) Factors to Consider:

- i) How to comply with the requirements of 35 U. S. C. section 112, first paragraph, mandating full and enabling disclosure and best mode description.
- ii) Who are likely to use the invented technology to make, use, sell or import the product of the invention? If a computer-related invention requires different actions to be taken by unrelated multiple parties before an infringement occurs, then there can never be a direct infringer. If there is no direct infringement, then there cannot be a contributory infringement or active inducement to infringe.
- iii) What steps are needed to perform the claimed process and where are potential infringing activities likely to occur?
- iv) The ever-widening use of the Internet and the potentially world-wide dispersion of persons/entities committing direct, indirect, contributory infringements and active inducement of infringement. In an infringement suit, it is best to have a direct infringer located in the United States for reasons of exercising personal jurisdiction and because without direct infringement, no contributory infringement or active inducement to infringe can exist.

(B) Types of Claims:

²⁰ *AT &T Corp. v. Excel Communications Inc.*, Fed. Cir., No. 98-1338, April 14, 1999)

- i) Apparatus/ product claim: defines a useful machine or manufacture by identifying the physical structure of the machine or manufacture in terms of its hardware or hardware and software combination.
 - a) A claim that encompasses any and all computer embodiment/ implementation of a process will be considered as directed to that underlying process and will be deemed to be statutory subject matter only if that underlying process itself is statutory subject matter.
 - b) A claim that defines a computer-related invention as a specific machine or specific article of manufacture describes the physical structure of the programmed computer or its hardware or software components. Such a claim, if it has a practical application in the technological arts, is undoubtedly statutory subject matter.
- i) Process/ method claim: defines one or more steps to practice the process. A statutory computer-related process either results in a physical transformation outside the computer for which a practical application in the technological arts is either taught in the specification or would be known to one who is reasonably skilled in the technology in question; or the process is limited by the language in the claim itself to a practical application within the technological arts. A process that consists solely of mathematical operation or manipulation of abstract ideas without practical application is non-statutory whether it is performed on a computer or not.
- ii) Some specific claim examples:
 - a) Computer-readable medium claims (“Beauregard” claims): directed to a computer-readable medium, such as computer memory, diskette or a CD-ROM, on which the software resides.
 Example language:
 An article of manufacture comprising:
 a computer-usable medium having computer readable program code means embodied therein for---, the computer readable program code means in said article of manufacture comprising:
 computer readable program code means for causing a computer to effect---.²¹

²¹ U. S. Patent No. 5,710,578, Gary M. Beauregard et al. (1998)

A program storage device readable by a machine, tangibly embodying a program of instructions executable by the machine to perform method steps for---, said method steps comprising:---²²

- b) Data structure claims (“Lowry” claims): directed to a memory that stores, uses and manages information that resides in it. A data structure is a physical or logical implementation of a data model’s organization of the data designed to support data manipulation functions. Therefore, if a claim cites a collection of data on the same medium without reciting any physical or logical relationship among the data, then the claimed data are non-statutory subject matter.

Example language:

A memory for storing data for access by an application program being executed on a data processing system, comprising:

A data structure stored in said memory, said data structure including information resident in a database used by said application program and including:---.²³

- c) Means-plus-Function claims: The means-plus-function limitations must be read in light of the structure disclosed in the specifications. If the claimed invention encompasses any and every machine or article of manufacture for causing the computer to perform the underlying process, then the following questions must be answered:

1. Does the claimed process have pre- and/or post-computer process activity that is more than nominal? A “Yes” answer advances the process toward affirmative determination of statutory subject matter.
2. Does the claimed process manipulate abstract ideas or solve mathematical problems without limitation to a practical application? A “Yes” answer tolls the death knell of the claim.

IV. Summary

Patent protection for software is widely available provided that the software in question is not merely an abstract idea constituting disembodied concepts or truths. An invention that contains a mathematical algorithm presents a statutory subject matter within the purview of 35 U. S. C. section

²² See footnote 21 above.

²³ *In re Lowry*, 32 F.3d 1579, 32 USPQ 2d 1031 (Fed. Cir. 1994)

101 if the mathematical algorithm has a practical application and if the invention, as a whole, produces a useful, concrete and tangible result or a result that corresponds to a useful, concrete and tangible thing (ex. electrocardiograph representing a patient's heart activity).

A variety of intellectual property protection can be available for different aspects of one invention. Due to conflicting requirements of the trade secret and the patent laws, these two forms of protection are mutually exclusive and cannot protect the same aspect of an invention simultaneously. This mutual exclusivity stems from the fact that a trade secret must be kept secret in order to maintain its validity whereas to obtain a patent, there must be a full and complete disclosure of the invention.

Different aspects of a software invention may suitably be protected by trade secret, trademark, copyright or patent. The functional elements that are new, non-obvious and productive of useful, concrete and tangible results through practical applications may be protected by patent while original source and object codes are subject to copyright protection. Unique marks may qualify for trademark and trade secret may protect any valuable proprietary information regarding the software.

Hay Kyung Chang
Reg. No.: 32,972
(aka Anne Lanteigne)
Intellectual Property Law
U. S. Army AMCOM
Redstone Arsenal, Alabama
June 7, 1999

**United States of America, Plaintiff-Appellant, v. Tennessee Air Pollution Control Board,
Defendant-Appellee.**

No. 97-5715

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 16863; 1999 FED App. 0266P (6th Cir.)

June 11, 1998, Argued

July 22, 1999, Decided

July 22, 1999, Filed

PRIOR HISTORY:

[*1] Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 96-00276. John T. Nixon, District Judge.

DISPOSITION:

AFFIRMED.

COUNSEL:

ARGUED: Naikang Tsao, U.S. DEPARTMENT OF JUSTICE, ENVIRONMENT & NATURAL RESOURCES DIVISION, Washington, D.C., for Appellant.

Barry Turner, OFFICE OF THE ATTORNEY GENERAL, ENVIRONMENTAL DIVISION, for Appellee.

ON BRIEF: Naikang Tsao, Evelyn S. Ying, U.S. DEPARTMENT OF JUSTICE, ENVIRONMENT & NATURAL RESOURCES DIVISION, Washington, D.C., for Appellant.

Barry Turner, OFFICE OF THE ATTORNEY GENERAL, ENVIRONMENTAL DIVISION, for Appellee.

Susan E. Ashbrook, April R. Bott, OFFICE OF THE ATTORNEY GENERAL OF OHIO, ENVIRONMENTAL ENFORCEMENT SECTION, Columbus, Ohio, Kathleen C. Walsh, Leslie M. Krinsk, STATE OF CALIFORNIA AIR RESOURCES BOARD, Sacramento, California, Michael W. Neville, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, San Francisco, California, Terence G. Dutton, OFFICE OF COUNTY COUNSEL FOR SAN DIEGO COUNTY, San Diego, California, Robert N. Kwong, BAY AREA QUALITY MANAGEMENT DISTRICT, San Francisco, California, Catherine M. Spinelli, SACRAMENTO METROPOLITAN AIR QUALITY MANAGEMENT DISTRICT, Sacramento, [*2] California, William M. Dillon, SANTA BARBARA COUNTY COUNSEL'S OFFICE, Santa Barbara,

California, for Amici Curiae.

JUDGES:

Before: NELSON and RYAN, Circuit Judges; ROSEN, District Judge. *

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY:

DAVID A. NELSON

OPINION:

OPINION

DAVID A. NELSON, Circuit Judge. This is an appeal from a judgment in which the district court declined to set aside a \$ 2,500 civil penalty assessed by an administrative agency of the State of Tennessee against the United States Army for failure to comply with Tennessee's air pollution regulations. At issue is the extent to which the federal government's sovereign immunity has been waived by § § 118(a) and 304(e) of the Clean Air Act, 42 U.S.C. § § 7418(a) and 7604(e). Concluding, as did the district court, that the Clean Air Act unambiguously waives sovereign immunity as to civil penalties such as the one in question here, we shall affirm the challenged judgment.

I

The Technical Secretary of the Tennessee Air Pollution Control Board imposed a civil penalty of \$ 2,500 against the United [*3] States Army for violations of the Tennessee Air Quality Act at the Milan Army Ammunition Plant in Milan, Tennessee. The United States does not dispute the fact that the Army violated the Tennessee Act in failing to give notice of its intent to remove certain pipe containing asbestos insulation. It is also undisputed that the Army failed to comply with Tennessee's asbestos handling rules.

After an administrative appeal, the Tennessee Air Pollution Control Board issued a final decision and order rejecting a defense of sovereign immunity and upholding the assessment. The Board stayed execution of its order, however, to allow the United States to seek judicial review. The United States then filed the present declaratory judgment action in federal court.

Based on a Clean Water Act case, *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 118 L. Ed. 2d 255, 112 S. Ct. 1627 (1992), the United States took the position that although sovereign immunity has been waived to the extent that a state may seek injunctive relief against the United States for a present violation of state air pollution standards -- and may impose a fine incident to the injunction to secure [*4] prospective compliance -- civil monetary penalties may not be imposed against the United States for past violations. On cross-motions for summary judgment the district court rejected this position and entered judgment in favor of the Board. See *United States v.*

Tennessee Air Pollution Control Bd., 967 F. Supp. 975 (M.D. Tenn. 1997). The present appeal followed.

II

Any waiver of sovereign immunity must be "unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192, 135 L. Ed. 2d 486, 116 S. Ct. 2092 (1996). Such a waiver must be strictly construed in favor of the United States. *Id.* The Clean Air Act, as we read it, meets these stringent rules; its text unequivocally and unambiguously effects a waiver of sovereign immunity extending to the civil penalty in question here.

The Clean Air Act permits any person to bring "a citizen suit" to enforce the federal clean air laws against "any person (including (i) the United States . . .)." 42 U.S.C. § 7604(a). n1 Under a subsequent subsection, 42 U.S.C. § 7604(e) -- a subsection that may be thought of as the "state suit" provision -- [*5] states as such are expressly empowered to bring enforcement actions against the United States under state air pollution laws and to obtain "any judicial remedy or sanction" or "any administrative remedy or sanction." The text of § 7604(e) reads, in relevant part, as follows:

" . . . Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from --

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States . . . under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States . . . in the same manner as nongovernmental entities, see section 7418 of this title." 42 U.S.C. § 7604(e) (emphasis supplied). n2

-----Footnotes-----

n1 In United States Dep't of Energy, Justice Souter considered the effect of the citizen suit sections of the Clean Water Act on sovereign immunity and concluded that "to the extent they waive federal immunity at all, [the citizen suit sections] waive such immunity only from federal-law penalties." 503 U.S. at 613 n.5. As we shall see, the same cannot be said of the "state suit" provision of the Clean Air Act, 42 U.S.C. § 7604(e), which waives sovereign immunity with regard to administrative remedies or sanctions imposed by a state against the United States under state or local law respecting control and abatement of air pollution. [*6]

n2 The United States argues in its opening brief that because the Tennessee Air Pollution Control Board never invoked § 7604(e), there is no case or controversy with respect to that section. As the Board's brief points out, however, the Board simply rejected an assertion by the United

States that sovereign immunity was not waived under a different section of the statute, 42 U.S.C. § 7418(a). A case or controversy is presented by the instant declaratory judgment suit, as the Board further notes, and the Board has consistently argued in this suit that civil penalty immunity is waived by both § 7604(e) and § 7418(a). The United States makes no attempt to resurrect its "case or controversy" argument in its reply brief, and we are satisfied that the argument is without merit.

-----End Footnotes-----

The words "any administrative remedy or sanction," as used in § 7604(e)(2), clearly encompass the civil penalty imposed by the Board in the case at bar. The Board's enforcement authority is not limited to prospective, coercive action, n3 nor is it restricted by "any other law," including [*7] the law relating to sovereign immunity.

-----Footnotes-----

n3 To construe "any administrative remedy or sanction" as limited to prospective, coercive action would be to render § 7604(e)(2) virtually meaningless, since administrative agencies are seldom empowered to take prospective, coercive action. See *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447, 485, 38 L. Ed. 1047, 14 S. Ct. 1125 (1894) (holding an agency does not have the "authority to compel obedience to its orders by a judgment of fine"). Cf. F. Cooper, 1 State Administrative Law 297-98 (2d ed. 1965); B. Schwartz, Administrative Law § 2.27 at 94-95 (3d ed. 1991).

-----End Footnotes-----

The United States argues that the state suit provision is not an affirmative waiver of sovereign immunity. What the statute says, however, is this: "Nothing in this section or in any other law of the United States shall be construed to prohibit . . . any State . . . from . . . bringing any administrative enforcement action or obtaining any administrative remedy or [*8] sanction in any State or local administrative agency . . . against the United States . . . under State or local law respecting control and abatement of air pollution." 42 U.S.C. § 7604(e). "[Any] other law" obviously includes the law of sovereign immunity, so this sentence tells us that nothing in the law of sovereign immunity shall be construed to prohibit any state from obtaining any administrative remedy or sanction against the United States. As we read it, this is a clear waiver of sovereign immunity.

The United States argues that § 7604(e) cannot effect a waiver of immunity by itself because it is merely a savings clause. Again, we disagree.

The first sentence of § 7604(e) is indeed a standard savings clause, one found in a number of statutes, including the Clean Water Act: n4 "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 7604(e). See also *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 328 n.21, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981), [*9] and the statutes

cited therein. But unlike the Clean Water Act, the Clean Air Act goes on to provide, among other things, that neither the citizen suit provision in § 7604(a) nor "any other law" shall restrict states from obtaining any judicial or administrative remedy or sanction. If words have meaning, this says that no law shall restrict the State of Tennessee from obtaining any administrative remedy or sanction against a federal air polluter.

-----Footnotes-----

n4 See 33 U.S.C. § 1365(e).

-----End Footnotes-----

The Clean Air Act also contains a waiver of sovereign immunity couched in these terms:

"Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative [*10] authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply . . . to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. . . ." 42 U.S.C. § 7418(a).

This subsection, commonly called the "federal facilities provision," goes on to provide that compliance is required "notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Id.* The district court concluded that the federal facilities provision of the Clean Air Act constitutes a waiver of sovereign immunity with respect to the civil penalty in question here, just as the state suit provision does. We are sympathetic to the court's conclusion, but we find it unnecessary to decide the question in light of our reading of the state suit provision, 42 U.S.C. § 7604(e).

The United States contends that § 7604(e) is solely dependent on § 7418. This argument is based on the last sentence of § 7604(e), which reads as follows: "For provisions [*11] requiring compliance by the United States . . . in the same manner as nongovernmental entities, see section 7418 of this title." The preceding sentence of § 7604(e), however, clearly provides that no law shall be read to restrict a state's authority to pursue "any judicial remedy or sanction" or "any administrative remedy or sanction" against the United States under the state's air pollution laws. The subsequent reference to the federal facilities provision simply reminds the reader that § 7418 defines the United States' burden to comply with state laws; it is § 7604 that expansively and unambiguously removes any impediment to enforcement in the event of noncompliance.

III

Despite the seemingly plain language of the Clean Air Act, the United States argues that *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 118 L. Ed. 2d 255, 112 S. Ct. 1627 (1992), in which the Supreme Court interpreted the sovereign immunity provisions of the Clean Water Act as not

extending to civil penalties imposed against the United States for past violations, mandates reversal of the district court's judgment. We find the argument unpersuasive.

Although the Clean Water Act contains [*12] no counterpart to the Clean Air Act's state suit provision, it does contain a federal facilities provision closely analogous to that of the Clean Air Act. See 33 U.S.C. § 1323. n5 Both facilities provisions apply "notwithstanding any immunity." The one significant difference between the two provisions lies in the addition of the following clause in the Clean Water Act: ". . . and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." 33 U.S.C. § 1323(a). The Clean Water Act thus contains an express limitation, not found in the Clean Air Act, on the liability of the United States for civil penalties.

-----Footnotes-----

n5 Section 1323 states:

"(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply . . . to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. . . . The United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. . . ."

-----End Footnotes----- [*13]

Construing § 1323 narrowly, the Supreme Court held that the linkage of the word "sanctions" with the word "process" in the sentence saying that every federal department shall comply with all state and local "process and sanctions" indicates that the Clean Water Act contemplates only "forward-looking orders" in the equitable tradition of "coercive sanctions for contempt." *United States Dep't of Energy*, 503 U.S. at 623. While recognizing that the waiver could be read more broadly, the Court held that the language of the statute expresses an unequivocal waiver only as to coercive sanctions, as opposed to punitive penalties. The United States contends that United States Dep't of Energy controls the case at bar because the Clean Air Act contains the same pairing of "process and sanctions" and because there is no reason to read the word "sanctions" in the Clean Air Act as meaning anything other than what it means in the Clean Water Act.

The federal facilities provisions of the two statutes may not be read in isolation, however; each provision must be interpreted in light of the remainder of the statute of which it is a part. Significantly, as we have [*14] said, the Clean Water Act contains no counterpart to § 7604(e) of the Clean Air Act, the subsection that authorizes states to "bring[] any enforcement action or

obtain[] any judicial remedy or sanction in any State or local court" or "bring[] any administrative enforcement action or obtain[] any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States."

Just as the Supreme Court cautioned us, in *United States Dep't of Energy*, to be mindful of the context of the word "sanctions" in the Clean Water Act, we must be mindful of the context of the federal facilities provision in the Clean Air Act. See *United States Dep't of Energy*, 503 U.S. at 622 (holding the context of "sanctions" provided "a clarity that the term lacks in isolation"). Even if "sanction" when paired solely with "process" is limited to coercive penalties, the phrase "any administrative remedy or sanction" -- the phrase found in § 7604(e) -- is not so limited. "Any administrative remedy or sanction" means precisely that, and a respectable argument can be made, we believe, that "sanction" in § 7418(a) has [*15] the same non-restrictive meaning it obviously has in § 7604(e). We do not rest our decision on this argument, however, because we believe § 7604(e) is dispositive in any event.

IV

In view of the significant differences between the Clean Water Act and the Clean Air Act, we reject the United States' argument that *United States Dep't of Energy* is controlling here. In 42 U.S.C. § 7604(e), we conclude, the Clean Air Act contains a waiver of sovereign immunity broad enough to encompass the administrative penalty assessed by the Board against the United States.

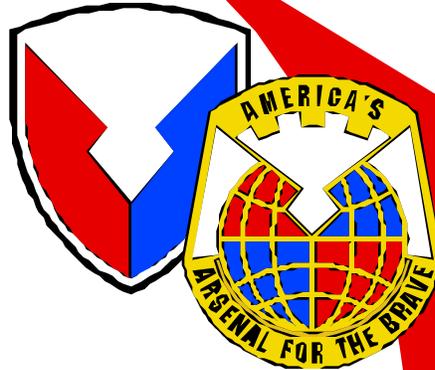
AFFIRMED.

Presented by:
ROBERT S. LINGO
Attorney Advisor

Army Materiel Command

**DISPOSAL OF ARMY
REAL ESTATE**

2 August 99



AMC – Relevant, Responsive & Ready!



GSA DISPOSAL OF REAL PROPERTY

- GSA is the federal agency responsible for property disposals
-
- Two Exceptions:**
 - ❖ BRAC Statute granted to DoD
 - ❖
 - ❖ **Special Legislation**
 - ❖
 - ✕ **Cornhusker AAP, Indiana AAP**
 - ✕ **Joliet AAP, Volunteer AAP**
 -
 -



RETENTION PRIOR TO DISPOSAL

- Management prior to GSA Disposal**
- Army responsibilities**
 - ❖ Identifying Enviro/Safety concerns to GSA
 - ❖ Responsible for remediation
 - ❖ Leasing authority if “non-excess”
 - ❖ Care and custody for 5 quarters after ROE
 - ❖ Obtaining funding for these responsibilities
- AMC Discussing with Corp of Engineers to assume restoration and management of some installations**

Slide # 3 of _10_



NEPA DOCUMENTATION

- Reporting property excess to GSA**
 - ❖ Categorical Exclusion A-24
 - ❖ Merely an administrative transfer between Federal agencies - no environmental effect
- NEPA Compliance for Disposal**
 - ❖ GSA responsibility
 - ❖ Advantages of Army named as Cooperating Agency
 - ❖ Must look at indirect, reasonable anticipated direct and indirect effects of disposal
 - ❖ Native American & Cultural Issues

Slide # 4 of _10_



ENVIRONMENTAL BASELINE SURVEY

- Army required to provide EBS to GSA sufficient for them to dispose of property**
 - ❖ List of hazardous substances
 - ❖ Environmental/Safety condition of property
 - ❖ Status of remediation
- Two Step Procedure**
 - ❖ Characterization based on records
 - ❖ Sampling or other effort to better define unknown areas and fully characterize
- Suspected contaminated areas cleared by Army's remediation & safety programs**

Slide # 5 of _10_



SUITABILITY TO TRANSFER

- FOST not required for GSA Disposals**
 - ❖ No statutory requirement for FOST
 - ❖ DoD created document for BRAC
 - ❖ Army must provide sufficient info to GSA to indicate remediation has been completed
- Army Suitability Documents**
 - ❖ FOSET for Early Transfer/Deferred Covenant
 - ❖ Operating Properly and Successful Demonstration where remedy installed, but remediation has not been achieved

Slide # 6 of _10_



REPORT OF EXCESS ITEMS

- Report of Excess should document**
 - ❖ **Hazardous substances storage and releases**
 - ❖ **UST presence & compliance**
 - ❖ **Potential explosive areas**
 - ❖ **Asbestos containing materials**
 - ❖ **Lead-based paint**
 - ❖ **PCB**
 - ❖ **Cultural & Natural Resource Information**
- GSA Environmental Guidebook for Realty Specialists--July 1998**

Slide # 7 of _10_



DEED LANGUAGE

- GSA Responsibilities**
 - ❖ **Responsible for general terms**
 - ❖ **Responsible for CERCLA covenants**
 - ❖ **Standard ACM and LBP clauses**
- Army responsibilities**
 - ❖ **Interim restrictions because of Early Transfer**
 - ❖ **Any remedy operation restrictions**
 - ❖ **Long term restrictions related to environmental use restrictions or landfills**
- Must work together**

Slide # 8 of _10_



GSA RESPONSIBILITIES

- Mc Kinney Homeless Act Screening**
 - ❖ **Army responsibility for leases**
 - ❖ **Center for Public Works Guidance**
- Endangered Species Act coordination**
- Historical Preservation Act coordination**
- Coastal Zone Management Determinations**
- Marketing of Property**
- Negotiation of Sale Agreement**
- Deed Preparation**

Slide # 9 of _10_



GSA-ARMY TEAM EFFORT

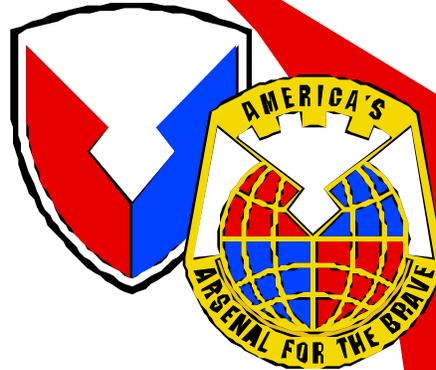
- Two agencies must work closely together**
- Form small team of dedicated people**
- Should be clear Team Leader for each**
- Remember your roles**
 - ❖ **Army makes property available for disposal**
 - ❖ **GSA in charge of disposal**

Slide # 10 of _10_

Presented by:
ROBERT S. LINGO
Attorney Advisor

Army Materiel Command

NON-BRAC DISPOSALS
5 August 99



AMC – Relevant, Responsive & Ready!



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AMC EXCESS INSTALLATIONS

AMCOM

Charles Melvin Price SC
St. Louis AAP
Tarheels Missile Plant

SBCCOM

Deseret Chemical Depot
Pueblo Chemical Depot
Rocky Mountain Arsenal
Umatilla Chemical Depot
Newport Chemical Depot

TECOM

Washington Courts Housing

IOC

Alabama AAP
Badger AAP
Cornhusker AAP
Indiana AAP
Joliet AAP
Kansas AAP
Longhorn AAP
Ravenna AAP
Sunflower AAP
Twin Cities AAP
Volunteer AAP

Slide # 3 of _12_



EXCESSING PROCESS

- MSC determines whether there is a mission or operational requirement
- If not, initiate Report of Excess process
 - ❖ Environmental factors
 - ❖ Economic analysis of disposal
- MACOM/HQDA/DoD determines whether excess to any other Defense needs
 - ❖ Possible retention for remediation
- GSA screens for other Federal uses

Slide # 4 of _12_



RETENTION PRIOR TO DISPOSAL

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Slide # 5 of _12_



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Slide # 6 of _12_



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Slide # 7 of _12_



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Slide # 8 of _12_



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 - ❖ UST presence & compliance
 - ❖ Asbestos containing materials
 - ❖ Lead-based paint
 - ❖ PCB
 - ❖ Cultural & Natural Resource Information

- GSA Environmental Guidebook for Realty Specialists--July 1998

Slide # 9 of _12_



BUILDING DEMOLITION

- Apply basic Army policy
 - ❖ Army will not demolish buildings to improve property
 - ❖ Exceptions:
 - ✘ Explosive or unacceptable risk
 - ✘ Structurally create present hazard
 - ✘ Cheaper to tear down than maintain

- Explosive Hazard Risk
 - ❖ Who decides what is acceptable
 - ❖ What standards--USASACS, DDESB

Slide # 10 of _12_



GSA RESPONSIBILITIES

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- Endangered Species Act coordination**
- Historical Preservation Act coordination**
- Coastal Zone Management Determinations**
- Marketing of Property**
- Negotiation of Sale Agreement**
- Deed Preparation**

Slide # 11 of _12_



SOME UNRESOLVED ISSUES

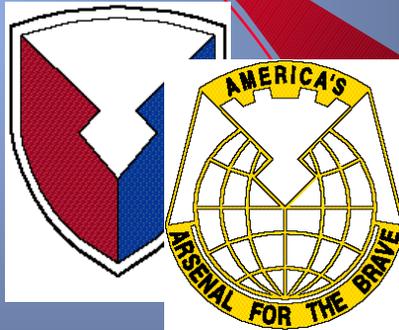
- Parcelization-avoiding cherry picking**
 - ❖ Obtaining sale receipt early for clean parcels
 - ❖ Funds could be used to fund restoration
 - ❖ Avoid being left with only dirty, unmarketable parcels--may decrease value of remainder
- Level of Environmental Restoration Less than Unrestricted, Residential**
 - ❖ Selected thru Restoration Program
 - ❖ Agreement with Purchaser
 - ❖ Restrictions set forth in Deed
- Role of States at Non-NPL Sites**

Slide # 12 of _12_

ARMY MATERIEL COMMAND

BRAC Transfer Case Studies

Stan Citron, AMC Legal
5 August 1999



AMC - RELEVANT, RESPONSIVE & READY



Introduction

- BRAC Transfer Case Studies -
 - ❖ Creative Transfers of Property with GW Problems -
 - RRAD Building Only
 - LEAD Phase I IC ROD
 - LEAD Phase II Quandary
 - ❖ TEAD §334 Transfer



Creative Transfers - RRAD

Background

- ❖ Bldg 333 is located on property with gw contamination
- ❖ Prospective purchaser needed title to use Bldg 333 equipment as collateral
- ❖ RRAD Commander wanted to transfer building to avoid maintenance costs

Slide # 3 of 9



RRAD - Building Only Transfer

Building Only Transfer -

- ❖ Army transferred building to LRA; retained underlying property
- ❖ LRA agreed to accept underlying property once a remedy is in place
- ❖ Army provided CERCLA covenant with respect to the building

Similar to BGAD and DPSC transfers

Slide # 4 of 9



Creative Transfers - LEAD Phase I

□ Background -

- ❖ Most of LEAD's BRAC property has gw contamination
- ❖ LRA wanted title to underlying property
 - Tenants not interested in leasing
 - Banks won't lend money just on buildings
- ❖ Army wanted to support reuse and installation wants to reduce maintenance costs

Slide # 5 of 9



LEAD - Phase I Transfer

□ Phase I Transfer

- ❖ Institutional Control ROD -
 - ROD imposed excavation/gw restrictions to protect human health
 - ROD recognized that final gw remediation will be taken on adjacent property
- ❖ Army provided CERCLA §120 covenant that all remedial action taken on the property
- ❖ Army transferred entire property to LRA (i.e., not a building only transfer)

Slide # 6 of 9



Creative Transfers - LEAD Phase II

Background -

- ❖ LEAD Phase II property has gw contamination
- ❖ EPA opposed to another IC ROD transfer
 - All remedial action wasn't taken on Phase I property
 - §334 is the mechanism to transfer property with gw contamination
- ❖ LRA is opposed to §334 due to perceived marketability problems

Slide # 7 of 9



LEAD - Phase II Transfer

Phase II Transfer Options -

- ❖ Option 1 (IC ROD) - Army/LRA support; EPA does not support
 - ❖ Option 2 (Limited Depth Transfer) - LRA supports; Army/EPA do not support
 - ❖ Option 3 (§334 Transfer) - Army/EPA support; LRA do not support
 - ❖ Option 4 (Hybrid) - Compromise Solution?
- 24 Jun 99 - DA advised LRA that §334 Transfer is preferred alternative.

Slide # 8 of 9



Creative Transfers - Conclusion

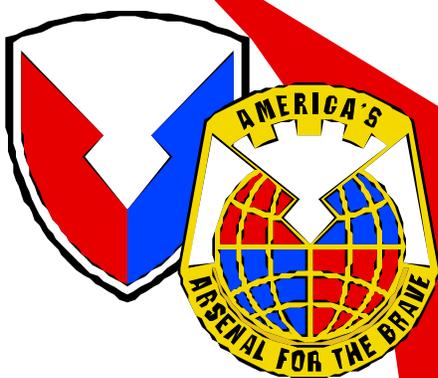
- Future of creative transfer mechanisms?**
 - ❖ **Army - Growing acceptance of §334**
 - ❖ **EPA - Developing a policy against the use of creative transfer mechanisms**
 - ❖ **LRAs- Will §334 play with the LRAs?**

- BRAC transfers will continue to evolve and expect greater use of §334 in the future.**

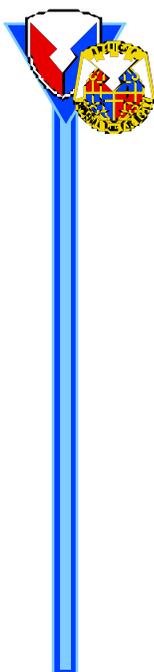
Presented by:
Stan Lowe
Environmental Quality Division
HQ AMC

Army Materiel Command

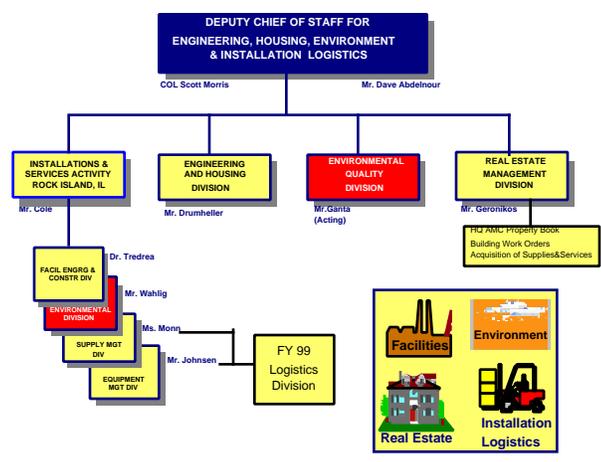
Environmental Requirements Affecting Real Property Activity
 5 August 1999



AMC – Relevant, Responsive & Ready!

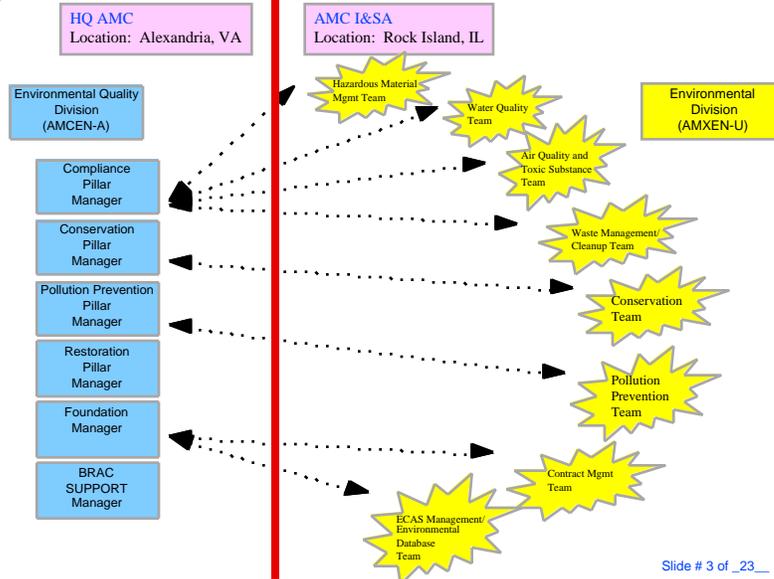


DCSEN Organization





DCSEN - Environmental Virtual Team Concept



National Environmental Policy Act

- PL 91-190; Title 40 CFR Part 1500
- AR 200-2, Environmental Effects of Army Actions, 23 December 1988
- Proposed Draft Revised AR 200-2
 - ❖ Seven years in the making.
 - ❖ Over 50 categorical exclusions proposed
 - ☀ 20 relate to Real Estate/Property activities
- AMC EA Guidance for Real Estate
- BRAC Manual on NEPA (provides guidance on reuse and disposal)



National Historic Preservation Act

- Title 36 CFR Part 800
- AR 200-4
- Pamphlet 200-4, Cultural Resources Management, 1997
- Proposed Army Counterpart Regulations to 36 CFR Part 800

Slide # 5 of _23_



Endangered Species Act of 1973 (ESA)

- 16 USC 1531-1544
- Title 50 CFR Part 402
- AR 200-3, Natural Resources--Land, Forest and Wildlife Management, February 1995

Slide # 6 of _23_



Clean Air Act Conformity

- ✧ Section 176(c) requires Federal agency activities to conform to the State Implementation Plan.
- ✧ Army policy requires a Record of Non-Applicability (RONA) for actions that are exempt.
- ✧ Conformity Rule only pertains to nonattainment or maintenance areas.

Slide # 7 of _23_



Migratory Bird Treaty Act (MBTA)



- ✧ Enacted 1918
- ✧ Makes it unlawful to kill, capture, harass, purchase or otherwise “take” any migratory bird without authorization.
- ✧ Migratory Bird: any bird whatever its origin and whether or not raised in captivity, which belongs to a species listed in §10.13 or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consist, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.
- ✧ Examples: Black-capped chickadees, crows, ducks, hummingbird, tanager.

Slide # 8 of _23_



Coastal Zone Management Act (CZMA)

- ✧ Purpose of the Act is to ensure that projects that are to occur in a State coastal zone (CZ) are consistent with the State's approved Coastal Zone Management Program.
- ✧ Coastal Zones (CZ) are established by Coastal States.
- ✧ CZs are tidal, normally extends inward to include the first dune and usually does not extend past a man-made structure such a road.
- ✧ Section 304(1) says, "Excluded from the CZ are lands that use of which is by law subject solely to the discretion of or which is held in trust by the Federal government, its officers, or agents."
- ✧ Military installations within the CZ do not have to comply unless their activity would impact the CZ off the installation.

Slide # 9 of _23_



Environmental Justice

- ✧ NEPA documentation must contain an analysis of the impacts of the proposed action and alternatives considered, including impacts that may have disproportionately high adverse human health or environmental effects on populations covered by E.O. 12898

Slide # 10 of _23_



PROTECTION OF CHILDREN

↗ E.O 13045, Protection of Children from Health Risks and Safety Risks (April 21, 1997).

As part of NEPA process, disproportionate risks to children that result from environmental health risks or safety risks should be considered and addressed during the identification and analysis of the potential environmental socioeconomic effects of the proposed action and alternative.

Slide # 11 of _23_

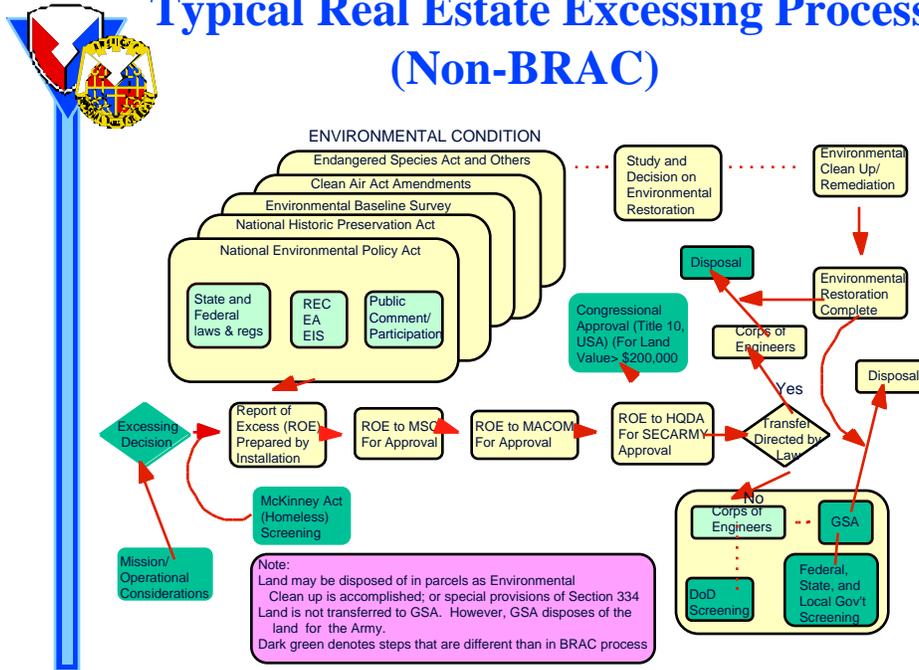


Installation Plans

- Real Property Master Plan
- Integrated Natural Resource Management Plan (INRMP)
- Integrated Cultural Resource Management Plan (ICRMP)
- Endangered Species Management Plan (ESMP)

Slide # 12 of _23_

Typical Real Estate Excessing Process (Non-BRAC)



DoD Directive 4715.3 - Environmental Conservation Program

Before disposing of DoD properties, the DoD component with responsibility for the property involved shall:

- ✧ Identify all significant natural and cultural resources, and determine whether they may be affected by the disposal action.
- ✧ Provide disposal plans to appropriate agencies, organizations, and individuals, and provide a reasonable opportunity for review and comment before proceeding with the disposal action.
- ✧ Ensure that “museum objects and documents” are identified and preserved.
- ✧ Disposed of the property IAW any other legal requirements.



Disposal of Non-BRAC Installations

- ↳ General Services Administration (GSA) brokers disposal (exception: special legislation)
- ↳ 3 MSCs (AMCOM, SBCCOM, IOC) and 19 installations involved or will be involved
- ↳ Primary Concerns:
 - ❖ Budgeting and programming funds; scheduling
 - ❖ Working with EPA, State, GSA, other regulatory agencies, local groups and citizens (to include Native Americans)
 - ❖ Congressional interest
 - ❖ Environmental documents, requirements and coordination
 - ❖ Early transfers under Section 334
 - ❖ Institutional controls (long term monitoring)

Slide # 15 of _23_



Environmental Baseline Survey (EBS)

- ↳ EBSs are prepared for acquisition, outgrants, and disposal.
- ↳ EBSs are not required for reassignments within DA, easements, licenses, and permits.
 - however, may be performed if desired by the Army or where extraordinary circumstances exist.

Slide # 16 of _23_



Purpose of an EBS

- For Disposal:
 - ❖ To identify and assess the condition of real property at the time of transfer out of the government's possession.
 - ❖ To identify potential environmental contamination liabilities.
 - ❖ To fulfill the government's requirements under 42 USC 9620(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to:
 - ❖ identify the type and quantity of hazardous substances stored, released, or disposed of on any real property being sold or otherwise transferred from federal ownership.
 - ❖ For Acquisition:
 - ❖ To preserve the CERCLA innocent landowner defense

Slide # 17 of _23_



Applicable Guidance Documents

- AR 200-1, para 15-6
- Memo SFIM-AEC-EQN, 7JUN99, SUBJ: GUIDELINES FOR EBS Supporting Utility Privatization--Action Memo (with 4 enclosures):
 - ❖ Model SOW for EBS
 - ❖ Frequently Asked Questions No.2: EBSs and Other Environmental Concerns Related to Privatization of Utilities
 - ❖ Environmental Conditions of Property Mapping Guidelines
 - ❖ EBS Recommended Outline
- DOD BRAC Cleanup Plan Guidebook, Fall 1995/Sep 1996 Revision
- Army Materiel Command FOST/FOSL Guidance (February 1998)

Slide # 18 of _23_



EBS Investigation



- Consists of, at minimum, the following:
- ❖ detailed search of Federal records
 - ❖ review of recorded chain of title documents
 - ❖ review of aerial photographs
 - ❖ visual inspection of property and adjacent property
 - ❖ physical inspection of adjacent real property
 - ❖ review of reasonably obtainable Federal, State, and local government records of adjacent property
 - ❖ interviews with current or former employees



Slide # 19 of _23_



Findings of Suitability

- Finding of Suitability to Transfer (FOST)
- Finding of Suitability for Early Transfer (FOSET)
- Finding of Suitability to Lease (FOSL)
- Environmental Condition of Property (ECOP)

Slide # 20 of _23_



Delegation of Authority 9-98

AMC DCS Engineering, Housing, Environment, and Installation Logistics Signature Authority		
	BRAC	Non-BRAC
FOST	DoD ECP Categories 1- 4, minus ETA*	DoD ECP Categories 1- 3, minus ETA*
FOSL	DoD ECP Categories 1- 7	DoD ECP Categories 1- 3
ECOP	All	All

* ETA - Early Transfer Action authorized under Section 334 of the FY97 Defense Authorization Act. FOSET is prepared for an ETA and is signed by the DESOH.

** Signed by Gen Wilson, 19 Jun 98

Slide # 21 of _23_



DoD Environmental Categories of Property

- 📌 **Category 1:** Areas where no release or disposal of hazardous substances or petroleum products has occurred.
- 📌 **Cat 2:** Areas where only release or disposal of petroleum products has occurred.
- 📌 **Cat 3:** Areas where release, disposal, and/or migration of hazardous substances has occurred, but at concentrations that do not require a removal or remedial response.
- 📌 **Cat 4:** Areas where release, disposal, and/or migration of hazardous substances has occurred, and all removal or remedial actions to protect human health and the environment have been taken.
- 📌 **Cat 5:** Areas where release, disposal, and/or migration of hazardous substances has occurred, and all removal or remedial actions are underway, but all required remedial actions have not yet been taken.
- 📌 **Cat 6:** Areas where release, disposal, and/or migration of hazardous substances has occurred, and all removal or remedial actions are underway, but all required remedial actions have not yet been taken.
- 📌 **Cat 7:** Areas that are not evaluated or require additional evaluation.

Slide # 22 of _23_



Disposal of Buildings/Facilities

- EBS not required when underlying land not included.
However:
 - ❖ **Must generate sufficient info to make determination that asbestos, PCBs or other Hazardous substances not present in structures.**
 - ❖ **Operations conducted inhouse: Suggest a SOP be developed to protect health, welfare, safety of government demolition workers, potential nearby people, and ensure proper disposal of waste material.**
 - ❖ **Operations contracted out: Instead, require contract performance IAW the law, etc. Contract and solicitation should advise of potential or actual knowledge of hazardous conditions.**

THE ENVIRONMENTAL LAW DIVISION BULLETIN

June 1999
Number 6

Volume 6,

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

District Court Rejects *Eastern Enterprises* Argument

Ms. Christine Azzaro¹

In *United States v. Alcan Aluminum Corporation*,² a federal district court examined whether retroactive application of the Comprehensive Environmental Response, Compensation and Liability Act³ ("CERCLA") constituted a taking under the Fifth Amendment of the Constitution. Retroactive application of CERCLA would require Alcan Aluminum Corporation to pay for the clean up of toxic waste that the company had previously disposed of lawfully at a hazardous waste site.⁴ The district court concluded that the Supreme Court's retroactivity analysis in *Eastern Enterprises v. Apfel*⁵ did not apply to CERCLA.⁶

In *Eastern Enterprises*, the Supreme Court examined whether the Coal Industry Retiree Health Benefit Act of 1992⁷ ("Coal Act"), when applied retroactively, constituted a taking under the Fifth Amendment.⁸ The Coal Act would have forced Eastern to pay to its former employees' retirement funds in addition to those that their retirement plan had already established, in compliance with then-current legislation.⁹ The Supreme Court held that the Coal Industry Retiree Health Benefit Act of 1992, constituted a taking under the Fifth Amendment, and thus violated the constitutional rights of Eastern.¹⁰ In a plurality decision, the Court held that the constitutionality of retroactive application of legislation depends upon the "justice and fairness" of the statute.¹¹ Under this analysis, three factors are used in order to determine the whether a regulation constitutes a taking: (1) what is the economic impact which the regulation has upon the defendant? (2) does the regulation

¹ Ms Azzaro is a summer intern at the U.S. Army Environmental Law Division. In August she will be a second year law student at St. John's University School of Law in New York.

² *United States v. Alcan Aluminum Corp.*, No. 87-CV-920, 1999 U.S. Dist. LEXIS 7103, (N.D.N.Y.) May 11, 1999).

³ 42 U.S.C. § 9607 (1998).

⁴ *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS at *5.

⁵ *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).

⁶ *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS at *5-*13.

⁷ 26 U.S.C. §§ 9701-9722 (1992).

⁸ *Eastern Enterprises*, 118 S. Ct. at 2150-2151.

⁹ *Id.* at 2141.

¹⁰ *Id.* at 2150-2151.

¹¹ *Id.* at 2146 (citing *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

interfere with the reasonable investment backed expectations of the defendant? (3) what is the character of the government action?¹²

Based on this test, four Justices concluded that the Coal Act violated Eastern's Fifth Amendment rights. Eastern's liability under the Coal Act would have been highly disproportionate to its experience with the retirement plan, and therefore would have constituted an unjust economic burden.¹³ Furthermore, the retroactive nature of the legislation interfered with the expectations of Eastern, due to the fact that Eastern had not contributed to the problem that made the legislation necessary, and Congress had never before become involved with the coal industry in such a manner.¹⁴ In a concurring opinion, Justice Kennedy concluded that the retroactive impact of the Coal Act was unconstitutional based upon its violation of the due process clause.¹⁵

In considering Alcan's CERCLA challenge, the district court first concluded that *Eastern* could not be employed as precedent for the *Alcan* case. The court pointed to the fact that the holding in *Eastern* was based upon a plurality decision, in which only four Justices had ruled that retroactive application of the Coal Act constituted a taking.¹⁶ Because the other five Justices, including Justice Kennedy in his concurring opinion, rejected this analysis the ruling in *Eastern* did not constitute binding precedent.¹⁷

This left the due process claim of Alcan to the "well settled rule that economic legislation enjoys a 'presumption of constitutionality' that can be overcome only if the challenger establishes that the legislature acted in an arbitrary and irrational way."¹⁸ Relying upon persuasive precedent, the court concluded that retroactive application of CERCLA was neither arbitrary nor irrational in basis.¹⁹

The district court went on to reason that even if *Eastern* were valid precedent for holding that retroactive use of CERCLA constituted a taking, the specific fact situation in *Alcan* would not pass the three-part test. Rather than finding an insurmountable economic burden, the district court stated that any economic impact that CERCLA would have on Alcan would be diminished by apportionment between responsible parties.²⁰ In addition, even if apportionment were not available, Alcan's potential liability was considerably less than the sum for which Eastern Enterprises would have been liable.²¹

Furthermore, liability was being imposed on Alcan because of actions that it had taken in the past. While Alcan claimed that it had not caused the pollution of the site, that fact still remained to be determined. Despite this, Alcan had indeed dumped toxic

¹² *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

¹³ *Id.* at 2149-2151.

¹⁴ *Id.* at 2151-2153.

¹⁵ *Id.* at 2154.

¹⁶ *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS 7103 at *5 (citations omitted).

¹⁷ *Id.*

¹⁸ *Alcan Aluminum Co.*, 1999 U.S. Dist. LEXIS 7103, at *14.

¹⁹ *Id.* (citations omitted).

²⁰ *See Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS 7103, at *3 -*4.

²¹ While Eastern Enterprises would have been liable for \$50 to \$100 million, Alcan's liability was in the approximate range of \$5 million. *See id.* at *10.

substances in the area that was now contaminated.²² In contrast, Eastern Enterprises was being held liable based upon neither its past actions, nor any agreement that it had made in the interim.²³

The Army is subject to liability under CERCLA in the same way that any other private party would be.²⁴ The Army does not, however, have Fifth Amendment rights. A finding that CERCLA violates the Fifth Amendment rights of private parties could leave the Army responsible for a greater allotment of site clean-up costs. Although CERCLA survived the retroactivity challenge in *Alcan*, the issue may be raised continually until it is ultimately resolved by the Supreme Court.
(Christine Azzaro/Lit)

CERCLA Non-Time Critical Removal Actions

Ms. Kate Barfield

The Comprehensive Environmental Response, Compensation and Liability Act,²⁵ (CERCLA) addresses the identification, characterization and -- if necessary -- the cleanup of releases of applicable hazardous substances into the environment.²⁶ Specifically, CERCLA authorizes the undertaking of cleanup (response actions) that are consistent with the National Contingency Plan (NCP).²⁷ There are two basic types of CERCLA response actions -- remedial actions and removal actions.²⁸ This article focuses on non-time critical removal actions.

Generally, removal actions involve "removing" contamination that resulted from a CERCLA hazardous substance release. Many removals are emergency or time-critical actions. But with non-time critical removals, decisionmakers have more time to plan their approach.²⁹ Given the possibility of more planning, non-time critical removal actions can raise some interesting questions. One issue that arose recently was whether the NCP's requirements for considering a full-blown response action would apply to discrete non-time critical removal actions. In short, the answer is no. Here is why.

Under the NCP, there are nine criteria³⁰ for assessing response actions, which are:

²² "CERCLA liability has not been imposed on Alcan for no reason; rather, it has resulted from Alcan's conduct in disposing of waste where hazardous substances have been found. Consequently, Alcan's liability is predicated on the link between its waste disposal activities and the environmental harms caused at [the sites]. *Id.* at *11.

²³ *Id.*

²⁴ 42 U.S.C. § 9620 (a)(1) (1998).

²⁵ 42 U.S.C. § 9601, *et seq.*

²⁶ For definitions of key terms, such as what constitutes a "release" or a "hazardous substance," *see*, 42 U.S.C. §§ 9601(14); (22).

²⁷ *See generally*, 40 C.F.R. Part 300.

²⁸ 42 U.S.C. § 9604(a).

²⁹ The administrative record requirements for a removal action can be found at 40 C.F.R. § 300.820.

³⁰ 40 C.F.R. § 300.430(e)(9)(iii)

Threshold Criteria

1. Overall protection of human health and the environment.
2. Compliance with applicable, relevant, and appropriate requirements (ARARs) or the eligibility of a waiver.

Primary Criteria:

3. Long term effectiveness and permanence.
4. Reduction of toxicity, mobility or volume through treatment.
5. Short term effectiveness.
6. Implementability.
7. Cost.

Modifying Criteria:

8. State acceptance.
9. Community acceptance.

With non-time critical removal actions, such an in-depth analysis is not necessary. Accordingly, EPA Guidance recommends that decisionmakers consider only three criteria when assessing a non-time critical removal action.³¹ These are:

1. Effectiveness
2. Implementability
3. Cost

The main difference between the NCP's Nine Criteria and the EPA's three criteria is that the EPA's version is shorter. It calls for a more streamlined analysis, without the NCP's modifying criteria. There is also another important distinction, though less obvious, regarding the use of "applicable requirements" and "relevant and appropriate requirements" (ARARs).³² CERCLA on-site remedial actions must comply with the substantive requirements contained in ARARs. Removal actions are only required to attain ARARs "to the extent practicable."³³ Lead agencies are permitted to consider whether compliance is practicable by examining the urgency of the situation and the scope of the removal action.³⁴ Hence, one more reason that the NCP's Nine Criteria do not apply to these actions.
(Kate Barfield/RNR)

³¹ EPA Guidance, OSWER No. 9360.0-32, *Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, August 1993.

³² 42 U.S.C. § 9621(a);(d)

³³ Note that the removal action must be Fund-financed. 40 C.F.R. § 300.415(j).

³⁴ 40 C.F.R. § 300.415(j)(1),(2).



DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY MATERIEL COMMAND
5001 EISENHOWER AVENUE, ALEXANDRIA, VA 22333-0001

REPLY TO
ATTENTION OF

AMCCC (600-50a)

10 JUN 1999

MEMORANDUM FOR SEE DISTRIBUTION

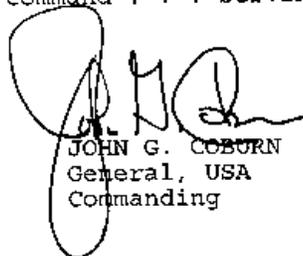
SUBJECT: Commander's Statement on Ethics

1. The Army Materiel Command is completing almost 37 years of being the key to Army readiness. During this time, we have earned an enviable reputation of institutional integrity. This is the direct result of the personal integrity exhibited by AMC employees. Our continued success depends on our continued personal commitment and readiness to deal with the ethical challenges that we confront when working with our programs, contractors, communities and each other. This readiness requires a personal working knowledge of the rules to ensure our actions always reflect the highest principles of honesty, loyalty and selfless service.

2. The Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR 2635) and the DoD Joint Ethics Regulation (DoD 5500.7-R) are the baseline. They set the minimum expectations for military and civilian personnel. We must have a basic awareness of the rules concerning such matters as gifts among ourselves and from outside sources, conflicts of interest, inappropriate appearances, our relationships with and support to professional and other private organizations, outside activities, and post-Government employment restrictions. Ensure that you attend the required ethics training. Insist on timely filing and review of financial disclosure reports. And, most importantly, when an ethics issue arises, seek the advice of your Ethics Counselor before you act.

3. I expect my commanders, directors, and supervisors to set the example and ensure that ethical issues are resolved while they are still issues and before they become problems.

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



JOHN G. COBURN
General, USA
Commanding

DISTRIBUTION: H, B

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AMCCC-B-BI

POINT PAPER

19 July 1999

SUBJECT: Invitational Travel Orders For Contractor Personnel

PURPOSE: To Provide Information About Upcoming Changes To Contractor Use of Invitational Travel Orders

FACTS:

O Effective October 1, 1999, the Joint Travel Regulation will prohibit the issuance of invitational travel orders ("ITO's") to contractors.

oo This change was originally scheduled to take place on June 1, 1999, but has now been postponed until October.

O DFAS will not pay contractor travel vouchers for any contractor ITO's issued after October 1, 1999.

O Many AMC contracts already "direct fund" contractor travel through the fixed contract price, through a reimbursable contract line item, or through contractor overhead rates.

oo These contracts already comply with the change and require no action.

O However, many AMC contracts rely on ITO's to fund contractor travel.

RECOMMENDATION:

O For those contracts that rely on ITO's, we recommend that requiring activities contact their contracting officers as soon as possible to direct fund all contractor travel after October 1, 1999.

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O This will likely require a modification to the statement of work.

oo The modification will vary for each contract.

oo Generally, the modification should be based on the contract structure and type, as well as on the nature, frequency, and predictability of travel.

NEXT STEPS:

O Requiring activities must describe (or at least estimate) the anticipated travel in the statement of work.

O In addition, requiring activities must provide funds for an increase in the contract price/cost or for a cost-reimbursable contract line item to cover the cost of travel.

oo The fiscal year and type of funds used for the modification will depend on the contract scope and structure, as well as on the date of the contract modification.

oo Requiring activities should work with their contracting officers and resource management staff to determine the correct "color of money" for their contract.

O Once a cost-reimbursement contract is appropriately modified, contractors may be reimbursed reasonable travel costs in accordance with Federal Acquisition Regulation 31.205-46 ("Travel Costs").

oo In most circumstances, this means that contractors cannot be reimbursed for costs in excess of the maximum allowable per diem and mileage rates.

O Contractors are not eligible for city pair air fares or other travel-related items restricted to Government employees.

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oo However, contractors traveling on official government business may receive special discounts from some hotels, car rental agencies, and from Amtrak.

oo In order to take advantage of any discounted rates, contracting officers should provide contractors with a "contractor letter of identification" in accordance with Joint Travel Regulation, para. C6005,H.

PREPARED BY: LISA R. SIMON
ASSOCIATE COUNSEL
AMCCC-B-BI
DSN 767-2552

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Subject: Prohibited Source -- Dirty Word? No!

Recently, an official of an Army affinity organization called me, because he was very concerned that his PO might be doing something "terrible." His PO was considering competing for an AMC contract, but wouldn't this make his PO a (shudder, grimace) "prohibited source?" He was really concerned that his PO might be doing something "dumb" that would adversely affect its relationship with the Army.

I explained what it meant to be a "prohibited source," that his PO and its various chapters were probably "prohibited sources" at least occasionally, but, it doesn't really mean much to the PO, rather it is a concept that helps define employee conduct. He then sent me an e-mail asking for an AMC opinion as to what this would mean if his PO bid on and entered into this contract. Here is what I responded.

"First, not being the PO's lawyer, I cannot provide you an opinion concerning how the PO may or may not be affected by its initiatives, e.g., bidding on an Army (USASAC) IDIQ contract and becoming a USASAC contractor for 5 years. However, what I am willing to do is to explain my view, as an AMC ethics official, of what a "prohibited source" means to Army/AMC/USASAC employees. After all, the rules proscribe and circumscribe EMPLOYEE conduct, not yours or the PO's.

"As I mentioned to you on the telephone, "prohibited source" is not a dirty word. It's just a fact. Either you are doing business with the Army, trying to do business with the Army (e.g., submitting a proposal), or seeking some other official action from the Army (e.g., support to a PO event), or not.

"Usually, professional organizations (POs) like your PO are "prohibited sources" on an intermittent basis. They are not like a company like General Dynamics who is constantly marketing, offering, and under contract to the agency, and always a prohibited source. But, from time to time, POs will also be "prohibited sources." If your PO should sign a 5 year IDIQ contract, your PO will be a "prohibited source" from the time that it starts to participate in the solicitation process; if your PO receives the award, then it will also be a "prohibited source" for during these five years.

"I also mentioned that I usually view the individual chapters separately among themselves and as between them and their parent. Therefore, even though the Huntsville chapter, for example, might be a "prohibited source" this month because of some event or purchase order, that does not make the other chapters or the parent also "prohibited sources." Similarly, if the parent is involved with some Army organization this month, this by itself does not make all the other chapters also "prohibited sources."

"What does it mean to your PO to be a "prohibited source"? Like I said, I cannot provide you legal advice. But, I can tell you how it affects the employees I advise, and indirectly that tells you what it means to your PO. A number of the Standards of Ethical Conduct and related rules in the Joint Ethics Regulation specifically refer to "prohibited sources." For example:

1. Employees may not accept gifts from "prohibited sources," except for those gifts that fall within one of the exceptions. But, it does not usually matter whether the source of the gift is a "prohibited source," because the other half of the rule is that employees will not accept gifts that are given because of their official position. Even though the gift might not be coming from a "prohibited source," it will still be prohibited (unless it falls into one of the exceptions) if it is offered because of the employee's official position. However, like I said, there are a couple of narrow exceptions that do not apply if the giver is a prohibited source; in such a case, it would make a difference to the employee as to whether he or she could accept the gift. But, this does not happen often.

2. Employees who file financial disclosure reports must obtain the prior approval of their supervisors or commanders before they can engage in compensated off-duty activity with a prohibited source. This does not apply to volunteer work. Even if the entity providing the compensation is not a prohibited source, there could be additional requirements because of readiness or security concerns. Even if the employee does not have to obtain prior approval, the employee must still report his or her position with, and source of income from this organization on his or her financial disclosure report.

"These are two examples that come to mind. You will note that, to the extent that there is any impact, it's on the employee.

"What if a commander is considering support to a PO event, such as providing a speaker? What if this same person is considering co-sponsoring an event with the PO? The criteria set out in the Joint Ethics Regulation are no different whether or not the PO is a "prohibited source." The Commander cannot approve the support or co-sponsorship, for example, if it will interfere with mission, if the event is priced so as to generate a profit, if it is not in our interests, and if we don't get the "bang for the buck" (a benefit commensurate with the time, effort and expense put into the support). Whether the requesting PO is a "prohibited source" is not a criteria. What could make a difference is if the PO is not tax exempt under 501(c)(3), or is a for profit organization.

"As a final point, here is a link to a recent DoD General Counsel memorandum about DoD employee serving as advisors to DoD contractors. I provide the link for your information although most of the principles set out herein are true whether the organization is a contractor (or prohibited source) or not.

http://www.defenselink.mil/dodgc/defense_ethics/index.html

"I hope that his helps explain what "prohibited source" means to Federal employees and their ethical conduct."

I believe it entirely proper to provide information like the above to POs. I know of instances where ethics officials have gone to PO Board meetings to provide information on the ethics rules. Indeed, it is in our interest to do so. But, be careful. We cannot become advisors to the POs. There is a line that we must watch for and not cross. After providing the above response to the PO in question, the PO official asked me to meet with him and another senior official in the PO so that they could ask me some more specific questions, to include specifically how the ethics rules will affect the PO in its work with the Army, especially at various meetings and symposia that it hosts. Here is what I answered:

"I'm sorry, but I must decline.

"I have already tried to explain what the concept of "prohibited source" means to Federal employees and how it fits into their Standards of Ethical Conduct. I also mentioned in our telephone conversation that these are the views of an AMC ethics official. I am no longer in the Army Standards of Conduct Office and cannot speak for them.

"To now meet to go into more detail and to discuss "how the rules will affect [your PO] in work with the Army on the your meetings, symposia, etc." would exceed my charter. Additionally, it would put me in the awkward position of providing advice and counsel to your PO with respect to these matters. Even though we are not adversaries, this could well conflict with my fiduciary duty to my client, the Army.

"I suggest that the best way to pursue this further, is with Mr. Al Novotne or COL Mike Schneider of the Army Standards of Conduct Office. Ideally, to avoid conflicts, you might have your PO counsel contact one of them to discuss the issues, and then your counsel can advise you on how best to proceed.

"I am sorry that I cannot be more responsive; but, I believe that this is the correct response. I hope that you understand. "

The PO response was understanding and positive.

Mike Wentink

Use of Official Motor Vehicles and Drivers

Recently, one of the HQ AMC officials asked me for the written AMC policy on the use of official cars and drivers. Here is what I advised...

"I understand that you are looking for written AMC policy on the authorized use of official vehicles and drivers. As far as I can determine, there is no specific written AMC policy. The closest that I can find is AMC Supplement to AR 58-1, dated 9 Sep 82 (actually, it is so old that it is called the "DARCOM" Supplement). It seems to direct itself primarily to the management of administrative use vehicles, rather than when they can legally be used. I am not sure who the proponent of this regulation is today... in 1982 it was the Director of Installations and Services.

"The "policy" concerning authorized use is statutory (31 USC 1344) and regulatory (DoD 4500.36-R, DoDI 4515.7, and AR 58-1) and Secretarial Policy (SECARMY Memorandum dated 8 Apr 99) in nature. The basic principle is that Government administrative use vehicles shall be used for official purposes only. That's the easy part. Sometimes, it is a bit difficult applying this principle to the actual situation. Here are some bullets for you:

With very few exceptions, home-to-work transportation is not allowed. Those exceptions include the Secretary of the Army and the Army Chief of Staff.

Rank or grade alone does not justify use of an official administrative use vehicle.

Within the NCR,, official vehicles generally may not be used to and from commercial terminals because "Public and commercial transportation to commercial terminals in the NCR is considered adequate for all but emergency situations, security requirements, and other unusual circumstances." DoDI 4515.7, para. D.2. This restriction applies to Reagan National, Dulles, BWI, and downtown DC bus and rail terminals.

Official attendance to after hours functions may be approved as an exception to policy. Travel is expected to begin and end at the employee's normal place of duty.

If the employee's spouse is attending a meeting or event with the employee, the spouse may accompany the sponsor in the official vehicle subject to space available (no other employee is displaced and a larger vehicle is not required), There can be no deviation to pick up the spouse, and the spouse may not ride unaccompanied.

"Finally, as with any resource, managers of that resource need to make reasoned judgments as to whether a proposed use is economical and efficient. Just because an administrative use vehicle would be permitted (official purpose), this might not be the best use of a driver and vehicle for one person, who has alternative means of transportation (e.g., the scheduled shuttle service). Timing, schedules, numbers of people, voluminous files, security concerns are all factors that could come into play.

"The above covers the usual issues. If you have a situation not covered by the above, please let me know the specifics so that I can help. If your office has not received the SECARMY memorandum through normal channels, I should be able to come up with a copy for you."

I provide the above in case you might find it useful.

Mike Wentink

From: SECDEF_WASHINGTON_DC//ASDPA/DPL//@unclas1.hq.navy.mil
[mailto:SECDEF_WASHINGTON_DC//ASDPA/DPL//@unclas1.hq.navy.mil]
Sent: Wednesday, May 19, 1999 05:31 PM
Subject: P R PUBLIC AFFAIRS POLICY GUIDANCE -- ELECTION YEAR 2000

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* * * * *

***** ACTION: N09C/CHINFO/OLA *****

P R 171527Z MAY 99
FM: SECDEF WASHINGTON DC//ASDPA/DPL//
ACTION OLA WASHINGTON DC

Subject: PUBLIC AFFAIRS POLICY GUIDANCE -- ELECTION YEAR 2000

UNCLAS SECTION 01 OF 02

SUBJ: Public Affairs Policy Guidance -- Election Year 2000

a. SECDEF msg 271505Z Mar 98, Public Affairs Policy Guidance --
Election Year 1998

b. DoD Directive 1344.10, Political Activities By Members Of The
Armed Forces

c. Public Law 103-94, Hatch Act Amendments

D. DoD Directive 5230.9, Clearance Of Department Of Defense
Information

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e. DoD Directive 1000.4, Federal Voting Assistance Program

F. DoD Instruction 5120.4, DoD Newspapers And Civilian Enterprise
Publications

G. DoD Instruction 1100.13, Surveys Of Department Of Defense
Personnel

H. DoD Directive 5120.20, Armed Forces Radio And Television Service
(AFRTS)

I. DoD Regulation 5120.20-R, Management And Operation Of Armed Forces
Radio And Television Service (AFRTS)

J. DoD Directive 5410.18, Community Relations

K. DoD Instruction 5410.19, Armed Forces Community Relations

L. 1998-1999 Voting Assistance Guide

M. DoD Directive 1344.13, Implementation Of The National Voter
Registration Act

1. The following public affairs policy guidance is provided to assist
commanders and public affairs officers (PAOs) in handling requests
for support of elections during the 1999-2000 election year cycle, as
defined in paragraph d. Commanders and PAOs will comply with this

guidance in the conduct of activities associated with political campaigns for elections for federal, state and local offices. This page 03 ruckjcs0650 unclas message supercedes ref a. Addressees are to ensure widest dissemination.

a. As a matter of long-standing policy, the Department of Defense does not engage in activities that could be interpreted as associating the Department with any partisan political causes, issues, or candidates. The political activities of individual military members are regulated by ref b. The political activities of civilian employees are restricted by the Hatch Act amendments, 5 U.S.C.. 7321 - 7326 (ref c). Civilian officers and employees with questions regarding the propriety of prospective political activities, or concerns about possible violations, may be directed to the Hatch Act hotline at the U.S. Office of Special Counsel, (800) 854-2824.

b. Inquiries from political campaigns should be considered as queries from the general public and should be responded to accordingly. When responding to queries from political campaign organizations, only information/material that is available to the general public is to be provided, per ref d. Additionally, there should be no attempt to explain or amplify prepared DoD or service statements or positions.

c. DoD command/internal information newspapers, both funded and page 04 ruckjcs0650 unclas civilian enterprise (CE), will support the federal voting assistance program (refs e and l) by carrying factual information about registration and voting laws, especially information on absentee voting requirements of the various states and territories. DoD newspapers will not carry campaign news, partisan discussions, cartoons, editorials, or commentaries dealing with political campaigns, candidates, or issues, per ref f. Civilian enterprise newspapers may not carry paid political advertisements or advertisements which advocate a particular position on a political issue. The above is more fully explained in ref f. No DoD newspaper or CE publication may conduct a poll, a survey, or a straw vote relating to a political campaign or partisan political issue, per refs f and g.

d. Per refs h and i, the Armed Forces Radio and Television Service (AFRTS) broadcast center will provide a free flow of balanced, non-funded, informational coverage of political campaigns provided by U.S. commercial and public networks. AFRTS outlets should make extensive use of such programming to include political analysis,

commentary, and public affairs programs in addition to hard news. great care should be shown by AFRTS outlets to maintain well-balanced coverage of political news without local comment, criticism, analysis, or interpretation of a political nature. Local programs or announcements concerning political parties, candidates or incumbents will not be broadcast during an election campaign period. The election campaign period begins with the first formal announcement of an individual's candidacy for Federal, state or local elected office, or formal status with the Federal elections commission, and ending no earlier than one week after the elections. The end date precludes the use of military installations as the site for post-election acceptance speeches, celebrations or other politically-oriented events. Information on the Federal Elections Commission may be found on the internet at www.fec.gov, or via the FEC fax information bulletin board at (202) 501-3413. Non-AFRTS military radio/television systems in CONUS, excluding cable services providing commercial programming, will not carry any partisan discussions, programs, editorials, or commentaries dealing with political campaigns, candidates, or issues. This does not preclude the above systems, i.e., AFRTS and non-AFRTS military radio/television systems, from using spot announcements encouraging armed forces personnel and their eligible family members to register and vote, either by absentee ballot or at the polls, providing these announcements have been approved by the Federal Voting Assistance Program (see section 3, below).

e. Installation commanders should not permit the use of installation facilities by any candidate (either incumbents or new office seekers), members of their staffs or their campaign representatives for: political assemblies or meetings; media events, including speeches; fund-raising social events for political candidates, parties, or causes regardless of the sponsorship; press conferences; any other activity that could be construed as political in nature.

(1) Installation commanders are advised not to allow their installation facilities to be used for polling or voting sites. locating polling or voting places on a military installation may result in conduct which could inadvertently violate one or more of the following statutory prohibitions, among others: 18 U.S.C. (504, 592, 593, 596, 602, 603, 606, 607, 608). More information on these and other statutes may be found on the internet at www.house.gov.

(2) Members of Congress, whether or not candidates for re-election to national office, may visit military installations to receive

briefings, tours and/or informational materials. If the candidate is
bt unclas final section of 02
currently a Government official and his/her duties require a visit to
an installation for related official duties, the response to the
request for the visit will include a reminder that the candidate may
not use the visit as a campaign vehicle. Other candidates for
national office who are not current Members of Congress or serving
governmental officials may be given the same access to installations
as any other unofficial visitor. Service chiefs of legislative
liaison should be consulted for special instructions/advice if there
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is any doubt on how to handle a specific request.

(3) Candidates, either incumbents or new office seekers, for local
and/or state offices may be given the same access to installations as
any other visitor.

(4) In all cases, commanders will inform candidates that while on a
military installation, all political activities and media events are
prohibited, including on-post/base media coverage of the candidate's
visit. (note: if the candidate has been invited to a military
installation as part of an official installation activity which
includes media coverage of that activity, the candidate may be
allowed to appear on camera and in photos as an official participant;
however, candidates will not be allowed to make statements or respond
to queries while on the installation.) If asked for the rationale for
this decision, the following guidance is approved for use: quote:
"Department of Defense policy has for many years prohibited the use
of military installations for any activity that could be construed as
political in nature, including news media coverage of any portion
of a political candidate's activities while on a military
installation regardless of the purpose of the visit." End quote. An
exception to this rule permits news media coverage of certain
page 03 ruckjcs0651 unclas
portions of visits to military installations by the President, Vice
President, and the Speaker of the House as explained in the following
paragraph.

(5) During an election year, media coverage of the arrival/departure
via military aircraft on a DoD installation of any elected officials
is not authorized if their itinerary includes political campaigning
in the local community, with the exceptions of the President, the
Vice President, and the Speaker of the House. If the President, the
Vice President, or the Speaker of the House fly into a military
installation aboard a military aircraft to campaign for a candidate
in the local community, media may be allowed a photo opportunity on

the military installation for the express purpose of covering the arrival or departure of these officials. The supported candidate may not be present during these photo opportunities. PAOs at installations anticipating a politically oriented visit by the President, Vice President, or the Speaker of the House should contact teams advancing such visits to ensure all concerned are aware of the provisions of this message, and especially this paragraph.

f. DoD policy prohibits armed forces involvement in political events, except for the provision of a joint armed forces color guard for the opening ceremonies at the national conventions of the Republican, Democratic, and other political parties formally recognized by the Federal Elections Commission. All other requests for community relations support (including bands, color guards, personnel and speakers) to political meetings, ceremonies, and like events, whether on the installation or in the civilian community, will be denied. Commanders will decline requests for support to any event with the potential for identification or apparent association with any partisan candidate or cause.

g. Speeches, articles, and public comment by military personnel in their capacity as service representatives must not contain material that may be construed as political in nature. Refs j and k pertain. the established review procedures for speeches and articles for publication by military personnel must be followed. Refs b, d, and f pertain.

h. Campaign literature may be distributed on military installations only as authorized by service regulations. Active duty military personnel are prohibited from distributing such materials.

i. Requests from politicians to tape or film campaign commercials in front of military equipment (i.e., ships, tanks, aircraft, etc.) On military property owned or leased by the Government will be denied. However, taping/filming from outside these areas, using them as a background cannot be refused as they are outside Government property. the only exception to this is if the taping/filming conflicts with operational security.

j. DoD employees, including Active Duty personnel, Reserve Component personnel on active duty, and civilian employees, are required to adhere to policy outlined in refs b and c on individual participation in political activities. These policies address a wide range of

activities, including speeches, political polls, ballots, straw votes, campaign efforts and solicitation of support for candidates.

2. DoD employees and their family members are encouraged to vote. voting assistance officers will be provided at every level of command. The OSD Director of the Federal Voting Assistance Program is located at the DoD Voting Information Center, Office of Secretary of Defense, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301-1155. The Center's telephone number is commercial (800) 438-8683, (703) 588-1584/dsn 425-1584, fax (703) 588-0108/DSN 425-0108, e-mail (all lower case) vote@fvap.gov. The program's web site is www.fvap.gov. Publication of the 2000-2001 page 06 ruckjcs0651 unclas edition of the Voting Assistance Guide is expected in October 1999.

3. Cognizant commands are advised to review ref m that applies to recruitment offices of the armed forces in carrying out applicable provisions of the Voter Registration Act.

4. Any policy questions or situations not covered by the foregoing guidance should be immediately brought to the attention of OASD(PA):DPL, LT Gai, commercial (703) 697-9845/DSN 227-9845 for resolution. Questions on media activities should be referred to Mr. Glenn Flood, OASD(PA):DDI, commercial (703) 695-6294/DSN 225-6294. Questions on community relations activities should be referred to Ms. Celia Hoke, OASD(PA):DPCR, commercial (703) 695-2733/DSN 225-2733.

5. Any disputes, unresolved issues or potential problems with Federal-level political candidates should be brought to the attention of OASD(PA), Mr. James Desler, Principal Deputy, commercial (703) 697-0713/DSN 227-0713, for resolution. If a dispute has been settled at the local level, please advise Mr. Desler of the nature of the dispute and the resolution so that questions may be answered at the OSD or national level, if they arise.

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