



Office of Command Counsel Newsletter

October 1999, Volume 99-5

REDS: Marching To the AMC Workplace

AMC now has some two dozen trained REDS Teams chaired by EEO with membership from the CPAC and Legal communities.

Two 1-1/2 day training programs were held in September to expand REDS, the AMC Alternative Dispute Resolution Model for workplace disputes. **Steve Klatsky**, Assistant Command Counsel for ADR, was instrumental in workshop design and implementation, ably assisted by **Linda Mills** from AMCCC.

The twin objectives of the REDS Workshop were:

o to describe the REDS program and various ADR processes contained in the Model

o to discuss the roles and responsibilities of the REDS teams in the implementation of REDS.

A copy of the REDS Workshop Agenda is provided to you (Encl 1). Additionally, the REDS Deskbook Index is provided (Encl 2).

The attendees were very enthusiastic, sharing experiences with ADR and traditional employment litigation, actively participating in the

dialogue. We think that these objectives were met.

One exciting component of REDS implementation is a REDS Mentoring Program. Each REDS Team will have a mentoring group, either from HQ AMC or one of the three original AMC REDS pilot sites: ARL, TACOM-W, or ANAD. The mentors will provide assistance and lend support in the MSC or installation implementation of REDS.

The AMC attorneys who attended the REDS Training Workshop are: **Sharon Hill**, AMCOM; **Robert Blackwood**, CCAD; **Eddie Bennett**, LEAD; **Susan Harbort**, CECOM (counsel to LSSC); **Karen Tomaine**, TYAD; **Amy Armstrong**, IOC; **Les Renkey**, BGAD; **Susan Luther** (Navy), Crane; **Bert Howell**, MAAP; **John Walling**, RIA; **Helen Evans**, SIAD (paralegal); **CPT Humphrey Johnson**; TEAD; **Ellen Marchese**, WVA; **Laurie Kwiedorowicz**, SBCCOM; **Cathleen Perry**, APG; **Garth Terry**, PBA; **Jim Gilliam**, PBA; **Jim Savage**, SSC; **Laura Cushler**, STRICOM; **Carrie Schaffner**, TACOM-ACALA; **Dean Brown**, ARDEC; **Joe Martin**, RRAD.

A special thanks to those AMC attorneys who instructed and facilitated the workshop: **George Worman** and **Susan Bennett** (ANAD) and **Sam Shelton**, ARL.

A memo has been sent by **General Coburn** to the MSC Commanders who, in turn, will forward the memo to AMC installation and activity commanders reiterating his support for REDS, asking each to receive a REDS briefing from their newly-trained REDS Team.

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Tax Advisory:

Hazardous Duty Pay Tax Consequences For DOD Personnel

SERVICE MEMBERS: DOD action does not end combat zone tax benefits for those actually serving in the Balkan combat zone or qualified hazardous duty area.

However, many serving in direct support of military operations in the Balkans lose imminent danger pay and consequently, combat zone tax benefits. Effective 15 September 1999, DOD terminated imminent danger pay (IDP) for:

(1) The Adriatic Sea and the Ionian Sea north of the 39th parallel.

(2) Italy: Land areas of Aviano Air Base; Cervia Air Base; Gioia del Colle Air Base; Trapani Air Base; Vicenza (all military installations and facilities); San Vito Air Station; Brindisi (all military installations and facilities); Naples (all military installations and facilities including the port of Naples); Sigonella and Augusta Bay (all military installations and facilities including the ports of Catania and Augusta Bay);

Gaeta (all military installations and facilities including the port of Gaeta); and Bari (all military facilities).

(3) Greece: Land area of Souda Bay (all military installations and facilities including the port of Souda Bay); Thessaloniki, land area within a 25 kilometer radius of 40o27'N, 22o59'E; waters of Themaikos Kolpos north of 40o15'N.

(4) Hungary: Tazsar, land area within 50 kilometer radius of 46o23N, 17o55E.

To qualify for combat zone tax benefits, service members performing military service outside of a combat zone or qualified hazardous duty area must receive IDP. Therefore, service members serving in a direct support role in these areas no longer qualify for combat zone tax benefits (after 15 September 1999). This does not end such benefits for those actually serving in the combat zone or qualified hazardous duty area.

Thanks to **Alex Bailey**, DSN 767-8004, Chief, Legal Assistance, HQ AMC.

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

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

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

Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

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

Acquisition Law Focus

Blanket Purchase Agreements & "Mini-Competitions"

Percival Park, DSN 221-3304, CECOM Acquisition Center-Washington, has provided an excellent article on blanket purchase agreements (BPAs) and "mini-competitions" under GSA Federal Supply Schedule Contracts (Encl 3).

BPAs have long been useful for certain small purchases or simplified acquisitions. In recent years, they have become more popular for a specialized use, as adjuncts to General Services Administration Federal Supply Schedule (GSA FSS, or Schedule) contracts to obtain more favorable prices or other benefits for the BPA-issuing agency and designated users. Such BPAs are issued under FAR 8.404(b)(4) and 13.303-2(c)(3), and under provisions contained in the underlying Schedule contracts.

A normal BPA is not a complete contract in itself until an order is issued under it; until then, it is no more than a "charge account" (FAR 13.303-1(a)). As for those BPAs issued under Schedule contracts, they do not stand entirely on their own as separate and distinct contracts

even when orders are issued. Additionally, they are not subject to the relatively low purchase limitations that apply to normal BPAs (FAR 13.303-5(b)(1)). Despite that, the issuance of these BPAs and orders under them are not subject to normal competition requirements; because the underlying Schedule contract was competitively awarded, they are presumed to be issued pursuant to full and open competition, like any order against a Schedule contract.

The article addresses several important issues, including:

What standards govern the Government's conduct of such "mini-competitions"?—FAR's limited guidance is cited.

What has the GAO told us? The GAO has pointed out that agencies are not required to conduct competitions for purchases carried out in connection with GSA FSS contracts, but that, if they elect to do so, the GAO will review the agency's actions to make sure they were fair and reasonable, and consistent with the solicitation.

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The Arsenal Act:

To What Facilities Does It Apply?

The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States so far as those factories or arsenals can make those supplies on an economical basis.” 10 United States Code section 4532 (a)

The Arsenal Statute is a fairly old, little used, and oft misunderstood piece of legislation. That said, it could very well be the key to maintaining the Army’s Organic Industrial Base. The following statement by an Arsenal Statute sponsor best illustrates this point. “The purpose of this amendment is to compel the executive officers of the government to have government work done at such arsenals as [Watervliet] and to cease handing out appropriations to private manufacturers. It is perfect nonsense to allow [over \$20,000,000 in government investment] to go to waste and at the same time turn over work to be done by contract to private manufacturers.” 59 Cong. Rec. 4157 (1920).

Recent events regarding the ever-shrinking role of Government-owned facilities in acquisition planning have increased debate about the proper role of the Arsenal Statute. Is an Arsenal Statute analysis mandatory? To what extent if any does the Arsenal Act require “component breakout” with “system buys”? What does “supplies” mean? Must a facility currently make the supplies needed or simply be capable of making the needed supplies? What is meant by economical basis? Are “out-of-pocket” cost evaluations always required or is it sometimes appropriate to evaluate “fully burdened” costs? When “out of pocket” costs are evaluated, should Program Managers be billed on the basis of “fully burdened” costs? To what facilities does the Arsenal Statute apply? Those are but a few questions raised by the Arsenal Statute. The General Accounting Office has addressed many of the questions. Nevertheless, questions still abound.

IOC’s **CPT Marc Howze**, DSN 793-8111, raises these

issues, providing a paper that highlights this issue: “To what facilities does the Arsenal Statute apply? Bottom line up front. The Arsenal Statute applies to Government-owned production facilities including arsenals, factories, ammunition plants and depots. This includes both Government-owned Government-operated (GOGO) and Government-owned Contractor-operated (GOCO) facilities (Encl 4).

**CLE
2000
Is Not A
Millenium
Away**

Legal Review of Patent Licensing Agreements: A View from the IPCA & A Checklist for You!

AMC has recently experienced difficulties with patent license agreements (PLAs) drafted by AMC major subordinate commands (MSCs) (and other Army organizations) not being approved as written by the Intellectual Property Counsel of the Army (IPCA). AMCCC IP Counsel **COL Bill Adams**, DSN 767-3117, asked **Alan Klein**, the IPCA, if he would write an article concerning items that he looks for in reviewing a PLA for approval.

Checklist

We thank Alan for providing an outstanding checklist covering license grant, licensee's performance, representations and warranties,

reports, modification and termination, sublicensing and reservation of rights (Encl 5).

A significant number of patent licensing agreements are being recommended for disapproval or modification by the IPCA because the license clauses appearing in the patent licensing agreements are not in compliance with the federal regulations. Either the required clauses are missing or the included clauses are inconsistent with the federal regulations. Before submitting patent licensing agreements to this office, all agreements should be reviewed carefully to ensure the propriety of the agreements.

Role of the IPCA

The Intellectual Property Counsel of the Army is tasked with the final legal review of all license agreements under Army-owned patent or patent applications. See AR 27-60, Chapter 7 and AR 70-57, Chapter 1.

The federal regulations for licensing of Government owned inventions issued by the Department of Commerce require that all licenses include certain provisions.

These regulations appear at 37 CFR Part 404 and are restated at Chapter 3, Section IV, of AR 70-57 (with "laboratory Director" substituted for "Federal agency" and "Army laboratory-owned" substituted for "federally owned").

Employment Law Focus

EO 13124: Amending the Civil Service Rules Relating To Federal Employees With Psychiatric Disabilities

President Clinton issued this Executive Order on June 4, 1999:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301 and 3302 of title 5, United States Code, and in order to give individuals with psychiatric disabilities the same hiring opportunities as persons with severe physical disabilities or mental retardation under the Civil Service Rules, and to permit individuals with psychiatric disabilities to obtain Civil Service competitive status, it is hereby ordered as follows:

The Federal Government as an employer should serve as a model for the employment of persons with disabilities and utilize the full potential of these talented citizens.

The Civil Service Rules provide that persons with

mental retardation, severe physical disabilities, or psychiatric disabilities may be hired under excepted appointing authorities. While persons with mental retardation or severe physical disabilities may be appointed for more than 2 years and may convert to competitive status after completion of 2 years of satisfactory service in their excepted position, people with psychiatric disabilities may not.

The Office of Personnel Management (OPM) and the President's Task Force on Employment of Adults with Disabilities believe that the Federal Government could better benefit from the contributions of persons with psychiatric disabilities if they were given the same opportunities available to people with mental retardation or severe physical disabilities.

NFFE Joins the AFL-CIO

The National Federation of Federal Employees has decision to join with the International Association of Machinists and Aerospace Workers union. This would make NFFE a part of the AFL-CIO. NFFE will be known as the NFFE Federal District of the IAMAW, AFL-CIO. As a part of the AFL-CIO, no other AFL-CIO unions can raid NFFE units.

NFFE was the largest independent Federal employee labor organization. NFFE represents many AMC employees. Its merger into the AFL-CIO is likely to produce an infusion of resources to the union, translating perhaps into new challenges for AMC managers. It is likely to produce stability in an organization that has had financial difficulties and significant executive personnel turnover during the 1990s.

Employment Law Focus

ADR at DOJ On the Rise!

The following are ADR Statistics (updated July 1, 1999) of the US Department of Justice Office of Dispute Resolution as posted on their webpage: <http://www.usdoj.gov/odr/textstatistics.html>

ADR Processes Completed

FY 95 - 509
FY 96 - 1231
FY 97 - 1579
FY 98 - 1800

ADR Processes Pending

FY 95 - 0
FY 96 - 744
FY 97 - 1506
FY 98 - 1499

These statistics are consistent with those compiled by other Federal agencies. As the lead ADR agency for the Federal government, you would expect DOJ to also lead the way in developing and implementing ADR programs. The DOJ website has some good material for those wishing further information on ADR.

EEOC Issues ADR Regulation

"Agencies Required to Establish or Make Available an ADR Program"

In 1998, the Equal Employment Opportunity Commission proposed to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. In addition, EEOC proposed to require that counselors advise aggrieved persons at the initial counseling session that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation.

After reviewing comments from the various agencies and employee organizations, the Commission has revised the ADR and counseling provisions in response to the comments. Agencies will be required to establish or make available an ADR program. The ADR program

must be available during both the pre-complaint process and the formal complaint process. Counselors will be required to inform individuals about the existence and nature of the agency's ADR program. The Commission encourages agencies to use ADR as a valuable tool in resolving EEO disputes at all stages of the EEO process.

One important provision provides additional time to the pre-complaint processing time when the parties choose to attempt resolution through use of ADR.

29 CFR 1614.105(f) states: Where the aggrieved person chooses to participate in an **alternative dispute resolution** procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be **90 days** (Encl 6).

Conflict Resolution In Nine Easy Steps

1. Define the conflict.

If two sides can define what they are fighting about, the chances increase that misperceptions will be clarified.

2. It is not you against me; it is you and me against the problem.

By focusing on the problem, and not the person with the problem, a climate of cooperation, not competition, is enhanced.

3. List the relationship's many shared concerns and needs, as against one shared separation.

All of us have been, are being or will be broken by life. If we are strong in the broken places, chances for mending increase. They will increase if the strengths of the relationship — the shared concerns and needs — are given more attention than the lone unshared separation.

4. When people have fought, do not ask what happened.

This is an irrelevant question. They will answer with their version of what happened, almost always self-justifying. The better question is, "What did you do?" This elicits facts, not opinions. Misperceptions are clarified, not prolonged.

5. Work on active listening, not passive hearing.

Conflicts escalate when partners try to talk more than listen and then only listen as a time-out for verbal rearming. Listening well is an act of caring.

6. Choose a place to resolve the conflict, not the battleground itself.

Armies tend to sign peace treaties far from war zones. Too many emotions are there.

7. Start with what's doable.

Restoration of peace cannot be done quickly. If it took a longtime for the dispute to begin, it will take time to end it. Work, on one

small doable rather than many large undoables.

8. Develop forgiveness skills.

Forgiveness looks forward, vengeance looks backward. Again, it's anatomy: we have eyes in the front of our heads, not the back.

9. Purify our hearts.

This is merely an elegant way of telling ourselves, "I need to get my own messy life in order before I can instruct others how to live."

Do these nine steps of nonviolent conflict resolution always work? No. Sometimes the conflict partners are so emotionally wounded or ideologically hidebound, that nothing can stop the violence. But large numbers of conflicts can be resolved without killing or wounding the other side, provided the strategies for peacemaking are known.

Source: Abstracted from Colman McCarthy in The Baltimore Sun

Environmental Law Focus

Start Watching How You Handle Your Light Bulbs

The U.S. Environmental Protection Agency (EPA) recently announced a rule which will cause most fluorescent and other lamps with toxic heavy metals, such as mercury and lead, to be identified as hazardous waste. These lamps will now be classified as D009 hazardous waste and must be managed under either full hazardous waste management regulations or under a subset of these regulations at 40 CFR Part 273, known as "Universal Waste."

The rule was published July 6, 1999, 64 Federal Register 36465, and becomes effective January 6, 2000. Some of the potential future problems with handling hazardous waste light lamps may be avoided by sending to a recycler, or switching to low-mercury fluorescent lamps that do not become hazardous waste. EPA's voluntary program, "Green Lights", encourages facilities to relamp to the more energy efficient fluorescent lamps, <http://www.epa.gov/greenlights.html>.

Help for Buying

Green -

Affirmative Procurement

Last issue we reported on the efforts to implement Executive Order 13101: "Greening the Government Through Waste Prevention, Recycling and Federal Acquisition" and that EPA has developed 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). EPA has indicated that it will include this area in its RCRA inspections as of July 1999. A good source of information on affirmative procurement requirements can be found at: <http://www.denix.osd.mil/denix/DOD/News/NAVSUP4C3/affirm.html>.

Do You Have Your YELLOW BOOK Yet?

In the last issue we advised that EPA had revised, after 10 years, its *Yellow Book: guide to Environmental Enforcement and Compliance at Federal Facilities*. All attorneys who are responsible for environmental compliance should have this reference volume

on their bookshelf, or readily access through the Web. The latter has now become easier, as it is available at the following web sites: <http://www.dscr.dla.mil/htis/htis.htm> or <http://es.epa.gov/oeca/fedfac/yellowbk/index.html>.

Environmental Law Focus

For Those Who Missed It--AMC Environmental Team VTC

The Command Counsel Environmental Team recently presented an Environmental VTC for AMC ELs and environmental personnel. Topics included environmental hot topics (CAA sovereign immunity update, Fort Ord CERCLA decision, and Langley AFB Geese case), CAA Risk Management Plan update, Lead Based Paint Hazards Update, and Recycled Material Purchasing requirements. Because of technical difficulties,

some MSCs were not able to connect. For all those who missed it, or do not have VTC capabilities, here are briefing charts of the information presented.

The first series of charts includes the following: Agenda, Hot topics, Non-Brac Transfers, Fort Ord CERCLA Case, and Punative Penalties (Encl 7).

The second series of charts concentrates on Lead

Based Paint and the Langley AFB Geese case. Also see the Ethics Focus for a discussion of the geese case as it pertains to use of E-Mail (Encl 8).

The third series of briefing charts highlightds two subjects: Risk Management Plans and Air Pollution Engineering (Encl 9).

The final series of charts discusses Affirmative Procurement (Encl 10).

ELD Bulletins for July and August 1999

Environmental Law Division Bulletins for July and August 1999 are provided for those who have not received an electronic version from ELD or who have a general interest in Environmental Law.

The July issue highlights the case before the U.S. Court of Appeals for the Ninth Circuit: whether section 120 of the Comprehen-

sive Environmental Response, Compensation and Liability Act ("CERCLA") provides an independent authority for cleanups of federal facilities.

The case is *Fort Ord Toxics Project v. California Environmental Protection Agency et al.* and involves the clean up at the former Fort Ord, California (Encl 11).

The lead article in the August issue is the case of *Ross v. Federal Highway Administration*, a federal district court ruled that an agency's action could be both "arbitrary and capricious" under the National Environmental Policy Act (NEPA) and "substantially justified" for purposes of the Equal Access to Justice Act (EAJA) (Encl 12).

Ethics Focus

More on Contractors in the Workplace New HQ DA Memo...

It seems that the AMC initiative in dealing with the subject issue is having quite an impact on other parts of the Federal Government. This interest has resulted in AMC presentations and classes to ethics officials within and outside of DoD. Our training has been presented to program and procurement personnel of other agencies. DoD issued some 50- plus pages of guidance, previously posted to the AMC Document Library on JAGCNet, and in it you can recognize many of the principles that we teach, along with our examples.

The latest is a memorandum issued jointly by the Administrative Assistant to the Secretary of the Army and the Director of the Army Staff. The purpose is "to remind HQDA Principals and Army Commanders of their responsibilities relating to contractors in the workplace." It acknowledges the importance of contractor support, but warns against

contractor employees performing "inherently governmental functions." Taskings must be within the contract SOW. It explains that contractor employees must always identify themselves as such, and reminds us that contractors do not supervise Federal employees. It concludes with the principle that sexual harassment and other forms of discrimination in the workplace are unacceptable whether it involves contractor or Federal employees.

A copy of this memo has been posted to the AMC Document Library in JAGCNet. Here is the link to the AMC Forum. Before you get there, you will, of course, have to enter your log-on name and password, and then click on the link in the upper right corner for "AMC Document Library". You will find this document in the ETHICS category.

<http://jagcnet.army.mil/jagcnet/forum/amcforum.nsf>

Retirement Briefing Point Paper

HQ AMC Ethics Team Chief, **Mike Wentink**, DSN 767-8003, provides an excellent Retirement Briefing Point Paper that can serve as a model for all AMC ethics counsel advising military or civilian personnel (Encl 13).

There are sections on pre-retirement matters such as negotiating for employment, working with foreign governments including corporations owned or controlled by foreign governments, provisions applicable to General Officers and Level V and VI SESs, procurement integrity rules, reporting requirements, provisions solely applicable to retired military members, as well as other general and miscellaneous issue

One specific reminder applicable to all former officers and employees is the following lifetime prohibition:

"May not, on behalf of someone else, try to influence any USG agency, officer or employee concerning the same particular matter involving a specific party in which you participated personally and substantially for the Government at any time ... for ever (18 USC 207(a)(1))."

OGE & GAO in Conflict on "Conflicts" re A-76?

The Office of Government Ethics (OGE) says a conflict is not a conflict when OGE says it's not a conflict (5 CFR Sec. 2640.403(d)).

The General Accounting Office (GAO) says that a conflict is still a conflict even when OGE says that it's not!

Confusing? See OGE DAEogram DO-99-035, dated 9 Sep 99 (Encl 14). **Mike Wentink** anticipated the problem. OGE is very concerned about the GAO decision in the matter of DZS/Baker LLC, B-281224, dated 12 Jan 99. In that case, the GAO sustained a protest against an USAF A-76 procurement where the decision was to do the work in-house. As you might recall, 14 of the 16 evaluators had their jobs at risk. As such, they were prohibited by 18 USC 208 from participating as evalua-

tors, because the official matter (the evaluation of the proposals) would have a direct and predictable affect on their financial interests, i.e., their jobs. However, 5 CFR Sec. 2640.403(d) exempts those employees from that conflict. OGE's position is that this exemption also means that there are no appearance problems, i.e., it "constitutes a determination under the standards of conduct that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations."

GAO started with the FAR premise that "the expenditure of public funds require[s] the highest degree of public trust and an impeccable standard of conduct." OGE faults this because this quotation does

not take into account the previous sentence that includes the phrase "except as authorized by statute or regulation." In effect, OGE says that its regulation authorizes this conflict.

OGE says that the GAO concluded that it was a conflict of interest for the affected employees to participate. Yes and No. The GAO did not conclude that there was an 18 USC 208 conflict of interest, or even that there was an appearance (5 CFR Sec. 2635.502). Rather, the GAO concluded that there was an "organizational conflict of interest (OCI)," and essentially decided in this case that the OCI created such appearances of, if not actual, impropriety so as to affect public trust in the integrity of the acquisition process.

E-Mail and Geese and Golf Courses

The story in the provided article (Encl 15) provides an excellent example of how E-Mail can come back and haunt you, as it did personnel at Langley AFB. Did they

trap and kill 189 geese as an aircraft safety measure or to keep the golf course clean? Advise your clients about the use of E-Mail, and make use of a training videotape that

Mike Wentink has on the subject--only 1 AMC Legal Office has thus far. Thanks to **MAJ Mike Stump** for noticing the article.

New or Maybe Not Entirely New OGE Form 450 Exclusions

Army SOCO has published two additional exclusions from the requirement to file a Confidential Financial Disclosure Report (OGE Form 450). The exclusion was done by SECARMY Memorandum dated 20 Aug 99, and issued pursuant to 5 C.F.R. Sec. 2634.905 (Encl 16).

IMPAC Card Holders

1) Actually, the first is not an entirely new exclusion. Rather, it builds on and expands the JER 7-300b.(2) exclusion of non-contract office personnel who are involved in procurement matters of \$2,500, or less, each time, and \$20,000, or less, per year. The expansion applies ONLY to IMPAC card holders. For IMPAC card holders, the SECARMY Memo eliminates the single action criteria (\$2,500 or less) and sets only a per annum criteria of \$100,000. This exclusion now applies even if the IMPAC card holder works in the contracting or procurement office. But, it does not apply if the IMPAC card holder has a

warrant, administers or monitors grants or other federally conferred benefits, or regulate or audit entities. This expansion does not apply to requirements generators, those who might accept and sign off on deliveries, or who might oversee the performance of small contracts... they still are governed by the \$2,500/\$20,000 rule... only to IMPAC card holders.

Special Government Employees

(2) Secondly, as an exclusion from the general requirement for special Government employees (18 U.S.C. 202(a)), as required by 5 C.F.R. Sec. 2634.904(b), academic interns are no longer have to file, if they would only file because they are a SGEs. (If you have not required your academic interns to file OGE Forms 450 as SGEs, don't worry... I don't think that anyone else was either, to include the Office of Government Ethics. This exclusion "legitimizes" practice).

Impartiality & Personal Relationships

In the business section of "The Washington Post," an interesting situation is posed in the "On the Job" column of the 28 July 1999 issue. Two employees in a Federal agency have a close, personal relationship. One of the employees in this relationship received a promotion, and she selected the other employee in the relationship to work for her... which was also a promotion for the second employee.

The answer set out in the column appears correct as far as it goes: there are OPM rules, but they apply only to marriage partners or other familial relationships. But, the OPM rules do not apply in this type of situation. Too bad; it reflects bad judgment, but the OPM rules don't apply.

But, **Mike Wentink** suggests that this answer does not go far enough... and, as ECs, you all know that! The "Standards of Ethical Conduct" govern this situation. There is definitely a "covered relationship" here as defined by 5 C.F.R. Sec. 2635.502(b)(1). It might seem that it does not *exactly* fit the definition, but 5 C.F.R. Sec 2635.702(d) brings this relationship under Sec. 2635.502. For more see (Encl 17).

AMC Legal Office Profile

Anniston Army Depot, Anniston, Alabama

Nestled in the foothills of the Appalachian Mountains in northeast Alabama, Anniston Army Depot (ANAD) occupies over 25 square miles of land, encompassing more than 18,000 acres of woodland and 10 acres of lakes and streams. Although rural in locale, ANAD is easily accessible by road, rail, and air. The ANAD currently has 2,647 civilian employees with a \$260M operating budget and a \$120M payroll.

The Depot Mission

From its origin in 1942 as an ammunition receiving, shipping, and storage depot, ANAD has transformed into a state-of-the-market maintenance facility. Although ANAD is a multi-mission installation, it is most frequently recognized for its heavy combat vehicle expertise. From the M48 tank of the 1950's to the M1 Series Battle Tank of today, ANAD has rightfully earned its reputation as "The Tank Rebuild Center of the World." But, we're not just tanks anymore! ANAD is presently the only

Small Arms Rebuild Center for our nation's Army. Whether it's rifles, pistols, or weapon-related hardware, ANAD's small arms repair facility possesses the skills and equipment necessary to satisfy our customer's needs. ANAD has also taken the lead in establishing partnerships and teaming arrangements with private industry. Its unique skills, equipment, and facilities, coupled with its diversity, have proven to make ANAD a prime target for teaming and partnering arrangements for defense and nondefense related items. ANAD is also a storage site for 7.1% of the nation's chemical weapons stockpile.

The Legal Office Mission Statement

The Anniston Army Depot Legal Office will deliver quality legal counseling and representational services to our clients in a professional and timely manner; we will remain responsive to our clients' current and future needs; and our work product will reflect the highest credit upon our people, the Depot, and the Army.

The Legal Office People

The ANAD Legal Office family consists of four attorneys and two paralegals. This close-knit family has a combined total of 88 years of service in this same office - talk about dedication!!

Les Mason (25 years) -

Les has been assigned to AMC as the chief legal counsel at ANAD since Oct 73. Four years were on active duty as the Depot Judge Advocate, and the balance, except for 8 months of active duty during the Persian Gulf War, were as the civilian supervisory chief counsel. His area of specialization is in "industrial law," with special emphasis, *inter alia*, in acquisition, partnering/privatization, law office management, and chemical emergency response. In 1987 Les received the Army Materiel Command Attorney of the Year Award. Interests beyond the law and AMC, include family, USAR, agriculture, investing, antiques, canoeing, billiards, and following the CATS (University of Kentucky Wildcat basketball of course).

AMC Legal Office Profile

Anniston Army Depot, Anniston, Alabama

(Continued)

Shelby L. (Mickey) Starling (13 years) - Mickey has served continuously in the Legal Office since May 86 with the exception of 7 months of military service with the 22d SUPCOM SJA Office in Dhahran, KSA, during Operations Desert Shield and Storm. Since mid 1987 he has been the installation's Environmental Law Specialist while also providing legal support in such areas as occupational health and safety, military justice, chemical surety, and acquisitions/ISSAs. He is also a TQM Coordinator, and a CO2 facilitator. Mickey and his wife, Sara, have 3 children: Todd-25; Laurel-21; and Claire-16. Mickey is a LTC and Legal Support Team leader in the Army Reserve. His interests include church, gardening, and jogging.

George Worman (13 years) - George is a Depot Labor Counselor, with primary responsibility for labor and civilian employment law. George also provides legal counsel on installation management issues such as ethics, fiscal law, and government information practices. He is a frequent speaker on prevention of sexual harassment, alternative dispute

resolution, and ethics in government, and he is a member of the installation Risk Reduction Team and Consideration of Others (CO2) Steering Committee. In 1996 he was presented with the Army Materiel Command Preventive Law Award. George lives in Jacksonville, Alabama, with his wife Beverly and daughters Katie, Kendall, and Karoline. He is active in the First United Methodist Church of Jacksonville, the Boy Scouts of America, and the Alabama Alumni Association. In his spare time, he enjoys camping, cooking, and playing the trumpet.

Susan Bennett (8 years) - Susan is a Depot Labor Counselor, with responsibility for civilian personnel and equal employment opportunity law. She also provides legal assistance to eligible clients and she provides legal advice and assistance to management in a variety of areas. She is a member of the EEO Action Committee, the Risk Reduction Team and the CO2 Steering Committee. She lives in Jacksonville with her 10 year old daughter. In her spare time she loves to read mystery novels and bake.

Joan Hayden (15 years) - Joan is a paralegal and provides support mainly in the contract and environmental law areas. She is responsible for the initial review of contracting and direct sales actions, as well as Interservice Support Agreements. She also provides litigation and administrative hearing support to the labor counselors. She is the ANAD Claims Officer and serves in that capacity on the CAIRA Team. In her spare time she likes to walk, cross-stitch, crochet, and spend time with her 3 children and grandson.

Kathy Phillips (14 years) - Kathy is a paralegal and the automation coordinator for the office. Her major responsibilities are to provide litigation and hearing support to the labor counselors and to ensure operation of the office computer system. She is also responsible for initial interviews of legal assistance clients and serves as the office budget coordinator. Kathy and her husband, Ken, have one child, Keith. Kathy is the pianist at her church where her husband Ken serves as Pastor. In addition to her church activities, Kathy enjoys antiquing, gardening, and family time.

Faces In The Firm

Hello

STRICOM

Laura Cushler arrived on August 29, travelling about as far as you can from Sierra Army Depot.

AMCOM

Rachel Howard joined Branch C of the Acquisition Law Division in September. A graduate of the University of Alabama Law School, she comes to Huntsville from private practice.

TACOM-ARDEC

Peter Giella joined the office in August from MTMC's office in Bayonne. Peter has 19 1/2 years of federal service. He graduated from Columbia Law School with a LLM from NYU.

Goodbye

AMCOM

Dal Widner retired on 30 September from the Acquisition Law Division after 10 years of service with MICOM/AMCOM. Best wishes to you.

CECOM

CPT Christian Knapp departed CECOM and the JAG Corps for private practice in Sacramento, California, with the firm Pursley & Glaser, P.C.

STRICOM

Bids farewell and best wishes to **Mike Lassman** who departed to join the HQ AMC Legal Office (as previously reported).

Promotion at AMCOM

CPT Chin-Zen Plotner was promoted to her current rank in a ceremony on 1 September officiated by Colonel Cornelius, Deputy Chief Counsel/SJA. Captain Plotner is Chief of Legal Assistance in the Office of Staff Judge Advocate.

TECOM Becomes ATEC

On 1 October TECOM ceases to exist and the US Army Test and Evaluation Command (ATEC) acquires most of the the former MSC's resources, test ranges and facilities.

We in the AMC Legal Community lose 19 counsel.

Best of luck and please stay close to AMC: HQ TECOM's **Laura Haug** and **Mary Raivel**; DPG's **LTC Gaylen Whatcott**, **LTC Gil Brunson**, and **Jack Skeen**; WSMR's **LTC Karl Ellcessor**, **Bob Colvin**, **CPT Justin Tade**, **Bill Fugelso**, **Steve Phillips** and **Mark Melynk**; and YPG's **CPT Charles Hardenbergh**, **MAJ George Figurski**, **Ron Greek**, **David Holbrook**.

The APG Garrison and attorneys [all but 3] go to SBCCOM at Edgewood.

Birth

Major **Gene** (Environmental/Safety Law) and Angie **Baime** had a baby boy August 25. The world welcomed Henry Ragland Baime with a beautiful sunny day. Congratulations! He's beautiful.

REDS TRAINING PROGRAM AGENDA

DAY 1

0800-0830 **Welcome:** Jean Cozart

Workshop Objectives, Administrative Announcements

0830-0930 **Team Building:** Linda Mills

Attendee Introduction: name, organization, duty position and 1 word to describe your experience with conflict outside the workplace.

REDS Team group discussion: Describe your experience with workplace grievances and complaints

0930-0945 **Break**

0945-1030 **Alternative Dispute Resolution:** Steve Klatsky

Basic review of ADR benefits, characteristics and methods

1030-1100 **REDS History and Background:** Carole Page

What did we do and what happened to bring REDS to you?

1100-1200 **REDS Program:** Jay Jamison

REDS components, Roles and Responsibilities

1200-1300 **Lunch**

1300-1530 **REDS Processes:** George Worman and Mary Mullen

REDS ADR Menu: mediation peer review, factual discovery.

REDS Action Plan, ADR agreement forms

REDS Team exercise: REDS Method Selection

(Break During this Session)

1530-1615 Evaluation: Sam Shelton, Jose Torres

Discussion of evaluation and feedback forms

1615-1630 Barriers, Impediments & Solutions: Kathy Buttrey, Elizabeth Bruton-Pollard

Homework: Team discussions and identification of barriers, impediments and potential solutions to the implementation and acceptance of REDS at your command/installation

DAY 2

0730-0800 Day 1 Recap: Steve Klatsky

0800-0900 Barriers, Impediments & Solutions: Kathy Buttrey

Team reports and group discussion

0900-0930 Metrics: Elizabeth Bruton-Pollard

Minimum reporting requirements to measure REDS success

Matrix developed by TACOM

0930-0945 Break

0945-1145 Marketing & Implementation: Moderator Jay Jamison

How to market at your installations--; Presentations by REDS Test Site representatives

(Break during this block)

1145-1215 REDS Mentoring Program: Carole Page

Each REDS Team provided an individual Mentor, from HQAMC or REDS test site, to assist in implementation, providing information and sharing experiences.

1215-1230 Wrap up: Jean Cozart

REDS TRAINING DESKBOOK

1. Inside Folder: Agenda, REDS brochure, note paper (3-hole punched)
2. Before TABS: Joint Memo to attendees signed by Korte, Darby, Cozart: Klatsky
3. TAB 1: List of AMC REDS Teams
4. TAB 2: REDS Action Plan
5. TAB 3: ADR Materials
6. TAB 4: REDS History and Background (Include Gen Coburn Briefing)
7. TAB 5: REDS Program
8. TAB 6: REDS Process
9. TAB 7: Evaluation
10. TAB 8: Metrics
11. TAB 9: Marketing & Implementation
12. TAB 10: REDS Mentoring Program

SUBJECT: The Use of Blanket Purchase Agreements and “Mini-Competitions” Under
General Services Administration Federal Supply Schedule Contracts

Blanket Purchase Agreements (BPAs) have long been useful for certain small purchases or simplified acquisitions. In recent years, they have become more popular for a specialized use, as adjuncts to General Services Administration Federal Supply Schedule (GSA FSS, or Schedule) contracts to obtain more favorable prices or other benefits for the BPA-issuing agency and designated users. Such BPAs are issued under FAR 8.404(b)(4) and 13.303-2(c)(3), and under provisions contained in the underlying Schedule contracts, rather than the general rules for BPAs (FAR 13.303-1, et seq.).

A normal BPA is not a complete contract in itself until an order is issued under it; until then, it is no more than a “charge account” (FAR 13.303-1(a)). As for those BPAs issued under Schedule contracts, they do not stand entirely on their own as separate and distinct contracts even when orders are issued. Additionally, they are not subject to the relatively low purchase limitations that apply to normal BPAs (FAR 13.303-5(b)(1)). Despite that, the issuance of these BPAs and orders under them are not subject to normal competition requirements; because the underlying Schedule contract was competitively awarded, they are presumed to be issued pursuant to full and open competition, like any order against a Schedule contract. Such BPAs may not, however, be “inconsistent with the terms of the applicable schedule contract” (FAR 13.303-2(c)(3)) and are supposed to address “the frequency of ordering and invoicing, discounts, and delivery locations and times” (FAR 8.404(b)(4)). As such, these BPAs are adjuncts to the underlying GSA FSS contracts, whose purpose is to meet specialized requirements of the users issuing them.

At FAR 8.404(b)(3) and (5), ordering offices are urged to seek price reductions for orders over the maximum order threshold. In their drive for lower prices and other benefits, agencies have introduced a form of competition into the process of issuing orders or BPAs under GSA FSS contracts. That is to say, they may invite Schedule contract holders to compete for issuance of an order, or for issuance of one or more BPAs under their contracts, or even for issuance of an order under previously issued BPAs, in response to a Request for Quotations (RFQ), usually on SF 1449 or other appropriate form.

These competitions, and issuance of requests for quotations, are not required by the FAR. It should be noted, however, that GSA has issued special ordering procedures under FAR 8.402 for two categories of Schedule 70 information technology (IT) services which are based on hourly rates. These are IT professional services under Special Item No. (SIN) 132-51, and Electronic Commerce (EC) services under SIN 132-52. The special procedures do require use of RFQs, among other things, to support the issuance of orders. The stated rationale is that, although the

Schedule labor rates are fair and reasonable, “the ordering office . . . is responsible for considering the level of effort and mix of labor proposed to perform a specific task being ordered and for making a determination that the total firm-fixed price or ceiling price is fair and reasonable.” GSA Revised Terms and Conditions for IT Professional Services (SIN 132-51) and EC Services (SIN 132-52), para. 2a(2).) No such procedures have been promulgated for any other category of IT services, or for IT equipment or supplies. Nevertheless, the published procedures are of interest for the framework they provide for general implementation of the loose guidance at FAR 8.404.

Other than as stated above, what standards govern the Government’s conduct of such “mini-competitions”? The FAR provides only limited guidance. The provisions under FAR 13.303 give a clear picture of what a BPA should look like, but BPAs under Schedule contracts are mentioned only in passing (FAR 13.303-2(c)(3)), and the purchasing instructions at FAR 13.303-5 are largely irrelevant to these BPAs. The potentially useful guidance at FAR 16.505(b) concerning issuance of orders under multiple-award Indefinite Delivery/Indefinite Quantity (IDIQ) contracts is inapplicable (FAR 16.500). FAR Part 38 on Schedule contracting is silent. Only FAR 8.404 even hints at the possibility of competition in its ordering procedures for optional use schedules. The GSA’s special ordering procedures apply only to certain services. With the dearth of regulatory guidance, the General Accounting Office (GAO), through its decisions, has provided some information on how to conduct mini-competitions in connection with BPAs and orders under Schedule contracts.

What has the GAO told us? In case after case, the GAO has pointed out that agencies are not required to conduct competitions for purchases carried out in connection with GSA FSS contracts, but that, if they elect to do so, the GAO will review the agency’s actions to make sure they were fair and reasonable, and consistent with the solicitation (e.g., *Haworth, Inc.*, B-256702.2, Sept. 9, 1994, 94-2 CPD para. 98; *Amdahl Corp.*, B-281255, Dec. 28, 1998, 98-2 CPD para. 161). Competition is the key; no distinction is made between orders or BPAs issued under Schedule contracts, or orders issued under BPAs.

If the agency discovers that its RFQ or Request for Proposals (RFP) does not accurately set forth its actual minimum needs, the agency must amend the solicitation and communicate the change to all participating vendors and give them a chance to bid anew. (*Lanier Business Products, Inc.* B-203977, Feb. 23, 1982, 82-1 CPD para. 159; *New Brunswick Scientific Co., Inc.*, B-246291, Feb. 3, 1992, 92-1 CPD para. 141.)

Fair treatment is imperative. Once it commences a mini-competition, an agency cannot take shortcuts, such as amendment or waiver of its requirements for only one of the vendors without communication to the others. (*Haworth, Inc.*, op. cit.; *Dictaphone Corp.*, B-254920.2, Feb. 7, 1994, 94-1 CPD para. 75; *SMS Data Products Group, Inc.*, B-280970.4, Jan. 29, 1999, 99-1 CPD para. 26.) (Id.)

The waiver or change of requirements can have implications for contract scope. In the 1997 case of Marvin J. Perry & Associates, B-277684, Nov. 4, 1997, 97-2 CPD para. 128, the Navy issued a RFQ to several holders of GSA FSS contracts for bedroom furniture. The RFQ specified that the furniture be made of red oak. The Navy issued an order to the low price vendor, which made delivery. Subsequently, the vendor advised that its supplier had mistakenly delivered ash furniture, which was cheaper than red oak. The Navy decided to accept the ash furniture when the vendor showed that it could stain it to look like red oak. The protestor stated that if it had known that the Navy would accept ash, it could have submitted a much lower quote. The GAO determined that the substitution was a material change, and beyond the scope of the order, primarily because of the significant difference in cost, and because the vendors could not reasonably have anticipated the change. “[T]he Navy was obligated to ensure that the competition was conducted fairly; the fact that a requirement is fulfilled through the FSS does not exempt an agency from treating vendors consistent with the concern for a fair and equitable competition that is inherent in any procurement.” (*Id.*, pp. 4-5.) In this case, the Navy should have given the competing vendors an opportunity to submit quotes on ash furniture.

An agency must recognize when clarification of a proposal is needed, and must seek it. In SMS Systems Maintenance Service, Inc., B-270816, April 29, 1996, 96-1 CPD para. 212, the GAO upheld a protest against a GSA Schedule order for computer equipment maintenance services by the Department of the Treasury because of unequal treatment of the vendors. The agency received two proposals. Both were unclear on significant points, but the agency sought clarification from only one, DEC, which happened to be the second low bidder. Moreover, DEC’s clarification revealed that it was not planning to meet the agency’s requirements as written. The agency issued an order to DEC. Upholding the protest, the GAO concluded, similar to *Haworth, op. cit.*, that the agency improperly relaxed the requirement for DEC, and that fairness required that SMS be given an opportunity to clarify its proposal, and also to quote on terms similar to those provided by DEC. By implication, alternatively, the agency should have affirmatively asked SMS for clarification; on the facts, apparently that vendor could easily have satisfied the agency’s concerns.

If an agency asks vendors to go to the trouble of preparing competitive quotes to meet a special requirement, it must say something about the basis for award and the evaluation criteria. In COMARK Federal Systems, B-278343, Jan. 20, 1998, 98-1 CPD para. 34, the Comptroller General sustained a protest against an acquisition of the Department of Health and Human Services for failure to do this. In 1997, the agency issued BPAs for various kinds of Automatic Data Processing (ADP) products and services, to several Schedule contractors. Subsequently, the agency issued to the BPA holders a RFQ for a delivery order for desktop workstations. The RFQ set forth no evaluation criteria. Eventually the agency accepted a non-low quote from one BPA holder and issued the order. COMARK protested “that the RFQ was silent as to what evaluation criteria the agency would follow”, and that it thought the agency wanted only “the low, technically acceptable quote.” Instead, according to the protestor, the agency “improperly engaged in a ‘best value’ procurement.” The GAO agreed, saying that, if an agency plans to conduct something beyond a simple Schedule purchase, and issues solicitations asking, for

example, that vendors select a configuration of items to meet the agency's specified requirements, the agency must provide some guidance about the selection criteria, "to provide for a fair and equitable competition." While the agency "need not identify detailed evaluation criteria", it must at least indicate the basis on which selection is to be made, in this case either low-cost technically acceptable, or best value with a cost/technical tradeoff.

BPAs must be issued in accordance with both FAR 8.404 and 13.303. The case of Boehringer Mannheim Corp., B-279238, May 21, 1998, 98-1 CPD para. 141, concerned a purchase of blood glucose monitoring products by the Department of Veterans Affairs. The agency conducted a competition among holders of GSA FSS contracts and issued a BPA to the winning vendor. The protestor complained about the alleged improper bundling of different products. Reviewing the facts, the GAO disagreed. Beyond that, two points are worth noting. In denying the protest, the GAO reviewed the agency's actions in light of FAR 8.404 and 13.303 and concluded that the agency "executed the . . . BPA in accordance with the FAR." Furthermore, the GAO observed, "A BPA is not a contract," but rather, as described at FAR 13.303-1(a), a simplified method of filling anticipated repetitive needs by establishing "charge accounts" with qualified sources.

The GAO's decision in the case of Information Systems Technology Corp., B-280013.2, Aug. 6, 1998, 98-2 CPD para. 36, indicates that a protester's challenge to a mini-competition will fail unless it can show prejudice. Here the GAO considered an acquisition of Independent Validation and Verification (IV&V) and system testing support services by the Department of Health and Human Services. The agency held a competition among holders of GSA FSS contracts for issuance of several BPAs, to be based on one factor, technical, with subfactors. Vendors were required to submit technical proposals for the BPAs. At their option, vendors could also propose separately on up to four task orders. According to the evaluation criteria in the solicitation, everything would be evaluated, but issuance of BPAs would be based only on technical proposals. Cost/price was not a factor for the BPAs, but would be a consideration later for issuance of the task orders. The protestor was not issued a BPA because the agency felt that its technical proposal did not contain enough detail to show that it understood the requirement. The firm argued that the agency should have considered its task order proposals in conjunction with its technical proposal, to obtain the desired information. Moreover, the protestor believed that the evaluations of the technical proposal and the task orders would be combined, because the invitation letter did not make clear to it that they would remain separate. The GAO agreed that the letter was unclear, but found that this did not prejudice the protestor. Not only did the protestor receive the lowest score on its technical proposal, but it also earned low scores on its task order proposals, again because of lack of detail. The task order scores would not have materially improved the protestor's technical score. (The GAO evinced no concern that cost or price was not a factor, presumably because prices already were available in the underlying GSA FSS contracts, and users would have several BPA holders from among whom to choose for performance of their task orders.)

Discussions with quoters must be meaningful. In sustaining the protest of ACS Government Solutions Group, Inc., B-282098, June 2, 1999, the Comptroller General found that the

Department of Housing and Urban Development had made a number of errors in an acquisition of comprehensive servicing for single-family home mortgages. The agency conducted a competition for issuance of a task order under the winning quoter's GSA FSS contract. The GAO found that the evaluation was flawed in several respects. The winning quote did not meet certain requirements concerning use of software; in effect, the agency changed or relaxed its requirements, but did not amend the RFP or otherwise notify all the offerors of the change. Further, under the past performance factor, the winner was in effect given double credit for certain experience. Finally, records of the evaluation showed that the agency was concerned about an unexplained increase in the protestor's prices from the base year to the outyears. However, the protestor apparently was not asked for an explanation. The GAO admitted that it was unsure whether this lack of discussion had any impact on the selection decision, but nevertheless felt that the agency was at fault for not discussing its concern with the protestor. Apparently treating this competition under Schedule contracts the same as if the agency had issued a RFP under FAR Part 15, the GAO stated, "The statutory and regulatory requirement for discussions with all competitive range offerors . . . means that such discussions must be meaningful, equitable, and not misleading. . . Discussions cannot be meaningful unless they lead an offeror into those weaknesses, excesses or deficiencies of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award." The GAO cited FAR 15.306(d)(1) and Du and Associates, Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD para. 156, among other authorities.

What conclusion can we draw from the above decisions? If an agency conducts a competition for issuance of Schedule orders, BPAs under Schedule contracts, or orders under such BPAs, in which vendors are required to propose something, such as lower prices, other than what is set forth in their Schedule contracts, the GAO will examine the competition to determine whether it was conducted in a fair and reasonable manner, and consistently with the solicitation. Except when proceeding under the GSA's special ordering procedures for certain services, an agency does not have to conduct a competition, or do anything more than what is required by FAR 8.404. If a BPA is issued, some of the guidance at FAR 13.303 will apply. Beyond that, the more an agency chooses to use procedures like those required for full and open competition, the more likely that the agency may be deemed bound to follow the applicable guidance in other parts of the FAR.

The Point of Contact in the Legal Office for this subject is Mr. Percival D. Park, DSN 221-3304.

KATHRYN T. H. SZYMANSKI
Chief Counsel

ARSENAL STATUTE

“The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States so far as those factories or arsenals can make those supplies on an economical basis.” 10 United States Code section 4532 (a)

The Arsenal Statute is a fairly old, little used, and oft misunderstood piece of legislation. That said, it could very well be the key to maintaining the Army’s Organic Industrial Base. The following statement by an Arsenal Statute sponsor best illustrates this point. “The purpose of this amendment is to compel the executive officers of the government to have government work done at such arsenals as [Watervliet] and to cease handing out appropriations to private manufacturers. It is perfect nonsense to allow [over \$20,000,000 in government investment] to go to waste and at the same time turn over work to be done by contract to private manufacturers.” 59 Cong. Rec. 4157 (1920).

Recent events regarding the ever-shrinking role of Government-owned facilities in acquisition planning have increased debate about the proper role of the Arsenal Statute. Is an Arsenal Statute analysis mandatory? To what extent if any does the Arsenal Act require “component breakout” with “system buys”? What does “supplies” mean? Must a facility currently make the supplies needed or simply be capable of making the needed supplies? What is meant by economical basis? Are “out-of pocket” cost evaluations always required or is it sometimes appropriate to evaluate “fully burdened” costs? When “out of pocket” costs are evaluated, should Program Managers be billed on the basis of “fully burdened” costs? To what facilities does the Arsenal Statute apply? Those are but a few questions raised by the Arsenal Statute. The General Accounting Office has addressed many of the questions. Nevertheless, questions still abound. This article will not attempt to answer all the questions raised. Other questions may be addressed in later articles. Rather, this article will address the question “To what facilities does the Arsenal Statute apply?”

Bottom line up front. The Arsenal Statute applies to Government-owned production facilities including arsenals, factories, ammunition plants and depots. This includes both Government-owned Government-operated (GOGO) and Government-owned Contractor-operated (GOCO) facilities.

Even though GOCO application has been a consistently applied principle of the Arsenal Statute, there are those in the acquisition community that mistakenly believe that the Arsenal Statute only applies to GOGOs. Two documents form the basis for this confusion. The first is the Office of the Secretary of the Army (OSA) Memorandum dated 30 July 92 from Assistant Secretaries of the Army Susan Livingstone and Stephen K. Conner. The Conner-Livingstone memorandum “provides guidance for the use of the authority of the Arsenal Statute.” However, the memo only provides guidance as it

relates to GOGOs. The purpose of the memorandum was not to eliminate GOCOs from the Arsenal Statute. Rather the purpose of the memo was to establish a procedure to identify and workload GOGO industrial facilities as manufacturing sources prior to any procurement action. To that end, the policy directed pre-solicitation make/buy decisions rather than head-to-head competitions with private industry.

The second source of confusion is the Army Materiel Command's (AMC) draft Make or Buy regulation dated 6 June 1995. In short, AMC's regulation prescribes policies, responsibilities and procedures for implementing the Conner-Livingstone memorandum. As such, it also limits its application to GOGO facilities.

Notwithstanding OSA and AMC omission of GOCO facilities in their policies, it is a well-settled principle that the Arsenal Statute applies to GOCO facilities. Any confusion regarding this fact was settled by the Comptroller General Opinion B-143232, December 15, 1960. In that opinion, the Comptroller General stated "'Government-owned factories' must be interpreted to include both Government-owned Government-operated, and Government-owned Contractor-operated industrial facilities." Since that opinion, the GAO has consistently reaffirmed that position. See Talon Manufacturing Company, Inc. B-261687, B-261687.2, October 19, 1995, Action Manufacturing Company B-220013, November 12, 1985, Olin Corporation B-189604, January 18, 1978, Olin Corporation, B-175703, July 23, 1973.

The future of the Army's industrial base is at best uncertain. However, if you want an indicator of what's to come, look to the Arsenal Statute. The Arsenal statute may be the only way to ensure that the full potential of the Army's Organic Industrial Base is used for economical acquisition of supplies and ensure the availability of these facilities and capabilities to meet urgent surge and contingency materiel requirements. As the Arsenal Statute goes, so goes the Army's Organic Industrial Base.

Questions regarding the Arsenal Statute may be addressed to CPT Marc A. Howze, Attorney Advisor, Industrial Operations Command at DSN 793-8111/COM (309) 782-8111 or email howzem@ioc.army.mil

LEGAL REVIEW OF PATENT LICENSING AGREEMENTS

The Intellectual Property Counsel of the Army is tasked with the final legal review of all license agreements under Army-owned patent or patent applications. See AR 27-60, Chapter 7 and AR 70-57, Chapter 1. The federal regulations for licensing of Government owned inventions issued by the Department of Commerce require that all licenses include certain provisions. These regulations appear at 37 CFR Part 404 and are restated at Chapter 3, Section IV, of AR 70-57 (with "laboratory Director" substituted for "Federal agency" and "Army laboratory-owned" substituted for "federally owned").

A significant number of patent licensing agreements are being recommended for disapproval or modification by this office because the license clauses appearing in the patent licensing agreements are not in compliance with the federal regulations. Either the required clauses are missing or the included clauses are inconsistent with the federal regulations. Before submitting patent licensing agreements to this office, all agreements should be reviewed carefully to insure the propriety of the agreements. For this purpose, it is suggested that use be made of the check list provided below.

CHECK LIST

(All references are to 37 CFR. Headings correspond to the Articles of a typical patent licensing agreement)

LICENSE GRANT

1. Is the duration of the license for a period specified in the license agreement? § 404.5(b)(1)
2. Is the license nonassignable without approval of the Federal Agency? § 404.5(b)(3)

LICENSEE'S PERFORMANCE

1. Has licensee agreed that any products embodying the invention or produced through the use of the invention will be manufactured substantially in the United States? § 404.5(a)(2)
2. Does the license require the licensee to carry out the plan for development or marketing of the invention, or both, to bring the invention to practical application within a period specified in the license? § 404.5(5)

REPRESENTATIONS AND WARRANTIES

_____ Does the license state that nothing relating to the grant of the license, nor the grant itself, shall be construed to

confer upon any person any immunity from or defenses under the antitrust laws or from a charge of patent misuse?
404.5(11)

REPORTS

1. Does the license require the licensee to report periodically on the utilization? § 404.5(6)

MODIFICATION AND TERMINATION

1. Does the license provide for the right of the Federal Agency to terminate the license, in whole or in part?
§ 404.5(9)

1. May the license be modified or terminated upon mutual agreement of the Federal agency and the licensee?
§ 404.5(10)

3. Does the license provide that a licensee whose license has been modified or terminated, in whole or in part, may appeal to the agency head? § 404.11

SUBLICENSING

1. Does the license provide that each sublicense shall make reference to the license, including the rights retained by the Government? § 404.5(4)

RESERVATION OF RIGHTS (Exclusive and Partially Exclusive licenses)

1. Is the license subject to the irrevocable, royalty-free right of the Government to practice and have practiced the invention? § 404.7(a)(2)(i) and (b)(2)(i)

2. If a domestic license, does it reserve to the Federal agency the right to require the licensee to grant sublicenses to responsible applicants, on reasonable terms, when necessary to fulfill health or safety needs?
§ 404.7(a)(2)(i)

3. Is the license subject to any licenses in force at the time of the grant of the license? § 404.7(a)(2)(iii) and (b)(2)(ii)

Alan P. Klein
Intellectual Property
Counsel of the Army

Alternative Dispute Resolution:

In the NPRM, the Commission proposed to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. In addition, EEOC proposed to require that counselors advise aggrieved persons at the initial counseling session that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation.

The commenters generally supported both proposals, agreeing that providing an ADR mechanism in the pre-complaint stage of the EEO process will resolve more claims earlier in the process. Many of the agency commenters emphasized their need for flexibility in developing their ADR programs. Small agencies, in particular, requested that they have the authority to determine on a case-by-case basis whether to offer ADR to an aggrieved person for his or her claim. Other agencies urged the Commission to ensure that the election provision take into account that ADR should be voluntary for both parties, the aggrieved person and the agency. Commenters also requested that EEOC clarify how the pre-complaint process will operate when ADR is involved and address the responsibilities of the Counselors throughout that process.

The Commission has revised the ADR and counseling provisions in response to the comments. Agencies will be required to establish or make available an ADR program. The ADR program must be available during both the pre-complaint process and the formal complaint process. Counselors will be required to inform individuals about the existence and nature of the agency's ADR program. The Commission encourages agencies to use ADR as a valuable tool in resolving EEO disputes at all stages of the EEO process.

Agencies are free to develop ADR programs that best suit their particular needs. While many agencies have adopted the mediation model, other resolution techniques are acceptable, provided that they conform to the core principles set forth in EEOC's policy statement on ADR, contained in Management Directive 110. The Commission believes that agencies should have flexibility in designing their ADR programs. EEOC expects that, overall, agencies will develop an array of ADR programs, designed to suit their particular circumstances. Agencies with limited funds and resources can use the services, in whole or in part, of another agency, a volunteer organization or other resources to make available an ADR program.

In keeping with the Commission's emphasis on voluntariness as a component of ADR, agencies may decide on a case-by-case basis whether it is appropriate to offer ADR in a given circumstance. EEOC does not anticipate that ADR will be used in connection with every matter brought to a Counselor. For example, some agencies may wish to limit pre-complaint ADR geographically (if extensive travel would be required), or by issue (excluding, for example, all claims alleging discriminatory termination). Some agencies may wish to exclude class allegations from their ADR programs. Agencies may not, however, exclude entire bases of discrimination from ADR programs. For example, it would be inappropriate for an agency to exclude from its ADR program all claims alleging race discrimination. [from an ADR program]

In response to a comment, the Commission has revised the regulatory provision governing the initial counseling session. The Commission has removed from section 1614.105(b)(1) the requirement that Counselors advise individuals both orally and in writing of their rights and responsibilities, revising the section to require only that Counselors provide that information in writing. Counselors are encouraged to discuss the rights and responsibilities involved in the EEO process orally with individuals, but are only required to provide that information to the individuals in writing.

When an agency offers ADR to an individual during the pre-complaint process, the individual may choose to participate in the ADR program at any point in the pre-complaint process. In all cases, the Counselor will conduct an initial counseling session, as currently provided, identifying claims and fully informing individuals about their rights. When ADR is selected, resolution attempts through traditional counseling will be eliminated and the limited inquiry of the traditional counseling will change. Counselors must also inform individuals that if the ADR process does not result in a resolution of the dispute, they will receive a final interview and have the right to file a formal complaint. Management Directive 110 will contain additional guidance on these pre-complaint procedures.

The Commission's intention in requiring an ADR program is that agencies establish informal processes to resolve claims. Thus any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act. Generally, the agency should have an official at any ADR session with full authority to resolve the dispute. To the extent consultations with other agency officials would be necessary during any

session, the agency is accountable for making sure those consultations can be accommodated.

If the ADR attempt succeeds in resolving the claim, the agency must notify the Counselor that the claim was resolved. If the ADR attempt is unsuccessful, the agency must return the claim to the Counselor to write the counseling report. That report will describe the initial counseling session, frame the issues, and report only that ADR was unsuccessful.

' 1614.102 **Agency program.**

* * * * *

(b) * * *

(2) Establish or make available an **alternative dispute resolution** program. Such program must be available for both the pre-complaint process and the formal complaint process.

* * * * *

* * * * *

* * * * *

4. Section 1614.105 is amended by redesignating paragraph (b) as paragraph (b)(1), revising the first sentence of redesignated paragraph (b)(1), adding paragraph (b)(2), revising the first sentence of paragraph (d) and revising paragraph (f) to read as follows:

' 1614.105 Pre-complaint processing.

* * * * *

(b)(2) Counselors shall advise aggrieved persons that, where the agency agrees to offer **ADR** in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.

* * * * *

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an **alternative dispute resolution** procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. * * *

* * * * *

(f) Where the aggrieved person chooses to participate in an **alternative dispute resolution** procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be **90 days**. If the claim has not been resolved before the **90th day**, the notice described in paragraph (d) of this section shall be issued.

* * * * *

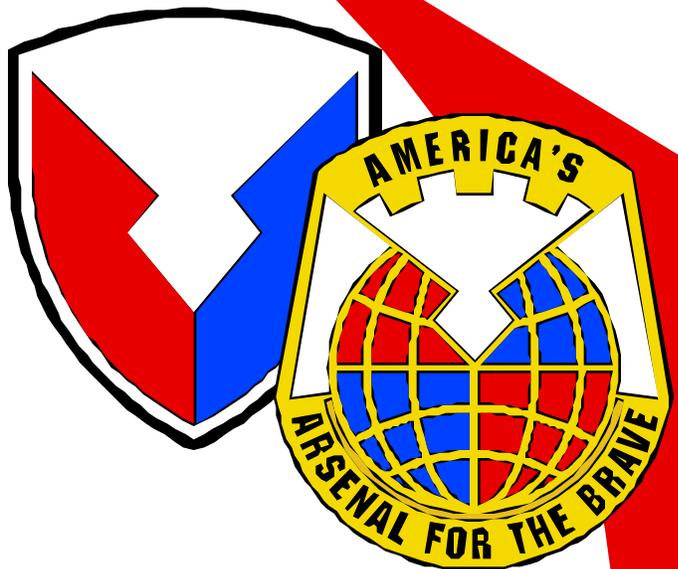
Presented by:
Robert S. Lingo
Associate Counsel

Army Materiel Command

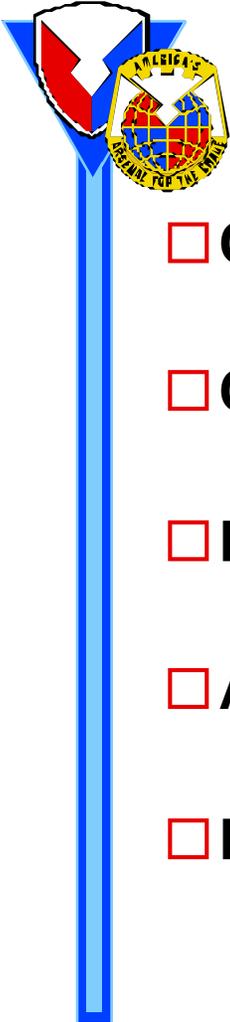
**AMC Environmental
VTC**

22 Sept 1999

1000 - 1100



AMC – Relevant, Responsive & Ready!



AGENDA

- Current Hot Topics**
- CAA Risk Management Requirements**
- Lead Based Paint & Hazard Issues**
- Affirmative Procurement Requirements**
- Discussion-time allowing**



NON-BRAC TRANSFERS

- 1993 ELD Legal Opinion: CERFA did not apply to non-BRAC DoD property**
 - ❖ **No requirement to get regulatory concurrence for uncontaminated property**
 - ❖ **CERCLA 120(h)(3) Covenant applied to both remediated & uncontaminated property**
- Army Office of General Counsel considering reversing opinion**
 - ❖ **CERFA applies to non-BRAC property**
 - ❖ **CERCLA 120(h)(4) Covenant for Uncontaminated Property**



NON-BRAC TRANSFERS

- So What - Is this a tempest in a tea pot ?**
 - ❖ **Maybe, but**
 - ❖ **Will determine what type of CERCLA covenant is granted, which is important to transferee**
 - ❖ **GSA does not want CERFA to apply, or be in position that regulators must concur on uncontaminated property determinations**
 - ❖ **Will affect how Army writes FOSTs for Army non-BRAC transfers**

- What to do--Stay tuned**



Fort Ord CERCLA Case

- Fort Ord Toxics Project and California Public Interest Research Group v. California EPA Army
- First time a federal appeals court has held that citizens may sue the military in order to obtain better environmental cleanups
- Military remedial action are pursuant to CERCLA 120
 - ❖ No bar to suits challenging military remedial actions
 - ❖ Suits challenging military removal actions are barred
- Would affect EPA Regions 9 and 10
- DoJ and Army considering appeal



PUNATIVE PENALTIES

EPA UST Penalty Assessments

- ❖ EPA asserts authority to fine federal agencies
- ❖ OSD requested an opinion from DoJ Office of Legal Counsel in July
- ❖ Pending administrative hearings on hold
- ❖ No final decision or DoJ opinion

State Punitive Air Penalties

- ❖ 6th Cir holds that CAA allows state to impose punitive penalties against federal facilities
- ❖ DoJ/Army considering rehearing or appeal to the U.S. Supreme Court



PUNATIVE PENALTIES

- EPA can assess penalties against federal facilities for CAA violations**
 - ❖ **Check the new Yellow Book**
 - ❖ **Attachment B**
 - ❖ **May appeal using new Rules of Practice**

- EPA Field Citation Authority**
 - ❖ **No developments; no final rule yet**
 - ❖ **Draft would provide for hearing before Regional Office attorney**



LBP - Background

- X The Great Debate -**
 - EPA - flaking LBP is a release of a hazardous substance under CERCLA.
 - Army - LBP hazards in target housing should be addressed according to Title X.
- X The Compromise -**
 - EPA agrees that Title X is sufficiently protective for the majority of situations involving target housing.
 - DoD/EPA developing a LBP Field Guide

AMC - RELEVANT, RESPONSIVE & READY



LBP Requirements

Title X

- **1960-78 Housing** - No abatement (only inspection)

Soils – abate bare soil >400 ppm (child play area) or >2000 ppm (other areas)

Child-occupied facilities
– No Title X requirements

Demolition – No Title X requirements

Field Guide

- **1960-78 Housing** – LBP abatement

Soils – take appropriate action if bare soil between 400-2000 ppm

Child-occupied facilities
– LBP inspection/abatement

Demolition – Soil sampling/abatement of new residential property

AMC - RELEVANT, RESPONSIVE & READY



LBP - Property Transfers

- X** Army will generally perform a LBP inspection & risk assessment for all target housing prior to transfer.
- X** DoD prefers that abatement responsibility be transferred to the purchaser
- X** Army ensure abatement (through contract clauses or self-certification by transferee).

AMC - RELEVANT, RESPONSIVE & READY



Langley AFB Geese

- X Newspaper Article - Email says Langley's Geese Killed over Golf**
- X Story involves - Geese, Golf, and General Officers!**
- X Langley Geese saga is a warning for us all in the age of email**
- X**

AMC - RELEVANT, RESPONSIVE & READY



Langley AFB Geese

X Chapter 1 - The Border Collie Proposal

- 16 June 97 - Env Office recommends border collie to control “nuisance geese” at golf course.
- 25 June 97 - Support Group CDR states he wants to avoid “geese lovers” pounding on door about cruelty to animals.
- 27 Jun 97 - Support Group CDR advised dog won’t hurt geese.

X No further action taken until Dec 98.

AMC - RELEVANT, RESPONSIVE & READY



Langley AFB Geese

X Chapter 2 - CG Golf Outing

- 7 Dec 98 - Flight Wing CDR notifies Support CDR of problems during CG golf outing and asks when the geese will be gone.
- 7 Dec 98 - Golf Manager apologizes to Support CDR for golf course problems and is working on geese issue
- 7 Dec 98 - Flight Wing CDR states issue is “not care and feeding of senior officers” but “paying attention to details that affect everyone”.

AMC - RELEVANT, RESPONSIVE & READY



Langley AFB Geese

X Chapter 3 - The Final Chapter

- Dec 98 to July 99 - Base officials spend seven months “blowing horns, setting off fireworks and fencing off ponds” to drive off geese
- 12 July 99 - Flight Safety Chief proposes geese options to Wing Cdr (1. Leave them alone, 2. Kill them, or 3 Ship to processing center).
- 15 July 99 - 189 geese netted and sent to processing plant for slaughter. Meat donated to needy families.

AMC - RELEVANT, RESPONSIVE & READY



Langley AFB Geese

X Lessons Learned -

- Colorful language can be taken out of context
- Draft “stand alone” emails on controversial topics
- Don’t say things in email that you wouldn’t want to see printed in the local newspaper!

X Geese are coming back!

AMC - RELEVANT, RESPONSIVE & READY

USACHPPM

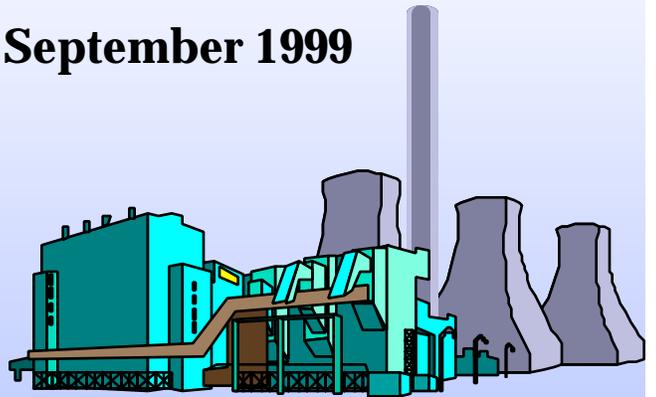
Air Pollution Engineering

CAA 112(r):

Risk Management Plans

The Latest

AMC Teleconference: 21 September 1999



USACHPPM

Air Pollution Engineering

- **Section 112(r)(7) of CAAA-90 - Original Congressional Statute**
- **40 CFR 68 Final Codified Rulemaking**
- **59 Federal Register 4478, 31 January 1994 Final List Rule**
- **61 FR 31668, 20 Jun 96 Final RMP Rule**
- **62 FR 45129, 25 Aug 97 Final Amendment - Technical Changes**
- **62 FR 45129, 25 Aug 97 Interpretations**
- **63 FR 640, 6 Jan 98 Final Amendment - Remove Explosives**
- **64 FR 963 , 6 Jan 99 Final Amendment - New Data Elements, CBI, NAICS**
- **P.L. 106-40 Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, Signed 6 August 1999 - Removed Flammables Used as Fuel - Protected OCA info.**

USACHPPM

Air Pollution Engineering

- **Have heard of no installations that should have submitted but haven't**
- **Went from about 65 to 30 installations with flammables being removed**
- **One installation is already calling for new RMP's**
- **General Duty Clause still a major issue**
- **Q&A Draft is still out there as draft**

USACHPPM

Air Pollution Engineering

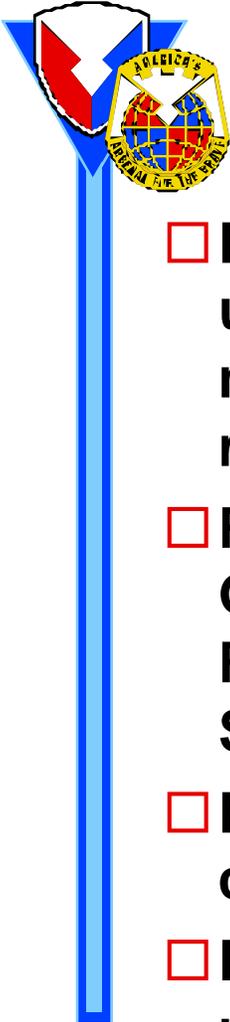
- **New law (PL 106-40) requires**
 - **All Program Level 2 and 3 RMP submitters must have a public meeting NLT 5 February 2000**
 - **Certification that meeting occurred must be submitted to FBI**
 - **Installations that have chosen to make OCA data public must notify EPA**
 - **Other provisions are studies, reports, etc.**

USACHPPM

Air Pollution Engineering

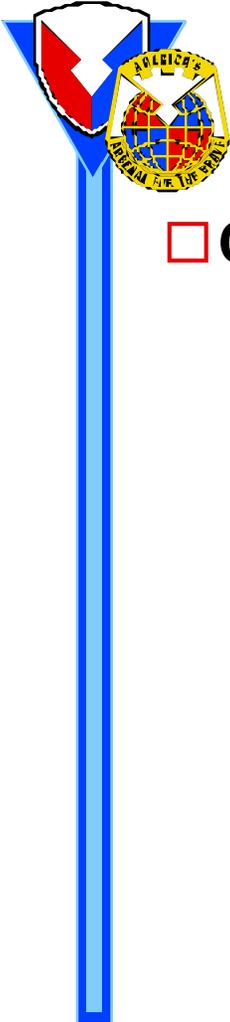
- **Further Information**

- **EPA Website - <http://www.epa.gov/ceppo>**
- **USACHPPM - Dave Reed or Sherri Hutchens**
Voice 410-436-3500/ Fax 410-436-3656 / DSN 584
David.Reed@apg.amedd.army.mil
Sherri.Hutchens@apg.amedd.army.mil



AFFIRMATIVE PROCUREMENT

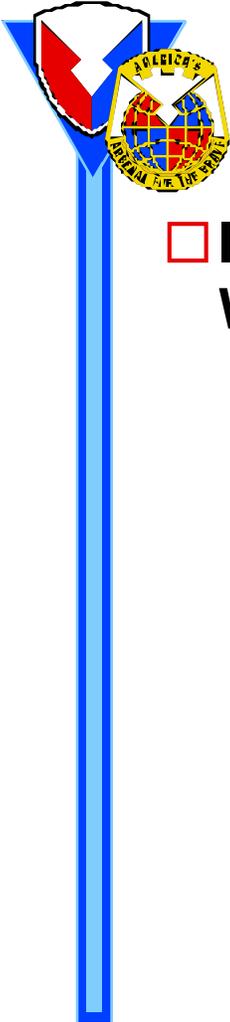
- Federal effort to promote recycling by using government purchasing to expand markets for recovered materials and recycled products
- Required by EO 13101: Greening the Government through Waste Prevention, Recycling, and Federal Acquisition, 14 Sep 1998
- FAR officially incorporated environmental considerations as of 22 Aug 1997
- Federal Agencies required to develop programs



AFFIRMATIVE PROCUREMENT RESPONSIBILITIES

CONTRACTING:

- ❖ Acquire compliant products whenever possible
- ❖ Include appropriate FAR clauses & provisions
- ❖ Ensure IMPAC cardholders receive training on Affirmative Procurement



AFFIRMATIVE PROCUREMENT RESPONSIBILITIES (Cont)

☐ INSTALLATION DIRECTORS OF PUBLIC WORKS:

- ❖ **Ensure plans, specs, SOWs, product descriptions consider a broad range of factors including elimination of virgin materials; use of recycled; waste prevention**
- ❖ **MUST play an active role in assisting Installation Contracting in training, educating, monitoring, and IMPLEMENTING the Affirmative Procurement Program**

THE ENVIRONMENTAL LAW DIVISION BULLETIN

July 1999

Volume 6, Number 7

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.

UNDER WHAT AUTHORITY DO FEDERAL FACILITIES PERFORM CERCLA CLEAN UPS?

Mike Lewis¹

The U.S. Court of Appeals for the Ninth Circuit currently is deciding whether section 120² of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides an independent authority for cleanups of federal facilities. The case is *Fort Ord Toxics Project v. California Environmental Protection Agency et al.*³ and involves the clean up at the former Fort Ord, California.

The former Fort Ord is on the National Priorities List⁴. It was conducting a CERCLA clean up that involved moving remediated sand from beach firing ranges to layer a landfill prior to capping. In order to do this, the Army designated the landfill a Corrective Action Management Unit ("CAMU")⁵ after coordination with the California Environmental Protection Agency ("CALEPA"). The Fort Ord Toxics Project ("FOTP") sued CALEPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act ("CEQA")⁶. FOTP named the Army as Real Parties in Interest and sought to enjoin the Army from executing its clean up plan as part of the suit.

The Army immediately removed this challenge to U.S. District Court⁷, and citing CERCLA section 113(h)⁸ sought to have it dismissed. CERCLA section 113(h) provides that: No Federal court shall have jurisdiction under Federal law. . . or under state law which is applicable or relevant and appropriate under section 9621 of this title

¹ Mike Lewis is an alias for Robert Lewis, an irascible old civilian attorney at ELD.

² 42 U.S.C. § 9620 (1998).

³ *Fort Ord Toxics Project et al., v. California Environmental Protection Agency et al.*, No. 98-16100 (9th Cir. 1999).

⁴ The National Priorities List ("NPL") is the prioritized list of sites needing clean up, updated annually, called for in accordance with 42 U.S.C. § 9605(a)(8)(B).

⁵ California state law generally prohibits disposal on the land of all hazardous waste. Cal. Code Regs. Tit 22, § 66264.552(a)(1), however permits the designation of a CAMU into which certain untreated hazardous waste as part of an overall remedy, as a variance from the general prohibition.

⁶ CAL. PUB. RES. Code §§ 21000 – 21178.1. CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.

⁷ The basis for the Army's removal was 28 U.S.C. § 1442(a) which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.

⁸ 42 U.S.C. § 9613(h).

(relating to clean up standards) to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title,

FOTP responded, among other arguments⁹, that clean up activities on federal facilities are selected under CERCLA section 120 and not section 104. Therefore, FOTP reasoned that the Army could not avail itself of CERCLA section 113(h) which was limited to actions undertaken under section 104 or ordered under section 106.

FOTP argued that remedies on federal facilities are not selected under section 104, but under 120(e)(4)(A)¹⁰ of CERCLA. This section is entitled “Contents of Agreement” and states that “Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following: A review of alternative remedial actions and selection of a remedial action by the head of the relevant agency. . . .” FOTP said that when Congress passed CERCLA section 120 in 1986 to create a special program to address hazardous substances remediation at federal facilities. This separate program, reasoned FOTP, was created in response to concerns both about the magnitude of toxic waste at these sites and about the lack of attention this problem was receiving under CERCLA. The exclusion of section 120 clean ups from the section 113(h) jurisdictional bar was thus, consistent with Congress’s efforts to enhance public oversight of federal facility clean ups. In further support of its position, FOTP pointed out that other sections of CERCLA distinguish between sections 104 and 120, such as section 113(g).¹¹

Unlike FOTP, which relied strictly on statutory interpretation, the Army noted that the issue of section 120 making the clean up of federal facilities outside the reach of section 113(h) has been examined by a number of courts and rejected. See *Hearts of America Northwest v. Westinghouse Hanford Co.*, 820 F. Supp. 1265, 1279 (W.D. Wash 1993); *Werlein v. United States*, 746 F. Supp 887, 892 (D. Minn. 1992); vacated in part, 793 F. Supp. 898 (D. Minn. 1992); see also, *Worldworks, Inc. v. United States Army*, 22 F. Supp. 2d 104 n.6 (D. Co. 1998). The Army argued that FOTP’s interpretation was directly at odds with the judicially recognized purpose of section 113(h) to expedite clean ups by insulating from judicial review until they have been implemented.

The District Court found that the clean up was selected under section 104 as delegated to the Secretary of Defense and that section 120 “establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities.”¹² The court agreed with *Werlein* that section 120 “provides a road map for the application of CERCLA and rejected FOTP’s position that *Werlein* was wrongly decided.¹³ The court also rejected FOTP’s reliance on CERCLA section 113(g) as misplaced. The court stated that because this section contained references to both sections 104 and 120 was not dispositive. To contrary, it found the reference in this section to the President taking the action as supporting the Army’s case.¹⁴ Finally, the court rejected FOTP’s reliance on *U.S. v. Allied Signal Corp.* 736 F. Supp. 1553 (N.D. Cal 1990) for the proposition that section 120 governed federal facility clean ups, because it did not directly address the issue of whether Congress, in enacting section 120, intended to by-pass the President.¹⁵

⁹ FOTP also claimed that CERCLA 113(h) does not bar challenges brought under state laws such as CEQA that are not applicable or relevant and appropriate requirements (ARARs), and if it does, this challenge must be remanded to state court.

¹⁰ 42 U.S.C. §9620(e)(4)(A).

¹¹ 42 U.S.C. § 9613(g)(1) distinguishes between investigations under sections 104 and 120.

¹² Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681 RMW May 11, 1998, at 8.

¹³ *Id.*, at 10.

¹⁴ *Id.*

¹⁵ *Id.*, at 12.

FOTP appealed the District Court's order arguing that the lower court erred in not finding that section 120 was a separate authority for remedy selection. FOTP argued that by creating section 120, Congress moved the authority for the selection of remedial action from section 104 to section 120 to prevent the President from delegating authority to select a remedy and that the language and structure of CERCLA demonstrate a clear distinction between actions taken under CERCLA 120 and those taken under 104. The Army reiterated its successful district court position. Oral argument took place on 22 May 1999. A decision is pending. (Mr. Lewis/LIT)

Regulatory Fees, ... or Taxes? Sorting Out the Difference

MAJ Robert J. Cotell and LTC Richard A. Jaynes

In recent months several installation environmental law specialists (ELs) have contacted ELD concerning potential payment of various fees imposed by states for environmental services. The fees vary in name and type to include "hazardous waste management fees," "water pollution protection fees," and "fees for environmental services." This article re-examines the familiar issue of federal liability for state imposed regulatory fees and taxes. The first section provides a review and update of the law of fee/tax liability. The second section provides a template for installation ELs to use in examining fee/tax issues. The final section outlines the steps to obtain HQDA approval to refuse payment of state imposed fees after an EL has concluded that a state or local regulator has imposed an unlawful tax.

I. Fee/Tax Liability

A. General

In general, the federal government is immune from state requirements including fees and taxes. This immunity is constitutionally established through the Supremacy Clause,¹⁶ and the Plenary Powers Clause.¹⁷ In addition, the Supreme Court established very early that "the Constitution and the laws made in pursuance thereof are supreme . . . and control the laws of the respective states, and cannot be controlled by them."¹⁸

Regarding taxes, the federal government cannot be made to pay a tax without a clear "congressional mandate."¹⁹ Likewise, the federal government is not subject to state requirements unless it has clearly consented to such in an unequivocal waiver of sovereign immunity.²⁰ These waivers cannot be implied,²¹ and must be strictly construed in favor of the United States.²²

B. Statutory Scheme

Among the major environmental laws there are four waivers of sovereign immunity concerning the issue of fees that will be reviewed here:

¹⁶ U.S. CONST. art. VI, cl. 2.

¹⁷ U.S. CONST. art. I, § 8, cl. 17.

¹⁸ *McCulloch v. Maryland*, 4 Wheat 316, 426, 4 L.Ed. 579 (1819).

¹⁹ *Kern-Limerick, Inc v. Scurlock*, 347 U.S. 110, 122 (1954).

²⁰ *Hancock v. Train*, 426 U.S. 167, 198, (1976).

²¹ *Missouri Pacific Railroad Co. v. Ault*, 256 U.S. 554 (1920).

²² *U.S. Department of Energy v. Ohio*, 112 S.Ct. 1627, 1633 (1992).

Clean Water Act (CWA): Congress waived immunity for “. . . all Federal, State, interstate, and local requirements, . . . in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.”²³

Resource Conservation and Recovery Act (RCRA): Federal facilities' solid and hazardous waste programs must comply with “. . . all Federal, State, interstate, and local requirements, . . . in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.”²⁴ Unlike the CWA, the RCRA further defines these "reasonable service charges" to include:

“. . . fees or charges assessed in connection with the processing and issuance of permits, renewal of permits, amendments to permits, review of plans, studies, and other documents, and inspection and monitoring of facilities, as well as any other nondiscriminatory charges that are assessed”²⁵

Safe Drinking Water Act (SDWA): The 1996 amendments to the SDWA added a waiver as to regulatory fees that is virtually identical to the RCRA waiver.²⁶

Clean Air Act (CAA): The CAA waiver may be broader than those found in the CWA, RCRA, or SDWA, because it omits the word "reasonable" from its waiver that requires compliance with:

“. . . all Federal, State, interstate, and local requirements, . . . in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply . . . (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program, . . .”²⁷

C. Fees v. Taxes

All of the above waivers of sovereign immunity only concern fees assessed by states against the federal government. Fees are charges for services rendered by state or local governments in administering their environmental programs. As one court put it, the "classic regulatory fee" is a levy "imposed by an agency upon those subject to its regulation" and used to raise money that is then placed into "a special fund to defray the agency's regulation-related expenses."²⁸ Besides such indirect regulatory purposes as targeted revenue raising, fees may also accomplish a direct regulatory purpose such as encouraging or discouraging certain behavior (e.g., waste reduction). By contrast, taxes are enforced contributions to provide for the general support of the entire community. The environmental waivers quoted above do not waive sovereign immunity for state taxation.

In light of the discussion above, drawing the distinction between a fee and a tax is legally important, but is often difficult to accomplish. In 1978 the Supreme Court in *Massachusetts v. U.S.*²⁹ established a test for analyzing all government-imposed fees for services. Under the *Massachusetts* test, if a fee satisfies all of the following three prongs it may be paid as a reasonable service charge:

- (1) Is the assessment non-discriminatory?;

²³ 33 U.S.C. § 1323(a).

²⁴ 42 U.S.C. § 6961(a).

²⁵ *Id.*

²⁶ 42 U.S.C. § 300j-6(a).

²⁷ 42 U.S.C. § 7418(a).

²⁸ *State of Maine v. Department of the Navy*, 973 F.2d 1007, 1012 (1st Cir. 1992).

²⁹ 435 U.S. 444 (1978). The *Massachusetts* case involved state immunity from federal taxation. The Court recognized that the states have a qualified immunity from federal taxation and established a three-pronged test to determine whether the immunity applies. By analogy the same principle may be applied in the context of state taxes on federal facilities. The use of the analogy was adopted by the First Circuit in *State of Maine v. Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992). It should be noted, however, the test was not adopted by the Eighth Circuit in *United States v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990).

- (2) Is it a fair approximation of the cost of the benefits received?; and,
- (3) Is it structured to produce revenues that will not exceed the regulator's total cost of providing the benefits?

The Department of Defense (DoD) issued a guidance document in June 1984 stating that all environmental service charges levied by a state should be evaluated against the three *Massachusetts* criteria.³⁰ In 1996, a DoD Instruction³¹ incorporated these criteria with others in guidance on when environmental fees are payable. Although the waivers of sovereign immunity noted above were passed after the *Massachusetts* case, they are consistent with it and may reflect an attempt by Congress to codify at least part of the test.³² Moreover, the Department of Justice (DoJ) has adopted the *Massachusetts* standard as the method for analyzing fee/tax issues. For example, in litigation involving state hazardous waste fees in New York the DoJ argued that the test was applicable to bar the state from imposing the fees.³³

D. Analysis under *Massachusetts*

Each of the prongs of the *Massachusetts* test has been further illuminated by litigation concerning environmental fees.

1. Discrimination Prong: Under *Massachusetts* the federal government must not be treated any differently in the enforcement of the fee requirement than other regulated entities. For example, in a case involving the imposition of RCRA hazardous waste fees, a federal district court summarily found that a state which exempted itself from imposition of the fees violates the nondiscrimination prong of the *Massachusetts* test.³⁴ Although analysis of this prong under the CAA may lead to a contrary result,³⁵ installations should nevertheless be alert to discriminatory air program fees.

³⁰ Department of Defense Memorandum, Subject: State Environmental Taxes, dated 4 June 1984. Although this letter from the Assistant Secretary of Defense for Installations to Service Secretaries does not specifically mention the *Massachusetts* case, it details the *Massachusetts* criteria as the basis for determining whether fees from a state are reasonable service charges or taxes.

³¹ DoD Instruction 4715.6, Environmental Compliance (Apr. 24, 1996) states that it is DoD policy to:

- “4.7. Pay reasonable fees or service charges to State and local governments for compliance costs or activities except where such fees are:
 - 4.7.1. Discriminatory in either application or effect;
 - 4.7.2. Used for a service denied to a Federal Agency;
 - 4.7.3. Assessed under a statute in which the Federal sovereign immunity has not been unambiguously waived;
 - 4.7.4. Disproportionate to the intended service or use; or
 - 4.7.5. Determined to be a State or local tax. (The legality of all fees shall be evaluated by appropriate legal counsel).”

³² For example, the fee waivers in RCRA and SDWA define reasonable service charges to include “nondiscriminatory charges,” an apparent codification of the first prong of the *Massachusetts* test. Also, these statutes also enumerate several types of fees that are payable, which may reflect a conclusion as to the benefits that such fees would provide to regulatory programs (i.e., addressing the second and third prongs of the test).

³³ *New York State Department of Env'tl. Conservation v. United States Dep't of Energy*, 850 F. Supp 132, 135 (N.D. NY)(1994). The case involved fees imposed prior to a 1992 amendment to RCRA that created waiver quoted in section B, above. The court was construing a previous waiver that obligated the federal government to pay “reasonable service charges.”

³⁴ *New York State Department of Env'tl. Conservation v. United States Dep't of Energy*, 89-CV-194 to 197, 1997 U.S. Dist. LEXIS 20718, at *22 (N.D. NY Dec. 24, 1997). Ironically, the court ordered the U.S. to pay the fees because the state had corrected the discriminatory practice by retroactively paying the fees during the litigation.

³⁵ *U.S. v. South Coast Air Quality Management District*, 748 F.Supp. 732 (C.D. Cal. 1990). The court held that it was not discriminatory to exempt a state from air fees while the U.S. must pay. The court reasoned that the CAA waiver of sovereign immunity was “to the same extent as any nongovernmental

The practice of states exempting their own programs is not uncommon. A recent ELD review of a Kansas statute revealed exactly this discrimination.³⁶ Analysis under the discrimination prong is generally the easiest aspect of fee/tax review because a problem may be plain from statutory text. An ELD reviewing a state statute should be careful to look for any provisions of state law which exempt out any particular entity: government or private. If the entity is in the same legal position as the federal government (i.e., a user of regulated substances, generator of regulated pollutants, or an applicant for environmental permits) it must be subject to the same fees.³⁷

2. Benefits Prong: The fee charged must be a fair approximation of the benefits received in order to be considered "reasonable." In announcing the three-part test in *Massachusetts*, the Supreme Court stressed that "[a] governmental body has an obvious interest in making those who *specifically benefit* from its services pay the cost . . ." (emphasis added).³⁸ Indeed, courts have determined that the "benefits to be examined in applying the test are those on whom the charges are imposed, not merely benefits to the public at large."³⁹ Over the years, however, a strict application of the benefits prong has eroded. Litigation in New York illustrates this point, where a federal district court found that hazardous waste generator and transporter fees were permissible even though federal facilities received no specific service.⁴⁰ According to the court ". . . the second prong of the Massachusetts test does not require an exact correlation, . . . between the costs of the overall services provided and the fees assessed for such services."⁴¹ The court noted that whether a federal entity actually uses any state services is irrelevant, because they constitute a "benefit" as long as the U.S. *could* use the state's services in the future, if needed. Likewise, a simple showing that the dollar value of specific services rendered by the state was less than charges for those services was not enough to establish a lack of benefit. Such a showing does not take into account "overall" benefits that facilities receive as a result of program availability.⁴² According to the court, the state need only show ". . . a rational relationship between the method used to calculate the fees and the benefits available to those who pay them."⁴³ The First Circuit pursued similar reasoning in a RCRA fee case.⁴⁴

The federal government has had little success in challenging environmental fees on the basis that they are excessive or do not approximate the costs of benefits received. The cases noted above demonstrate that federal courts may be expected to apply deferential standards when analyzing the "reasonableness" of environmental fees. An installation contesting a fee solely on the basis that there are little or no benefits should be alert to these

entity . . ." Accordingly, under the CAA, a state may be treated differently as it is considered a "governmental entity."

³⁶ Environmental Law Division Memorandum, Subject: Kansas Solid Waste Tonnage Fee, dated 2 August 1999. The memorandum notes that "[t]he State of Kansas has established a statutory scheme that allows for the collection of solid waste tonnage or "tipping" fees of \$1.00 for each ton of solid waste disposed in any landfill in the state (KSA section 65-3415b(a)). . . . The statute provides, however, that these fees do not apply to "construction and demolition waste disposed of by the state of Kansas, or by any city or county in the state of Kansas, or by any person on behalf thereof." KSA Section 65-3415b(c)(5)." The memorandum concludes that the fee is discriminatory and should not be paid.

³⁷ DoD's success in encouraging the State of California to revamp its hazardous waste fees to remove discriminatory provisions is another example of this approach.

³⁸ *Massachusetts v. U.S.*, 435 U.S. 444, 462 (1978).

³⁹ *United States v. State of Maine*, 524 F. Supp. 1056 (1981).

⁴⁰ *New York State Dept. of Env'tl. Conservation v. United States*, 850 F.Supp 132 (N.D.NY 1994).

⁴¹ *Id.* at 142.

⁴² *Id.* at 136.

⁴³ *Id.* at 143.

⁴⁴ *State of Maine v. Department of the Navy*, 973 F.2d 1007 (1st Cir. 1992). See also *New York State Dept. of Env'tl. Conservation v. United States*, 772 F.Supp 91 (N.D. NY 1991), for a discussion of the second and third prongs of the *Massachusetts* test.

broad standards. Given the current state of the law the overwhelming majority of "benefits" analyses will lead to the conclusion that the state may levy the fee.

3. Fee Structure Prong: Is the fee structured to produce revenues that will not exceed the total cost to the state of the benefits supplied? If this prong is addressed strictly in terms of total program revenues as compared to expenditures, relief from payment of fees will be unlikely as long as there is a "rough relation between state regulatory costs and the fees charged."⁴⁵ This analytical approach has not received much attention in practice probably because obtaining the fiscal information necessary to pursue it successfully would be difficult.

Problems associated with the third prong are more easily identified when a state fails to restrict the use of environmental fees to related environmental programs. For example, ELD concluded that installations in Georgia should not pay certain hazardous waste fees because these revenues are placed into a fund from which the state legislature may make general appropriations. Similarly, DoJ's Office of Legal Counsel opined that a District of Columbia CAA program of charging monthly fees for parking spaces was essentially designed to create a subsidy for its mass transit system.⁴⁶ ELSs should raise concerns whenever state statutes allow environmental fees to be used for broad purposes or comingled with unrelated state funds.

II. Fee/Tax Template

The following summarizes the foregoing discussion into a template for analyzing fee/tax issues:

A. Closely examine the applicable waiver of sovereign immunity.

That is, look at the waivers reviewed above for the CWA, RCRA, SDWA, or CAA to see if the fee in question is clearly within the general scope of the waiver.

B. Does the levy pass each of the prongs in the Massachusetts v. U.S. test?

The following three prongs reflect a lens for further examining waivers of sovereign immunity for regulatory fees based on judicial decisions. If the answers to all three of the primary questions are yes, then the fee is a payable service charge, not an unlawful tax.

1. Is the levy imposed in a nondiscriminatory fashion?
 - Are there regulated entities within the state on whom the fee is not imposed?
 - Are those entities similarly situated with the federal government (i.e., do they generate regulated substances and apply for environmental permits)?
 - Is the state government required to pay its own fees?

2. Is the levy based on a fair approximation of the costs of the benefits (i.e., is it associated with a discernible benefit to the payor)?
 - Characteristics associated with benefits to the payor (i.e., "user" fees):
 - payments are made in return for government-provided benefits
 - duty to pay arises from voluntary use of services (e.g., receipt of a permit)
 - failure to pay results in termination of services
 - levy is imposed by an *agency* in capacity as vendor of goods and services

⁴⁵ State of Maine v. Department of the Navy, 973 F.2d 1007, 1013 (1st Cir. 1992).

⁴⁶ **DoJ Opinion of the Office Of Legal Counsel, Subject: Whether the District of Columbia's Clean Air Compliance Fee May Be Collected from the Federal Government, 1996 OLC LEXIS 10 (23 Jan. 1996). This opinion, while it did not specifically track with the structure of the Massachusetts test, is an excellent discussion of the legal principles that support it.**

- payments are calculated to recoup actual costs of regulating the payor
- services, though not actually used by payor, are available to the payor
- payments, though not actually equal to direct services received, support overall general benefits of the regulatory program

- Characteristics not associated with benefits to the payor (i.e., taxes):
 - liability arises from status (e.g., assessments for property owners)
 - failure to pay results in penalties
 - duty to pay arises automatically, regardless of services provided
 - levy is imposed by the *government* in capacity as a sovereign agent
 - payments are fixed and charged the same to all users
 - payments are used to provide benefits to the public at large
 - services are not available to the payor

3. Is the levy structured to produce revenues that will not exceed the total cost to the state government of the benefits to be supplied to the payor?

- Does it demonstrably support only the cost to the state of administering the regulatory program? or,
- Does it produce net revenues to the state for potentially unrelated uses (i.e., nonregulatory government programs or the general public)?

III. Procedures for Approval to Not Pay Unlawful Fees

In resolving environmental fee/tax issues, it is essential that all DoD facilities within a state act in unison. Inconsistent approaches among installations to a fee/tax issue is a recipe for long-term contentious relations between the non-paying installation and the regulatory agency. To maintain an installation's credibility and to avoid acrimony that can spill over into all media programs, thorough coordination among all DoD (and, preferably, all federal) installations and with headquarters is required before deciding to not pay fees. Moreover, the ability of the U.S. to successfully litigate fee/tax cases may be thwarted by installations that take inconsistent positions on issues that arise.

As noted at the outset, the four environmental statutes discussed here all contain waivers of immunity for the payment of regulatory fees. In practice, installations should be paying all environmental fees assessed by states under these programs unless ELD, in consultation with other DoD Services, makes a written determination that they are unlawful taxes. In general, when a state agency requests the payment of a regulatory fee, the installation ELS should be the first to analyze the issue of liability using the template outlined in the previous section. The ELS should research the state law, make copies of relevant statutes, and examine prior versions of the statutes to determine if there has been a recent change. In addition, the ELS should determine whether the installation has paid the fee in the past, and note any other relevant background information.

If the ELS concludes that the fee should not be paid, the ELS should diplomatically ask the regulatory agency to delay enforcement of the fee until it has been reviewed by higher federal authorities. Often times the state agencies will not be familiar with the concept of sovereign immunity, or the *Massachusetts* test. The ELS should explain the laws and request cooperation. The ELS should stress that the installation has a duty and obligation to maintain compliance with all state laws and regulations, but that a sovereign immunity issue affects the installation's authority to pay the fee, and must be addressed at higher levels.⁴⁷

The ELS should next forward the ELS's legal opinion detailing the specific statutory sections and relevant facts to the servicing Army Regional Environmental Coordinator (REC)

⁴⁷ William D. Benton and Byron D. Baur, *Applicability of Environmental "Fees" and "Taxes" To Federal Facilities*, A.F. L. REV. 253, 261 (1989). This article includes many practical tips on resolving fee/tax issues.

and the MACOM. The Army REC should alert ELD and all Army installations within the jurisdiction to the issue and find out whether each installation has been paying the fees in question. Based on input from other Army installations, the Army REC should augment the factual summary and legal opinion with additional information and legal analysis. The Army REC then coordinates the issue with the designated DoD REC,⁴⁸ who has responsibility for developing a DoD position on issues of common concern to all military installations and RECs.⁴⁹ The DoD REC should serve as the primary point of contact with the state on the issue, to ensure that all military installations speak with one voice.⁵⁰ Should differences arise among DoD Services as to whether a fee in question should be paid, the DoD REC will have the primary responsibility to resolve those differences.

As noted above, Army RECs should coordinate their factual summaries and legal opinions with ELD as well as the DoD REC. This will allow ELD to make coordination with the headquarters elements of the other DoD Services, if needed.⁵¹ In addition, for RCRA fee/tax questions, ELD effects any necessary policy coordination with the Army Secretariat (the DoD-designated Executive Agent for RCRA issues)⁵² through the Army General Counsel. ELD also consults with DoJ to determine if a particular position will be supported in the event of litigation over RCRA-based fees.

The key to efficiently resolving fee/tax issues is the initial research and opinion by the ELS, followed by further development and active coordination of the issue by both the Army and DoD RECs. Following the procedures outlined above will allow the installation to resolve each fee/tax issue while minimizing damage to working relationships with regulators. That is, regulators should be instructed that fee/tax issues are significant legal and policy matters that are addressed by "higher headquarters," and that decisions to withhold payments for particular fees are not made at the installation level. (MAJ Cotell and LTC Jaynes/CPL)

EPA Publishes Consolidated Rules of Practice

Major Robert Cotell

On 23 July 1999 the EPA published its new Consolidated Rules of Practice ("CROP"), in Federal Register Vol. 64, No. 141. The rules become effective 23 August 1999. The Rule revises the existing CROP and includes expansion of 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 rules are important guidance for the ELS who anticipates practice before an Administrative Law Judge. (MAJ Cotell/CPL)

Underground Storage Tank Update

Major Robert Cotell

⁴⁸ Where the Army REC is also the DoD REC, that office would perform dual functions. *See*, DoD Instruction 4715.2, DoD Regional Environmental Coordination, paragraph 4.3.1 (May 3, 1996). Under this Instruction, the Army REC also serves as the DoD REC for EPA Regions 4, 5, 7, and 8. Air Force RECs are also DoD RECs for Regions 2, 6, and 10. Navy RECs are also DoD RECs in Regions 1, 3, and 9. *Id.* at paragraph 3.1.

⁴⁹ *Id.* at paragraph 5.4.1. Under this policy, the DoD REC for each region is responsible for monitoring and coordinating the consistent interpretation and application of DoD environmental policies on military installations.

⁵⁰ *Id.* at paragraph 5.2.1.

⁵¹ Coordinating fee/tax issues typically results in ELD preparing legal opinions on whether a particular fee is payable. Sample analyses for fee issues in Georgia, California, and Kansas are available on request.

⁵² DoD Instruction 4715.6, Environmental Compliance, enclosure 2 (Apr. 24, 1996).

The spring has been filled with much activity in the area of Underground Storage Tanks (UST). Fortunately, most of the news has been favorable to the Army and other federal agencies contesting UST fines from the EPA. Whether this will continue in the future, however, remains to be seen.

In April the Navy contested a UST fine at the Oceana Naval Air Station before the Chief, EPA Administrative Law Judge. Although the Navy had some factual defenses concerning the violations, the primary defense concerned the lack of legal authority of the EPA to impose fines on another federal agency for UST violations. The Chief, ALJ heard the arguments and reserved her decision for a later date.

In the meantime, on 16 April 1999, the OSD Office of General Counsel sent a formal request to the Department of Justice Office of Legal Counsel (OLC) requesting resolution of the dispute between the executive agencies. The letter urged that Congress had made no "clear statement" that it intended one executive agency be able to fine another for UST violations. The "clear statement" standard had been articulated by the DoJ in an earlier opinion regarding the Clean Air Act and was determined to be the standard applicable for deciding the authority to fine.

At the time of the letter to the DoJ, another UST case involving Walter Reed Army Medical Center (WRAMC) was pending before the same Chief, ALJ, and was scheduled for a hearing on 18 May 1999. Prior to the hearing the OSD General Counsel requested that all military agencies with UST cases pending should request stays of proceedings in order to allow time for the DoJ to render an opinion. WRAMC requested the stay and, surprisingly, EPA concurred. According to the EPA counsel at the WRAMC hearing, the EPA had been requested by the DoJ to concur in all motions to stay UST proceedings. Shortly after the WRAMC stay was granted, the Navy requested a stay of the penalty portion of the forthcoming opinion of the Chief, ALJ in its case. The EPA agreed to the stay, and it was granted.

Approximately a year prior to both the WRAMC and Oceana cases, the Air Force had two UST cases pending a Tinker and Barksdale Air Force bases. In both cases the Air Force had submitted motions to dismiss based on the authority to fine issue. For almost a year the cases were awaiting decision by the ALJ. When the letter was sent by OSD OGC to DoJ OLC Barksdale requested a stay similar to the WRAMC and Oceana cases. However, before Tinker could request a stay, the ALJ promptly rendered a surprising opinion. The opinion completely upheld the OSD position on fines between agencies. The ALJ concluded "Congress has not expressed an intent ... to subject a Federal agency to assessment of punitive penalties by the EPA for past or existing violations of UST requirements."

The decision in the Tinker case has given an unexpected boost to the OSD's chances of having a positive result from the OLC opinion. Now, if the OLC should uphold an authority of the EPA to fine another federal agency, it will be necessary to rebut not only the arguments of the OSD OGC letter, but those of the EPA's own ALJ as well. On the other hand, however, most of the rationale put forward in the OSD letter and the ALJ opinion are the same, and the OLC is committed to neither.

Early speculation was that the OLC opinion would be issued in July. The month has come and gone and, as yet, no opinion. In fact, so far, the EPA has not yet issued comments on the OSD request, which are required before OLC renders an opinion. Accordingly, it may be quite a while before there is an opinion.

In the meantime EPA appears to be unimpressed by the ALJ opinion. On 1 July 1999 EPA issued a \$259,960 UST fine to Ft. Drum, NY. It is expected that EPA will concur in a request to stay proceedings in this case. However, the fact that EPA is continuing to issue fines indicates that they anticipate a positive result from the OLC.

For installations facing potential UST fines the guidance from ELD remains the same. There is no authority for EPA to impose the fines and they should not be paid. Likewise no SEPs or other settlement arrangements should be made in lieu of such fines. This remains the guidance until OLC renders an opinion. (MAJ Cotell/CPL)

Court of Appeals Renders Bizarre Decision on CAA Fines

Mike Lewis

The long awaited Clean Air Act Sovereign Immunity case at Milan Army Ammunition Plant has finally been decided. On 22 July 1999, the U.S. Court of Appeals for the Sixth Circuit decided that the Clean Air Act (CAA) allows states to impose and collect civil penalties from federal facilities. Tennessee had fined Milan \$2500 for violating the Tennessee Air Quality Act. The provision in the CAA on which Tennessee relied to fine Milan was almost identical to a provision in the Clean Water Act (CWA) that the United States Supreme Court has ruled does not permit states to fine federal facilities. For this reason, the Army contested the fine and lost in U.S. district court. The Army appealed. The Sixth Circuit, however, affirmed the lower court ruling holding that the CAA differed sufficiently from the CWA to permit states to fine federal facilities. The Sixth Circuit relied upon a here-to-fore unknown "state suit" provision within the CAA section 304(e) to find a waiver. This decision will embolden states in their efforts to regulate and fine DoD activities. The Army will seek DoD support for appealing this decision to the Supreme Court.

In the meantime, for all Army installations outside of the 6th Circuit, the guidance from ELD remains the same. Sovereign Immunity has not been waived for the Clean Air Act. No fines should be paid and no SEPs or other settlements should be negotiated in lieu of such fines. Installations within the 6th Circuit should consult ELD on all CAA fines. (Mr.Lewis/LIT)

THE ENVIRONMENTAL LAW DIVISION BULLETIN

August 1999

Volume 6, Number 8

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

Today's Koan¹: Can an Agency be Arbitrary and Reasonable at the Same Time?

LTC David B. Howlett

In *Ross v. Federal Highway Administration*,² a federal district court ruled that an agency's action could be both "arbitrary and capricious" under the National Environmental Policy Act (NEPA)³ and "substantially justified" for purposes of the Equal Access to Justice Act (EAJA).⁴

In *Ross*, the Federal Highway Administration (FHWA) was participating with local authorities to build an expressway near Lawrence, Kansas. A 1990 NEPA Environmental Impact Statement (EIS) and Record of Decision drew opposition from property owners on the eastern side of the proposed project. In 1994, the State of Kansas and FHWA agreed to proceed on the western segments of the project. FHWA then began to supplement the EIS as it applied to the eastern side of the project. The various parties involved could not agree on a route on the eastern side. Kansas and local governments agreed in 1997 to fund the eastern project themselves. Taking the view that it was no longer a federal project, the FHWA published a notice in the Federal Register withdrawing the Notice of Intent to supplement the EIS.

Plaintiffs sued to enjoin the project and to compel completion of the supplemental EIS. Applying the arbitrary and capricious standard of review in the Administrative Procedure Act,⁵ the court found that the FHWA had violated NEPA by not completing the supplemental EIS. The Tenth Circuit Court of Appeals affirmed this decision.⁶

Plaintiffs applied to the court for attorneys' fees under EAJA. The relevant portion of EAJA provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court

¹ In Zen practice, a koan is a short vignette describing a paradoxical situation. It is used by the zen master to cause the student to depart from established patterns of thinking.

² No. 97-2132, 1999 U.S. LEXIS 8870 (D. Kan. May 24, 1999), 48 ERC 1980.

³ 42 U.S.C. §4321 et seq.

⁴ 28 U.S.C. §2412.

⁵ 5 U.S.C. §706(2)(A).

⁶ *Ross v. Federal Highway Administration*, 162 F.3d 1046 (10th Cir. 1998).

finds that the position of the United States was substantially justified or that special circumstances make an award unjust.⁷

It was undisputed that plaintiffs were a “prevailing party.” Even though the court found the FHWA’s actions arbitrary and capricious, it held that the agency could argue that its position was substantially justified. The court cited precedent and legislative history for this proposition.⁸

The FHWA restated its position that the eastern part of the project was not a “major federal action” because it was not federally funded. This position was supported by case law governing at the time as well.⁹ The court found that since the FHWA’s argument had a reasonable basis in fact and law, the government’s position was substantially justified and plaintiffs’ EAJA motion was therefore denied.

This case means that a court requirement to do new or additional NEPA analysis does not necessarily mean that an award of attorneys’ fees under EAJA will automatically follow. (LTC Howlett/LIT)

Migratory Bird Treaty Act May Now Apply To Federal Agencies

MAJ James H. Robinette II

Federal agencies’ obligations under the Migratory Bird Treaty Act¹⁰ (MBTA) were recently thrown into greater confusion at the hands of the federal district court for the District of Columbia. In direct opposition to two federal circuit courts of appeals, the district court held that the MBTA does apply to Federal agencies, who must therefore obtain appropriate permits before engaging in activities resulting in the “take” of migratory bird species. If upheld on appeal, this ruling could require installations to revert to traditional means of obtaining “take” permits from the U.S. Fish and Wildlife Service, including intentional depredation permits for the control of nuisance birds.

In 1997, two federal circuit courts ruled that the MBTA does not apply to the United States, its instrumentalities, or its officers and agents. The Eleventh Circuit held in the case of *Sierra Club v. Martin*¹¹, that Congress did not clearly intend for the Act to apply to the federal government. In *Martin*, the Sierra Club sued the Forest Service to prevent the taking of migratory birds in the course of timber harvesting for which the Forest Service had contracted. The court concluded that the MBTA did not apply to the federal government by contrasting the definition of the term person under the MBTA with the definition of the term person under the Endangered Species Act¹² (ESA). “Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do

⁷ 28 U.S.C. §2412(d)(1)(A)

⁸ *Ross v. Federal Highway Administration*, 48 ERC at 1982, *citing* *Cohen v. Bowen*, 837 F.2d 582, 585 (2d. Cir. 1988)(quoting H.R. Rep. No. 96-1418, 96th Cong., 2d. Sess., at 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4990).

⁹ See *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990).

¹⁰ The Migratory Bird Treaty Act (MBTA) provides in pertinent part: “[E]xcept as permitted by regulations..., it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill... any migratory bird, any part, nest, or egg of any such bird, or any product... composed in whole or in part, of any such bird....” 16 U.S.C. § 703. The MBTA carries criminal penalties: up to six months confinement and/or a \$15,000 fine for violation of a regulation made pursuant to the MBTA, or up to two years imprisonment and a maximum \$250,000 fine if the violation is done with a pecuniary motive. 16 U.S.C. § 707.

¹¹ *Sierra Club et al. v. George G. Martin et al.*, 110 F.3d 1551 (11th Cir. 1997).

¹² 16 U.S.C.S. § 1532(13) (LEXIS 1999).

so.”¹³ The court also examined the historical context of the MBTA’s enactment, noting that twenty years before the MBTA became law, Congress had authorized the Forest Service to manage the national forests to provide timber for the nation. The court reasoned:

In light of that purpose, it is difficult to imagine that Congress enacted the MBTA barely twenty years later intending to prohibit the Forest Service from taking or killing a single migratory bird or nest ‘by any means or in any manner’ given that the Forest Service’s authorization of logging on federal lands inevitably results in the deaths of individuals birds and destruction of nests.¹⁴

The Eighth Circuit reached a similar result in *Newton County Wildlife Assoc. v. United States*.¹⁵ In that case the United States was sued by environmentalists seeking to halt timber sales in the Ozark National Forest, along the Buffalo River. Similar to the plaintiffs in *Martin*, the plaintiffs in *Newton County* sought to enjoin the timber sales because the Forest Service had not obtained a permit from the Fish and Wildlife Service to take migratory birds, among other reasons. The court first noted that the definition of the term “person” does not ordinarily include the sovereign.¹⁶ The court disagreed with the plaintiffs’ assertion that “[the] MBTA must apply to federal agencies if our Nation is to meet its obligations under the 1916 treaty,”¹⁷ noting that “the government’s duty to obey arises from the treaty itself; the statute extends that duty to private persons.”¹⁸ Finally, the court noted that the Fish and Wildlife Service did not require, and its MBTA regulation did not contemplate, federal agencies applying for migratory bird taking permits.¹⁹

On July 6, 1999, a memorandum opinion handed down in the case of *Humane Society v. Glickman*²⁰ by the district court for the District of Columbia came to the opposite conclusion, holding that the strictures of the MBTA apply to federal officials. In that case, the Department of Agriculture had developed a program to euthanize Canada geese in Virginia, thereby alleviating problems caused by the burgeoning Canada geese population. The Humane Society filed suit to enjoin execution of the program, citing violations of NEPA and the MBTA. In a lengthy analysis of the MBTA’s applicability to federal officials, the court eventually determined that the MBTA does bind federal agency actions.

First, the court examined the Supreme Court’s dicta in *Robertson v. Seattle Audubon Society*,²¹ in which the Supreme Court seemed to assume that federal agencies are bound by the MBTA, though the opinion never directly addressed or analyzed that issue squarely. Next, the court examined the exceptions to the canon that “[s]ince, in common usage, the term ‘person’ does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.”²² The court found that compliance with the MBTA would not “deprive the sovereign of a recognized or established prerogative title or interest,”²³ and that “the sovereign is embraced by general words of a statute intended to prevent injury and wrong.”²⁴ Thus, the court reasoned, federal agencies are bound by the MBTA, given the Supreme Court’s “considered dictum,”²⁵ and the applicability of the two exceptions to the general rule regarding sovereign immunity.

¹³ *Martin*, 110 F.3d at 1555.

¹⁴ *Martin*, 110 F.3d at 1556.

¹⁵ *Newton County Wildlife Assoc. et al. v. United States*, 113 F.3d 110 (8th Cir. 1997).

¹⁶ *Newton County*, at 113 F.3d 115.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, at 116.

²⁰ *Humane Society, et al., v. Dan Glickman et al.*, Civ. Act. No. 98-1510 (D.D.C. 1999).

²¹ *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).

²² *United States v. Cooper*, 312 U.S. 600, 604 (1941).

²³ *Nardone v. United States*, 302 U.S. 379, 383 (1937).

²⁴ *Id.*

²⁵ *Humane Society*, at 10.

As of this writing in late August, a decision has not yet been made on whether to appeal the district court's ruling, leaving an open question as to whether federal agencies will now have to apply for permits from the USFWS before engaging in any activities which may be construed as taking migratory birds. That being the case, installation ELSs consider offering the following guidance to natural resource managers and other relevant installation staff. Where activities to control nuisance birds are proposed for the intentional take of migratory bird species, the installation should apply to the USFWS for depredation permits allowing for intentional take at specified levels and through particular methods. For other activities which foreseeably will result in unintentional take, such as contracting for the harvest of timber, the installation should consider whether to apply for an appropriate permit. In all permitting actions, installations should carefully prepare and maintain their application and the USFWS response. In all circumstances where installation activities may result in adverse impacts to migratory birds, such impacts should be considered and, where appropriate, mitigated through the NEPA and Integrated Natural Resource Management Planning processes. ELSs should contact ELD for further guidance on a case by case basis. (MAJ Robinette/RNR)

Second Circuit Clarifies Burden of Proof under RCRA

MAJ Mike Egan

Thomas and Filomena Prisco were simply trying to find an economical way to level their land when they began operation of a landfill on their property in Putnam County, New York.²⁶ Little did they know that that they were embarking on a odyssey that would ultimately clarify the burden of proof under the Resource Conservation and Recovery Act (RCRA) and have a potential impact on all future citizen suits under this statute.

From sometime in 1986 until February 1988, the Priscos served as largely absentee managers of the landfill with day to day operation falling at different times to three separate entities. As might be imagined, based upon the relative inexperience and lack of attention on the part of the Priscos, New York's Department of Environmental Conservation (DEC) discovered that hazardous substances from the landfill had leached into nearby wetlands.²⁷

While contesting the imposition of civil penalties, the Priscos went on the offensive by suing a large and diverse array of people who had any association with the landfill. Among the causes of action was RCRA 7002(a)(1)(B), known as a private attorney general provision, that allows citizen suits. This provision states that any person has a right of action

against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to or the environment.²⁸

During the course of protracted litigation, the district court dismissed the RCRA claim stating that the plaintiff had failed to prove that waste attributed to particular defendants was linked to an imminent and substantial endangerment. Specifically, the district court held that the Priscos had not carried their burden under RCRA because they could not link any specific defendant to any particular waste.²⁹

²⁶ Prisco v. A & D Carting, 168 F.3d 593 (2nd Cir. 1999)

²⁷ *Id.* at 599-600

²⁸ 42 U.S.C. §6972(a)(1)(B)

²⁹ Prisco v. A & D Carting, 168 F.3d 593, 608-9 (2nd Cir. 1999)

On appeal to the Second Circuit, the Priscos claimed that the lower court had acted contrary to the intent of the statute when it required an additional burden of linking a defendant and its waste to an imminent and substantial endangerment.³⁰ The appellant claimed that the word “may” was intended to capture anyone who contributed any waste to a site at which there ultimately arose a risk to health or the environment. The appellate court disagreed. Relying on the plain language of the statute, the Second Circuit affirmed the holding of the district court.³¹

Environmental Law Specialists should be aware that this additional burden now presents another arrow in the quiver in the defense of citizen suits. In any 7002 suit the government must ensure that the plaintiff is able to link a particular waste with the alleged imminent and substantial endangerment. (MAJ Egan/CPL)

³⁰ *Id* at 609

³¹ *Id.*

RETIREMENT BRIEFING
POINT PAPER

I. PRE-RETIREMENT MATTERS:

A. If negotiating with a company for, or have an understanding with respect to, future employment, you have a financial interest in that company that can result in a conflict of interest. May need to issue a written notice of this disqualification.

B. Merely "seeking" employment (*e.g.*, sending an unsolicited resume) creates a disqualifying relationship with the target company, *i.e.*, you may not participate in any official matter that affects financial interests of the company.

C. In some cases, may need to:

1. Issue a written notice of disqualification to superiors, subordinates and perhaps others;
2. Issue a special notice to specified individuals if participating in a procurement;
3. Change duties; and/or
4. Forgo pre-retirement job hunting with one or more companies.

E. Travel expenses paid for job interviews are gifts from an outside source, but may be accepted if the potential employer in such situations customarily pays such expenses.

F. Employment while on leave, including terminal leave: remember, you are still on active duty, and officers and employees are prohibited by criminal law from representing any non-Federal entity before the Federal government concerning *any* particular matter. If you file a financial disclosure report, you must obtain prior written approval before being employed by a "prohibited source" (*e.g.*, a contractor or someone seeking official action from the Army).

II. RETIRED MILITARY MEMBERS:

Retired military members may not accept employment from any foreign government, including corporations owned or controlled by foreign governments, without consent of Congress (Art I, sec 9, cl 8, US Constitution). Consent obtained if the Secretary of the Army and the Secretary of State approve (10 USC 712). Retired personnel seek approval from Commander, U.S. Army Reserve Personnel Center, ATTN: ARPC-SFR-SC, 9700 Page Boulevard, St. Louis, MO 63132-5200, Telephone (314) 538-5090, DSN 892-5090. (AR 600-291).

III. FORMER "SENIOR EMPLOYEES" (GENERAL OFFICERS AND LEVEL V & VI SESs):

A. May not, on behalf of someone else, attempt to influence anyone in the department or agency served in during the last year concerning any official matter ... for one year (cooling off period) (18 USC 207(c)).

B. May not aid, advise or represent any foreign entity to help influence any USG entity or employee ... for one year (18 USC 207(f)).

IV. ALL FORMER OFFICERS OR EMPLOYEES:

A. May not, on behalf of someone else, try to influence any USG agency, officer or employee concerning the same particular matter involving a specific party in which you participated personally and substantially for the Government at any time ... for ever (18 USC 207(a)(1)).

B. May not, on behalf of someone else, try to influence any USG officer or employee concerning a particular matter involving a specific party that was pending under your official responsibility during the last year of service ... for two years (18 USC 207(a)(2)).

V. PROCUREMENT INTEGRITY LAWS:

A. For one year, you may not accept compensation from a contractor if you:

1. Served as procuring contracting officer, source selection authority, a member of the source selection evaluation board or council, or the chief of a financial or technical evaluation team, for a procurement of more than \$10,000,000 won by that contractor.

2. Served as program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 held by that contractor.

3. Personally made a decision to award a contract, subcontract, modification, task order or delivery order in excess of \$10,000,000 to that contractor.

4. Personally made a decision to establish overhead or other rates, approve a contract payment or payments, or to pay or settle a claim, for more than \$10,000,000 for that contractor.

B. The restriction applies only to the prime contractor, but it does not apply to employment by a different division or affiliate of the contractor that does not produce the same or similar products or services.

VI. REPORTING REQUIREMENTS:

If you file the Public Financial Disclosure Report (SF 278), you must file a termination report not earlier than 15 days before, and not later than 30 days after retirement.

VII. Miscellaneous Military Provisions:

A. Use of Title. Retirees may use military rank in private commercial or political activities, but the retired status must be clearly indicated, there must be no appearance of DoD endorsement, and the use must not discredit DoD (JER 2-304).

B. Wearing the Uniform. Retirees may wear their uniform for funerals, weddings, military events (such as parades or balls), and national or state holidays. They may wear medals on civilian clothing on patriotic, social or ceremonial occasions. (para. 29-4, AR 670-1).

VIII. IN GENERAL:

A. Unless Procurement Integrity applies (Section V., above), you can work for whomever you want (except for foreign governments) and work on any project or matter for the new employer.

B. Unless Procurement Integrity applies (Section V., above) none of the restrictions and prohibitions are at issue unless and until you begin to interface with departments or agencies of the USG (except for General Officers and SESs advising foreign governments in their first year).

C. If you are not restricted by the one-year Procurement Integrity no-compensation ban, and if you do not interface with the USG, all you need to worry about is protecting and not exploiting classified, procurement integrity and other inside information.

Michael J. Wentink
Ethics Counselor
Office of Command Counsel
U.S. Army Materiel Command
(703) 617-8003, DSN 767-8003
(rev'd September 1999)

September 9, 1999
DO-99-035

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Section 208 Exemptions for Disqualifying Financial
Interests that are Implicated by Participation in OMB
Circular A-76 Procedures

A recent decision by the Comptroller General has generated several inquiries about the applicability of the exemption under 5 C.F.R. § 2640.203(d) for employees who evaluate contractor proposals for procurements conducted under Office of Management and Budget (OMB) Circular A-76 procedures.(1) In that decision, fourteen of the sixteen employee evaluators held positions that were subject to being contracted out. The employees evaluated the technical proposals of contractors who were offering to perform the maintenance, operation, repair and minor construction services currently performed in-house by the Government employees. A total of 495 employees worked in the affected component. The Comptroller General concluded that it was a conflict of interest for the affected employees to participate in the evaluation of the contractor proposals, citing various provisions of the Federal Acquisition Regulation (FAR).

The Comptroller General decision did not address the Office of Government Ethics (OGE) exemption under 18 U.S.C. § 208 for employees who participate in particular matters where the disqualifying financial interest arises from Federal Government employment. We are issuing this Memorandum to reaffirm the applicability of the exemption at 5 C.F.R. § 2460.203(d) for employees who participate in matters conducted under OMB Circular A-76 procedures.(2) The Federal Acquisition Regulation at 48 C.F.R. § 3.101-1 requires that:

[g]overnment business be conducted in a manner that is above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree

of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions. [underscoring supplied]

While the Comptroller General opinion cited part of this FAR provision as a basis for the decision, it did not include or discuss the first sentence of the provision. Additionally, although raised by the attorney representing the Department of the Air Force, the opinion made no mention in the decision concerning the conflict of interest statute in 18 U.S.C. § 208 nor of the exemptions that OGE has issued by regulation implementing that statute. We believe that these were significant omissions that may well have affected the conclusion in that case.

Unless permitted by 18 U.S.C. § 208(b)(1)-(4), an employee is prohibited by 18 U.S.C. § 208(a) from participating personally and substantially in an official capacity in any particular matter in which to his knowledge, he, or any other person specified in the statute, has a financial interest, if the particular matter will have a direct and predictable effect on that interest. A "particular matter" includes evaluation of contract bids or proposals. An employee who evaluates bids or proposals of contractors who are offering to perform the work that the employee performs in-house is participating personally and substantially in a particular matter that will have a direct and predictable effect on his financial interest. In the absence of an exemption or an individual waiver, the employee could not evaluate such bids or proposals without violating Section 208(a).

In accordance with 18 U.S.C. § 208(b)(2), OGE has provided an exemption for such employees who participate in particular matters where the disqualifying financial interest arises from Federal Government employment. While an employee may not make determinations that would individually and specially affect his own salary and benefits, the exemption does permit an employee to make determinations that would affect an entire office or group of employees, even though the employee is a member of that group. Under those circumstances, employees who participate in matters connected with OMB A-76 procedures, including the evaluation of bids or proposals, are not in

violation of Section 208(a). As noted in 5 C.F.R. § 2635.501, a determination that an exemption in 5 C.F.R. § 2640 applies also constitutes a determination under the standards of conduct that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

Employees who participate in A-76 procedures, however, should be reminded of other conflict of interest provisions that may apply in Title 18 of the United States Code, in the standards of ethical conduct at 5 C.F.R. part 2635, and in the procurement integrity provisions at section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. § 423) and its implementing regulations at 48 C.F.R. § 3.104.(3) For this reason, and because we anticipate that conflict of interest issues will arise more frequently as A-76 efforts increase, we ask that you share this Memorandum with procurement officials at your agency and with those involved in the implementation of A-76 procedures.

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1. The decision was DZS/Baker LLC; Morrison Knudsen Corporation, B-281224, January 12, 1999.
 2. We address in this Memorandum only our interpretation of 18 U.S.C. § 208 and the exemption at 5 C.F.R. § 2640.403(d) that is authorized by 18 U.S.C. § 208(b)(2). This Memorandum does not purport to interpret OMB Circular A-76 nor the Revised Supplemental Handbook to OMB Circular A-76.
 3. For a fuller discussion of these restrictions, see OGE Informal Advisory Letter 95 x 10 (originally published as an article in the Government Ethics Newsgram, Summer 1995, entitled "Privatization Issues Affect Federal Employees," Vol. 12, No. 2, pp. 1-3).

E-Mail and Geese and Golf Courses

You might wonder what these three items in the subject line have to do with each other?

It seems that officials at Langley AFB here in Virginia trapped and slaughtered 189 geese. Why did they do such a terrible thing? Because of safety... the officials were concerned about their high performance aircraft sucking one of these birds into the intake and crashing. Sounds reasonable, doesn't it?

Well, it seems that a local newspaper FOIA'd all the e-mail traffic that dealt with the geese issue over the last two years. Guess what all these e-mails talked about? Every one of them expressed concern as to how they messed up the golf course! Guess what NONE of them talked about? You guessed it... not a one discussed flight safety. Guess who were never part of the e-mail traffic? This should be easy -- that's right, none of the safety officials were even copy furnished!

An abject lesson concerning e-mail... a lesson that goes well beyond the ethical issues on the use of Government resources! E-Mails are records, official records, and subject to FOIA. I bet that all those that participated in the dialogue concerning geese on the golf course thought that they were "deleted." When old and stale e-mail shows up a year or two later and are examined in the harsh light of day, without the benefit of any context, the result can be might embarrassing, or worse!

I suggest that this is a good example for emphasizing with your clients the importance of restrained use of the official e-mail system. It is not just "private" conversation that all goes away when we hit the "delete" key.

Don't forget that I have an outstanding training video on the proper (and improper) use of e-mail. To date, only one MSC has requested to borrow it. It is entitled "e-mail essentials -- Legal & Appropriate Use of e-mail". Let me know if you want to borrow it.

If you want to read the article, it is at this URL:

<http://www.washingtonpost.com/wp-srv/local/feed/a30462-1999aug23.htm>

Mike Wentink

P.S. Thanks to MAJ Mike Stump who brought this article to my attention.

Exclusion from OGE Form 450 Filing Requirement

Army SOCO has published two additional exclusions from the requirement to file a Confidential Financial Disclosure Report (OGE Form 450). The exclusion was done by SECARMY Memorandum dated 20 Aug 99, and issued pursuant to 5 C.F.R. Sec. 2634.905. It is supposed to be posted in SOCO's Standards of Conduct documents on JAGCNet, but I can't find it. Therefore, I have reproduced it below.

I will summarize the two exclusions:

(1) Actually, the first is not an entirely new exclusion. Rather, it builds on and expands the JER 7-300b.(2) exclusion of non-contract office personnel who are involved in procurement matters of \$2,500, or less, each time, and \$20,000, or less, per year. The expansion applies ONLY to IMPAC card holders. For IMPAC card holders, the SECARMY Memo eliminates the single action criteria (\$2,500 or less) and sets only a per annum criteria of \$100,000. This exclusion now applies even if the IMPAC card holder works in the contracting or procurement office. But, it does not apply if the IMPAC card holder has a warrant, administers or monitors grants or other federally conferred benefits, or regulate or audit entities. This expansion does not apply to requirements generators, those who might accept and sign off on deliveries, or who might oversee the performance of small contracts... they still are governed by the \$2,500/\$20,000 rule... only to IMPAC card holders.

(2) Secondly, as an exclusion from the general requirement for special Government employees (18 U.S.C. 202(a)), as required by 5 C.F.R. Sec. 2634.904(b), academic interns are no longer have to file, if they would only file because they are a SGEs. (If you have not required your academic interns to file OGE Forms 450 as SGEs, don't worry... I don't think that anyone else was either, to include the Office of Government Ethics. This exclusion "legitimizes" practice).

The SECARMY Memo follows.

If you have any questions, let me know.

Mike Wentink

SECRETARY OF THE ARMY
Washington

August 20, 1999

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Exclusion from OGE Form 450 Filing Requirement

I have determined that more Army officers, employees and enlisted personnel are filing an OGE Form 450, Confidential Financial Disclosure Report, than is necessary for the integrity of Army programs. Supervisors are reminded that, when subordinates are unlikely to be involved in a real or apparent conflict of interest; when they are subject to a substantial degree of supervision; or when they exercise control over matters which would be inconsequential to Army integrity, they should not be required to file this disclosure report.

Exclusion from filing the OGE 450 is also appropriate when an employee only exercises control over matters that have a low dollar threshold. The Joint Ethics Regulation (JER), DoD 5500.7-R, para. 7-300b.(2) has excluded those employees who control expenditures of less than \$20,000 cumulatively per year. In spite of this exclusion, a number of IMPAC card holders have been required to file, even though they are subject to a high degree of supervision and do not have independent control of matters that are consequential to Army integrity.

Accordingly, pursuant to 5 C.F.R. 2634.905, I have determined that IMPAC credit card holders who make annual purchases totaling less than the small purchase threshold, as defined in the Federal Acquisition Regulations (currently \$100,000), shall be excluded from filing the OGE Form 450. This determination does not preclude individual supervisors from requiring subordinates to file the form when, in the supervisor's judgment, the subordinate has duties involving the exercise of significant independent judgment over matters that will have a substantial impact on the integrity of Army operations and relationships with non-federal parties. Further, this determination does not apply to individuals who hold contracting warrants, or otherwise fall within the categories defined in 5 C.F.R. ?? 2634.904(a)(1)(ii) [administering or monitoring grants, subsidies, licenses or other federally conferred financial or operational benefits] or (iii) [regulating or auditing any non-federal entity]; and JER, para. 7-300a [listing a number of positions presumed to have filing requirements].

Pursuant to 5 C.F.R. ? 2634.905, I further determine that academic student interns shall be excluded from filing an OGE Form 450. This determination applies to interns who are students at accredited academic

institutions as defined in 20 U.S.C. ?? 1141(a) and 2891(21). This determination does not preclude individual supervisors from requiring subordinates to file the form when, in the supervisor's judgment, the subordinate has duties involving the exercise of independent judgment over matters that will have a substantial impact on the integrity of Army operations and relationships with non-federal parties. Further, this determination does not apply to individuals who hold contracting warrants, or otherwise fall within the categories defined in 5 C.F.R. ?? 2634.904(a)(1)(ii) or (iii); and JER, para. 7-300a.

//signed//

Louis Caldera

E-Mail to ECs, Subject: Impartiality in Performing Official Duties

In the business section of "The Washington Post," an interesting situation is posed in the "On the Job" column of the 28 July 1999 issue. Two employees in a Federal agency have a close, personal relationship. It appears so close, that the other workers think that the relationship is intimate. One of the employees in this relationship received a promotion, and she selected the other employee in the relationship to work for her... which was also a promotion for the second employee. The worker writing in to the "Post" says that this has impacted negatively on morale, that it sure seems like favoritism, and there are others who would have liked to have a crack at this job. You will find the article at:

The answer set out in the column appears correct as far as it goes: there are OPM rules, but they apply only to marriage partners or other familial relationships. But, the OPM rules do not apply in this type of situation. Too bad; it reflects bad judgment, but the OPM rules don't apply.

But, I suggest that this answer does not go far enough... and, as ECs, you all know that! The "Standards of Ethical Conduct" govern this situation. There is definitely a "covered relationship" here as defined by 5 C.F.R. Sec. 2635.502(b)(1). It might seem that it does not *exactly* fit the definition, but 5 C.F.R. Sec 2635.702(d) brings this relationship under Sec. 2635.502. In addition, it could be that these two employees in this relationship are members of the same household (although that is not stated in the article). Accordingly, the ethics rules say:

"Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interests of a member of his household [if that should be the case here], or knows that a person with whom he has a covered relationship [that *is* the case here] is ... a party to such a matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate ... " unless he has received written authorization (in accordance with Sec. 2635.502(d)).

Accepting as fact that the two employees have a close, personal (intimate) relationship, how do you think that a reasonable person will view one of them selecting the other for promotion; one of them making work assignments, training decision, award recommendations, etc.? Pretty bad appearances, don't you think? Unfortunately, the way the rules are written are nonsensical! It gives the employee first bite at the apple: " ... and where the employee determines that the circumstances would cause ... etc.". So, all the employee has to say is that "I didn't think that there was any issue." But, what about judgment? Where was management when this was going on? Poor judgment all around!

Now what? The employee who made the selection of her close and personal friend is purposely obtuse or just clueless and says "But, I didn't see a problem." This does not lock management in concerning prospective matters. The "agency designee" can say: "Well, I *do* see a problem, I *do* think that a reasonable person with knowledge of the relevant facts would question your impartiality in your participation in official matters affecting this other employee." Now the employee is disqualified from participating in such matters. See Sec. 2635.502(c). One of them will probably have to be transferred to resolve the disqualification.

I take the time to point this article out to you and to discuss the issues. They are complex issues, difficult to deal with, and all wrapped up in emotion. They are especially problematical when we don't have statutory guidance (e.g., the nepotism law, or conflicts of interest type statute like 18 U.S.C. Sec. 208 -- the financial interests of a spouse are imputed to an employee by law, but NOT the financial interests of a close, personal, or even intimate and live-in friend!) What's important to my mind is that we be alert to such situations, understand where these relationships fit into the scheme of things, and insist on management dealing with and resolving the issues. There is nothing worse than letting situations like this fester.

Mike Wentink