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SHOW ME THE FINES! EPA's HEAVY HAND SPURS CONGRESSIONAL REACTION

Major Robert J. Cotell

On 25 October 1999 the President signed the Defense Appropriations Bill for FY 2000 (Public Law 106-79). The bill will have a dramatic effect on how the Army processes and approves the settlement of environmental fines. Section 8149 of the bill directs that none of the funds appropriated for FY 2000

"may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of **the** fine or penalty has been specifically authorized by law." [emphasis added]

The section further provides that funds expended to perform supplemental environmental projects (SEPs) pursuant to a settlement agreement are considered "payment of the penalty." Although some attorneys have pointed out that this section may simply restate the age-old requirement for explicit authorizing language in media statutes before federal agencies can pay penalties, in fact the bill's mandate for "the" fine to be specifically authorized is controlling. Environmental Law Division (ELD) interprets Section 8149 to require specific congressional approval for the use of FY 2000 funding to pay for any fines or SEPs.

This interpretation of Section 8149 also tracks with the general understanding of its origin and purpose. The main catalyst for including this provision in the appropriations bill was EPA's proposal to issue a massive fine at Fort Wainwright, Alaska. Although the installation has not yet received a formal complaint for alleged Clean Air Act violations, EPA opened preliminary negotiations with a proposed penalty of over \$16 million. This single penalty would equal the total for nearly 200 assessed penalties received throughout the Army from all environmental regulators under all media statutes over the past seven years.

Even more alarming than the sheer magnitude of EPA's settlement offer, however, is the basis for it. Over 99% of the proposed fine is based on two types of "business" penalty assessment criteria that have no relevance to federal agencies. First, EPA proposes to recover \$10.5 million for alleged "economic benefits" received by the installation for non-compliance. Second, EPA is seeking an additional nearly \$5.5 million simply because Fort Wainwright is a "large business" and has substantial assets that EPA presumes the Army can sell or mortgage to raise money to pay for penalties. The inapplicability of these considerations to federal facilities was the topic of an article in last month's bulletin. It is understood that EPA's attempt to extend these business-based concepts to federal facilities in such a dramatic fashion caused Senator Stevens from Alaska (who is also Chairman of the

Senate Appropriations Committee) to press for adding Section 8149 to the appropriations bill while it was being considered by a House-Senate conference committee.

At present, nearly all fines are settled through consent agreements between installation commanders and federal or state regulators, after receiving concurrence by ELD. The new legislation will require the Army and DoD to maintain strict centralized scrutiny of all such agreements and obtain prior approval by Congress of any penalty payments with FY 2000 funds. The method by which the Army/DoD will attain congressional approval is in the process of being developed. However, Section 8149 is not expected to alter the basic aspects of negotiating settlement agreements. That is, installation environmental law specialists (ELs) will continue to negotiate consent agreements with federal or state regulators, and installation commanders will continue to be the Army's signatories for those agreements.

Two significant changes are likely: (1) all consent agreements will need to include a provision indicating that any payment of fines or SEPs is subject to congressional approval; and, (2) the installation will be required to prepare a settlement memorandum that explains why any payments for fines and SEPs are appropriate. The settlement memorandum will be necessary for DoD to pursue receiving a line-item budget authorization from Congress. In cases where the value of a SEP exceeds the reduction in fine amount, particular care must be given to point out whether regulatory agencies are giving penalty offset credit for SEPs that were already programmed into environmental budgets prior to the enforcement action.

In addition to affecting future settlement agreements, Section 8149 may also place restrictions on installation settlements that are already concluded. Presently ELD has identified five installations that: (1) negotiated SEPs to settle enforcement actions in previous fiscal years; and, (2) will need to use FY 2000 funding to complete the SEPs. The installations are: Walter Reed Army Medical Center; Fort Campbell; Fort Gordon; Pueblo Chemical Depot; and Deseret Chemical Depot. If any other installations have projects that fit into this category, the ELS should contact ELD as soon as possible.

ELD will prepare instructions to Staff Judge Advocates, to include proposed additional language for consent agreements, as soon as the DoD procedures are completed. In the interim, it is essential for each ELS to ensure that installations do not spend any FY 2000 funding to pay for penalties or SEPs. As enforcement actions arise, negotiations to achieve compliance should proceed as normal, as well as negotiations regarding penalties and SEPs. It will be important, however, to emphasize to the regulator throughout any negotiations that all fines and SEPs must be approved by Congress before they can be paid or implemented. (MAJ Cotell/CPL)

Fun With Removal Actions

Ms. Kate Barfield¹

Removal actions are undertaken to deal with contamination as required by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² CERCLA defines a removal action as: "...the cleanup or removal of released hazardous substances from the environment, [and] such actions as may be necessary taken in the

¹ The author would like to thank Mr. Joe Donovan, EPA Region 3, for his helpful assistance on the requirements of removal actions.

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

event of the threat of release of hazardous substances into the environment..."³ Removals include actions required to: (1) monitor, assess or evaluate a release or threat of a release; (2) the disposal of removed material and (3) other actions taken prevent or mitigate damage to public health or the environment.⁴ Removals may be undertaken as independent actions or, if warranted, as part of an ongoing remedial action.⁵ The Army, as CERCLA Lead Agent,⁶ is authorized to conduct removals and may choose to undertake such actions when remediating installations subject to Base Realignment and Closure (BRAC).⁷ Accordingly, this article examines different types of removal actions and how they are documented at both DoD's active and BRAC remediation sites.

Types of Removal Actions: There are three types of removal actions -- emergencies, time-critical removals and non-time critical removals. In practice, the distinctions among the three groups can become vague, so here is a general breakdown of their requirements:

Emergencies: Removal should begin right away. Emergency removals include actions that must be taken within hours or days after a serious threat to human health or the environment has been substantiated.⁸ These removals, by definition, involve a sense of urgency. Examples include a fire in a chemical warehouse, a hazwaste tanker accident or the need to address leaking tanks filled with an explosive substance.

Time Critical: This type of removal concerns a release that should be addressed within six months.⁹ Time-critical removals tend to involve less acute circumstances than an emergency, yet prompt action is still warranted. Important factors are the nature and extent of the release and its possible impact on nearby populations or a particularly sensitive environment. Examples of time-critical removals could encompass the need to address open tanks of hazardous substances located near a residential area or an action taken to deal with a waste dump containing leaking chemical drums.

Non-Time Critical: Here, both the process of planning and the actual removal is expected to take more than six months.¹⁰ Generally, this approach is reserved for situations that require the removal of a contaminant, but there is time for more advance planning. Examples could include: (1) a response to deal with the contamination that, though isolated from public access, could eventually pose a threat to groundwater or (2) the removal of hazardous chemical containers that will likely begin to leak before the year is out.¹¹ Because more planning time is allotted for these actions, non-time critical actions generally involve more up-front documentation and public notice.¹²

³ CERCLA, 42 U.S.C. § 9601(23).

⁴ *Id.*

⁵ 40 C.F.R. § 300.420(b)(3).

⁶ CERCLA, 42 U.S.C. § 9604(a); Exec. Order 12580, 52 Fed. Reg. 2923, January 23, 1987.

⁷ *See generally*, 10 U.S.C. § 2687.

⁸ CERCLA Section 9604(a)(1) authorizes removal actions "[w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or a substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare..."

⁹ 40 C.F.R. § 300.415(b)(3).

¹⁰ 40 C.F.R. § 300.415(b)(4).

¹¹ *See, EPA Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, EPA 540/R-93/057, OSWER 9360.0-32, August, 1993.

¹² *EPA Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, EPA 540/R-93/057, OSWER 9360.0-32, sec. 1.2, August, 1993.

Time Critical and Non-Time Critical Removal Actions: It's all in the timing. If action must be taken within six months, it is time-critical. If a longer planning period is appropriate, a non-time critical removal can be initiated. When distinguishing between the two, facts are key -- such as the likelihood of spillage, contamination migration, fire, explosion, and the potential for human exposure or damage to the food chain.¹³

One common misconception is that a time-critical removal must take place within six months or it will devolve into a non-time critical action. This is not so. Should funding or personnel shortage delay a time-critical action, its status does not change. Instead, the Lead Agency would be expected to take reasonable steps to resolve the delay.¹⁴

Conducting a Removal -- The Basics:

- Ensure that the on-scene coordinator is notified of the release in question.¹⁵
- Conduct a site evaluation.¹⁶
- Prepare the necessary decision documents or action memoranda.
- Undertake all required public participation.
- Conduct the removal.
- Ensure that appropriate documentation is included in the administrative record.¹⁷

How To Decide if a Removal Action is Needed: The NCP provides the following considerations to help you decide if a removal action is appropriate. Again, these are fact-specific. Relevant factors include the extent of contamination, the likelihood of contamination migration and the human or environmental impacts anticipated:

- Exposure (actual or potential) to humans, animals, or the food chain from hazardous substances, pollutants or contaminants.
- Actual or potential contamination of drinking water supplies and the presence of particularly sensitive eco-systems.
- Bulk containers of hazardous substances, pollutants or contaminants that pose a threat of release.
- The potential for migration of high levels of hazardous substances, pollutants or contaminants in soils that are at or near the surface.
- Weather conditions that may cause hazardous substances, pollutants or contaminants to be released or dispersed.
- Threat of fire or explosion.

¹³ The NCP provides a list of response activities that may be appropriate for removal, which also provides examples of these "ranking" factors. See, 40 C.F.R. § 300.415(e).

¹⁴ This could include appropriate interim measures, such as containing the contamination or beefing up environmental monitoring. See, Office of the Deputy Under Secretary of Defense (Environmental Security), *BRAC Environmental Program Fact Sheet, Expediting BRAC Cleanups Using CERCLA Removal Authority*, p. 6, Spring, 1997.

¹⁵ 40 C.F.R. § 300.405(a).

¹⁶ 40 C.F.R. § 300.415(a)(1).

¹⁷ CERCLA's overarching requirement for an administrative record can be found CERCLA, 42 U.S.C. § 9613(k). For more assistance on how to prepare your administrative record, see, U.S. EPA, Solid Waste and Emergency Response, *Superfund Removal Procedures Action Memorandum Guidance*, EPA/540/P-90/004, OSWER 9360.3-01, p. 7-25, December, 1990.

- Availability of another appropriate response to deal with the situation and other factors indicating a threat to human health or the environment.¹⁸

Documentation Requirements: Each type of removal action has slightly different documentation requirements. Only the non-time critical removal involves a specific format (discussed below). For emergencies and time-critical removals, the decision document need not match a specific template, but must show that the action was reasonable and in compliance with the law.

Documenting an Emergency Removal Action: Because of the urgency involved with emergencies, fewer planning documents are required. But, at the time of the removal, the Lead Agency should have identified the type and gravity of the threat to human health or environment and assessed the proximity of affected populations.¹⁹ The administrative record should justify the need for an emergency action.²⁰ Decision documents should be made available for public inspection no later than 60 days after initiation of the removal.²¹ The Lead Agent should provide written responses to significant public comments.²²

Documenting the Time-Critical Removal Action: The administrative record should contain a decision document that describes the site's history, current activities and any health or environmental threats.²³ Specifically, this record provides the following:

- Documentation that the Lead Agent reviewed the site evaluation and the levels of risk to determine that a removal action was appropriate.
- A discussion as the possible courses of action, their level of urgency and the reasoning behind the decision to select a removal action.
- A discussion of relevant federal, State or local environmental laws, regulations or guidance, including federal and State applicable or relevant and appropriate requirements (ARARs).²⁴ These ARARs should be met "to the extent practicable considering the exigencies of the situation..."²⁵
- Other action memos, decision documents and pertinent records.²⁶
- The Lead Agent's compliance with public participation requirements.²⁷

¹⁸ See, 40 C.F.R. § 300.415(b)(2)(I)-(viii).

¹⁹ 40 C.F.R. § 300.410(c)(1); U.S. EPA, Solid Waste and Emergency Response, *Superfund Removal Procedures Action Memorandum Guidance*, EPA/540/P-90/004, OSWER 9360.3-01, p. 12-16, December, 1990. In emergencies involving contaminated soil and drinking water, it may be advisable to contact the Agency for Toxic Substances and Disease Registry.

²⁰ 40 C.F.R. § 300.410(c);(e).

²¹ 40 C.F.R. § 300.820(4)(b)(1). See also, 40 C.F.R. § 300.415(n)(2).

²² 40 C.F.R. §§ 300.820(4)(b)(2); 300.415(n)(2).

²³ For assistance, see, *EPA Final Guidance on Administrative Records for Selection of CERCLA Response Actions*, OSWER Directive 9833.3A-1, December 3, 1990.

²⁴ States should be consulted during this process. 40 C.F.R. § 300.525(d),(e). See also, U.S. EPA, OSWER Publication 9360.3-02, *Superfund Removal Procedures: Guidance on the Consideration of ARARs During Removal Actions*, August, 1991.

²⁵ 40 C.F.R. § 300.415(j). Note that because of the time-critical nature of this type of removal, it may not be possible to identify more obscure ARARs, though the cleanup authority would identify the most relevant and significant ARARs. These ARARs and other relevant federal, State or local environmental laws, regulations or guidance would then be listed in the appropriate decision documents. This list should be as complete as possible, considering the exigencies of the removal. Remember that your documentation is intended to show that the agency made a goodfaith effort to identify applicable requirements.

²⁶ This record should include documents that were considered or relied upon when making the decision to proceed with a removal action -- even discussions that oppose the decision.

Even after the decision document has been formalized, the Lead Agency may continue to add documents to the administrative file. These additional documents may include discussions of response actions not addressed in the initial removal action or modifications to the final decision.²⁸ Note that changes to a signed decision document will likely trigger additional public comment requirements, as well as the need for a formal response to those comments.²⁹ Likewise, should this form of removal action be delayed beyond 120 days from initiation, additional public participation requirements come into effect.³⁰

Documenting a Non-Time Critical Removal: Because a non-time critical removal allows for at least six months of planning, more documentation is required. The factors that go into the decision to conduct a non-time critical removal are outlined in an Engineering Evaluation and Cost Analysis (EE/CA)³¹ which should:

- Document the contamination at the site and any threats that may be posed to human health and welfare or to the environment.
- Identify and compare removal action alternatives.
- Provide a recommended removal action alternative.
- Identify federal and State applicable or relevant and appropriate requirements -- ARARs -- or other relevant advisories, criteria or guidance, which are to be met to the extent practicable.³²
- The Lead Agent's compliance with public participation requirements.³³

These EE/CAs are then made available for public comment and the Army will then provide its response to significant comments received.³⁴ If the removal action will then not proceed within 120 days, the NCP requires extra public notification and opportunity to comment.³⁵ Again, changes to the response action set forth in the EE/CA will trigger additional documentation and public comment requirements.³⁶

Documenting BRAC Removals: Removals conducted at Base Realignment and Closure (BRAC) properties involve the same requirements stated above and are conducted in accordance with the removal authority provided under Section 104 of CERCLA.³⁷ This authority would permit emergency removals, as well as time-critical and non-time critical removals. Such removal actions can be initiated at any time during the investigation or

²⁷ 40 C.F.R. §§ 300.820(a)(3); 300.415(n)(1),(2).

²⁸ 40 C.F.R. § 300.825(a).

²⁹ 40 C.F.R. § 300.825(b),(c).

³⁰ 40 C.F.R. §§ 300.415(n)(3).

³¹ 40 C.F.R. § 300.415(b)(4)(i); 40 C.F.R. § 300.820(a)(1).

³² 40 C.F.R. § 300.415(j). Given that this form of removal action allows for more time to plan and prepare, the list of ARARs and other relevant federal, State or local laws, regulations or guidance will likely be more expansive. Other criteria or guidance that does not rise to the level of a promulgated standard required of an ARAR may also be considered. See also, U.S. EPA, OSWER Publication 9360.3-02, *Superfund Removal Procedures: Guidance on the Consideration of ARARs During Removal Actions*, August, 1991.

³³ 40 C.F.R. §§ 300.820(3); 300.415(n)(4).

³⁴ 40 C.F.R. §§ 300.820(a)(2); (3); 300.415(n)(1); (4). See also, Office of the Deputy Under Secretary of Defense (Environmental Security), *BRAC Environmental Program Fact Sheet, Expediting BRAC Cleanups Using CERCLA Removal Authority*, p. 3-4, Spring, 1997. This guidance contains a handy chart tracking the community-relations requirements for all removals.

³⁵ 40 C.F.R. § 300.415(n)(3).

³⁶ 40 C.F.R. § 300.825(b),(c).

³⁷ CERCLA, 42 U.S.C. § 9604(a).

cleanup phase at a BRAC site -- if data reveals that such response actions are warranted.³⁸ Note that a single BRAC site may involve more than one type of removal action. For example, in the event of a hazardous chemical release, an emergency or time-critical action could be employed to quickly install a containment system. Then, a non-time critical removal could be used to deal with the contained chemicals.³⁹

With BRAC removals, the BRAC Environmental Coordinator (BEC) does much of the legwork. S/he is responsible for working with the appropriate regulators, as well as the BRAC cleanup team members, to investigate the need for a removal and ensure that all necessary documentation is prepared.⁴⁰ When approaching non-time critical removals, the BEC will document this decision in the EE/CA. The BEC will also give the involved federal, State and local agencies an opportunity to review and comment on the proposed removal actions. One good way to begin this process is to provide the draft action memorandum to the relevant agencies and other members of the BRAC cleanup team.⁴¹ The BEC will also make the EE/CA available for a 30-day public comment period and will also hold a public meeting regarding the proposed action. After considering the comments received, the BEC may proceed with the removal.⁴²

Conclusion: Hopefully, this article helps clarify the differences among various removal actions or at least it allows for more educated confusion. Should you need more guidance, the EPA/DoD documents referenced here are available on the Web. (Barfield/RNR)

EPA publications can be found at:

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Superfund Removal Procedures: EPA Action Memorandum Guidance
EPA Guidance on Conducting Non-Time Critical Removals under CERCLA
EPA Guidance on the Consideration of ARARs During Removal Actions
EPA Final Guidance on Administrative Records for Selection of CERCLA Response Actions

Guidance for DoD properties subject to BRAC can be found at:

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Expediting BRAC Cleanups Using CERCLA Removal Authority

" FY 2000 " AIR FORCE ENVIRONMENTAL LAW COURSES

Mary F. Nixon

The following is a list of Environmental Law Courses to be conducted at the Air Force Judge Advocate General's School at Maxwell Air Force Base in Alabama during FY 2000. At present the Army has ten positions reserved for the Advanced Environmental Law Course and 25 positions each for the Basic and Update Courses. Installation Environmental Law Specialists who wish to attend the Advanced Course must send a request through their MACOM ELS to Army Environmental Law Division, Ms. Mary Nixon, 703-696-1230, mary.nixon@hqda.army.mil. ELSs interested in attending the Basic or Update Courses should contact Ms. Nixon at ELD directly. The number of authorized

³⁸ Office of the Deputy Under Secretary of Defense (Environmental Security), *BRAC Environmental Program Fact Sheet, Expediting BRAC Cleanups Using CERCLA Removal Authority*, p. 2, Spring, 1997.

³⁹ *Id.* at p. 4; 7.

⁴⁰ *Id.* at p. 1; 7.

⁴¹ *Id.* at p. 5.

⁴² *Id.* at p. 3-4; 5.

positions is subject to change. Funding for those selected to attend will come from installation budgets.

MAFJAG740 -- Advanced Environmental Law Course (20 hours). This course is an advanced seminar covering complex and specialized areas of environmental compliance for DOD installations. Its purpose is to enhance the effectiveness of military and civilian attorneys whose practice is primarily focused on advising and assisting commanders in resolving environmental law problems. Because the course focuses on current developments and trends, the curriculum varies significantly from year to year. Examples of currently taught topics include impacts of fiscal law on payment of fines and penalties under the Federal Facilities Compliance Act, litigation trends, ecosystem management (including proposed amendments to the Endangered Species Act), environmental issues in base closure, spent munitions regulations, the executive order pertaining to environmental justice, Clean Air Act developments, environmental ethics, shipboard pollution, and the regulator's perspective on DOD compliance.

Dates: 6-8 Dec 99

Target Audience: Attorneys in policy making positions at the MACOM (or equivalent) or higher levels.

MAFJAG750 -- Environmental Law Update Course (20 hours). This intermediate-level course is for environmental law practitioners who have been to the basic Environmental Law Course or equivalent, have a moderate amount of environmental law experience, and spend at least 50 percent of their time on environmental law matters. Ultimately, its purpose is to enhance the effectiveness of military and civilian attorneys in advising and assisting commanders in resolving environmental law problems. Because the course focuses on current developments and trends as they impact DOD and the component services, the curriculum varies significantly from year to year. Examples of current topics include payment of fines and penalties under the Federal Facilities Compliance Act; litigation trends; ecosystem management (including proposed amendments to the Endangered Species Act); environmental issues in base closure; spent munitions regulations; the executive order pertaining to environmental justice; Clean Air Act developments; environmental ethics; shipboard pollution; the regulator's perspective on DOD compliance; and practical considerations in conducting the Installation Restoration Program, environmental audits, and environmental analyses prepared under the National Environmental Policy Act.

Dates: 14-16 Feb 00

Target Audience: Installation-level Attorneys.

MAFJAG670 -- Environmental Law Basic Course (35 hours). The Environmental Law Course was established to provide specialized instruction to attorneys who have primary responsibility at installation or major command levels for addressing and resolving environmental problems. The course objectives are to familiarize attorneys with the range of potential environmental law problems, potential liability of DoD and its employees, procedures for obtaining permits, and responding to notices of violation. Because the Air Force is DoD's Executive Agent for environmental law training, the course brings together a total of 116 students. There is a continuing, current need for this course because of the high rate of turnover due to rotation and separation, as well as the complex and rapidly developing statutory, regulatory and case law under the multitude of federal and state environmental statutes.

Dates: 17-21 Apr 00

Target Audience: Installation-level Attorneys.

SHEDDING SOME LIGHT ON TRITIUM EXIT SIGNS

Major Ken Tozzi

The U.S. Army has used tritium exit signs on Army installations for a number of years. Legal requirements apply to the installation, servicing, removal, and transfer of tritium exit signs.⁴³ This article outlines the legal requirements and issues installation environmental law attorneys should be aware of in this admittedly obscure but important area of law.

Tritium is defined as a rare radioactive hydrogen isotope with atomic mass.⁴⁴ The radioactive properties of tritium are useful in the production of a continuous light source. A continuous light source can be produced by mixing tritium with a chemical that emits light in the presence of radiation (a phosphor). Typically such continuous light sources are useful where dim light conditions require illumination without the use of electricity or batteries. Exit signs are an example of the practical use of tritium to produce a continuous light source that is reliable in the event of power outages and blackouts, where generator or battery power is unavailable as a backup power source.⁴⁵

Tritium exit signs are regulated by the Nuclear Regulatory Commission, which issues a general license to federal government agencies (among others) to "[A]cquire, receive, possess, use or transfer, ... byproduct material contained in devices designed and manufactured for the purpose of ... producing light or an ionized atmosphere."⁴⁶ The Army is considered a general licensee by definition, and no application for a general license is required. As a general licensee the Army must comply with certain requirements regarding tritium exit signs.

Among the requirements applicable to the Army regarding tritium exit signs are a requirement to assure that labels affixed to the sign stating that removal of the sign is prohibited are maintained;⁴⁷ a requirement that installation, servicing, or removal of tritium exit signs be performed by a person holding a specific license to perform such activities;⁴⁸ a requirement to maintain records of the performance of installation, servicing, and removal from the installation of tritium exit signs;⁴⁹ a requirement to maintain such records for a period of three years;⁵⁰ and a requirement not to abandon a device containing byproduct material (tritium).⁵¹ The requirements to test devices containing byproduct material do not apply to devices containing only tritium,⁵² so the exit signs do not have to be tested.

⁴³ See generally 10 C.F.R. § 31.5 (1993).

⁴⁴ THE AMERICAN HERITAGE DICTIONARY, Based on the Second College Edition of the American Heritage Dictionary, Dell Publishing Co., Inc., 1983, p. 723.

⁴⁵ University of Michigan School of Public Health Homepage (last modified Oct. 7, 1999)

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⁴⁶ 10 C.F.R. § 31.5(a).

⁴⁷ 10 C.F.R. § 31.5(c)(1).

⁴⁸ 10 C.F.R. § 31.5(c)(3)(ii).

⁴⁹ 10 C.F.R. § 31.5(c)(4). See also Army Regulation (AR) 11-9, The Army Radiation Safety Program, para. 1-4(k)(4), requiring each commander to maintain an inventory of radiation sources in accordance with the requirements of NRC licenses, and AR 11-9, para. 2-7(b) for radioactive waste disposal guidance.

⁵⁰ 10 C.F.R. § 31.5(c)(4)(iii).

⁵¹ 10 C.F.R. § 31.5(c)(6).

⁵² 10 C.F.R. § 31.5(c)(2)(ii).

The above requirements should not present major problems for installations that currently use tritium exit signs in their buildings. Environmental law attorneys should ensure that appropriate installation personnel (local Radiation Safety Officers and Directorates of Public Works personnel) are aware of the above requirements so that compliance can be assured. Particular attention should be paid to situations where demolition of buildings is contemplated. If the Army is demolishing buildings, tritium signs should be removed and disposed of prior to demolition in accordance with Army Regulation 11-9.⁵³ It is important to note that the Nuclear Regulatory Commission recently cited an Army installation for failure to maintain records for generally licensed devices, and for unauthorized disposal of licensed materials, illustrating the importance of compliance with the above requirements.

Perhaps the more challenging situation occurs where the Army attempts to transfer buildings containing tritium exit signs to a third party through the Base Realignment and Closure (BRAC) process. Army real property is often transferred through the BRAC process to a third party called a Local Reuse Authority (LRA). Typically the LRA then develops the property pursuant to a reuse plan. In this situation the Army, as a general licensee, may only transfer tritium exit signs to another general licensee where the signs remain in use at the transferred building.⁵⁴ General licenses are issued to “[C]ommercial and industrial firms and research, educational and medical institutions, individuals in the conduct of their business, and Federal, State or local government agencies...”⁵⁵ Local Reuse Authorities are sometimes local government agencies or quasi-governmental entities. In cases where the LRA is a government entity, the restriction on transfer only to another general licensee poses no legal impediment to the transfer. Where the transferee is quasi-governmental or private in nature, however, an analysis as to whether the transferee is considered a general licensee under 10 C.F.R § 31.5(a) is required.

There are other additional requirements in transferring tritium exit signs in intact buildings to a third party. Assuming that the transferee is a general licensee, the Army must provide the transferee with a copy of 10 C.F.R § 31.5 and safety documents identified in the label of the device (exit signs) within 30 days of the transfer.⁵⁶ The Army must also report to the Nuclear Regulatory Commission the manufacturer’s name and model number of the device transferred, the name and address of the transferee, and a point of contact between the Commission and the transferee.⁵⁷ Individuals working on BRAC transfers of buildings containing tritium exit signs must be aware of the above legal requirements. Model language for transfer documents providing notice of the presence of tritium signs is currently under development.

The foregoing information will hopefully aid the environmental law attorney in analyzing legal issues involving tritium exit signs. POC at ELD is MAJ Ken Tozzi at (703)696-1562, kenneth.tozzi@hqda.army.mil. (MAJ Tozzi/RNR)

⁵³ Army Regulation 11-9, *supra* note 7.

⁵⁴ 10 C.F.R. § 31.5(c)(9)(i).

⁵⁵ 10 C.F.R. § 31.5(a).

⁵⁶ 10 C.F.R. § 31.5(9)(i).

⁵⁷ *Id.* The report should be made to the Director of Nuclear Material Safety and safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

General Conservation Permitting Policy May Cut Much Red Tape

MAJ James H. Robinette II

On 28 October 1999, the Fish and Wildlife Service (FWS) published a proposed policy⁵⁸ on general conservation permits which may offer efficiencies in how Army activities are permitted by FWS to conduct natural resource research, management and conservation activities. FWS is accepting comments on the proposed policy until 27 December 1999.

The policy will test the concept of a permit similar to State scientific collecting permits. Under the proposed policy, a single general conservation permit could be issued in lieu of a number of individual permits, with the permitted activities reflecting those whose benefits outweigh their risks to the resource (species or habitat) in question. Under the policy, a general conservation permit would only be available to individuals and institutions that have outstanding professional credentials and that are conducting scientific, management, and conservation activities. The scope of the policy is virtually all activities for which FWS currently issues permits.

Although the policy does not directly address federal agencies, neither does it exclude federal agencies from applying for permits under the policy. Conceivably, an installation natural resource manager could obtain a permit for all research, management, and conservation activities on an installation for up to five years. (MAJ Robinette/RNR)

⁵⁸ Proposed Policy on General Conservation Permits, 64 Fed. Reg. 58,086 (1999) (proposed Oct. 28, 1999).