

# USALSA Report

United States Army Legal Services Agency

## *Litigation Division Notes*

The Civilian Personnel Branch of Litigation Division provides the following notes. For further information you may call DSN 426-1600.

### **Army Air Traffic Controller Age Discrimination Litigation**

On 9 December 1981, President Ronald Reagan, by memorandum to the Director of the Office of Personnel Management (OPM), imposed an indefinite ban on employment by the Federal Aviation Administration (FAA) of striking members of the Professional Air Traffic Controllers Organization (PATCO) because the strike was not authorized by law. For a period of twelve years, those PATCO members were ineligible for employment with the FAA, to include federal employment at Army airfields.

On 12 August 1993, by memorandum to the OPM, President Clinton repealed the ban on reemployment of air traffic controllers (ATCs) terminated as a result of their strike against the federal government in August 1981. On 4 October 1993, as a result of President Clinton's repeal of the ban, the OPM issued Federal Personnel Manual (FPM) Bulletin 731-10 which mandated that all individuals terminated by the strike may be considered for employment in FAA ATC Specialist positions and in other positions in the federal government. Federal Personnel Manual Bulletin 731-10 urged these former ATCs to seek employment with those federal departments and agencies from which they were banned and urged that the ATCs directly contact the federal facilities where they would like to be considered for employment.

Installation civilian personnel officers (CPOs) and ATC selecting officials have received numerous applications for installation ATC positions at Army airfields from individuals terminated during the 1981 PATCO ban. Invariably, these individuals exceed the maximum entry age of thirty for original appointment as a DOD ATC, as required by the DOD.<sup>1</sup> However, the maximum entry age applies only to *original* appointments. Consequently, it does not apply to those former PATCO

members who received their original appointment before they were terminated due to the ban. Because of the confusion over age requirements, PATCO applicants may be incorrectly considered as "too old" for ATC vacancies. Ensuring that CPOs and selecting officials understand that the maximum entry age requirement applies only to *original* appointments should help to avoid any unnecessary age discrimination litigation surrounding the denial of ATC positions. Major Fair.

### **Observations About Settlement Agreements**

Most tribunals, including the Supreme Court, encourage negotiated settlement during the administrative processing of a complaint.<sup>2</sup> Settlements can be a winning situation for both sides. However, there is nothing worse than later discovering a potential defect in the agreement which may void it entirely, or worse, actually give the other side an advantage in future litigation. Four recent Army civilian personnel district court cases involved claims which were the subject of settlement agreements. Plaintiffs argued that the agreements were void or simply do not concern the causes of action raised in their court actions. Below are some tips to ensure that the agreement you enter into today will stand up in federal court years later.

One source of problems is the rush to produce a written product. In one pending case, a facially correct and binding settlement agreement suffered from a number of deficiencies. It was not sufficiently edited for punctuation or content (for example, the word "settlement" was misspelled). Furthermore, the agreement concerns only Title VII issues, but contained an incomplete discussion and waiver of rights under the Age Discrimination and Employment Act.<sup>3</sup> Most damaging was that the agreement did not adequately state what consideration management was to receive as part of the settlement agreement. While everything that the plaintiff was to receive was clear, the only benefit for management was that an unspecified formal EEO complaint which had been filed on a given date was settled.<sup>4</sup> There was no other discussion within the agreement itself of what the EEO complaint concerned.<sup>5</sup> A review of all records at the EEO office revealed that the plaintiff did not file a formal EEO complaint on the date specified in the agreement and that the relevant formal complaint was dated some weeks earlier. It

---

1. See Memorandum, Assistant Secretary of Defense, subject: Maximum Entry Age for Department of Defense Air Traffic Controllers (May 9, 1995) (retaining the maximum entry age of 30 as provided by Public Law 96-347). However, the DOD memorandum allows component heads to waive the maximum entry age with respect to those individuals meeting the following criteria: (1) received ATC specialist certification according to FAA standards; (2) been qualified and facility certified in a DOD or FAA ATC facility; and, (3) engaged in the direct separation and control or management of air traffic at any ATC facility controlling traffic within United States airspace, or in such facilities operated by the DOD or the FAA outside the United States within one year prior to the date of appointment.

2. *Brown v. General Serv. Admin.*, 425 U.S. 820, 828-31 (1976).

3. The waiver of ADEA claims did not comply with the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f) (1996), which has specific requirements that must be met before an ADEA claim can be waived.

appears that in the rush to produce an agreement, an older agreement may have been pulled off a computer screen to serve as the template in which new information was added while portions of the original were deleted. This procedure was apparently performed without careful review and thoughtful consideration as to whether the old agreement contained all the necessary terms. In this rush, the wrong date was entered into the agreement and no other mention was made as to which claims the plaintiff was waiving. To avoid such problems, labor counselors must carefully review settlement agreements. Have someone else review the agreement and seek advice from more senior members of the office or attorneys in your technical chain.

In another case, no written manifestation of the agreement was ever produced. It is common practice for settlement agreements made during Merit Systems Protection Board (MSPB) hearings to simply be “read into the record,” but not all MSPB hearings are transcribed. Thus, if the matter is brought into federal court, one must go through the time-consuming process of requesting the hearing tapes from the MSPB and searching them to find the settlement discussions. Additionally, tapes tend to get lost or suffer from sound deficiencies and other problems. Labor counselors may want to consider preparing a written settlement agreement which can be signed by all parties. Copies can be added to the record and maintained by the labor counselor and other appropriate offices.

The Civilian Personnel Branch recently had a case in which the plaintiff argued that he was on medication and suffering from severe sleep deprivation at the time of the settlement. Consequently, he claimed that he was “confused” and “not thinking straight” when he entered into the negotiated settlement agreement.<sup>6</sup> In this case, all of the individuals who signed the agreement for management, including the labor counselor, were named as alleged discriminating officials in other causes of action. Because of this apparent conflict, the court was not persuaded by their statements that the plaintiff appeared fine at the time that he entered into the agreement. However, the district court upheld the agreement because the plaintiff was represented by an attorney who also signed the agreement. If the

plaintiff had not been represented by counsel, the court may have decided differently. Given the possibility that the labor counselor and other management officials may later be labeled as interested parties, or even as alleged discriminatory officials, management might consider having a completely neutral and detached witness present at the signing of the agreement for the sole purpose of later testifying as to the plaintiff’s capacity. Such a witness could be anyone not involved with labor matters (e.g., the NCOIC of the criminal law section, the chief of legal assistance, or the claims office secretary).

Finally, agreements must be honored. Prior to entering into an agreement to give the complainant the “next available GS-5,” consult everyone responsible for these positions (supervisors as well as funding appropriators) to verify when the next available position will occur. Make sure all terms of the agreement are well thought out and defined. For instance, if a position becomes open, but there is no money to fill it, is it available? Additionally, explore all contingencies. If no positions become available for a year or two, has management complied with the terms, or has there been a breach?<sup>7</sup> Has there been actual accord and satisfaction?<sup>8</sup> Failing to comply with an agreement is significant, but there are worse aspects. Should the matter end up in Court, it can impact on the credibility of the government’s overall position and invite an adverse decision as to the causes of action.

The Litigation Division’s Civilian Personnel Branch’s mission is to defend management’s decisions. It is easier to defend complaints that are the subject of well thought out and properly prepared settlement agreements. Labor counselors should carefully consider the above comments and seek advice and guidance on how best to ensure that a contemplated settlement agreement is written clearly and concisely enough to dispose of any potential future claims. Major Ray.

#### **A Note of Caution About E-Mail**

One author predicts that as computer records become increasingly important to everyday business, electronic mail (e-mail) will become the “darling of discovery.”<sup>9</sup> Plaintiffs’ attor-

---

4. The EEO claim can be identified in a number of ways. For instance, by stating exactly what it concerns (i.e., a performance evaluation, given by Joe Boss, for the period 1991-1992, while complainant served as a GS-5) or by referencing case numbers (the local EEO number, the MSPB number, and/or the EEOC number). In addition, labor counselors are encouraged to negotiate as comprehensive a waiver as possible. For instance, instead of just obtaining a waiver of a particular formal EEO complaint, seek to obtain a waiver of the complainant’s right to bring a further complaint or suit on any claim that was or could have been raised up to the date of the settlement agreement.

5. Settlement agreements take on the attributes of a contract. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-38 (1975). Courts may or may not allow oral or written evidence to vary or contradict the terms of the agreement depending on the Court’s interpretation of the contract and the parole evidence rule.

6. Employees may waive their claims only when they have a full understanding of their rights and they voluntarily enter into the agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 35, 52 (1974).

7. Clearly define the procedures and remedies available to the complainant should he or she believe that a breach has occurred.

8. It is performance of the conditions of the accord which extinguish the underlying obligation. *Geisco, Inc. v. Honeywell, Inc.*, 682 F.2d 54, 57-58 (2d Cir. 1982); *Bowater N. Am. Corp. v. Murray Mach., Inc.*, 773 F.2d 71 (6th Cir. 1985).

9. John J. Dunbar, *When Documents Are Electronic: Discovery of Computer-Generated Materials*, WASH. STATE B. NEWS, Apr. 1997, at 33.

neys are quickly realizing the potential value in the discovery of all types of electronic information.<sup>10</sup> E-mail messages, for example, often contain a surprising degree of candor. Unlike a formal memorandum memorializing an action, an e-mail message may reveal the writer's full knowledge and intent on an issue.<sup>11</sup> Prior drafts of a memorandum and e-mail may also be used to fill in the gaps when memories of discussions about an action are vague or when paper documents were destroyed over time.<sup>12</sup>

With the advent of office automation, labor counselors and other legal advisors should use every available opportunity to issue words of caution about the use of electronic information. Managers and employees must be advised that e-mail systems are not private forums in which to engage in confidential communications. Except for relevance, undue burden, or privilege, e-mail messages and other electronic information are fully discoverable as "documents" under the definition provided in Federal Rule of Civil Procedure 34.<sup>13</sup> Additionally, in many jurisdictions Federal Rule 26(a) also requires the voluntary disclosure of "data compilations" as part of the "initial disclosure" required of parties in litigation. Managers and employees should also be advised that it is not all that difficult to find deleted "skeletons in the closet;" in other words, "deleted" does not always mean "destroyed." For example, deleted e-mail is often found on backup tapes of file servers, and deleted word processing files are easily recovered from the computer hard drive if not yet written over.<sup>14</sup> Your local Information Management Office (IMO) is an invaluable source for further education on these issues.

A final piece of advice concerns what to do if an EEO complainant, MSPB appellant, or plaintiff in civil litigation puts you on notice that he intends to seek computer discovery. You must take immediate steps to ensure that the electronic information is preserved by seeking the advice and assistance of the local IMO. Not only will the IMO know how to preserve the information, but it should also be able to help you "think big" or to realize the full extent of electronic information potentially available for discovery. For example, when you have a hard drive copied for preservation, ensure that all deleted and fragmented electronic data on the drive are copied as well as active files. If e-mail is routinely backed up to tapes, ensure that the system administrator preserves those tapes and does not copy over them in future backups.

As use of computer discovery continues to increase, the fairly scarce case law in this field will continue to develop and to clarify the issues. In the meanwhile, you should educate your "clients" about their use of electronic information and be prepared to preserve electronic information at first notice of intent to discover.<sup>15</sup> Captain Williams.

### **Supreme Court Rules Former Employees Are Covered Under Title VII**

Recently, the United States Supreme Court resolved a conflict between the circuit courts and recognized the right of former employees to file suit under Title VII of the Civil Rights Act for postemployment retaliation. *Robinson v. Shell Oil Co.*,<sup>16</sup> unanimously reversed a decision by the United States Court of Appeals for the Fourth Circuit.<sup>17</sup> Robinson had initially filed an action for discriminatory discharge. While his

---

10. One computer expert estimates that 20-30% of all information, including e-mail, is never printed in hard copy and that this percentage is increasing. Joan E. Feldman, *Evidence with a Bite: Computerized Files in Civil Litigation*, COMPUTER FORENSICS (1996).

11. Dunbar, *supra* note 9.

12. By way of example, one author reports a litigation moment every lawyer dreams of:

The expert told us that his draft report had been discarded. We knew that the electronic version of his current report had been prepared by writing over the draft in the word processing program without saving the prior version. Unfortunately for him, he was unaware that computers do not literally write over the prior draft as long as there is disk space, they simply assign the prior version's space as available for rewriting and invisible to the program. Utility programs like Norton Utilities easily recover the "deleted" documents. We did. The draft was devastating to the expert's current opinion. The case settled one week later.

*Attorneys Sift Electronically Stored Information for Gold*, FED. DISCOVERY NEWS, Jan. 1997, at 1.

13. This rule provides the following:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phone records, and other data compilations from which information can be obtained [and] translated, if necessary, by the respondent through detection devices into reasonably usable form) . . .

FED. R. CIV. P. 34(a). The 1979 Amendments to the Advisory Committee Notes state: "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronics (sic) data compilations . . ."

14. MICHAEL J. PATRICK, AN ATTORNEY'S GUIDE TO PROTECTING, DISCOVERING, AND PRODUCING ELECTRONIC INFORMATION 4:10 (1995).

15. At least three types of sanctions have been employed by the courts for failure of a party to fully preserve and comply with a request for computer discovery: default judgment, monetary sanctions, and adverse inferences drawn at summary judgment or trial. Dunbar, *supra* note 9, at 39.

charge was pending, Robinson applied for a position with another company. He alleged that Shell Oil gave a negative employment reference in retaliation for his protected activity. The Supreme Court held that including former employees within the protection of Title VII for the purpose of retaliatory conduct was necessary to give full effect to the law's antiretaliation provisions.

Former employees who have engaged in protected activities could allege that postemployment actions, such as negative references, are retaliation. When negotiating settlement agreements, particularly ones that include provisions for the employee to leave federal service, labor counselors should consider establishing formal reference procedures. The settlement agreement could address the type of recommendation that would be given to other employers and could also direct the employee to list a particular person as a reference. It is essential that former supervisors are made explicitly aware of the terms of any settlement agreement to avoid inadvertent violations.

While *Robinson* held that former employees could assert the protections of Title VII, the Supreme Court did not address the merits of the alleged negative recommendation.<sup>18</sup> While negative recommendations may be the most obvious allegation of reprisal, other actions also may be viewed as stating a cause of action. For example, improper release of information to third parties, failing to provide employee records or information, refusal to hire family members, and a host of other perceived wrongs. Labor counselors should continue to stress compliance with established regulations and office practices and encourage supervisors to seek guidance if they believe a former employee is trying to "set up" the agency. Major Hokenson.

## ***Environmental Law Division Notes***

### **Recent Environmental Law Developments**

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically in the Environmental files area of the Legal Automated Army-wide Systems (LAAWS) Bulletin Board Service (BBS). The latest issue, volume 4, number 7, is reproduced below. The *Bulletin* is also available on the Environmental Law Division Home Page (<http://>

160.147.194.12/eld/eldlink2.htm) for download as a text file or in Adobe Acrobat format.

### **Final Military Munitions Rule: An Overview**

On 12 February 1997, the Environmental Protection Agency (EPA) published the Military Munitions Rule,<sup>19</sup> which identifies when conventional and chemical military munitions become hazardous waste under the Resource Conservation and Recovery Act (RCRA). Military organizations that manage munitions must be prepared to implement this rule on 12 August 1997, the effective date.

The 1992 Federal Facility Compliance Act (FFCA) amended the Resource Conservation and Recovery Act (RCRA) by requiring the EPA to publish regulations that identify when munitions become a hazardous waste subject to the RCRA. In developing its rule over the past four years, the EPA reviewed comments from numerous organizations and individuals, including the Department of Defense (DOD), other federal agencies, states, tribes, universities, corporations, and citizens' groups.

The Military Munitions Rule will primarily affect the DOD, including the National Guard. Other federal agencies, such as the Department of Energy and the United States Coast Guard, which deal with military munitions on behalf of the DOD, will also be affected, as will government contractors who produce or use military munitions for the DOD. Some parts of the rule, however, apply to both military and nonmilitary activities. For example, the emergency response provisions, the new storage standards under subpart EE, and the limited exemption from manifest and marking requirements, apply to military and nonmilitary alike.

The rule acknowledges that the DOD has long-established and extensive storage and transportation standards that ensure explosive safety and security, while at the same time protecting human health and the environment. In drafting its rule, the EPA acknowledged that these DOD standards, developed and overseen by the Department of Defense Explosives Safety Board (DDESB), are at least as stringent as the RCRA standards. The EPA also relied on the military's excellent safety record in its management of munitions and explosives, regardless of their status as a product or waste.

---

16. 117 S.Ct. 843 (1997).

17. *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995).

18. *Robinson*, 117 S. Ct. at 843.

19. 62 Fed. Reg. 6621.

### *State Authority*

The EPA has adopted the traditional RCRA approach to state authority and allows states to adopt requirements for military munitions that are more stringent or broader in scope than the federal requirements. At the same time, the EPA strongly encourages states to adopt the provisions of this new rule. It remains to be seen just how states will seek to manage waste military munitions. Nonetheless, in preparation for implementing the rule in August 1997, the DOD has drafted an interim implementation policy and distributed it to the field.

In the coming months, the DOD will be working closely with installations, major commands, and regulators to identify issues and to seek consensus on a final implementation policy. To assist states in understanding its munitions management practices, the DOD has been engaged in a partnering effort with state, tribal, and environmental group representatives. This initiative will continue in an effort to persuade regulators to adopt the EPA rule and the DOD's plan for implementing the rule.

The DOD's Regional Environmental Coordinators (REC) will support the partnering process by briefing regulators and facilitating discussions. The Regional Environmental Coordinators will also work closely with state regulators to assist in modifying state laws and regulations as may be necessary to adopt the EPA rule. Whether or not some states develop more stringent standards, the EPA rule has provided a blueprint and significantly clarified the military waste munitions management requirements.

### *When Are Munitions a Waste?*

The Rule addresses a fundamental question—when do unused military munitions become a waste and thereby subject to the requirements of the RCRA? The rule identifies four circumstances under which unused munitions become waste:

- (1) when abandoned by being disposed of, burned, detonated, incinerated, or treated prior to disposal;
- (2) when removed from storage for the purpose of being disposed of, burned, incinerated, or treated prior to disposal;
- (3) when deteriorated or damaged (for example, leaking or cracked) to the point that it cannot be put into serviceable condition and cannot reasonably be recycled or used for other purposes; or
- (4) when declared a waste by an authorized military official (for example, the determination made by the Army concerning the M-55 rocket in 1984).<sup>20</sup>

---

20. 40 C.F.R. § 266.202(c)(1)-(4).

21. *Id.* § 266.202(a)(1)-(2).

In the case of "used or fired" munitions, the EPA followed their long-standing position that deposit of a product on the ground incident to its normal and expected use does not trigger the RCRA and indicated that some munitions can be expected to malfunction and not to explode on impact. In such circumstances, the EPA has defined as solid waste those unexploded ordnance that are:

- (1) transported off range or from the site of use for the purposes of storage, reclamation, treatment, disposal, or treatment prior to disposal;
- (2) recovered, collected, and then disposed of by burial or landfilling, either on or off a range; or
- (3) fired and land off range and are not promptly rendered safe and/or retrieved.

The rule also identifies specific circumstances under which military munitions are not waste. Notably, military munitions are not waste when used for their intended purposes, such as:

- (1) munitions used in training military personnel or emergency response personnel, including training in the destruction of unused propellant;
- (2) munitions used in research, development, testing, and evaluation activities;
- (3) munitions destroyed during range clearance activities on active and inactive ranges; and
- (4) unused munitions that are repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subject to materials recovery activities. Assignment of a particular condition code or placement in one of the DOD's demilitarization accounts does not automatically result in designation of an item as a waste because many of these materials are subjected to recovery, reuse, and recycling activities.<sup>21</sup>

The EPA has postponed final action on whether military munitions on closed or transferred ranges are solid waste until the DOD issues its Range Rule. The Range Rule, which the DOD expects to propose this summer, sets forth a process for addressing unexploded ordnance and other contaminants at these ranges.

### *Storage Standards*

The EPA has finalized two approaches for the storage of waste munitions. The "conditional exemption" approach is available only for the storage of waste military munitions, while the new unit standards under 40 C.F.R. parts 264 and 265,

subpart EE, are available to military and nonmilitary handlers of waste munitions and explosives.

The conditional exemption is based on the EPA's determination that the DOD's management practices make it unlikely that these waste munitions will be mismanaged and thereby present a hazard to human health and the environment. The conditional exemption allows nonchemical waste military munitions to exit the traditional RCRA regulatory scheme for hazardous wastes and, instead, be managed under a more tailored set of rules. Chemical munitions and agents are not eligible for the conditional exemption provision.

Additionally, for munitions to qualify for the exemption, they must be subject to the jurisdiction of the DDESB, managed in accordance with the DDESB's published standards (no waivers are allowed), stored in units identified to regulators, and inventoried annually and inspected quarterly. Theft, loss, or violations that may endanger health or the environment must be reported to the regulatory agency.

While a failure to meet any of the previously outlined conditions results in an immediate loss of the exemption, owners or operators may request reinstatement. This conditional exemption will greatly reduce the administrative burdens of storing waste military munitions, while providing regulators with the oversight and accountability they sought.

Under the second approach for storage of waste munitions, the EPA set forth new unit standards in subpart EE of 40 C.F.R. parts 264 and 265, dealing with permitted and interim status facilities. Subpart EE requires that hazardous waste munitions and explosives (military or nonmilitary) be stored in units that minimize the potential for detonation or release; provide a primary barrier to contain the hazardous waste; and, in the case of liquid wastes, provide for secondary containment or a vapor detection system.

The storage unit must be monitored and inspected frequently enough to assure that controls and containment systems are working as designed. The DOD storage units that satisfy the DDESB standards should already meet the unit standards of subpart EE. Unlike the conditional exemption, owners and operators will also have to comply with the RCRA's other subtitle C requirements, including the need to obtain a RCRA storage permit.

The DOD anticipates that subpart EE permits will be sought for units storing waste chemical munitions and agents, as well as for units storing conventional munitions that do not qualify for conditional exemption (e.g., because the storage unit requires a waiver from one or more DDESB standards).

In light of the extensive controls that the DOD employs when transporting munitions, the EPA has provided a limited exemption from the RCRA's transportation requirements. A RCRA manifest is not required for shipments of waste munitions and explosives (excluding chemical munitions and agents) between military entities. Such shipments must comply with the DOD shipping controls, including the use of a Government Bill of Lading (GSA SF 1109), Requisition Tracking Form (DD Form 1348), Signature and Talley Record (DD Form 1907), Special Instructions for Motor Vehicle Drivers (DD Form 836), and Motor Vehicle Inspection Report (DD Form 626).

"Military" is defined broadly enough to include the "Armed Services, Coast Guard, National Guard, Department of Energy (DOE), or other parties under contract or acting as an agent for the foregoing, who handle military munitions."<sup>22</sup> The exemption also provides for similar reporting requirements as required under the storage exemption. This limited exemption, however, may be difficult to implement on a widespread scale until states through which such shipments must travel have adopted the provision as part of their state laws and regulations.

The EPA also adopted a second exemption from the transportation requirements which applies to both military and nonmilitary generators and transporters of hazardous wastes, including waste munitions and explosives. The EPA has deleted the requirements for marking and manifesting hazardous wastes transported on a public or private right-of-way within or along the border of contiguous properties under the control of the same person.<sup>23</sup>

While designed to benefit small quantity generators, such as universities seeking to consolidate their hazardous waste activities, the DOD will also benefit. For example, military generators may transport hazardous wastes from one area of an installation to another by using the public highway that bisects the installation.

#### *Emergency Response Activities*

The EPA has also clarified long-standing EPA policies regarding the applicability of the RCRA requirements to emergency response activities. These munitions-specific provisions apply both to military and nonmilitary emergency response activities and, therefore, are scattered throughout the regulation.<sup>24</sup> In essence, these provisions codify exemptions from the generator, transporter, and permitting requirements in connection with immediate responses to emergencies involving munitions or explosives.

22. *Id.* § 266.201.

23. *Id.* § 262.20(f).

24. *Id.* §§ 262.10(i), 263.10(e), 264.1(g)(8)(i)(D)(iv), 265(e)(11)(i)(D)(iv), 270.1(c)(3)(i)(D)(iii).

For example, emergency response personnel need not obtain a generator identification number, make a hazardous waste determination, complete a RCRA manifest, mark or label the item, or obtain a regular RCRA treatment permit. A RCRA emergency permit is required, however, in those cases where the emergency response specialist determines that time will allow.

The EPA also made clear in the rule's preamble that emergency response personnel need not be concerned with land disposal restrictions and corrective action requirements. They must maintain records of the actions taken for three years. These exemptions are directed toward relieving emergency response personnel from being distracted by the RCRA's complicated administrative and substantive requirements.

#### *Permit Modifications*

The new definition of when munitions become a waste includes munitions that the DOD previously did not view as wastes. The EPA has partially relieved the DOD's concern that existing permitted facilities would be unable to accept these newly designated wastes if their permit or permit application does not specifically allow the receipt of wastes from off-site sources. The rule allows a "grace period" during which the DOD facilities may seek modifications of their permit or permit application to allow receipt of these off-site wastes.

A permit holder may continue to accept waste military munitions despite the absence of such language or inclusion of an explicit restriction on receipt from off-site sources if the facility was already permitted to handle waste military munitions on the effective date of this rule, 12 August 1997; if the permit holder submits, by 12 August 1997, a Class 1 modification request to remove the restriction; and if the permit holder submits a Class 2 modification request by 7 February 1998.

To qualify for the grace period, the modification is limited to removal of the off-site restriction. Other modifications to increase quantities or to accept new waste streams are outside the grace period provision. Because most of the DOD's existing treatment permits are still pending regulatory approval, most modification requests will be to amend the permit application, rather than an actual permit. In these interim status cases, facilities must amend their Part A and B application prior to accepting off-site wastes (i.e., these changes are not subject to the August 1997 and February 1998 deadlines).

While this provision seems to be straightforward, the services remain concerned because the final decision to grant or deny the modification request still rests with the regulator. The DOD is also pursuing a technical amendment to make clear that the grace period also applies to similar modifications to storage permits.

The Military Munitions Rule is the result of a concerted effort by the EPA and the DOD to strike a balance between environmental concerns and explosives safety concerns. The Rule, as finally promulgated, clarifies how and to what extent the RCRA's waste management scheme will apply to waste munitions activities. It provides federal and state regulators and the public with the oversight and input to which they have become accustomed in other waste management activities. It also affords the DOD an opportunity to manage its munitions, both product and waste, in a way that is sensitive to environmental concerns while accomplishing its national defense mission. The task now is to work with state and federal regulators to ensure that the rule is implemented consistently in all the jurisdictions in which the DOD has a presence. Lieutenant Colonel Bell.

#### **Harmon Decision Deals Enforcement Blow to Regulated Community**

The United States Environmental Protection Agency's Environmental Appeals Board (EAB) recently issued a decision in *In Re Harmon Electronics, Inc.*,<sup>25</sup> which weakened industry's position on three key issues when contesting enforcement actions under the RCRA.

For a fourteen-year period, employees of a Missouri company, Harmon Electronics, illegally disposed of various unused organic solvents by dumping them out the back door of the facility. Harmon management discovered the practice during an internal compliance assessment in November 1987 and ordered it stopped immediately. After assessing the environmental damage caused by the dumping, Harmon self-disclosed the disposal practice to the Missouri Department of Natural Resources (MDNR) seven months later. Because the EPA had delegated hazardous waste permitting and enforcement authority to Missouri, the MDNR inspected the site and entered into negotiations with Harmon. The MDNR concluded that, "because of Harmon's voluntary disclosure and its cooperation in completing work to characterize the site," Harmon would be allowed to enter into a consent decree, rather than face an administrative order with a possible punitive fine.<sup>26</sup> The consent decree contained standard language that it "settled the petition," and that it "shall apply to all persons, firms, corporations, or other entities who are or will be acting in concert and in privity with, or on behalf of, the parties to this Decree . . . ." The EPA Region VII, which retains oversight authority in state RCRA programs, informed the MDNR that Harmon's violations constituted "class I" violations under the EPA's RCRA Enforcement Response Policy. The EPA threatened to overfile MDNR if the latter did not pursue monetary penalties. When the MDNR did not, Region VII filed a four-count complaint against Harmon, proposing a penalty of \$2,343,706.

25. *In re Harmon Elec., Inc.*, RCRA (3008) Appeal No. 94-4 (EAB, Mar. 24, 1997).

26. *Id.* at 6.

At the administrative hearing in January 1994, the Presiding Officer lowered the penalty to \$586,716. Harmon's appeal to the EAB raised, among others, three important issues: (1) whether the Region's overfiled enforcement action was barred by the RCRA and res judicata principles; (2) whether the Region's action was barred by the statute of limitations, since the violations took place more than five years before the enforcement action; and (3) whether the gravity-based portion of the penalty should have been eliminated under the EPA's audit policy, since the violations were self-reported and voluntarily corrected.

### *The EPA Overfiling State Action*

In support of its position on the overfiling issue, Harmon first noted EPA's disregard of the plain language of section 3006 of the RCRA, which provides that authorized state programs operate "in lieu of" the federal program, and that any action by the state under its authorized program "shall have the same force and effect" as actions taken by the EPA. Harmon also observed that, while overfiling is appropriate when the state has taken no enforcement action, the appropriate response when the EPA believes that the enforcement response is inadequate is to withdraw the state authorization.<sup>27</sup> The EAB dismissed these arguments, citing the "well-established reading of the statute" that authorizes the EPA to take action even after a state has already done so.<sup>28</sup>

Harmon's second point in support of its overfiling position was that the Region's enforcement action was barred by res judicata principles. Because the Harmon/MDNR consent decree was signed by a circuit court judge, Harmon argued, the full faith and credit statute<sup>29</sup> required that federal courts give the same preclusive effect to a state court judgment that other state courts would.<sup>30</sup> The EPA countered that it was not in privity with Missouri, and that res judicata principles only apply to claims that have been adjudicated, whereas the present consent decree "resolves no issues of fact or law."<sup>31</sup>

27. *Id.* at 11.

28. *Id.* at 12.

29. 28 U.S.C. § 1738 (1996).

30. RCRA (3008) Appeal No. 94-4, 7 E.A.D. at 13.

31. *Id.*

32. *Id.*

33. *Id.* at 17.

34. 2 E.A.D. 381, 385-86 (CJO 1987).

35. RCRA (3008) Appeal No. 94-4, 7 E.A.D. at 24.

36. *Id.*

37. *Id.* at 26-27.

The EAB sided with the EPA, ruling that the state authorization did not itself create privity between Missouri and EPA. The EAB explained that state authorization alone does not ensure an identity of interests for purposes of establishing privity and that privity requires a sufficient identity of interests between the parties—in this case, between a state's enforcement interests and the EPA's.<sup>32</sup> The Board concluded, based on evidence presented, including the fact that Region VII had pressed MDNR to pursue monetary penalties and the latter did not, the MDNR and EPA did not share a sufficient identity of interests.<sup>33</sup> The Board also cited *In re Martin Electronics, Inc.*,<sup>34</sup> in support of the proposition that, even had the identity of Missouri's and EPA's interests been closer aligned in this case, the parties still were not in privity, since the EPA's approval of the state's consent order was not required.

### *Continuing Violations*

In considering the second issue, the EAB conducted a lengthy examination of the precedents construing the 28 U.S.C. § 2462 statute of limitations, under which the government is barred from maintaining an action to enforce a civil fine or penalty unless the action is commenced within five years from "the date when the claim first accrued." The Board explained that a claim "accrues" when the legal and factual prerequisites for filing suit are in place, noting that this occurs at different points depending on the type of case (e.g., a victim's injuries suffered in an auto collision versus long-term health effects in a toxic tort case victim).<sup>35</sup> When the wrongful conduct is of the type that can continue over a period of time, "the violation accrues on the last day conduct constituting an element of the violation takes place."<sup>36</sup> Thus, explained the EAB, the date when a violation accrues is different from the date it first occurs. A civil enforcement action can therefore be maintained "at any time beginning when the illegal course of conduct first occurs and ending five years after it is completed."<sup>37</sup> The Board also cited the plain language of section 3008 of the RCRA, which allows penalties for "per day of noncompliance."

## Application of the EPA Audit Policy

With respect to the third issue, Harmon detected its violations in November 1987 and reported them in June 1988. Because of this good-faith effort, the Presiding Officer reduced the Region's originally proposed multi-day penalty by 66% and increased the downward adjustment for good faith. Although Harmon conceded that it had not met all nine conditions for elimination of the gravity-based portion of the fine set out in the EPA's Incentives for Self-Policing: Discovery Disclosure, Correction, and Prevention of Violations,<sup>38</sup> (Audit Policy) it maintained that it satisfied the "spirit" of the Audit Policy and that the gravity-based penalties assessed should therefore be eliminated. The EAB rejected the "spirit" argument, citing Harmon's failure to recognize that an important aspect of the Audit Policy is to encourage settlement over litigation.<sup>39</sup>

Some point out that Harmon is a poor candidate for an Audit Policy test case,<sup>40</sup> since Harmon's self-disclosure was issued before the final Audit Policy was published, and because Harmon was deemed to be a repeat offender, having engaged in illegal dumping for over fourteen years. But, without specifically holding that a facility would be ineligible to eliminate the gravity-based portion of a penalty unless all nine conditions of the Audit Policy were satisfied, the EAB left a clear impression that the Policy's conditions "are to be respected," making the use of the Audit Policy's penalty reductions in instances of self-reported violations more difficult.<sup>41</sup>

### Conclusion

The EAB's ruling in *Harmon* has significant ramifications. First, *Harmon's* resolute approval of the EPA overfiling of state consent orders—even those approved by the state courts—could force states toward more stringent enforcement responses than they otherwise might have pursued. States will be aware that a *Harmon*-energized EPA will be keeping a close watch on effective enforcement of the delegated hazardous waste program. This more authoritative supervisory relationship could hamper extensive efforts at some installations to nurture congenial relations with their state environmental regulatory agencies. *Harmon* also illuminates some of the differences underlying state and EPA enforcement priorities: while the EPA Region repeatedly cautioned and reproved MDNR for failing to punish the violator through punitive fines, MDNR sought to reward Harmon, through a no-fine consent order, for self-

reporting its violations upon discovery and taking predisclosure steps to assess the extent of the contamination. Second, *Harmon's* interpretation of the RCRA's contemplation of when a violation "accrues," and the notion of a "continuing violation" is damaging, because the ruling allows enforcement agencies to stretch a single "act" of noncompliance into a continuous violation. Taken to its logical conclusion, one act of illegal dumping, as in the *Harmon* case, can be penalized as the multiyear operation of an unpermitted hazardous waste disposal facility and can bring an enforcement action any time within five years after the spill is ultimately cleaned or a proper permit is obtained. Finally, the EAB's ruling that compliance with the "spirit" of the Audit Policy would not necessarily be enough to eliminate the gravity portion of an assessed fine further reduces the likelihood that self-reporting a violation would be in a facility's best interests, or that a good-faith report will regularly be rewarded with penalty reduction. Captain Anders.

### Application of RCRA to a One-Time Spill

An occasional occurrence during operational training is the accidental release of material such as oil or other fluids. This may be due to a minor leak from a vehicle or a larger spill as the result of a major accident. These materials are usually deposited in places other than the RCRA managed treatment, storage, or disposal facilities, and often on private property.

The RCRA establishes a "cradle to grave" regulatory scheme for the treatment, storage, and disposal of solid and hazardous waste. The intent of Congress throughout the legislative history of the RCRA has been the protection of human health and the environment from the disposal of discarded hazardous waste. Hazardous waste under the RCRA is a subset of solid waste.<sup>42</sup> For a waste to be classified as hazardous, it must first qualify as a RCRA solid waste. Therefore, the starting point in determining the applicability of the RCRA is an examination of the statutory and regulatory definitions of solid and hazardous waste.

The statutory definition of "solid waste" includes: "any garbage; refuse; sludge generated from a treatment plant, water supply treatment plant, or air pollution control facility; and other discarded material."<sup>43</sup> The only category of waste that might describe a spill is "discarded material." The statute does not further define "discarded material."

---

38. 60 Fed. Reg. 66,706 (1995).

39. RCRA (3008) Appeal No. 94-4, 7 E.A.D. at 58.

40. See TOXICS L. REP., Jan. 22, 1997, at 917.

41. See also EPA's Audit Policy Interpretive Guidance, summarized in INSIDE EPA, Jan. 24, 1997, at 9-10.

42. 42 U.S.C. § 6903 (1996).

43. *Id.* § 6903(27) (1996).

The EPA's regulations define "solid waste" in the context of the management of hazardous waste under the RCRA subtitle C. The regulations implementing the statute define solid waste as "any discarded material." Discarded material is further defined as abandoned, recycled, or inherently waste-like material.<sup>44</sup> The regulations then specify that materials are solid waste if they are abandoned by being: "(1) disposed of; or (2) burned or incinerated; or (3) accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated."<sup>45</sup>

The subcategory of "hazardous waste" refers to those solid wastes that may: "(A) cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."<sup>46</sup> The EPA's regulatory definition of hazardous waste specifies that a solid waste is a hazardous waste if it is not excluded from the definition and is either specifically listed as hazardous or exhibits a hazardous waste characteristic.<sup>47</sup> The EPA established three hazardous waste lists: (1) hazardous wastes from nonspecific sources, (2) hazardous wastes from specific sources, and (3) discarded commercial chemical products.<sup>48</sup> If a solid waste is not a listed hazardous waste or a mixture of a listed waste and a solid waste, it may still be hazardous if it exhibits a hazardous characteristic. The four hazardous waste characteristics are ignitability, corrosivity, reactivity, and toxicity.<sup>49</sup> The regulatory definition of hazardous waste identifies hazardous wastes for the purpose of subtitle C regulation of these wastes. If a material satisfies the regulatory definition of solid waste and is hazardous under the regulations as either a listed or characteristic hazardous waste, then the comprehensive controls of subtitle C apply. Subtitle C management includes permitting requirements, land disposal restrictions, and technical standards.

The EPA does not consider it within the regulatory or statutory definitions of solid waste when the use of products for their intended purpose results in the deposit of hazardous material on the land. For example, the authorized use of pesticides is not covered by the regulatory scheme of the RCRA. The regu-

lations do not classify as solid waste those commercial products whose use involves application to the land when such products are used in their normal manner. Products applied to the land in their ordinary usage are not "discarded material" subject to waste management regulation.

In determining the applicability of the RCRA to one-time spills during operational activity, the definitions of solid and hazardous waste must be considered. The key issue regarding the applicability of the regulatory definition to spills is whether the material has been "abandoned," as defined in the regulations. When material is spilled in the operation of equipment during normal training, the operator does not "abandon" the material. The focus of the activity is the use of the material, not the disposal of it. The fact that the material ends up in contact with the environment in the same way that wastes do is not dispositive. If the material is collected soon after the spill occurs, the recovered material would be considered solid waste when removed from the site for treatment or disposal.

Even if it can be successfully argued that the spilled material does not fall within the regulatory definition of "solid waste," it may fall within the broader statutory definition. The RCRA regulations clearly state that the regulatory definition of solid and hazardous waste applies only for purposes of implementing subtitle C of the RCRA.<sup>50</sup> In issuing the final rule amending the definition of solid waste, the EPA made it clear that the broader statutory definitions of solid and hazardous waste apply for purposes of enforcing the "imminent and substantial endangerment" provisions of 42 U.S.C. § 7003.<sup>51</sup> The imminent and substantial endangerment provision of the RCRA provides broad remedial authority to address a hazard to health or the environment presented by disposal of solid or hazardous waste. Courts have supported the EPA's position that the regulatory definition of solid waste is narrower than the statutory definition.<sup>52</sup>

The EPA's position is that if products are released into the environment and left indefinitely, they eventually become discarded within the statutory definition of "solid waste." In *Remington Arms*,<sup>53</sup> the United States Court of Appeals for the Second Circuit agreed with the EPA in finding that lead shot

44. 40 C.F.R. § 261.2 (1996).

45. *Id.* § 261.2(b).

46. 42 U.S.C. § 6903(5) (1996).

47. 40 C.F.R. § 261.3(a) (1996).

48. *Id.* §§ 261.31-261.33.

49. *Id.* § 261.20.

50. *Id.* § 261.1(b)(1).

51. 50 Fed Reg. 614, 627 (1985); 40 C.F.R. § 261.1(b)(2) (1996).

52. *See, e.g., Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993).

and clay targets left in Long Island Sound had accumulated long enough to be considered solid waste.<sup>54</sup> The court did not decide how long materials must accumulate before they are considered discarded. Both the EPA and the courts, however, have concluded that the statutory definition applies only to suits brought to abate an imminent or substantial endangerment to human health or the environment.

Therefore, if a spill is left in place, the spilled materials may be considered “discarded” within the statutory definition of “solid waste,” and possibly within the regulatory definition. A failure to respond to a spill of hazardous material could be evidence of an intent to discard. It is unclear at what point in time a spill that has not been cleaned up would be considered a statutorily “discarded” solid waste and therefore subject to section 7003 remedial action or a regulatory solid waste subject to subtitle C regulation. In accordance with the intent of Congress, the EPA applies the broader definition of solid waste for remedial purposes in contrast to regulatory purposes in order to preserve the widest latitude to address imminent threats to human health and the environment. The RCRA’s regulatory management requirements are limited to activities that warrant cradle to grave regulation. It is reasonable to construe the definition of solid waste narrowly for regulatory purposes to avoid the imposition of subtitle C requirements.

The specific provisions of the RCRA corrective action program do not apply to one-time spills. Key corrective action provisions found at sections 3004(u) and (v) of the RCRA require the EPA to incorporate corrective action obligations into any permit issued. Section 3008(h) of the RCRA subjects interim status facilities to corrective action authority. These provisions require clean up of any past or present contamination that results from operation of a “solid waste management unit.”

The EPA proposed a regulatory framework for implementing corrective action in July 1990 and issued a revised advanced notice of proposed rulemaking in May 1996. In the 1990 proposal, the EPA defined the term “solid waste management unit,” or SWMU, to mean, “Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include an area at a facility at which solid wastes have been routinely and systematically released.”<sup>55</sup> An example of this, provided by the EPA, is a loading area where operations result in a small but steady spillage that contaminates the soil over time. In this proposal, the EPA

also recognized that not all areas where releases have occurred are considered SWMUs. The proposal specifically indicated that a one-time spill that had been “adequately” cleaned up would not constitute a SWMU. The EPA warned, however, that if the spill is not cleaned up it would be “illegal disposal” and subject to enforcement action.

In the 1990 proposal, the EPA recognized that military firing ranges and impact areas are not SWMUs. Unexploded ordnance fired during target practice is not discarded material since the ordinary use of ordnance includes placement on the land. The EPA cited a United States district court decision,<sup>56</sup> which suggests that materials resulting from uniquely military activities fall outside the definition of solid waste and are not subject to the RCRA corrective action. More recently, in the Military Munitions Rule, the EPA affirmed the proposition that the normal use of munitions in training activities, including the resulting deposit on the land, does not constitute disposal within the meaning of the RCRA.<sup>57</sup>

The EPA recognizes two definitions for both solid and hazardous waste: one definition from the RCRA statute for the purpose of remedial enforcement and one definition found in the regulations for the purpose of the subtitle C management program. Although one-time spills might not be solid waste under the narrower regulatory definition, they may become RCRA statutory wastes if they are left in place and pose an “imminent and substantial endangerment” under Section 7003 of the RCRA. One-time spills are not subject to the more specific corrective action provisions, which require clean up of contamination from SWMUs. In managing our spills, we must adequately clean up the material in a timely manner and reduce the likelihood of a release that may, with the passage of time, be considered “discarded” or pose an “imminent and substantial endangerment.” Major Anderson-Lloyd.

### Endangered Species Litigation

In a unanimous ruling on 19 March 1997, the United States Supreme Court held that the Endangered Species Act’s (ESA) citizens suit provision<sup>58</sup> negates the traditional “zone of interests” test traditionally used to determine standing to bring suits.<sup>59</sup> The Court also held that, for purposes of the Administrative Procedures Act (APA), plaintiffs who suffer economic harm as a result of jeopardy determinations by the United States Fish and Wildlife Service (Service) under the ESA are included

---

53. *Id.*

54. *Id.*

55. 55 Fed. Reg. 30,798, 30,808 (1996).

56. *Barcello v. Brown*, 478 F. Supp. 646, 668-69 (D.P.R. 1979).

57. 62 C.F.R. § 6621 (1996).

58. 16 U.S.C. § 1540(g) (1996).

within the zone of interests of affected persons for purposes of standing to bring suit under the APA.<sup>60</sup>

In *Bennett*,<sup>61</sup> ranchers and irrigation districts located within the Bureau of Land Management's Klamath Irrigation Project (Project) challenged a Service Biological Opinion (BO) regarding the effects of Project water levels on two endangered fish species. The Service found that the long-term operation of the Project was likely to jeopardize the fish. The Service then identified reasonable and prudent alternatives that included maintaining minimum water levels in two reservoirs. The petitioners argued that the Service's jeopardy determination violated section 7 of the ESA, and that the BO also had the effect of designating critical habitat without the requisite consideration of economic impacts, in violation of section 4 of the ESA. The suit was brought against the Service, and did not include the Bureau of Land Management. The United States District Court for the District of Oregon dismissed the complaint on the grounds that the plaintiffs did not have standing, since their "recreational, aesthetic, and commercial interests . . . do not fall within the zone of interests sought to be protected by ESA."<sup>62</sup> The United States Court of Appeals for the Ninth Circuit affirmed, holding that the "zone of interests" test limits classes that may bring an ESA challenge under either the APA or the ESA's citizens suit provision.

In overturning the Ninth Circuit, the Supreme Court (quoting the ESA's citizens suit provision, which states that any person may commence a civil suit), held that the zone of interests test does not apply to suits brought under the ESA's citizens suit provision.<sup>63</sup> Further, the Court held, because the petitioners' allegation of economic harm is sufficient to satisfy the requirement that they claim to have been "injured in fact" by the Service's BO (which was found to constitute a final agency action) and because their injury was "fairly traceable" to the BO, the petitioners have standing under Article III.<sup>64</sup> The Court went on to hold that petitioners' claim that the Service failed to perform a non-discretionary function by not considering economic impacts while effectively creating critical habitat, falls under the ESA's citizens suit provision at 16 U.S.C. § 1540(g)(1)(C).<sup>65</sup> With respect to petitioners' claims that the Service violated section 7 of the ESA, the Court found that the ESA's citizens suit

provision only includes violations committed by regulated parties.<sup>66</sup> Therefore, since the Service is not a regulated party under this section, the petitioners' section 7 claims, by default, fall under the APA. Applying the zone of interests test to the section 7 claims, the Court found that the economic harm claimed by the petitioners was sufficient to place them within the zone of interests protected by the ESA.<sup>67</sup>

This decision opens the door to a new class of ESA challenges (i.e., those based on economic harm). Furthermore, because many such challenges may now be brought under the APA, the ESA's sixty-day notice requirements will no longer apply, and successful plaintiffs may be able to recover attorneys fees under the Equal Access to Justice Act. Captain Stanton.

### **Integrated Natural Resources Management Plan (INRMP) Guidance Released**

On 21 March 1997, Headquarters, Department of the Army, issued the "Army Goals and Implementing Guidance for Natural Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP)" (hereinafter Guidance). In accordance with the Guidance, each installation in the United States with 500 or more acres, and certain OCONUS installations, must complete a PLS and complete and execute an INRMP. The Defense Planning Guidance also established goals to have all PLSs completed by fiscal year (FY) 1998 and to have an approved INRMP for each applicable installation by FY 2000.

The purpose of completing a PLS and an INRMP is to ensure that natural resources conservation measures and Army activities on mission land are integrated and are consistent with federal stewardship and legal requirements. The primary objective of the INRMP, as recognized in the Guidance, is support of the installation operational mission. In the memorandum distributing the Guidance, the Army's Assistant Chief of Staff for Installation Management reinforces the critical relation of an INRMP to mission support: "The availability of training land in the future will be largely determined by what is done

---

59. *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

today to properly integrate land use and natural resources management.”

### *Approval of INRMPs*

Army Major Commands (MACOMs) review and approve INRMPs. Prior to MACOM approval, the state fish and wildlife agency and the United States Fish and Wildlife Service should concur with the fish and wildlife aspects of the INRMP.<sup>68</sup> Additionally, all aspects of the INRMP that may potentially impact any federally listed threatened or endangered species must be the subject of consultation under section 7 of the ESA.<sup>69</sup> Finally, prior to implementing the INRMP, the installation must fully comply with the National Environmental Policy Act (NEPA) of 1969.

### *NEPA Compliance*

As stated in the Guidance, all installation INRMPs must undergo NEPA analysis in accordance with *Army Regulation 200-2, Environmental Effects of Army Actions*<sup>70</sup> (AR 200-2). In most cases, because INRMPs are derived to maintain and to sustain natural resources, production of an environmental assessment (EA) accompanied by a finding of no significant impact (FONSI) should satisfy the requirements of AR 200-2 and the NEPA. If, however, implementation of the INRMP will significantly impact the environment, then the installation must produce an environmental impact statement (EIS).

When complying with AR 200-2, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. When preparing an EA and a

FONSI under AR 200-2, the installation has the latitude to use the scoping process to elicit public comments early in the drafting process or may limit the public comment to that period dictated by AR 200-2. A longer public comment period may be beneficial if the installation determines that certain aspects of the INRMP may be controversial. Experience shows that potentially controversial aspects of an INRMP include those portions of an INRMP that determine management of:

- (1) guidelines for hunting and fishing programs (access, fees, etc.);
- (2) treatment of threatened and endangered species; and,
- (3) consumptive uses of natural resources, to include commercial forestry, grazing and agricultural leases, and mining.

The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a reasonable range of alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP—perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency. Major Ayres.

---

68. Pursuant to the Sikes Act, 16 U.S.C. §§ 670a-670o (1996), the military has authority to enter into cooperative agreements with the Secretary of Interior (United States Fish and Wildlife Service and/or the National Marine Fisheries Service) and state fish and game agencies. Additionally, in accordance with 10 U.S.C. § 2671, the Army must require that all hunting, fishing, and trapping at an installation be held in accordance with state fish and game laws.

69. The Endangered Species Act of 1973, *as amended*, 16 U.S.C. § 1536(a)(2) (1996); *see also* 50 C.F.R. pt. 402, Interagency Cooperation—Endangered Species Act of 1973, *as amended* (implementing regulations).

70. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988).