

USALSA Report

United States Army Legal Services Agency

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 8, is reproduced in part 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.

Overseas Environmental Baseline Guidance Document (OEBGD)

The Air Force is currently updating the OEBGD, but no formal draft has yet been submitted to the Services for comment.¹ The OEBGD is designed to set specific criteria that establish a baseline standard for military installations and that are designed to protect human health and the environment.

The Air Force is designated as the lead Service to review and update the OEBGD,² last promulgated in October 1992. As part of the review process, Air Force technical staff recently submitted a draft revision of the OEBGD to several technical counterparts at overseas commands. This informal draft created some controversy at several overseas commands. As a result, the Air Force environmental staff requested guidance from the Office of the Deputy Under Secretary of Defense for Environmental Security (DUSD) on several policy issues raised by the revision process. At a meeting called by the DUSD staff on 16 April 1997, the Services agreed to coordinate several policy precepts to guide the Air Force revision process. The services requested a sufficient formal comment period to allow time for coordination with overseas commands on any draft revised OEBGD. Also, Department of Defense Directive 4715.5 requires formal coordination with the Services prior to publication of an OEBGD. Major Ayres.

Executive Order for Protection of Children from Environmental Health Risks and Safety Risks

On 21 April 1997, President Clinton issued Executive Order 13,045 (EO 13,045), Protection of Children From Environmental Health Risks and Safety Risks,³ which notes that children often suffer disproportionately from environmental health and safety risks, due in part to a child's size and maturing bodily systems. The executive order defines environmental health and safety risks as:

risks to health or to safety that are attributable to products or substances that the child is likely to come in contact with or ingest (such as the air we breathe, the food we eat, the water we drink or use for recreation, the soil we live on, and the products we use or are exposed to).⁴

In light of these risks, EO 13,045 requires Federal agencies, to the extent permitted by law and mission, to identify and assess environmental health and safety risks that may affect children disproportionately. The Order further requires Federal agencies to ensure that its policies, programs, activities, and standards address these disproportionate risks.

Installations will find that EO 13,045 could have wide reaching implications, and commanders and judge advocates should begin integrating it into daily practice. The National Environmental Policy Act (NEPA) is one area of integration and is the perfect tool to examine the effects an action will have on children. The integration of EO 13,045 into NEPA is similar to what is currently being done with Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority and Low-Income Populations. Major Polchek.

Federal Facilities And The Clean Water Act

Bigger, better, and faster seems to be the trend in recent legislation which provides for federal facility sovereign immunity waivers under the major federal environmental laws. On 20 March 1997, Representative Dan Schaefer introduced a bill⁵ which would expand the present waiver of sovereign immunity under the Clean Water Act (CWA). The proposed legislation

1. DEP'T OF DEFENSE, INSTR. 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (22 Apr. 1996) (mandating the establishment and maintenance of the OEBGD).

2. *Id.*

3. Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (1997).

4. *Id.*

follows the pattern set by the waivers passed under the Resource Conservation and Recovery Act and the Safe Drinking Water Act, both of which Mr. Schaefer introduced.

The bill was initially referred to the House Committee on Transportation and Infrastructure, and it was subsequently referred to the Subcommittee on Water Resources and Environment on 3 April 1997. This bill exemplifies the type of narrowly drafted and relatively unresisted CWA legislation that is expected during this Congress. While it may appear that the legislation has a way to go before becoming law, it is not likely to encounter significant opposition, unlike other proposed environmental reforms, such as the amendment of Superfund or the Intermodal Surface Transportation Efficiency Act. Captain DeRoma.

Cumulative Effects Under the National Environmental Policy Act (NEPA)

The Cumulative Effects analysis of most National Environmental Policy Act (NEPA) documents is an area worthy of careful scrutiny, yet it is often neglected. This deficiency is not surprising considering the lack of direction on this issue provided in NEPA and in the implementing Council on Environmental Quality (CEQ) regulations. To remedy this problem, the CEQ recently published *Analyzing Cumulative Effects Under the National Environmental Policy Act* to provide a practical framework for assessing the cumulative impacts of an agency's proposed action.

Many actions are insignificant when viewed in isolation. When added together with other actions, however, the effects may collectively become significant. These cumulative effects are of the type of effects that NEPA documents should be examining. Cumulative effects are defined as:

The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.⁶

The new CEQ guidance recommends paying particular attention to cumulative effects during the scoping process, while describing the affected environment, and when analyzing the environmental consequences of the action. In the guidance, which provides eight general principles for assessing cumulative effects, the CEQ recommends examining the cumulative effects on a resource or ecosystem beyond traditional political or administrative boundaries. For example, this might require examining the impact an action will have on an entire watershed, not just within the installation. In addition, the CEQ provides many examples of tools available to assist the NEPA practitioner in assessing cumulative impacts, ranging from simple checklists and questionnaires to more formal modeling or trends analysis techniques.

Army NEPA practitioners are encouraged to adopt some or all of the CEQ guidance in order to strengthen this traditionally weak area of analysis. Copies of the guidance are available in the Environmental Law files of the LAAWS BBS. Major Polchek.

Enforcement Update

Statistics

Since Congress expanded the waiver of sovereign immunity for solid and hazardous waste violations in October 1992, Army installations have been assessed \$13.4 million in 147 fines and penalties cases.⁷ Although ninety-seven of the 147 fines and penalties were levied by States for a total of \$4.7 million, the twenty-nine imposed by the EPA amount to \$8.5 million. Sylvia Lowrance, the EPA's Deputy Assistant Administrator for Enforcement and Compliance Assurance, indicated that the numbers will likely increase markedly in FY 1997, stating, "the environmental cop is back on the beat."⁸

Reporting Requirements

The new *Army Regulation 200-1*, published in February 1997, provides slightly different reporting requirements than the previous edition of the regulation. Installations must report enforcement actions through the Army Compliance Tracking System Report (ACTS) within forty-eight hours and any fine or penalty within twenty-four hours.⁹ An enforcement action is defined as "[a]ny written notice of a violation of any environmental law from a regulatory official having a legal enforcement authority."¹⁰ This includes a "Warning Letter, Notice of

5. Federal Facilities Clean Water Compliance Act of 1997, H.R. 1194, 105th Cong. (1997).

6. 40 C.F.R. § 1508.7 (1996).

7. Of the 147 cases, 83 involved fines for RCRA violations, accounting for 78 percent of the fines and a total of \$10.4 million.

8. See Bureau of Nat'l Aff., *Record Amount of Criminal Penalties Leads EPA Accomplishments for Fiscal 96*, TOXICS L. REP., at 1098-99 (Mar. 5, 1997). The EPA's combined total of \$173 million in criminal, civil, and administrative penalties assessed (\$76.6 in criminal penalties, \$66.3 in civil judicial penalties, and \$29.9 million in administrative penalties) was the highest in the EPA's history.

9. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, paras. 1-27a(16), 13-6, 15-7b (Feb. 1997).

Noncompliance (NON), Notice of Violation (NOV), Notice of Significant Noncompliance (NOSN), Compliance Order (CO), Administrative Order (AO), Compliance Notice Order (CNO), [and] Finding of Violation.”¹¹ Any enforcement action that “involves a fine, penalty, fee, tax, media attention, or has potential for off-post impact” must be reported within forty-eight hours through legal channels (i.e., through the MACOM ELS), at the same time it is reported through ACTS; this initial notification will be followed by written notification within seven days.¹² Note that the notification requirement extends not only to an assessed fine, but also to a “fee.” In the past, “fees” assessed by states against installations were actually imposed to settle minor instances of noncompliance or were a veiled tax, both of which Federal facilities may not pay. Therefore, the portion of the reporting requirement quoted above requires that every “enforcement action that involves a fee” be reported, but it does not require that a report be made of every fee that is paid.

Increased use of BEN Model by States

The EPA’s Inspector General is recommending that the EPA prompt state regulatory agencies to recover the economic benefit of noncompliance from alleged violators. The EPA inspector general’s 31 March 1997 report, *Further Improvements Needed in the Administration of RCRA Civil Penalties*, specifically notes: “[I]t is essential that EPA and state enforcement actions recover a violator’s benefit of economic noncompliance [through use of the ‘BEN Model’], and that EPA’s ‘overfiling’ authority can be used to recover these benefits ‘when necessary,’ i.e., when a state has not properly applied the BEN Model.”¹³

The current DOD position is that application of economic benefit principles, based upon avoided or delayed compliance expenditures, to Federal facilities is not appropriate because: (1) the DOD is not a profit-seeking enterprise and has a non-profit mission; (2) DOD facilities do not self-determine their environmental compliance budgets but are dependent upon outside executive and legislative authorizations; and (3) the federal budget structure is such that imposing BEN-based penalties is more likely to reduce the level of environmental compliance spending than to increase it and could draw money from otherwise achievable environmentally beneficial projects. In light of this stepped-up pressure from the EPA, installations should be

wary of state attempts to impose inappropriate BEN-based penalties in enforcement actions. Captain Anders.

Has the EPA Deserted *Oregon Natural Desert*?

On the issue of regulating nonpoint source runoff from federal lands via state water quality certification programs, guidance from the EPA is mixed. This issue arose after the United States District Court for the District of Oregon issued its opinion in *Oregon Natural Desert Association v. United States Forest Service*.¹⁴ In that opinion, the court held, inter alia, that the phrase “any discharge” under section 401 of the Clean Water Act was not restricted to point source discharges and stated that “[section] 401 applies to all federally permitted activities that may result in a discharge, including discharges from nonpoint sources.”¹⁵ Following the court’s decision, the EPA began drafting a preliminary framework for the regulation of nonpoint sources similar to those addressed in the case. The framework purportedly would have broadened the types of discharges from federal lands to be considered by states when establishing water quality standards and also would have delineated how states should analyze the impact of the discharges upon water quality.

Several federal agencies were surprised by the decision in *Oregon Natural Desert* and the EPA’s subsequent reaction. Since these events, the Department of Agriculture has asked the Department of Justice (DOJ) to support an appeal of the case, and DOJ has filed a motion of appeal. When asked about the status of the framework, one EPA staff member stated that progress had been frozen. The individual would not state if further progress would occur or whether the project had been abandoned. If work on the framework resumes, it is possible that it could significantly affect the ability of states to control federally permitted or licensed activities on federal lands via section 401 certification. These activities are currently addressed by memoranda of understanding between the EPA and other federal agencies. Captain DeRoma.

Punitive Fines and the Clean Air Act

Recently, in *United States v. Tennessee Pollution Control Board*,¹⁶ the United States District Court for the Middle District of Tennessee held that the Clean Air Act (CAA) allows States to assess punitive fines against federal facilities. This decision

10. *Id.* at 37.

11. *Id.* app. A.

12. *Id.* para. 15-7c.

13. Inside Wash. Publishers, *IG Calls for Increased Pressure on States to Recover “Economic Benefit,”* 18 INSIDE EPA 2, 2-3 (Apr. 11, 1997).

14. 940 F. Supp. 1534 (D. Or. 1996).

15. *Id.* at 1540.

16. No. 3:96-0276 (M.D. Tenn. Apr. 10, 1997).

is contrary to another United States District Court decision in *United States v. Georgia Department of Natural Resources*.¹⁷

The Tennessee case began when, on 20 August 1993, the Tennessee Air Pollution Control Board (TAPCB) assessed a \$2,500 civil penalty under the Tennessee Air Quality Act against the Milan Army Ammunition Plant (Milan) for past violations of Tennessee's Division of Air Pollution Control rules. Although Milan did not dispute the underlying allegation that it failed to provide written notice of its intention to remove 330 linear feet of pipe containing asbestos, the Army contended that the sovereign immunity of the United States barred imposition of the penalty. Following a hearing on this issue, an administrative law judge concluded on 26 January 1996 that CAA section 118(a) waives sovereign immunity.

On 14 February 1996, the TAPCB issued orders providing final denial of the Army's administrative appeal and staying enforcement of the penalty until exhaustion of judicial remedies. The Army sought to enjoin the penalty in the United States District Court.

In the memorandum in support of its motion for summary judgment, the United States argued that, based on the Supreme Court decision in *United States Department of Energy v. Ohio*,¹⁸ the CAA did not waive sovereign immunity for civil penalties. In that case, the Supreme Court held that neither the Clean Water Act (CWA) nor the Resource Conservation and Recovery Act (RCRA) waived sovereign immunity for civil penalties.¹⁹ The United States also emphasized the recent United States District Court ruling in *Georgia Department of Natural Resources*,²⁰ where that court, based on facts nearly identical to those in the Milan case, held that the CAA does not waive immunity.²¹

The TAPCB filed a cross-motion and argued that the CAA's language was sufficiently different from the CWA and RCRA to find a waiver. The TAPCB also argued that the citizen suits provision²² provided a wiver. On 8 April 1997, the court rejected the United States arguments, granted TAPCB's cross-motion for summary judgment, and dismissed the complaint for failure to state a claim.

This adverse decision was not entirely unexpected because the same judge hearing the *Milan* case had held in *United States v. Tennessee Air Pollution Control Board*,²³ that the CAA allowed States to impose punitive fines against federal facilities. The Army expects that this decision will be appealed to the United States Court of Appeals for the Sixth Circuit and has not changed its position that Army facilities do not pay punitive fines assessed under the CAA. Lieutenant Colonel Olmscheid.

U.S. Army Environmental Management and ISO 14000

The Army study team working on ISO 14000 recently briefed their progress to the Deputy Assistant Secretary of the Army (DASA) for Environment, Safety, and Occupational Health. ISO 14000 is an internationally accepted standard for environmental management. Many multinational companies are converting to this management system so that they can compete in the European market, where such a system is a generally accepted practice. The Army is examining the potential benefits of adopting or incorporating ISO 14000 into its current environmental management program. The Army's Environmental Compliance Assessment System and Installation Status Report II programs are widely approved by regulators and provide commanders with all required information to stay in compliance with environmental laws. Although ISO 14000 is not required to ensure compliance, it might add an improved management tool for use by installation commanders. The Study Team recommended, and the DASA approved, a pilot program at Fort Lewis and Tobyhanna Army Depot to gauge the benefits of ISO 14000 to the Army. Mr. Nixon.

EAB Decision Upholds Use of Penalty Policies, Even Absent Rulemaking

A February decision by the United States Environmental Protection Agency's Environmental Appeals Board (EAB) dealt a small blow to industry when it ruled that the EPA's penalty policies under the various environmental statutes could guide the process of setting the amount of a punitive fine,²⁴ even though the policies failed to use the formal public notice and comment rulemaking process under the Administrative Procedure Act (APA).²⁵ Industry facilities have long used the lack of compliance with the APA as a possible defense in con-

17. 897 F. Supp. 1464 (N.D. Ga. 1995).

18. 503 U.S. 607 (1992).

19. *Id.*

20. 897 F. Supp. 1464.

21. *Id.*

22. Clean Air Act, 42 U.S.C.A. § 7604 (West 1997).

23. 31 Env't Rep. Cas. 1500 (M.D. Tenn. 1990).

24. Employers Ins. Co. of Wausau and Group Eight Tech., Inc., TSCA Appeal No. 95-6, (EAB, Feb. 11, 1997).

testing penalties derived mechanically under one of the environmental penalty policies.

In 1995, Chief Administrative Law Judge Jon Lotis ruled that the EPA's environmental penalty policies do not bind judicial penalty decisions, unless those policies were promulgated through a formal rulemaking process under the APA.²⁶ Judge Lotis reduced the amount of a fine assessed against a company under the Toxic Substances Control Act (TSCA) from \$76,000 to \$58,000, and he held that the fine was rigidly derived under the EPA's TSCA Penalty Policy, which had not been adopted pursuant to the APA's rulemaking procedures.²⁷ The case was hailed as a significant victory for industry, as it obligated the EPA to support factually any findings, assumptions, or determinations on which its assessed penalties rest. Then, as long as the hearing judge had "considered" the penalty policy, he or she would be free to apply the policy or to depart from it, basing the decision solely upon the strength of the evidence.²⁸

On appeal, however, the EAB ruled that Judge Lotis had taken an extreme position on the rulemaking issue and held that mechanically applied penalty policies could form the basis for civil penalties, even though they had foregone APA formal rulemaking procedures.²⁹ The EAB explained, "we readily agree that [the] EPA's adjudicative officers must refrain from treating [a penalty policy] as a rule," and should question the policy where applicable.³⁰ The Board stopped short, however, of disallowing reliance on the penalty policies by enforcement officials, "either as a tool for developing penalty proposals or to support the appropriateness of such proposals in individual cases."³¹

The EAB's ruling still retains some of the sting of Judge Lotis' ruling, to the satisfaction of industry practitioners. The EAB specified that penalties are only supportable to the extent that they are:

calculated in a manner consistent with the Agency's obligation to "take into account" the factors enumerated in [the TSCA penalty policy] It is therefore incumbent upon the complainant in all TSCA penalty cases, in order to establish the "appropriateness" of a recommended penalty, to demonstrate how the TSCA penalty criteria relate to the particular facts of the violations alleged.³²

The EAB also reaffirmed that presiding officers are not bound by the EPA's penalty policies and can depart where the facts make departure appropriate. The Board, citing 40 C.F.R. § 22.27(b), held that the presiding officer may disagree with the Region's analysis and application of the statutory penalty factors to particular cases.³³ Further, the Presiding Officer may assess a penalty which is different from the penalty recommended by the Region. "While the Presiding Officer must consider the Region's penalty proposal . . . he or she is in no way constrained by the Region's penalty proposal, even if that proposal is shown to have 'take[n] into account' each of the prescribed statutory factors."³⁴

Installation attorneys should press EPA regional counsel to comply fully with Agency internal policy guidance concerning building a case for administrative fines in enforcement actions. A memorandum from the Director of the EPA's Office of Regulatory Enforcement directs EPA attorneys to follow specific procedures.³⁵ For example, "[i]n the prehearing exchange or hearing, the facts relevant to determining an appropriate penalty under the particular statute should be presented as evidence."³⁶ The memorandum also directs EPA attorneys to maintain a "case 'record' file," which documents all factual information relied upon in developing the penalty amount pled in the complaint, and which "may be provided to the Respondent with copies of relevant documents from the case file."³⁷ Captain Anders.

25. 5 U.S.C.A. § 552 (West 1997).

26. *Employers Ins. Co. of Wausau and Group Eight Tech., Inc.*, TSCA-V-C-62-90, 1995 TSCA LEXIS 15 (Sept. 29, 1995).

27. *Id.*

28. *Id.* at 37.

29. *Wausau*, TSCA Appeal No. 95-6.

30. *Id.* at 35 (citing *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)).

31. *Id.*

32. *Id.* at 29.

33. *Id.* at 30.

34. *Id.*

35. Memorandum from Robert Van Heuvelen, Director, Office of Regulatory Enforcement, EPA, to EPA Regional Offices (Dec. 15, 1995).

36. *Id.*

Litigation Division Note

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

Feres Cases Need Investigation, Too

Introduction

Attorneys who are generally aware of the Federal Torts Claims Act³⁸ (FTCA) also know of the *Feres* doctrine, which stands for the proposition that the FTCA does not waive the sovereign immunity of the United States against suits brought by military members for “incident to service” injuries.³⁹ In the past, courts readily dismissed *Feres* cases when there was simply evidence that a service member was injured on post, even in the absence of a detailed factual investigation.⁴⁰ Many of today’s courts no longer find such basic facts sufficient to dismiss a lawsuit.⁴¹ This note discusses the need for Litigation Division to factually support motions to dismiss with much more information than is currently being captured during the administrative claims investigation of *Feres* cases.

“Incident to Service” Factors

The *Feres* doctrine continues to be a strong and reliable defense for the United States because the United States Supreme Court has consistently upheld the doctrine.⁴² The *Feres* defense consists of arguing the “incident to service” factors: (1) situs of the injury; (2) nature of the plaintiff’s activities at the time of the incident; (3) the duty status of the plaintiff at the time of the incident; and (4) the benefits accruing to the service member.⁴³

In the Supreme Court’s most recent case discussing *Feres*, the Court reaffirmed a straightforward application of the “incident to service” test, believing any other approach would

impermissibly intrude into military affairs.⁴⁴ “The ‘incident to service’ test . . . provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters.”⁴⁵

Situs of the Injury

Although the situs of the injury is a relatively simple concept, litigation reports often do not adequately address this factor. A fully documented litigation report will not only identify exactly where the incident occurred, but it will also provide other pertinent information surrounding the location. If off-post, what are the “incident to service” factors? Did the incident occur at an off-post bus stop used solely by military buses? Was the incident off-post, but just outside the gate? Was the incident on federal land (and under federal control), or did it occur on a state highway that runs through the installation or on a railroad or power company easement? Was the installation a closed or open post? Could civilians access the area where the incident occurred? Was the area off-limits, or was the service member not authorized to be there? Answers to these types of questions (along with supporting evidence) are crucial to successfully asserting the *Feres* defense.

Duty Status

Whenever a plaintiff is a service member, a litigation report should include evidence of the service member’s status at the time of the incident. Standard evidence in the litigation report should include, for example, a copy of the member’s personnel file, a DA Form 2-A or 2-1 (or service equivalent), a copy of a Leave and Earnings Statement for the month in question, the member’s Reserve Officer Training Corps contract (or orders for a particular event), reserve orders, interview notes from the service member, and interview notes from the supervisor addressing the service member’s status.⁴⁶ Absent such evidence, trial attorneys are forced to use limited discovery to substantiate a plaintiff’s duty status at the time of the accident.

37. *Id.*

38. 28 U.S.C.A. §§ 1346(b), 2671-80 (West 1996).

39. *Feres v. United States*, 340 U.S. 135 (1950).

40. *See, e.g.*, *Shaw v. United States*, 854 F.2d 360 (10th Cir. 1985); *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985).

41. *See, e.g.*, *Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994), *aff’g* 877 F. Supp. 1569 (M.D. Ga. 1992), *vacated for rehearing en banc*, 28 F.3d 1076 (1994), *judgment affirmed by equally divided court*, 37 F.3d 617 (1994). The end result of the appellate court action leaves the district court judgment (a soldier injured in on-post quarters while on leave is not *Feres*-barred) intact.

42. *United States v. Johnson*, 481 U.S. 681 (1987); *United States v. Stanley*, 483 U.S. 669 (1987).

43. Many courts also consider whether a service member has available an alternate compensation scheme. Therefore, claims attorneys must obtain factual information concerning any compensation available, whether paid or not.

44. *Stanley*, 483 U.S. at 682-83.

45. *Id.*

Nature of Plaintiff's Activities

A detailed review (during the claims investigation) of the plaintiff's activities at the time of the incident is essential to establish that the injury was incident to service. This requires a claims investigator to interview claimants carefully to see what they were doing, where they were coming from, where they were going, and why they were engaged in the activity.⁴⁷ The chain of command should also be interviewed about the incident and the duty status of the service member.

Benefits Accruing to the Plaintiff

In many cases, substantiating the benefits accruing to the plaintiff is relatively simple. Free medical care and access to military flights are obvious benefits to members of the military and universally act to bar service members from recovery. However, further investigation may be necessary if the incident occurs, for example, at an off-post event (such as a command sponsored golf tournament or other group recreational activity). Was the service member involved in a physical activity (i.e., getting the benefit of improved physical fitness)? Do nonmilitary personnel have access to the same benefit? If an automobile accident occurs off-post, did the service member receive payment for using the vehicle (e.g., financial benefits)?

Available Compensation Scheme⁴⁸

The availability of an alternate compensation scheme is not one of the factors of the "incident to service" test, but some courts look at it when deciding *Feres* cases.⁴⁹ As a result, every litigation report raising the *Feres* defense should include basic

information and evidence to support the proposition that compensation was available to the plaintiff, whether paid or not.

While the compensation depends on the injuries suffered by the plaintiff, a brief discussion (with statutory authority) on the benefits available from the Department of Veterans Affairs (DVA) would greatly assist an Assistant United States Attorney (AUSA).⁵⁰ Similarly, a discussion on the availability of guaranteed military medical care and the benefits available from the Physical Evaluation Board (PEB) process for "incident to service" injuries is crucial to understanding the breadth of the compensation scheme available to all active duty service members, and such a discussion should be included in the litigation report for any claim of injury.⁵¹ Copies of all documents proving receipt of the compensation or results of a PEB must be included in the litigation report. Bear in mind that while some, but not all, AUSAs are familiar with the military and can generally argue the availability of compensation, the details of each case must come from those who prepare the litigation report.

A recent case highlights the importance of fully developing the facts in a *Feres* case. The plaintiff alleged that an Army and Air Force Exchange Service (AAFES) truck hit him on his way to work. The Government successfully argued in the motion to dismiss that the plaintiff (an active duty sailor at the time of the incident) was *Feres*-barred for an off-post accident that occurred while he was driving to his place of duty. Because the case appeared to be one in which a military member was simply commuting to work, the "incident to service" factors were not addressed in the litigation report.⁵² As a result, most of the substantive factual basis relied on in the motion to dismiss was developed well after the litigation had begun.⁵³

The administrative claims investigation correctly identified that plaintiff was on active duty, lived on a federal installation, and was on his way to work. In preparing the motion to dis-

46. While interview notes cannot be used as evidence, they are useful in understanding the facts surrounding an incident. Notes also identify people from whom declarations may need to be obtained in support of a motion to dismiss.

47. Look for a military connection. Was the soldier driving to the post exchange or medical clinic? Was the soldier benefiting from the activity by maintaining his physical fitness or improving his morale?

48. In addition to the fairly clear (but sometimes difficult to apply) "incident to service" test, there are broader rationales underlying the congressional refusal to waive sovereign immunity for suits by service members. These include: (1) the availability of a separate, comprehensive compensation scheme (*i.e.*, Veterans benefits); (2) the effect upon military order, discipline, and effectiveness if service personnel are permitted to sue the government; (3) the distinctly Federal relationship between the government and members of the armed services; and (4) the unfairness of permitting "incident to service" claims to be determined by local (*i.e.*, nonuniform) laws.

49. *See, e.g.*, *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1997).

50. For example, the DVA determines (and funds) dependency and indemnity compensation and provides lifetime medical treatment for service-related injuries. In *Dreier*, the court held that the soldier was not barred by *Feres* and relied, in part, on its finding that the deceased's family was denied administrative compensation for the soldier's death. *Id.* at 855. Government counsel determined after the decision that, in fact, the family was receiving appropriate survivor benefits from both the Army and DVA.

51. DEP'T OF ARMY, REG. 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION (1 Sept. 1990). This process evaluates soldiers for "incident to service" injuries and determines if a soldier qualifies for a disability rating.

52. In most jurisdictions, commuting to work does not bring an employee into the scope of his or her employment, and the person is individually liable. *See generally* 2 LESTER S. JAYSON, PERSONAL INJURY, HANDLING FEDERAL TORT CLAIMS § 9.07[3][a] (1996) (citations omitted; discussing the concept that service members commuting to or from work are not within the scope of their employment).

Conclusion

miss, the government discovered additionally that, at the time of the accident, plaintiff was billeted at the Army installation because the Navy barracks at his nearby duty station were being completely renovated. According to plaintiff's senior Non-Commissioned Officer (an E-9), the command had decided to house sailors with cars at the Army installation. Those without cars would be bussed to the duty station from closer barracks. The sailors temporarily billeted at the Army installation were directed to use privately owned vehicles to drive to work.

This additional information surrounding plaintiff's activities and the duty status of the plaintiff at the time of the incident provided sufficient evidence to successfully assert the "incident to service" *Feres* defense.

The days of an "easy" *Feres* case are over. Because *Feres* decisions can—and often do—hinge on a single fact, claims attorneys must investigate and support all factors.⁵⁴ To accomplish this, claims attorneys must first understand the differences between the "incident to service" test and the *Feres* rationales. Second, they must then conduct a thorough investigation that identifies and develops the facts that best support *all* the issues that often arise during the course of litigation. While the government is still largely successful when raising the *Feres* defense, conducting full investigation of *Feres* cases will insure the defense retains its vitality. Major Boucher.

53. Development of the facts late in the process is difficult and invites disaster. For example, the speed at which lawsuits are processed in the Eastern District of Virginia (the "Rocket Docket") is dramatic, and there is little time for factual development. As a result, AUSAs rely heavily on the facts contained in the litigation report.

54. Nick Adde, *Ruling Gives Suits Chance, Chips at Feres Doctrine*, ARMY TIMES, Apr. 21, 1997, at 21 ("[A] case that might go one way under *Dreier* would come out differently if one fact were different." (quoting Eugene R. Fidell)).