

# USALSA Report

United States Army Legal Services Agency

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

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 8, is reproduced in part below.

### ***United States v. Hoechst Celanese Corp.: Challenging Inconsistent Interpretations by EPA Regions***

In a petition for certiorari that is attracting a great deal of interest, Hoechst Celanese Corp. is seeking reversal of a decision by the United States Court of Appeals for the Fourth Circuit<sup>1</sup> that found the corporation liable for violations of the Clean Air Act (CAA) and National Emission Standard for Hazardous Air Pollutants (NESHAP) for benzene.<sup>2</sup> The petition concerns the interpretation of the CAA fugitive emission standard for benzene, which applies to a facility that “uses” more than 1000 megagrams of benzene a year.<sup>3</sup> Hoechst was cited for violations that were based on the Environmental Protection Agency (EPA) Region IV’s interpretation of “use” which was contrary to the interpretation of Region VI that exempted a similar facility of Hoechst’s from the requirements.<sup>4</sup>

Region IV’s interpretation of benzene “use” was not limited to the amount consumed, but also included recycled benzene each time it cycled through two separate points in the system. Based on this interpretation, Region IV denied Hoechst an exemption from the regulations because its plant used more than 1000 megagrams per year.<sup>5</sup> Region VI had exempted a

similar plant, by taking the position that “use” was measured by the total quantity of benzene that was in use at the facility.<sup>6</sup>

An issue for the Fourth Circuit was the consistency and availability of Region IV’s interpretation. The court found that despite previous contrary interpretations of “use” by other EPA offices and state agencies, Region IV put Hoechst on actual notice of their interpretation by a letter.<sup>7</sup> The Fourth Circuit decided that Region IV’s interpretation deserved deference because it was consistent with the CAA or its regulations and was not created for the purpose of litigation.<sup>8</sup>

Circuit Judge Niemeyer’s partial dissent recognized the problem with inconsistent EPA interpretations over a period of time and throughout different regions. The dissent asserted that Region IV’s notice of their interpretation should not constitute a definitive agency-wide EPA notice that could result in penalties for noncompliance.<sup>9</sup> The Corporate Environmental Enforcement Council and seven other national trade associations have picked up the dissent’s reasoning in an amicus brief that supports Hoechst’s petition for certiorari. The brief that was filed on April 22, 1998, states that EPA’s regional offices should apply consistent and publicly available interpretations of federal regulations. In addition, the brief supports the position that only those agency interpretations that are published and have nation wide application should be given deference.<sup>10</sup>

This issue is of interest to any regulated entity that operates in more than one EPA Region. As different regulatory requirements are placed on facilities that are located in different parts of the country, the resulting confusion becomes a real operational impediment. When a federal appeals court upholds a regional interpretation that is then controlling in that circuit’s jurisdiction, there may be a problem with conflicting regional

1. *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997).

2. *Id.*

3. *Id.* at 219.

4. *Id.* at 228.

5. *Id.* at 222.

6. *Id.* at 232.

7. *Id.* at 229.

8. *Id.* at 221.

9. *Id.* at 233.

10. High Court Brief Argues Interpretation of EPA Rules Must Agree With one Another, 12 *Tox. L. Rep.* 48, 1407 (1998).

interpretations because EPA's regions are not contiguous with federal judicial circuits. Major Anderson-Lloyd.

### Enforcing Executive Orders

Many executive orders contain the proviso that the order does not create a private right of action. For example, Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Population and Low Income Populations, Section 6-609 states that "[t]his order is intended only for internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any persons. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."<sup>11</sup>

Recently, there was a challenge of the Environmental Assessment (EA) regarding Army construction activities in support of the U.S. Border Patrol along the Rio Grande River. The plaintiffs sought to enjoin these activities by alleging, among other things, that the Army failed to comply with Executive Order 11988, Flood Plain Management, 3 C.F.R. 117 (1978) and Executive Order 119909, Protection of Wetlands, 3 C.F.R. 121 (1978).<sup>12</sup> They do not contain the limiting language on judicial review cited above. These executive orders, which are very similar, require federal agencies to make certain determinations regarding the necessity of undertaking a project in a 100-year flood plain or wetland. According to the plaintiffs the EA lacked these determinations.

The court in *Rio Grande International Study Center v. United States Department of Defense* did not rule on the plaintiffs' assertion that the Army needed to comply with the executive orders. Instead, the court found that the non-compliance, if any, was minor and that the balance of harm tipped to the Army

completing the project.<sup>13</sup> In a footnote, however, the court, did analyze whether a private right of action existed.<sup>14</sup> The court expressed doubt that these executive orders could be enforced by private parties. It relied on *Facchiano Constr. Co. v. United States Dep't of Labor*,<sup>15</sup> which held that generally there is no private right of action to enforce obligations imposed on executive branch officials by executive orders. The *Rio Grande* court noted that the action by the agency would be reviewable only if the executive order in question had the force and effect of law and was intended to create a private right of action.<sup>16</sup> Executive orders have the force and effect of law when they are issued pursuant to a statutory mandate or a delegation from Congress. The *Rio Grande* court expressed two reasons why these two could not be enforced privately. First, the court noted that both executive orders relied on the "the authority vested in [the President] by the Constitution and statutes of the United States of America and as President of the United States of America, in furtherance of the National Environmental Policy Act . . . .",<sup>17</sup> which the court viewed as a broad invocation of the Constitution and laws of the United States. Citing *Independent Meat Packers Ass'n v. Butz*,<sup>18</sup> the court said that the force and effect of law is not conferred by such broad invocations. Second, relying on *Watershed Assoc. Rescue v. Alexander*,<sup>19</sup> the court in *Rio Grande* court noted that none of the statutes invoked by these executive orders directed the President to issue orders that have the force and effect of law.

There is authority, however, in the Fifth Circuit that is contrary to the position that was expressed by the court in *Rio Grande*. Specifically in *Harris*,<sup>20</sup> the Fifth Circuit Court of Appeals held that Executive Order 11990 had the force and effect of law. This case was not addressed by the court in *Rio Grande* even though it was cited by the plaintiffs. While *Harris v. United States* offers no analysis on why it finds that this order has the force and effect of law, it certainly leaves open the question of its enforceability.

The lesson to be learned from *Rio Grande*, is that the enforceability of Executive Orders 11988 and 11990 is not set-

11. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

12. See *Rio Grande Int'l Study Center v. United States Department of Defense*, No. L-98-9 (S.D. Tex. filed Feb. 13, 1998) (unpublished opinion on file with the author).

13. *Id.*

14. *Id.* at No. L-98-9, n8.

15. 987 F.2d 206, 210 (3d Cir. 1993).

16. See *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 (8th Cir. 1975).

17. *Rio Grande Int'l Study Center v. United States Department of Defense*, No. L-98-9 (S.D. Tex., filed Feb. 13, 1998).

18. *Independent Meat Packers*, 526 F.2d at 235.

19. 586 F. Supp. 978, 987 (D. Neb. 1982).

20. 19 F.3d 1090, 1093 (5th Cir. 1994).

ted. More importantly, it does not need to become an issue in the NEPA context. Findings that an agency must make in order to proceed with activities in a flood plain or wetlands, are set out in Section 2(a)(1) of Executive Order 11988 and Section 2(a) of Executive Order 11990. Reviewers of EAs and environmental impact statements that involve activities in, or affecting, flood plains or wetlands, must ensure that these documents articulate the requirements of Section 1(a)(1) and/or Section 2 (a) and how they are satisfied. Mr. Lewis.

### **Alternate Dispute Resolution Working Group Reconvenes**

The Department of Defense (DOD) Environmental Alternative Dispute Resolution Working Group has reconvened. The first action of the working group was to develop a charter. The members agreed upon the charter as follows:

To promote and encourage the understanding and use of Alternative Dispute Resolution (ADR) by DOD components in environmental planning, compliance, restoration, and litigation matters in conjunction with development of partnering relationships with federal, state, and local environmental regulators and stakeholders. To identify procedures for and barriers to: timely and efficient implementation of environmental ADR processes; effective oversight within DOD components of environmental ADR initiatives; and expanding availability and access among DOD components of information and training that relate to environmental ADR initiatives.

After finalizing the charter, the working group attendees discussed the various ADR initiatives that were being undertaken by the Department of Justice (DOJ) and the EPA, and recognized a need to become more familiar with similar initiatives that may also be underway within their own component.

You may want review how ADR can assist you in your work as well. Copies of the following can be provided upon request: DOJ's Policy on the Use of ADR and Case Identification Criteria for ADR; EPA's Guidance on the Use of ADR in EPA Enforcement Cases; EPA's Status Report on Use of ADR in Enforcement and Site Related Action (1995-1996); EPA's Superfund Enforcement Mediation-Regional Pilot Project Results; DOD ADR Program Components; DOD Directive 5145.5 (April 22, 1996) on ADR; Executive Order 12988 - Civil Justice Reform; and White House Memo, Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (May 1, 1998). Please contact Carrie Greco

at (703) 696-1566 if you would like a copy of any of these documents.

The working group is currently reviewing their components' initiatives and also areas where barriers that may exist to broader use of ADR can be removed or lowered. If you have any questions about the use of ADR in your case or project you may call the Army Dispute Resolution Points of Contact Gary E. Bacher, Assistant to the General Counsel, who may be contacted at (703) 697-5155; Colonel Nicholas P. Reston, Chief, Contract Appeals Division, United States Army Litigation Center, who may be contacted at (703) 696-1511; the Dispute Resolution Specialist, Lawrence M. Baskir, Principal Deputy General Counsel, who may be contacted at (703) 697-4807; or the Army's representative for the Working Group, Carrie Greco, who may be contacted at (703) 696-1566. Ms. Greco.

### **CWA Services Steering Committee to Examine MP&M Survey**

The Clean Water Act Services Steering Committee (SSC) is examining issues that involve DOD responses to a federal facility survey that was sent to the DOD from the EPA. The purpose of the survey is to collect information and data to assist the EPA as the agency drafts regulations that will set effluent limitations for metal products and machinery activities. The EPA has advised the SSC that the agency is primarily concerned with gathering data that pertains to the following areas: process waste discharges, pretreatment units, pollution prevention, and costs. Members of the SSC have reviewed the survey and concluded that while it will help provide useful information to the EPA, some modifications are required. For the most part, these changes will either tailor particular questions more closely to DOD activities or clarify what types of information may be used to answer the survey questions.<sup>21</sup> The SSC members will meet to begin drafting the DOD-proposed version of the survey late this month with the aim of sending it to selected installations in June 1998. Major DeRoma.

### ***Litigation Division Note***

#### **Right to Financial Privacy Act**

Recently, a number of civil actions have been filed against the Army alleging violations of the Right to Financial Privacy Act<sup>22</sup> (RFP Act) arising out of military criminal investigations and prosecutions. This note reviews the substantive and procedural requirements of the RFP Act, as well as the provisions relating to civil liability for violations of the Act.

21. For example, rough estimates vs. detailed effluent sampling and analysis.

22. Right to Financial Privacy Act of 1978, 12 U.S.C. A. § 3401, et seq. (West 1998).

Congress passed the RFPFA in response to the Supreme Court's decision in *United States v. Miller*<sup>23</sup> which held that a bank customer has no constitutionally protected privacy interests in bank records.<sup>24</sup> The RFPFA protects "customers<sup>25</sup> of financial institutions<sup>26</sup> from unwarranted intrusions into their records while at the same time permitting legitimate law enforcement activity."<sup>27</sup> The RFPFA applies to financial institutions located in any State or territory of the United States.<sup>28</sup>

Pursuant to the Act, a government authority may access the financial records of any customer from a financial institution only if: the customer consents; the government obtains a valid search warrant; a proper judicial subpoena is issued; or, an appropriate authority submits a proper formal written request.<sup>29</sup> In addition, the RFPFA permits government access to a customer's financial records pursuant to an administrative subpoena.<sup>30</sup> In the Army, administrative subpoenas are only available to Army personnel through the DOD Inspector General's office.<sup>31</sup> On the other hand, nothing in the Act prevents a financial institution from notifying a government authority that such institution possesses information regarding a customer who may have violated a statute or regulation.<sup>32</sup>

Violation of the RFPFA by government personnel may result in government liability to the customer in the amount of:

- (1) \$100 without regard to the volume of the records involved;
- (2) any actual damages sustained by the customer as a result of the disclosure;
- (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and
- (4) the costs of the action together with reasonable attorney's fees as determined by the court.<sup>33</sup> Customers may also obtain injunctive relief against the government pursuant to the RFPFA.<sup>34</sup>

These are the only authorized judicial remedies and sanctions for violations of the RFPFA.<sup>35</sup> Suppression of records at a court-martial is not a remedy available to the plaintiff.<sup>36</sup> Ordinarily, money damages will be limited to a civil penalty and actual damages unless the customer can prove a willful or intentional violation of the Act. Nevertheless, attorney's fees and costs associated with the civil litigation can be very, very expensive. For example, the court in *Neece v. I.R.S.*<sup>37</sup> awarded each plaintiff \$100 as a civil penalty, \$1580 for actual damages, \$68,883.75 for attorney's fees and \$24,126.23 for costs associated with the litigation.<sup>38</sup>

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23. 425 U.S. 435 (1976).

24. H.R. Rep. No. 95-1383, at 34 (1978).

25. 12 U.S.C. A. § 3401(5) (West 1998). For purposes of the Act, "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary in relation to an account maintained in the person's name." *Id.*

26. *See id.* § 3401(1). For purposes of the Act, "financial institution" means any office of a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands." *Id.*

27. H.R. Rep. No. 95-1383, at 34 (1978).

28. 12 U.S.C. A. § 3401(1).

29. *See id.* §§ 3402, 3408. For Army personnel, the authority to make formal written requests is limited to law enforcement personnel. *See* U.S. DEP'T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS, para. 2-3 (15 Jan. 1992) [hereinafter AR 190-6].

30. 12 U.S.C. A. § 3405.

31. Inspector General Act of 1978, 5 U.S.C. A. app. 3 § 6(a)(4) (1982). *See also* AR 190-6, *supra* note 29 para. 2-3.

32. 12 U.S.C. A. § 3403(c).

33. *See id.* § 3417(a).

34. *See id.* § 3418.

35. *See id.* § 3417(d).

36. *Wooten v. U.S. Army*, 34 M.J. 141, 148 (C.M.A. 1992).

37. 41 F.3d 1396 (10th Cir. 1994).

38. *Id.* at 1399-1403.

As in the most recent suits filed against the Army, three alleged violations of RFPA most often form the basis of civil litigation against the Army. First, plaintiffs frequently contend the government failed to properly notify the customer pursuant to 12 U.S.C.A. § 3406(b). Second, plaintiffs often allege the Army law enforcement personnel failed to obtain the concurrence of the appropriate United States Attorney's Office prior to seeking a search warrant under Rule 41, Federal Rules of Criminal Procedure. Finally, plaintiffs commonly contend that Army law enforcement personnel improperly received grand jury information in violation of 12 U.S.C.A. § 3420. These frequently-asserted claims are briefly discussed in turn.

### *Notification*

The RFPA provides that the customer of the financial institution generally must be given notice that records relating to him have been sought by a governmental entity.<sup>39</sup> Records sought by grand jury subpoenas are exempt from the compulsory notification requirements.<sup>40</sup> If the government obtains the customer's financial records pursuant to a search warrant, prior notice is not required.<sup>41</sup> However, when records are obtained pursuant to a search warrant, notice must be given no later than 90 days after execution of the search warrant unless the government has obtained a court order granting a delay in giving notice under 12 U.S.C.A. § 3406(c).<sup>42</sup>

There are several statutory exceptions to the notification requirements (and other provisions of the Act) that may be applicable in the military context. First, the RFPA does not apply in connection with a civil action arising from a government loan, loan guarantee, or loan insurance agreement.<sup>43</sup> In

addition, no notification is required if the bank is merely asked to provide basic account information such as name, type of account, and account number.<sup>44</sup> Also, government authorities performing authorized foreign intelligence investigations are permitted access to records of customers of financial institutions without notifying those customers.<sup>45</sup> Moreover, the financial institution may disclose financial information or records that are not identifiable as being derived from the financial records of a particular customer.<sup>46</sup> Finally, government access to customer information without notification can be obtained in emergency situations where delay would create imminent danger of physical injury, serious property damage, or flight from prosecution.<sup>47</sup>

### *United States Attorney Concurrence*

Law enforcement personnel may obtain financial records using a search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure.<sup>48</sup> However, under no circumstances may a military agent of the DOD seek a search warrant under Rule 41 without the concurrence of the appropriate United States Attorney's Office.<sup>49</sup>

### *Grand Jury Information*

Finally, "financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of the grand jury . . . shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized

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39. 12 U.S.C.A. §§ 3405, 3406, 3407, 3408 (West 1998).

40. *See id.* § 3413(i).

41. *See id.* § 3406(b).

42. *Id.*

43. *See id.* § 3413(h).

44. *See id.* § 3413(g).

45. *See id.* § 3414(a).

46. *See id.* § 3413(a).

47. *See id.* § 3414(b)(1).

48. AR 190-6, *supra* note 29, para. 2-4(a).

49. 28 C.F.R. § 60.1 (1996).

by Rule 6(e) of the Federal Rules of Criminal Procedure.”<sup>50</sup> Rule 6(e)(3)(A) permits disclosure of grand jury information to government attorneys as well as other personnel necessary to assist that government attorney in the performance of his duty to enforce federal criminal law.<sup>51</sup> Under Rule 6(e)(3)(B), the information may not be used for any other purpose.<sup>52</sup>

The requirements of the RFPA are not onerous. With a basic understanding of the RFPA and its applicability in specific situations, Army attorneys and the law enforcement personnel they advise can avoid common pitfalls that are increasingly spawning civil litigation. Unawareness of or disregard for the RFPA’s requirements unnecessarily exposes the government to litigation and costly civil liability. Major Key.

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50. 12 U.S.C.A. § 3420(a).

51. FED. R. CRIM. P. 6(e).

52. *Id.*