

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*, 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 1, is reproduced in part below.

President Clinton Signs Executive Order for Federal Support of Community Efforts along American Heritage Rivers

On 11 September 1997, President Clinton issued Executive Order 13,061, Federal Support of Community Efforts Along American Heritage Rivers.¹ Practitioners should be aware that this Executive Order may have implications for installations under the National Environmental Policy Act (NEPA).

Executive Order 13,061 is an initiative to support community-led efforts relating to rivers that spur economic revitalization, to protect natural resources and the environment, and to preserve historical and cultural heritage. Beginning in early 1998, communities can nominate, and the President will designate, several rivers as American Heritage rivers.² The designation as an American Heritage river will commit the federal government to focus the delivery of the resources needed to support and to restore these rivers and their adjacent communities.³

Federal agencies will be required to commit to a policy that will ensure that their actions have a positive effect on the natural, historic, economic, and cultural resources of the designated rivers and communities. Agencies will be required to consult

with the communities, to consider their objectives, and to ensure that agency actions are compatible with the overall character of the community. Installations should use the NEPA process to examine the impact their actions will have on these designated rivers and communities. Major Polchek.

Resource Conservation and Recovery Act Rulemaking Update

Hazardous Waste Identification Rule For Contaminated Media

On 29 April 1996, the Environmental Protection Agency (EPA) issued a notice of proposed rulemaking for the Hazardous Waste Identification Rule for Contaminated Media (HWIR-media).⁴ As a part of the effort to reinvent government, the rule was intended to streamline federal rules under the Resource Conservation and Recovery Act⁵ (RCRA) for the cleanup of contaminated media and other remediation wastes. The proposed rule was the subject of an EPA and state workgroup that had been attempting to reach a consensus on RCRA cleanup reform since 1993. The rule proposed a risk-based "bright line" scheme that would require federal regulation of wastes with toxicity levels falling above the "bright line" and delegate to states cleanup control for wastes with toxicity levels below the "bright line."⁶ Due to opposition to this scheme from both environmentalists and industry, the EPA is considering other options to avoid the contentious issues surrounding the "bright line" proposal. The EPA recently decided to abandon the 1996 proposal and finalize only parts of the original proposal.⁷

The EPA plans to focus on a few more narrowly tailored regulatory changes to hazardous waste cleanup rather than pursue the comprehensive approach of the original HWIR-media proposal. It is likely that the EPA has scrapped the bright line scheme of distinguishing higher and lower risk contamination. In addition, the EPA will not withdraw the corrective action management regulations, as earlier proposed, but will allow them to complement the revised rule.⁸ Possible targets of a

1. See 62 Fed. Reg. 48,445 (1997). Executive Order 13,061 and further information can be found at <http://www.epa.gov/rivers>.

2. *Id.*

3. *Id.*

4. 61 Fed. Reg. 18,780 (1996).

5. 42 U.S.C.A. §§ 6901-91 (West 1997).

6. 61 Fed. Reg. at 18,794.

7. Information Paper from Carolyn Hoskinson, EPA Office of Solid Waste, subject: Hazardous Waste Identification Rule For Contaminated Media (Sept. 1997) [hereinafter Information Paper] (copy on file with author).

more focused regulation include: alternative land disposal restriction treatment standards for hazardous contaminated soil; streamlined permitting for cleanup sites; options for remediation piles; and a RCRA exclusion for dredged materials managed under the Clean Water Act⁹ or the Marine Protection Research and Sanctuaries Act.¹⁰ The EPA expects to finalize the rule in June 1998.¹¹

Hazardous Waste Recycling Rule

The EPA Office of Solid Waste has decided not to pursue a comprehensive rulemaking to reform the federal hazardous waste recycling scheme.¹² Since 1993, the agency has been studying ways to create a simpler, clearer regulatory system for hazardous waste recycling. In late 1996, the EPA began meeting with stakeholders to discuss a draft proposal for rewriting the RCRA definition of solid waste to clarify what materials would be subject to regulation and what materials would be exempt under recycling rules.

The draft proposal offered two options for regulating and/or exempting the recycling of secondary materials. Under the "transfer-based" option, material is excluded from regulation if it is recycled "on-site" and meets certain requirements.¹³ The "in-commerce" option excludes material based on *how* it is recycled, not *where* it is recycled.¹⁴ The proposals, however, received widespread opposition from the states, industry, and environmental groups. As with the HWIR-media rule, the EPA has now decided to pursue some narrower regulatory initiatives rather than a wide-ranging reform.¹⁵ The original proposal was expected in early 1998; however, there may be some delay to address the concerns raised and to craft the narrow refinement to the regulation.

Corrective Action Rulemaking

The EPA proposed a regulatory framework for implementing corrective action in July 1990¹⁶ and issued a revised advanced notice of proposed rulemaking in May 1996.¹⁷ Since the 1996 proposal, the EPA has been evaluating comments from the public and has been working on a set of principles for reforming corrective action through possible legislative effort. The EPA now plans to release a notice of data availability that will incorporate changes that were suggested through the comment process.¹⁸ It may be that the corrective action rule will not be issued as proposed but will take the form of guidance or a restatement of policy. The focus of the reform appears to be on streamlining cleanups without emphasizing the process. The rule would set technical and procedural requirements to expedite cleanups without forcing authorized states to undergo an additional review.

Hazardous Waste Management System: RCRA Post-Closure Requirements

The EPA is forecasting the proposal of a rule in the winter or spring of 1998 to address RCRA post-closure requirements.¹⁹ The rulemaking will be an amendment of the regulations in two specific areas. First, the rule will address the necessity of a post-closure permit. Second, it will address the issue of state authority for compelling corrective action at interim status facilities.

Current regulations require a permit for facilities that need post-closure care.²⁰ In some cases, a permit is not appropriate because the post-closure care is being met through other mechanisms, such as CERCLA²¹ actions or consent agreements. The

8. *Id.*

9. 33 U.S.C.A. §§ 1251-1387 (West 1997).

10. *Id.* §§ 1401-45.

11. Information Paper, *supra* note 7.

12. *RCRA Regulations*, ENVTL. POL'Y ALERT - TRACKING SERV., NOV. 5, 1997, at 11 [hereinafter *RCRA Regulations*].

13. Hazardous Waste Recycling Rule Draft Proposal (distributed by the EPA at a public meeting held on 19 November 1996) (copy on file with author).

14. *Id.*

15. *RCRA Regulations*, *supra* note 12.

16. 55 Fed. Reg. 30,798 (1990).

17. 61 Fed. Reg. 8658 (1996).

18. Interview with Hugh Davis, EPA Office of Solid Waste, in Wash., D.C. (Oct. 15, 1997).

19. Semiannual Regulatory Agenda, 62 Fed. Reg. 22,296, 22,357 (1997).

20. 40 C.F.R. § 270.1 (1995).

proposed change would remove the requirement to have a permit in all cases.²² States and the EPA regions would have the flexibility to use other methods of assuring post-closure care.

The second area for amendment is that of state authority for compelling corrective action at interim status facilities. Some states have adopted corrective action authority for sites with interim status; however, it is not a requirement. Under the proposed change, states would be required to adopt as part of their RCRA program the authority to compel corrective action at facilities with interim status permits.²³ The EPA believes this amendment would provide a more consistent implementation of corrective action by the states.²⁴ Major Anderson-Lloyd.

Third Circuit Narrows Plaintiffs' Standing

The debate over standing for citizen groups to enforce environmental laws has been ignited again by a controversial decision by the United States Court of Appeals for the Third Circuit. In *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*,²⁵ the court denied the legal standing of environmentalists to bring a citizen suit under the Clean Water Act²⁶ (CWA). The court found that the plaintiffs were unable to demonstrate a direct link between Magnesium Elektron's (MEI's) pollution and harm to the water body in question.

The court set aside the trial court's judgment of more than two million dollars for one hundred fifty CWA permit violations. The testimony at trial of an expert witness who was called by MEI was crucial to the appellate court's decision. The expert testified that MEI's permit violations had no impact on the water body, and the plaintiffs did not contradict the expert's testimony.

For an organization to have standing, a plaintiff-member must show: (1) an injury in fact (an invasion of a legally pro-

TECTED interest which is concrete and particularized and actual or imminent); (2) a causal link between the defendant's conduct and the injury; and (3) the likelihood that judicial relief will redress the plaintiff's injury.²⁷ The court of appeals found that the plaintiffs could not satisfy the injury-in-fact prong of this test, unless there was a direct harm to the body of water.

Theoretically, the implications of this case and its impact on satisfying the injury-in-fact prong of the doctrine of standing can extend beyond the CWA to other media, such as the Clean Air Act²⁸ (CAA). Future potential plaintiffs may find it more difficult to prove a direct harm under the CAA. Major Egan.

Nuclear Regulatory Commission Cites Firms for Violations Involving Transfer of Exit Signs

The Nuclear Regulatory Commission (NRC) issued a press release in which it announced that it has cited a New York company for a violation of agency requirements for the transfer and disposal of "EXIT" signs which contain radioactive material.²⁹ The NRC did not, however, impose a fine upon the company.

The signs in question are illuminated without electricity and contain Tritium, a substance which is regulated under 10 C.F.R. § 31.5. The requirements of this section are not particularly onerous, but owners of these signs need to be aware of the requirements. Primarily, the holders of these devices must ensure that the original warning labels remain affixed.³⁰ These devices can only be transferred if they remain in the same particular location,³¹ and the transferor should provide to the new holder copies of the regulatory provisions and any safety documents provided on the label. Additionally, the transferor must notify the NRC within thirty days of the transfer.³²

Installations that have these signs in their inventories must be aware of, and comply with, the NRC requirements. Compli-

21. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-75 (West 1997).

22. 62 Fed. Reg. at 22,357.

23. *Id.*

24. *Id.*

25. 96-5049, 1997 U.S. App. LEXIS 20846 (10th Cir. Aug. 5, 1997).

26. Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1387 (West 1997).

27. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

28. 42 U.S.C.A. §§ 7401-7671q (West 1997).

29. Notice of Violation, *In re Apex Corp. Research Ctr.*, No. 03-05250 (NRC Sept. 10, 1997).

30. 10 C.F.R. § 31.5(b)(1) (1997).

31. *Id.*

32. *Id.* § 31.5(c)(9)(i).

ance will potentially be an issue when property is marked for disposal or demolition. Major Egan.

The NEPA/NHPA Interface

The United States District Court for the Southern District of New York recently addressed the interface between the National Environmental Policy Act³³ (NEPA) and the National Historic Preservation Act³⁴ (NHPA). In *Knowles v. U.S. Coast Guard*,³⁵ the plaintiffs alleged that the Coast Guard should have prepared an environmental impact statement (EIS) rather than an environmental assessment (EA) when closing the Coast Guard Support Center on Governor's Island, New York. The plaintiffs argued that the Coast Guard was required to prepare an EIS rather than an EA because one of the alternatives considered in the Coast Guard's EA would have had a significant adverse impact on historic buildings on Governor's Island. The court found, however, that the production of an EIS was not warranted because the Coast Guard did not choose the alternative complained of and because the Coast Guard's EA and finding of no significant impact (FONSI) were conditioned upon the implementation of mitigation measures.³⁶ The mitigation measures included the completion of the standard maintenance measures which formed the basis for the conclusion that the closure of the facility would have no significant adverse impact on the island's historic buildings.

The court also addressed the timing between the NEPA process and the NHPA consultation process. The plaintiffs claimed that the Coast Guard violated both the NHPA and the NEPA when the Coast Guard issued the FONSI prior to completing consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council for Historic Preservation (ACHP), in accordance with the NHPA and its implementing regulations.³⁷ The court found that the Coast Guard was not required to complete the consultation process before issuing the FONSI.³⁸ The court's finding, however, relies upon the fact that the Coast Guard discussed the publication of the FONSI with the ACHP prior to publication. The court also noted that the Coast Guard ultimately entered into a programmatic agreement

with the SHPO and the ACHP.³⁹ In the programmatic agreement, both the SHPO and the ACHP concurred that the action would not have a significant adverse impact on historic properties.

Installation environmental law practitioners should note that a FONSI should not normally be published prior to consultation with the SHPO and, if appropriate, the ACHP. Prior to issuing a FONSI, installation attorneys should work toward concurrence from the SHPO and the ACHP that an agency action will not have a significant adverse impact on historic properties. Major Ayres.

Litigation Division Notes

Recent Military Personnel Decisions

Holley v. United States⁴⁰

The United States Court of Appeals for the Federal Circuit recently reversed a decision by the United States Court of Federal Claims which held that a probationary Regular Army officer⁴¹ who was eliminated for cause was entitled to a formal hearing before he received a general discharge under honorable conditions which contained "stigmatizing" language.

Background

First Lieutenant (1LT) John D. Holley graduated from the United States Military Academy in 1986 and served in Germany in 1987 and 1988. During that time, he made statements which indicated that he had used, or intended to use, illegal drugs. His commander gave him an administrative reprimand and referred to those statements in 1LT Holley's officer efficiency report. Although 1LT Holley showed marked improvement in his performance and conduct following the reprimand, the Department of the Army initiated an administrative elimination proceeding.⁴²

33. National Environmental Policy Act, 42 U.S.C.A. §§ 4321-70d (West 1997).

34. National Historic Preservation Act, 42 U.S.C.A. § 470.

35. No. 96 Civ. 1018, 1997 U.S. Dist. LEXIS 3820 (S.D.N.Y. Mar. 31, 1997).

36. *Id.* at 3826.

37. Protection of Historic Properties, 36 C.F.R. pt. 800 (1997).

38. *Knowles*, 1997 U.S. Dist. LEXIS 3820 at 3832.

39. *Id.* at 3833.

40. 32 Fed. Cl. 265 (1994), *rev'd*, 124 F.3d 1462 (Fed. Cir. 1997).

41. See 10 U.S.C. § 630 (1994) (providing that the secretary of a military department may, subject to regulations prescribed by the Secretary of Defense, discharge Regular Army officers with less than five years of active commissioned service).

A memorandum which notified 1LT Holley of the pending proceeding advised him that if an honorable or general discharge was recommended his case would not be referred to a board of officers prior to approval by the Secretary of the Army. His chain of command recommended that he be retained on active duty, but the Secretary of the Army approved 1LT Holley's separation. On 2 June 1989, the Army separated 1LT Holley "under honorable conditions." His Department of Defense Form 214 listed "Misconduct Moral or Professional Dereliction or in Interest of National Security" as the reason for the discharge.

The Court of Federal Claims

After his discharge, 1LT Holley filed suit in the Court of Federal Claims. He asserted that the Army's failure to afford him a hearing prior to issuing a general discharge violated his statutory rights under 10 U.S.C. §§ 1181-85 and violated his "fundamental right to due process of law."⁴³ The Army argued that 1LT Holley's separation was not accomplished under 10 U.S.C. §§ 1181-85, but under 10 U.S.C. § 630, which specifically relates to the separation of Regular Army officers who have less than five years of service. The court, however, noted that neither the memorandum which initiated 1LT Holley's elimination proceeding nor the relevant Army regulation provisions cited any specific statutory authority.⁴⁴ The court also noted that 10 U.S.C. §§ 1181-85, which deal generally with the separation of officers and provide for a right to a hearing before a board officers, do not expressly exclude probationary officers.⁴⁵ The court held that both the characterization of service (under honorable conditions) and the narrative comment concerning the reason for discharge were sufficiently stigmatizing that the Army should have afforded Holley a hearing.⁴⁶ The

court order the Army to restore Holley to duty with back pay and allowances.⁴⁷ Additionally, the court specifically rejected the Army's argument that the court lacked subject matter jurisdiction for the case.⁴⁸

The Court of Appeals

The U.S. Court of Appeals for the Federal Circuit initially concluded that the Court of Federal Claims had jurisdiction under the Tucker Act to consider Holley's claim of statutory and regulatory violations, as well as his constitutional due process issue.⁴⁹ Turning to the substance of the lower court's decision, however, the court found that the Army was correct in its interpretation that neither the statute concerning probationary officers nor the implementing regulation required a board of inquiry prior to separation, unless an other than honorable discharge was contemplated.⁵⁰ Perhaps more significantly, the court held that constitutional due process did not require a full adversarial hearing in this case.⁵¹ The court ruled that the statutory and regulatory rights to be notified of the reasons for proposed elimination and the opportunity to submit written matters were adequate to protect probationary officers from being unfairly stigmatized in the course of separation from the Army.⁵² Lieutenant Colonel Elling.

*Blaney v. West*⁵³

In February 1997, an Army officer filed a complaint on behalf of his infant daughter. The suit sought to enforce the infant's claimed constitutional right to access to her mother in order to breast feed. On 9 May 1997, the United States District Court for the District of Columbia dismissed the complaint for

42. See U.S. DEP'T OF ARMY, REG. 635-100, PERSONNEL SEPARATIONS: OFFICER PERSONNEL, ch. 5 (1 May 1989), *superseded by* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (21 July 1995).

43. *Holley*, 32 Fed. Cl. at 271-74.

44. *Id.*

45. *Id.*

46. *Id.* at 274-75.

47. *Id.*

48. *Id.* at 275-76, n. 12. The court specifically rejected the Army's argument that the Tucker Act, 28 U.S.C. § 1491, (the alleged jurisdictional predicate in the case) did not afford jurisdiction in a claim for failure to provide a due-process "name clearing" hearing in the absence of a claim for money damages. The court concluded that Holley's complaint essentially raised a claim for wrongful discharge based on the Army's procedural failure to afford a hearing, for which jurisdiction was proper.

49. *Holley v. United States*, 124 F.3d 1462, 1466 (Fed. Cir. 1997).

50. *Id.* at 1469.

51. *Id.*

52. *Id.* at 1469-70.

53. No. 97-341 (D.D.C., May 9, 1997).

failure to state a claim under the Fifth and Thirteenth Amendments.

The suit sought declaratory and injunctive relief to require the Army to grant a one-year-old child unrestricted access to her mother, an active duty Army helicopter pilot.⁵⁴ The plaintiff alleged that breast feeding is incompatible with her mother's military duties⁵⁵ and that the mother's military duties violated the child's constitutional right to be breast fed. The district court disagreed, finding no precedent from the United States Supreme Court or the United States Court of Appeals for the Circuit of the District of Columbia which recognizes a constitutional right either to be breast fed or to breast feed.⁵⁶ The court also dismissed the plaintiff's claim that the Army's conduct in refusing to grant unrestricted access to her mother violated the mother's Thirteenth Amendment right against involuntary servitude.⁵⁷ Though the court did not publish its decision, the case affirms the inherent authority of commanders to impose reasonable, duty-related restrictions on soldiers, even if the soldiers are parents. Lieutenant Colonel Elling and Major Parker.

Baldwin v. Perry⁵⁸

In the first known challenge to legislation which authorizes benefits and privileges for family members who are victims of abuse by soldiers who lose their right to retired pay, the United States District Court for the Western District of Texas found that the Uniformed Services Former Spouses Protection Act⁵⁹ (USFSPA) does not waive sovereign immunity. The court determined that the USFSPA expressly precludes liability on the part of the government and its officials in cases where direct

payments to a former spouse comply with the statute and its implementing regulations.

In 1992, the plaintiff's former spouse lost his retirement privileges due to his court-martial conviction for sexually abusing his children.⁶⁰ The plaintiff originally filed for USFSPA benefits in August 1994, and she began receiving payments and privileges in November 1994.⁶¹ The plaintiff subsequently filed a complaint in which she claimed, inter alia, that she should have started receiving benefits and payments at an earlier date and that the dependant identification (ID) card she received should have listed her sponsor's status as "master sergeant, retired."⁶²

The plaintiff started receiving payments from the Defense Finance and Accounting Service (DFAS) in the amount of one half of a retired master sergeant's pay in accordance with 10 U.S.C. § 1408(h). The Army had not, however, developed the policies and computer software necessary to issue appropriate ID cards to § 1408(h) beneficiaries. Section 1408(h) states that a former spouse such as the plaintiff is entitled to receive all privileges and benefits "in the same manner as if the member or former member . . . was entitled to retired pay."⁶³ At the time the suit was filed, ID card regulations and policies only allowed an ID Card to reflect a sponsor's current rank and status (in this case, the grade of private, not master sergeant). In light of the statutory requirements, Litigation Division counsel initiated a change in ID card policy to accommodate former spouses such as the plaintiff. The Litigation Division also advised the plaintiff that she could receive the appropriate ID card if she applied for it at the nearest military personnel office.

The court granted the Army's motion to dismiss for lack of subject matter jurisdiction.⁶⁴ The undisputed facts showed that

54. The mother, 1LT Emma Cuevas, is a graduate of the United States Military Academy.

55. *Blaney*, No. 97-341, slip op. at 3-4.

56. *Id.* at 5-7. The court also noted that those jurisdictions which have recognized a constitutionally protected interest in breast feeding have held that such a right is protected only from excessive state interference. *Id.* at 6, n.4. See *Southerland v. Thigpen*, 784 F.2d 713, 716 (5th Cir. 1986); *Berrios-Berrios v. Thornburg*, 716 F. Supp. 987, 990 (E.D. Ky. 1989). Though the court ruled that the plaintiff failed to state a claim, it noted that certain factors undercut the complaint. These factors included: (1) 1LT Cuevas voluntarily assumed her active duty obligations in exchange for her education at the United States Military Academy and her flight training and (2) her command made considerable accommodations, including an abbreviated work schedule and extended lunch hour so that she could have sufficient time to nurse her daughter. *Blaney*, No. 97-341, slip op. at 6, n. 4.

57. *Blaney*, No. 97-341, slip op. at 7.

58. Order, Civ. No. W-96-CA-317 (W.D. Tex. Oct. 14, 1997).

59. 10 U.S.C.A. § 1408 (West 1997).

60. The spouse's sentence included reduction to the lowest enlisted grade, a bad conduct discharge, and four years confinement. *Baldwin*, Civ. No. W-96-CA-317, at 1.

61. The USFSPA requires that payments must start within ninety days of receipt of a proper application. 10 U.S.C.A. § 1408(d)(1). The plaintiff contended, contrary to the plain language of the statute, that payments should have started on either the date on which her former spouse's court-martial sentence became final or the date on which her divorce became final, whichever was later.

62. Due to her husband's conviction, reduction in rank, and discharge, her ID card listed her sponsor's rank/grade as private/E-1.

63. 10 U.S.C.A. § 1408(h).

the Army had fully complied with the USFSPA's requirements, apart from failing to issue the appropriate ID card to the plaintiff.⁶⁵ The court also denied the plaintiff's cross-motion for summary judgment concerning the appropriate sponsor's rank

on her ID card;⁶⁶ the issue was moot, given the Army's willingness to issue her the correct ID card. Major Parker.

64. *Baldwin*, Civ. No. W-96-CA-317, at 5.

65. The court noted that, although the plaintiff's ID card indicated the incorrect sponsor's rank, she otherwise received all of the benefits to which she was entitled. *Id.*

66. *Id.* at 11.