

USALSA Report

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Environmental Law Division Notes

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Compiling an Administrative Record

If an Army decision in the environmental arena has been challenged in litigation, the Army installation involved will normally be required to compile an administrative record. An administrative record is the paper trail that documents the decision-making process, the basis for the decision, and the final decision. The local environmental law specialist (ELS) will be called upon to assist and provide legal advice while the administrative record is being compiled. Last year, the Department of Justice (DOJ) released a memorandum providing guidance to federal agencies on how to compile an administrative record of agency decisions.¹ This article summarizes DOJ's guidance.

Generally, the Administrative Procedures Act (APA)² governs judicial review of a challenged agency decision. A court will review the Army's action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.³ The court will evaluate the entire administrative record in making this determination. It is important to note that several other statutes and regulations may specify what documents and materials constitute the administrative record.⁴ Therefore, before the installation begins compiling the administrative record, the ELS should determine whether the APA is the only statute or regulation that applies in the case.

One installation employee should be designated as the "certifying officer" in charge of compiling the administrative record.⁵ This individual should keep a record of where he searched for documents and materials and who was consulted in the process. He should be very meticulous when conducting

the search and compiling the administrative record, otherwise, the court will be limited in their review of the Army's decision, and the defense of that decision will be much more difficult. Ultimately, this individual may be required to prepare an affidavit certifying the contents of the administrative record to the court.

Before the certifying officer begins his search, the ELS should discuss with him what type of documents and materials should be included in the administrative record, where to look for those documents and materials, how to organize the administrative record, how to handle privileged documents and materials, and the importance of a complete administrative record.

First, the administrative record should consist of all documents and materials directly or indirectly considered by the Army in making the challenged decision. It should include all documents and materials that were considered or relied upon by the Army both at the time the decision was made and those from the time of the challenged decision, even if they were not specifically considered by the final decision-maker. If a document or material fits into one of these categories but does not "support" the Army's final decision, it should still be included in the administrative record. The bottom line is that all documents and materials that are *relevant to the Army's decision-making process* should be included in the administrative record.

The certifying officer may ask what "type" of documents and materials should be included in the administrative record. Documents and materials should not be limited to paper documents but should include other means of communicating, storing, or presenting information: e-mail, computer tapes, discs, microfilm and microfiche, data files, graphs, and charts. These documents and materials may include the following policies, guidelines, directives, manuals, articles, books, technical information, sampling results, survey information, engineering reports, studies, decision documents, minutes of meetings, transcripts of meetings, notes, and memorandums of telephone conversations and meetings.

The certifying officer may also ask what types of documents and materials should be excluded from the record. Clearly, doc-

1. Memorandum from Department of Justice to Federal Agencies, subject: Guidance to Federal Agencies on Compiling the Administrative Record (Jan. 1999) (unpublished memorandum on file with author).

2. See 5 U.S.C.A. § 701 (West 2000).

3. *Id.* § 706(2)(A).

4. See 42 U.S.C.A. §§ 7607(d)(7)(A), 9613(j), (k) (West 2000); 40 C.F.R. §§ 300.800-300.825, pt. 24 (2000).

5. The "certifying officer" is normally the individual assigned to the installation environmental office who is most familiar with the environmental documentation leading to the Army decision. The certifying officer is selected on a case-by-case basis. Some examples of possible certifying officers are: NEPA Project Officer, NEPA Coordinator, Environmental Engineer, Physical Scientist, Biologist.

uments that were not in existence at the time of the Army decision should not be included in the record. Additionally, as a general rule, the administrative record should not include *internal* "working drafts" of documents. Draft documents, however, that were circulated outside the Army for comment and reflect significant changes in the Army decision-making process in their final version should be included in the administrative record.

Second, the certifying officer should conduct a thorough search for the purpose of compiling the administrative record, listing where files are located. His search should include public document rooms and archives. Additionally, the certifying officer should contact all Army personnel, including those at the installation level and higher headquarters, involved in the decision and ask them to search their files for documents and materials related to the final decision. The certifying officer should also contact former employees involved in the decision and ask for guidance on where to search. If another agency was involved in the Army decision, the officer should contact the other agency and insure that any of their documents that were considered or relied upon by the Army in making the decision are included in the record.

Third, the certifying officer should organize the documents in a logical and accessible way, such as chronologically, topically, categorically, or otherwise. The certifying officer should also prepare an index of the administrative record that includes, at a minimum, the date, title, and brief description of the document. Once the certifying officer has completed the administrative record, he should consult the installation ELS for review of privileged documents. When the record is finalized, the certifying officer may be required to prepare and sign an affidavit, which attests that he has personal knowledge of the assembly and authenticity of the record.

Fourth, after the certifying officer finishes compiling the record, he should submit it to the ELS for review of privileged documents. The ELS should review the record and be sensitive to privileges and prohibitions against disclosure. These include the attorney-client privilege, attorney work product privilege, the Privacy Act,⁶ deliberative or mental processes, executive privilege, and confidentiality. The ELS should consult with the assigned ELD and DOJ attorneys for guidance on how to annotate the privileged documents in the administrative record index or a separate privilege log. The index or log should include, at a minimum, the date, title, and brief description

tion of the document as well as the privilege asserted. The privileged documents themselves should be redacted or removed from the administrative record.

Finally, the ELS should stress the importance of a complete administrative record. By compiling a complete administrative record, the certifying officer will provide the court with evidence that supports the Army's decision and details the Army's compliance with the relevant statutory and regulatory requirements. If the administrative record fails to explain the Army's reasoning and final decision and frustrates judicial review, the court may remand the record to the Army. The court may allow the Army to supplement the record with affidavits or testimony. Once the Army supplements the record, however, the court may allow additional discovery if the opposing party proffers sufficient evidence to show bad faith, improper influence on the decision-maker, or agency reliance on substantial materials not included in the record. An initially incomplete record raises questions as to the completeness of the ultimately final record. An incomplete record also raises the possibility of additional unnecessary litigation. For these reasons, the ELS and certifying officer should do all they can to avoid an incomplete administrative record. Major Shields.

Can States Squirm Out of Liability?: The 11th Amendment and CERCLA

The Court of Appeals for the Second Circuit recently upheld the dismissal of a clean up suit against a state, holding that the action was barred by the Eleventh Amendment to the Constitution.⁷ In *Burnette v. Carothers*,⁸ homeowners (the Burnettes) claimed that a nearby Connecticut prison was contaminating their wells. They sued the state for environmental response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁹ The district court granted Connecticut's motion to dismiss for lack of subject matter jurisdiction, finding the suit was barred by the Eleventh Amendment to the Constitution.¹⁰

While case law generally holds that a state is immune from suits brought in federal courts by its citizens, the Supreme Court has held that Congress may abrogate states' sovereign immunity if: (1) Congress unequivocally expresses its intent to do so, and (2) Congress acts pursuant to a valid exercise of power.¹¹

6. 5 U.S.C.A. § 552a.

7. U.S. CONST. amend. XI. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

8. 192 F.3d 52 (2d Cir. 1999).

9. 42 U.S.C.A. § 9601. Plaintiffs also brought claims under the Clean Water Act (33 U.S.C.A. §§ 1251-1387 (West 2000)) and the Resource Conservation and Recovery Act (42 U.S.C.A. §§ 6901-6991(h)), whose sovereign immunity provisions are substantially similar.

10. *Burnette*, 192 F.3d at 56.

Litigation Division Note

Shake, Rattle, and Roll: Artillery Noise Litigation

Introduction

Although Congress did intend unequivocally to abrogate states' immunity in CERCLA, it was acting pursuant to the Commerce Clause.¹² According to the Supreme Court, only congressional action taken under the authority of the Fourteenth Amendment would be sufficient to overcome states' Eleventh Amendment immunity.¹³

The Court of Appeals for the Second Circuit rejected the idea that Congress, by creating a recovery claim, was establishing a property right pursuant to the Fourteenth Amendment.¹⁴ It also rejected the claim that Connecticut consented to federal jurisdiction by accepting federal funds to run its prison system.¹⁵

Plaintiffs next claimed that they were suing state officials rather than the state itself and that this did not violate the Eleventh Amendment according to *Ex Parte Young*.¹⁶ The court of appeals found that this claim had been waived by the plaintiffs in earlier proceedings.¹⁷ In any event, it is not clear that individual Connecticut officials would have been responsible parties under CERCLA § 107.¹⁸

In addition to maintaining the vitality of a two hundred-year-old amendment, this case forces advocates in CERCLA litigation to consider whether state agencies can be properly joined as CERCLA responsible parties. This decision also adds new importance to the question of whether a state National Guard organization is a federal or state actor for purposes of its waste disposal actions. Lieutenant Colonel Howlett.

Noise claims, which historically have made up a small share of all lawsuits filed against the United States, are becoming more common. The most prevalent type of noise claims are based on overflights by aircraft and usually deal with damage to livestock. Several articles on this particular type of noise claim have appeared in previous editions of *The Army Lawyer*.¹⁹ This article discusses *Gold Turkey Farm v. United States*,²⁰ a case involving another type of noise claim: a claim for damages based on noise produced by weapons training.²¹ This type of claim will likely become more common due to the ever-increasing commercial and residential development surrounding military installations. Claims attorneys can apply the lessons learned to future similar cases to help avoid any adverse impact on an installation's training mission.

Facts of the Case

Plaintiffs own and operate a turkey breeder farm that is located approximately seven miles from Camp Ripley, Minnesota.²² Although plaintiffs have been raising turkeys since 1959, they did not start their turkey egg-laying operation until 1972. Camp Ripley, founded in 1931, operates two artillery ranges as a part of its training mission and serves as a location for training active duty, National Guard, and Army Reserve units.

11. *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996).

12. U.S. CONST. art. I, § 8, cl. 3.

13. *Seminole Tribe*, 517 U.S. at 59, 65-66.

14. U.S. CONST. amend. XIV

15. *Burnette*, 192 F3d 60.

16. 209 U.S. 123 (1908).

17. *Burnette*, 192 F3d 57.

18. 42 U.S.C.A. § 9607 (West 2000) (determining liability under the CERCLA provisions).

19. See, e.g., Captain Brian H. Nomi, *Of Ostriches and Other Ratites—A Claims Saga*, ARMY LAW., Apr. 1996, at 43; Mr. Rouse, *Overflight Claims*, ARMY LAW., Aug. 1996, at 32.

20. *Gold Turkey Farm v. United States*, No. 5-96-22 (D. Minn. Dec. 28, 1998).

21. Typically artillery or tanks.

22. *Gold Turkey Farm*, No. 5-96-22, slip op. at 2.

In 1993, plaintiffs filed a Federal Tort Claims Act (FTCA)²³ claim alleging that the noise from artillery firing exercises conducted at Camp Ripley disrupted their turkeys' egg-laying capabilities.²⁴ After investigating the claim on its merits, the U.S. Army Claims Service (USARCS) denied plaintiffs' claim.²⁵ In 1996, less than six months after their administrative claim was denied, plaintiffs filed suit. The complaint alleged that the United States conducted military exercises at Camp Ripley that included the negligent firing of large caliber artillery weapons²⁶ in such a way that the noise and concussion therefrom disrupted the plaintiffs' production of turkey eggs.

Initial discovery conducted on the case established that all of the artillery exercises subject to the complaint were conducted in accordance with regulation and all rounds fired landed within the appropriate impact areas. After this information was produced, the plaintiffs shifted the theory of their case. In answers to interrogatories propounded by the United States, plaintiffs contended that the alleged negligence did not rest with the firing of the weapons, but with the failure to process and investigate plaintiffs' reports of excessive noise and by failing to institute remedial measures.²⁷ The United States filed a motion to dismiss for lack of subject matter jurisdiction²⁸ pursuant to the Discretionary Function Exception to the FTCA.²⁹ Specifically, the United States contended that the selection of the situs of Camp Ripley, as well as the location of

the firing positions and impact areas, are discretionary, and thus the United States was immune from tort liability.³⁰ The United States also argued that the decision to conduct military activities (such as firing artillery) was within the Discretionary Function Exception.³¹

With respect to plaintiffs' allegations that Camp Ripley had failed to properly investigate their complaints and institute remedial measures, the United States argued that Camp Ripley had followed all statutes and regulations governing noise control. Although Congress passed the Noise Control Act of 1972³² to decrease noise pollution, the Noise Control Act specifically exempts "any military weapons or equipment designed for combat use."³³ Nevertheless, the Army implemented a regulation to comply with the federal statutes and regulations dealing with noise.³⁴ The goal of the Army's Environmental Noise Abatement Program is to minimize noise to the greatest extent practicable and in a manner consistent with mission accomplishment.³⁵ The United States argued that Camp Ripley's decision not to reduce its noise output was well-grounded in policy, and therefore protected by the Discretionary Function Exception.³⁶ On 28 December 1998, the *Gold* court agreed that the suit was barred by the Discretionary Function Exception and dismissed plaintiffs' complaint.³⁷

23. 28 U.S.C.A. § 1346 (West 2000).

24. *Gold Turkey Farm*, No. 5-96-22, slip op. at 2. Specifically, the 12 September 1993, claim alleged that their turkeys experienced a dramatic drop in egg production due to severely heavy shelling at Camp Ripley. *Id.* at 1. Plaintiffs alleged that the value of their lost egg production amounted to over \$84,000. From 1993 through the dismissal of their suit, plaintiffs annually filed claims making similar allegations.

25. *Id.* at 2. Plaintiffs' claim, which was initially construed as a tort claim under chapter four of *Army Regulation 27-20, Claims*, was denied on August 9, 1995. See U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (31 Dec. 1997) [hereinafter AR 27-20]. Plaintiffs' claim was subsequently denied on 10 November 1997, pursuant to AR 27-20, Chapter 3 (Military Claims Act (10 U.S.C.A. § 2733 (West 2000))).

26. During the time in question, Camp Ripley supported live-fire training exercises for 105mm, 155mm, and 8-inch howitzers.

27. *Gold Turkey Farm*, No. 5-96-22, slip. op. at 8.

28. FED. R. CIV. P. 12(b)(1).

29. 28 U.S.C.A. § 2680(a) (West 2000). The purpose of the exception is to prevent "judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 807-08 (1984).

30. See *Barroll v. United States*, 135 F. Supp. 441, 449 (D. Md. 1955) (holding location of an artillery testing range and the location of the firing positions are within the discretionary function exception); see also *Leavell v. United States*, 234 F. Supp. 734 (E.D. S.C. 1964); *Nichols v. United States*, 236 F. Supp. 241 (S.D. Cal. 1964); *Schubert v. United States*, 246 F. Supp. 179 (S.D. Tex. 1965).

31. *Barroll*, 135 F. Supp. at 449. Furthermore, the types of weapons and other equipment issued to soldiers, as well as the types of training they are required to undergo is non-justiciable. See *Gilligan v. Morgan*, 413 U.S. 1, 6-8 (1973).

32. 42 U.S.C.A. § 4901 (West 2000).

33. *Id.* § 4902(3)(B)(i).

34. U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, ch. 7 (23 Apr. 1990) [hereinafter AR 200-1] (implementing the provisions of the Noise Control Act and 32 C.F.R. § 650.161 (2000)).

35. See 32 C.F.R. § 650.162(a-d); AR 200-1, *supra* note 34, para. 7-2. It must be noted that these regulations do not prescribe specific amounts of noise that can be generated at Army installations.

Lessons Learned

Claims attorneys can learn several lessons from this long and arduous case. The holding of the case emphasizes the following three points:

(1) *Understand the plaintiff's theory of negligence and basis for recovery.* In *Gold*, the specific negligent acts or omissions on which plaintiffs based their suit were not established until after written discovery began. As a result, the plaintiffs' changed their theory of negligence several times. Therefore, it is critical to "lock-in" a plaintiff soon after litigation has been initiated by using carefully drafted interrogatories and requests for admissions.³⁸

(2) *Ensure the claim is investigated and final action is taken under all potential avenues of redress.* In *Gold*, the FTCA³⁹ and the Military Claims Act⁴⁰ (MCA) provided potential causes of action. However, USARCS initially only considered and denied the claim as a tort claim. If the plaintiffs could have proven they were injured from the artillery noise, they could have recovered under the MCA even in the absence of negligence because the firing of artillery for training purposes is a non-combat activity covered by the MCA. Because the claim had only undergone an FTCA review, the court initially denied the United States' motion to dismiss and stayed the case to allow USARCS to consider the claim under the MCA. It was not until after the claim had been investigated and denied under both the FTCA and MCA that the court dismissed plaintiffs' claim pursuant to the Discretionary Function Exception.⁴¹

(3) *Ensure the installation is complying with the Army's Environmental Noise Abatement Program.* To prevail under the Discretionary Function Exception in noise litigation cases, the installation must first establish its compliance with all mandatory provisions of the Environmental Noise Abatement Program.⁴² The claims office should gather, analyze, and preserve relevant documentation early in the investigation. Claims attorneys at installations that produce a great deal of noise should also work closely with their installation's environmental office. This accomplishes two things: first, the claims attorney will benefit by being educated on the installation's noise abatement program, and second, the claims office will be in a better position to be notified of future potential noise claims.

Conclusion

As civilian communities continue to expand near military installations, claims for damages based on noise produced by weapons training will likely become more prevalent. Even one successful claim can have enormous ramifications on an installation because of the adverse impact it may have on the ability to conduct live-fire weapons training. Therefore, claims attorneys must ensure that their installation is compliant with the Army's Environmental Noise Abatement Program and they must be prepared to vigorously investigate and defend noise claims. Captain Elkin.

36. During oral argument on its motion to dismiss, the United States noted that there were two policies at issue in the case: the policy to effectively and efficiently train soldiers and the policy to control environmental noise. The United States argued that these policies were not competing, but instead, the training policy preempts the noise control policy based on the fact that the regulation requires that noise be minimized only to the extent that it is consistent with mission accomplishment.

37. *Gold Turkey Farm*, No. 5-96-22, slip op. at 13.

38. For an excellent note on interrogatories, see Major Corey Bradley, *Interrogatories-to Answer or not to Answer, That is the Question: A Practical Guide to Federal Rule of Civil Procedure 33*, ARMY LAW., Aug. 1997, at 38.

39. See 28 U.S.C.A. § 1346(b) (West 2000); AR 27-20, *supra* note 25, ch. 4.

40. See 10 U.S.C.A. § 2733 (West 2000); AR 27-20, *supra* note 25, ch. 3. Paragraph 3-2(a)(2) of AR 27-20 provides that claims may be paid for damage to property "incident to non-combat activities of the armed services."

41. Investigation of the claim, which included the employment of several experts, concluded that there was no correlation between Camp Ripley's firing activities and the plaintiffs' turkeys' egg production.

42. See AR 200-1, *supra* note 34, paras. 7-2, 7-3.