

# THE AIR FORCE LAW REVIEW

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# THE AIR FORCE LAW REVIEW

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**FOREWORD**  
**By Ms. Mary L. Walker**  
**The Air Force General Counsel**

I am pleased that this issue of The Air Force Law Review is dedicated to the field of environmental law, and commend the authors of these articles for their hard work and the efforts of the editors and staff in producing this volume. The articles promise to provide helpful information to Air Force practitioners as well as to share the scholarship of the authors through various research and library resources.

My own career as an environmental and natural resources lawyer began in the formative years of that discipline in the early 1970's as the major federal statutes were put in place. Since that time, we have seen the subject of environmental law become more international in focus and the issues more global. My own work in the private sector as corporate counsel handling environmental issues and as a member of California law firms engaged in providing environmental counsel and litigation for a variety of clients often included issues in foreign lands. In government, I previously served as the Principal Deputy Assistant Attorney General for the Environmental and Natural Resources Division of the Department of Justice, as the Deputy Solicitor for the Department of the Interior, as Assistant Secretary for Environment, Safety & Health at the Department of Energy and as a US Commissioner on the Inter-American Tropical Tuna Commission.

During my legal career, I have been privileged to participate in the development of many of the seminal developments and federal programs in the environmental area. For example, while at the Department of Justice, we worked with EPA to develop the new Superfund enforcement program that resulted in the cleanup of thousands of sites, and developed the Environmental Crimes Unit that is now a major function deterring the violation of our Nation's environmental laws. At the Department of Interior, we developed the first Natural Resource Damage Regulations.

Over the last three decades, environmental considerations have permeated business and governmental decision-making. In the public and private sectors, NEPA compliance and environmental permitting requirements now drive decisions, which a generation ago may have been made for other reasons. The practice of many Air Force attorneys reflects these changes. The result is better decision-making for government, business and the environment.

Since my appointment as General Counsel of the Department of the Air Force in 2001, I have been keenly interested in the environmental issues encountered by our Air Force legal team, such as taking full advantage of the process that allows us the opportunity to comment on proposed actions by other agencies that affect Air Force interests, seeking recovery of cleanup costs incurred by the Air Force, helping our leadership consider the full range of natural resources they manage and providing legal support for the disposal of closed bases and, on the other end of the spectrum, providing sound legal counsel in the deliberations leading to the BRAC 2005 process. My staff is also engaged in a variety of issues surrounding the privatization of family housing in support of the Secretary's commitment to eliminate all substandard housing for Air Force families by 2008. And, I should mention that one of the charges to our new Brussels office (GC Europe) is to make sure Air Force interests are addressed as a result of the international environmental regulatory measures being considered by the European Union.

I look forward to working with all of you as we face our ever-growing environmental challenges.

## INTRODUCTION

By Major General Thomas J. Fiscus  
The Judge Advocate General

The first Master Environmental Law edition of the Air Force Law Review was published in 1989. Reflecting our environmental emphasis at the time, it focused almost exclusively on environmental compliance issues. In the 14 years since that first edition was published, much has changed. This volume is the first part of two parts dedicated to environmental issues. New doctrine, new missions, new threats, and new weapon systems are all transforming the 20<sup>th</sup> Century Air Force into the aerospace force of the new millennium. Just as the warfighter evolves to meet these new challenges, the JAG Corps must likewise transform itself in order to enable and ensure mission accomplishment.

The field of environmental law has also evolved at a lightning pace over the past 14 years. As this expanding body of law intertwines with every facet of our military training and war-fighting missions, the Air Force faces new challenges that our predecessors never had cause to consider. Community developments that were once miles from our runways have expanded to within feet of our security fences. Waste disposal practices that were once state-of-the-art are now subject to multimillion dollar lawsuits. Perhaps the most important challenge we face, however, is that of fashioning our legal advice in such a way that we balance environmental compliance and stewardship while at the same time maintaining our national security mission. As caretakers of millions of acres of our country's most pristine ecosystems, our responsibilities are awesome.

Upon no one do these responsibilities fall more heavily than the installation commander and the base level environmental attorney who provides legal advice to that commander. Our attorneys field the day-to-day questions, carefully guiding a diverse clientele through a maze of complex statutes and regulations. Does the Clean Water Act apply to the base car wash? Does it really take a specially-certified person to pick up and move this endangered tortoise before it wanders onto the runway? Who's responsible for the fuel storage tanks under the AAFES gas station? Issue spotting in the environmental arena is complex and difficult. The stakes are high: the wrong decision can result in punishments ranging from regulatory warning letters threatening a shut down of mission activities to efforts to impose criminal liability on the Wing Commander.

Some of you reading this may be that installation environmental law attorney. If so, know that you're not alone in finding the way ahead. Support for your practice can be found in many resources throughout the JAG Corps and General Counsel Office. This is the first of two volumes of the Master Environmental Law Edition of the Air Force Law Review to be printed in 2003. Both volumes are designed specifically for the installation environmental attorney and intended for use as a reference tool in his/her daily practice. I know you will find the articles both timely and thorough, and hope that you will use them as a starting point for your legal research in this challenging body of law. I wish each of you the best of luck, and sincerely thank you for your efforts in furthering our stewardship responsibilities to the environment while ensuring mission accomplishment.

# ENVIRONMENTAL CRIMINAL LIABILITY: WHAT FEDERAL OFFICIALS KNOW (OR SHOULD KNOW) CAN HURT THEM

LIEUTENANT COLONEL JOSEPH E. COLE\*

## I. INTRODUCTION

The concept of holding a corporate officer or federal official liable for an environmental crime based on their position of authority over the violating activity is known as the Responsible Corporate Officer (RCO) doctrine.<sup>1</sup> While individual criminal liability for corporate officials is not a new concept in environmental law,<sup>2</sup> the application of the RCO doctrine, especially in concert with the Public Welfare Offense doctrine,<sup>3</sup> is an unsettled area of law. This article addresses criminal liability under environmental statutes, basic principles of corporate and officer liability, the genesis and current state of the RCO and Public Welfare Offense doctrines, their impact on the litigation of environmental crimes, and their applicability to federal officials.

## II. FUNDAMENTAL CRIMINAL ELEMENTS

American criminal law fundamentally concerns itself with whether the accused has committed a prohibited act (*actus reus*), and if so, whether the act was committed with a guilty mind (*mens rea*).

### A. *Actus Reus*

Before determining one's *mens rea*, it is necessary to determine that one committed a prohibited or criminal act.<sup>4</sup> While such acts often consist of one's own affirmative conduct, they can also be of other types.

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<sup>1</sup> As discussed below, this concept of criminal liability is as applicable to federal government officials (military and civilian) as it is to corporate officers.

<sup>2</sup> Decided in 1943, *United States v. Dotterweich* is regarded as the earliest application of the Responsible Corporate Officer Doctrine. See *United States v. Dotterweich*, 320 U.S. 277 (1943).

<sup>3</sup> A public welfare offense is one that a "reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 433 (1985).

<sup>4</sup> WAYNE R. LAFAVE, *CRIMINAL LAW*, 214 (3rd Ed. 2000).

### 1. Omission (Failure to Act)

The imposition of criminal liability may arise where an individual fails to perform a required act. Such liability derives from the common law notion of a duty to act. However, a person generally does not have a legal duty to act.

The following are examples of conditions giving rise to a duty to act: a duty based on relationship, a contract, and most importantly from the environmental perspective, a duty based upon statute.<sup>5</sup> An example of an environmental statute creating a duty to act is found in the Comprehensive Environmental Response, Compensation and Liability Act's (CERCLA's)<sup>6</sup> requirement that certain reports be made.<sup>7</sup>

### 2. Vicarious Liability

Vicarious liability occurs "where the defendant, generally one conducting a business, is made liable (though without personal fault) for the bad conduct of someone else, generally his employee."<sup>8</sup> Vicarious liability does away with "personal *actus reus*,"<sup>9</sup> rendering one liable for the acts of subordinates or agents.

### 3. Derivative Liability

A corporate officer may stand liable not only for the acts of those subordinate to him, but also for the acts of the corporation. When a corporation commits an offense, it is the principal. Corporate officers in positions of authority who fail to exercise that authority in preventing/remediating violations can be said to aid and abet those violations. This is the derivative approach to liability.<sup>10</sup> When applied to strict liability

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<sup>5</sup> See *id.* at 215-219.

<sup>6</sup> The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (1988), Codifying Pub. L. No. 96-510, 94 Stat. 2767 (1980) as amended.

<sup>7</sup> See 42 U.S.C. § 6603(b).

<sup>8</sup> See LAFAYE, *supra* note 4, at 265.

<sup>9</sup> *Id.*

<sup>10</sup> Under this approach, the mental state for the aider and abettor is the same as that for the principal. The mental state for the aider and abettor is not a constant, but varies with the crime. It may be purposeful intent, if, under the particular crime charged, the principal is not guilty unless acting with purposeful intent. It may be knowledge, bad purpose, or strict liability; for each offense, the aider and abettor's mental state is derived from that required of the principal.

offenses, the derivative approach treats the aider and abettor as standing "in the shoes of the principal," thereby obviating the need for a culpable mental state on the part of the corporate official.

### B. *Mens Rea*<sup>11</sup>

There are differing approaches to determining the degree of criminality exhibited by the alleged criminal to complete the commission of the crime. That is, what was the extent of the guiltiness of his state of mind? Generally, these approaches can be separated into four categories of crimes; (1) those that require the intent to commit the act or bring about the result; (2) those requiring knowledge of the act; (3) those requiring recklessness or disregard in taking an action or causing its result; and (4) those requiring negligence in taking the action or causing the result. In addition, a crime may be one of strict liability, requiring no determination of the criminal's state of mind.<sup>12</sup> As the Supreme Court has observed, however, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."<sup>13</sup>

It is important to pay particular attention to the language of the environmental statute as well as the legislative intent evinced by Congress as to what the knowledge requirement is for culpability in the criminal activity.<sup>14</sup> Typically, criminal statutes contain words of criminality to delineate the requisite intent required for the commission of the offense. That is, words such as "intentionally," "knowingly," "willfully," and "recklessly" are used to describe the *mens rea* required for the crime. This article will emphasize the "knowingly" *mens rea* since that is most often the standard of wrongful purpose required in environmental statutes.<sup>15</sup>

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Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1410 (2002).

<sup>11</sup> *Mens rea*, criminal intent, and *scienter* are used to describe the state of mind that usually must be shown to prove criminal conduct. See WAYNE R. LAFAYE, *CRIMINAL LAW*, 224 (3rd Ed. 2000).

<sup>12</sup> The Rivers and Harbors Act of 1899 for example has such a standard of strict liability for actions relating to discharges of refuse into the navigable waters of the United States and for any action that inhibits the navigability of those waters. See generally 33 U.S.C. §§ 401-407.

<sup>13</sup> *United States v. United States Gypsum*, 438 U.S. 432, 436 (1978).

<sup>14</sup> DONALD A. CARR ET AL., *ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS*, 128 (1995).

<sup>15</sup> See ARNOLD W. REITZE, JR., *AIR POLLUTION CONTROL LAW: COMPLIANCE & ENFORCEMENT*, 578 (2001). See also 42 U.S.C. § 7413(c); 42 U.S.C. § 6928(d)&(e); 42 U.S.C. § 9603(b)&(d); 7 U.S.C. § 1367(b)(ii); 15 U.S.C. §§ 2614-1615; 33 U.S.C. § 1319(c). The Toxic Substances Control Act is the only environmental statute containing a general criminal provision requiring proof that an act was committed "knowingly or willfully." 15 U.S.C. § 15(b).

## *Constructive Knowledge/Willful Blindness*

The law requires notice that certain conduct is prohibited; “[w]ere it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.”<sup>16</sup> Nonetheless, it is also equally fundamental to our common law jurisprudence that ignorance of the law is no excuse.

“Willful blindness” is a well-known evidentiary principle involving the concept of transferred intent. The doctrine allows the factfinder to infer knowledge from proof that a defendant shielded himself from knowledge of an illegal act.<sup>17</sup> Deliberately remaining ignorant of facts that are otherwise apparent creates an inference that the defendant avoided the facts because of knowledge of the wrongfulness of the conduct.<sup>18</sup>

In addition, proof of knowledge can arise when a person “has notice of facts which would put one on inquiry as to the existence of that fact, when he has information to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man would believe that such a fact existed.”<sup>19</sup> Under the willful blindness doctrine, a defendant’s actual knowledge or conscious avoidance are treated the same; proof of either one may meet the knowledge requirement in a criminal offense.

### III. CORPORATIONS AND CORPORATE OFFICERS

#### A. Theories of Corporate Liability

By creating a legal entity responsible for the actions of the business organization, the individual owners of the corporation generally can escape personal liability for corporate activities.<sup>20</sup> Originally, not only was personal liability limited, but the corporation itself “could not be criminally culpable,

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<sup>16</sup> *Lambert v. California*, 355 U.S. 225 (1957).

<sup>17</sup> See LAFAVE, *supra* note 4, at 219.

<sup>18</sup> See Barry M. Hartman & Charles A. De Monaco, *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 ELR 10,145 (1993).

<sup>19</sup> See LAFAVE, *supra* note 4, at 220.

<sup>20</sup> “Basic to the theory of corporation law is the concept that a corporation is a separate entity, a legal being having an existence separate and distinct from that of its owners. This attribute of the separate corporate personality enables the corporation’s stockholders to limit their personal liability . . . . The corporate form, however, is not lightly disregarded, since limited liability is one of the principal purposes for which the law has created the corporation.” Lynda J. Oswald and Cindy A. Schipani, *Legal Theory: CERCLA and the “Erosion” of Traditional Corporate Law Doctrine*, 86 Nw. U.L. REV. 259 (1992), citing *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5<sup>th</sup> Cir. 1973).

because it possessed no cognitive ability and therefore could not form the *mens rea* traditionally required for a conviction."<sup>21</sup>

### 1. Development of Corporate Criminal Liability

This latter concept was rejected by the United States Supreme Court in *New York Central & Hudson River Railroad v. United States*.<sup>22</sup> In *New York Central*, the railroad company was found to have violated the Elkins Act<sup>23</sup> by paying shippers a rebate for using the railroad line. The Act made the corporation criminally liable for the criminal acts committed by corporate directors, officers, and any other acting on behalf of the corporation. Even though no evidence was produced showing the directors had authorized or approved the prohibited rebates, the corporation was found criminally responsible. Relying on tort law doctrine, the Court based this accountability on the imputed benefit received by the corporate principal from the acts of the agent; "justice requires that the [principal] be held responsible."<sup>24</sup>

### 2. Traditional Theories of Civil Liability

Under the doctrine of *respondeat superior*, a corporation, as a principal, generally is bound by the acts of its agents so long as those agents do not step outside the scope of their employment.<sup>25</sup> In another approach to corporate liability, the corporation itself may step outside the scope of its employment—a corporation can be held accountable for illegal actions committed beyond the power of its by-laws or charter. Finally, "piercing the corporate veil"<sup>26</sup> is another avenue of corporate liability. This approach is used to extend liability for wrongful acts of a corporation to the parent corporation, or to officers, directors, and even individual shareholders. Underlying this theory of liability is the corporation as a "false front" or sham for a parent corporation, behind whose limited liability protections officers and shareholders should not be allowed to hide. Although typically used in civil cases, a court has used the

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<sup>21</sup> Keith Welks, *Corporate Criminal Culpability: An Idea Whose Time Keeps Coming*, 16 COLUM. J. ENV'T. L. 294 (1991).

<sup>22</sup> 212 U.S. 481 (1909).

<sup>23</sup> Pub. L. No. 57-103, 32 Stat. 847 (1903).

<sup>24</sup> *New York Central*, 212 U.S. at 493.

<sup>25</sup> "Respondeat superior" is a traditional tort law doctrine that can be defined as "the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1313 (7<sup>th</sup> Ed. 1999).

<sup>26</sup> "Piercing the corporate veil" is defined as "the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." BLACK'S LAW DICTIONARY 1168 (7<sup>th</sup> Ed. 1999). The concept of piercing the corporate veil also is traditionally used to find a parent corporation responsible for the acts of a subsidiary when "the corporate form would otherwise be misused to accomplish wrongful purposes . . ." *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

concept to impose criminal liability on a parent corporation for the acts of a subsidiary.<sup>27</sup>

## B. Theories of Corporate Officer Liability

Corporate officers are criminally liable for the acts they personally commit, for the acts of agents or subordinates, for crimes that they aid or abet,<sup>28</sup> and for crimes they fail to prevent despite their responsible positions.<sup>29</sup> While most of these liability theories are fairly self-explanatory, the latter one, known as “responsible share” requires a few further words of explanation.

This concept, arising out of the U.S. Supreme Court case, *United States v. Dotterweich*,<sup>30</sup> attaches liability to all (including corporate officials) who have a responsible share in the furtherance of a criminal act prohibited by statute. Due to the potential risk of harm involved by violation of a statute, a corporate official in a position of “responsible relation” to the danger, and who could be informed of the danger, is thereby responsible for the violation of the statute when it occurs.<sup>31</sup> It is this concept of liability for offenses arising under the doctrine of a public welfare offense that is the basis upon which the RCO doctrine lies.

## IV. DUAL INDOCTRINATION: THE PUBLIC WELFARE OFFENSE AND RESPONSIBLE CORPORATE OFFICER (RCO) DOCTRINES

### A. The Public Welfare Offense Doctrine—Eliminating the *Mens Rea* Requirement

When a statute merely codifies the common law, courts often assume there is a *scienter* requirement even if the level of culpability has not been addressed.<sup>32</sup> For statutes concerned with public health, safety, and welfare, however, courts have taken a different view. Generally, a public welfare statute without a standard for culpability will require the government to only prove the defendant had the responsibility and had either the authority to prevent or the ability to remedy a violation; the government does not have to show that the individual had the intent to violate the law or even any

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<sup>27</sup> See *United States v. Exxon Corp. & Exxon Shipping Co.*, Crim. No. A-90-015-Cr. (D. Alaska 1990).

<sup>28</sup> “The definition of aiding and abetting requires knowledge of the criminal act and some participation in bringing it to completion. Instructing or authorizing another to commit an offense is all that is required to impose liability.” WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS*, 255 (6<sup>th</sup> Ed. 1998).

<sup>29</sup> See generally *id.* at 254.

<sup>30</sup> 320 U.S. 277 (1943).

<sup>31</sup> *Id.* at 285.

<sup>32</sup> *Staples v. United States*, 511 U.S. 600, 616 (1994).

knowledge of the violation.<sup>33</sup> As defined by the U.S. Supreme Court, a public welfare statute is one that makes criminal an act that a “reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety.”<sup>34</sup>

### *1. Perimeter Points of the Public Welfare Offense Doctrine*

The following U.S. Supreme Court cases are frequently cited when addressing the application of public welfare offense principles to the knowledge requirement of environmental statutes.

#### *a. United States v. International Minerals & Chemical Corp.*<sup>35</sup>

The seminal case addressing application of the public welfare offense doctrine to a situation similar to that involved in environmental statutes is *United States v. International Minerals & Chemical Corp.*<sup>36</sup> In this case, the corporate defendant was charged with shipping hazardous materials in interstate commerce and knowingly failing to show that the materials were properly identified as such in accordance with Department of Transportation regulations.<sup>37</sup> The corporation was charged with violating 18 U.S.C. § 834(f) for “knowingly violating any such regulation,” in reference to a regulation created for the safe transportation of corrosive liquids.<sup>38</sup> Interpreting the meaning of “knowingly violates any such regulation,” the Court held the statute was a “shorthand designation” for knowingly committing the acts that violate the Act.<sup>39</sup>

The Supreme Court, quoting from *Morissette v. United States*,<sup>40</sup> a leading public welfare case, recognized the importance of criminal intent when it stated, “[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”<sup>41</sup> Yet in *International Minerals*, the Court explained that when dangerous products or “obnoxious” waste materials are the regulated activity, the likelihood of regulation is so great that anyone involved in the activity is

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<sup>33</sup> See *Dotterweich*, 320 U.S. 277; *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971); *United States v. Park*, 421 U.S. 658 (1975).

<sup>34</sup> *Liparota v. United States*, 471 U.S. 419, 433 (1985).

<sup>35</sup> 402 U.S. 558 (1971).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 558.

<sup>38</sup> *Id.* at 559.

<sup>39</sup> *Id.* at 562.

<sup>40</sup> *Morissette v. United States*, 342 U.S. 246 (1952).

<sup>41</sup> *Morissette*, 342 U.S. at 256.

presumed to be aware of the regulatory requirement.<sup>42</sup> The government therefore was not required to prove the accused intended the prohibited result of his actions; nor was the defendant allowed to use its ignorance of the law as a defense.<sup>43</sup>

*b. Liparota v. United States*<sup>44</sup>

Another oft-cited case in the application of the public welfare offense doctrine to environmental cases is *Liparota v. United States*.<sup>45</sup> In this case, a restaurant owner was convicted under 7 U.S.C. § 2024(b)(a) for unlawfully acquiring and possessing food stamps for less than the face value of the stamps.<sup>46</sup> The statute imposed liability on “whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by [the statute] or the regulations.”<sup>47</sup> At trial, the trial judge instructed the jury that the government had to prove the defendant acquired and possessed the food stamps in a manner not authorized by the statute or regulations and the defendant did so knowingly and willfully. The government’s position was the statute was violated if the defendant knew that he acquired or possessed the food stamps in an unauthorized manner; proof of the defendant’s *mens rea* was not required by the statute to show a violation.

The Supreme Court held that to prove a violation of the statute, the defendant had to know that his acquisition or possession of the food stamps was somehow contrary to law or regulation. In its review of the knowledge necessary for conviction, the Court looked first to Congressional intent. After finding it unclear as to the knowledge required by the statute, the Court relied on *Morissette* and the contention that it is fundamental to universal systems of law that before treating an act as criminal that there be a requirement of intention.<sup>48</sup> The Court determined that innocent conduct would be criminalized if proof of knowledge of the unauthorized nature of the defendant’s acts was not required. Concluding that although the statute did not provide a mistake of law defense, there was nothing in the legislative history to indicate that Congress intended the result urged by the government.<sup>49</sup> The Court distinguished the food stamp offenses from the definition of a public welfare offense in which the Court would accept that there is no *mens rea*

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<sup>42</sup> *International Minerals*, 402 U.S. at 563-564.

<sup>43</sup> *Id.*

<sup>44</sup> 471 U.S. 419 (1985).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 420.

<sup>47</sup> *Id.* at 420, n.1.

<sup>48</sup> *Id.* at 432.

<sup>49</sup> *Id.*

required; this conduct was not such that a reasonable person should know it is subject to a stringent public regulation due to the threat to health or safety.<sup>50</sup>

The Supreme Court's disparate holdings in *International Minerals* and *Liparota* have resulted in a "patchwork quilt" among the circuit courts of appeal in their various and sometimes confusing treatment of environmental statutes as public welfare statutes.<sup>51</sup>

*c. Staples v. United States*<sup>52</sup>

An illustrative example of the Supreme Court's emphasis on the narrowness of the public welfare statute *mens rea* exception is *Staples v. United States*.<sup>53</sup> In this case, the defendant was charged with violating a felony provision of the National Firearms Act<sup>54</sup> by possessing an unregistered machine gun. During execution of a search warrant of his home, the defendant was found in possession of a weapon that had been modified to fire more than one shot with a single pull of the trigger. Hence, it was considered a machine gun under the statute.<sup>55</sup>

At trial, the defendant argued that he had no knowledge of the weapon's automatic firing capability and therefore was not criminally liable. Despite his request, the trial judge declined to instruct the jury that the government must prove the defendant knew the gun would fire automatically. The defendant was found guilty and sentenced to probation for five years and a \$5,000 fine.<sup>56</sup>

The defendant ultimately appealed his conviction to the U.S. Supreme Court. The National Firearms Act was silent regarding *mens rea*, and the government argued against any such element, alleging that the case revolved around a public welfare offense: the purpose of the statute was to restrict the circulation of dangerous weapons, and individuals possessing guns should be aware of the likelihood of their regulation. The Court rejected this argument, holding that the government must prove actual knowledge on the part of the defendant of the characteristics of the weapon that brought it within the scope of the statute.

The Court, however, limited its holding narrowly, indicating that its "reasoning depends upon a common sense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may have in dealing with the regulated items."<sup>57</sup> The Court went to great lengths to distinguish this holding from its decision in

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<sup>50</sup> *Id.* at 433.

<sup>51</sup> See CARR, ET AL., *supra* note 14, at 186.

<sup>52</sup> 511 U.S. 600 (1994).

<sup>53</sup> *Id.*

<sup>54</sup> 26 U.S.C. §§ 5801-5872.

<sup>55</sup> *Staples*, 511 U.S. at 603.

<sup>56</sup> *Id.* at 601.

<sup>57</sup> *Id.* at 620.

*United States v. Freed*<sup>58</sup> where a violation of the same section of the National Firearms Act involving possession of a hand grenade was treated as a public welfare offense. The Court in *Staples* concluded that innocent gun ownership is commonplace, whereas an individual in possession of grenades is aware of their dangerous properties.

Notably, the Court also commented on the public welfare doctrine (eliminating any *mens rea* requirement) and the impact which potential punishment might have in relation to its application. While the Court said its prior precedents “suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense,”<sup>59</sup> it refrained from stating that it was inappropriate to consider that public welfare offenses may not be punished as felonies.<sup>60</sup> The Court determined that “such a definitive rule of construction” did not need to be adopted to decide this case.<sup>61</sup>

*d. United States v. X-Citement Video, Inc.*<sup>62</sup>

In *United States v. X-Citement Video, Inc.*,<sup>63</sup> the Supreme Court decided whether a statute that makes “knowingly” transporting, receiving, shipping and distributing sexually explicit conduct involving a minor child a federal crime, also requires knowledge that the material depicted a minor. The defendant was charged with violations of the Protection of Children Against Sexual Exploitation Act of 1977.<sup>64</sup> The Court addressed whether “knowingly” as used in the statute modifies only the verbs—transports, ships, receives, distributes or produces—or also the subsections of the statute addressing the use of a minor. While the Court acknowledged that the most grammatical reading of the provision suggested that it only modified the surrounding verbs, the

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<sup>58</sup> 401 U.S. 601 (1971).

<sup>59</sup> *Staples*, 511 U.S. at 603.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 513 U.S. 64 (1994).

<sup>63</sup> *Id.*

<sup>64</sup> Specifically, the defendant was charged with violating 18 U.S.C. § 2252 which states in pertinent part:

(a) Any person who—

(1) knowingly transports or ships in interstate commerce or foreign commerce by any means including by computer or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . .

(2) knowingly receives, or distributes, any visual depiction . . . or knowingly reproduces any visual depiction for distribution in interstate or foreign comers or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . .

Court found that the “plain language reading of the statute was not so plain”<sup>65</sup> and held that the defendant must know the depiction was of a minor engaged in sexually explicit conduct.

The Court again relied on the principle announced in *Morissette* recognizing the importance of a requirement of evil intent to sustain the finding of a crime.<sup>66</sup> To do otherwise, the Court opined, would allow the convictions of defendants who “had no idea they were even dealing with sexually explicit material.”<sup>67</sup> The Court found the statute was not a public welfare offense because people “do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation.”<sup>68</sup> In so holding, the Court, as it had in *Staples*, also considered the harsh penalties involved and how that tempered the application of the public welfare doctrine. The Court followed *Staples* in favor of a scienter requirement applying “knowingly” to every element of the statute.

## 2. Application of the Public Welfare Offense Doctrine to Environmental Statutes

Public welfare statutes impart strict liability standards, eliminating *mens rea* requirements even if the individual defendant had no knowledge of the violation or intent to violate the law. Courts have traditionally found that the risk of harm to the public by not holding a party accountable for a hazardous activity outweighs the “conventional requirement for criminal conduct-awareness of some wrongdoing.”<sup>69</sup> The rationale is the accused, if he does not cause the violation, “usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”<sup>70</sup>

### *United States v. Hanousek*<sup>71</sup>

The Supreme Court recently bypassed an opportunity to definitively address the applicability of public welfare analysis to environmental statutes when it denied *certiorari* in *United States v. Hanousek*.<sup>72</sup> In doing so, the Court let stand the Ninth Circuit’s treatment of a Clean Water Act (CWA)<sup>73</sup> violation as a public welfare offense.

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<sup>65</sup> *X-Citement Video, Inc.*, 513 U.S. at 69.

<sup>66</sup> *Morissette*, 342 U.S. at 256.

<sup>67</sup> *X-Citement Video, Inc.*, 513 U.S. at 69.

<sup>68</sup> *Id.* at 71.

<sup>69</sup> *United States v. Dotterweich*, 320 U.S. 277, 280-281 (1943), (citing *United States v. Balint*, 258 U.S. 250 (1922)).

<sup>70</sup> *Morissette*, 342 U.S. at 255-256.

<sup>71</sup> 176 F.3d 1116 (9<sup>th</sup> Cir. 1999), *cert denied*, 528 U.S. 1102 (2000).

<sup>72</sup> *Id.*

<sup>73</sup> 42 U.S.C. §§ 7401-42 (1988), Codifying Pub. L. No. 95-95, 91 Stat. 685 (1977) as amended.

The defendant was roadmaster of a railroad and responsible "for every detail of the safe and efficient maintenance . . . of the entire railroad."<sup>74</sup> As roadmaster, the defendant oversaw a rock quarrying project. During the course of that project, approximately 700 feet of a petroleum pipeline were left unprotected and subsequently ruptured.<sup>75</sup> Defendant was convicted of negligently discharging oil into a navigable river in violation of CWA §§ 309(c)(2)(A) and 311(b)(3).<sup>76</sup>

On appeal before the Ninth Circuit, the defendant contended he should be held to a standard of criminal negligence rather than ordinary negligence.<sup>77</sup> The Ninth Circuit, however, concluded that "Congress intended that a person who acts with ordinary negligence . . . may be subject to criminal penalties."<sup>78</sup> The Court reasoned the criminal provisions of the CWA were public welfare offenses proscribing "conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."<sup>79</sup>

While the Supreme Court denied *certiorari* on this issue, there were dissents to the denial. Justice Thomas, joined by Justice O'Connor, maintained that the Ninth Circuit's interpretation of the public welfare offense doctrine was too broad:

We have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities . . .<sup>80</sup>

Here one may recall that the majority *Staples* and *X-Citement Video* decisions generally strengthened *mens rea* requirements, requiring criminal culpability in statutes which, on their face, arguably required none.<sup>81</sup>

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<sup>74</sup> 176 F.3d at 1119.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1118.

<sup>77</sup> The defendant urged the Court to define criminal negligence as "a gross deviation from the standard of care that a reasonable person would observe in the situation." See American Law Institute, *Model Penal Code* § 2.02(2)(d) (1985). The Court found that by the plain language of the statute Congress intended to use "negligently" to mean the failure to use such care that a reasonably prudent person would use under similar circumstances. 176 F.3d at 1121.

<sup>78</sup> 176 F.3d at 1121.

<sup>79</sup> *Id.*

<sup>80</sup> 528 U.S. 1102, 1105 (2000) (Thomas, J., dissenting).

<sup>81</sup> See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with the intent requirement"); *Liparota v. United States*, 471 U.S. 419, 425-426 (1985) (defendant convicted of unlawfully acquiring and possessing food stamps in an unauthorized manner; government must prove defendant knew his acquisition and/or possession of the food stamps was unlawful); *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464, 468 (1994) (adopting presumption that *mens rea* requirement should apply to

## B. The Responsible Corporate Officer (RCO) Doctrine

Under traditional concepts of criminal law, the bases of individual criminal liability of corporate officials are “for crimes that they personally commit, for crimes they aid or abet and for crimes they fail to prevent by neglecting to control the misconduct of those subject to their control.”<sup>82</sup> The latter category of liability has been the vehicle for imposing criminal liability upon corporate officials through analysis of public welfare offenses under what is known as the responsible corporate officer doctrine.

Pursuant to this doctrine, a corporate officer is personally criminally liable on the basis of his “responsible relation” to the criminal violation, despite lack of any knowledge on his part of illegal activity. Hence, this doctrine provides both a way to hold corporate officers personally accountable and also eliminate or reduce any *mens rea* requirement. While sometimes applied to situations in which the public welfare offense doctrine may also apply, the two doctrines generally overlap in their practical provision of constructive knowledge to satisfy/eliminate the traditional *mens rea* element.

### 1. Perimeter Points for the Responsible Corporate Officer Doctrine

The following U.S. Supreme Court cases are frequently cited when addressing the application of responsible corporate officer principles to personal liability and knowledge requirements of environmental statutes.

#### a. *United States v. Dotterweich*<sup>83</sup>

The United States Supreme Court in *United States v. Dotterweich*<sup>84</sup> first addressed the individual liability of a corporate officer under a public welfare statute. Dotterweich, the president of a pharmaceutical company, was found guilty of shipping adulterated and misbranded goods in violation of the Food, Drug, and Cosmetic Act (FDCA).<sup>85</sup> The FDCA was enacted by Congress to expand its ability to prevent noxious articles from entering the commerce stream.<sup>86</sup> The Act was designed as a strict liability statute dispensing with the typical requirement of awareness on the part of the

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every element of the crime that would otherwise criminalize innocent conduct); *Posters 'N' Things, Ltd. v. United States*, 114 S.Ct. 1747, 1753-1754 (1994) (despite absence of the term “knowingly” from the statute prohibiting interstate conveyance in plan to sell drugs, required proof that defendant knowingly made use of such a scheme).

<sup>82</sup> See KNEPPER & BAILEY, *supra* note 28.

<sup>83</sup> 320 U.S. 277 (1943).

<sup>84</sup> *Id.*

<sup>85</sup> 21 U.S.C. § 301 *et seq.*

<sup>86</sup> *Dotterweich*, 320 U.S. at 280.

wrongdoer; liability was imposed without regard to the criminal intent of the defendant.<sup>87</sup>

Dotterweich was responsible for the day-to-day supervision of his company. Despite no showing that he knew of or participated in the illegal conduct, he was convicted of this misdemeanor<sup>88</sup> offense. Dotterweich argued that he could not personally be held liable because the corporation was the only "person" subject to prosecution under the statute. The Supreme Court disagreed, stating that the crime could be committed "by all who have a responsible share in the furtherance of the transaction which the statute outlaws."<sup>89</sup> By holding Dotterweich criminally liable despite his lack of knowledge about any illegal activity, the Supreme Court laid the foundation of the RCO doctrine. The Court justified the result by weighing the potential risk of harm upon an unsuspecting public against the hardship suffered by the corporate official who, although not intending to violate the statute, was in a position of "responsible relation" to the danger such that he could be informed of the danger before loosing it on consumers.<sup>90</sup>

b. *United States v. Park*<sup>91</sup>

The Supreme Court further clarified the RCO doctrine in *United States v. Park*.<sup>92</sup> Again reviewing a FDCA strict liability criminal conviction, the Court found the president and chief executive officer of a national grocery store chain responsible for misdemeanor violations related to the contamination of food stored at the company's warehouses.<sup>93</sup> On appeal, the president (Park) asserted that he could not be held personally responsible because he had delegated responsibility for warehouse sanitation to "dependable subordinates."<sup>94</sup> Despite the breadth of the corporate officer's responsibilities in managing a national corporation, and the fact that various functions were "assigned to individuals who, in turn, have staff and departments under them,"<sup>95</sup> the president was held responsible. The Court found "[t]hose corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are

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<sup>87</sup> *Id.* at 281.

<sup>88</sup> The distinction between misdemeanor and felony offenses is significant; so too is it significant in the application of the RCO doctrine according to some commentators. See Cynthia H. Finn, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U.L. REV. 543 (1996).

<sup>89</sup> 320 U.S. 277 at 284.

<sup>90</sup> *Id.* at 285.

<sup>91</sup> 421 U.S. 658 (1975).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 661-662.

<sup>94</sup> *Id.* at 663-664.

<sup>95</sup> *Id.* at 663.

necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations."<sup>96</sup>

The government did not have to prove the officer committed a wrongful act. Pursuant to the Court's reasoning, criminal liability under a public welfare statute such as the FDCA does not turn upon the corporate official's "awareness of wrongdoing."<sup>97</sup> The Court set out the proof needed for a showing of liability: "[t]he Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."<sup>98</sup> While these expectations of responsibility place high burdens on corporate officers, they are consistent with the public's expectations of someone in a position of authority over enterprises that affect public health and safety.<sup>99</sup>

## 2. Application of the RCO Doctrine to Environmental Statutes

There are several underlying issues that continue to impact the RCO doctrine in relation to a public welfare analysis and its application to environmental statutes. Included in this complicated mix is the specific *mens rea* requirement for the statute at issue, treatment of the environmental statute as a public welfare statute, the effect of treatment as a public welfare statute (i.e. the elimination or reduction of *mens rea*), and application of public welfare analysis to felony offenses. Nonetheless, the practice of treating environmental statutes as public welfare statutes has been prevalent for some time, and is not without historical antecedents.<sup>100</sup>

### *United States v. Johnson & Towers, Inc.*<sup>101</sup>

One of the earliest cases to apply the RCO doctrine (and also implicate the public welfare offense doctrine) in the prosecution of an environmental statute is *United States v. Johnson & Towers, Inc.*<sup>102</sup> In this case, two management employees of an industrial engine repair company were found covered by the definition of a "person" so as to be potentially liable for

<sup>96</sup> *Id.* at 672.

<sup>97</sup> *Id.* at 672-673.

<sup>98</sup> *Id.* at 673-674.

<sup>99</sup> *See id.* at 672.

<sup>100</sup> "Public welfare offenses in the environmental law context originated under the Refuse Act of 1899. Environmental violations under the Act were treated as public welfare offenses, and the Act authorized the prosecution of individuals who had no specific knowledge of the allegedly criminal act." *See* Randall S. Abate & Danya E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act*, 9 N.Y.U. ENVTL L.J. 304, 314-315 (2001).

<sup>101</sup> 741 F.2d 662 (3d Cir. 1984).

<sup>102</sup> *Id.*

criminal violations of the Resource Conservation and Recovery Act (RCRA) § 3008(d)(2)(A) for treating, storing, or disposing of hazardous wastes without a permit.

On appeal, the defendants argued the statute only contemplated that “owners” and “operators” are “persons” for purposes of RCRA liability because they are the only individuals with the ability to obtain a permit.<sup>103</sup> After reviewing legislative history, the Court determined Congress intended to reach employees engaged in the treatment, storage, and disposal activities and “did not explicitly limit criminal liability to owners and operators.”<sup>104</sup>

The Third Circuit concluded, relying on *Dotterweich*, that “in RCRA, no less than in the Food and Drug Act, Congress endeavored to control hazards that, ‘in the circumstances of modern industrialism, are largely beyond self-protection.’”<sup>105</sup> Despite then identifying the case as involving a public welfare offense not requiring proof of *mens rea*, the Court opined that the statute required knowledge of every element of the crime. However, the requisite knowledge could be inferred due to the employees’ “responsible positions” within the corporation.<sup>106</sup>

The next section reviews the environmental statutes, the associated *mens rea* requirements for those statutes, and how those requirements are integrated into applications of the RCO doctrine.

## V. ENVIRONMENTAL STATUTES’ MENS REA REQUIREMENTS

The main federal environmental statutes require proof of knowledge to meet the *scienter* requirements of their criminal provisions. For example, in the Clean Water Act (CWA),<sup>107</sup> it is a felony offense to *knowingly* violate a condition of a permit issued under the Act.<sup>108</sup> Likewise, this same conduct, *knowing* violation of a permit, is also an offense under the Clean Air Act (CAA).<sup>109</sup> In the Resource Conservation and Recovery Act (RCRA),<sup>110</sup> any person who *knowingly* transports any hazardous waste is subject to liability.<sup>111</sup> Finally, in the Comprehensive Environmental Response, Compensation and

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<sup>103</sup> *Id.* at 664.

<sup>104</sup> *Id.* at 667.

<sup>105</sup> *Id.* at 665 (quoting *Dotterweich*, 320 U.S. at 282).

<sup>106</sup> *Id.*

<sup>107</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1972), Codifying Pub. L. No. 92-500, 86 Stat. 816 (1972) as amended. The FWPCA is generally referred to as the Clean Water Act.

<sup>108</sup> *Id.* § 1319(c)(2).

<sup>109</sup> 42 U.S.C. § 7413(c) (1988).

<sup>110</sup> The Solid Waste Disposal Act, as amended by The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-699k (1988), codifying Pub. L. No. 94-580, 90 Stat. 2795, 2796, as amended.

<sup>111</sup> *Id.* § 6928(d)(1).

Liability Act (CERCLA),<sup>112</sup> it is a felony to *knowingly* fail to report the release of a hazardous substance.<sup>113</sup>

The majority view, such that it is, holds that a knowing violation does not require the defendant to have been aware of a law and to have intentionally violated it; it only requires the defendant to have been aware of his conduct.<sup>114</sup> A person is usually treated as having acted “knowingly” when an act was committed “voluntarily and intentionally and not because of ignorance, mistake, accident or some other reason.”<sup>115</sup> A review of the specific statutory offenses at issue<sup>116</sup> and an examination of the approaches to proof of knowledge in the various U.S. circuit courts of appeal provide insight into the different methods of meeting statutory *mens rea* requirements.

## A. Environmental Statutory Provisions

### 1. Clean Air Act<sup>117</sup>

The Clean Air Act (CAA) governs stationary and mobile sources of air pollution through a system of air quality standards contained in state implementation plans. These plans are enforced through emission limitations and permit requirements.

Criminal penalties for violations of the Act are imposed by 42 U.S.C. § 7413(c). The CAA makes criminal the unpermitted release of any hazardous pollutant into air by any person.<sup>118</sup> In addition, the CAA makes it criminal for a person to knowingly violate state implementation plans and to fail or refuse to comply with any compliance order of the EPA Administrator, the national emission standards for hazardous air pollutants, or other requirements under the Act. It is also a criminal violation for any person to (1) knowingly make a false statement in a document filed, maintained, or used for purposes of compliance with the Act; or (2) knowingly falsify, tamper with, or render inaccurate a monitoring device or method required to be maintained under the Act.<sup>119</sup> Finally, the CAA provides criminal sanctions for persons who either

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<sup>112</sup> **The Comprehensive Environmental Response, Compensation and Liability Act**, 42 U.S.C. §§ 9601-9675 (1988), codifying Pub. L. No. 96-5610, 94 Stat. 2767 (1980) as amended.

<sup>113</sup> *Id.* § 9603(b)(3) as amended by The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 109, 100 Stat. 1613, 1632-1633.

<sup>114</sup> See LAFAYE, *supra* note 4, at 214; see REITZE, *supra* note 15, at 578.

<sup>115</sup> Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 LOY. CHI. L. J. 169 (1994) (quoting *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 52 n.15 (1<sup>st</sup> Cir. 1991)).

<sup>116</sup> The primary laws reviewed in this article are: Clean Air Act, 42 U.S.C. §§ 7401-7671q (1990), Clean Water Act, 33 U.S.C. §§ 1251-1387 (1972); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-699k (1988); and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1988).

<sup>117</sup> 42 U.S.C. §§ 7401-42 (1988), codifying Pub. L. No. 95-95, 91 Stat. 685 (1977) as amended.

<sup>118</sup> See 42 U.S.C. § 7413(c)(1) & (3).

<sup>119</sup> See *id.* § 7413(c)(2).

knowingly or negligently release hazardous air pollutants when such a release puts others in imminent danger of death or serious bodily injury.<sup>120</sup>

Liability under the above provisions is dependent upon whether an individual falls within the definition of a “person.”<sup>121</sup> As defined in the statute, a “responsible corporate officer”<sup>122</sup> is a “person.”

## 2. *Clean Water Act*<sup>123</sup>

The Clean Water Act (CWA) generally regulates the discharge of pollutants into the waters of the United States or into municipal wastewater treatment systems. The statute also protects wetlands. Like the CAA, a permit system serves as the main regulatory enforcement mechanism: discharges cannot lawfully be made into the environment without a permit.<sup>124</sup> The criminal provisions of the CWA proscribe knowing and negligent conduct by a “person.”<sup>125</sup> The definition of “person” includes a “responsible corporate officer.”<sup>126</sup>

The CWA imposes liability on persons who knowingly discharge pollutants into waters of the United States without a permit or who violate an effluent limitation, pretreatment requirement, or permit condition.<sup>127</sup> As with the CAA, knowing false statements in a document filed for purposes of compliance with the Act or knowing falsifications or tampering with required monitoring devices are also criminal violations.<sup>128</sup> The CWA also provides for criminal sanctions against any person who knowingly or negligently discharges a pollutant into the waters of the United States that places others in imminent danger of death or serious bodily injury.<sup>129</sup> For the offense of failing to report discharges of hazardous substances or oil into the environment, an additional factor for consideration is whether the person is alleged to be the “person in charge” of a vessel or facility.<sup>130</sup>

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<sup>120</sup> See *id.* § 7413(c)(4) & § 7413(c)(5).

<sup>121</sup> *Id.* § 7413(c).

<sup>122</sup> *Id.* § 7413(c)(6).

<sup>123</sup> Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1387 (1972), codifying Pub. L. No. 92-500, 86 Stat. 816 (1972) as amended. The FWPCA is generally referred to as the Clean Water Act.

<sup>124</sup> 33 U.S.C. § 1342.

<sup>125</sup> 33 U.S.C. § 1319(c)(1), (c)(2). Again, the term “person” applies to both individuals and corporations. See 33 U.S.C. § 1362(5).

<sup>126</sup> 33 U.S.C. § 1319(c)(6).

<sup>127</sup> 33 U.S.C. § 1342.

<sup>128</sup> 33 U.S.C. § 1319(c)(4).

<sup>129</sup> 33 U.S.C. § 1319(c)(3)(A).

<sup>130</sup> 33 U.S.C. § 1321(b)(5).

### 3. *Resource Conservation and Recovery Act (RCRA)*<sup>131</sup>

The Resource Conservation and Recovery Act (RCRA) governs the reporting and record-keeping requirements related to the storage, treatment, and disposal of hazardous wastes. RCRA defines “persons” to whom the criminal provisions are applicable as individuals as well as corporations and does not exclude corporate officers or employees.<sup>132</sup> However, unlike the CWA and CAA, RCRA does not expressly include responsible corporate officers as “persons.”<sup>133</sup>

RCRA imposes criminal liability upon persons who knowingly treat, store, or dispose of hazardous waste at a facility without a permit or in knowing violation of a permit.<sup>134</sup> A person who knowingly generates and transports a hazardous waste either to an unpermitted facility or without the required manifest faces criminal sanctions.<sup>135</sup> The Act also prohibits knowing false statements or omissions in required documents or knowingly failing to file such documents;<sup>136</sup> knowing destruction, alteration, or concealment of required records;<sup>137</sup> knowing export of hazardous wastes without consent or in violation of agreements between the United States and the receiving country.<sup>138</sup> In addition, criminal liability may arise if a person was engaged in conduct related to treatment, storage, or disposal of hazardous wastes that might present an imminent and substantial endangerment to human health or the environment.<sup>139</sup>

### 4. *Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)*<sup>140</sup>

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) governs the cleanup of hazardous substances from abandoned sites and provides an emergency response system for the release of hazardous substances. The criminal provisions of CERCLA apply to three categories of violators: (1) a “person in charge” of a vessel or facility, (2) a

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<sup>131</sup> The Solid Waste Disposal Act, as amended by The Resource Conservation and Recovery Act, 42 U.S.C.A. §§ 6901–699k (1988), codifying Pub. L. No. 94-580, 90 Stat. 2795, 2796, as amended.

<sup>132</sup> 42 U.S.C. § 6093(15).

<sup>133</sup> In *United States v. MacDonald & Watson Oil Co.*, 933 F.2d 35 (1<sup>st</sup> Cir. 1991), the First Circuit refused to extend RCRA liability on the RCO doctrine.

<sup>134</sup> 42 U.S.C. § 6928(d)(2).

<sup>135</sup> *Id.* § 6928(d)(6) and (d)(2).

<sup>136</sup> *Id.* § 6928(d)(3).

<sup>137</sup> *Id.* § 6928(d)(4).

<sup>138</sup> *Id.* § 6928(d)(6).

<sup>139</sup> See 42 U.S.C. §§ 6928(d)-(e), 6992d(b) & (c).

<sup>140</sup> The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601-9675 (1988), codifying Pub. L. No. 96-510, 94 Stat. 2767 (1980) as amended.

“person” who fails to report a release, and (3) the “owner or operator” of a facility.

Failure of a “person in charge” of a vessel or a facility to immediately report a release of a reportable quantity of a hazardous substance is a criminal offense.<sup>141</sup> Likewise, knowing and willful failure to report a release of certain identified chemicals by a “person” is an offense.<sup>142</sup> CERCLA also calls for criminal culpability for an “owner or operator” at the time of the disposal of a hazardous waste, or the current owner or operator, who knowingly fails to report the site to the EPA, or knowingly fails to maintain, destroys, or falsifies required records.<sup>143</sup>

## B. Case Law *Mens Rea* Interpretations

With notable exception in the Fourth Circuit, the case law analyzing environmental statutes tends to reduce the standard of proof required for a knowing violation. This is mostly a result of the public welfare doctrine and related concepts: that the public cannot protect itself from the dangers of hazardous substances<sup>144</sup> and that persons involved with hazardous substances “have every reason to be aware that their activities are regulated by law, aside from the rule that ignorance of the law is no excuse.”<sup>145</sup>

### 1. *United States v. Weitzenhoff*<sup>146</sup>

In *United States v. Weitzenhoff*, the defendants were managers of a sewage treatment plant in Hawaii. The plant had a National Pollutant Discharge Elimination System permit for the discharge of suspended solids and biochemical oxygen demand into the ocean.<sup>147</sup> When waste activated sludge began to accumulate at the plant, the managers gave instructions to employees to systematically dispose of the sludge by pumping it into the

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<sup>141</sup> See 42 U.S.C. § 9603(b)(3).

<sup>142</sup> Pursuant to the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-50, which was added as part of the Superfund Authorization and Reauthorization Act amendments. See *id.* § 11045(b)(4).

<sup>143</sup> 42 U.S.C. § 9603(c) & (d). Although courts have not yet interpreted “owner or operator” in a criminal context, possible application of the terms may be made by analogy to findings of liability in civil cases that have addressed their applicability. See *infra* section VI D 4 (discussion of such civil law findings by the U.S. Supreme Court in *United States v. Bestfoods*, 118 S.Ct. 1876 (1998)).

<sup>144</sup> See *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971).

<sup>145</sup> *United States v. Dean*, 969 F.2d 187, 192 (6<sup>th</sup> Cir. 1992).

<sup>146</sup> 35 F.3d 1275 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

<sup>147</sup> CWA § 402 provides the permitting process that allows for the discharge of pollutants in compliance with the requirements of the Act. The section is titled, National Pollutant Discharge Elimination System (NPDES); permits granted under this section are known as NPDES permits.

outfall pipe at the treatment plant which discharged directly into the ocean. Because the sludge bypassed the effluent monitoring device, it was not reported in the plant's discharge monitoring reports. Discharges between April 1988 to June 1989 violated the plant's average effluent limitation during most of that time period.<sup>148</sup> At trial, the managers were found in violation of CWA § 309 for knowingly discharging pollutants in violation of their permit.<sup>149</sup>

On appeal, the plant managers argued that the court erred by not requiring the government to prove they knew their actions, or failures to act, were unlawful, and by not instructing the jury that it was a defense that they believed the discharges were allowed under the plant's permit as an appropriate bypass.

The Ninth Circuit held that the term "knowingly," as used in the CWA, does not require proof that a defendant knew their conduct was illegal.<sup>150</sup> The Court found the term's use to be ambiguous, and after considering the legislative history of the 1987 amendment to the Act that changed the *mens rea* from "willfully" to "knowingly," concluded that "[b]ecause they speak in terms of 'causing' a violation, the congressional explanations of the new penalty provisions strongly suggest that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit."<sup>151</sup>

The Court's holding in *Weitzenhoff* seems to apply a strict liability standard.<sup>152</sup> This has caused concern for the regulated community as it means individuals can be held liable for violating permit conditions (which can be complicated and difficult to execute) even when they have a good-faith belief in the legality of their actions.<sup>153</sup>

Of even greater concern to some was the Court's conclusion that environmental laws are public welfare statutes.<sup>154</sup> In an amended opinion, the Court affirmed its previous opinion in *Weitzenhoff*, but revised it to address the

<sup>148</sup> *Weitzenhoff*, 35 F.3d 1275 at 1282.

<sup>149</sup> The relevant portion of 33 U.S.C. § 1319(c)(2) provides:

**(2) Knowing violations**

Any person who—Knowingly violates section . . . 1311 . . . of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section . . . of this title . . . shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.

<sup>150</sup> *Weitzenhoff*, 35 F.3d 1275 at 1284.

<sup>151</sup> *Id.*

<sup>152</sup> See REITZE, *supra* note 15, at 578.

<sup>153</sup> See CARR, ET AL., *supra* note 14, at 208.

<sup>154</sup> *Id.* at 209.

applicability of *Staples*<sup>155</sup> to treatment of environmental statutes as public welfare statutes.<sup>156</sup>

As discussed above, *Staples* seemed to express concern about relaxing the *mens rea* requirements for any crime, including public welfare offenses, where the defendant may face a substantial prison sentence.<sup>157</sup> The Ninth Circuit distinguished that case, however, noting that “mere ownership of a gun is not sufficient to place people on notice that the act of owning an unregistered firearm is not innocent under the law.”<sup>158</sup> Citing to discussion in *Staples* of public welfare offenses as encompassing “those regulations that govern handling of ‘obnoxious materials,’”<sup>159</sup> the Ninth Circuit found the dumping of pollutants to be the kind of activity, unlike gun ownership, which should put the owner on notice of their relationship to a public danger.<sup>160</sup>

## 2. *United States v. Wilson*<sup>161</sup>

In *United States v. Wilson*, the Fourth Circuit sets out what may be the most demanding test for proving a defendant “knowingly” committed an environmental crime. This case also addresses a violation of CWA § 309, in the context of a wetlands issue.

The defendants were convicted of discharging fill material and excavated dirt into wetlands without a permit.<sup>162</sup> Over a five-year period, they attempted to drain a number of properties during the land development phase of a construction project. The properties contained lands which were later identified as wetlands, yet no effort had been made to pursue permits to dredge or fill them.

On appeal, the defendants challenged the jury instructions on two bases: first they did not require proof the defendants knew their conduct was unlawful, and second, they failed to require proof that defendants had a “knowing” intent as to each of the elements of the offense.<sup>163</sup>

The Fourth Circuit disagreed with the defendants’ challenge that the government should have to prove awareness of the illegality of their conduct, but agreed that the instructions did not adequately inform the jury that the government’s burden is to prove knowledge with regard to every element of

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<sup>155</sup> 511 U.S. 600 (1994).

<sup>156</sup> 35 F.3d 1275 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

<sup>157</sup> *Staples*, 114 S.Ct. at 1799 (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)).

<sup>158</sup> *Weitzenhoff*, 35 F.3d at 1285-1286.

<sup>159</sup> *Id.* (citing *Staples*, 114 S.Ct. at 1798).

<sup>160</sup> *Id.* at 1286.

<sup>161</sup> 133 F.3d 251 (4<sup>th</sup> Cir. 1997).

<sup>162</sup> The CWA prohibits the discharge of dredged or fill material into the navigable waters of the United States without a permit.

<sup>163</sup> 133 F.3d at 260.

the offense.<sup>164</sup> In what appears to be a misapplication of the Supreme Court's analysis of the knowledge requirement in *International Minerals*, the Fourth Circuit cites to *International Minerals* for the proposition that the use of "knowingly violates" in the statute requires proof that the defendant must have knowledge of the facts meeting each essential element of the offense.<sup>165</sup>

In the case of a permit violation such as this, to sustain a conviction, the government must therefore prove the defendant *knew* he did not have a permit.<sup>166</sup> (This requirement puts the Fourth Circuit in complete disagreement with the Ninth Circuit's conclusion in *Weitzenhoff* that it is irrelevant "whether the polluter is cognizant of the requirement or even the existence of the permit."<sup>167</sup>) Although *Wilson* states that requirement of proof that a defendant knew that he did not have a permit is not to show that permits are available or required, the effect of it is to require proof of knowledge that the defendant's acts were unlawful.<sup>168</sup>

This result appears to be squarely contradicted by the Supreme Court's subsequent opinion in *United States v. Bryan*.<sup>169</sup> In *Bryan*, the Court interpreted both "knowingly" and "willfully" as used in the Firearms Owners' Protection Act,<sup>170</sup> prohibiting unlicensed dealing in firearms. The Act contained three provisions using the term "knowingly" and one that used "willfully."<sup>171</sup> The defendant was found guilty of dealing in firearms without a license in violation of 18 U.S.C. § 924(a)(1)(D), the provision requiring a "willful" violation.

At trial, the defendant made a motion that the jury be instructed that he could not be found guilty unless he had knowledge of the licensing requirement. The trial court declined to instruct the jury in that way, instead instructing that a person "need not be aware of the specific law or rule that his

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<sup>164</sup> *Id.* at 265.

<sup>165</sup> *Id.* at 262.

<sup>166</sup> *Id.* at 264.

<sup>167</sup> *Weitzenhoff*, 35 F.3d at 1284.

<sup>168</sup> *See Wilson*, 133 F.3d at 264. Since the Court required proof of knowledge for all statutory elements of the offense, it had to justify how requiring proof of awareness of illegality of conduct by knowledge that the defendant did not have a permit was not proof of knowledge of the unlawfulness of the act. While the Court states that the purpose of the requirement is to preserve a mistake of fact defense, it appears to be a rationalization to remain consistent with its interpretation of how "knowingly" in the statute required proof of knowledge to every essential element of the offense.

<sup>169</sup> 524 U.S. 184 (1998).

<sup>170</sup> 18 U.S.C. § 922(1)(a).

<sup>171</sup> Specifically, Title 18, U.S.C. § 924(a)(1) provides in relevant part:

Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever—

(A) knowingly makes any false statement . . .

(B) knowingly violates subsection . . .

(C) knowingly imports or brings into the United States . . .

(D) willfully violates any other provisions of this chapter,

shall be fined under this title, imprisoned not more than five years or both.

conduct may be violating. But he must act with the intent to do something the law forbids.”<sup>172</sup>

The Supreme Court distinguished “knowingly” and “willfully” in relation to culpability and stated “the term ‘knowingly’ does not necessarily have any reference to a culpable state of mind or to knowledge of the law,” rather, “the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.”<sup>173</sup> The Court found that a “willful” requirement is a heightened state of *mens rea* that relates to the “evil-doing” mind of the defendant with knowledge that his conduct was unlawful as opposed to knowledge that his conduct violated a specific law.<sup>174</sup>

As articulated by the Court, the requirement for “knowingly” is a much lower standard than that required by the Fourth Circuit in *Wilson*. As the *Bryan* Court stated, “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.”<sup>175</sup>

### 3. *United States v. Hayes International Corp.*<sup>176</sup>

The Eleventh Circuit in *United States v. Hayes International Corp.* addressed a conviction under RCRA Section 3008(d)(1)<sup>177</sup> for knowing transportation of hazardous waste to an unpermitted facility. The defendants in *Hayes* had contracted with Performance Advantage, Inc., to dispose of their hazardous wastes.<sup>178</sup> Subsequently, over six hundred drums of wastes generated by Hayes were found to have been illegally disposed of by Performance Advantage.<sup>179</sup>

On appeal, defendants contended they did not commit any “knowing” violation because they misunderstood the regulations, did not know that Performance Advantage did not have a permit, and had been under the

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<sup>172</sup> *Bryan*, 524 U.S. at 189.

<sup>173</sup> *Id.* at 192 (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J. dissenting)).

<sup>174</sup> *Id.* at 193.

<sup>175</sup> *Bryan*, 524 U.S. at 193.

<sup>176</sup> 786 F.2d 1499 (11<sup>th</sup> Cir. 1986).

<sup>177</sup> The relevant portion of 42 § 6928(d)(1) is set forth as follows:

(d) Criminal penalties

Any person who—

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter . . . shall upon conviction, be subject to a fine of not more than \$50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both.

<sup>178</sup> *Hayes*, 786 F.2d at 1501.

<sup>179</sup> See 786 F.2d 1499 (11<sup>th</sup> Cir. 1986).

mistaken belief<sup>180</sup> that Performance Advantage was recycling the waste. As stated by the Eleventh Circuit, “the degree of knowledge necessary for a conviction under 42 U.S.C. § 6928(d)(1), unlawful transportation of hazardous waste, is the principal issue in this appeal.”<sup>181</sup>

The Court first considered the legislative history of § 6928(d) and found that Congress had “not sought to define ‘knowing’ for offenses under subsection (d); that process has been left to the courts under general principles.”<sup>182</sup> The Court then turned to *International Minerals*<sup>183</sup> and found that this statute is not drafted in such a way as to make knowledge of the illegality an element of the offense; in addition, the Court found that § 6928(d) was “undeniably” a public welfare statute.<sup>184</sup> Accordingly, “it would be no defense to claim no knowledge that the paint waste was a hazardous waste . . . nor would it be a defense to argue ignorance of the permit requirement.”<sup>185</sup>

Nonetheless, the Court found that the congressional purpose was to require knowledge of the permit status. In this case, the word “knowingly” in the statute immediately precedes the word “transports” and is not set out as a modifier for all subsequent elements in an offense, yet the Court was willing to interpret that Congress intended a showing of knowledge of the permit status. The government’s burden in proving this knowledge is met if the defendant willfully fails to determine the permit status. Furthermore, the “existence of the regulatory scheme” and the inferences it raises of procedures and common knowledge involved in the transportation and disposal of hazardous wastes will also satisfy this burden.<sup>186</sup>

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<sup>180</sup> There are some scenarios where a good-faith belief could give rise to a mistake of fact defense. In *International Minerals*, the Supreme Court found that in a case involving “knowing” shipment of dangerous chemicals, a person who believed in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered. *International Minerals*, 402 U.S. at 563-564. The court in *Hayes* also would have applied mistake of fact, in principle, if the facts were that the defendant reasonably believed that the materials were actually being recycled. *Hayes*, 786 F.2d at 1506. See also *United States v. Ahmad*, 101 F.3d 386 (5<sup>th</sup> Cir. 1996) and *United States v. Wilson*, 133 F.3d 251 (4<sup>th</sup> Cir. 1997).

<sup>181</sup> 786 F.2d at 1500.

<sup>182</sup> *Id.* at 1502 (citing to S. Rep. No. 172, 96<sup>th</sup> Cong., 2d Sess. 39 (1980), reprinted in 1980 U.S.C.C.A.N. 5019, 5038).

<sup>183</sup> 402 U.S. 558 (1971).

<sup>184</sup> 786 F.2d at 1503.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1504-1505.

## VI. ENVIRONMENTAL CRIMINAL LIABILITY AND THE RCO DOCTRINE

### A. Application Approaches

There have been a number of different decisions applying the RCO doctrine to environmental statutes, and almost as many methods of application. Generally, the decisions follow three approaches: (1) the RCO doctrine does not negate the *mens rea* element of a crime; (2) the RCO doctrine applies, even though there's ample proof of actual knowledge of the violation; (3) the RCO doctrine applies to find an accused guilty of a criminal violation as a result of his position as a corporate officer. The U.S. Supreme Court has yet to weigh in on the application of RCO doctrine to environmental statutes.<sup>187</sup>

#### 1. *The First Approach*: *United States v. MacDonald & Watson Oil Co.*<sup>188</sup>

The first approach is best demonstrated by *United States v. MacDonald & Watson Oil Co.*. In this case, a corporate president, among others, was convicted of violating RCRA (for knowing disposal of hazardous wastes without a permit) and CERCLA (knowing failure to report the release of a hazardous substance).<sup>189</sup> At trial, the president argued that he had not "knowingly" violated RCRA; and evidence was adduced that while he was involved in the day-to-day operations of the company and was aware that the company had improperly disposed of hazardous wastes in the past, he was not aware of the particular violations at issue in this case.<sup>190</sup>

On appeal, the First Circuit examined the RCO doctrine, holding that the president's position alone was not enough to prove his knowledge. Critical to the Court was that a person's status as a responsible corporate officer is not a substitute for proof of knowledge for a crime with a specific knowledge element.<sup>191</sup> The Court also distinguished *Dotterweich*<sup>192</sup> and *Park*.<sup>193</sup> Acknowledging that these cases stood for well-established law in public welfare statutes where there is not an express *scienter* requirement, the Court said, however, "we know of no precedent for failing to give effect to a

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<sup>187</sup> See *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3<sup>rd</sup> Cir. 1984); *United States v. Dee*, 912 F.2d 741, (4<sup>th</sup> Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991); *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (3<sup>rd</sup> Cir. 1979), *cert. denied*, 100 S.Ct. 1020 (1980); *United States v. Weitzenhoff*, 35 F.3d 1275 (9<sup>th</sup> Cir. 1993), *cert. denied*, 115 S. Ct. 939 (1995).

<sup>188</sup> 933 F.2d 35 (1<sup>st</sup> Cir. 1991).

<sup>189</sup> *Id.* at 50.

<sup>190</sup> *Id.* at 50-51.

<sup>191</sup> *Id.* at 55.

<sup>192</sup> 320 U.S. 277 (1943).

<sup>193</sup> 421 U.S. 658 (1975).

knowledge requirement that Congress has expressly included in a criminal statute.<sup>194</sup>

### 2. *The second approach: United States v. Brittain*<sup>195</sup>

The second approach or “modified RCO doctrine” is epitomized in cases where there was a showing of actual knowledge of wrongdoing on the part of the defendant, yet notwithstanding that demonstration, the court relied at least to some extent on the RCO doctrine. In *United States v. Brittain*, a public utilities director was found guilty of discharging pollutants in violation of the CWA. Raising the issue *sua sponte*, the Tenth Circuit found the RCO doctrine applicable to the facts of this case.<sup>196</sup> While the Court recognized that the jury considered the defendant’s specific conduct and not just his corporate position, it still discussed, arguably in *dicta*, that a responsible corporate officer, “to be held criminally liable . . . would not have to ‘willfully or negligently’ cause a . . . violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.”<sup>197</sup> The Court’s views are generally consistent with the Third Circuit’s opinion in *Johnson & Towers*<sup>198</sup> and are seen as one of the broadest applications of the doctrine.<sup>199</sup>

### 3. *The Third Approach: United States v. Dee*<sup>200</sup>

The third approach, a “pure” application of the RCO doctrine, relies upon an individual’s corporate position as the basis for determining liability, thereby dispensing with any statutory *mens rea* requirement. The analyses from *Johnson & Towers* above and the Fourth Circuit in *United States v. Dee* are prime examples of this category.

The “*Aberdeen case*,” as *United States v. Dee* is commonly referred to in the military, involved the prosecution of three, high-level, federal civilian employees for violations of RCRA stemming from a multitude of offenses related to the improper storage and disposal of hazardous wastes at Aberdeen Proving Ground, a U.S. Army installation in Maryland. Although the RCO doctrine is not mentioned in the opinion, the Court discusses the defendants’ positions as department heads responsible for ensuring that procedures relating to RCRA were followed and that their subordinates were aware of and in compliance with the procedures.<sup>201</sup>

<sup>194</sup> 933 F.2d at 51-52.

<sup>195</sup> 931 F.2d 1413 (10<sup>th</sup> Cir. 1991).

<sup>196</sup> *Id.* at 1419.

<sup>197</sup> *Id.*

<sup>198</sup> 741 F.2d 662 (3d Cir. 1984).

<sup>199</sup> See Hustis & Gotanda, *supra* note 115, at 174.

<sup>200</sup> 912 F.2d 741 (4<sup>th</sup> Cir. 1990), *cert denied*, 111 S. Ct. 1307 (1991).

<sup>201</sup> *Id.* at 747.

Relying on *International Minerals*,<sup>202</sup> the Court found that the extremely hazardous nature of the substances<sup>203</sup> that were the subject of the violations required that the government did not have to prove that the defendants knew violation of RCRA was a crime nor that the chemical wastes were listed as RCRA hazardous wastes.<sup>204</sup> The Court used the public welfare rationale from *International Minerals* to reject the defendants' argument that they did not "knowingly" violate RCRA. When the public welfare analysis is read together with the Court's continued attention to the positions of the defendants and their responsibilities, this case can be seen as a pure application of the RCO doctrine based on the positions of the responsible officials.

## B. Recent Applications of the RCO Doctrine

### I. *United States v. Iverson*<sup>205</sup>

In 1999, the Ninth Circuit decided *United States v. Iverson*. Mr. Iverson was the founder, president, and chairman of the board of CH20, Inc., a company that blended and distributed chemicals and chemical products. CH20 shipped the chemicals to customers in drums and then reused any returned drums after cleaning them. During different periods between 1985-1988 and then again between 1992-1995, Iverson personally discharged and directed employees to illegally discharge the wastewater that resulted from the drum cleaning onto the plant's property, through a sewer drain at another property belonging to the defendant, and through a sewer drain at the defendant's home.

At trial, the prosecution argued that Iverson could be liable under the CWA as a responsible corporate officer. The trial court instructed the jury that Iverson could be found liable as a RCO if he met the following criteria: "(1) that the defendant had knowledge of the fact pollutants were being discharged to the sewer system by employees of CH20, Inc.; (2) that the defendant had the authority and capacity to prevent the discharge of pollutants to the sewer system; and (3) that the defendant failed to prevent the on-going discharge of the pollutants to the sewer system."<sup>206</sup> Iverson was convicted of violations of the Clean Water Act and state and local law<sup>207</sup> and sentenced to one year in custody, three years of supervised release, and a \$75,000 fine.<sup>208</sup>

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<sup>202</sup> 402 U.S. 558 (1971).

<sup>203</sup> All three defendants were chemical engineers working for the United States Army and assigned to the Chemical Research, Development, and Engineering Center in the development of chemical warfare systems. 912 F.2d at 741.

<sup>204</sup> *Id.*

<sup>205</sup> 162 F.3d 1015 (9<sup>th</sup> Cir. 1999).

<sup>206</sup> *Id.* at 1022.

<sup>207</sup> The state and local laws are not federal offenses. However, the CWA allows states to administer water pretreatment programs and, if EPA approves a state's program, violations of

On appeal to the Ninth Circuit, Iverson argued that a corporate officer is only “responsible” when he exercises control over the activity causing the discharge.<sup>209</sup> In addition, he also argued that the “responsible corporate officer” instruction allowed the jury to convict him without finding a violation of the CWA.<sup>210</sup>

The Court’s analysis tracked the development of the responsible corporate officer doctrine through *Dotterweich* and *Park* and cited to applications of the doctrine in other CWA cases.<sup>211</sup> The Court reviewed congressional actions in 1987, revising and replacing CWA criminal provisions, “most importantly” making a violation of the CWA a felony rather than a misdemeanor. Also important to the Court was that Congress made no changes to the CWA “responsible corporate officer” provision, especially since such changes came long after *Park* was decided. The Court stated, “[t]hat being so, we can presume that Congress intended for *Park*’s refinement of the “responsible corporate officer” doctrine to apply under the CWA.”<sup>212</sup>

The Ninth Circuit found that the trial court’s “responsible corporate officer” instructions were not erroneous, reasoning that the “instruction relieved the government *only* of having to prove that the defendant *personally* discharged or caused the discharge of a pollutant. The government still had to prove that the discharges violated the law and that the defendant knew that the discharges were pollutants.”<sup>213</sup> The Court found that under the CWA, a person with the authority to control the activity that violated a provision is a responsible corporate officer.<sup>214</sup> Furthermore, the Court held that “[i]here is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.”<sup>215</sup> Thus, the opinion appears to hold that a potentially “innocent” corporate officer could be held criminally liable based solely on his position of corporate authority.

## 2. *United States v. Ming Hong*<sup>216</sup>

The Fourth Circuit was the first circuit court to interpret the RCO doctrine after *Iverson*.<sup>217</sup> In *United States v. Ming Hong*, Hong operated a

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those regulations are treated as federal criminal offenses. See 33 U.S.C. § 1342(b) and 1319(c)(2).

<sup>208</sup> *Iverson*, 162 F.3d at 1019.

<sup>209</sup> *Id.* At 1022.

<sup>210</sup> *Id.* at 1026.

<sup>211</sup> See *United States v. Brittain*, 931 F.2d 1413, 1419 (10<sup>th</sup> Cir.) and *Frezza Bros., Inc.*, 602 F.2d at 1130 (3<sup>rd</sup> Cir. 1979). See *Iverson*, 162 F.3d at 1024 and n.3.

<sup>212</sup> 162 F.3d at 1024.

<sup>213</sup> *Id.* at 1026 (emphasis in original).

<sup>214</sup> *Id.* at 1025.

<sup>215</sup> *Id.*

<sup>216</sup> 242 F.3d 528 (4<sup>th</sup> Cir. 2001).

wastewater treatment facility that discharged untreated wastewater in violation of the facility's discharge permit. Hong was convicted of negligently violating pretreatment requirements under CWA § 1319(c)(1)(A).<sup>218</sup> On appeal before the Fourth Circuit, he challenged the district court's treatment of him as a responsible corporate officer; specifically, he argued that the government failed to prove that he was a designated officer of the company; and, in the alternative, if this was not required, that he did not exercise sufficient control over the company's operations to be responsible for the violations.<sup>219</sup>

The Fourth Circuit held that the government did not have to prove the defendant was a designated corporate officer: "[t]he gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable."<sup>220</sup> Hong had acquired the wastewater treatment facility in 1993 and subsequently made several changes to the name of the company, eventually calling it Avion Environmental Group.<sup>221</sup> Despite his avoidance of formal association with the company and not being identified as an officer of Avion, Hong controlled the company's finances and played a major role in its operations.<sup>222</sup> Furthermore, he was involved in the purchase of a wastewater treatment system and had knowledge that the system was ineffective in treating the facility's wastewater and was regularly present at Avion while discharges openly occurred.<sup>223</sup>

The Court found these facts, when considered with the defendant's substantial control of corporate operations, provided ample evidence that Hong had the authority to prevent the illegal discharges. In this decision, the Court favorably cited to *Iverson's* "responsible corporate officer" analysis.<sup>224</sup>

### C. Application of the RCO Doctrine to Federal Officials

Notwithstanding the fact that none of the cases discussed in this section use the words "responsible corporate officer," they evidence application of the

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<sup>217</sup> The analysis in the *Iverson* decision was followed again in the Ninth Circuit in *United States v. Cooper*, 173 F.3d 972 (9th Cir. 1999), *cert. denied*, 528 U.S. 1019 (1999), and in the Eleventh Circuit in *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 2326 (2002).

<sup>218</sup> 242 F.3d at 529-530.

<sup>219</sup> *Id.* at 530.

<sup>220</sup> *Id.* at 531.

<sup>221</sup> *Id.* at 529.

<sup>222</sup> While not listed as a corporate officer of Avion, the defendant maintained an office on the premises at Avion, reviewed marketing reports, suggested marketing strategies, controlled Avion expenses, and signed a lease as president of Avion. *See id.*

<sup>223</sup> *Id.* at 532.

<sup>224</sup> After discussing *Dotterweich* and *Park*, the court cites to *Iverson* as setting out the principles for determining when an individual is a responsible corporate officer under the CWA. *See id.* at 531.

RCO doctrine to federal agency employees in the conduct of their official duties.<sup>225</sup> While a federal employee or agency official may not “receive a benefit commensurate to the risk”<sup>226</sup> in the form of salary or dividends enjoyed by a corporate officer, or the same authority to effect policy within their organization, they will be treated as corporate officers in relation to an illegal activity over which they occupy a supervisory position and have control authority. Hence, like a corporate officer, these individuals are deemed to have stepped out of their official capacity when their conduct rises to the level of criminal activity.<sup>227</sup> While there may be some latitude for the actions of federal officials in the performance of official duties, there is no blanket immunity from criminal prosecution.<sup>228</sup>

### *1. Sovereign Immunity/Official Immunity*

The criminal liability of federal employees, to include military personnel, for violations of environmental laws is also affected by principles of sovereign immunity and official immunity. Sovereign immunity is a judicially created doctrine that makes the United States, absent an express waiver of sovereign immunity by Congress, immune from all suits.<sup>229</sup> Where sovereign immunity has been waived and federal officials are prosecuted in their official capacity, the doctrine of official immunity may protect them from state criminal prosecutions, so long as they were performing official duties.<sup>230</sup> This concept is based on the Supremacy Clause of the U.S. Constitution<sup>231</sup> and is traced to the seminal case of *In re Neagle*.<sup>232</sup>

In *Neagle*, the Supreme Court held that a U.S. deputy marshal, while performing his official duties defending a Supreme Court justice, could not be prosecuted by California for having killed someone who attacked the justice. The Court stated that if a marshal “is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act, he did no

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<sup>225</sup> Patrick O. Cavanaugh & Christopher Harris, *Environmental Crimes and the Responsible Government Official*, NAT. RESOURCES AND ENVT. 23 (1991).

<sup>226</sup> See generally Margaret K. Minister, *Federal Facilities and the Deterrence Failure of Environmental Laws: The Case For Criminal Prosecution of Federal Employees*, 18 HARV. ENVT. L. REV. 137, 174 (1994).

<sup>227</sup> See *Dee*, 912 F.2d at 744.

<sup>228</sup> See *id.*

<sup>229</sup> See James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279 (1991).

<sup>230</sup> See Susan L. Smith, *Shields for the King's Men: Official Immunity and Other Obstacles to Effective Prosecution of Federal Officials for Environmental Crimes*, 16 COLUM. J. ENVT. L. 1 (1991).

<sup>231</sup> U.S. CONST. art. VI, cl.2.

<sup>232</sup> 135 U.S. 1 (1890).

more than what was necessary and proper for him to do, he cannot be guilty of a crime.”<sup>233</sup>

The Court, discussing the supremacy of the federal government over the states, quoted *Tennessee v. Davis*<sup>234</sup> regarding the importance of official immunity: “[T]he general government . . . can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court . . . the operations of the general government may at any time be arrested at the will of one of its members . . .”<sup>235</sup> The standard that has been applied following *Neagle* is a two-part test: (1) was the federal employee performing an act authorized by federal law; (2) were the actions of the employee necessary and proper in the performance of the authorized act.<sup>236</sup>

In application to the prosecution of environmental crimes, the doctrine would likely preclude a state criminal prosecution against a federal official as long as that individual’s actions met the test as set out above.<sup>237</sup> However, if the prosecution was based on the failure of the employee to perform a required duty, or negligence in the performance of that duty, a responsible corporate officer analysis could then apply to the employee’s actions as official immunity would not preclude prosecution.

## 2. Considerations re Military Members

The concept that the RCO doctrine creates a duty on the part of a superior in a position of authority to be aware of and accountable for violations within their span of control is a theme central to military command principles.<sup>238</sup> “[T]he requirements of public welfare statutes and the responsible corporate officer doctrine fit perfectly within the philosophy of command. They emphasize authority and responsibility as the basis of imposing criminal liability; the key elements of command are authority and

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<sup>233</sup> *Id.* at 75.

<sup>234</sup> 100 U.S. 257, 262-263 (1879) (quoting *Martin v. Hunter’s Lessee*, 14 U.S. 304, 363 (1816)).

<sup>235</sup> *Id.* at 61-62.

<sup>236</sup> See Smith, *supra* note 230, at 38 (citing to *Kentucky v. Long*, 837 F.2d 727, 744 (6<sup>th</sup> Cir. 1988) for the modern application of the doctrine).

<sup>237</sup> In a federal prosecution for federal crimes, “[t]he supremacy clause concerns which give rise to *Neagle*-type immunity are not implicated.” *United States v. Dee*, 912 F.2d 741, 744, n.7 (1990).

<sup>238</sup> “The Supreme Court, in essence, has found that corporate officers have a duty to know about the violations within their dominion and control, and that lack of knowledge is no defense” Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA after United States v. Dee*, 59 GEO. WASH. L. REV. 862, 883 (1991).

responsibility.”<sup>239</sup> The failure to take measures within a commander’s authority may result in the commander’s culpability for the actions of his subordinates.<sup>240</sup> While there have been no prosecutions against military members under the RCO doctrine, the possibility certainly is present and has been a suggested client counseling topic for military legal counsel.<sup>241</sup>

### 3. *The Federal Official Cases: Establishing a “Responsible Federal Employee Doctrine”*

#### a. *United States v. Dee*<sup>242</sup>

As mentioned above, the case of *United States v. Dee* involved the prosecution of three high-ranking federal civilian employees of the United States Army. The Fourth Circuit never used the words “responsible corporate officer doctrine,” however; the case is generally accepted as having applied it.<sup>243</sup> The Court instead said the defendants were responsible for the control and maintenance of the chemical storage facilities, and, therefore, they could be liable for the poor management of the hazardous wastes therein and the associated criminal offenses.<sup>244</sup>

The important aspect for federal employees and agency officials is that federal employees are not exempt from liability under RCRA; in fact, a federal employee, when sued in his official capacity is still an “individual” under the definition of a “person” in RCRA.<sup>245</sup> Furthermore, the Court stated that “[e]ven where certain federal officers enjoy a degree of immunity for a particular sphere of official actions, there is no general immunity from criminal prosecution for actions taken while serving their office.”<sup>246</sup> While the *Dee* case may be the leading decision for what has also been called the “responsible federal employee doctrine,”<sup>247</sup> there are two other circuit court cases that have applied the RCO doctrine to federal employees as well.

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<sup>239</sup> See Calve *supra* note 229, at 301, 346. See also Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates -- The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT’L L.J. 272 (1997).

<sup>240</sup> See Calve, *supra* note 229, at 301.

<sup>241</sup> See Brian J. Hopkins, *Environmental Crimes: Recent Case Law and Practice*, 19 A.F. L. REV. 1, 18 (1996).

<sup>242</sup> 912 F.2d 741 (4<sup>th</sup> Cir. 1990), *cert denied*, 111 S. Ct. 1307 (1991).

<sup>243</sup> See generally Margaret K. Minister, *supra* note 226.

<sup>244</sup> *Dee*, 912 F.2d 741, 748-749.

<sup>245</sup> *Id.* at 744 (citing RCRA § 6903(15)).

<sup>246</sup> *Id.*

<sup>247</sup> See generally Minister, *supra* note 226.

b. *United States v. Carr*<sup>248</sup>

In the first of these, *United States v. Carr*, the Second Circuit Court of Appeals focused on who is a “person in charge” under CERCLA. Mr. Carr was a maintenance foreman employed by the Army at Fort Drum. Carr directed a work crew to dispose of waste paint cans in a pond in violation of CERCLA. After learning from his subordinates that the cans were leaking into the man-made pond, Carr instructed the employees to fill in the pond with dirt. He was found guilty of failing to report the unauthorized release of the hazardous substances in the cans. Carr argued that he was not a “person in charge” due to his “relatively low rank.”<sup>249</sup> The Court found that, “Congress intended . . . to reach a person—even if of relatively low rank—who, because he was in charge of a facility, was in a position to detect, prevent, and abate a release of hazardous substances.”<sup>250</sup> Again, although not specifically mentioning the RCO doctrine, the Court used the typical “control” language of the public welfare cases to express a “responsible relation” between Carr and his ability to prevent the hazard, just as in *Dotterweich*.

c. *United States v. Curtis*<sup>251</sup>

The most recent case involving a federal employee to be reviewed at the circuit level was *United States v. Curtis*. Mr. Curtis was the Fuels Division Director at Adak Naval Air Station. He was found guilty of discharging pollutants in violation of the CWA. Specifically, he directed his employees to pump jet fuel into a pipeline that he knew would leak. The pipeline ultimately leaked fuel into a stream.

Mr. Curtis argued that he was not a “person” under the CWA because federal employees were not included in the definition of a “person” liable for prosecution under the Act.<sup>252</sup> The Ninth Circuit reasoned that the defendant’s claim for immunity was no different than the claims made by the defendants in *Dee*.<sup>253</sup> The Court found “clear and unambiguous” congressional intent to bring federal employees within the jurisdiction of persons who are subject to criminal liability under the statute.<sup>254</sup> “In accord with the statutes’ plain meaning, individual federal employees acting within the course and scope of

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<sup>248</sup> 880 F.2d 1550 (2<sup>nd</sup> Cir. 1989).

<sup>249</sup> *Id.* at 1554.

<sup>250</sup> *Id.*

<sup>251</sup> 988 F.2d 946 (9<sup>th</sup> Cir. 1993).

<sup>252</sup> *Id.* at 947.

<sup>253</sup> *Id.* at 947-948.

<sup>254</sup> *Id.* at 948.

their employment are subject to criminal prosecution for violation of the Clean Water Act."<sup>255</sup>

## D. Criticisms Of The RCO Doctrine

### 1. Purported Elimination of Mens Rea Requirements

Although the RCO doctrine has been a feature of the American legal system at least since the early 1940's,<sup>256</sup> it has also been frequently criticized.<sup>257</sup> Usually, criticisms of the doctrine attack its effect on any required *mens rea* element.<sup>258</sup> However, in no application of the RCO doctrine to an environmental statute has the requirement for proving *mens rea* been done away with; the requirement for knowledge of the underlying acts is still required and can be inferred as a result of the corporate officer's position and authority. The decision always remains with the factfinder whether the defendant had the criminal intent required. Conversely, a strict liability crime would not require culpability or even an awareness of conduct on the part of the wrongdoer.<sup>259</sup>

### 2. Lesser Government Burden of Proof for Felony Convictions

While the public welfare doctrine, with its strict liability elimination of *scienter* requirements, has traditionally been applied to misdemeanor statutes, the environmental statutes to which the RCO doctrine is being employed are felony statutes with express knowledge requirements. Some see this latter development as a violation of a defendant's right to due process due to the imposition of significant penalties and the lowering of the government's burden to prove guilt.<sup>260</sup>

On these grounds, there is considerable debate about the applicability of the public welfare offense doctrine to environmental statutes.<sup>261</sup> The Supreme Court even hints in *Staples*<sup>262</sup> that punishing a violation of a public

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<sup>255</sup> *Id.* at 949.

<sup>256</sup> See *Dotterweich*, 320 U.S. 277 (1943).

<sup>257</sup> See Finn, *supra* note 88; Richard G. Singer, *The Myth of the Doctrine of the Responsible Corporate Officer*, 6 TOXICS L. REP. 1378 (1992); Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861, 866 (1996).

<sup>258</sup> See Finn, *supra* note 88 at 548.

<sup>259</sup> LAFAYE, *supra* note 4, at 242-243. "Requiring the government to prove only that the defendant acted with awareness of his or her conduct does not render [a criminal provision] a strict liability offense." *United States v. Sinskey*, 119 F.3d 712, 717 (8<sup>th</sup> Cir. 1997).

<sup>260</sup> See Keith A. Gaynor, et al., *Improving Fairness in Environmental Enforcement*, 7 TOX. L. REP. 1029, 1031 n.84 (1993).

<sup>261</sup> See also Lazarus, *supra* note 257 at 866.

<sup>262</sup> 511 U.S. 600 (1994).

welfare statute as a felony may be inappropriate.<sup>263</sup> However, as mentioned above,<sup>264</sup> the Court was unwilling to decide that particular issue. Subsequently, in *Weitzenhoff*,<sup>265</sup> the Ninth Circuit distinguished *Staples* and found that it was appropriate to consider an environmental felony statute under public welfare principles.

Another aspect of the felony offense debate is congressional intent, particularly after the CAA and CWA were amended to include a “responsible corporate officer” as a “person.” While it can be argued that “Congress’ repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing interpretations,”<sup>266</sup> when those amendments were made, the statutes did not include felony violations. Regardless, if Congress was concerned about application of the RCO doctrine to felony violations, perhaps it would have amended the statutes, but it has not. It remains unknown whether such inaction represents a general malaise or, instead, encouragement for a broader reach of environmental criminal liability.

### 3. *Need for Lenity in the Face of Statutory Ambiguity*

The complex nature<sup>267</sup> of environmental law includes much ambiguity and raises the possibility that, as a minority of courts have suggested, the “rule of lenity” should be applied to environmental criminal statutes.<sup>268</sup> Under that rule, when a statute is ambiguous, it should be interpreted in favor of the defendant.<sup>269</sup> “The purpose of narrowly construing criminal statutes is that, if they are ambiguous, a person would not have adequate warning that his or her conduct is deemed illegal.”<sup>270</sup> However, the rule of lenity only applies when there is a grievous ambiguity or uncertainty in the statute and when, “after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.”<sup>271</sup>

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<sup>263</sup> *Id.* at 616.

<sup>264</sup> See *supra*, text accompanying nn. 59-61.

<sup>265</sup> 35 F.3d 1275 (9<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995).

<sup>266</sup> See *Bragdon v. Abbot*, 524 U.S. 624 (1998).

<sup>267</sup> “For those who dare to study, teach, or practice environmental law, its complexity is virtually a mantra.” Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2428 (1995).

<sup>268</sup> See Jonathan Snyder, *Back to Reality: What “Knowingly” Really Means and the Inherently Subjective Nature of the Mental State Requirement in Environmental Criminal Law*, 8 MO. ENVTL. L. & POL’Y REV. 1, 11-12 (2002) (discussion of “rule of lenity” and application to environmental criminal provisions).

<sup>269</sup> See *Iverson*, 162 F.3d at 1025.

<sup>270</sup> See Snyder, *supra* note 268, at 12.

<sup>271</sup> *Muscarello v. United States*, 118 S.Ct. 1911 (1998) (quoted in *Iverson*, 162 F.3d at 1025, n.8).

#### 4. RCO Doctrine Conflicts with Supreme Court Environmental Civil Liability Standards

Liability under the RCO doctrine depends upon a defendant's corporate position and concomitant authority to control activities. In light of the Supreme Court's decision in *United States v. Bestfoods*,<sup>272</sup> it appears the Court might reject such a broad approach to imposing environmental liability on corporate officers based on a lack of "actual control."<sup>273</sup> In this civil liability CERCLA case, the Court would not extend liability to a parent corporation absent direct participation by the parent in the subsidiary's activities related to the offense.<sup>274</sup>

While defining "operator" under CERCLA, the Court presented a definitional component that could potentially derail a criminal case based on the RCO doctrine: requirement that an operator be directly involved in activities relating to the violation as opposed to merely being in a position to do something about it.<sup>275</sup> While CERCLA defines an "operator" as "any person . . . operating a facility,"<sup>276</sup> the Court in *Bestfoods* would require more specificity related to "managing" or "directing" the activities themselves.<sup>277</sup>

The *Bestfoods* test for "owner" civil liability under CERCLA was extended to the CAA in *United States v. Dell'Aquila*<sup>278</sup> in the Third Circuit. There, the Court followed the *Bestfoods* test, applying that opinion's logic to a different environmental statute because of the shared purposes and language between the statutes.<sup>279</sup> As *Iverson* was decided after *Bestfoods*, the Ninth Circuit apparently did not find its holding with regard to corporate parent-subsidary relationships to have any bearing on their interpretation of the relevance of the RCO doctrine in the context of an individual's criminal liability.

## VII. CONCLUSION

When an individual, whether corporate officer, sewage treatment plant manager, or military installation commander, is in a position of authority over dangerous activities that are highly regulated, the majority of courts will find a way to make them responsible for those activities, most likely through an entwining of the public welfare offense and RCO doctrines. Despite the

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<sup>272</sup> 118 S.Ct. 1876 (1998).

<sup>273</sup> *Id.* at 1886.

<sup>274</sup> *Id.* at 1887.

<sup>275</sup> *Id.*

<sup>276</sup> 42 U.S.C. § 9601 (20)(A)(ii).

<sup>277</sup> *Id.* at 1887.

<sup>278</sup> 150 F.3d 329 (3<sup>rd</sup> Cir. 1999).

<sup>279</sup> *Id.* at 334.

appearance of courts' willingness to impose a strict liability standard, in fact,<sup>280</sup> the RCO doctrine has not been applied in the absence of at least some evidence of knowledge on the part of the corporate actor. The extent of knowledge required varies somewhat among the circuit courts of appeal.

As a matter of policy, the application of the RCO doctrine that best factors in —

- the expectations of the public for protection from hazards, and
- the responsible party's knowledge of and ability to control the activity

would seem to be the best methodology for determining criminal culpability.<sup>281</sup> It will be up to the courts, or Congress, to determine how that policy is implemented given the required knowledge elements of the various criminal violations within the environmental statutory regimes. "In such matters, the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted."<sup>282</sup>

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<sup>280</sup> See *United States v. Britain*, 931 F.2d 1413, 1419 (10<sup>th</sup> Cir. 1991); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3<sup>rd</sup> Cir. 1984); *United States v. Dee*, 912 F.2d 741, (4<sup>th</sup> Cir. 1990), *cert. denied.*, 111 S. Ct. 1307 (1991).

<sup>281</sup> See *Hartman and De Monaco*, *supra* note 18.

<sup>282</sup> *Dotterweich*, 320 U.S. at 285.

# ASBESTOS: A LEGAL PRIMER FOR AIR FORCE INSTALLATION ATTORNEYS

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## I. INTRODUCTION

At virtually all military installations, asbestos will sooner or later create environmental, safety and legal issues. In years past, asbestos was so widely used in construction materials that it is presumed present in structures built prior to 1980.<sup>1</sup> The statutes and regulations that today address the potential hazards of asbestos are part of a complex, piecemeal and overlapping scheme to control toxic substances in general. The purpose of this article is to provide a basic familiarization with asbestos, highlight relevant statutory and regulatory provisions, illustrate their application to asbestos remediation, discuss the degree to which federal facility operators are subject to potential civil and criminal liability, and suggest ways in which proactive stances may be taken to preclude any such liabilities.

## II. ASBESTOS

Asbestos is a naturally occurring silicate mineral fiber, the most common type of which is white; others are blue, gray or brown.<sup>2</sup> The different types include chrysotile, amosite, crocidolite, tremolite, anthophyllite and actinolite. Chrysotile is the most common type of asbestos, and makes up approximately 90%-95% of all asbestos contained in U.S. buildings.<sup>3</sup>

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<sup>1</sup> See 29 C.F.R. §§ 1910.1001(b) and 1926.1101(b) (2003). A *de facto* ban on some asbestos manufacturing began in the late 1970s due to a large volume of asbestos product liability lawsuits and EPA's 1979 announcement that it would begin promulgating a rule to ban asbestos. See generally Rita L. Wecker, *Case Comment: A "Hard Look" at a Soft Analysis, Corrosion Proof Fittings v. Environmental Protection Agency*, 4 B.U. PUB. INT. L.J. 145 (Spring, 1994). See also Advance Notice of Proposed Rulemaking, 44 Fed. Reg. 60,061 (October 17, 1979).

<sup>2</sup> U.S. Environmental Protection Agency (EPA) Office of Air Quality and Standards Factsheet, *Asbestos: Health and Exposure*, at <http://www.epa.gov/oppt/asbestos/health.pdf>.

<sup>3</sup> EPA Asbestos Factsheet, at <http://www.epa.gov/oppt/asbestos/asbe.pdf>.

Asbestos is resistant to heat, corrosion, and friction, and has a high tensile strength and stiffness.<sup>4</sup> These properties make it a seemingly superb insulating and construction material. Hence, asbestos is commonly found in wallboard, panels, ceiling tile,<sup>5</sup> floor tiles, roofing material (e.g., felt, flashing and paint), cement-asbestos siding and piping, fire doors, elevators, brake shoes, gaskets, mastic, caulk, paint and laboratory equipment (e.g., hoods, oven gaskets, gloves and bench tops).<sup>6</sup>

When locked into a surrounding matrix where the asbestos fibers are not capable of becoming airborne, asbestos is said to be “nonfriable.”<sup>7</sup> Alternatively, asbestos is “friable” when its matrix is sufficiently degraded that it can be crumbled to a powder with hand pressure, thereby causing a potential release of asbestos fibers into the air.<sup>8</sup> Asbestos is hazardous when its fibrous particles become airborne, creating the possibility that they may be inhaled or ingested.<sup>9</sup> Exposure to very high levels of airborne asbestos has been linked to asbestosis, characterized by scarring of the lungs; mesothelioma, characterized by cancer of lungs, chest and abdominal cavity lining; as well as lung and gastrointestinal cancers.<sup>10</sup> Illness typically occurs 15-40 years following exposure.<sup>11</sup>

Microscopic asbestos fibers can be made airborne through any number of activities relating to asbestos containing material (ACM).<sup>12</sup> Asbestos fibers may become airborne through “contact,” “reentrainment”

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<sup>4</sup> *Id.*

<sup>5</sup> An experienced asbestos management and environmental engineer advises that asbestos is fairly uncommon in ceiling tiles, which are typically mistaken for asbestos because of asbestos containing material (ACM) above them dropping fibers. Telephone interview with Michael Redfern, AETC/CEVQ (Jan. 27, 2003).

<sup>6</sup> See EPA Asbestos Factsheet, *Where Can Asbestos Be Found?*, at <http://www.epa.gov/opptintr/asbestos/asbuses.pdf>. See also EPA Asbestos Factsheet, *Asbestos in the Home*, at <http://www.epa.gov/asbestos/ashome.html#1>.

<sup>7</sup> 29 C.F.R. §§ 1910.1001(b) and 1926.1101(b) (2003). See also EPA Asbestos Factsheet, *Demolition Practices Under The Asbestos NESHAP*, at <http://www.epa.gov/region04/air/asbestos/demolish.htm>. Nonfriable asbestos materials are classified as either Category I or Category II material. Category I material is defined as asbestos containing resilient floor covering, asphalt roofing products, packings and gaskets. *Id.* Asbestos containing mastic is also considered a Category I material. *Id.* Category II material is defined as all remaining types of non-friable ACM not included in Category I that, when dry, cannot be crumbled, pulverized or reduced to powder by hand pressure. *Id.* Nonfriable asbestos cement products such as transite are an example of Category II material. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See EPA Asbestos Factsheet, *supra* note 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 29 C.F.R. § 1910.1001(b)(2003). Defining ACM as material containing greater than 1% asbestos.

or “fallout.” Contact includes striking, cutting and drilling ACM.<sup>13</sup> Reentrainment refers to the sweeping, dusting or unfiltered vacuuming of asbestos dusts.<sup>14</sup> Fallout refers to old and deteriorated asbestos fibers becoming airborne due to damage or destruction of the bonding agent used to hold the ACM together.<sup>15</sup>

The simple presence of ACM in a structure does not necessarily require its abatement or active management. Schools are an exception, where more extraordinary effort may be required to prevent any exposure to children.<sup>16</sup> Generally, abatement is only mandated where there is a threat to human health, usually in the form of potential exposure to airborne asbestos.<sup>17</sup>

Threats to human health can frequently be found in building demolition and renovation because such activities often result in ACM contact and reentrainment.<sup>18</sup> Additionally, maintenance workers such as civil engineers, craftsmen and custodians are at risk of potential exposure from fallout because their work routinely puts them in places such as boiler and machinery rooms where asbestos is frequently present in old insulating materials and machine parts.<sup>19</sup> Hence, these personnel must be trained in the recognition and proper handling of friable asbestos.<sup>20</sup>

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<sup>13</sup> *Id.* See also 29 C.F.R. § 1926.1101(b) (2003); and *Demolition Practices Under the Asbestos Neshap*, *supra* note 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Compare the requirements EPA promulgated per its authority under the Asbestos Hazard Emergency Response Act (AHERA) at 40 C.F.R. § 763(a) (requiring local education authorities to identify and manage both friable and nonfriable ACM) with the regulations EPA issued under the Clean Air Act (CAA) at 40 C.F.R. 61, Sbpt. M (allowing intact asbestos to be left in place).

<sup>17</sup> See ANDREW N. DAVIS & PAUL E. SCHAFFMAN, *THE HOME ENVIRONMENTAL SOURCEBOOK* 45 (1996).

<sup>18</sup> Approximately 5.7 million cubic feet of regulated asbestos-containing material (RACM) is disposed of annually from demolition and renovation operations. EPA, *Common Questions on the Asbestos NESHAP at* <http://www.epa.gov/region04/air/asbestos/asbqa.htm>.

<sup>19</sup> See *EPA Study of Asbestos-Containing Materials in Public Buildings, A Report to Congress*, Cat. No. 3C.2bE (February, 1988), cited in 134 Cong. Rec. S. 3155 (1988).

<sup>20</sup> While most states have training and accreditation programs, OSHA also maintains national training materials. See Environment, Health and Safety Online, *Training Materials for OSHA's Asbestos Standards*, at <http://www.ehso.com/Asbestos/asbesttrn.php>. This training covers exposure limits, materials that are presumed to contain asbestos, specific procedures for floor care, brake and clutch repair, and duties of building owners like identification, record keeping, notification, signs and labels, awareness training for employees who will perform housekeeping activities in asbestos containing areas and medical surveillance. *Id.* EPA also has accreditation requirements. For removal of non-intact, friable asbestos in buildings, EPA requires accreditation training for workers and supervisors alike. See 40 C.F.R. Sbpt. E, App. C (2003). This training is identical to that required by the

### III. APPLICABLE STATUTES AND REGULATIONS

The primary legal authority governing toxic substances generally is the Toxic Substances Control Act (TSCA),<sup>21</sup> enacted by Congress to give the U.S. Environmental Protection Agency (EPA) the ability to track the 75,000 industrial chemicals currently produced in the United States or imported from other countries.<sup>22</sup> Although TSCA does address asbestos,<sup>23</sup> in practice, regulations issued pursuant to the Occupational Safety and Health Act (OSHA)<sup>24</sup> and the Clean Air Act (CAA)<sup>25</sup> play a larger role in controlling asbestos remediation issues. Accordingly, this article will next examine the OSHA and the CAA, with other applicable statutes and regulations to follow.

#### A. Occupational Safety and Health Act<sup>26</sup>

While the Occupational Safety and Health Act does not contain specific provisions on asbestos, it provides the Occupational Safety and Health Administration the authority to issue regulations for workplace safety.<sup>27</sup> In the asbestos arena, the most important OSHA regulation incorporates a Construction Standard for Asbestos.<sup>28</sup> It applies to individuals involved in construction, renovation and demolition activities. It establishes a permissible exposure limit (PEL) of 0.1 fibers per cubic centimeter of air (f/cc) as an eight-hour time-weighted average and an excursion level of 1.0 f/cc averaged over a sampling period of 30

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Occupational Safety and Health Act (OSHA) for Class I and II work, but it must be obtained from an EPA approved course provider. *Id.*

<sup>21</sup> 15 U.S.C. §§ 2601-2671 (2003).

<sup>22</sup> See Toxic Substances Control Act (TSCA) Inventory Update Rule Amendments, 64 Fed. Reg. 165, 46,774 (August 26, 1999)(codified at 40 C.F.R. pt. 710).

<sup>23</sup> TSCA addresses asbestos primarily through the Asbestos Hazard Emergency Response Act (AHERA). 15 U.S.C. §§ 2641 – 2656 (2003).

<sup>24</sup> 29 U.S.C. §§ 651- 678 (2003).

<sup>25</sup> 42 U.S.C. §§ 7401 - 7671q (2003).

<sup>26</sup> 29 U.S.C. §§ 651- 678 (2003).

<sup>27</sup> *Id.* § 651.

<sup>28</sup> 29 C.F.R. § 1926.1101 and 29 C.F.R. § 1910.1001(b) (2003). The Construction Standard for Asbestos contains four classifications of work in the definition section: Class I is the removal of thermal system insulation, presumed asbestos containing material (PACM) and surfacing material containing more than 1% asbestos; Class II is the removal of all other ACM; Class III regulates maintenance and repair operations disturbing asbestos; and Class IV regulates housekeeping and custodial operations where employees contact ACM or PACM but do not disturb it. The permissible exposure limit (PEL) is defined at 29 C.F.R. § 1926.1101(c)(2003).

minutes.<sup>29</sup> It also establishes engineering controls<sup>30</sup> and personal protective equipment requirements for individuals involved in asbestos-related work, and outlines requirements for medical surveillance and record keeping.

The other OSHA regulation that bears close scrutiny is the General Industry Standard for Asbestos.<sup>31</sup> It establishes the same PEL and excursion limit as outlined in the Construction Standard. The scope of the General Industry Standard applies to all occupational exposures to asbestos not specified in the Construction Standard.<sup>32</sup> For example, it would apply to custodians who perform equipment maintenance in areas where ACM is present or to vehicle maintenance workers who work with brakes that contain ACM.<sup>33</sup>

Notably, OSHA does not directly apply to federal facilities. Its provisions, however, have been made applicable via a mandate in Executive Order (EO) 12,196, directing that all federal agencies have occupational safety programs.<sup>34</sup> Unless alternative standards have been approved by the Secretary of Labor, these programs must abide by OSHA standards.

The Air Force has implemented EO 12,196 through Air Force Instruction (AFI) 91-301, *Air Force Occupational and Environmental*

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<sup>29</sup> 29 C.F.R. § 1926.1101(c)(1) (2003). An excursion limit is a short-term limit of 30 minutes whereas the exposure limit is based on 8 hours. The excursion limit is higher than the exposure limit because the excursion duration is for a much shorter period (i.e. for short periods, it is allowable for an employee to breathe in higher levels). However, according to EPA, there is no "safe" amount of asbestos. See EPA Asbestos Factsheet, *supra* note 3.

<sup>30</sup> Engineering controls include measures such as vacuuming and wetting down dust, storing debris in leak tight containers, enclosing areas with plastic sheeting, as well as ventilating and filtering work areas. See 29 C.F.R. § 1926.1101(g) and 29 C.F.R. § 1910.1001(f)(1) (2003).

<sup>31</sup> The General Industry Asbestos Standard includes: PEL at 29 C.F.R. § 1910.1001(c) (2003); Signage at § 1910.1001(j)(3); Employee Information at § 1910.1001(j)(2); Labeling at § 1910.1001(j)(4); Employee Training at § 1910.1001(j)(7); and Record Keeping at § 1910.1001(j)(2).

<sup>32</sup> 29 C.F.R. § 1910.1001(a)(2) ("This section does not apply to construction work as defined in 29 C.F.R. § 1910.12(b) (Exposure to asbestos in construction work is covered by 29 C.F.R. § 1926.1101)"). A good way to seek clarification in instances where the regulations are unclear is OSHA's website, which contains Standard Interpretation and Compliance Letters at [http://www.osha.gov/pls/oshaweb/owasrch.search\\_form?p\\_doc\\_type=INTERPRETATION&p\\_toc\\_level=0&p\\_keyvalue=119960328.html](http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=INTERPRETATION&p_toc_level=0&p_keyvalue=119960328.html).

<sup>33</sup> See OSHA Fact Sheet on Asbestos at 1 (2002), at <http://www.osha.gov/OshDoc/data/AsbestosFacts/asbestos-factsheet.pdf>.

<sup>34</sup> Exec. Order No. 12,196 §§ 1-201 and 401, 3 C.F.R. § 145 (1980).

*Safety, Fire Protection, and Health (AFOSH) Program*<sup>35</sup> and AFOSH Standard 48-8, *Controlling Exposures To Hazardous Materials*.<sup>36</sup> Attachment 9 to AFOSH Standard 48-8 specifically covers Occupational Exposure to Asbestos.

Another key Air Force asbestos regulation is AFI 32-1052, *Air Force Facility Asbestos Management*, requiring bases to conduct facility asbestos surveys and develop Asbestos Management and Operating Plans.<sup>37</sup> Other relevant Air Force instructions include, AFI 32-7040, *Air Quality Compliance*,<sup>38</sup> AFI 32-7066, *Environmental Baseline Surveys in Real Estate Transactions*<sup>39</sup> and AFI 48-119, *Medical Service Environmental Quality Programs*.<sup>40</sup>

## B. The Clean Air Act<sup>41</sup>

In 1970, the Clean Air Act (CAA) authorized EPA to identify hazardous air pollutants and establish risk-based National Emission Standards for Hazardous Air Pollutants (NESHAPs) for new and existing sources.<sup>42</sup> The following year, EPA identified asbestos as a hazardous pollutant; and in 1973, promulgated the Asbestos NESHAP.<sup>43</sup> Virtually all states have been delegated authority to administer the federal asbestos NESHAP program, though EPA still retains program oversight authority.<sup>44</sup>

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<sup>35</sup> *Air Force Occupational and Environmental Safety, Fire Protection, and Health (AFOSH) Program*, AFI 91-301 (June 1, 1996), available at <http://www.e-publishing.af.mil/pubfiles/af/91/afi91-301/afi91-301.pdf>.

<sup>36</sup> *Controlling Exposures To Hazardous Materials*, AFOSH Standard 48-8 (September 1, 1997), available at <http://www.e-publishing.af.mil/pubfiles/af/48/afoshstd48-8/afoshstd48-8.pdf>.

<sup>37</sup> *Air Force Facility Asbestos Management*, AFI 32-1052 (March 22, 1994), available at <http://www.e-publishing.af.mil/pubfiles/af/32/afi32-1052/afi32-1052.pdf>.

<sup>38</sup> *Air Quality Compliance*, AFI 32-7040 (May 9, 1994), available at <http://www.e-publishing.af.mil/pubfiles/af/32/afi32-7040/afi32-7040.pdf>.

<sup>39</sup> *Environmental Baseline Surveys in Real Estate Transactions*, AFI 32-7066 (April 25, 1994), available at <http://www.e-publishing.af.mil/pubfiles/af/32/afi32-7066/afi32-7066.pdf>.

<sup>40</sup> *Medical Service Environmental Quality Programs*, AFI 48-119 (July 25, 1994), available at <http://www.e-publishing.af.mil/pubfiles/af/48/afi48-119/afi48-119.pdf>.

<sup>41</sup> 42 U.S.C. §§ 7401 - 7671q (2003).

<sup>42</sup> 42 U.S.C. § 7412 (2003).

<sup>43</sup> *Common Questions on the Asbestos NESHAP*, *supra* note 18. Also under its Clean Air Act (CAA) authority, EPA has promulgated specific standards for asbestos, including the *Asbestos Training Requirements-Model Accreditation Plan* at 40 C.F.R. § 763, Appendix C (2003) and *Bulk Sampling Requirements for Surfacing Material*, 40 C.F.R. §§ 763.86-763.87 (2003).

<sup>44</sup> As of 1990, 45 states were delegated authority. See *Common Questions on the Asbestos NESHAP*, *supra* note 18. In 2000, EPA promulgated a revised rule on worker protection, amending the worker protection rule to cover state and local government employees. See *Asbestos Worker Protection*, 65 Fed. Reg. No. 221, 69210 (November

The asbestos NESHAP establishes standards for renovation or demolition activities where certain threshold quantities of regulated asbestos-containing materials (RACM)<sup>45</sup> are present.<sup>46</sup> The standards minimize the release of asbestos fibers through specified work practices to be followed in the processing, handling and disposal of ACM.<sup>47</sup> Additionally, the regulations require the owner of the building or the contractor to notify applicable state and local agencies or EPA regional offices before all demolition or renovation of buildings that contain a certain threshold amount of asbestos.<sup>48</sup>

### C. The Toxic Substances Control Act<sup>49</sup>

In relation to asbestos, TSCA and its implementing regulations are primarily concerned with schools: the identification of ACM in schools, school response actions to ACM once discovered, and the training and accreditation of those who conduct school abatement actions.<sup>50</sup> More recently, TSCA's training and accreditation provisions have been extended to certain work performed in public and commercial buildings (i.e., non-school buildings).<sup>51</sup>

#### 1. Toxic Substance Control Act and Schools

Under the authority of TSCA, EPA issued the "Asbestos-in-Schools Rule" in May, 1982. This was the very first regulation to mandate control of asbestos, and it applied only to schools.

A more comprehensive law, the Asbestos Hazard Emergency Response Act (AHERA), was passed in 1986.<sup>52</sup> It, too, primarily applies to schools, including Department of Defense elementary and secondary

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15, 2000), available at <http://www.epa.gov/opptintr/asbestos/wpr.pdf>, amending 40 C.F.R. § 763, Sbpt. G (2003).

<sup>45</sup> RACM is defined as, "(a) friable asbestos material; (b) Category I nonfriable ACM that has become friable; (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting or abrading; or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this Sbpt." 40 C.F.R. § 61.141 (2003). For a discussion of threshold quantities, see *infra* Section IV.B. of this text.

<sup>46</sup> *Common Questions on the Asbestos NESHAP*, *supra* note 18.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 15 U.S.C. §§ 2601 – 2671 (2003).

<sup>50</sup> See 40 C.F.R. pt. 763 Sbpt. E (2003).

<sup>51</sup> Asbestos School Hazard Abatement Reauthorization Act (ASHARA), Pub. L. No. 101-637, 100 Stat. 4589 (1990), amending AHERA, 15 U.S.C. §§ 2641 – 2656 (1988).

<sup>52</sup> AHERA, Pub. L. No. 99-519, 100 Stat. 2970 (1986) (at 15 U.S.C. §§ 2641 – 2656 (1986)).

schools. AHERA does not apply to training schools for military or civilian personnel.<sup>53</sup> AHERA requires local education agencies to inspect their schools for asbestos containing building materials and prepare management plans that recommend the best way to reduce the asbestos hazard.<sup>54</sup> Options include repairing damaged ACM, spraying it with sealants, enclosing it, removing it or keeping it in good condition so that it does not release fibers.<sup>55</sup>

AHERA's implementing regulations are found in 40 C.F.R. Part 763, Subpart E. They spell out a framework for inspection, sampling, analysis, assessment, hazard response, operations and maintenance, training, planning and record keeping for asbestos in schools.

## 2. Toxic Substances Control Act and Public/Commercial Buildings

The Asbestos School Hazard Abatement Reauthorization Act amended TSCA and required EPA to revise its asbestos model accreditation plan under AHERA to extend training and accreditation requirements to include persons performing certain asbestos related work in public and commercial buildings.<sup>56</sup> It also increased the minimum number of training hours required for accreditation.<sup>57</sup> These newer requirements are found in regulations at Appendix C to Subpart E of 40 C.F.R. Part 763.<sup>58</sup> Therefore, even though the basic regulation applies only to schools, the training and accreditation requirements outlined in Appendix C apply to anyone performing abatement, supervision, inspection, management planning or project design in public or commercial buildings.<sup>59</sup>

For purposes of Appendix C, the phrase "public or commercial building" means the interior space of any building that is not a school building, except that the term does not include any residential apartment buildings of fewer than ten units or detached single-family homes.<sup>60</sup> The term includes, but is not limited to, industrial and office buildings, residential apartment buildings and condominiums of ten or more dwelling units, government-owned buildings, colleges, museums, airports, hospitals,

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<sup>53</sup> *Id.*

<sup>54</sup> See EPA, *The Asbestos Informer*, at <http://www.epa.gov/region04/air/asbestos/inform.htm>.

<sup>55</sup> *Id.*

<sup>56</sup> See ASHARA, Pub. L. No. 101-637, *supra* note 51. Specifically, 15 U.S.C. § 2646(a)(1) and (3) (2003) require accreditation.

<sup>57</sup> *Id.*

<sup>58</sup> 40 C.F.R. pt. 763, Sbpt. E, App. C; 59 Fed. Reg. 5251 (Feb. 3, 1994) and 60 Fed. Reg. 31922 (June 19, 1995).

<sup>59</sup> 65 Fed. Reg. No. 204, 63071-63073 (October 20, 2000).

<sup>60</sup> *Id.* See also 40 C.F.R. pt. 763, Sbpt. E.I.A, App. C (2003).

churches, preschools, stores, warehouses and factories.<sup>61</sup> Interior space includes exterior hallways connecting buildings, porticos and mechanical systems used to condition interior space.<sup>62</sup>

#### **D. Comprehensive Environmental Response, Compensation and Liability Act<sup>63</sup>**

Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), EPA is required to establish a list of hazardous substances and release quantities that, if exceeded, must be reported to the National Response Center.<sup>64</sup> Asbestos is listed as a hazardous substance with a reportable quantity of one pound; however, this designation applies only to friable asbestos.<sup>65</sup> Thus, if someone spills one pound of friable asbestos outside of a building or contained area or container, the spill must be reported to the National Response Center within 24 hours.<sup>66</sup>

CERCLA requires federal facilities leasing or transferring ownership of property to disclose information about the release, disposal or existence of asbestos at the property.<sup>67</sup> A notice for storage applies only when asbestos is stored in quantities greater than or equal to 1000 kilograms or the reportable quantity has been met under CERCLA, whichever is greater.<sup>68</sup> CERCLA reportable quantities for material such as asbestos are found in the tables at 40 C.F.R. § 302.4.

#### **E. Emergency Planning and Community Right-to-Know Act<sup>69</sup>**

The Emergency Planning and Community Right-to-Know Act (EPCRA) requires several different types of asbestos reporting. Section 313 necessitates reporting manufacture, use or possession of friable asbestos for annual Toxic Chemical Release Inventory Reporting.<sup>70</sup> Although federal agencies are not statutorily required to comply with EPCRA, they are required to by virtue of EO 13,148.<sup>71</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 42 U.S.C. §§ 9601 – 9607 (2003).

<sup>64</sup> *Id.* §§ 9601– 9603.

<sup>65</sup> Designation, Reportable Quantities, Notification, 40 C.F.R. pt. 302 (2003).

<sup>66</sup> *Id.*

<sup>67</sup> 40 C.F.R. pt. 373 (2003).

<sup>68</sup> 40 C.F.R. § 373.1 (2003).

<sup>69</sup> 42 U.S.C. §§ 11001 – 11050 (2003).

<sup>70</sup> 42 U.S.C. § 11023 (2003).

<sup>71</sup> Exec. Order No. 13,148, *Greening the Government Through Leadership in Environmental Management*, 65 Fed. Reg. 24595 (2000). This modified and revoked the previous version, Exec. Order No. 12,856, *Federal Compliance with Right-to-Know Laws*

## F. Safe Drinking Water Act<sup>72</sup>

The Safe Drinking Water Act (SDWA) addresses asbestos in that, under SDWA authority to regulate drinking water contaminants, EPA has issued a maximum contaminant level for asbestos.<sup>73</sup>

## G. Resource Conservation and Recovery Act<sup>74</sup>

The Resource Conservation and Recovery Act (RCRA) imposes requirements for hazardous waste handling. Although asbestos is not a listed hazardous waste, it may be deemed one under RCRA as a widely recognized severe human health risk.<sup>75</sup> Thus, RCRA's hazardous waste disposal provisions may be applied to asbestos disposal.

## H. The Federal Wage System: Pay Entitlement for Wage-Grade Employees Exposed to Airborne Asbestos<sup>76</sup>

As a part of the Federal Wage System, Congress has authorized Environmental Differential Pay (EDP) as additional pay for government wage-grade employees subject to unusually severe working conditions or hazards.<sup>77</sup> Congress tasked the Office of Personnel Management (OPM) with determining the particular conditions or hazards for which EDP may be paid. Accordingly, OPM has defined a multitude of such situations.<sup>78</sup> They fall into two categories: those payable for a hazard *per se* and those payable only if the hazard has not been "practically eliminated."<sup>79</sup> EDP is authorized for exposure to airborne concentrations of asbestos. Asbestos EDP is payable only in the event such exposure has not been "practically

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*and Pollution Prevention Requirements*, 58 Fed. Reg. 41981 (August 3, 1993) (making EPCRA reporting mandatory).

<sup>72</sup> 42 U.S.C. §§ 300f–300j (2003).

<sup>73</sup> The Maximum Contaminant Level for asbestos is found at Title 40 C.F.R. § 141.51 (2003), and is equivalent to 7 million fibers (greater than 10 microns in length) per liter of water.

<sup>74</sup> 42 U.S.C. §§ 6901–6992k (2003).

<sup>75</sup> See, e.g., *Metal Trades, Inc. v. United States*, 810 F. Supp. 689, 695 (D. S.C. 1992).

<sup>76</sup> This subsection was supplied by Lt Col Todi Carnes, presently the Deputy Staff Judge Advocate, Space and Missile Center, Los Angeles Air Force Base, California. It is based upon verbatim extractions she authored in pleadings that were filed in the case of American Federation of Government Employees, Local 1617 and United States Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio, Texas, Case No. 0-AR-3469, 58 F.L.R.A. 13 (September 11, 2002) [on file with AFLSA/JACL/CLLO].

<sup>77</sup> 5 U.S.C. § 5343(c)(4) (2003).

<sup>78</sup> See 5 C.F.R. § 532.511, Sbpt. E, App. A (2003).

<sup>79</sup> *Id.*

eliminated”<sup>80</sup> through the use of, for example, personal protective equipment.

The Federal Labor Relations Authority (FLRA) recognizes and consistently follows the holding by the United States Court of Appeals for the Federal Circuit in *O’Neill v. United States*, 797 F.2d 1576 (Fed. Cir. 1986). The *O’Neill* Court determined that a condition precedent of asbestos EDP entitlement is the establishment of a quantitative level of airborne asbestos concentrations, the exceedence of which would indicate a failure to have “practically eliminated” the hazard, thus warranting payment of EDP.<sup>81</sup> Until very recently, however, there has been no federal-wide standard for this threshold quantitative level.<sup>82</sup>

Setting the threshold quantitative level has historically been a matter for individual agencies to determine, subject to negotiation if there was a union that desired it. Arbitration sometimes served as a method of determination—but only as a means of last resort. The FLRA has said, “[i]n the absence of a mandated quantitative level set by applicable law or regulation or otherwise agreed to by the parties,’ the arbitrator is free to determine the quantitative level of exposure for the payment of EDP.”<sup>83</sup>

With passage of the National Defense Authorization Act (NDAA) of 2004,<sup>84</sup> the threshold quantitative level became set by applicable law. It is no longer subject to determination by unilateral agency action, collective bargaining, or arbitration. In section 1122(a) of the NDAA of 2004, Congress adopted as the threshold quantitative level the asbestos PEL promulgated pursuant to the OSHA. Hence, the OSHA PEL for asbestos is now the federal-wide quantitative threshold for the payment of asbestos EDP.<sup>85</sup>

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<sup>80</sup> *Id.* at Part II, Sbpt. E, App. A (Category 16).

<sup>81</sup> *Allen Park Veterans Administration Medical Center and American Federation of Government Employees Local 933*, 34 F.L.R.A. No. 168 (1990).

<sup>82</sup> *Compare* 5 U.S.C. § 5545(d) (1993) (In 1993, Congress authorized Hazardous Duty Pay (HDP) for general schedule employees; and, as it had previously with environmental differential pay (EDP) for wage-grade employees, tasked OPM to promulgate appropriate regulations. OPM not only promulgated an identical 8% differential pay for exposure to asbestos for general schedule employees, it also tied the payment of HDP to the OSHA PEL. 5 C.F.R. § 550.903, App. A (2003). Hence, there has historically been a government-wide standard for asbestos HDP payments to general schedule employees.)

<sup>83</sup> *U.S. Dept. of the Army, Red River Army Depot Texarkana, Texas and American Federation of Government Employees Local 3961*, 53 F.L.R.A. No. 11 (1997) *citing* *Allen Park*, *supra* note 81.

<sup>84</sup> National Defense Authorization Act of 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

<sup>85</sup> *Id.* § 1122(a) (to be codified at 5 U.S.C. § 5343(c)(4)). This statutory standard also applies to HDP for general schedule employees. *Id.* § 1122(b) (to be codified at 5 U.S.C. § 5545(d)). This was true even before passage of the NDAA of 2004. See *supra* note 82. For more information on the OSHA PEL, see *supra* text accompanying note 29.

In the event an installation receives a union grievance seeking payment of asbestos EDP, they should contact the Air Force Legal Services Agency's Central Labor Law Office (AFLSA/CLLO) immediately. These cases can quickly mushroom into class action cases and require headquarters oversight at the earliest opportunity.

### **I. Miscellaneous Statutory and Regulatory Provisions**

Individual state laws containing versions of the above federal provisions also may apply to federal facilities.<sup>86</sup> States can issue standards that are more stringent than federal standards.<sup>87</sup>

Also worth mentioning, the Department of Transportation has promulgated 49 C.F.R. Chapter 1, establishing labeling, packaging and transportation requirements for ACM.<sup>88</sup>

## **IV. STATUTORY & REGULATORY APPLICATION TO ASBESTOS REMEDIATION**

### **A. Covered Structures**

The definition of "facility" under EPA's NESHAP rule is quite broad. Office, industrial, residential structures and even ships are "facilities," whether public or private.<sup>89</sup> Residential buildings which have four or fewer dwelling units are not considered "facilities" unless they are part of a larger installation. For example, a military base, company housing, an apartment or housing complex are qualified facilities.<sup>90</sup>

### **B. Asbestos Threshold Levels Triggering NESHAP Work Practice Standards for Demolition and Renovation Projects**

Asbestos NESHAP regulations must be followed for all demolition and renovation of facilities having at least 80 linear meters (260 linear feet) of RACM on pipes or 15 square meters (160 square feet) of RACM on other facility components. NESHAP regulations also apply where at least 1 cubic meter (35 cubic feet) of RACM is removed from facility components where the length or area could not be previously measured.<sup>91</sup>

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<sup>86</sup> For a discussion on the subject of waiver of federal sovereign immunity, *see infra* Section V.A of this text.

<sup>87</sup> *See, e.g.*, 40 C.F.R. § 63.90 (2000).

<sup>88</sup> 49 C.F.R. Ch. 1 (2003).

<sup>89</sup> *See Common Questions on the Asbestos NESHAP, supra* note 18.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

These amounts are known as "threshold" amounts.<sup>92</sup> All demolition and renovation is subject to the Asbestos NESHAP insofar as owners and operators must determine if, and how much asbestos is present at the site.<sup>93</sup>

### C. Notification of Renovation or Demolition

Notification is a written notice of intent to renovate or demolish. For all demolitions, notification must be given to the appropriate regulatory agency, even in the absence of any known asbestos at the site.<sup>94</sup> For renovations, the notice requirements apply if the quantitative amounts of RACM mentioned in subsection B above are met.

The owner or operator makes required notifications to the delegated state or local pollution control agency in the area or the EPA regional office, depending on what authority has been delegated.<sup>95</sup> Some EPA regions require that both the EPA regional office and the local agency be notified, while some require notice only to the delegated state or local agency.<sup>96</sup> If the program is not delegated, notification should be made to the EPA regional office. The EPA Asbestos NESHAP regulation requires ten working days' advance notice. Most state regulations have identical advance notice provisions.<sup>97</sup>

Substantively, notifications must contain certain specified information, including but not limited to, scheduled start and completion dates, location of the site, names of operators or asbestos removal contractors, methods of removal, amount of asbestos and whether the operation is a demolition or renovation.<sup>98</sup>

### D. Required Training and Certifications

Applicable training and certification requirements depend upon the type of asbestos work being performed. There are four classes of asbestos work.<sup>99</sup> Class I work includes removal of thermal system insulation (like pipe insulation and tank insulation) and asbestos surface coatings (like fireproofing and popcorn ceilings). OSHA training and certification requirements apply to all employees who remove insulation or surfacing asbestos. Asbestos workers require 32 hours of initial training with 8 hours' annual refresher training. This training must be consistent with the

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<sup>92</sup> 40 C.F.R. § 61.145(b) (2003).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See EPA, *Asbestos-General*, at <http://www.epa.gov/earth1/r6/6pd/asbestos/asbgenl.htm>.

<sup>96</sup> See *id.*

<sup>97</sup> See *The Asbestos Informer*, *supra* note 54.

<sup>98</sup> 40 C.F.R. § 61.145(b) (2003).

<sup>99</sup> See *supra* note 28.

EPA Model Accreditation Plan (MAP). Asbestos supervisors require 40 hours of initial training with 8 hours of annual refresher training. At least one person on the project must be certified as an asbestos supervisor.<sup>100</sup>

Class II work involves removal of other types of asbestos material such as flooring, roofing and transite. There are regulatory requirements for training and certification of all employees who remove asbestos flooring, roofing, ceiling tiles, transite, gaskets or other asbestos containing materials that are not thermal insulation or surfacing materials. For instance, eight hours of training is required in the specific asbestos material that the employee will be removing (i.e., roofing or flooring). Employees also need an annual eight-hour refresher class. If more than one kind of Class II material is to be abated in an asbestos project, a certified worker or supervisor must perform the work.<sup>101</sup>

Class III work involves repair and maintenance activities that might disturb asbestos materials. For example, replacement of a steam pipe fitting might mean disturbance of the asbestos containing insulation covering the fitting. All situations involving Class III work must be abated by Class I or Class II trained personnel prior to the project. Class III training must be consistent with EPA MAP requirements and include at least 16 hours of "hands-on" training.<sup>102</sup>

Class IV work includes maintenance, housekeeping and custodial activities in areas that contact, but do not disturb ACM. As defined by OSHA, it includes cleanup of dust, waste and debris from Class I, II or III work. A two-hour training session is required that must be consistent with EPA requirements for training of local education agency maintenance and custodial staff.<sup>103</sup>

## **E. Required Physical Measures for Handling RACM<sup>104</sup>**

### *1. Non-Friable Asbestos*

As earlier mentioned, the presence of asbestos in a building does not mean certain danger. As long as ACM stays in good condition, exposure is unlikely. Non-friable asbestos that poses no immediate threat of release generally need not be removed.

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<sup>100</sup> See 40 C.F.R. pt. 763, Sbpt. E, App. C (2003). See also 40 C.F.R. §§ 1926.1101 and 1910.1001 (2003).

<sup>101</sup> *Id.*

<sup>102</sup> 40 C.F.R. § 763.92(a)(2) (2003).

<sup>103</sup> 40 C.F.R. § 763.92(a)(1) (2003).

<sup>104</sup> For a definition of "RACM," see *supra* note 45 and accompanying text.

## 2. Friable Asbestos

If it is necessary to abate the ACM, there are three approaches: removal, encapsulation and enclosure.<sup>105</sup> The type of asbestos and the potential danger involved must be determined before deciding which of these methods to use.<sup>106</sup> Removal includes, *inter alia*, "the taking out or the stripping of substantially all ACBM [asbestos-containing building material] from a damaged area."<sup>107</sup> Encapsulation is "the treatment of ACBM with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers, as the encapsulant creates a membrane over the surface . . . or penetrates the material and binds its components together."<sup>108</sup> Enclosure involves setting "an airtight, impermeable, permanent barrier around ACBM to prevent the release of asbestos fibers into the air."<sup>109</sup>

Any actual handling of RACM must be undertaken by trained and certified workers. During most asbestos work, respirators and high-efficiency particulate air (HEPA) filters must be used to abate airborne asbestos fibers.<sup>110</sup> Additional personal protective equipment, such as a hood, gloves and full body suit may also be necessary.<sup>111</sup>

## 3. Requirement for ACM Removal Prior to Demolition or Renovation Activities

Although asbestos may be in a non-friable state, demolition and renovation activities present the possibility of applying something more than mere hand pressure to ACM with a resulting discharge of asbestos fibers into the air. Even if ACM is not damaged during the course of

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<sup>105</sup> 40 C.F.R. § 763.83 (1994).

<sup>106</sup> See, e.g., 29 C.F.R. § 1926.58 (1994). For example, "[a]sbestos insulation should be removed: (a) when it is breaking away from the base; or (b) when the insulation is likely to be abraded or otherwise damaged; or (c) when the surface is very friable; or (d) when the resultant concentration of airborne asbestos dust is above the exposure limit." Martin S. Hall, *Asbestos: Fatal Fiber or Fiber Phobia - The Purchaser's Perspective*, 79 ILL. B.J. 228, n.1 (1991). When ACM does not fall into one of the above categories or is not likely to be "disturbed," a program of encapsulation or enclosure may be economically preferable. *Id.*

<sup>107</sup> 40 C.F.R. § 763.83 (2003).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See 29 C.F.R. §§ 1910.1001 and 1926.1101 (2003). See also, Dept. of Labor (DoL), *Better Protection Against Asbestos in the Workplace*, Factsheet 92-06, at <http://www.pp.okstate.edu/chs/training/oshasbes.htm>. If air sampling shows that no fibers are airborne, filters and masks may not be required. High-efficiency particulate air (HEPA) filters are capable of trapping and retaining at least 99.97 percent of all mono-dispersed particles of 0.3 micrometers in diameter. 29 C.F.R. § 1926.1101(b) (2003).

<sup>111</sup> *Id.*

demolition or renovation, such activities are likely to result in ACM waste, and all asbestos waste must be appropriately handled.

For these reasons, all RACM must be removed from a facility being demolished or renovated before any disruptive activity begins. The RACM must be kept adequately wet<sup>112</sup> to prevent fiber release before, during and after removal operations. Finally, demolition and renovation activities must be conducted in a manner producing no visible emissions to the outside air.<sup>113</sup>

#### F. Air Force Oversight Over Contract Abatement Operations

Though much ACM remediation on Air Force installations is done by contractors, this does not mean the Air Force has no responsibility or potential liability. From a contractual point of view, it is important both to manage and oversee work to ensure it is properly done and to have contract safeguards concerning compliance and indemnification.

Air Force contracts, however, often make the contractor responsible for occupational health and safety. These contracts usually contain the standard Federal Acquisition Regulation (FAR) clause stating that the contractor shall comply with 29 C.F.R. §§ 1926 and 1910 on OSHA workplace safety. The FAR also requires that contractors include similar clauses in any subcontracts.<sup>114</sup> In such cases, the Base Environmental Engineer (BEE) does not fulfill his normal function.<sup>115</sup>

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<sup>112</sup> EPA defines "adequately wet" to mean "sufficiently mix or penetrate with liquid to prevent the release of particulates." EPA, *Asbestos NESHAP Adequately Wet Guidance*, No. EPA340/1-90-019, at <http://www.epa.gov/region04/air/asbestos/awet.htm>. If visible emissions are observed coming from ACM, then that material has not been adequately wetted. *Id.*

<sup>113</sup> EPA, *Asbestos/NESHAP Regulated Asbestos Containing Materials Guidance*, at <http://www.epa.gov/region4/air/asbestos/asbmatl.htm>.

<sup>114</sup> 48 C.F.R. § 52.236-13 (2003).

<sup>115</sup> See *DoD Safety and Occupational Health (SOH) Program*, DODI 6055.1, par. 2.5 (August 19, 1998). The DODI generally does not apply to DoD contractor personnel and contractor operations. *Id.* at para. 2.5. Additional details are given in enclosure E5 of the DODI. In peacetime operations performed in the United States, the contractor is responsible directly to the federal or state occupational safety and health authority for the safety and health of contractor employees. *Id.* at E5. DoD safety and health responsibilities in contractor plants and contractor operations on DoD property are generally limited to helping to ensure the safety of DoD owned equipment, protection of the production base, protection of government property, protection of on-site DoD personnel and protection of the public. *Id.* A contractor is responsible for the safety and health of employees and protection of the public at contractor plants and work sites. *Id.* See also *Safety, USAF Mishap Prevention Program*, AFI 91-202, para 3.5 (August 1, 1998):

AF Safety personnel must not put anything in a contract that establishes a requirement for the Air Force to protect contractor employees or their

While the BEE and base safety personnel do not normally monitor contractor employees because of the potential environmental liability if RACM is disposed of improperly, the quality assurance personnel monitoring the contract should still be vigilant.<sup>116</sup>

## G. Required Workplace Record Keeping

### 1. Workplace Monitoring – Airborne Asbestos Levels

The employer must keep an accurate record of all measurements taken to monitor employee exposure to asbestos. This record includes: 1) the date of measurement; 2) operation involving exposure; 3) sampling and analytical methods used, as well as evidence of their accuracy; 4) number, duration and results of samples taken; 5) type of respiratory protective devices worn by workers; 6) name and social security number of each worker; and 7) the results of all employee exposure measurements.<sup>117</sup> This record must be kept for 30 years.<sup>118</sup>

In both general industry and construction, worker exposure must be limited to 0.2 fibers per cubic centimeter of air (0.2 f/cc), averaged over an eight-hour work shift.<sup>119</sup> The excursion or short-term limit is one fiber per cubic centimeter of air (1 f/cc) averaged over a sampling period of 30 minutes.<sup>120</sup> In general industry, employers must conduct initial monitoring for workers who may be exposed above 0.1 f/cc.<sup>121</sup> Subsequent monitoring must be conducted at reasonable intervals, but in no case longer than six

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equipment. Likewise, do not include anything in inspection or surveillance programs to give the perception that the Air Force is supervising or observing contractor personnel to provide for their personal safety or to ensure the safety of their equipment.

*See also, Safety. General Industrial Operations, AFOSHSTD 91-66 (October 1, 1997) (“This standard applies to all US Air Force industrial operations . . . This standard does NOT apply to contractors working on Air Force installations, including contractors who use government furnished equipment and facilities. They are responsible for the safety and health of their personnel.”).*

<sup>116</sup> Environmental liability could arise in relation to the CAA Asbestos National Emission Standard for Hazardous Air Pollutant (NESHAP) or under the Resource Conservation and Recovery Act.

<sup>117</sup> 29 C.F.R. §§ 1910.1001 and 1926.1101 (2003). *See also, Controlling Exposures To Hazardous Materials, AFOSH Standard 48-8, Attach. 9 (September 1, 1997), available at <http://www.e-publishing.af.mil/pubfiles/af/48/afoshstd48-8/afoshstd48-8.pdf>. See also *Better Protection Against Asbestos in the Workplace, supra* Note 110.*

<sup>118</sup> *Id.* To avoid confusion, the OSHA standards apply to contractors performing work on military installations whereas the AFOSH standards apply to military and Air Force civilian personnel performing asbestos work. The standards are very similar.

<sup>119</sup> *Better Protection Against Asbestos in the Workplace, supra* note 110.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

months for employees exposed above the action level.<sup>122</sup> In construction, daily monitoring must be continued until exposure drops below the action level (0.1 f/cc).<sup>123</sup> Daily monitoring is not required where employees are using supplied-air respirators operated in the positive pressure mode.<sup>124</sup>

## 2. Medical Examinations

In general industry, personnel assigned to positions involving exposure to airborne concentrations of asbestos at or above the action level or the excursion level must have a preplacement physical examination.<sup>125</sup> The physical examination must include a chest X-ray, medical and work history, and pulmonary function tests.<sup>126</sup> Subsequent exams must be given annually and upon termination of employment, though chest X-rays are required annually only for older workers whose first asbestos exposure occurred more than 10 years ago.<sup>127</sup> In construction, examinations must be made available annually for workers exposed above the action level or excursion limit for 30 or more days per year, or who are required to wear negative pressure respirators.<sup>128</sup> Chest X-rays for construction workers are given at the discretion of a physician.<sup>129</sup>

## H. Waste Disposal Requirements

### 1. Physical Requirements

Asbestos must be **properly bagged** in double-seal containers with pre-printed asbestos warning **labels**. **ACM** waste must be disposed of at a

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* The term "positive pressure" implies that the pressure within the respiratory inlet covering (i.e., the facepiece, hood or helmet) is somewhat greater than outside pressure and that any air movement will be outward. Since air contaminants are unlikely to travel against air flow, it follows that positive pressure devices should provide high levels of protection. Larry Janssen, *What is a Positive Pressure Respirator*, 3M JOB HEALTH HIGHLIGHTS, Vol. 15(1) (1977), available at <http://multimedia.mmm.com/nws/mediawebserver.dyn?000000JHT4307Da0nDa000A85lx9999z>.

<sup>125</sup> *Better Protection Against Asbestos in the Workplace*, *supra* note 110. See also AFOSH Standard 48-8, *supra* note 117.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> A negative pressure respirator is a mask that does not maintain overpressure, it merely filters air being breathed in. See 40 C.F.R. § 1926.1101(h)(3)(i) (2003) for specific requirements on the type of mask required for different airborne asbestos levels. Disposable masks are not allowed when working with ACM. *Id.*

<sup>129</sup> *Better Protection Against Asbestos in the Workplace*, *supra* note 110.

landfill approved for asbestos.<sup>130</sup> ACM waste that is not bagged must be kept adequately wet.<sup>131</sup> ACM waste in the context of demolition and renovation includes RACM waste and materials contaminated with asbestos, including disposable equipment and clothing.<sup>132</sup>

## 2. Record Keeping Requirement—and Waste Shipment Record

When ACM waste is transported off-site, the owner or operator of a source whose activities produce the waste, the waste generator,<sup>133</sup> must provide the waste site transporter, operator or owner with a waste shipment record (WSR).<sup>134</sup> The original should be turned over to the transporter along with the waste shipment, although the generator should retain a copy signed by the transporter acknowledging receipt of the waste shipment for record keeping.<sup>135</sup>

The owner or operator of the waste disposal site must send a signed copy of the WSR back to the waste generator within 30 days and attempt to reconcile any discrepancy between the quantity of waste listed on the WSR and the actual amount of waste received.<sup>136</sup> If, within 15 days of receiving the waste, the waste site owner or operator cannot reconcile the discrepancy, the problem must be reported to the same agency that was notified of the demolition or renovation.<sup>137</sup>

A waste generator must retain copies of all WSRs, including WSRs signed by the owner or operator of the waste disposal site where the waste

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<sup>130</sup> The waste disposal site must be operated in compliance with 40 C.F.R. § 61, Sbpt. M (2003).

<sup>131</sup> 40 C.F.R. § 61.150(a)(3) (2003).

<sup>132</sup> Category I or Category II nonfriable ACM that has been contaminated by RACM and cannot be decontaminated (e.g., bulk building debris) must be treated as ACM waste. Category I or Category II ACM that does not meet the definition of RACM after a demolition or renovation, and is not contaminated with RACM, is not ACM waste and is not subject to the wetting requirement of 40 C.F.R. § 61.150(a)(3) (2003). See *Demolition Practices Under The Asbestos NESHAP*, *supra* note 7. Category I or II nonfriable ACM that is not subject to 40 C.F.R. § 61.150(a)(3) would still have to be disposed of in a landfill accepting building debris, a landfill that operates in accordance with 40 C.F.R. § 61.154 (2003) or at a facility that operates in accordance with 40 C.F.R. § 61.155 (2003). *Id.* This waste material would not be allowed at any facility that would sand, grind, cut or abrade the non-RACM waste or otherwise turn it into RACM waste, such as a cement recycling facility. *Id.* In addition, if Category I or II nonfriable ACM is sanded, ground, cut or abraded during disposal at a landfill before burial, it is subject to the NESHAP. *Id.*

<sup>133</sup> Waste generators include asbestos mills, manufacturers, fabricators, demolition, renovation and spraying operations. 40 C.F.R. §§ 61.149 and 150 (2003).

<sup>134</sup> See *The Asbestos Informer*, *supra* note 54.

<sup>135</sup> See EPA Field Guide, *Reporting and Record Keeping Requirements For Waste Disposal*, at <http://www.epa.gov/region4/air/asbestos/waste.htm>.

<sup>136</sup> See *The Asbestos Informer*, *supra* note 54.

<sup>137</sup> *Id.*

was deposited, for at least two years.<sup>138</sup> The WSRs should be kept in chronological order in a secure, water-tight file.<sup>139</sup> Entities are expected to provide copies of WSRs upon request of the responsible agency and to make the WSR file available for inspection during normal business hours.<sup>140</sup>

### I. Transferring Properties with ACM to Parties Outside of the Department of Defense

Prior to property disposal, all available information on the existence, extent and condition of ACM shall be incorporated into the Environmental Baseline Survey or other appropriate document to be provided to the transferee.<sup>141</sup> Department of Defense (DoD) policy is that “unless it is determined by competent authority that the ACM in the property does pose a threat to human health at the time of transfer, all property containing ACM will be conveyed, leased, or otherwise disposed of ‘as is’ through the Base Realignment and Closure (BRAC) process.”<sup>142</sup>

Under certain circumstances, property can be transferred even with ACM that poses a threat to human health. Removal or abatement is not required if the building is scheduled for demolition by a transferee, occupation of the building is prohibited prior to demolition and the transferee accepts responsibility.<sup>143</sup>

## V. CIVIL ENFORCEMENT ISSUES

### A. Sovereign Immunity

Most major environmental statutes allow EPA to delegate permitting, oversight and enforcement responsibilities to the states. This ensures national consistency of minimum standards while providing flexibility to the states in implementing rules. Under this arrangement, known as “cooperative federalism,” the federal government establishes statutory minimum standards and procedural requirements, and states develop implementation and enforcement programs subject to federal

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<sup>138</sup> See *Reporting and Record Keeping Requirements*, *supra* note 135.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Memorandum from OSD-ES (Subject: Asbestos, Lead Paint and Radon Policies at BRAC Properties) (October 31, 1994), *limited availability at* [https://aflsa.jag.af.mil/GROUPS/AIR\\_FORCE/ENVLAW/DOD-ash-LBP-radon-BRAC.doc](https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/ENVLAW/DOD-ash-LBP-radon-BRAC.doc).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

approval and oversight.<sup>144</sup> Ultimately, under this system, either a state or EPA may seek to take enforcement action for an alleged rule violation.

Before a state may take enforcement action against a federal entity, there must be a specific waiver of sovereign immunity permitting such action. Starting in the early 1970's, Congress began including waivers of sovereign immunity in federal pollution abatement statutes as it created statutory programs delegating significant standard setting, regulatory and enforcement powers to the states.

When faced with a state enforcement action, one should always closely scrutinize the issue of sovereign immunity. Sovereign immunity waivers must clearly and unequivocally permit the action the state seeks to take. Hence, even if there is a waiver of sovereign immunity for some purposes, it may not cover the specific action at issue. This is particularly true in the area of financial penalties.<sup>145</sup>

Unlike the states, it would appear that EPA faces no such sovereign immunity hurdles in seeking to take enforcement action against federal agencies.<sup>146</sup> For example, as discussed in a 1997 Department of Justice opinion concerning the CAA, there is a "clear statement" in the CAA provisions and legislative history to provide the EPA authority to levy punitive penalties against federal agencies.<sup>147</sup>

#### **B. Enforcement Actions Under the Toxic Substances Control Act**

While TSCA waives sovereign immunity for requirements and fines against federal facilities for lead-based paint,<sup>148</sup> it does not do so for asbestos or other toxic substances. Without the waiver of federal sovereign immunity, state laws or regulations promulgated wholly under their TSCA authority do not apply to federal facilities.

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<sup>144</sup> See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (May 2002), available at <http://www.nyu.edu/pages/lawreview/77/2/breyer.pdf>.

<sup>145</sup> *DoE v. Ohio*, 503 U.S. 607, 615 (1992); *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980); and *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927).

<sup>146</sup> *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*, OLC LEXIS 20 (June 14, 2000), available at <http://www.usdoj.gov/olc/ustop2.htm> (U.S. Dept. of Justice (DoJ) appears to say that sovereign immunity does not apply between two federal agencies in an enforcement action).

<sup>147</sup> *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, OLC LEXIS 29 (July 16, 1997), available at [http://www.usdoj.gov/olc/cleanair\\_op.htm](http://www.usdoj.gov/olc/cleanair_op.htm).

<sup>148</sup> 15 U.S.C. § 2688 (2003).

### C. Enforcement Action Under the Occupational Safety and Health Act

As mentioned earlier, OSHA does not directly apply to federal agencies because there is no section in the statute directing application to federal facilities. However, OSHA applies through EO 12,196.<sup>149</sup> This executive order implements the statute by imposing a duty on the Department of Labor to assist federal agencies in developing occupational safety and health programs.<sup>150</sup>

While OSHA inspectors can inspect DoD workplaces with functions comparable to those in private industry,<sup>151</sup> there is no authority for OSHA inspection of military personnel or “uniquely military equipment, systems, or operations.”<sup>152</sup> This includes operation of aircraft, ships, missiles and radar sites.

When an OSHA inspector finds a violation in areas they do inspect, an enforcement action cannot be issued. Instead, the inspector “promptly issues a report to the head of the agency.”<sup>153</sup> The report shall describe the nature of the findings and may make recommendations for correcting the violation.<sup>154</sup> OSHA can inspect DoD contractors with full enforcement powers.<sup>155</sup>

### D. Enforcement Action Under the Clean Air Act

States can also regulate asbestos under the CAA, and depending on the jurisdiction, may be able to assess punitive penalties. Courts have taken varying views on the waiver of sovereign immunity in the CAA. In the 9<sup>th</sup> and 6<sup>th</sup> Circuits, CAA fines are payable.<sup>156</sup> In the 11<sup>th</sup> Circuit, Air

<sup>149</sup> Exec. Order No. 12,196, 45 Fed. Reg. 12,769, 3 C.F.R. § 145 (1980).

<sup>150</sup> Exec. Order No. 12,196 §§ 1-201 and 401. DoL has promulgated 29 C.F.R. pt. 1960 (2003), which contains the Basic Program Elements for OSHA. See 60 Fed. Reg. 34851 (July 5, 1995) for most recent promulgation of rule.

<sup>151</sup> 29 C.F.R. § 1960.31.

<sup>152</sup> Exec. Order No. 12,196, *supra* note 149 at § 1-101 (“This order applies to all agencies of the Executive Branch except military personnel and uniquely military equipment, systems, and operations.”).

<sup>153</sup> *Id.* at § 1-401(I). OSHA inspectors may focus on employee protective measures and equipment, training, monitoring and other regulatory requirements identified in Volume 29 of the C.F.R. An EPA or state environmental department inspector may focus on notification, protective measures, disposal and other requirements identified in 40 C.F.R. pt. 61. There is substantial overlap in what OSHA and EPA cover.

<sup>154</sup> *Id.*

<sup>155</sup> OSHA Enforcement authority is derived from powers provided by 29 U.S.C. §§ 658 - 659 (Procedure for Enforcement), 662 (Procedures to Counteract Imminent Dangers), and 666 (Penalties) (2003).

<sup>156</sup> Memorandum by Deputy Assistant Secretary of the Air Force for Environment, Safety and Occupational Health, *Air Force Policy on the Payment of Fines and Penalties for*

Force policy is to resist fines.<sup>157</sup> Depending on case-by-case analysis, fines may be payable in other circuits.<sup>158</sup> Hence, in many states the environmental regulators may have an enforcement vehicle for levying penalties for asbestos violations.

### E. Enforcement Action Under the Resource Conservation and Recovery Act

Another enforcement tool that may be available, depending on the facts surrounding the violation, is RCRA. The Federal Facilities Compliance Act of 1992 waived sovereign immunity for punitive fines for RCRA solid and hazardous waste violations.<sup>159</sup> Hence, there is full authority for regulation and enforcement as long as the asbestos in question is a solid or hazardous waste.<sup>160</sup> However, asbestos is not a listed hazardous waste, and is much more likely to be regulated under the CAA Asbestos NESHAP, TSCA or OSHA.

## VI. CRIMINAL LIABILITY

The late 1990s saw a large increase in the number of criminal prosecutions for asbestos violations.<sup>161</sup> Individual government employees should be mindful that they may be subject to such prosecution.<sup>162</sup> They are not normally protected by whatever degree of sovereign immunity the federal government may possess, and may even have to provide for their

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*Violations of the Clean Air Act (CAA)*, (July 17, 2002), limited availability at [https://aflsa.jag.af.mil/GROUPS/AJR\\_FORCE/ENVLAW/Payment%20of%20Fines%20and%20Penalties%20for%20CAA.pdf](https://aflsa.jag.af.mil/GROUPS/AJR_FORCE/ENVLAW/Payment%20of%20Fines%20and%20Penalties%20for%20CAA.pdf). See also *United States v. Tennessee Air Pollution Control Board*, 185 F.3d 529 (6th. Cir 1999).

<sup>157</sup> *Air Force Policy on the Payment of Fines and Penalties*, *supra* note 156.

<sup>158</sup> *Id.*

<sup>159</sup> Pub. L. No. 102-386 (October 6, 1992), amending federal facility language at 42 U.S.C. § 6961 and the definition of "person" at § 6903(15).

<sup>160</sup> See *Metal Trades*, 810 F. Supp. 689 (holding that asbestos is a statutory hazardous waste in the context of a Navy contract appeal where the issue was whether asbestos could be characterized as a RCRA hazardous waste).

<sup>161</sup> See *EPA Reports Record Highs in Fines Collected From Criminal Polluters*, ASBESTOS & LEAD ABATEMENT REP., March 10, 1997, at 1; and Traci Watson, *Today's EPA: You Pollute, We Prosecute*, USA TODAY, May 21, 1998, at A5 (discussing increase in criminal environmental prosecutions and noting 300% increase in environmental investigative force).

<sup>162</sup> See, e.g., *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990)(supervising engineer responsible for operations and RCRA compliance at the U.S. Army chemical research laboratory convicted under RCRA for "knowingly . . . stor[ing], or dispos[ing] of . . . hazardous waste . . . without a permit").

own defense if the prosecution is federal or if it is determined they acted outside their scope of employment.<sup>163</sup>

While TSCA establishes criminal penalties for asbestos abatement violations,<sup>164</sup> as a matter of practice, most criminal prosecutions for asbestos violations are charged under the CAA. Alternatively, as discussed in Section IIIG above, asbestos may be covered under RCRA.<sup>165</sup> Also, in the event asbestos debris is discharged into United States waters, a criminal prosecution under the Clean Water Act may arise.<sup>166</sup>

### A. Required Mens Rea

Like most environmental crimes, the prosecution does not have to prove knowledge of the proscriptive statute or regulation, but merely that the pollutant involved was prohibited. For example, in *United States v. Weintraub*, intent was satisfied by knowledge of the presence of asbestos rather than the particular type of asbestos to which work-practice standards applied.<sup>167</sup> In *United States v. Buckley*, intent required for crimes relating to asbestos emissions and failure to notify authorities was established simply by knowledge of the prohibited acts, not of the statutes or health hazards.<sup>168</sup> Finally, in *U.S. v. Dipentino*, a debris pile of ACM left by the defendant was sufficient to sustain a CAA conviction where the defendant had knowledge that the debris contained ACM).<sup>169</sup>

### B. Supervisory Liability: *U. S. v. Pearson*<sup>170</sup>

Thomas Pearson was convicted of CAA violations.<sup>171</sup> In 1995, Pearson was employed by a Navy contractor as a certified asbestos supervisor to remove asbestos from the central heating plant at the

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<sup>163</sup> See *Civil Litigation*, AFI 51-301, para. 1.3 (July 1, 2002). DoJ will not defend an individual against a federal criminal action. For state criminal actions, DoJ will only defend employees who acted within the scope of employment.

<sup>164</sup> 15 U.S.C. § 2615(b) (2003).

<sup>165</sup> *Metal Trades*, 810 F. Supp. at 695.

<sup>166</sup> See, e.g., *United States v. Technic Services*, No. 01-30057 (9<sup>th</sup> Cir. Dec. 23, 2002) (Alaska asbestos removal contractor convicted of air and water pollution offenses and obstruction of justice).

<sup>167</sup> *United States v. Weintraub*, 273 F.3d 139 (2<sup>nd</sup> Cir. 2001).

<sup>168</sup> *United States v. Buckley*, 934 F.2d 84 (6<sup>th</sup> Cir. 1991).

<sup>169</sup> *United States v. Dipentino*, 242 F.3d 1090, 1096 (9<sup>th</sup> Cir. 2001). For other illustrative asbestos cases, see *United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 588 (6<sup>th</sup> Cir. 1991); *United States v. Fern*, 155 F.3d 1318, 1325-26 (11<sup>th</sup> Cir. 1998); *United States v. Tomlinson*, 1999 U.S. App. LEXIS 16758 (9<sup>th</sup> Cir. 1999); *United States v. Chau*, 293 F.3d 96 (3<sup>rd</sup> Cir. 2002); *United States v. Shurelds*, 1999 U.S. App. LEXIS 3521 (6<sup>th</sup> Cir. 1999).

<sup>170</sup> *United States v. Pearson*, 274 F.3d 1225, 1229 (9<sup>th</sup> Cir. 2001).

<sup>171</sup> 42 U.S.C. §§ 7412-7413 (1990).

Whidbey Island Naval Air Station. Under CAA regulations, asbestos must be wetted before removal.<sup>172</sup> Contrary to this requirement, Pearson's removal site had dry asbestos "all over the place," air circulation machines were clogged and bags of asbestos were outside the containment area.<sup>173</sup>

Pearson was charged with two counts of knowingly causing asbestos removal in violation of the CAA.<sup>174</sup> Pearson argued that he was not involved with the asbestos removal and was only involved with the demolition phase.<sup>175</sup> The district court provided instructions on the definition of "supervisor" for the jury to make a finding.<sup>176</sup> Ultimately, Pearson was acquitted on one count and convicted on the other. He was sentenced to ten months' confinement and three-years' supervised probation.<sup>177</sup>

On appeal, Pearson argued that the district court applied the wrong definition of "supervisor," and that "he did not have enough authority to be liable as a 'supervisor' under the CAA."<sup>178</sup> Both the district court and the Ninth Circuit applied the "substantial control" standard, which requires a defendant to have the "ability to direct the manner in which work is performed and the authority to correct problems."<sup>179</sup> Because a "supervisor" is not necessarily the individual with the highest authority, the Ninth Circuit held that the district court did not abuse its discretion in instructing the jury to apply the "substantial control" standard in determining Pearson's liability as a supervisor.<sup>180</sup>

Pearson contended that because he was an employee carrying out orders, he could not be held liable as an operator under the CAA's criminal provisions unless he was in knowing and willful violation of the Act.<sup>181</sup> Although the Ninth Circuit agreed that a jury could reasonably find that an individual who qualifies as a supervisor under section 7412 also could qualify as an employee under section 7413(h), Pearson failed to raise and meet his burden of establishing that he was only an employee because he contended no involvement in the asbestos clean-up.<sup>182</sup> Hence, the district

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<sup>172</sup> 40 C.F.R. § 61.141 (2001).

<sup>173</sup> *Pearson*, 274 F.3d at 1229.

<sup>174</sup> *Id.* at 1228.

<sup>175</sup> *Id.* at 1229.

<sup>176</sup> *Id.* at 1230.

<sup>177</sup> *Id.*

<sup>178</sup> See 42 U.S.C. § 7412 or § 7413 (1990) for definition of "supervisor."

<sup>179</sup> *Pearson*, 274 F.3d at 1231.

<sup>180</sup> *Id.* at 1233.

<sup>181</sup> *Id.* at 1232. An employee "who is carrying out his normal activities and who is acting under orders from the employer" is not liable under the CAA's criminal provisions as an operator except for knowing and willful violations. 42 U.S.C. § 7413(h)(1990).

<sup>182</sup> *Id.* at 1232.

court did not err in excluding instructions to the jury on the issue of whether Pearson acted as an employee.<sup>183</sup>

## VII. DEALING WITH ASBESTOS PROACTIVELY

As previously mentioned, AFI 32-1052, *Air Force Facility Asbestos Management*, requires Air Force bases to conduct facility asbestos surveys and develop Asbestos Management and Operating Plans.<sup>185</sup> The Management Plan should include an inventory of buildings surveyed with known ACM and be closely scrutinized during Environmental Compliance Assessment and Management Program assessments to ensure accuracy.<sup>186</sup> It can be an invaluable resource tool, but is only as good as it is accurate.

Remember that any grievance filed for asbestos EDP on behalf of wage-grade employees should be immediately coordinated with AFLSA/CLLO. Their timely involvement will ensure that the case is appropriately assessed and adequate preparations are made for a response.

Lastly, where installation property is being transferred outside DoD, one should ensure that Environmental Baseline Surveys give notice of the presence of any asbestos to subsequent owners.<sup>187</sup> This can be a pivotal point in later disputes over liability for ACM remediation and disposal costs.

## VIII. CONCLUSION

Asbestos can cause significant environmental issues with pre-1980s structures. There are many potentially applicable environmental statutes and regulations. To assure compliance and avoid civil or criminal penalties, attorneys should proactively ensure that any asbestos remediation requirements have been properly analyzed and incorporated into management and abatement planning.

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<sup>183</sup> *Id.*

<sup>184</sup> See *The Environmental Impact Analysis Process*, AFI 32-7061 (March 12, 2003). The process may also be found at 32 C.F.R. § 989 *et. seq.* (2003).

<sup>185</sup> *Air Force Facility Asbestos Management*, AFI 32-1052 (March 22, 1994), available at <http://www.e-publishing.af.mil/pubfiles/af/32/afi32-1052/afi32-1052.pdf>.

<sup>186</sup> *Environmental Compliance Assessment and Management Program (ECAMP)*, AFI 32-7045 (July 1, 1998).

<sup>187</sup> An Environmental Baseline Survey may be required in accordance with *Environmental Baseline Surveys in Real Estate Transactions*, AFI 32-7066 (April 25, 1994).

# ENVIRONMENTAL LAW AND NATIONAL SECURITY: CAN EXISTING EXEMPTIONS IN ENVIRONMENTAL LAWS PRESERVE DOD TRAINING AND OPERATIONAL PREROGATIVES WITHOUT NEW LEGISLATION?

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## I. INTRODUCTION

The Department of Defense (DoD) has become increasingly concerned in recent years about the impacts of growth and environmental requirements on training and operations. Collectively these diverse impacts have come to be known as encroachment.<sup>1</sup>

Examples of encroachment abound and have been extensively reported in the media.<sup>2</sup> The Marines at Camp Pendleton, California are prevented from digging foxholes and are forced to drive vehicles single file through protected habitat.<sup>3</sup> The Air Force at Nellis AFB, Nevada has stopped flying with live ordnance to the South because of the development of extensive housing just off

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<sup>1</sup> DoD defines encroachment as the cumulative result of any and all outside influences that inhibit necessary training and testing. Deputy Under Secretary of Defense (Readiness) Dr. Paul M. Mayberry and Deputy Under Secretary of Defense (Installations and Environment) Mr. Raymond F. DuBois Jr., Testimony to the House Armed Services Committee on Range Encroachment (May 16, 2002) (available at <http://www.defenselink.mil/dodgc/lrs/docs/test02-05-16MayberryDuBois.rtf>) [*hereinafter* Mayberry/DuBois testimony].

<sup>2</sup> See, e.g., George Cahlink, *Green Troops*, GOV'T EXECUTIVE (Oct 2002).

<sup>3</sup> See Jeanette Steele, *CORPS' WAR WITH LAW: Marines say protection of species hurts combat training*, SAN DIEGO UNION-TRIB., Sep. 26, 2002, at A1.

the end of the runway.<sup>4</sup> The Air Force has also restricted operations on the Barry M. Goldwater Range to protect the breeding season and habitat for the endangered sub-species known as the Sonoran Pronghorn.<sup>5</sup> A proposed expansion to the Channel Islands National Marine Sanctuary and a proposed change to sanctuary regulations have threatened to restrict the Air Force's satellite launch operations at Vandenberg AFB, California. The Navy has nearly ceased operation on the Vieques Island ranges in Puerto Rico due to Clean Water Act litigation and political pressure. The Navy also has serious concerns about the impact of its latest sonar on marine mammals.<sup>6</sup> The Army, like all the services, has had to perform expensive "work arounds" to preserve training initiatives. Examples are Fort Bragg, North Carolina, where much has been spent to safeguard the red-cockaded woodpecker<sup>7</sup> and Fort Irwin, California, where protecting the Desert Tortoise<sup>8</sup> has adversely impacted realistic training.

In an effort to combat this encroachment, in the 2002 legislative session, DoD proposed legislation known as the Readiness and Range Preservation Initiative (RRPI).<sup>9</sup> The RRPI came under heavy fire from environmental groups<sup>10</sup> but ultimately resulted only in a narrow exemption from the Migratory Bird Treaty Act, discussed *infra*.

In March of 2003, DoD directed the service secretaries to "develop procedures that will ensure such cases are brought to DoD's attention sufficiently early in the regulatory or judicial process so that the Secretary may act to request (or in the case of the Endangered Species Act, direct) an appropriately tailored exemption before military preparedness is affected."<sup>11</sup> DoD again submitted legislation for the 2003 session<sup>12</sup> and on the 24th of November, President Bush signed the "National Defense Authorization Act of

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<sup>4</sup> United States General Accounting Office Report on Military Training: DoD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges, at p. 11 (June 2002) (available at <http://www.gao.gov/new.items/d02614.pdf>).

<sup>5</sup> Mayberry/Dubois testimony, *supra* note 1 at p. 9.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Linda Kanamine, *Fort Bragg Defense is for the Birds*, USA TODAY, Aug. 10, 1995 at 7A.

<sup>8</sup> *In Mojave, Tortoise and Plant Delay Expansion of Army Base*, N.Y. TIMES, Jan. 1, 2002 at A16.

<sup>9</sup> Mayberry/Dubois testimony, *supra* note 1 at p. 11.

<sup>10</sup> See Eric Pianin, *Bird Nests and Bomb Ranges: Hill Nears Pact to Exempt Pentagon from Law Protecting Species*, WASH. POST, Oct. 23, 2002 at A9.

<sup>11</sup> Memorandum from Deputy Secretary of Defense to THE SERVICE SECRETARIES (Subject: Consideration of Requests for Use of Existing Exemptions Under Federal Environmental Laws) (7 Mar 2003) [on file with authors].

<sup>12</sup> See Eric Pianin, *Environmental Exemptions Sought*, WASH. POST, Mar. 6, 2003 at A21. See also Ariel Sabar, *Pentagon Seeking Environmental Exemptions*, BALTIMORE SUN, Jan. 19, 2003 at A12.

2004”<sup>13</sup> with changes to the Endangered Species Act and the Marine Mammal Protection Act.<sup>14</sup>

While this article will not attempt to present comprehensive solutions to encroachment, it will briefly describe the existing national security exemptions in our environmental laws and give examples of their use. It will also look at common law privileges that might afford DoD some relief.

## II. EXEMPTIONS IN ENVIRONMENTAL LAWS

### A. RCRA (42 U.S.C. §6961(a)): Presidential exemption for one year (additional one year exemption with new determination) – report to Congress required

The Resource Conservation and Recovery Act (RCRA)<sup>15</sup> gives the Environmental Protection Agency (EPA) authority to regulate the treatment, storage, transportation, and disposal of hazardous waste from cradle to grave.<sup>16</sup> EPA has done so with an intricate permitting program that can make compliance complex and burdensome for the regulated entity. Of more importance to this article, however, are the regulatory requirements for biannual inventories of hazardous wastes generated and the requirement for EPA and state inspection of hazardous waste facilities. These requirements often pose the largest concerns for national security at DoD facilities because inspectors need to observe the processes that generate the hazardous wastes and because their reports are public records.

With that backdrop, it is appropriate to explore RCRA’s provision for potential exemption:

The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process

<sup>13</sup> National Defense Authorization Act of 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

<sup>14</sup> Section 318 of the National Defense Authorization Act of 2004 amends § 4(a)(3) of the Endangered Species Act (16 U.S.C. § 1533(a)(3)) to prevent the Secretary of Interior from designating DoD land as critical habitat if the land has a written integrated natural resource management plan under the Sikes Act. It also adds “impact on national security” to the Secretary’s considerations under § 4(b)(2). *Id.* at § 318. Section 319 changes the Marine Mammal Protection Act’s definition of “harassment” for military readiness activities (to be codified at 16 U.S.C. 1362(18)) and adds an exemption provision for actions “necessary for national defense” (to be codified at 16 U.S.C. § 1371). It also addresses incidental takings in military readiness activities. *Id.* at § 319 (to be codified at 16 U.S.C. 1371(a)(5)).

<sup>15</sup> 42 U.S.C. §§ 6901-6992k. RCRA amended the Solid Waste Disposal Act, and one will occasionally see citations to that original law.

<sup>16</sup> See generally 40 C.F.R. §§ 260-268.

and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.<sup>17</sup>

This Presidential exemption to RCRA has rarely been invoked and there has been little litigation concerning it.

An example, however, of such litigation is found in a Department of Energy argument that its Oak Ridge facility should not be required to obtain a RCRA permit. The U.S. District Court for the Eastern District of Tennessee held that the facility must either get a permit or apply for a presidential exemption.<sup>18</sup>

Possibly the most famous invocation of RCRA's presidential exemption occurred with regard to a classified Air Force operating location near Groom Lake, Nevada. That situation began as two cases, *Frost v. Perry*<sup>19</sup> and *Doe v. Browner*.<sup>20</sup> Plaintiffs in the *Browner* case were employees at the site seeking to force the EPA to carry out its mandatory requirements under RCRA. Specifically, they wanted the agency to inspect the location. In *Frost*, a former employee's widow and others brought suit to compel the Air Force to comply with its obligations under RCRA.<sup>21</sup>

To make a very long story short, EPA was granted summary judgment on most of plaintiffs' claims in the *Browner* case because it had already conducted an inspection and received an inventory from the Air Force by the time of trial. The inspection report and the inventory were classified, however, and the court found that this classification conflicted with RCRA's § 3007b public disclosure requirements.<sup>22</sup> The court ordered the EPA Administrator to either declassify the report or seek a presidential exemption.<sup>23</sup>

Before resolution of the case on appeal, EPA sought and received an exemption from President Clinton as follows:

I hereby exempt the Air Force's operating location near Groom Lake, Nevada from any Federal, State, interstate or local provision respecting

<sup>17</sup> 42 U.S.C. § 6961(a).

<sup>18</sup> *Legal Environmental Assistance Foundation, Inc. v. Hodel*, 586 F. Supp. 1163, 1167 (E.D. Tenn., 1984) (finding that DOE's hazardous waste was subject to RCRA and that the agency should seek a presidential exemption for national security if they could not apply for a permit).

<sup>19</sup> 161 F.R.D. 434 (D. Nev. 1995).

<sup>20</sup> 902 F. Supp. 1240 (D. Nev. 1995).

<sup>21</sup> The suit contained eleven claims for relief alleging the Air Force's improper treatment, storage, and disposal of hazardous waste. These included improper burning of hazardous waste.

<sup>22</sup> *Browner*, 902 F. Supp. at 1252. See also 42 U.S.C. § 6927(b)(1) (providing for public availability).

<sup>23</sup> 902 F. Supp. at 1253.

control and abatement of solid waste or hazardous waste disposal that would require the disclosure of classified information concerning that operating location to any unauthorized person. Presidential Determination No. 95-45, 60 Fed. Reg. 52,823 (Oct. 10, 1995).<sup>24</sup>

The Ninth Circuit upheld the exemption in the face of plaintiffs' arguments that the President could only exempt a facility from certain sections of RCRA but could not exempt documents by their status. The Court held that Congress left to the President's discretion what was in "the paramount interest of the United States."<sup>25</sup> That interest was the prevention of disclosure of classified information to unauthorized persons.

The companion case, *Frost*, never reached the merits. The Court ultimately found the plaintiffs would never be able to state a claim because much of the requested discovery was classified.<sup>26</sup> The Air Force was not required to answer plaintiffs' discovery requests because of the state secrets privilege, which will be discussed *infra* under common law exemptions.

**B. CLEAN AIR ACT: Presidential exemption (42 U.S.C. § 7418(b)) for one year if in "the paramount interest of the United States"; hazardous air pollutants exemption (42 U.S.C. § 112(i)(4)); no exemptions for new source performance standards**

#### *I. Refugees to Fort Allen*

The Presidential exemption for Clean Air Act (CAA) requirements has been invoked in one situation involving the relocation of Haitian and Cuban refugees to Fort Allen, Puerto Rico. From April to June 1980, approximately 114,000 refugees entered the United States, and the government was struggling to cope with the problem of overcrowding in refugee camps.<sup>27</sup> As part of the solution, the United States planned to relocate some of the refugees to Fort Allen, a United States Naval Communications Center that was due to be transferred to the Puerto Rico National Guard.<sup>28</sup>

In the summer of 1980, the State<sup>29</sup> and local residents filed suit seeking to stop the transfer of refugees, alleging that the intended relocation violated,

<sup>24</sup> *Kasza v. Browner*, 133 F.3d 1159, 1173 (9<sup>th</sup> Cir. 1998). The President renewed this determination on 28 September 1996 (Presidential Determination 96-54, 61 Fed. Reg. 52679 (1996)) and 26 September 1997 (Presidential Determination 97-35, 62 Fed. Reg. 52647 (1997)). It has been renewed each year since then.

<sup>25</sup> *Kasza*, 133 F.3d at 1173-74.

<sup>26</sup> *Frost v. Perry*, 919 F. Supp. 1459, 1467 (D. Nev. 1995).

<sup>27</sup> *Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1040 (D.P.R. 1981).

<sup>28</sup> *Colon v. Carter*, 507 F. Supp. 1026, 1029 (D.P.R. 1980).

<sup>29</sup> In this section and most laws of the United States, "state" means any of the several states, including the District of Columbia and Puerto Rico. Puerto Rico is referenced here.

among other statutes, the National Environmental Policy Act (NEPA),<sup>30</sup> the Solid Waste Disposal Act (SWDA),<sup>31</sup> and the Clean Water Act (CWA).<sup>32</sup> In response, the President signed Executive Order 12244 exempting "each and every particular emission source located on Fort Allen . . . from compliance with the provisions of the [Clean Air Act]."<sup>33</sup> The Executive Order also exempted Fort Allen from CWA, SWDA and Noise Control Act<sup>34</sup> requirements. The U.S. District Court for the District of Puerto Rico held that the Executive Order was "a valid exercise of Presidential Powers notwithstanding its invocation by a party Defendant after the commencement of this litigation."<sup>35</sup>

It should be noted that with respect to the SWDA exemption, the District Court subsequently reversed its ruling, holding that "the exemption from the Solid Waste Disposal Act . . . is limited in scope and does not encompass the full range of the proven consequences of the refugee activities at Fort Allen."<sup>36</sup> The Court reasoned that because the statutory exemption only exempted solid waste management facilities and because Fort Allen did not have such a facility, requirements relating to solid waste producing activities were not exempt.<sup>37</sup> The District Court's holding was vacated by the First Circuit Court of Appeals because a settlement rendered the ruling moot.<sup>38</sup> However, the District Court's ruling stands as a warning to environmental practitioners that a waiver must be drafted carefully to ensure its scope reflects the underlying statutory authority and encompasses all anticipated activities.

## 2. Other Exemptions in the CAA

In addition to being able to exempt any federal agency from the requirements of the CAA, the President may, "if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting . . . any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States . . . and which are uniquely military in nature."<sup>39</sup> The President must reconsider the need for such regulations at three-year intervals. The President has not invoked this provision.

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<sup>30</sup> 42 U.S.C. §§ 4321-4347.

<sup>31</sup> 42 U.S.C. §§ 6901-6992k.

<sup>32</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

<sup>33</sup> Exec. Order No. 12244, 45 Fed. Reg. 66,443 (1980). President Reagan issued a similar Executive Order a year later, Exec. Order No. 12327, 46 Fed. Reg. 48,893 (1981).

<sup>34</sup> 42 U.S.C. §§ 4901-4918.

<sup>35</sup> *Colon v. Carter*, 507 F. Supp. 1026, 1032 (D.P.R. 1980).

<sup>36</sup> *Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1048 (D.P.R. 1981).

<sup>37</sup> *Id.* at 1048-49.

<sup>38</sup> *Marquez-Colon v. Reagan*, 668 F.2d 611, 614 (1st Cir. 1981).

<sup>39</sup> 42 U.S.C. § 7418(b).

Scattered throughout the text of the CAA are a variety of other provisions that may be used to exempt specific national security activities. For example, CAA section 604(f) allows the President to exempt the use of certain ozone depleting substances if consistent with the Montreal Protocol, if adequate substitutes are not available, and if such use is necessary to protect national security interests.<sup>40</sup> Other national security provisions in the CAA have a similar, narrow focus.<sup>41</sup>

Regulations implementing the CAA also have exemptions related to national security. For example, a conformity determination<sup>42</sup> is not required, generally speaking, for actions in response to emergency situations such as terrorist acts and military mobilizations.<sup>43</sup> Also, tactical vehicles may be granted an exemption from new vehicle standards and diesel fuel standards.<sup>44</sup> Environmental practitioners are encouraged to check applicable CAA regulations for exemptions that may be applicable to the military.

### *3. Including Exemptions in Title V Permits<sup>45</sup>*

For a number of years, the DoD CAA Services Steering Committee (SSC) has recommended that installations with Title V permits seek to include a national security provision in their permits. The national security provision suggested by the CAA SSC exempts emissions that result from surge conditions that are in response to a national security emergency. The Naval Air Weapons Station, China Lake, has a national security provision in its Title V permit. The permit states, in relevant part, that “[w]hen a national security emergency occurs, the resulting surge conditions shall not be considered in determining compliance with permit terms.”<sup>46</sup> The permit states that the Commanding Officer is responsible for determining when a national security emergency exists. However, if the surge condition lasts for longer than 30 days, the Secretary of the Navy must approve continued use of the exemption. Installations should consider including an emergency exemption in their Title V permit if there is likely to be a significant emissions increase due to a national security situation.

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<sup>40</sup> 42 U.S.C. § 7671c(f).

<sup>41</sup> See, e.g., 42 U.S.C. § 7522(b)(1) (EPA may exempt new motor vehicles or engines for reasons of national security); 42 U.S.C. § 7586(g) (facilities selling alternative fuel need not be open to the public due to security concerns); 42 U.S.C. § 7588(e) (vehicles may be exempted from fleet vehicle program based on national security).

<sup>42</sup> 42 U.S.C. § 7506(c).

<sup>43</sup> See 40 C.F.R. § 51.852, 51.853(d), (e).

<sup>44</sup> 40 C.F.R. §§ 85.1708, 80.602.

<sup>45</sup> 42 U.S.C. §§ 7651-7651o. A Title V permit is an operating permit for stationary sources issued pursuant to Title V of the Clean Air Act Amendments of 1990, Pub. L. 101-549, Title V, 104 Stat. 2399, 2635-48 (1990) (codified as amended at 42 U.S.C. 7661).

<sup>46</sup> Great Basin Unified Air Pollution Control District, Permit #:V-1A, general condition 16 [on file with Mr. Leslie H. Reed, Jr., AFLSA/JACE].

#### *4. Requesting Variances from State or Local Air Boards*

Some state or local air regulations contain provisions allowing a person to apply for a variance from regulatory requirements. Although variance procedures are not exclusively for “national security,” they are an alternative that should be considered if mission requirements dictate.

Variance procedures differ from state to state. For example, sections 42350-42362 of the California Health and Safety Code allow a person to apply for a variance from “the rules and regulations of the [air] district.”<sup>47</sup> In order for the variance to be granted, a hearing board must make six findings of fact, including, among others, that the applicant is or will be in violation of a rule, regulation, or order; that, due to conditions beyond the reasonable control of the petitioner, requiring compliance would result in either an arbitrary or unreasonable taking of property or the practical closing of a lawful business; and that during the period of the variance, the petitioner will reduce excess emissions to the maximum extent feasible.<sup>48</sup>

During the 2000-2001 energy crisis in California resulting in rolling blackouts across the State, Onizuka Air Force Station (AFS) sought a variance from a permit limiting the use of its back-up generators. Under Onizuka AFS’s CAA permit, the back-up generators were only allowed to operate for approximately 16 hours during a 12-month period in the event commercial power and natural gas supplies were lost. Faced with the prospect of rolling blackouts and a questionable supply of natural gas, Onizuka AFS applied for a variance to ensure that it would have power to perform its satellite control mission. After a hearing, the Bay Area Air Quality Management District Hearing Board granted the variance.

A note of caution before seeking a state or local variance: although a state may have established variance procedures, the United States Environmental Protection Agency (EPA) does not recognize such procedures as a legitimate way of complying with the CAA. Thus, even though a state may grant a variance, EPA can still take enforcement action for the underlying violation. Therefore, before pursuing a variance, environmental practitioners should be mindful of the risk involved. Air Force practitioners should seek MAJCOM and Air Staff concurrence prior to seeking a variance.

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<sup>47</sup> Cal. Health and Safety Code § 42350(a).

<sup>48</sup> Cal. Health and Safety Code § 42352(a).

**C. ENDANGERED SPECIES ACT: National security exemption (16 U.S.C. 1536 (j)) and Endangered Species Committee review (16 U.S.C. 1536 (e)(2))**

Section 7(a)(2) of the Endangered Species Act (ESA)<sup>49</sup> requires federal agencies to consult with the Fish and Wildlife Service<sup>50</sup> to ensure planned actions are not likely to jeopardize the continued existence of any endangered or threatened species or to result in the destruction or adverse modification of critical habitat.<sup>51</sup> Section 7(j), however, provides a unique national security exemption.<sup>52</sup>

A federal agency, the governor of the state where the action will occur, or any permit or license applicant may apply to the Secretary of Interior, who will consider the exemption request initially. If, in the Secretary's opinion, the action would likely jeopardize species or habitat, the exemption request will be considered by the Endangered Species Committee<sup>53</sup> for final determination.<sup>54</sup> This Committee reviews applications to decide whether to grant an exemption from the requirements of section 7(a)(2).<sup>55</sup>

The Committee employs a high threshold standard for exemptions, specifically: (i) there are no reasonable and prudent alternatives to the agency action; (ii) benefits of the action clearly outweigh the benefits of conserving the species and habitat, and the action is in the public interest; (iii) the action is of regional or national significance; and (iv) there have been no irreversible commitments of resources.<sup>56</sup> Finally, reasonable mitigation and enhancement measures must be established.<sup>57</sup>

Ultimately, the Secretary of Defense (SECDEF) can overcome the Committee standard by directing the Committee to grant an exemption if he

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<sup>49</sup> 16 U.S.C. §1536 (a)(2).

<sup>50</sup> For marine species, one must consult with the National Marine Fisheries Service.

<sup>51</sup> 16 U.S.C. § 1536(a)(2).

<sup>52</sup> 16 U.S.C. § 1536(j).

<sup>53</sup> The Endangered Species Committee is composed of seven members: the Secretaries of Agriculture, the Army, and the Interior (serving as Chairman), as well as the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, the Administrator of the National Oceanic and Atmospheric Administration, and one individual, selected for each hearing by the Secretary of the Interior and appointed by the President, representing the affected state or states. 16 U.S.C. §1536(e)(3).

<sup>54</sup> 16 U.S.C. § 1536 (g)(1).

<sup>55</sup> 16 U.S.C. § 1536 (a)(2). The six standing members of the Committee and one selected by the President for each affected state may hold hearings and secure information to carry out their duties. 16 U.S.C. § 1533.

<sup>56</sup> 16 U.S.C. § 1536 (h)(1)(A).

<sup>57</sup> 16 U.S.C. § 1536 (h)(1)(B).

finds it necessary for reasons of national security.<sup>58</sup> This power has never been exercised, but it appears to be virtually unlimited. "Virtually," because the provision immediately preceding it states that "notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it . . . if the Secretary of State . . . certifies . . . that the granting . . . would be in violation of an international treaty obligation."<sup>59</sup> Neither has this provision ever been tested. Both of these unusual exemption provisions have the "notwithstanding any other provision of this chapter" language.<sup>60</sup> If a situation materializes where the two conflict and SECDEF and the Secretary of State cannot agree, the President will likely have to resolve the conflict.

Though the SECDEF's national security exemption has never been invoked, practitioners seeking to invoke it will benefit from a brief description of the Committee process and the cases considered to date. The ESA was originally passed in 1973 without any provision for the Endangered Species Committee. The statute's lack of flexibility in calling for almost absolute protection of an individual species from extinction resulted in controversy. The controversy arrived in the form of a small non-descript fish that stopped the construction of a dam. The fish, of course, was the snail-darter, and the dam was the Tennessee-Tellico. It was this seemingly irreconcilable conflict between survival of a species and a federal infrastructure project that led Congress in 1978 to add provisions for the cabinet-level Endangered Species Committee (ESC) in an effort to mediate future conflicts between economic and environmental interests.<sup>61</sup>

If at least five of the seven members of the Committee find that the applicable criteria, as specified in the ESA, have been satisfied, an exemption will be granted, the text of which will specify the appropriate mitigation and enhancement measures.<sup>62</sup> This exemption is permanent and irrevocable unless the Secretary of the Interior finds the action will result in the extinction of another species not considered in the exemption application.<sup>63</sup> While removing the absolute inflexibility of the 1973 Act, the ESC utilized a very demanding balancing test in the event of an "irresolvable conflict,"<sup>64</sup> one that was very difficult to satisfy.<sup>65</sup>

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<sup>58</sup> "Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." 16 U.S.C. § 1536 (j).

<sup>59</sup> 16 U.S.C. § 1536(i).

<sup>60</sup> *Id.*

<sup>61</sup> 16 U.S.C. § 1536 (l)(1).

<sup>62</sup> 16 U.S.C. §§ 1536 (h)(1), (h)(1)(B).

<sup>63</sup> 16 U.S.C. § 1536(h)(2)(B)(i).

<sup>64</sup> Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(4), 92 Stat. 3751 (amending 16 U.S.C. § 1532 (1976)).

<sup>65</sup> The Carter Administration conducted comprehensive surveys of Department of the Interior files and determined that, of more than 4500 potential conflicts, only three had been

Shortly after it was formed, the Committee was quickly labeled the "God Squad" or "Extinction Committee." The body first considered exemptions for the Tellico Dam project in Tennessee and then for the Gray Rocks Dam on the Laramie River in Wyoming.<sup>66</sup> In the Gray Rocks Dam case, the Committee granted the exemption; in the Tellico Dam case, it did not.<sup>67</sup> For the Tellico Dam case, the Committee carefully reviewed the evidence and considered the benefits of the dam and the costs associated with obliterating the Little Tennessee River. These costs included eradication of the snail darter and the loss of the riverside way of life. They concluded unanimously that the continued existence of the snail darter outweighed the completion of the Tellico Dam.<sup>68</sup> Rather than exempting the dam outright, Congress amended the ESA in 1978 mandating both the balancing test and the Committee described in the previous paragraph.

In the Gray Rocks case, a dam project in Wyoming threatened whooping cranes in Nebraska. The Committee voted unanimously to grant an exemption, with enforceable mitigation and enhancement measures imposed to reduce the threat to the birds. These measures provided for the establishment of a conservation trust fund to maintain critical habitat, and monitoring of water withdrawals from the dam. To date, that is the only application for exemption that has been fully granted.<sup>69</sup> Thus, from 1978 until 1991, the Committee met twice and granted one exemption.

In 1991, the Secretary of the Interior became involved in another issue that would eventually call the Committee back into session. The question had been smoldering in litigation for years.<sup>70</sup> At issue were 44 proposed Bureau of Land Management (BLM) timber sales in Oregon and the spotted owl that made its home in the trees to be harvested. The issue pitted the timber economy and way of life against the spotted owl and the old-growth ecosystem of the Pacific Northwest in what was largely a battle of biology and politics.

BLM and the Fish and Wildlife Service are both federal agencies under the supervision of the Department of Interior. Although they have separate areas of responsibility, the nature of those responsibilities (land, plants,

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administratively irreconcilable and, in each of these three cases (including Tellico), the federal agency involved had refused to discuss project adjustments that would have alleviated the conflict. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978). See Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences*, 19 U. MICH. J.L. REFORM 805, 828 n.82 (1986) (providing in-depth analysis of Tellico Dam issue).

<sup>66</sup> 16 U.S.C. § 1539 (i)(1) (Supp. III 1979).

<sup>67</sup> See Jared des Rosiers, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825, 845-46 (1991).

<sup>68</sup> GEORGE C. COGGING, CHARLES WILKERSON, & JOHN D. LESSHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 805 (3<sup>rd</sup> ed. 1993).

<sup>69</sup> *Id.* at 806.

<sup>70</sup> For a description of the litigation, see, e.g., John Lowe Weston, *The Endangered Species Committee and the Northern Spotted Owl: Did the "God Squad" Play God?*, 7 ADMIN. L.J. AM. U. 779 (1993).

animals, and the use of land) means their policies are inextricably linked. Early in 1992, as directed by Manuel Lujan, Secretary of the Interior, BLM developed a recovery plan. Several months later, Interior formulated its own somewhat less protective preservation plan. The Fish and Wildlife Service found that the timber sales would "likely jeopardize" the continued existence of the owl.<sup>71</sup>

Secretary Lujan took the issue to the Committee, and on May 14, 1992, in a five to two vote, the Committee granted an exemption for about one-quarter of the BLM timber sales and denied the request for the remainder.<sup>72</sup> Both plans were greeted with little support from either side, and the controversy raged on. This was the last time the Committee officially convened.

#### D. MIGRATORY BIRD TREATY ACT (MBTA)

The Migratory Bird Treaty Act (MBTA)<sup>73</sup> was, until recently, a piece of legislation little known to military practitioners or anyone else. It was passed in 1918 to codify the contents of numerous bilateral and multi-lateral treaties prohibiting the taking of migratory birds.<sup>74</sup> The statute was designed to criminalize common practices that countries had begun to realize were decimating migratory bird populations.<sup>75</sup> The Act provides in pertinent part:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird . . .<sup>76</sup>

Not only is the Act's language extensive but the list of covered species is staggering. Even species such as raptors and cattle egrets—though they don't migrate off the parcel on which they were born—are covered by the Act.

Air Force practitioners initially paid the Act little heed because several different U.S. circuit courts of appeal had held that the federal government was

<sup>71</sup> *Id.* at 808.

<sup>72</sup> *Id.* at 806.

<sup>73</sup> 16 U.S.C. §§ 703-712.

<sup>74</sup> For a list of treaties and species covered, see 50 C.F.R. § 10.13.

<sup>75</sup> Throughout the country in the early 20<sup>th</sup> century, huge muzzle loading guns known as cannons were used to kill hundreds of wild birds with a single shot. This practice is dramatized in James Michener's novel, *Chesapeake*.

<sup>76</sup> 16 U.S.C. § 703.

not subject to the MBTA.<sup>77</sup> Accordingly, the U.S. Fish and Wildlife Service (FWS) ceased giving permits<sup>78</sup> to federal agencies for intentional taking of migratory birds. These intentional takes were of the type undertaken through the Air Force's Bird Air Strike Hazard (BASH) program to rid flightlines of birds dangerous to flying operations when they couldn't be controlled in other ways.<sup>79</sup>

The D.C. Circuit altered the MBTA playing field in July of 2000. In *Humane Society v. Glickman*,<sup>80</sup> the court held that MBTA proscriptions applied to a Department of Agriculture effort to eradicate the nuisance of an exploding population of Canada Geese. This case was a surprise to Government practitioners but at least there were regulations that might allow an installation to get a permit for intentional takes.<sup>81</sup>

The tougher situation involved unintentional takes. For the Air Force, unintentional takes arise in two principal ways: bird deaths on power poles and bird deaths from activities on ranges. In an effort to deal with these situations, President Clinton signed an Executive Order<sup>82</sup> requiring federal agencies to work with FWS to mitigate the negative impact of unintentional takes. It stopped short of requiring permits, however, because FWS had no regulations to grant permits for unintentional takes. Up until that time, they had used their enforcement discretion to avoid the issue when there were insignificant impacts to birds.<sup>83</sup>

The Navy ran afoul of the unintentional take issue in 2002 when the U.S. District Court for the District of Columbia held the Navy was violating the MBTA by unintentionally taking migratory birds while bombing a range in the Farallon de Medinilla islands.<sup>84</sup> In a subsequent case,<sup>85</sup> the Court found it

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<sup>77</sup> See generally, *Newton County Wildlife Ass'n. v. United States*, 113 F.3d 110, 115 (8th Cir. 1997) (concluding that the Forest Service is not a "person" for purposes of the MBTA); *Sierra Club v. Martin*, 110 F.3d 1551 (11<sup>th</sup> Cir. 1997); *Curry v. United States*, 988 F. Supp. 541 (W.D. Penn. 1997).

<sup>78</sup> 50 C.F.R. § 21.

<sup>79</sup> See generally, AFI 32-7064, *Integrated Natural Resource Management* (Aug 1, 1997), ¶ 6.6; AFI 91-202, *USAF Mishap Prevention Program* (Aug 1, 1998); AFPAM 91-212, *Bird Aircraft Strike Hazard (BASH) Mgmt. Techniques* (April 1, 1997). On September 12, 1997, USAF/ILE issued a policy directing installations to, among other things, comply with the treaties, follow the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, and make every effort to use non-lethal means, before intentionally taking any migratory birds. Memorandum from HQ USAF/ILE to ALMAJCOM/SE/CE and USAFA/SE/CE (Subject: Interim Policy on Migratory Bird Treaty Act (MBTA)) (12 Sep 1997) [on file with authors].

<sup>80</sup> 217 F.3d 882 (D.C. Cir. 2000) (dealing with MBTA § 703, not the criminal provisions of § 707).

<sup>81</sup> See 50 C.F.R. § 21.

<sup>82</sup> Exec. Order No. 13,186, 66 Fed. Reg. 3,853 (2001).

<sup>83</sup> *Center for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 168 (D. D.C. 2002), *vacated and remanded as moot*, *Center for Biological Diversity v. England*, No. 02-5163 consolidated with No. 02-5180, 2003 U.S. App. LEXIS 1110 (D.C. Cir. 2003) (upon amendment of the MBTA).

<sup>84</sup> 191 F. Supp. 2d 161 (D. D.C. 2002).

had no choice but to enjoin the Navy (and the Air Force)<sup>86</sup> from using the range. This decision precipitated a Congressional response. Section 315 of the Fiscal Year 2003 Defense Authorization Act<sup>87</sup> makes the MBTA inapplicable to the incidental taking of birds during "military readiness activities"<sup>88</sup> until such time<sup>89</sup> as the Secretary of Interior writes regulations, with the concurrence of SECDEF,<sup>90</sup> exempting "military readiness activities." This legislative initiative was part of a larger package of DoD legislative proposals that will be discussed *infra*.

**E. CLEAN WATER ACT (CWA):<sup>91</sup> Presidential exemption (33 U.S.C. § 1323(a)) for one year if in "the paramount interest of the United States"; exemption may be renewed; not available for new sources subject to national performance standards (33 U.S.C. § 1316) or subject to toxic and pretreatment effluent standards (33 U.S.C. § 1317)**

The President has only invoked this exemption in connection with the relocation of Haitian and Cuban refugees to Fort Allen, Puerto Rico.<sup>92</sup> However, the Supreme Court recognized the validity of the exemption in *Weinberger v. Romero-Barcelo*.<sup>93</sup> In that case, the district court held, in part, that the Navy's release of ordnance into the waters surrounding Vieques Island, Puerto Rico, constituted the discharge of a pollutant without a permit in violation of the CWA.<sup>94</sup> However, the district court refused to enjoin the Navy from further training.

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<sup>85</sup> *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (D. D.C. 2002).

<sup>86</sup> The Air Force submitted evidence to the court that the Air Force used the range about 25% of the time and that 57% of its training ordnance in the Pacific theater was dropped on that range. Air Force Brief, *Center for Biological Diversity v. Pirie* [on file with authors].

<sup>87</sup> Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 315 (2002).

<sup>88</sup> (f) MILITARY READINESS ACTIVITY- (1) In this section the term 'military readiness activity' includes--(A) all training and operations of the Armed Forces that relate to combat; and (B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. (2) The term does not include--(A) the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare, and recreation activities, shops, and mess halls; (B) the operation of industrial activities; or (C) the construction or demolition of facilities used for a purpose described in subparagraph (A) or (B).

*Id.* at § 315(f).

<sup>89</sup> The Act requires regulations not later than one year after enactment. *Id.* at § 315(d)(1).

<sup>90</sup> *Id.* at § 315(d)(2).

<sup>91</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

<sup>92</sup> See *supra* section II. B. (CAA section).

<sup>93</sup> 456 U.S. 305 (1982).

<sup>94</sup> *Id.* at 309.

The Court of Appeals for the First Circuit reversed, holding that the CWA required the court to enjoin the unpermitted discharge.<sup>95</sup> The First Circuit relied, in part, on the availability of the Presidential exemption to support its holding that the district court must issue an injunction, stating that the Navy was free to request a Presidential exemption if the injunction would significantly interfere with the Navy's training.<sup>96</sup>

The Supreme Court reversed and held that the district court had equitable discretion whether to issue an injunction for a CWA violation. In its opinion, the Court explained that the Presidential exemption did not support the conclusion that the district court must enjoin the Navy for an unpermitted discharge. The Court reasoned that the exemption serves a different and complementary purpose from an injunction, specifically "that of permitting noncompliance by federal agencies in extraordinary circumstances."<sup>97</sup>

In *Natural Resources Defense Council v. Watkins*, 954 F.2d 974 (4th Cir. 1992), the Fourth Circuit addressed the Presidential exemption in the CWA. The Court observed that by virtue of the exemption, the "Executive Branch possesses ultimate unilateral authority to prevent any compromise to national security concerns."<sup>98</sup> The Court went on to state that the Supreme Court's *Romero-Barcelo* decision illustrated that the Presidential exemption "could completely isolate a non-complying federal facility from the purview of the courts."<sup>99</sup>

Like the CAA, the CWA allows the President, if he determines it to be in the paramount interest of the United States, to issue regulations exempting from compliance with effluent standards any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States and are uniquely military in nature.<sup>100</sup> The President must reconsider the need for such regulations at three-year intervals. The President has not invoked this provision.

## F. NEPA: Relief from the requirements of the National Environmental Policy Act (NEPA) versus an actual exemption; Administrative Procedure Act (APA) §701 (b)(1)(g)

### 1. NEPA and the APA

NEPA section 102(2)(C) requires federal agencies undertaking major federal actions significantly affecting the quality of the human environment to include a detailed statement by the responsible official on the environmental

<sup>95</sup> *Romero-Barcelo v. Brown*, 643 F.2d 835, 862 (1st Cir. 1981).

<sup>96</sup> *Id.*

<sup>97</sup> *Romero-Barcelo*, 456 U.S. at 318.

<sup>98</sup> *Natural Resources Defense Council v. Watkins*, 954 F.2d 974, 982 (4th Cir. 1992).

<sup>99</sup> *Id.* at 983.

<sup>100</sup> 33 U.S.C. § 1323(a).

effects of the action and potential alternatives to it.<sup>101</sup> The statute does not, however, provide a cause of action to plaintiffs wanting to enforce it against federal agencies. The Administrative Procedure Act (APA) provides that cause of action.

A plaintiff wanting to sue the Government for violating NEPA does so under sections 703 and 704 of the APA.<sup>102</sup> These provide for judicial review of final agency actions for which there is no adequate remedy in a court. Section 706(2)(A) of the APA provides the standard of review. It states in pertinent part that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>103</sup>

The APA, however, has a sort of national security exemption. Section 701(b)(1)(G) excludes from the definition of agency "military authority exercised in the field in time of war or in occupied territory." Courts have interpreted this clause narrowly. Although they are loath to interfere in command relationships<sup>104</sup> or the military's decisions on training and equipping,<sup>105</sup> they have not given military departments much deference when it comes to application of other statutory schemes.<sup>106</sup>

## 2. The CEQ and "Emergency Circumstances"

Outside the APA, NEPA has no other statutory exemption for national security. Rather, the courts and the Council on Environmental Quality (CEQ) have found certain leeway in the language of the statute. As one court stated, "Thus, while Congress hoped to compel the considerations of environmental concerns in significant federal actions, Congress also recognized that 'essential considerations of national policy' could prevent the meticulous application of NEPA."<sup>107</sup> CEQ has indeed promulgated regulations to take emergencies into account. For example, one regulation states:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit

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<sup>101</sup> 42 U.S.C. § 4332(2)(C).

<sup>102</sup> 5 U.S.C. §§ 703-04.

<sup>103</sup> 5 U.S.C. § 706(2)(A).

<sup>104</sup> *Chappell v. Wallace*, 462 U.S. 296 (1983).

<sup>105</sup> *Gilligan v. Morgan*, 413 U.S. 1 (1973).

<sup>106</sup> *See, e.g., Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991) (holding that plaintiffs' challenge to a Health and Human Services rulemaking that allowed the military to use investigational drugs was outside the military authority exception).

<sup>107</sup> *Valley Citizens for a Safe Env't v. Vest*, 22 ELR 20355 (D. Mass. May 6, 1991) *citing* *Kleppe v. Sierra Club*, 427 U.S. 390, 421 (1976) (Marshall, J. dissenting) (because NEPA is a "vaguely worded statute," courts have the responsibility to give meaning to NEPA provisions).

such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.<sup>108</sup>

A case at Westover AFB during Operation Desert Storm tested the emergency circumstance concept. In 1987, Westover Air Force Base issued an Environmental Impact Statement (EIS) to evaluate the likely effects that the presence and operation of C-5 transport aircraft would have on the environment.<sup>109</sup> The EIS provided that no military activity would be routinely scheduled between 10:00 p.m. and 7:00 a.m., but in September 1990, the Air Force began flying on a 24-hour schedule due to events relating to Operation Desert Storm.<sup>110</sup> CEQ determined the situation in the Middle East constituted an emergency within the meaning of its regulations and allowed the Air Force to operate the flights.

Plaintiffs, a group desirous of quiet around the base, challenged CEQ's authority to allow such arrangements in an emergency and the application of the regulation to those circumstances. The court upheld CEQ's authority to both issue emergency regulations and its application to Westover. Notably the court reflected that NEPA requires compliance only "to the fullest extent possible,"<sup>111</sup> indicating an EIS is not mandatory in all circumstances. Further it held that the decision by CEQ and the Air Force to characterize the Westover situation as an emergency was reasonable given the hostile and unpredictable Persian Gulf crisis.<sup>112</sup> It is interesting to note that the parties in Westover never contended that an EIS was essential under all circumstances. The disagreement was over what constituted an emergency sufficient to circumvent the EIS requirement.

### *3. Other Unique Situations, Waivers, and Classified Actions*

In addition to the CEQ emergency exemption, practitioners should look to Air Force guidance on the subject.<sup>113</sup> AFI 32-7061, The Air Force Environmental Impact Analysis Process (EIAP), as promulgated at 32 C.F.R. § 989, recognizes that "unique situations may arise that require [different] EIAP strategies."<sup>114</sup> It cautions, however, that "[t]hese situations may warrant modification of the procedures," but should only be considered when the resulting process "would benefit the Air Force and still comply with NEPA and CEQ regulations."<sup>115</sup>

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<sup>108</sup> 40 C.F.R. § 1506.11.

<sup>109</sup> Valley Citizens, 22 ELR 20355.

<sup>110</sup> *Id.*

<sup>111</sup> 42 U.S.C. § 4332.

<sup>112</sup> Valley Citizens, 22 ELR at 20365.

<sup>113</sup> See also Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979).

<sup>114</sup> 32 C.F.R. § 989.34(a).

<sup>115</sup> *Id.*

A related exception allows for emergency or immediate actions where time does not allow immediate compliance with CEQ regulations.<sup>116</sup> In applying this exception, the courts do not simply permit DoD agencies to bypass NEPA. They will, however, allow a military department to make a decision without going through the public notice and comment portions of the law. An Air Force example of this occurred during the F-15 beddown at Luke AFB in the 1970s. In that case, the Ninth Circuit held that exigencies of national defense required deployment actions prior to a final EIS. In sanctioning such actions, the Court relied on the fact that decision makers had reviewed a completed, though not final, EIS prior to making their decision.<sup>117</sup>

Another case worth noting is *Crosby v. Young*.<sup>118</sup> It stands for the proposition that CEQ has the requisite authority to allow an agency, in this case the Department of Housing and Urban Development, after making alternative arrangements with CEQ, to approve urban development funding before completion of an EIS. The Court found that CEQ had the authority to interpret the provisions of NEPA to accommodate emergency circumstances. Another case involved a fact situation in which Congress mandated a timeline shorter than the time it would take to accomplish an EIS. The Court held that the agency had little choice but to comply with the mandate and that this was an emergency situation.<sup>119</sup>

In addition to emergency provisions, there is a waiver provision in the regulations.<sup>120</sup> These waivers must be approved at the Secretariat level and cannot contravene NEPA or CEQ regulations. The waivers can, however, substitute more suitable procedures than those in the regulations or allow for experimentation in certain situations.<sup>121</sup>

Classified actions get special treatment under Air Force and CEQ rules.<sup>122</sup> In the 1981 case of *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,<sup>123</sup> the Supreme Court upheld the district court's decision concerning classified information. Plaintiffs sued to require the Navy to prepare an EIS for alleged plans to store nuclear weapons in a proposed facility in Hawaii. The Navy had completed an Environmental Assessment for

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<sup>116</sup> 32 C.F.R. § 989.34(b).

<sup>117</sup> *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1218 (9th Cir. 1979).

<sup>118</sup> *Crosby v. Young*, 512 F.Supp. 1363, 1386 (E.D. Mich. 1981).

<sup>119</sup> *Cohen v. Price Commission*, 337 F.Supp. 1236, 1242 (S.D.N.Y. 1972).

<sup>120</sup> In order to deal with unusual circumstances and to allow growth in the NEPA process, SAF/MIQ may grant waivers to those procedures contained in this part not required by NEPA or the CEQ Regulations. Such waivers shall not be used to limit compliance with NEPA or the CEQ Regulations but only to substitute other, more suitable procedures relative to the context of the particular action. Such waivers may also be granted on occasion to allow experimentation in procedures in order to allow growth in the EIAP. This authority may not be delegated. 32 C.F.R. § 989.36.

<sup>121</sup> *Id.*

<sup>122</sup> See 32 C.F.R. § 989.26; 40 C.F.R. § 1507.3(c).

<sup>123</sup> *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

construction of a weapons storage facility. Those documents, however, were classified, as the facility was capable of storing nuclear weapons. The lower court decided that NEPA applied to the Navy's actions, but that given national security provisions and the Navy's own regulations,<sup>124</sup> the Navy had complied with NEPA to the fullest extent possible. The circuit court of appeals disagreed, requiring the agency to prepare and release a hypothetical EIS for the operation of a facility capable of storing nuclear weapons.

The Supreme Court overturned the appeals court decision, finding that a hypothetical EIS was a creature of judicial cloth and not mandated by statute or regulation. The Court acknowledged the twin goals of NEPA: a) ensuring federal agency decisionmaking utilized environmental considerations; and b) informing the public that those environmental matters had been considered, stating these two aims were compatible but not necessarily coextensive.<sup>125</sup> Thus, NEPA contemplates that in a given circumstance a federal agency might have to include environmental considerations in its decisionmaking process, yet withhold public disclosure.<sup>126</sup> The Navy still needed to consider environmental consequences in its evaluative process, even if it was unable to meet NEPA's public disclosure goals due to the classified nature of the material and the exemption found in Freedom of Information Act Exemption 1.<sup>127</sup>

#### 4. NEPA in Summary

In the final analysis, there is no *per se* national security exemption in NEPA. Practitioners need to understand that the APA may disallow NEPA causes of action against the Air Force in certain situations. The regulations also provide some flexibility to NEPA's procedural requirements in certain emergency situations. A careful analysis of the facts will be necessary in each case.

### G. EXEMPTIONS IN OTHER STATUTES

#### 1. *Comprehensive Environmental Response, Compensation, Liability Act (CERCLA)*

The President may issue orders regarding response actions as may be necessary to protect national security. Such orders may include an exemption

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<sup>124</sup> Navy Security Classification Guide for Nuclear Weapons, Navy SWOP 55-1 (1974); Dept. of Navy, OPNAV Instruction 5721.1C (1975).

<sup>125</sup> Weinberger, 454 U.S. at 141.

<sup>126</sup> 42 U.S.C. § 4332 (2)(C).

<sup>127</sup> Weinberger, 454 U.S. at 145. FOIA exemption 1 states: "(b) This section does not apply to matters that are - (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

from CERCLA and the Emergency Planning and Community Right-to-Know Act (EPCRA).<sup>128</sup> (While Congress authorized an exemption from EPCRA, EPCRA, on its face, is not applicable to federal agencies; EPCRA is applicable to federal agencies through Executive Order 13,148.)

### 2. *Toxic Substances Control Act (TSCA)*

The Administrator of the Environmental Protection Agency shall waive compliance with TSCA upon a request and determination by the President that the waiver is necessary in the interest of national defense.<sup>129</sup>

### 3. *Safe Drinking Water Act (SDWA)*

The President may exempt facilities for one year if in "the paramount interest of the United States."<sup>130</sup> Exemption may be renewed.

### 4. *Coastal Zone Management Act (CZMA)*

If a federal court finds that a federal activity is inconsistent with an approved state coastal zone management program, the President may exempt that activity if he determines the activity is in the paramount interest of the United States.<sup>131</sup>

### 5. *Marine Protection, Research, and Sanctuaries Act (MPRSA)*

The MPRSA gives the Secretary of Commerce authority to designate Marine Sanctuaries and to promulgate regulations to protect them.<sup>132</sup> The head of a federal agency may decide not to implement Department of Commerce alternatives regarding agency activities that may injure marine sanctuary resources if the agency head issues a written statement explaining the reasons for such a decision.<sup>133</sup>

### 6. *Sikes Act Exemption*

An installation's Integrated Natural Resource Management Plan (INRMP) may substitute for a critical habitat designation under the ESA.<sup>134</sup> It

<sup>128</sup> 42 U.S.C. § 9620(j); 42 U.S.C. §§ 11,001-11,050.

<sup>129</sup> 15 U.S.C. § 2621.

<sup>130</sup> 42 U.S.C. § 300j-6.

<sup>131</sup> 16 U.S.C. § 1456(c)(1)(B).

<sup>132</sup> 16 U.S.C. § 1439.

<sup>133</sup> 16 U.S.C. § 1434(d)(3).

<sup>134</sup> 16 U.S.C. § 1533(a)(3)(B)(i).

must also provide for “no net loss in the capability of military installation lands to support the military mission of the installation.”<sup>135</sup>

### 7. Emergency Military Construction

In the event of a declaration of war or the declaration by the President of a national emergency, “the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects. . . necessary to support such use of the armed forces.”<sup>136</sup> The President authorized the use of this provision in Executive Order 13,235, November 16, 2001.

## III. COMMON LAW EXEMPTIONS

### A. The State Secrets Privilege

As described *supra* in the RCRA section, the Groom Lake litigation concerning hazardous waste management at a classified operating location was stopped in its tracks by the state secrets privilege.<sup>137</sup> The Ninth Circuit Court of Appeals has described the state secrets privilege as a common law evidentiary privilege allowing the government to deny discovery.<sup>138</sup> Courts should generally try to disentangle sensitive from non-sensitive information,<sup>139</sup> but must remain wary of seemingly innocuous information fitting into a larger mosaic.<sup>140</sup> Once the privilege is invoked, it is absolute, irrespective of plaintiff’s showing of necessity.<sup>141</sup>

The plaintiffs in the Groom Lake litigation argued that RCRA should control over a common law remedy. They argued that RCRA’s presidential exemption represents Congress’ codification of the only national security exemption from the hazardous waste statute.<sup>142</sup> The Court rejected this argument, noting that the privilege has constitutional underpinnings, has been established in the rules of evidence for over two hundred years, and may well be at the head of the list of common law privileges.<sup>143</sup>

The plaintiffs next argued that the state secrets privilege, as asserted by the Air Force in these cases, was overly broad. The privilege was supported by an unclassified declaration signed by Sheila Widnall, Secretary of the Air

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<sup>135</sup> 16 U.S.C. § 6702(b)(1).

<sup>136</sup> 10 U.S.C. § 2808.

<sup>137</sup> See *Kasza v. Browner*, 133 F.3d 1159 (9<sup>th</sup> Cir. 1998).

<sup>138</sup> *Id.* at 1165, note 1 citing *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>139</sup> *Kasza*, 133 F.3d at 1166.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1167.

<sup>143</sup> See *id.* at 1167-68; see also *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978).

Force.<sup>144</sup> Several classified declarations were also filed with the Court for *in camera* review—one from Dr. Widnall and one from the Vice Chief of Staff. The court found all the declarations sufficient and not overly broad. Of note, the unclassified declaration applied the mosaic theory to what it described as “security sensitive environmental data.” As Dr. Widnall stated:

The following are examples of why certain environmental data is sensitive to the national security. Collection of information regarding the air, water, and soil is a classic foreign intelligence practice, because analysis of these samples can result in the identification of military operations and capabilities. The presence of certain chemicals or chemical compounds, either alone or in conjunction with other chemicals and compounds, can reveal military operational capabilities or the nature and scope of classified operations.<sup>145</sup>

Although there are statutory construction arguments against its use,<sup>146</sup> and some commentators argue that its use has been over expanded,<sup>147</sup> the state secrets privilege remains a potent weapon for DoD practitioners to consider when faced with litigation involving classified subject matter.

### B. The Totten Doctrine

Sometimes called a distant relative of the state secrets privilege,<sup>148</sup> the Totten Doctrine is another potential common law tool to use in cases with classified facts. The Doctrine derives its name from the 1875 U.S. Supreme Court case, *Totten Administrator v. United States*.<sup>149</sup> The plaintiff, administrator of William A. Lloyd’s estate, originally sued in the U.S. Court of Claims on behalf of Mr. Lloyd’s heir, Enoch Totten, to recover monies promised to him by secret agreement with the President of the United States. At the beginning of the Civil War, Abraham Lincoln asked that Lloyd spy for the Union. They agreed to payment of \$200 per month.<sup>150</sup> Following the war, Lloyd was paid for his expenses but was denied the salary.

The Court of Claims dismissed the suit on the theory that the President did not have the authority to enter into a contract for secret services on behalf

<sup>144</sup> *Kasza*, 133 F.3d at 1181 (the declaration is reprinted at the end of the case).

<sup>145</sup> *Id.* at 1182.

<sup>146</sup> See Jonathon Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000).

<sup>147</sup> J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 584-85 (1994) (asserting that the privilege was only used five times between 1951 and 1970 while it has been invoked more than 50 times since 1971).

<sup>148</sup> See e.g., Sean C. Flynn, *The Totten Doctrine and its Poisoned Progeny*, 25 VT. L. REV. 793 (2001).

<sup>149</sup> 92 U.S. 105 (1875).

<sup>150</sup> *Id.* at 106.

of the United States. The Supreme Court upheld the dismissal on other grounds. The Court held simply that contracts for secret services needed to be kept secret forever—that “[b]oth employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter.”<sup>151</sup>

The case has been used as authority over the years to dismiss lawsuits whose subject matter dealt with contracts for secret services. It has arguably expanded in recent years to cover other non-contract cases involving secrets.<sup>152</sup> The Doctrine has the potential to be even more powerful than the state secrets privilege because it requires immediate dismissal of the case without the *in camera* review or disentanglement of the non-sensitive items.

#### IV. CONCLUSION – EXISTING EXEMPTIONS ARE NOT ENOUGH

The foregoing brief description of national security exemptions from the various environmental laws is a starting point for practitioners looking to preserve an operational or training mission in the face of irreconcilable environmental requirements and to comply with DoD policy. While the exemptions have been rarely used, this appears to be changing. Although DoD might be able to take greater advantage of these exemptions from time to time, the bottom line is that we must be able to train the way we fight, and we must be able to operate to defend the country and its interests. Individual pieces of this day-to-day training are difficult to quantify in absolute national security terms.

Most of the exemptions described above are narrow and conceived for limited or one-time uses. In other words, the “work-arounds” described at the beginning of this paper are one-time exemptions that might be acceptable for an individual training mission; however, the aggregate result of having to employ these exemptions on a case-by-case basis might be “death by a thousand cuts.” The death in question being the totality of realistic training for the military. In the final analysis training and operations are on-going needs—not an emergency or an exception.

Although existing exemptions are a valuable hedge against unexpected future emergencies, they cannot provide the legal basis for the Nation’s everyday military readiness activities. . .

The Defense Department believes that it is unacceptable as a matter of public

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<sup>151</sup> *Id.*

<sup>152</sup> See Flynn *supra* note 148.

policy for indispensable readiness activities to be unlawful under our environmental laws **absent repeated invocation** of emergency authority—particularly when **narrow clarifications of the underlying regulatory statutes** would enable us both to conduct essential activities and protect the environment.<sup>153</sup>

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<sup>153</sup> Mayberry/Dubois testimony, *supra* note 1 at p. 26.

# THE RECEIPT, NEGOTIATION AND RESOLUTION OF ENVIRONMENTAL ENFORCEMENT ACTIONS

MAJOR F. SCOTT RISLEY\*

## I. INTRODUCTION

Every major environmental statute designates one or more federal agencies to administer and enforce the requirements established in the statute and implementing regulations.<sup>1</sup> Most statutes designate the U.S. Environmental Protection Agency (EPA) and also allow states to enforce requirements established under EPA's delegated program.<sup>2</sup> Regulatory agencies inspect facilities to evaluate compliance and, when the regulator determines that a violation has occurred, it has the discretion to issue an enforcement action. Such enforcement actions not only specify the offending act or omission, but usually outline the criteria under which the violation may be cured, and frequently assess penalties.<sup>3</sup>

The consequences of an enforcement action may be far-reaching for the installation, Air Force, and the Department of Defense because it may set precedent concerning the resolution of similar enforcement actions, impact funding and resources, influence public perception of military activities, affect ongoing or future litigation, and provide a basis for the regulator to impose a greater fine for future violations. Consequently, it is essential that installation environmental attorneys be involved with all aspects of each enforcement action and coordinate, as appropriate, with the Major Command (MAJCOM)

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<sup>1</sup> See, e.g., 16 U.S.C. 1540(e) (Endangered Species Act: Secretary of the Interior, Secretary of Commerce, Secretary of Agriculture, Secretary of the Treasury, Secretary of the Department in which the Coast Guard is operating, or all such Secretaries).

<sup>2</sup> See, e.g., 15 U.S.C. § 2684 (Toxic Substances Control Act: EPA Administrator and State enforcement of lead-based paint training and certification requirements and lead hazard pamphlet); 42 U.S.C. § 7413 (Clean Air Act: EPA Administrator and State enforcement of the State Implementation Plan); 33 U.S.C. § 1319 (Clean Water Act: EPA Administrator and State enforcement of permits). In contrast to these examples, there is no provision permitting state enforcement of the requirements established in the Endangered Species Act. See 16 U.S.C. §§ 1531 - 1544.

<sup>3</sup> For example, see the EPA's enforcement and compliance policies and guidance at: <http://www.epa.gov/compliance/resources/policies/index.html>.

and Regional Counsel Offices (RCOs).<sup>4</sup> The environmental attorneys must work closely with the installation organizations—usually the Civil Engineering Squadron—to appropriately and timely respond to all enforcement actions. This article provides basic information covering the management of enforcement actions from their receipt to closure.

## II. RECEIVING AN ENFORCEMENT ACTION

Appropriate reporting of and responding to enforcement actions requires environmental attorneys to understand the various notifications that constitute an enforcement action. This first section examines what is and is not an environmental enforcement action, addresses two particularly thorny issues related thereto, and reviews enforcement action reporting requirements.

### A. What Constitutes an Enforcement Action

Air Force Instruction (AFI) 32-7047, *Environmental Compliance Tracking and Reporting*,<sup>5</sup> defines an Enforcement Action (EA)<sup>6</sup> as “[a]ny written notice from a federal, state, district, county or municipal regulatory agency indicating one or more violations of environmental statutes or regulations including warning letters, notices of violation or noncompliance, administrative orders, and consent orders.”<sup>7</sup> An EA must be in writing. Oral communications do not constitute EAs. An EA must be issued under the auspices of a governmental body that has the authority to enforce environmental requirements within its jurisdiction. Finally, an EA must assert that the acts or omissions of the Air Force have violated one or more provisions of a codification of environmental requirements that the EA’s issuer has authority to enforce. From a due process perspective, the EA must put the Air Force on notice of the alleged violation with sufficient specificity to allow the Air Force to ascertain its possible culpability and formulate a response.

There is no universally recognized nomenclature for these notifications of environmental violations. The AFI provides several examples: “warning letters, notices of violation or noncompliance, administrative orders, and

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<sup>4</sup> The MAJCOM and Regional attorneys will coordinate, as appropriate, with the Air Force Legal Services Agency, Environmental Law and Litigation Division (AFLSA/JACE).

<sup>5</sup> AFI 32-7047, *Compliance Tracking and Reporting* (March 31, 1994).

<sup>6</sup> It is unfortunate that within the immense universe of possible two-letter acronyms, the Air Force chose one that has long been identified with the National Environmental Policy Act. “EA” as used in this article and in the source documents from which this article is derived, including AFI 32-7047, is in no way related to a NEPA Environmental Assessment, which also uses the acronym “EA.”

<sup>7</sup> AFI 32-7047, Attachment 1. Having been issued on 31 March 1994, AFI 32-7047 is in the process of being rewritten, and this will undoubtedly result in a new definition of an environmental enforcement action.

consent orders.” This list is not exhaustive, but is merely representative of some of the most commonly-used captions.

Notably, AFI 32-7047 places no qualifiers on the intended recipient. Within the very broad parameters of reasonableness, an EA can be addressed to most anyone in a position of responsibility at the alleged offending facility. Such recipients could include, but are not limited to, the wing commander, the staff judge advocate, the base civil engineer, or even the superintendent of an installation’s waste-water treatment plant or the manager of its haz-mat pharmacy.

### *1. No Harm, No Foul, No NOV? No Way!*

There are constant attempts by those who are regulated to constrict what does and does not constitute an EA. The most common reoccurring example is the wishful belief that if the violation the EA addresses is remedied within a prescribed period of time (such as same month, same day, or before the written notification is received), it is not really an EA. When an inspection is conducted, the resultant EA is frequently not issued for several days, weeks, or even months. For minor violations, this time lag often allows sufficient opportunity for the facility to return to compliance within a short time after, or perhaps even before, the EA is issued. This “no harm, no foul, no NOV” approach often results in the erroneous conclusion that there has been no violation. Regardless of when a facility is returned to compliance, an EA is still an EA if it meets the above-discussed AFI 32-7047 criteria.

### *2. “Parking Tickets”*

Just as the regulated community likes to narrowly construe EAs, regulators often cast as broad an EA net as possible, issuing a loosely defined category of EAs often referred to as “parking tickets.” For example, during a multi-media inspection at one Air Force base, the inspector produced a pre-printed pad with “Notice of Violation” emblazoned in large letters across the top, under which a laundry list of commonly violated regulatory provisions were enumerated. Before leaving the facility, the inspector had issued 15 of these “NOVs,” most of which were cured before the ink in the check-marked columns or his signature at the bottom of the page had even dried. Nevertheless, employing a strict application of AFI 32-7047’s definition, these “speeding tickets” qualified as EAs. They were a written communication from a state regulator indicating one or more violations of a specified environmental regulation.

Not all EAs are created equal. Whether the EA covers a minor violation with no costs associated therewith, or addresses many major violations and assesses a penalty in the millions of dollars, it is still an EA and must be reported.

## B. Reporting Requirements

Once an EA is identified, the reporting requirements are quite simple: all EAs must be reported. "All" includes those EAs citing violations the installation cured before the EA was issued. "All" entails no-cost "parking tickets," and "all" encompasses major facility infrastructure defects that will necessitate costly modifications. Now that it is clear *what* must be reported, this begs the question, "Report to *whom, when?*"

AFI 32-7047, and AFI 51-301, *Civil Litigation*,<sup>8</sup> are unequivocal in this regard.<sup>9</sup> It is incumbent upon the base-level legal office to report all EAs to their MAJCOM, their Regional Counsel Office, and the Air Force Legal Services Agency's Environmental Law and Litigation Division (JACE). Initial contact should be made by the most immediate means practicable, e.g., fax or e-mail, followed by a more detailed communication as such details become available. This would include either a faxed or e-mail-transmitted, scanned copy of the EA itself, and any background information available, as well as the installation's response to the regulator once it is available.

Reporting an EA is not a concession that the recipient agrees with the EA's factual basis or concurs with its legal validity. Such disagreement or non-concurrence does not relieve the recipient of its reporting obligations. Similarly, the fact that the civil engineering community may be reporting an EA through its channels does not satisfy the legal community's obligation to report that same EA through legal channels.<sup>10</sup>

It is not for academic or mere bean counting purposes that JACE tracks EAs. JACE's objective is to track EAs the way the respective regulators track them; it is the regulators' "score" which serves as the benchmark for the penalty calculation matrix, of which past compliance history is a significant component. Being cognizant of an installation's compliance and enforcement history is essential to our role in protecting the mission and protecting Air Force commanders from environmental fines and litigation.

Relatively recently, an Air Force attorney attended an NOV settlement negotiation armed with what he thought were *the facts* only to learn that the regulator had a record of several open EAs at that particular base of which the attorney was unaware. This not only threw the attorney off guard and totally undermined his negotiating position, but the number of open NOVs placed the Air Force into the next higher level of the regulator's penalty matrix based on

<sup>8</sup> AFI 51-301, *Civil Litigation*, ¶ 5.1 (July 1, 2002).

<sup>9</sup> See AFI 32-7047, ¶6; AFI 51-301, ¶ 5.1

<sup>10</sup> This difference in the CE and JA objectives in tracking EAs accounts for why there has frequently been a discrepancy in the number of open EAs the respective organizations are tracking at any given time. In times past, CE has been inclined to stop tracking an EA once it has remedied the underlying cause of an EA, whereas JA continues to track an EA until JA receives written confirmation from the regulator that the EA is closed.

the base's recalcitrant past performance. Such a costly discrepancy between how many EAs a regulator is tracking and how many the Air Force is tracking is most often attributable to our failure to properly identify and subsequently report EAs. In any event, reporting EAs to higher headquarters should not be viewed negatively; such coordination makes it possible to bring to bear the joint expertise of both the MAJCOM and JACE in the zealous representation of the Air Force.

### III. NEGOTIATING AND SETTLING ENFORCEMENT ACTIONS

The Air Force goal is always to be in compliance and thereby avoid EAs altogether. Regrettably, this ideal is far removed from the real world in which the Air Force and the regulators must co-exist. Once the Air Force is aware that it is out of compliance, whether by self-discovery or action by a regulator, the goal is to return to compliance as soon as is practicable. When the Air Force is made aware that it is out of compliance by way of an EA, the Air Force must not only return to compliance but must also resolve, or "close," the EA.

Several years ago, HQ USAF/CEV issued a policy memorandum stating that "the Air Force shall comply with the [Open Enforcement Action] closure definitions in DoDI [Department of Defense Instruction] 4715.6, *Environmental Compliance* ... This preempts paragraph 6.6 of AFI 32-7047, *Compliance Tracking and Reporting*."<sup>11</sup> DoDI 4715.6, Enclosure 3, ¶ E3.1, defines a Closed Enforcement Action as:

An enforcement action that is resolved by one of the following:

- E3.1.1. Revocation of the action by the imposing regulator;
- E3.1.2. Closure of the action following written notice by the regulator that the action is closed;
- E3.1.3. Closure of the action, after a reasonable time span, following written notice to the regulator of intent to close an enforcement action; or
- E3.1.4. Receipt of a signed compliance agreement or order.<sup>12</sup>

With these criteria as a backdrop, this section addresses the following aspects of the resolution/closure process: drafting a written initial response, sovereign immunity and fee/tax analyses as potential EA defenses, and EA settlement/closure coordination.

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<sup>11</sup> HQ USAF/CEV [now ILEV], Policy Memorandum on Open Enforcement Actions (12 Aug 96) (on file with AFLSA/JACE).

<sup>12</sup> DODI 4715.6, *Environmental Compliance*, Enclosure 3, ¶ E3.1 (April 24, 1996).

## A. Drafting a Written Reply

The first step in resolving an EA is to formally reply in writing to the EA. Immediately after receiving an EA, the environmental attorney must thoroughly review the document and determine answers to the following questions:

- Who issued the enforcement action (e.g., U.S. EPA, U.S. Department of Labor, state or local regulatory agency, etc.)?
- What are the alleged violations?
- What laws or regulations were allegedly violated?
- When did the violations occur? Are the violations ongoing?
- What, if any, action has been taken to address the alleged violations?
- What response and/or action does the regulator require? (e.g., payment of penalties, submission of a management plan, sampling, etc.)?
- When is the initial response due?
- What other response options does the Air Force have (e.g., request an informal meeting or hearing)?
- Has the enforcement action been reported to the MAJCOM and/or the RCO?
- Who at the installation and within the Air Force must coordinate on the response?
- What is the Air Force's analysis and position, and what is the best way to respond?

Answering these basic questions will greatly facilitate preparing an EA response.

An initial written reply is the appropriate response to any EA, including those seemingly trivial EAs one would rather not dignify with a response. A prompt, accurate and professional response to an errant EA often results in the regulator withdrawing or revoking it. The next worst thing to ignoring an EA is to provide an irresponsible, unreasoned, or hostile response. Firm, but professional, is the best guideline for tone. (If the response asserts that the installation either has never been out of compliance or has returned to compliance, the response should request that the regulator acknowledge this, and specifically request written confirmation that the EA has been closed.)

Timeliness is also of great importance. Invariably, an EA will state a time within which its recipient must respond, such as ten days, or 30 days, from its receipt. Though perhaps slightly better than an irresponsible reply or no reply at all, an untimely response should be avoided if at all possible, and when such avoidance is not possible, an extension should be requested.

Finally, a signed and dated copy of any EA response should be provided to JACE. Some, if not most, MAJCOMs may also require that an installation coordinate on all EA responses. Even if not mandated, MAJCOM and RCO coordination is always advisable: they are in a better position to identify trends and to ensure that similar issues, both inside and outside the regulator's jurisdiction, are addressed similarly.

### **B. Sovereign Immunity Analysis**

As to the substantive aspect of an EA response, the analysis begins with a determination as to whether or not the government has waived sovereign immunity in the area of law addressed by the EA. The federal government is only required to comply with federal, state, interstate and local environmental laws when Congress has waived the federal government's sovereign immunity and has subjected itself to those specific laws. Even if sovereign immunity has been waived for a particular environmental activity, the federal government is not authorized to pay fines (also called penalties) unless the waiver of sovereign immunity specifically requires such payment.<sup>13</sup> Thus, the attorney may need to consider whether a waiver exists in relation to specific aspects of the enforcement action. For example, a state may seek to enforce its laws requiring registration of a storage tank and payment of an annual registration fee, or a county may seek permit renewal fees. As with the environmental activity and fines/penalties, there must be a specific waiver of sovereign immunity allowing the federal government to pay such environmental fees.

### **C. Fee/Tax Analysis**

Even if sovereign immunity has been waived, the federal government is prohibited from paying a fee if the fee is actually an illegal tax in disguise. The test to determine whether a fee is legitimate or is really an illegal tax masquerading as a fee was established in the 1978 Supreme Court case, *Massachusetts v. United States*,<sup>14</sup> in which the State challenged a federally imposed fee. Under the *Massachusetts* test, charges are payable if they:

- Do not discriminate against [federal] functions:

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<sup>13</sup> *Dept. of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (stating that "any waiver of the National Government's sovereign immunity must be unequivocal ... 'and not enlarge[d] ... beyond what the language requires'"(citations omitted)).

<sup>14</sup> 435 U.S. 444 (1978).

- Are based on a fair approximation of use of the system; and
- Are structured to produce revenues that will not exceed the total cost to the [state] government of the benefits to be supplied.<sup>15</sup>

Official DoD guidance appears to incorporate the *Massachusetts* test. Specifically, DODI 4715.6, *Environmental Compliance* (24 Apr 96), states that it is DoD policy to pay reasonable fees or service charges to state and local governments for compliance costs or activities except where such fees are:

- Discriminatory in either application or effect;
- Used for a service denied to a federal agency;
- Assessed under a statute in which federal sovereign immunity has not been unambiguously waived;
- Disproportionate to the intended service or use; or
- Determined to be a state or local tax.<sup>16</sup>

If the installation determines that an environmental fee cannot be paid, it must forward its analysis to the MAJCOM for a final decision. Prior to refusing payment, Air Force policy requires the MAJCOM to coordinate with JACE, SAF/GCN<sup>17</sup> and SAF/TEE.<sup>18</sup> The policy applies to the refusal to pay fees based on a fee/tax analysis; it does not prohibit local disputes concerning the amount of the fee.<sup>19</sup>

#### D. Settlement/Closure Coordination

The formality required to resolve an EA varies with the regulator and the magnitude and severity of the violations the EA addresses. Some of the "speeding ticket" varieties of EAs have a "closed" or "returned to compliance" column in which its issuer can place his or her initials and the date. The vast majority of EAs, however, are resolved by a progression of written and oral negotiations over a period of time. A few EAs result in litigation. As noted

<sup>15</sup> *Id.* at 466-67.

<sup>16</sup> DODI 4715.6, ¶ 4.7.

<sup>17</sup> SAF/GCN is the Secretary of the Air Force General Counsel's Office, Deputy General Counsel for Installations and Environment.

<sup>18</sup> SAF/MIQ Memorandum, *Environmental Fee/Tax Policy - ACTION MEMORANDUM* (Nov. 17, 1989) (SAF/MIQ was redesignated as SAF/TEE; SAF/IEE is the Undersecretary of the Air Force for Installations and Environment and Logistics, Deputy Assistant Secretary for Environmental Safety and Occupational Health) (on file with AFLSA/JACE).

<sup>19</sup> *See id.*

above, the fourth method DoDI 4715.6 provides for resolving an EA is by way “of a signed compliance agreement or order.” Whether such an agreement or order must be executed to close out an EA will depend, once again, on the jurisdiction and the nature of the alleged violations.

Of primary importance is the fact that JACE coordination is required for all payments of environmental fines, penalties, or supplemental environmental projects, as well as their underlying settlement agreements.<sup>20</sup> Furthermore, some fines, penalties and their settlements, such as those involving Clean Air Act violations within the Ninth Circuit, must be coordinated with the Department of Justice. These requirements do not exist because Air Force environmental attorneys in the field are incapable of expert settlement draftsmanship, nor because higher headquarters is merely engaged in bureaucratic meddling. On the contrary, this “[c]entralized control is essential to ensure that the Air Force is not harmed by agreements that set bad precedent or are inconsistent with Air Force-wide policies.”<sup>21</sup>

#### IV. DOCUMENTING ENFORCEMENT ACTION CLOSURE

The second leading cause of discrepancies between the number of EAs a regulator is tracking and how many the Air Force is tracking is that regulators' records often indicate particular EAs are open when Air Force records show them as closed. This is not problematic provided an Air Force attorney can produce a document from the file proving a particular EA was in fact closed on a specific date. There is a continuum, or sliding scale of proof, that an EA has been resolved. Proof ranges from the strongest evidence of closure (e.g., an original, signed and dated letter from the regulator on its letterhead, stating that the EA recipient is in compliance and the EA is closed) to evidence so weak that it is virtually worthless (e.g., an Air Force-generated memo-for-record pseudo-documenting a series of oral transactions that ultimately points to an unnamed bureaucrat of dubious authority employed somewhere in the bowels of one of the regulator's unidentified field offices). To increase the likelihood that Air Force closure documents fall near the strongest-evidence end of the spectrum, this section will address the preferred mechanisms for documenting an EA's closure.

##### A. Obtain Regulator's Written Confirmation

As stated earlier, the Air Force does not recognize “oral” EAs, and, understandably, no self-respecting regulator will accept “oral affirmation” from an EA recipient that it has returned to compliance. Similarly, the Air

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<sup>20</sup> See TJAG Special Subject Letter 2001-4: Reporting Environmental Enforcement Actions (28 Mar 01) (on file with AFLSA/JACE).

<sup>21</sup> JACE, Coordination and Settlement of Notices of Violation Memo (12 May 97) (on file with AFLSA/JACE).

Force does not accept "oral confirmation" that an EA is closed. Getting something in writing (an e-mail message is better than nothing) takes relatively little time and prevents future confusion or misstatements about how long the EA was open and whether, and when, the Air Force complied with all requirements necessary to close it.

Some regulators, without prompting, will routinely provide the EA recipient with written acknowledgement that the installation is in compliance in regard to the EA's subject matter, and that the EA is closed. Regrettably, some regulators fail to conform to this most basic form of commercial or regulatory etiquette. If a regulator will not automatically provide documentation of an EA's closure, the installation should make a written request to the regulator asking for written confirmation of the EA's closure. As a matter of practice, this is usually done in one of the last paragraphs of the EA response, but it can be in a separate letter.

Regulator responses to such requests vary greatly. Some regulators generate a standard form letter, while others are much less formal. In reply to its request for written confirmation of EA closure, a base recently received a copy of the NOV from the regulator with a hand-written annotation scrawled across the bottom, "Closed," the day's date, and the signature of the regulator's agent. Regardless of the degree of closure documentation formality, the Air Force needs whatever it is that the regulator has in its files to show the EA is closed.

#### **B. Declare Constructive Closure**

If a written request for affirmative confirmation of EA closure is ignored, it may be necessary to send the regulator written notice of "constructive closure." This is usually done via a registered-mail, return-receipt-requested letter stating something to the effect that the installation considers itself to be in compliance as of a specific date, and that due to the regulator's failure to honor the installation's request for closure confirmation, the installation deems the clearly-identified EA closed unless it is contacted by the regulator within 60 days of its receipt of the installation's letter. If the regulator disagrees with the installation's determination and contacts it within the specified time, then the resolution process continues. If the installation is not contacted by the regulator by the 61st day after the green, return-receipt-requested postcard indicates the regulator signed for the letter, the installation will close the EA and memorialize it with a brief MFR to which a copy of the letter and a copy of the return-receipt-requested postcard are attached.

#### **V. CONCLUSION**

EAs are merely a mechanism by which regulators evaluate compliance with environmental laws and regulations and note violations by those they

regulate. As a regulated community, the Air Force must track EAs in the same manner as the regulator, or, at a minimum, be cognizant of the differences in the respective tracking systems so that the Air Force knows what data its regulators are recording. If a regulator characterizes a written communication as an EA, the Air Force is best served by considering it an EA until the matters in question can be resolved, one way or another. If in doubt, report. There are no documented cases of anyone being reprovved for erring on the side of caution. Regrettably, there are numerous instances of EAs which have gone unidentified, and therefore, unreported, often to the detriment of the Air Force.

Though "zero tolerance" for violations resulting in NOVs remains the official Air Force policy, until this ideal becomes a reality, the next best thing to not receiving an EA for environmental violations is to resolve them as expeditiously as possible. The first step in doing so is the submission of a professionally prepared, well-reasoned response. In some instances, resolution entails entering into some sort of agreement or order. When that occurs, higher-headquarters coordination is imperative. For all EAs resolved by something other than a written agreement or order, documenting the EA's closure is of vital importance. This will best protect the Air Force in future disputes with regulators by having a record that clearly indicates the issuance, resolution, and closure of all EAs.

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# LEAD-BASED PAINT ACTIVITIES IN MILITARY FAMILY HOUSING

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## I. INTRODUCTION

Lead-based paint issues affect virtually every military installation. Within the last several years, lead-based paint (LBP) has received a great deal of attention within the Department of Defense (DoD), with significant changes in 1999 and 2001 to several regulations governing LBP and LBP hazards in residential housing. Consequently, this article is intended to provide the major statutory and regulatory requirements as well as some DoD and service-specific policies to assist DoD attorneys with addressing LBP issues in military family housing (MFH). The intent is to consolidate the main requirements into one document that will serve as a useful reference. The primary statutes and regulations focus on housing because lead poses the most danger to children; hence, this article focuses on housing and does not cover non-residential structures.

As the focus of this article is on LBP requirements and policies, the background in Part II, which explains health risks and relevant statutes governing lead, will be brief. Part III provides an overview of LBP legislation and implementing regulations, with detailed coverage of the important regulatory developments since 1999. This part also defines key terms and LBP activities. Part IV highlights LBP issues in the historic building context. Part V addresses applicability of the main regulations to three types of transactions involving DoD MFH: occupancy of MFH, the transfer/sale of DoD residential property, and privatization of DoD residential property. This section also highlights Air Force efforts to develop LBP policy and guidance.

## II. BACKGROUND<sup>1</sup>

From 1900 through the 1940's, lead was a primary ingredient in many oil-based house paints.<sup>2</sup> Lead-based paint has been used on all types of

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<sup>1</sup> For extensive and detailed information about the sources and effects of lead, see Centers for Disease Control and Prevention, Preventing Lead Poisoning in Young Children (1991), at <http://wonder.cdc.gov/wonder/prevguid/p0000029/p0000029.asp>. The CDC Childhood Lead Poisoning Prevention Program can be accessed at <http://www.cdc.gov/nceh/lead/lead.htm>.

surfaces, but was used more often on exterior surfaces than on interior surfaces, and more frequently on trim, windows, and doors than on walls and ceilings.”<sup>3</sup>

After 1940, lead-free latex paints became popular, resulting in decreased use of LBPs through the 1950’s and 1960’s.<sup>4</sup> Thus, the use of LBP in housing was highest prior to 1960.<sup>5</sup>

In 1978, the United States Consumer Product Safety Commission (CPSC) completely banned LBPs from residential use.<sup>6</sup> The LBP applied many years ago, however, remains potentially hazardous because lead does not decompose.<sup>7</sup>

The sources of lead in the environment are numerous, including “leaded gasoline, lead in pipes and plumbing fixtures, lead from industrial emissions, lead-soldered cans, leaded crystal, and some improperly fired pottery with lead-based glaze.”<sup>8</sup> Other sources of lead poisoning are related to hobbies (making stained-glass windows), work (recycling or making automobile batteries), drinking water (lead pipes, solder, brass fixtures, and valves), and home health remedies (arzacón and greta, which are used for upset stomach or indigestion; pay-loo-ah, which is used for rash or fever).<sup>9</sup>

While the removal of lead from sources (e.g., gasoline and food canning) has reduced population blood lead levels by more than 80 percent, nearly one million children have excessive blood lead levels.<sup>10</sup> The three major sources of lead exposure to children are LBP, lead-contaminated soil and dust, and drinking water.<sup>11</sup> Of these three sources, the most common way

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<sup>2</sup> Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9063, 9065-9066 (Mar. 6, 1996) (final rule) [hereinafter Lead; Requirements for Disclosure].

<sup>3</sup> Thomas J. Miceli, Katherine A. Pancak & C.F. Sirmans, *Protecting Children From Lead-Based Paint Poisoning: Should Landlords Bear the Burden?*, 23 B.C. ENVTL. AFF. L. REV. 1, 4 (Fall 1995).

<sup>4</sup> Lead; Requirements for Disclosure, *supra* note 2, at 9066.

<sup>5</sup> Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 64 Fed. Reg. 50,139, 50,141 (Sep. 15, 1999) (final rule) [hereinafter Requirements for Notification].

<sup>6</sup> *Id.* HUD’s 1999 regulation continued the prohibition against the use of new paint containing more than 0.06 percent by weight of lead in federally owned or assisted housing. This provision has been in HUD regulations since the late 1970’s and was based on the CPSC’s 1977 regulation at 16 C.F.R. pt. 1303. *Id.* at 50,166.

<sup>7</sup> Miceli *et al.*, *supra* note 3, at 3.

<sup>8</sup> *Id.*

<sup>9</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, NAT’L CTR. FOR ENVTL. HEALTH FACT SHEET, CHILDHOOD LEAD POISONING, at <http://www.cdc.gov/nceh/lead/factsheets/childhoodlead.htm>.

<sup>10</sup> Requirements for Notification, *supra* note 5, at 50,141.

<sup>11</sup> PROACT, TI#16487, LEAD-BASED PAINT BACKGROUND SECTION (Jan. 1998), available at <http://www.afcee.brooks.af.mil/pro-act/fact/jan98.asp> [hereinafter PROACT, TI#16487].

young children become lead poisoned is through exposure to lead in dust<sup>12</sup> from LBP in housing.<sup>13</sup>

Approximately 75% of the nation's housing stock built before 1978 contains some LBP.<sup>14</sup> This paint poses little risk when it is properly maintained and managed.<sup>15</sup> It becomes a hazard, however, when it flakes and/or contaminates soil or dust.<sup>16</sup> Children, in particular, are susceptible to lead poisoning through inhalation of lead dust, ingestion of dust by putting a hand or other object covered with lead dust in their mouths; or eating paint chips or soil containing lead.<sup>17</sup> For adults, the major source of lead exposure is from maintenance, renovation, abatement work, and corrosion control of items coated with LBP.<sup>18</sup>

Once in the body, lead can cause serious adverse health effects. In adults, lead can cause reproductive problems, high blood pressure, digestive problems, nerve disorders, memory and concentration problems, and muscle and joint pain.<sup>19</sup> Children are at greater risk than adults because their brains and nervous systems are more sensitive, and their bodies absorb more lead.<sup>20</sup> Adverse effects to children include damage to the brain and nervous system, behavior and learning problems (e.g., hyperactivity), slowed growth, hearing problems, and headaches.<sup>21</sup>

### III. LEGISLATIVE AND REGULATORY OVERVIEW<sup>22</sup>

#### A. The Overlapping Regulation of Lead

Congress reacted to the dangers of lead by creating an overlapping regulatory scheme. While the primary statute addressing LBP is the Toxic Substances Control Act (TSCA),<sup>23</sup> other statutes also regulate lead. For

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<sup>12</sup> HUD, HUD's 'Lead-Safe Housing Rule,' at <http://www.hud.gov/offices/lead/leadsaferule/index.cfm> [HUD's 'Lead-Safe Housing Rule'].

<sup>13</sup> *Id.*

<sup>14</sup> EPA, EPA-747-F-96-002, EPA AND HUD MOVE TO PROTECT CHILDREN FROM LEAD-BASED PAINT POISONING; DISCLOSURE OF LEAD-BASED PAINT HAZARDS IN HOUSING (Mar. 1996, rev. Dec. 96), available at <http://www.epa.gov/lead/fs-discl.pdf> [hereinafter EPA FACT SHEET].

<sup>15</sup> *Id.*

<sup>16</sup> See Lead; Requirements for Disclosure, *supra* note 2, at 9066.

<sup>17</sup> EPA, EPA-747-K-99-001, Protect your Family From Lead in Your Home, p. 2 (Sep. 2001), available at <http://www.epa.gov/opptintr/lead/leadpdf.pdf> [hereinafter EPA-747-K-99-001].

<sup>18</sup> PROACT, TI#16487, *supra* note 11.

<sup>19</sup> EPA-747-K-99-001, *supra* note 17, at 3.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 3; Housing and Community Development Act of 1992, Pub. L. No. 102-550 § 1002(2), 106 Stat. 3672.

<sup>22</sup> For a detailed history of LBP legislation, see Thomas F. Zimmerman, *The Regulation of Lead-Based Paint in Air Force Housing*, 44 A.F. L. REV. 169 (1998).

<sup>23</sup> Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (subchapter IV – Lead Exposure Reduction).

example, lead is a criteria pollutant under the Clean Air Act;<sup>24</sup> a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act of 1980;<sup>25</sup> and a substance with reportable quantities under the Emergency Planning and Community Right-to-Know Act.<sup>26</sup> It is also a hazardous waste under the Resource Conservation and Recovery Act.<sup>27</sup> While there are several statutes that address lead, this article focuses on those that relate to LBP requirements for residential housing.

As will be seen, LBP legislation generally assigns LBP regulation to the U.S. Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD). HUD provides requirements concerning the activities that are required in target housing<sup>28</sup> (e.g., inspection and abatement); EPA defines the lead levels that constitute a LBP hazard and specifies how LBP activities are to be conducted (e.g., by properly trained individuals); and HUD and EPA jointly develop requirements governing the disclosure of LBP and/or LBP hazards.

Currently, the main statutory requirements concerning LBP are in three locations: (1) the Lead-Based Paint Poisoning Prevention Act (LPPPA) in Chapter 63 of Title 42, United States Code (42 U.S.C. § 4821 *et seq.*); (2) subchapter IV of TSCA (15 U.S.C. §§ 2681 – 2692); and (3) Chapter 63A of Title 42, United States Code. Chapter 63A contains those provisions of the Residential Lead-Based Paint Hazard Reduction Act (RLBPHRA) that were

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<sup>24</sup> The Clean Air Act required EPA to set National Ambient Air Quality Standards (NAAQS) for air pollutants at levels deemed necessary to protect the public health with an adequate margin of safety. 42 U.S.C. § 7409. The EPA set NAAQS for six principal pollutants (called “criteria” pollutants), including lead. 40 C.F.R. §§ 50.4-50.12 (sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide and lead).

<sup>25</sup> CERCLA requires the Administrator to designate as hazardous substances those substances which may present a substantial danger to the public health or welfare of the environment when released into the environment. 42 U.S.C. § 9602. Lead is designated a hazardous substance. 40 C.F.R. §§ 302.4, tbl. 302.4. For a detailed discussion concerning CERCLA and the regulation of LBP, see Zimmerman, *supra* note 22, at 199-216.

<sup>26</sup> The person in charge of a vessel or facility must immediately notify the National Response Center as soon as he or she has knowledge of any non-federally permitted release of a hazardous substance in a quantity equal to or exceeding the reportable quantity. 42 U.S.C. § 11004; 40 C.F.R. § 302.6.

<sup>27</sup> 42 U.S.C. §§ 6901-6992k; 40 C.F.R. § 261.24 (listing concentration of lead for toxicity characteristic). For a detailed discussion concerning the regulation of LBP waste under RCRA, see Zimmerman, *supra* note 22, at 186-199. If faced with an issue concerning the disposal of LBP waste from MFH, environmental attorneys should be aware of EPA’s recent rule that provides an additional disposal option for residential LBP waste. Specifically, the rule expressly allows residential LBP waste that is exempted from the hazardous waste management requirements as household waste to be disposed of in construction and demolition landfills. Criteria for Classification of Solid Waste Disposal Facilities and Practices and Criteria for Municipal Solid Waste Landfills: Disposal of Residential Lead-Based Paint Waste, 68 Fed. Reg. 36,487 (June 18, 2003) (final rule).

<sup>28</sup> For a definition of “target housing,” see *infra* text accompanying note 38.

not incorporated into the LPPPA or added to TSCA.<sup>29</sup> The development of federal LBP laws are summarized in the following chronology.

1. *Passage of the Lead-Based Paint Poisoning Prevention Act (LPPPA)*<sup>30</sup>

In 1971, Congress first addressed residential LBP with the Lead-Based Paint Poisoning Prevention Act (LPPPA).<sup>31</sup> In this Act, Congress banned the use of LBP in residential structures constructed or rehabilitated by the federal government.<sup>32</sup> Amendments in 1973, 1976, 1978 and 1988 added various requirements applicable to federally assisted<sup>33</sup> and federally owned housing.<sup>34</sup>

2. *Passage of the Residential Lead-Based Paint Hazard Reduction Act (RLBPHRA or Title X)*<sup>35</sup>

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act (RLBPHRA). The RLBPHRA is Title X of the Housing and Community Development Act of 1992, 42 U.S.C. § 4851 *et seq.*, and is often referred to as "Title X." As previously indicated, various provisions of Title X were incorporated into the LPPPA and TSCA. Those remaining are codified in Title 42 of the United States Code, Chapter 63A.

Title X significantly changed the LBP requirements for housing.<sup>36</sup> These requirements apply to *target housing*, which means

any housing constructed prior to 1978, excluding two types of housing: (1) housing for the elderly or persons with disabilities, unless a child who is less

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<sup>29</sup> See Residential Lead-Based Paint Hazard Reduction Act, Pub. L. No. 102-550, 106 Stat. 3672 (1992).

<sup>30</sup> Lead-Based Paint Poisoning Prevention Act, Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified at 42 U.S.C. § 4801, *et seq.*).

<sup>31</sup> *Id.*

<sup>32</sup> Pub. L. No. 91-695 § 401, 84 Stat. 2078, 2079 (1971) (codified at 42 U.S.C. § 4831(b)). The statute also prohibited the application of LBP to any cooking utensil, drinking utensil, or eating utensil manufactured and distributed after January 13, 1971. 42 U.S.C. § 4831(a). The Consumer Product Safety Commission was required to impose conditions to prohibit the application of LBP to toys and furniture. 42 U.S.C. § 4831(c).

<sup>33</sup> "Housing receiving Federal assistance means housing which is covered by an application for HUD mortgage insurance, receives housing assistance payments under a program administered by HUD, or otherwise receives more than \$5,000 in project-based assistance under a Federal housing program administered by an agency other than HUD." 24 C.F.R. § 35.110. "Project-based rental assistance means Federal rental assistance that is tied to a residential property with a specific location and remains with that particular location throughout the term of the assistance." *Id.*

<sup>34</sup> See Zimmerman, *supra* note 22, at 199-216 for an overview of these LPPPA amendments.

<sup>35</sup> Residential Lead-Based Paint Hazard Reduction Act, Pub. L. No. 102-550, 106 Stat. 3672 (1992).

<sup>36</sup> *Id.*

than six years of age resides or is expected to reside<sup>37</sup> in such housing; and  
(2) any zero-bedroom dwelling.<sup>38</sup>

One of the underlying principles of Title X was shifting the focus of public and private sector decision makers from the mere presence of LBP to the presence of LBP hazards.<sup>39</sup> The term "LBP hazard" encompasses LBP and all residential lead-containing dusts and soils -- regardless of the source of the lead -- which, due to their condition and location, would adversely affect human health.<sup>40</sup>

#### a. Inspection Requirements

Title X amended the LPPPA and TSCA. The LPPPA was amended to require the HUD Secretary (Secretary) to establish procedures mandating an inspection for the presence of LBP prior to federally-funded renovation likely to disturb painted surfaces.<sup>41</sup> The Secretary also was required to establish procedures mandating the inspection and abatement of LBP hazards in all federally owned target housing constructed prior to 1960, and an inspection for LBP and LBP hazards in all federally owned target housing constructed between 1960 and 1978.<sup>42</sup> The term "federally owned housing" is defined to include residential dwellings owned or managed by a federal agency, which includes DoD.<sup>43</sup>

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<sup>37</sup> "Expected to reside" means there is actual knowledge that a child will reside in a dwelling unit reserved for the elderly or designated exclusively for persons with disabilities. 24 C.F.R. § 35.110.

<sup>38</sup> Pub. L. No. 102-550 § 1004(27), 106 Stat. 3672 (1992); 42 U.S.C. § 4851b. "Zero-bedroom dwelling means any residential dwelling in which the living areas are not separated from the sleeping area. The term includes efficiencies, studio apartment, dormitory or single room occupancy housing, military barracks, and rentals of individual rooms in residential dwellings. . . ." 24 C.F.R. § 35.110.

<sup>39</sup> Lead, Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1205, 1207 (Jan. 5, 2001) (EPA's final rule establishing lead hazard standards).

<sup>40</sup> *Id.* See the definition of *LBP hazard* in section III-B-2-A.

<sup>41</sup> Pub. L. No. 102-550 § 1012(a)(3)(C), 106 Stat. 3672 (1992) (amending section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4822).

<sup>42</sup> *Id.* § 1013 (amending section 302(a) of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4822(a)).

<sup>43</sup> "The term 'federally owned housing' means residential dwellings owned or managed by a Federal agency, or for which a Federal agency is a trustee or conservator. For the purpose of this paragraph, the term "Federal agency" includes the Department of Housing and Urban Development, . . . the Department of Defense, the Department of Veterans Affairs, . . . and any other Federal agency." *Id.* § 1004; 42 U.S.C. § 4851b (8).

### *b. Informational Disclosure Requirements*

New requirements in Title X established LBP information disclosure requirements. Specifically, Congress required the EPA Administrator (Administrator) in consultation with the Secretary, to publish and periodically revise a lead hazard information pamphlet.<sup>44</sup> In addition, the Administrator was required to implement regulations requiring paid renovators to provide a lead hazard information pamphlet to owners/occupants of housing to be renovated.<sup>45</sup> The Secretary was required to establish procedures for provision of lead hazard information pamphlets to target housing purchasers and tenants.<sup>46</sup> The provision of these latter pamphlets was to precede any contract obligation of the potential purchaser or tenant in accordance with regulations to be jointly developed by the Secretary and the Administrator.<sup>47</sup>

### *c. Lead Exposure Reduction*

In Title X, Congress substantially amended TSCA by adding a new title to address LBP: "Title IV – Lead Exposure Reduction."<sup>48</sup> In addition to the information disclosures above, the statute requires the Administrator to, *inter alia*,

- 1) Promulgate regulations governing LBP activities to ensure that individuals engaged in LBP activities are properly trained, contractors engaged in LBP activities are certified, and training programs are accredited;<sup>49</sup>
- 2) Promulgate regulations for the renovation and remodeling of target housing, public buildings constructed before 1978, and commercial buildings;<sup>50</sup>
- 3) Promulgate regulations that identify LBP hazards, lead-contaminated dust, and lead-contaminated soil;<sup>51</sup>
- 4) Establish a program to certify laboratories as qualified to test substances for lead content;<sup>52</sup>

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<sup>44</sup> Pub. L. No. 102-550 § 1021(a), 106 Stat. 3672, 3920 (1992) (adding TSCA § 406(a), 15 U.S.C. § 2686(a)).

<sup>45</sup> *Id.* (adding TSCA § 406(b), 15 U.S.C. § 2686(b)).

<sup>46</sup> *Id.* § 1012(a)(3)(A) (amending section 302 of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. § 4822(a)).

<sup>47</sup> *Id.* § 1018 (codified at 42 U.S.C. § 4852d).

<sup>48</sup> *Id.* § 1021 (amending 15 U.S.C. § 2601, *et seq.*).

<sup>49</sup> 15 U.S.C. § 2682(a).

<sup>50</sup> 15 U.S.C. § 2682(c). Initially, TSCA required the Administrator only to promulgate guidelines for the conduct of renovation and remodeling activities. 15 U.S.C. § 2682(c)(1). By October 28, 1996, however, the Administrator was required to revise its regulations to address renovation and remodeling activities. 15 U.S.C. § 2682(c)(2).

<sup>51</sup> 15 U.S.C. § 2683.

*d. Waiver of Sovereign Immunity and State Programs*

*(1) Waiver of Sovereign Immunity*

Prior to the passage of Title X, TSCA did not have any waivers of sovereign immunity. The new Title IV addressing LBP included a waiver of sovereign immunity specifically concerning LBP activities. This is the only waiver of sovereign immunity within TSCA. It requires the federal government to comply with all federal, state, interstate, and local requirements, both substantive and procedural, respecting LBP, LBP activities, and LBP hazards, to the same extent as any nongovernmental entity.<sup>53</sup> The waiver specifically includes reasonable service charges as well as all administrative orders and punitive civil and administrative penalties and fines.<sup>54</sup> Because of this extremely broad waiver and the wide range of state programs,<sup>55</sup> DoD attorneys must determine the existence and applicability of a state's LBP program when advising on LBP issues.

*(2) State LBP Programs*

States can obtain authorization to administer and enforce the EPA's LBP regulatory requirements in two areas: (1) the training of individuals,

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<sup>52</sup> 15 U.S.C. § 2685(b).

<sup>53</sup> 15 U.S.C. § 2688. Here is the waiver in majority part:

Each department, agency, and instrumentality of executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in a lead-based paint hazard, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for certification, licensing, recordkeeping, or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) respecting lead-based paint, lead-based paint activities, and lead-based paint hazards in the same manner, and to the same extent, as any nongovernmental entity is subject to such requirements, including the payment of reasonable service charges. The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines regardless of whether such penalties or fines are punitive or coercive in nature, or whether imposed for isolated, intermittent or continuing violations . . . .

15 U.S.C. § 2688.

<sup>54</sup> *Id.*

<sup>55</sup> For a more detailed discussion of sovereign immunity and the range of state lead-based paint programs, see Zimmerman, *supra* note 22, at 216-225.

accreditation of training programs, and certification of contractors;<sup>56</sup> and (2) the publication of a lead hazard information pamphlet.<sup>57</sup> States must certify that their program is at least as protective of human health and the environment as the federal program and provides adequate enforcement.<sup>58</sup> With one exception, states and their political subdivisions may impose more stringent requirements than those imposed in TSCA Subchapter IV.<sup>59</sup> The exception is that states and local governments cannot establish any requirement, prohibition, or standard relating to the lead content in paints that differs from the standards in the LPPPA and its implementing regulations.<sup>60</sup>

Although there are no provisions allowing states to administer and enforce HUD's LBP disclosure requirements, HUD regulations state that nothing in its regulations "shall relieve a seller, lessor, or agent from any responsibility for compliance with State or local laws, ordinances, codes, or regulations governing notice or disclosure of known lead-based paint and/or lead-based paint hazards."<sup>61</sup> For the requirements concerning the evaluation and reduction LBP hazards, the final rule states, "If the requirements of this rule for a dwelling unit or residential property differ from those of the State, tribal or local government, the more protective requirement applies."<sup>62</sup> In sum, participants in any government housing program covered by HUD's regulations must comply with state, tribal or local law, ordinance, code or regulations governing LBP evaluation and hazard reduction.<sup>63</sup> If HUD determines that such state or local requirements provide for evaluation or hazard reduction in a manner providing comparable protection from LBP hazards to that provided by HUD's regulatory requirements, then HUD may modify or waive some or all HUD requirements in a manner that will promote efficiency.<sup>64</sup>

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<sup>56</sup> 15 U.S.C. § 2684(a); e.g., Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities, State of Mississippi Authorization of Lead-Based Paint Activities Program, 68 Fed. Reg. 27,557-559 (May 20, 2003) (final approval).

<sup>57</sup> 15 U.S.C. § 2684(a). The scope of an authorized state program is limited to the requirements established under section 2682 ("Lead-based paint activities training and certification") and/or section 2686 ("Lead hazard information pamphlet"). See 15 U.S.C. §§ 2682, 2684(a), 2686.

<sup>58</sup> 15 U.S.C. §§ 2684(a), (b).

<sup>59</sup> *Id.* § 2684(c).

<sup>60</sup> 42 U.S.C. § 4846.

<sup>61</sup> Impact on state and local requirements, 24 C.F.R. § 35.98.

<sup>62</sup> Requirements for Notification, *supra* note 5, at 50,145.

<sup>63</sup> 24 C.F.R. § 35.150(a).

<sup>64</sup> *Id.* § 35.150(b). HUD regulations also permit a state, tribal or local law, ordinance, code or regulation to define lead-based paint differently than the Federal definition, and for the more protective definition (i.e., the lower level) to be followed in that state, tribal or local jurisdiction. 24 C.F.R. § 35.150(b). However, this statement appears to be at odds with the statutory provision making null and void all state and local definitions of LBP which differ from the federal definition. 42 U.S.C. § 4831(d) [Subpar. (d) does not appear in 4831--MWI].

### (3) *Relationship of Sovereign Immunity Waiver and State Programs*

A major issue concerning a state's enforcement authority is whether that state must have a program authorized by EPA in order to have the authority to enforce its state requirements against DoD. Of course, there must first be a waiver of sovereign immunity covering the activity and entity in question. This issue is particularly important when addressing LBP activities because the scope of LBP activities for which there is a waiver of sovereign immunity (discussed above in section III-A-2-d-(1)) is broader than the LBP activities for which a state can have an authorized program (discussed above in section III-A-2-d-(2)).

There are two positions on the issue. One position is that even when the waiver of sovereign immunity requires DoD to comply with state and local requirements, the state must have an authorized program in order to have enforcement authority against DoD. The second position is that an authorized program is not a prerequisite, and the waiver of sovereign immunity is sufficient to allow a state to enforce its requirements.

The basic argument underlying this second position is that the waiver of sovereign immunity and the authorization for state programs should be read separately because the waiver of sovereign immunity does not link compliance with the state and local requirements to an authorized state program.<sup>65</sup> Consequently, DoD must comply with state and local requirements concerning lead-based paint, lead-based paint activities, and lead-based paint hazards to the same extent as any nongovernmental entity is subject to such requirements—even if the state does not have an authorized program. Authorization from the EPA, however, gives a state the authority to administer and enforce its requirements against DoD in lieu of the corresponding federal program.<sup>66</sup> Without such authorization, the state can still enforce its own requirements. The failure to comply with federal or state requirements could result in the imposition of fines or penalties since the waiver unambiguously allows such consequences.<sup>67</sup> As DoD's LBP guidelines for the disposal of DoD residential real property provide--

TSCA (15 U.S.C. 2688) contains a waiver of sovereign immunity for state and local laws relating to lead-based paint and lead-based paint activities. Most states now have authorized programs under 40 CFR Part 745, Subpart Q, defining training and certification requirements for inspectors, risk assessors, and abatement contractors involved in lead-based paint activities. Authorized programs may include standards for lead-based paint that may be more stringent than current federal regulations, the proposed TSCA 403 rule standards, or Field Guide requirements. States may also have specific testing and disposal requirements for lead-based paint waste and debris

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<sup>65</sup> See 15 U.S.C. §§ 2684, 2688.

<sup>66</sup> See *id.* § 2684.

<sup>67</sup> *Id.* § 2688.

generated during abatement and demolition activities. Lead-based paint evaluation and abatement activities and disposal of lead-based paint debris must comply with promulgated state requirements.<sup>68</sup>

The interplay between a provision authorizing state programs and the waiver of sovereign immunity requires further research and analysis. At this time, there appear to be no legal decisions that address this issue “on point.” Until there is certainty on this issue, installation environmental attorneys faced with a state enforcement action against DoD for LBP activities should carefully review the state’s enforcement authority and forward any questions to the appropriate MAJCOM and/or Regional Environmental Office.

## B. Regulatory Overview

As required by TSCA, both the EPA and HUD promulgated regulations covering LBP activities conducted by individuals, contractors and laboratories. In addition, HUD promulgated regulations covering the evaluation and reduction of LBP hazards, as required by Title X.<sup>69</sup> The key regulations are in Title 24 and Title 40 of the Code of Federal Regulations (for HUD and EPA, respectively). The most significant additions and changes to the regulations occurred in 1996, 1998, 1999 and 2001.

This section lists and discusses the major regulations affecting federally owned housing by the type of requirement and/or activity; the applicability of these major regulations to DoD is discussed *infra* in Part V.

### 1. Disclosure of LBP and LBP Hazards (Subpart A)<sup>70</sup>

In 1996, the EPA and HUD jointly established regulations requiring persons selling or leasing target housing to disclose known LBP and/or LBP hazards:<sup>71</sup> identical language was placed in the EPA and HUD regulations (40 C.F.R. Part 745, subpart F and 24 C.F.R. Part 35, subpart H, respectively). The disclosure rules do not require sellers or landlords to test or remove LBP, and it does not invalidate leases and sales contracts.<sup>72</sup> Before a contract for sale or lease is ratified, they do require—

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<sup>68</sup> DEP’T OF DEF., LEAD-BASED PAINT GUIDELINES FOR DISPOSAL OF DEPARTMENT OF DEFENSE RESIDENTIAL REAL PROPERTY – A FIELD GUIDE, p. 6 (Dec. 1999) (State and Local Laws), available at <http://www.dtic.mil/envirodod/Policies/BRAC/LeadPaintFieldGuide.pdf> [hereinafter DoD Field Guide].

<sup>69</sup> See *supra* notes 41-43 and accompanying text.

<sup>70</sup> For an overview of the disclosure rule, see EPA Fact Sheet, *supra* note 14.

<sup>71</sup> Lead; Requirements for Disclosure, *supra* note 2. This final rule was issued under the authority of section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4852d.

<sup>72</sup> EPA Fact Sheet, *supra* note 14.

- a) Sellers and lessors (landlords) to provide the purchaser or lessee with the EPA, CPSC<sup>73</sup> and HUD jointly-developed pamphlet entitled *Protect Your Family From Lead in Your Home* or an equivalent pamphlet that EPA has approved for use in a particular State;<sup>74</sup>
- b) Sellers and lessors to disclose known LBP and LBP hazards to purchasers or lessees (renters);<sup>75</sup>
- c) Sellers and lessors to provide the purchaser or lessee with relevant records or reports concerning LBP and LBP hazards in the housing;<sup>76</sup> and
- d) Sellers to give purchasers a 10-day period to conduct an inspection or risk assessment before the purchaser is obligated under a contract to purchase target housing.<sup>77</sup>

While the disclosure rules generally apply to all transactions to sell or lease target housing, including subleases, they do not apply to (1) sales of target housing at foreclosure; (2) leases of target housing found to be LBP-free by a certified inspector; (3) short-term leases of 100 days or less, where no lease renewal or extension can occur; and (4) renewals of existing leases in target housing in which the lessor has previously disclosed all required information and where the lessor does not have any new information about the presence of LBP and/or LBP hazards.<sup>78</sup>

In 1999, HUD significantly changed Part 35 ("Lead-Based Paint Poisoning Prevention in Certain Residential Structures") of its Title 24 regulations.<sup>79</sup> The text of the 1996 disclosure rule that was in subpart H, however, remained unchanged. It was merely moved and redesignated as subpart A--its current location.<sup>80</sup> The EPA regulations governing the disclosure of LBP and LBP hazards remained unchanged.

<sup>73</sup> See *supra* note 7 and accompanying text.

<sup>74</sup> *Id.* at 9083, 9087 (currently codified at 24 C.F.R. § 35.88(a)(1); 40 C.F.R. § 745.107(a)(1)); EPA-747-K-99-001, *supra* note 17, at 2.

<sup>75</sup> Lead; Requirements for Disclosure, *supra* note 2, at 9084, 9087 (codified at 24 C.F.R. § 35.88(a)(2); 40 C.F.R. § 745.107(a)(2)).

<sup>76</sup> *Id.* at 9083-9084, 9087 (codified at 24 C.F.R. § 35.88(a)(4); 40 C.F.R. § 745.107(a)(4)).

<sup>77</sup> *Id.* at 9084, 9087 (codified at 24 C.F.R. § 35.90; 40 C.F.R. § 745.110).

<sup>78</sup> Scope and Applicability, 24 C.F.R. § 35.82.

<sup>79</sup> Requirements for Notification, *supra* note 5.

<sup>80</sup> *Id.* at 50,201 (codified at 24 C.F.R. §§ 35.80-35.98).

## 2. Evaluation and Reduction of LBP Hazards

HUD's 1999 final rule mentioned in the above paragraph implemented the requirements of the LPPPA, as amended by sections 1012 and 1013 of Title X.<sup>81</sup> Since Title X provided a new, sweeping approach to addressing LBP poisoning, HUD needed to change comprehensively its LBP regulations.<sup>82</sup> Thus, this final rule revised subparts B through G and added subparts H through R (with E and N-Q reserved).<sup>83</sup>

Within these subparts, HUD set hazard reduction requirements more strongly emphasizing the reduction of lead in dust.<sup>84</sup> This rule also consolidated HUD's LBP requirements for all federal programs in one part of Title 24 of the Code of Federal Regulations while eliminating redundancy and achieving consistency among the LBP requirements for different HUD programs.<sup>85</sup> The requirements were based on the latest knowledge of lead poisoning causation and the technologies and practices to evaluate and reduce LBP hazards.<sup>86</sup>

Only four of the subparts apply to federally owned housing: subpart A (information disclosure) discussed *supra* and subparts B, C, and R. Following a definitional outline of terms that DoD attorneys should be familiar with, subparts B, C, and R are summarized immediately below. They are more substantively discussed *infra* in Part V.

### a. Definitions

The terms below are those that DoD attorneys are likely to encounter. Their definitions are quoted from 24 C.F.R. § 35.110 (subpart B).

*Abatement* means any set of measures designed to permanently eliminate LBP or LBP hazards [where *permanent* means an expected design life of at least 20 years]. Abatement includes:

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<sup>81</sup> *Id.* at 50,140. This final rule implements sections 1012 and 1013 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672. Section 1012 covered the evaluation and reduction of LBP hazards in federally assisted housing; section 1013 covered the disposition of federally owned housing. The provision prohibiting certain methods of paint removal listed in 24 C.F.R. § 35.140 (e.g., open flame burning or torching; machine sanding or grinding without a high-efficiency particulate air (HEPA) local exhaust control; abrasive blasting or sandblasting without HEPA local exhaust control; and most dry sanding or dry scraping) was effective on November 15, 1999. All other provisions of the rule were effective on September 15, 2000.

<sup>82</sup> *Id.* at 50,142.

<sup>83</sup> *Id.* at 50,201.

<sup>84</sup> HUD's 'Lead-Safe Housing Rule', *supra* note 12. Consequently, one new requirement is for dust to be tested after paint is disturbed. *Id.*

<sup>85</sup> Requirements for Notification, *supra* note 5, at 50,140 and 50,142.

<sup>86</sup> *Id.* at 50,142.

- (1) The removal of LBP and dust-lead hazards, the permanent enclosure or encapsulation of LBP, the replacement of components or fixtures painted with LBP, and the removal or permanent covering of soil-lead hazards; and
- (2) All preparation, cleanup, disposal, and post abatement clearance testing activities associated with such measures.

*Certified* means licensed or certified to perform such activities as risk assessment, LBP inspection, or abatement supervision, either by a State or Indian tribe with a LBP certification program authorized by the EPA.

*Chewable surface* means an interior or exterior surface painted with LBP that a young child can mouth or chew. A chewable surface is the same as an "accessible surface" as defined in 42 U.S.C. § 4851b(2).

*Deteriorated paint* means any interior or exterior paint or other coating that is peeling, chipping, chalking or cracking, or any paint or coating located on an interior or exterior surface or fixture that is otherwise damaged or separated from the substrate.

*Encapsulation* means the application of a covering or coating that acts as a barrier between the LBP and the environment and that relies for its durability on adhesion between the encapsulant and the painted surface, and on the integrity of the existing bonds between paint layers and between the paint and the substrate.

*Enclosure* means the use of rigid, durable construction materials that are mechanically fastened to the substrate in order to act as a barrier between LBP and the environment.

*Evaluation* means a risk assessment, a lead hazard screen, a LBP inspection, paint testing, or a combination of these to determine the presence of LBP hazards or LBP.

*Friction surface* means an interior or exterior surface that is subject to abrasion or friction, including, but not limited to, certain window, floor, and stair surfaces.

*Hazard reduction* means measures designed to reduce or eliminate human exposure to LBP hazards through methods including interim controls or abatement or a combination of the two.

*Impact surface* means an interior or exterior surface that is subject to damage by repeated sudden force, such as certain parts of door frames.

*Interim controls* means a set of measures designed to reduce temporarily human exposure or likely exposure to LBP hazards. Interim controls include, but are not limited to, repairs, painting, temporary containment, specialized cleaning, clearance, ongoing LBP maintenance activities, and the establishment and operation of management and resident education programs.

*Lead-based paint* means paint or other surface coatings that contain lead equal to or exceeding 1.0 milligram per square centimeter or 0.5 percent by weight or 5,000 parts per million (ppm) by weight.

*Lead-based paint hazard* means any condition that causes exposure to lead from dust-lead hazards,<sup>87</sup> soil-lead hazards,<sup>88</sup> or LBP that is deteriorated or present in chewable surfaces, friction surfaces, or impact surfaces, and that would result in adverse human health effects.

*Lead-based paint inspection* means a surface-by-surface investigation to determine the presence of LBP and the provision of a report explaining the results of the investigation.

*Lead hazard screen* means a limited risk assessment activity that involves paint testing and dust sampling and analysis as described in 40 C.F.R. 745.227(c) and soil sampling and analysis as described in 40 C.F.R. 745.227(d).

*Risk assessment* means: (1) An on-site investigation to determine the existence, nature, severity, and location of LBP hazards; and (2) The provision of a report by the individual or firm conducting the risk assessment explaining the results of the investigation and options for reducing LBP hazards.<sup>89</sup>

#### *b. HUD Subparts Applicable to DoD: B, C, and R*

In addition to subpart A (disclosure rules), which was summarized above, subparts B, C, and R are here summarized because they apply to real property transactions involving DoD residential real property. They do not, however, apply to all DoD housing transactions, which is explained in Part V.

*Subpart B* contains general LBP requirements and “applies to all target housing that is federally owned and target housing receiving Federal assistance to which subparts C, D, F through M, and R of [part 35] apply, except where indicated.”<sup>90</sup>

*Subpart C* applies to the sale of property owned by a federal agency other than HUD.<sup>91</sup> For all target housing constructed prior to 1960, an evaluation (inspection and risk assessment) must be conducted before closing the sale.<sup>92</sup> All LBP hazards must be abated; however, abatement can be

<sup>87</sup> See *infra* notes 120-21 and accompanying text.

<sup>88</sup> See *infra* note 122 and accompanying text.

<sup>89</sup> A risk assessment is conducted to determine the extent of the hazard and involves “observing the condition of the paint, evaluating dust and soil samples for the presence of lead, and obtaining information regarding the occupancy of the housing unit by children under the age of six.” Miceli *et al.*, *supra* note 3, at 6 (based on the definition of “risk assessment” in Title X).

<sup>90</sup> 24 C.F.R. § 35.100(b)(1).

<sup>91</sup> *Id.* § 35.200. The requirements apply to federally owned properties offered for sale on or after Sep. 15, 2000. *Id.*

<sup>92</sup> *Id.* § 35.210(a).

completed before closing or can be carried out by the purchaser before occupancy.<sup>93</sup> If the latter is chosen, the federal agency is responsible for assuring that abatement is accomplished.<sup>94</sup> For all target housing constructed after 1959 and before 1978, the federal agency must conduct an evaluation.<sup>95</sup> The results of the inspection and risk assessment must be made available to prospective purchasers.<sup>96</sup>

*Subpart R* provides the standards and methods that apply in subparts B, C, D, and F through M for evaluation and reduction of LBP hazards.<sup>97</sup> Notably subpart R's designation of levels defining dust-lead hazards and soil-lead hazards has been superseded. It was intended that the latter levels established in subpart R would be used only until EPA promulgated such standards pursuant to TSCA.<sup>98</sup> In 2001, the EPA promulgated TSCA standards for LBP hazards, superseding those previously set by HUD in subpart R.<sup>99</sup>

### 3. *Training, Certification, Accreditation and Work Practice Standards*<sup>100</sup>

In 1996, the Administrator published EPA's final rule for the certification and training of LBP professionals.<sup>101</sup> The rule requires the following:

- a) Individuals conducting LBP inspection, risk assessment or abatement in **target housing and child-occupied facilities**<sup>102</sup> be properly **trained and certified**;<sup>103</sup>
- b) Training programs be **accredited**;<sup>104</sup> and
- c) LBP activities be conducted according to effective and safe work practice standards.<sup>105</sup>

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<sup>93</sup> *Id.* § 35.210(b).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* § 35.215.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* § 35.1300.

<sup>98</sup> *Id.* § 35.1320(b)(2).

<sup>99</sup> See discussion in Part III-B-5.

<sup>100</sup> For an overview of the Training and Certification Program, see the EPA document, *Training and Certification Program for Lead-Based Paint Activities in Target Housing and Child Occupied Facilities - Section 402/404*, at <http://www.epa.gov/lead/leadcert.htm> [hereinafter *Training and Certification Program*].

<sup>101</sup> Lead, Requirements for Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities, 61 Fed. Reg. 45,778-830 (Aug. 29, 1996) (final rule) (codified at 40 C.F.R. Part 745) [hereinafter *Lead, Requirements for Lead-Based Paint Activities*].

<sup>102</sup> Note that the scope of this rule is broader than some of the other rules because it applies to specified LBP activities in target housing *and* child-occupied facilities.

<sup>103</sup> *Lead, Requirements for Lead-Based Paint Activities*, *supra* note 101, at 45,778.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

The work practice standards do not apply to all activities that involve LBP; instead, the standards apply only to those activities that are described as an inspection, risk assessment or abatement by an individual who offers these services.<sup>106</sup> Thus, the rule does not regulate an individual who samples paint on a cabinet to determine if the paint contains lead<sup>107</sup> or contractors performing renovations that incidentally disturb LBP.<sup>108</sup> The rule carves out renovations by excluding them from the definition of abatement.<sup>109</sup>

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<sup>106</sup> *Id.* at 45,779, 45,822 (codified at 40 C.F.R. 745.227(a)(2)).

<sup>107</sup> *Id.* at 45,779. *Inspection* is defined to mean "a surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation." 40 C.F.R. § 745.223.

<sup>108</sup> Lead, Requirements for Lead-Based Paint Activities, *supra* note 101, at 45,779.

<sup>109</sup> The definition of abatement is as follows:

*Abatement* means any measure or set of measures designed to permanently eliminate lead-based paint hazards. Abatement includes, but is not limited to:

(1) The removal of lead-based paint and lead-contaminated dust, the permanent enclosure or encapsulation of lead-based paint, the replacement of lead-painted surfaces or fixtures, and the removal or covering of lead-contaminated soil; and

(2) All preparation, cleanup, disposal, and post-abatement clearance testing activities associated with such measures.

(3) Specifically, abatement includes, but is not limited to:

(i) Projects for which there is a written contract or other documentation, which provides that an individual or firm will be conducting activities in or to a residential dwelling or child-occupied facility that

(A) Shall result in the permanent elimination of lead-based paint hazards;

or

(B) Are designed to permanently eliminate lead-based paint hazards and are described in paragraphs (1) and (2) of this definition.

(ii) Projects resulting in the permanent elimination of lead-based paint hazards, conducted by firms or individuals certified in accordance with § 745.226, unless such projects are covered by paragraph (4) of this definition; ...

(4) Abatement does not include renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling, even though these activities may incidentally result in a reduction or elimination of lead-based paint hazards. Furthermore, abatement does not include interim controls, operations and maintenance activities, or other measures and activities designed to temporarily, but not permanently, reduce lead-based paint hazards.

40 C.F.R. § 745.223 (definitions in subpart L, *Lead-Based Paint Activities*).

#### 4. Pre-Renovation Requirements<sup>110</sup>

As required by TSCA,<sup>111</sup> EPA issued a final rule requiring renovators to distribute a lead hazard information pamphlet to housing owners and occupants before conducting renovations in target housing.<sup>112</sup> This rule, which was published on June 1, 1998, ensures that owners and occupants are given information that will allow them to avoid exposure to lead-contaminated dust and LBP debris that are sometimes generated during renovations of housing with LBP.<sup>113</sup>

#### 5. Lead Hazard Levels<sup>114</sup>

In HUD's 1999 regulations (summarized in section III-B-2 above), dust-lead hazard and soil-lead hazard definitions were based on the levels promulgated by EPA or, if EPA had not set such levels, the levels set by HUD were to be used, as stated in the following definitions:

*Dust-lead hazard* means surface dust that contains a dust-lead loading (area concentration of lead) at or exceeding the levels promulgated by the EPA pursuant to section 403 of the Toxic Substances Control Act or, if such levels are not in effect, the standards in § 35.1320.<sup>115</sup>

*Soil-lead hazard* means bare soil on residential property that contains lead equal to or exceeding levels promulgated by the [EPA] pursuant to section 403 of the Toxic Substances Control Act or, if such levels are not in effect, the following levels: 400 µg/g in play areas; and 2000 µg/g in other areas with bare soil that total more than 9 square feet (0.8 square meters) per residential property.<sup>116</sup>

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<sup>110</sup> For EPA's information sheet on the Pre-Renovation Rule, see the EPA document, *Pre-Renovation Lead Information Rule TSCA 406(b)*, at <http://www.epa.gov/lead/leadrenf.htm>.

<sup>111</sup> 15 U.S.C. § 2686(b) (TSCA § 406(b)).

<sup>112</sup> Lead, Requirements for Hazard Education Before Renovation of Target Housing, 63 Fed. Reg. 29,907 (Jun. 1, 1998) (final rule) (codified at 40 C.F.R. subpart E, §§ 745.80 – 745.88) [hereinafter *Lead, Requirements for Hazard Education*].

<sup>113</sup> *Id.* at 29,908.

<sup>114</sup> For EPA's information sheet on its lead hazard standards, see the EPA document, *Residential Lead Hazard Standards – TSCA Section 403*, at <http://www.epa.gov/opptintr/lead/leadhaz.htm> [hereinafter *Residential Lead Hazard Standards*].

<sup>115</sup> 24 C.F.R. § 35.110 (definitions in subpart B of part 35). The interim dust lead standards in 35.1320 are given for four evaluation methods. For lead hazard screens, the dust lead standards are 25 micrograms per square foot (µg/ft<sup>2</sup>) for floors and 125 µg/ft<sup>2</sup> for interior window sills. For risk assessments, reevaluations or clearances, the dust lead standards are 40 µg/ft<sup>2</sup> for floors and 250 µg/ft<sup>2</sup> for interior window sills. 24 C.F.R. § 35.1320(b)(2). Finally, the clearance standard for dust following abatement is 800µg/ft<sup>2</sup>.

<sup>116</sup> 24 C.F.R. § 35.110 (definitions in subpart B of part 35).

On January 5, 2001, EPA promulgated standards for lead hazard levels, as required by Title X (TSCA § 403).<sup>117</sup> When EPA standards became effective on March 6, 2001,<sup>118</sup> they superseded those in HUD's 1999 regulations.

EPA's hazard standard for LBP is more detailed than HUD's definition in section III-B-2-a above, to wit:

*Paint lead hazard* is any of the following:

- a. Any lead-based paint on a friction surface that is subject to abrasion and where the lead dust levels on the nearest horizontal surface underneath the friction surface are equal to or greater than the dust hazard levels.
- b. Any damaged or otherwise deteriorated lead-based paint on an impact surface that is caused by impact from a related building component.
- c. Any chewable lead-based paint surface on which there is evidence of teeth marks.
- d. Any other deteriorated lead-based paint in residential buildings or child-occupied facility or on the exterior of any residential building or child-occupied facility.<sup>119</sup>

For lead in dust, the following are EPA's standards:

The dust-lead hazard standards are 40 micrograms per square foot ( $\mu\text{g}/\text{ft}^2$ ) for floors based on a weighted average of all wipe samples and 250  $\mu\text{g}/\text{ft}^2$  for interior window sills based on a weighted average of all wipe samples.<sup>120</sup>

The clearance standards for dust following an abatement are 40  $\mu\text{g}/\text{ft}^2$  for floors, 250  $\mu\text{g}/\text{ft}^2$  for interior window sills, and 400  $\mu\text{g}/\text{ft}^2$  for window troughs.<sup>121</sup>

Finally, the soil-lead hazard standards for bare residential soil are 400 parts per million (ppm) by weight in play areas based on the play area bare soil sample and an average of 1,200 ppm in bare soil in the remainder of the yard based on an average of all other samples collected.<sup>122</sup>

In addition to applying EPA's hazard standards to LBP activities, EPA intends its hazard standards to "serve as general guidance for other EPA programs engaged in toxic waste cleanups."<sup>123</sup> EPA also amended dust and

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<sup>117</sup> Lead, Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1205 (Jan. 5, 2001) (final rule). In addition to establishing lead hazard levels, this final rule amended dust and soil sampling requirements and amended state program authorization requirements. *Id.* EPA promulgated these regulations in accordance with 15 U.S.C. § 2683; TSCA § 403 (which were added to TSCA via Title X).

<sup>118</sup> 66 Fed. Reg. 1206.

<sup>119</sup> *Id.* at 1210 (codified at 40 C.F.R. § 745.65(a)).

<sup>120</sup> *Id.* at 1211 (codified at 40 C.F.R. § 745.65(b)).

<sup>121</sup> *Id.* (codified at 40 C.F.R. § 745.227(e)(8)(viii)).

<sup>122</sup> *Id.* (codified at 40 C.F.R. § 745.65(c)).

<sup>123</sup> *Residential Lead Hazard Standards*, *supra* note 114.

soil sampling requirements and state program authorization requirements in its final rule.<sup>124</sup>

#### 6. Standards and Accreditation Programs for Laboratories<sup>125</sup>

EPA's National Lead Laboratory Accreditation Program (NLLAP) was established as required by Title X.<sup>126</sup> Through this accreditation program, EPA recognizes laboratories that demonstrate the ability to accurately analyze samples for lead (e.g., paint chip, dust and/or soil).<sup>127</sup>

The requirement to use laboratories recognized by the EPA was promulgated in the August 29, 1996, rule governing training and certification.<sup>128</sup> Specifically, paint chip, dust, and soil samples collected pursuant to the work practice standards in subpart L of the regulations must be analyzed by a laboratory recognized by EPA<sup>129</sup> "as being capable of performing analyses for lead compounds in paint chip, dust, and soil samples."<sup>130</sup>

A state seeking authorization for a LBP compliance and enforcement program must have access to a recognized laboratory as defined in EPA regulations,<sup>131</sup> or, alternatively, the state must implement a quality assurance program ensuring the quality of laboratory personnel and protecting the integrity of analytical data.<sup>132</sup> Regardless of the legal requirements for entities regulated by federal or state requirements to use recognized laboratories, EPA suggests that parties responsible for LBP abatement and control activities may wish to use NLLAP laboratories "to avoid potential liability in lead poisoning cases."<sup>133</sup>

<sup>124</sup> Lead, Identification of Dangerous Levels of Lead, 66 Fed. Reg. at 1206.

<sup>125</sup> For an overview of the laboratory accreditation program, see the EPA document, *The National Lead Laboratory Accreditation Program (NLLAP)*, at <http://www.epa.gov/opptintr/lead/nllap.htm> [hereinafter *NLLAP*].

<sup>126</sup> Pub. L. No. 102-550 § 1021, 106 Stat. 3672 (1992) (codified at 15 U.S.C. § 2685(b); TSCA § 405(b)).

<sup>127</sup> EPA Document - Laboratory Program, *supra* note 125. An updated list of NLLAP laboratories can be obtained from the National Lead Information Center Clearinghouse at 1-800-424-LEAD.

<sup>128</sup> This rule is summarized in footnotes 100 - 109 and the accompanying text.

<sup>129</sup> *Recognized laboratory* is defined as "an environmental laboratory recognized by EPA pursuant to TSCA section 405(b) as being capable of performing an analysis for lead compounds in paint, soil, and dust." 40 C.F.R. § 745.223.

<sup>130</sup> Lead, Requirements for Lead-Based Paint Activities, *supra* note 101, at 45,824 (codified at 40 C.F.R. § 745.227(f)(2)).

<sup>131</sup> See *infra* note 133.

<sup>132</sup> 40 C.F.R. § 745.327(c)(3).

<sup>133</sup> EPA, EPA 747-R-96-010, SURVEY OF STATE LEAD LABORATORY ACCREDITATION PROGRAMS p. 3 (Nov. 1996), available at <http://www.epa.gov/lead/96-010.pdf>.

## C. Enforcement

Generally, the Administrator has authority to administer and enforce the requirements regarding disclosure of known LBP and/or LBP hazards and the training, certification, and work practice standards.<sup>134</sup> The Secretary of HUD, however, does not have the same direct enforcement authority because the Lead-Based Paint Poisoning Prevention Act does not provide any independent enforcement provisions.<sup>135</sup> Instead, the Secretary relies on HUD's authority to affect the ability of an entity to receive money or participate in a HUD program in the future.<sup>136</sup>

## IV. LBP AND HISTORIC BUILDINGS

Since old houses may be designated as historic landmarks under the national Historic Preservation Act of 1966 (NHPA),<sup>137</sup> DoD attorneys must consider whether lead-based paint activities will trigger NHPA requirements. When a house is listed or eligible to be listed on the National Registry of Historic Buildings, any activities that may affect its exterior appearance must be coordinated with the State Historic Preservation Officer (SHPO).<sup>138</sup>

## V. DOD AND SERVICE-SPECIFIC LBP POLICIES<sup>139</sup>

The information in this part is grouped according to the type of real estate transaction involving housing: (1) occupancy, (2) sale/transfer, and (3) privatization. When relevant, child-care facilities are addressed.

### A. Occupancy of MFH

The only DoD policy relevant to the occupancy of MFH concerns the disclosure rules. The Air Force, however, has policies that encompass broader requirements. Both are covered below in subsections 1 and 2.

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<sup>134</sup> See 15 U.S.C. § 2684(h) (providing that the Administrator will enforce requirements in states without authorized programs). The EPA's enforcement authority includes civil and criminal sanctions. See 15 U.S.C. § 2615; 40 C.F.R. § 745.118.

<sup>135</sup> Requirements for Notification, *supra* note 5, at 50,168.

<sup>136</sup> See *id.* (discussion on HUD's enforcement of its regulations).

<sup>137</sup> 16 U.S.C. § 470a(a) (providing for designation of properties as historic landmarks).

<sup>138</sup> *Id.* § 470a(b)(3) (requiring SHPOs to consult with federal agencies on federal undertakings that may affect historic properties).

<sup>139</sup> The U.S. Army Lead and Asbestos Homepage is available at <http://www.hqda.army.mil/acsimweb/fd/LeadAsbestos/pages/home.htm>. Information on the Navy's lead policies is available at <http://enviro.nfesc.navy.mil/esc425/LdNPOL.htm>.

## *1. DoD Disclosure Policy*

DoD does not consider its Residency Occupancy Agreements (ROAs) to be the legal equivalent of a lease, and therefore does not consider there to be any legal requirement to observe disclosure rules with regard to them. Nonetheless, as a matter of policy, the Air Force and other DoD Components do comply with the disclosure rules with regard to ROAs. The history behind this position is outlined below.

In 1997, DoD issued a one-page policy memorandum requiring its Components to comply with the EPA and HUD disclosure rules in 40 C.F.R. Part 745 Subpart F and 24 C.F.R. Part 35 Subpart H.<sup>140</sup> The memorandum states the following concerning the disclosure requirements:

These rules apply to DOD family housing built before 1978 and to their disposal by lease or sale. Occupancy of DOD family housing by military members and their families is considered to be leasing of housing, with regard to these rules. Disposal of housing pursuant to Base Realignment and Closure process or similar actions constitute disposal by sale. Compliance with disclosure rules must be documented. . . . Occupants must also be issued a copy of the EPA pamphlet entitled, 'Protect Your Family from Lead in Your Home.'<sup>141</sup>

DoD's policy could have been better worded to convey clearly its position that DoD does not consider ROAs to be the legal equivalent of a lease. Nonetheless, DoD's position is better stated in a subsequent dispute with the EPA.

Specifically, DoD's position was challenged on July 28, 1998, when EPA Region VI filed an administrative complaint against the Navy for its failure to comply with the disclosure rules at Kingsville Naval Air Station, Texas.<sup>142</sup> EPA sought \$408,375 in civil penalties for sixty-six alleged violations associated with eleven ROAs.<sup>143</sup> The administrative law judge (ALJ) found the Navy to be a "lessor" and the ROAs to be "contracts to lease" within the meaning of the Residential Lead-Based Paint Hazard Reduction Act (RLBPHRA) of 1992.<sup>144</sup>

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<sup>140</sup> Memorandum from the Deputy Under Secretary of Defense (Industrial Affairs & Installations) and Deputy Under Secretary of Defense (Environmental Security), *Disclosure of Known Lead-Based Paint (LBP) and/or LBP Hazards in DOD Family Housing* (Feb. 18, 1997) [hereinafter DOD 1997 Disclosure Policy]. As explained in the text accompanying footnotes 79 - 80, Subpart H in part 35 of HUD's regulations was moved to subpart A with no text changes.

<sup>141</sup> *Id.*

<sup>142</sup> In the Matter of U.S. Dep't of the Navy, Kingsville Naval Air Station, TSCA Docket No. VI-736C(L) (Feb. 18, 1999), <http://www.epa.gov/aljhomep/orders.htm>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

On appeal, however, the Environmental Appeals Board (EAB) reversed the ALJ's decision and dismissed the complaint, stating that it "cannot uphold the Order based upon the Presiding Officer's analysis, which relied on Texas law."<sup>145</sup> The Board stated,

While the Board does have the authority, as the Agency's final decisionmaker in this case, to fashion through this adjudicative proceeding a legally binding interpretation of the terms "lease" and "contract to lease" under the Disclosure Rule and section 1018 of the RLBPHRA, we decline to exercise that authority here. Fairly read, the Disclosure Rule does not bear any contemplation of ROAs – arrangements peculiar to the military establishment. Not surprisingly then, there is, as best we can discern, no indication that the issue of ROA coverage was identified during the interagency review process that accompanied the rule's promulgation.<sup>146</sup>

The Board highlighted in a footnote DoD's issuance of its 1997 memorandum, and quoted most of its text.<sup>147</sup> The following statement followed the quote:

Given the serious and unquestioned health effects of lead-based paint, we would expect Navy to comply with the disclosure requirements as contemplated by this [DoD] memorandum.<sup>148</sup>

## 2. Current Air Force Policies

### a. Disclosure Policy

In 1996, the Air Force issued its policy concerning disclosure requirements.<sup>149</sup> While consistent with the ultimate DoD policy, it may be interpreted as stating that the "acceptance" of MFH by qualified occupants is synonymous with "leasing."<sup>150</sup> The fact that the Air Force policy predates the

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<sup>145</sup> *In re* U.S. Dep't of Navy, Kingsville Naval Air Station, Kingsville, Texas, TSCA Appeal No. 99-2, Part II (Mar. 17, 2000), <http://www.epa.gov/boarddec/eabtsca.htm>. However, the Board also "[did] not adopt Navy's contention that the federal property and contract law cited by Navy is dispositive with respect to whether a transaction is a 'contract to lease' for purposes of the Disclosure Rule and RLBPHRA section 1018." *Id.*

<sup>146</sup> *Id.* The Board informed the Region that if it intended to regulate ROAs under the Disclosure Rule, it would have to develop a "workable and supportable interpretation," and appropriately amend the Disclosure Rule to reflect that interpretation. *Id.*

<sup>147</sup> *Id.* at n 9.

<sup>148</sup> *Id.*

<sup>149</sup> Memorandum from the Office of The Civil Engineer, Director of Environment (HQ USAF/CEV), Policy and Guidance on Lead-Based Paint (LBP) Final Disclosure Rule (Aug. 19, 1996), *available at* [http://www.afcee.brooks.af.mil/dc/dcp/news/AFRPA\\_Workshop/07/lbp\\_final\\_disclosure\\_rule.pdf](http://www.afcee.brooks.af.mil/dc/dcp/news/AFRPA_Workshop/07/lbp_final_disclosure_rule.pdf).

<sup>150</sup> *Id.* (The policy memorandum states, "The disclosure regulations apply to the acceptance (leasing) of Air Force MFH by qualified occupants and the sale (transfer) of Air Force MFH under Base Realignment and Closure (BRAC) and non-BRAC property disposals.")

DoD policy memorandum and the Kingsville Naval Air Station administrative case may be the reason for the choice of wording. The Air Force Center for Environmental Excellence (AFCEE) PROACT Fact Sheet on LBP also seems to equate "acceptance" of MFH with "leasing,"<sup>151</sup> which likewise may be due to the fact that the fact sheet predates the Kingsville case. The Air Force's legal position (espoused by SAF/GCN--the Department of the Air Force General Counsel (Installations and Environmental Law)), however, is consistent with DoD's position: while the agreement to occupy MFH is not the legal equivalent of a lease, the Air Force complies with the disclosure requirements as a matter of DoD policy.<sup>152</sup>

*b. Identification and Treatment of LBP in Facilities*

In May 1993, the Air Force quickly responded to the RLBPHRA with its LBP policy and guidance.<sup>153</sup> The policy directs Air Force installations to take actions to address LBP and LBP hazards, including the following: identify, evaluate, control and eliminate existing LBP hazards;<sup>154</sup> protect facility workers and occupants, especially children, from existing LBP hazards;<sup>155</sup> prevent LBP hazards from developing;<sup>156</sup> restrict the use of LBP;<sup>157</sup> and identify, evaluate and remediate past LBP hazards.<sup>158</sup>

The scope of the Air Force's 1993 LBP policy is broader than the federal regulations in two ways. First, the types of facilities covered is broader because the Air Force requires LBP in all facilities (e.g., MFH, industrial facilities, DoD schools) to be addressed rather than only LBP in target housing. The policy requires facilities that are or may be used by young children to be given priority.<sup>159</sup> Second, the Air Force policy encompasses facilities that

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<sup>151</sup> See PROACT, TI#16487, *supra* note 11.

<sup>152</sup> When the Air Force updates its 1993 LBP policy memorandum, it should consider updating its 1996 disclosure policy memorandum so the text conveys clearly that occupancy of MFH is not considered to be the legal equivalent of a lease.

<sup>153</sup> Memorandum from Air Force Chief of Staff (HQ USAF/CC), Air Force Policy and Guidance on Lead-Based Paint in Facilities (May 24, 1993) available at [http://www.afcee.brooks.af.mil/dc/dcp/news/AFRPA\\_Workshop/07/af\\_policy\\_guidance\\_lead-based\\_paint.pdf](http://www.afcee.brooks.af.mil/dc/dcp/news/AFRPA_Workshop/07/af_policy_guidance_lead-based_paint.pdf) [hereinafter Air Force 1993 Policy].

<sup>154</sup> Priority is to be given to facilities that are frequented by children under age seven and those with painted surfaces in deteriorated condition. *Id.* at para. 6a.

<sup>155</sup> *Id.* at para. 6b.

<sup>156</sup> *Id.* at para. 6c.

<sup>157</sup> *Id.* at para. 6d.

<sup>158</sup> *Id.* at para. 6f.

<sup>159</sup> The policy defines *high-priority facilities* as "Facilities or portions of facilities which are or may be frequented or used by children under age seven, which are further prioritized as follows: child development centers, annexes, and playground equipment; Air Force licensed family day care homes; youth centers; recreational facilities, and playgrounds; waiting areas at medical and dental treatment centers; Air Force-maintained Department of Defense (DoD)

were constructed prior to 1980 rather than 1978.<sup>160</sup> The reason for these two additional years is because the Air Force assumed that stocks of LBP were not depleted until two years after the 1978 Consumer Product Safety Commission (CPSA) ban on residential use of LBPs, which did not extend to federal facilities.<sup>161</sup>

The office of primary responsibility for the Air Force's 1993 policy, the Office of the Civil Engineer, Environmental Division (HQ USAF/ILEV), plans to update the policy to incorporate regulatory and policy changes.

*c. Effect of HUD's 1999 Regulations<sup>162</sup> on Air Force Policies*

While the Air Force may determine it should revise its 1993 LBP policy based on requirements in HUD's 1999 regulations, this determination arguably will be a matter of policy rather than legal requirement. The basis for this conclusion is that subparts B (general requirements and definitions) and R (methods and standards) only apply if one of the other subparts (C, D, or F through M) applies.<sup>163</sup> None of the specific types of federal housing activity or assistance covered in subparts C, D, and F through M apply to the occupancy of MFH, meaning that subparts B and R also do not apply. Furthermore, the discussion in HUD's final rule regarding scope and applicability states:

Section 302 of the LPPPA [Lead-Based Paint Poisoning Prevention Act] requires HUD 'to establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning with respect to any existing housing which may present such hazards and which is covered by an application for mortgage insurance or housing assistance payments under a program administered by the Secretary or otherwise receives more than \$5,000 in project-based assistance under a Federal housing program.' In addition, the LPPPA requires HUD to establish procedures for the inspection and reduction of lead-based paint hazards in Federally owned housing at disposition. Accordingly, this final rule covers all target housing that: (1) HUD is associated with; (2) receives more than \$5,000 in project-based

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schools; military family housing (MFH) currently occupied by families with children under seven; and remaining MFH." *Id.* at para. 5a.

<sup>160</sup> Air Force 1993 Policy, *supra* note 153.

<sup>161</sup> PROACT, TI#16487, *supra* note 11.

<sup>162</sup> This refers to the requirements in 24 C.F.R. Part 35.

<sup>163</sup> The applicability provision for subpart B states the following: "This subpart applies to all target housing that is federally owned and target housing receiving Federal assistance to which subparts C, D, F through M, and R of this part apply, except where indicated." 24 C.F.R. § 35.100(b). The phrase "to which subparts C, D, ...apply" must modify both federally owned housing and housing receiving federal assistance because subpart C applies only to the sale/transfer of federally owned housing and not to housing receiving federal assistance. Furthermore, the purpose of subpart R "is to provide standards and methods for evaluation and hazard reduction activities required in subparts B, C, D, and F through M." 24 C.F.R. § 35.1300.

assistance under a program of an agency other than HUD; and (3) is being disposed of by the Federal government.<sup>164</sup>

Consequently, HUD's regulations do not affect Air Force activities associated with occupancy. Of course, SAF/GCN will assist in determining what changes HQ USAF/ILEV should make to the Air Force's current LBP policy.

Because HUD's 1999 regulations did not change the disclosure requirements, the DoD and Air Force disclosure policies remain unaffected.

### B. Sale/Transfer of Military Family Housing (MFH)

DoD must comply with applicable requirements when it sells or transfers target housing. Specifically, the disclosure rules in 40 C.F.R. Part 745 Subpart F (EPA) and 24 C.F.R. Part 35 Subpart A (HUD) must be followed because these rules are applicable to the sale or lease of federally owned target housing.<sup>165</sup> In addition, 24 C.F.R. Part 35 Subparts B, C and R apply to the sale of federally owned target housing.<sup>166</sup>

The applicability of these portions of the EPA and HUD regulations is explained in DoD's guidance document attached to its policy memorandum. In January 2000, DoD stated its policy for disposal of residential real property,<sup>167</sup> and attached its Interim Final Field Guide<sup>168</sup> containing guidelines for disposal of DoD residential real property. The Field Guide was jointly developed by DoD and EPA, with the assistance of HUD and the General Services Administration (GSA).<sup>169</sup> The Field Guide is for use "in the evaluation and control of [LBP] at DoD residential real property scheduled for disposition under the base realignment and closure (BRAC) program."<sup>170</sup> The Field Guide states DoD's preference that abatement be made a condition of the transfer and for the service to ensure that the transferee completes abatement prior to occupancy or sale of the real property.<sup>171</sup>

<sup>164</sup> Requirements for Notification, *supra* note 5, at 50,145.

<sup>165</sup> See *supra* notes 70-80 and accompanying text (section III-B-1).

<sup>166</sup> See *supra* notes 90-99 and accompanying text (section III-B-2b).

<sup>167</sup> Memorandum from the Office of the Under Secretary of Defense (Environmental Security), Lead-Based Paint Policy for Disposal of Residential Real Property (Jan. 7, 2000) available at [http://www.dtic.mil/envirodod/Policies/BRAC/DoD\\_LeadPaintPolMem.pdf](http://www.dtic.mil/envirodod/Policies/BRAC/DoD_LeadPaintPolMem.pdf) [hereinafter DoD Memo-Disposal of Residential Property]. This policy supersedes the DoD Oct. 31, 1994 LBP policy attached to the Principal Assistant Deputy Under Secretary of Defense (Environmental Security) memorandum, *Asbestos, Lead Paint and Radon Policies at BRAC Properties* (Oct. 31, 1994). DoD Memo-Disposal of Residential Property. The asbestos and radon policies in that document remain in effect. *Id.*

<sup>168</sup> DoD Field Guide, *supra* note 68.

<sup>169</sup> *Id.* at ii (Foreword).

<sup>170</sup> DoD Memo-Disposal of Residential Property, *supra* note 167.

<sup>171</sup> DoD Field Guide, *supra* note 68, at 18.

DoD policy, which is reiterated in the Field Guide, requires the following actions beyond those strictly required by law:

- 1) Abate soil-lead surrounding target housing;<sup>172</sup>
- 2) Evaluate the need for interim controls, abatement, or no action for bare soil lead concentrations between 400 and 2000 ppm (excluding children's play areas) based on the findings of the LBP inspection, risk assessment and criteria;
- 3) Evaluate and abate LBP hazards in structures reused as child-occupied facilities<sup>173</sup> located on residential real property;
- 4) Evaluate and abate soil-lead hazards for target housing demolished and redeveloped for residential use following transfer.<sup>174</sup>

In April 2003, a final joint LBP Field Guide was distributed for coordination.<sup>175</sup> This revision incorporates EPA's latest regulations identifying LBP hazards, lead-contaminated dust, and lead-contaminated soil.<sup>176</sup> It also addresses comments from EPA related to its new remediation guidance addressing Superfund cleanups of lead-contaminated residential sites. Any DoD environmental attorney involved with a LBP issue should determine whether the joint LBP Field Guide has been finalized and, if yes, determine the applicability of its requirements to a current issue. Until the joint LBP Field Guide is issued, the December 1999 Interim Final Guide discussed above should be used along with any implementing guides, such as the ones highlighted below.

In May 2001, the Air Force Base Conversion Agency (AFBCA), which is now merged into the Air Force Real Property Agency, issued guidance for the management of LBP at Air Force BRAC installations.<sup>177</sup> This guidance

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<sup>172</sup> Title X requires abatement of LBP hazards only in target housing constructed prior to 1960. DoD Memo-Disposal of Residential Property, *supra* note 167.

<sup>173</sup> DoD defines *child-occupied facilities* as "day care centers, preschools, and kindergarten classrooms visited regularly by children under six years of age." *Id.*

<sup>174</sup> Title X does not require an inspection and risk assessment or LBP control and abatement for residential dwellings that are demolished or not intended for occupancy after transfer. However, DoD directs the terms of the property transfer to include a **requirement** for the transferee to evaluate and abate any soil-lead hazards before newly constructed housing units are occupied. *Id.*

<sup>175</sup> The DoD Environmental Cleanup Office (Assistant Deputy Undersecretary of Defense, Cleanup) is the point of contact for the final coordination effort within DoD.

<sup>176</sup> See *supra* notes 114-124 and accompanying text (section III-B-5).

<sup>177</sup> Operating Procedures for the Management of Lead-Based Paint at Air Force Base Realignment and Closure Installations (May 2001) (updating and revising the AFBCA 1996 Interim Operating Procedures for Management of LBP at Air Force BRAC Installations) (on

instructs that the DoD/EPA Field Guide be used as a resource on the technical details of the evaluation, inspection, risk assessment, and abatement standards of Title X.<sup>178</sup> For those standards in the DoD/EPA Field Guide that exceed Title X requirements, the AFBCA guide specifically directs their implementation for all property transfer agreements executed after March 30, 2000.<sup>179</sup>

In addition to the Air Force, the Army issued guidance for the transfer of Army real property that implements the DoD policy and Field Guide.<sup>180</sup> The Army's guidance applies to the transfer by sale of any Army real property; it is not limited to transfers under the BRAC program.<sup>181</sup>

In its 1999 final rule, HUD stated that with regard to disposal of military property, it recognizes that there are several statutory, regulatory and policy requirements regarding the cleanup, disposal and reuse of BRAC properties.<sup>182</sup> HUD noted that DoD uses provisions in contracts for sale and deeds to assure that LBP hazards in target housing built before 1960 will be abated prior to occupancy.<sup>183</sup> The following was included in the final rule as an example of a typical contract or deed provision:

Purchaser agrees that purchaser will be responsible for the abatement of any lead-based paint hazards (as defined in Title X and implementing regulations) by a certified contractor in accordance with Title X and implementing regulations before the use and occupancy of such improvements as a residential dwelling (as defined in Title X).<sup>184</sup>

HUD also recommends that federal agencies document compliance with this type of provision by including a contractual requirement that the purchaser submit to the agency a copy of the certified abatement report, including clearance.<sup>185</sup> HUD's above example of a typical contract or deed provision and recommendation that contractors be required to submit documentation to show compliance should be considered and used, as appropriately tailored, in any contract involving LBP activities.

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file with the legal office for the Air Force Real Property Agency, office number 703-695-4691).

<sup>178</sup> *Id.* at 6, para. 2.2.

<sup>179</sup> *Id.* For property transfer agreements executed before March 30, 2000, AFBCA's 1996 procedures applied. AFBCA Summary of LBP Applicability and Procedures, Figure 1, available from the AFRPA office.

<sup>180</sup> Memorandum from the Department of the Army, Assistant Chief of Staff for Installation Management (DAIM-FD), *Guidance for Lead-Based Paint Hazard Management During Transfer of Army Real Property* (Mar. 28, 2000) (with attached guidance document dated Mar. 30, 2000).

<sup>181</sup> *Id.*

<sup>182</sup> Requirements for Notification, *supra* note 5, at 50,169.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

### C. Privatization of MFH

The DoD Field Guide does not apply to leases or public/private ventures (PPV).<sup>186</sup> Because the privatization of MFH is not an outright transfer or sale,<sup>187</sup> the Air Force is developing a separate policy addressing LBP hazards in AF MFH approved for privatization. This policy is undergoing final review and coordination. Generally, the Air Force's policy will require developers to address LBP and LBP hazards in MFH in a manner consistent with the HUD regulations. The Army and the Navy have arrived at similar policy positions.<sup>188</sup>

The Air Force Privatized Housing Management Office (AF/LEHM) is developing an implementation procedures and guidance document for addressing LBP and LBP hazards in Air Force Military Housing Privatization Initiatives. It will provide information to privatization team members, helping to ensure that LBP is timely and adequately addressed during the privatization effort.

### VI. CONCLUSION

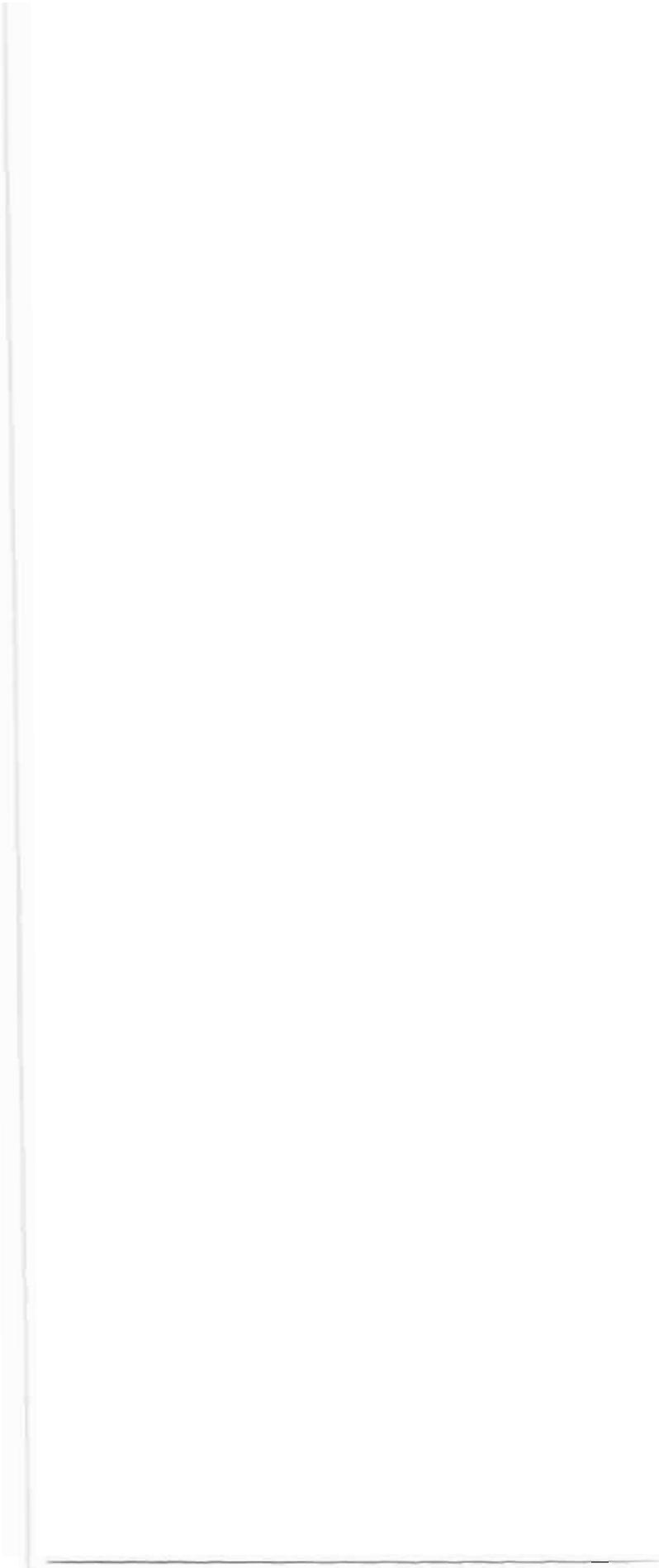
Lead-based paint requirements have changed significantly since 1999, and the Air Force and other services continue to develop policy and guidance to assist their installations with properly addressing LBP and LBP hazards. This article focused on LBP requirements, providing information on the applicability of these requirements to DoD. While the major existing policies were included, there will likely be several major new policies within the next year. This includes policy and guidance for housing to be privatized and an update to the Air Force's 1993 LBP policy. One of DoD's highest priorities, as well as of its Components, will continue to be the management of LBP in a manner that protects the environment and human health, particularly that of children.

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<sup>186</sup> DoD Field Guide, *supra* note 68, at viii n.1.

<sup>187</sup> The privatization transactions are not outright transfers or sales because the Air Force retains an interest in the property and, in some cases, may be involved as a limited partner in the management of the property.

<sup>188</sup> The Assistant Secretary of the Army (Installations & Environment) determined the Army policy for its Residential Communities Initiative (RCI). This determination does not appear to be stated in a formal policy letter. The Navy has issued a formal policy letter, Lead-Based Paint Hazards in DON PPV Projects (Oct. 16, 2002).



# CULTURAL RESOURCE PRESERVATION LAW: THE ENHANCED FOCUS ON AMERICAN INDIANS

MS. LAURYNE WRIGHT\*

*To us the ashes of our ancestors are sacred and their resting place is hallowed ground. Our religion is the tradition of our ancestors--the dreams of our old men, given them in the solemn hours of night by the Great Spirit; and the visions of our sachems; and is written in the hearts of our people.*

*Seathl, Duwamish chief<sup>1</sup>*

## I. INTRODUCTION

In 1831 the United States Supreme Court first characterized the relationship of Indian tribes to the United States as being like that of a ward to a guardian, making the federal government a trustee.<sup>2</sup> Today, the concept of "trust" with respect to American Indians is more aptly defined as a responsibility of federal agencies to foster trust among Indian tribes through a government-to-government relationship that reflects respect for their sovereign status.

That evolution in the concept of trust has occurred over the past 30 years, as cultural resource preservation laws have gradually adopted an enhanced focus on American Indians, or Native Americans.<sup>3</sup> These laws have

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<sup>1</sup> NATIVE AMERICAN WISDOM 46 (Kristen M. Cleary ed., Barnes & Noble Books 1996).

<sup>2</sup> See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (Indian tribes were first described as distinct political entities, yet dependent nations. Defined as capable of governing themselves, they were made more like a state and less like a foreign nation because their lands were within the United States.).

<sup>3</sup> The term "Native American" came into usage in the 1960s and was originally applied to American Indians and Alaska Natives, later including Native Hawaiians and Pacific Island Territories Natives in some federal programs. DEP'T OF DEFENSE AND UNITED STATES ARMY ENVTL. POLICY INST., AMERICAN INDIAN CULTURAL COMMUNICATIONS STUDY GUIDE (2001). According to Webster's II New Riverside University Dictionary 785 (1984), the terms "Native American" and "Indian American" are synonymous, with usage varying according to tribe and region. However, many members of North American Indian tribes may prefer the latter designation to the former because it is a legal term that includes Native Hawaiians, Aleuts, and other native Pacific Islanders. Furthermore, "Native American" was a term developed by the Bureau of Indian Affairs. See DEP'T OF DEFENSE AND UNITED STATES ARMY ENVTL. POLICY INST. *supra* this note.

Federal agency responsibility with respect to inadvertent discoveries includes an initial cessation of activity for 30 days, reasonable efforts to protect the discovered items, and immediate oral notification to culturally affiliated Indian tribes, followed by written confirmation.<sup>35</sup> It is at this point that consultation with Indian tribes takes place.

The purpose of such consultation is to positively identify and confirm that what has been discovered is in fact a cultural item subject to disposition under NAGPRA. Once such confirmation is achieved, Indian tribes direct how, within the parameters of NAGPRA, the items are to be protected or repatriated. Upon certification from an appropriate authority<sup>36</sup> that tribal notification has been accomplished, the federal activity leading to the inadvertent discovery may be resumed, and disposition of cultural items will be carried out pursuant to NAGPRA repatriation procedures.<sup>37</sup> Federal agencies cannot delegate these responsibilities under NAGPRA, except to the Secretary of the Interior upon his/her consent.<sup>38</sup>

NAGPRA expressly provides that, “[t]his Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.”<sup>39</sup> The notion, however, that NAGPRA has established a trust or fiduciary relationship between the government and American Indians has been rejected. The U.S. District Court for the District of Hawaii has held the preceding statutory language to be a “disclaimer intended to ward off tangential repatriation claims from groups other than Native Americans or Native Hawaiians rather than as establishing a fiduciary obligation on the federal government.”<sup>40</sup>

*a. NAGPRA Jurisdictional Area—Federal or Indian Lands*

As indicated above, NAGPRA’s reach is limited to cultural items found on federal or Indian land. In *Romero v. Becken*,<sup>41</sup> for example, human remains were inadvertently found during construction of a golf course in Universal City, Texas. The plaintiff claimed to be a lineal descendant of the Lipan

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<sup>35</sup> *Id.*

<sup>36</sup> The following are authorized certifying authorities: the Secretary of a U.S. Department, the head of any U.S. agency or instrumentality, and the relevant Indian tribe or native Hawaiian organization. *Id.*

<sup>37</sup> *Id.* § 3002(d)(1)-(2).

<sup>38</sup> *Id.* § 3002(d)(3).

<sup>39</sup> *Id.* § 3010.

<sup>40</sup> *Na Iwi O Na Kapuna O Makapu v. Dalton*, 894 F. Supp. 1397, 1410 (D. Haw. 1995).

<sup>41</sup> 256 F.3d 349 (5<sup>th</sup> Cir. 2001).

Apache<sup>42</sup> chief Cuelgas de Castro. Ultimately, the Court held that the remains were found on municipal land.<sup>43</sup>

Universal City had acquired the land through gifts of private landowners and, pursuant to the Clean Water Act, was required to conduct an archaeological survey of the project site prior to building the golf course. Consequently, the Army Corps of Engineers (Army Corps) began oversight of the project.<sup>44</sup> The Court held that, “The fact that the U.S. Army Corps of Engineers, a federal agency, was involved in a supervisory role with the Texas Antiquities Commission does not convert the land into ‘federal land’ within the meaning of the statute.”<sup>45</sup>

*b. Distinguishing 30-day Cessation Period from Period for Reasonable Protection Efforts*

Although NAGPRA requires a 30-day cessation of activity upon the inadvertent discovery of cultural items on federal or Indian lands, efforts at protecting the items may be required to extend beyond the 30-day period. In *Yankton Sioux Tribe v. United States Army Corps of Engineers*,<sup>46</sup> the plaintiff tribe alleged the Army Corps failed to satisfy its duty to secure and protect inadvertently discovered human remains embedded in frozen lakeshore soil. The Army Corps filed a motion to dismiss, arguing that it had satisfied NAGPRA’s notification, tribal certification, and 30-day cessation of activity requirements, and that it took reasonable efforts to protect the accessible remains by removing those that were “loose and scattered” before resuming activity.<sup>47</sup> Further, the Army Corps asserted the Court lacked authority to address long-term protection of remains that might be exposed in the future.<sup>48</sup>

The Court denied the Army Corps’ motion to dismiss, finding that neither NAGPRA nor its implementing regulations<sup>49</sup> relieved the Army Corps of its duty to secure and protect inadvertently discovered human remains upon the lapse of the 30-day cessation-of-activity period.<sup>50</sup> The Court determined that NAGPRA regulations do not specify a time period within which a federal agency is relieved of the duty to secure and protect inadvertently discovered human remains.<sup>51</sup> The Yankton Sioux Tribe went on to obtain an injunction

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<sup>42</sup> The Lipan Apache Band of Texas is not a federally recognized tribe. See *infra* note 65.

<sup>43</sup> 256 F.3d at 354.

<sup>44</sup> *Id.* at 352.

<sup>45</sup> *Id.* at 354.

<sup>46</sup> 194 F. Supp. 2d 977 (D. S.D. 2002).

<sup>47</sup> *Id.* at 981-982.

<sup>48</sup> *Id.* at 982.

<sup>49</sup> 43 C.F.R. § 10 (1977).

<sup>50</sup> 194 F. Supp. 2d at 986.

<sup>51</sup> *Id.*

against the Army Corps, requiring it to cease all construction in that area, and prohibiting it from denying tribal member access to the area.<sup>52</sup>

## 2. Inventory Requirement

Basically, NAGPRA tells federal agencies that as of November 16, 1990, if they have collections of certain American Indian items, they must catalog or inventory those items to determine and disclose what is in their possession.<sup>53</sup> A summary of a federal agency's collection is to be provided to lineal descendants, Indian tribes, or Native Hawaiian organizations, as may be applicable.<sup>54</sup>

Although NAGPRA requires efforts to identify the cultural affiliation of cultural items, by express provision of the statute, requests for additional documentation relating to affiliation are not to be construed as authorization for new scientific studies of the items.<sup>55</sup> Clarification of the statutory parameters on permissible scientific analysis and who may be qualified to determine cultural affiliation have been provided by two NAGPRA lawsuits involving human remains recovered from land controlled by the Department of the Navy on the island of Oahu, Hawaii.

### a. *Na Iwi O Na Kapuna O Makapu v. Dalton*

In *Na Iwi O Na Kapuna O Makapu v. Dalton*,<sup>56</sup> a Native Hawaiian organization objected to a physical anthropologist's examination of a cranium<sup>57</sup> to determine cultural affiliation. In this, the first DoD project to fall under NAGPRA, the Navy awarded the Bishop Museum a contract to inventory human remains disinterred from the Mokapu Peninsula. The general objective was to accurately list human remains and funerary objects and to determine the number of individuals represented.<sup>58</sup>

In conducting its inventory, the Bishop Museum did not perform DNA analysis or generally conduct extensive metric or nonmetric analyses of the remains. Its use of standard physical anthropological methods to determine the various ages and sexes represented and, thereby, the number of individuals present was upheld:

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<sup>52</sup> *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 209 F. Supp. 2d 1008 (D. S.D. 2002).

<sup>53</sup> 25 U.S.C. §§ 3003-3004 (1990).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 3003(b)(2).

<sup>56</sup> 894 F. Supp. 1397 (D. Haw. 1995).

<sup>57</sup> Sherry Hutt & C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, 31 ARIZ. ST. L.J. 363, 382 (1999).

<sup>58</sup> 894 F. Supp. at 1402.

Examinations done for the purpose of accurately identifying cultural affiliation or ethnicity are permissible because they further the overall purpose of NAGPRA, proper repatriation of remains and other cultural items.<sup>59]</sup>

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NAGPRA Section 3003(b)(2) merely prevents federal agencies and museums from conducting additional research after completion of the initial inventory. Section 3003(b)(2) is wholly inapposite to examinations conducted at the inventory compilation stage. The section's restrictive language only applies upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice [of the completed inventory, . . . for] additional available documentation to supplement the [inventory] information required by subsection (a) of [Section 3003]." 25 U.S.C. Section 3003(b)(2) (emphasis provided). Because the Federal Defendant did not conduct its examination in response to a request for information, Section 3003(b)(2) is of no consequence.

. . . Section 3003(b)(2)'s restrictive language [is included] to prevent agencies and museums from using a request for additional documentation as an excuse to initiate new studies and further delay the repatriation process.<sup>60]</sup>

*b. Monet v. Hawaii*

The second lawsuit involved a claim of lineal descendency over the same Mokapu remains. In *Monet v. Hawaii*,<sup>61</sup> the plaintiff, unlike the Na Iwi O Na Kapuna O Mokapu, proposed to establish his lineal descendency through DNA studies. Monet alleged the Marine Corps lacked authority to determine the appropriate recipient of cultural items due to lack of expertise. The Court dismissed Monet's complaint, finding the Marine Corps to be a federal agency with authority to determine cultural affiliation of cultural items under NAGPRA, rendering its expertise irrelevant. Additionally, because the Marine Corps had not completed its inventory at the time the complaint was filed, the Court found the issue of repatriation not ripe for decision. The Ninth Circuit affirmed this decision.<sup>62</sup>

*3. Repatriation Claims*

Priority for repatriation claims of cultural items goes to lineal descendants of the individual whose body, funerary and/or sacred objects are

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<sup>59</sup> *Id.* at 1415.

<sup>60</sup> *Id.* at 1417.

<sup>61</sup> CV-96-00006-DAE (D. Haw. 1996) (unpublished opinion), affirmed by Ninth Circuit. *See* Hutt & McKeown, *supra* note 57, at 382-83.

<sup>62</sup> *Monet v. United States*, 114 F.3d 1195 (9<sup>th</sup> Cir. 1997).

being claimed.<sup>63</sup> Notably, lineal descendants, unlike Indian tribes, do not have to be federally recognized by the Bureau of Indian Affairs (BIA).<sup>64</sup> If lineal descendency cannot be ascertained, those claiming a cultural affiliation gain priority. Cultural affiliation involves a traceable group relationship to present-day federally recognized Indian tribes or Native Hawaiian organizations.<sup>65</sup>

More than one tribe may claim affiliation.<sup>66</sup> The NAGPRA Review Committee settles such disputes, as well as issues involving unclaimed property.<sup>67</sup> In the absence of lineal descendants or groups claiming cultural affiliation, repatriation efforts focus on federally recognized Indian tribes.

### *Repatriation and the Kennewick Man*

The most highly publicized NAGPRA repatriation case to date involves human remains dubbed "the Kennewick Man," determined to be 9,000 years old. The remains were discovered at an Army Corps work site along the Columbia River near Kennewick, Washington, which is federal, aboriginal Indian land.<sup>68</sup>

As described in *Bonnichsen v. United States*,<sup>69</sup> the Army Corps, after completely covering the discovery site under tons of dirt topped with plants,<sup>70</sup>

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<sup>63</sup> 25 U.S.C. § 3002(1) (1990).

<sup>64</sup> In *Idrogo & Americans for Repatriation of Geronimo v. Dept. of the Army & President Clinton*, 18 F. Supp. 2d 25 (D.C. Cir. 1998), an individual who "believed" he was a direct descendant of Geronimo claimed entitlement to return of Geronimo's remains pursuant to NAGPRA. The Court granted the Army's motion to dismiss for lack of standing, finding that Idrogo had not claimed to be a "member of any recognized (or unrecognized, for that matter) Native American tribe." 18 F. Supp. 2d at 27. NAGPRA does not provide individuals with a basis for monetary relief. *Romero v. Becken*, 256 F.3d 349, 354-55 (5<sup>th</sup> Cir. 2001) (denying individual's claim for monetary damages—"NAGPRA exists to give protection to Native American artifacts, cultural items, and other such objects "having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American." 25 U.S.C. § 3001(3)(d).").

<sup>65</sup> 25 U.S.C. § 3001(2). Unrecognized tribes with NAGPRA claims sometimes avoid the "standing" issue by affiliating with a recognized tribe. This acknowledges the government-to-government relationship of Indian tribes with the United States. The BIA publishes a list of federally recognized tribes every two years in the Federal Register. See *Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 67 Fed. Reg. 134 (July 12, 2002).

<sup>66</sup> 25 U.S.C. § 3002(a)(2)(C).

<sup>67</sup> *Id.* §§ 3002(b), 3006(c)(4). NAGPRA provided for the establishment of a committee to monitor and review implementation of the inventory and identification process and repatriation activities. See *Id.* § 3006(a)-(1).

<sup>68</sup> The discovery also attracted attention because some physical features, such as the shape of the face and skull, appeared to differ from modern American Indians. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1121 (D. Or. 2002).

<sup>69</sup> 217 F. Supp. 2d 1116 (D. Or. 2002) (appeal after remand, 969 F. Supp. 628 (D. Or. 1997)).

<sup>70</sup> The Army Corps of Engineers covered the site where the Kennewick man was discovered with approximately two million pounds of rubble and dirt, topped with 3,700 tree plantings, an act which undoubtedly hindered efforts to verify the age of the remains, and effectively

decided to grant custody of the Kennewick Man to a coalition of Indian tribes based on the age of the remains and their discovery within the United States.<sup>71</sup> Plaintiff scientists and religious groups challenged the Army Corps' decision, attempting to halt transfer of the remains to Indian tribes under NAGPRA by claiming the remains were not descended of an American Indian and seeking an opportunity to study them.

The Army Corps denied plaintiffs' request to study the remains, despite the Army Corps' representation that it buried the site to preserve its archaeological value for further study.<sup>72</sup> Local Indian tribes opposed scientific study of the remains on religious grounds.<sup>73</sup>

Ultimately, the Court agreed with plaintiffs. In the final outcome, the Court set aside the decision awarding the remains to the tribal coalition, enjoined transfer of the remains to the tribes, and required that archaeologists be allowed to study the remains. With respect to NAGPRA, the Court said, "The term 'Native American' requires, at a minimum, a cultural relationship between remains or other cultural items and a present-day tribe, people, or culture indigenous to the United States... The evidence in the record would not support a finding that Kennewick Man is related to any particular identifiable group or culture, and the group or culture to which he belonged may have died out thousands of years ago."<sup>74</sup> The Court noted that, "Congress did not create a presumption that items of a particular age are 'Native American.'" <sup>75</sup>

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obliterated efforts to determine whether other artifacts were present at the site that might have indicated a relationship to American Indians. *Id.* at 1126.

<sup>71</sup> *Id.* at 1130. The tribal claimants included the Confederated Tribes & Band of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Colville Reservation, and the Wanapam Band, which is not a federally recognized tribe. *Id.* at 1122.

<sup>72</sup> *Id.* at 1126. The administrative "record strongly suggests that the Corps' primary objective in covering the site was to prevent additional remains or artifacts from being discovered, not to 'preserve' the site's archaeological value or to remedy a severe erosion control problem as Defendants have represented to this court." *Id.* at 1125.

<sup>73</sup> *Id.* at 1121.

<sup>74</sup> *Id.* at 1138. As the Court noted, "Interpreting the statute as requiring a 'present-day relationship' is consistent with the goals of NAGPRA: Allowing tribes and individuals to protect and claim remains, graves, and cultural objects to which they have some relationship, but not allowing them to take custody of remains and cultural objects of persons and people to whom they are wholly unrelated." *Id.* at 1136.

<sup>75</sup> *Id.* at 1138.

### III. THE NATIONAL HISTORIC PRESERVATION ACT

*What we are told as children is that people when they walk on the land leave their breath wherever they go. So wherever we walk, that particular spot on the earth never forgets us, and when we go back to these places, we know that the people who have lived there are in some way still there, and that we can actually partake of their breath and of their spirit.*

*Rina Swentzell, Santa Clara Pueblo*<sup>76</sup>

#### A. The National Historic Preservation Act of 1966

The National Historic Preservation Act of 1966 (NHPA)<sup>77</sup> established a program for preserving historic properties throughout the nation.<sup>78</sup> Section 106 of the NHPA **requires** federal agencies to take into account the effect of their **undertakings on any** district, site, building, **structure**, or object that is included in or **eligible for inclusion** in the National Register.<sup>79</sup> Additionally, federal agencies **must afford** the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such **undertakings**<sup>80</sup>

##### 1. The NHPA Section 106 Process

Generally known as the "Section 106 process," the "reasonable opportunity to comment" portion of NHPA Section 106 is accomplished

<sup>76</sup> NATIVE AMERICAN WISDOM, *supra* note 1, at §2.

<sup>77</sup> Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. § 470).

<sup>78</sup> The Act's purpose provides that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b)(4). The National Environmental Policy Act, passed several years later in 1969, stated among its other goals that the federal government shall "preserve important historic, cultural and natural aspects of our national heritage." Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4331(b)(4)).

<sup>79</sup> 16 U.S.C. § 470f. The National Register of Historic Places is a basic inventory of historic resources in the United States administered by the National Park Service, and maintained by the "Keeper," who has authority to list and determine eligibility of historic properties. The National Register lists: (a) objects that are associated with events that have made a significant contribution to the broad patterns of our history; (b) objects that are associated with the lives of persons significant in our past; (c) objects that embody the distinctive characteristics of a type, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) objects that have yielded, or may be likely to yield, information important in prehistory or history. 36 C.F.R. § 60.4 (2003).

<sup>80</sup> 16 U.S.C. § 470f. The Advisory Council on Historic Preservation is an independent federal agency whose members are appointed by the President. ACHP members include the Architect of the Capitol; Secretaries of Interior, Agriculture, Defense and Transportation; Administrators of the EPA and GSA; Chairman of the National Trust for Historic Preservation; President of the National Conference of SHPOs; a governor, a mayor, a Native Hawaiian, and eight additional non-federal individuals. *Id.* § 470i(a).

through consultation of the federal agency with other interested parties.<sup>81</sup> Participants in the process include an agency official, the ACHP,<sup>82</sup> and consulting parties.<sup>83</sup> Consulting parties include the State Historic Preservation Officer (SHPO); Indian tribes<sup>84</sup> and Native Hawaiian organizations,<sup>85</sup> representatives of local governments with jurisdiction over the area of effect; applicants for federal assistance, permits, licenses, and other approvals; and any additional consulting parties, including the public.<sup>86</sup>

The agency official has approval authority for the undertaking and can commit the federal agency to take appropriate action for a specific undertaking as a result of Section 106 compliance.<sup>87</sup> A key player in the Section 106 process is the SHPO, representing the interests of a state and its citizens.<sup>88</sup> A SHPO is designated in each state by the Governor or chief executive or by state statute to administer the State Historic Preservation Program.<sup>89</sup> With respect to the Section 106 process, the SHPO advises federal agencies and assists them in carrying out their NHPA Section 106 responsibilities.<sup>90</sup>

In *Attakai v. United States*,<sup>91</sup> a 1990 NHPA case presaging future action by Congress, the U.S. District Court for the District of Arizona ruled on claims brought by members of the Navajo tribe. Navajo plaintiffs sought to enjoin the Department of the Interior and the Bureau of Indian Affairs (BIA) from constructing fences and livestock watering facilities on land apportioned to a neighboring Hopi tribe by the Navajo-Hopi Land Settlement Act. The plaintiffs' principal claim was that defendants did not engage in consultation with the SHPO in determining the existence of historic properties as required by NHPA regulations.<sup>92</sup> Plaintiffs also contended that the defendants were

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<sup>81</sup> 36 C.F.R. § 800.1(a) (2003).

<sup>82</sup> 16 U.S.C. § 470f.

<sup>83</sup> 36 C.F.R. § 800.2(a)-(c).

<sup>84</sup> Under the NHPA, "Indian Tribes" include an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. *Id.* § 800.16(m).

<sup>85</sup> Under the NHPA, Native Hawaiian Organizations are any organization that serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians. *Id.* § 800.2(s)(1).

<sup>86</sup> "Additional consulting parties" are certain individuals with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effect on historic properties. *See Id.* § 800.2(c)(5) and (d).

<sup>87</sup> *Id.* § 800.2(a).

<sup>88</sup> *Id.* § 800.2(c)(1)(i).

<sup>89</sup> *Id.* § 60.3(n) (2003).

<sup>90</sup> *Id.* § 800.2(c)(1)(i).

<sup>91</sup> 746 F. Supp. 1395 (D. Ariz. 1990).

<sup>92</sup> *Attakai*, 746 F. Supp. at 1406.

required to consult with them or the entire Navajo tribe as part of the Section 106 process.<sup>93</sup>

Upholding plaintiffs' claims,<sup>94</sup> the *Attakai* Court noted that NHPA regulations "clearly require that an Indian tribe participate as a consulting party and that it must concur in any agreement regarding undertakings which affect its lands."<sup>95</sup> However, because the undertakings were to take place on the Hopi Reservation, the Court found that it was the Hopi tribe that must concur in any agreement, as opposed to the Navajo tribe.<sup>96</sup> Nevertheless, the Court determined that NHPA regulations required the Navajo tribe to be afforded an opportunity to participate in the Section 106 consultation as they "clearly contemplate participation by Indian tribes regarding properties beyond their own reservations," regardless of whether they are non-Indian lands.<sup>97</sup>

## 2. NHPA Section 110

Section 110 of the NHPA requires federal agencies to assume responsibility for preservation of historic properties they own or control and to establish a program ensuring that historic properties under their jurisdiction and control are identified, evaluated and nominated to the National Register.<sup>98</sup> A secondary claim in the above *Attakai* case involved federal agency responsibilities under NHPA Section 110, wherein plaintiffs contended that defendants failed to establish a program to inventory historical sites on the Hopi Partitioned Lands.

In rejecting this claim, the United States District Court for the District of Arizona stated, "There is nothing in section 110 of the Act which suggests that Congress intended to impose the obligations of that section on federal agencies with regard to Indian lands...Congress provided for federal responsibilities with regard to protection of historic resources on Indian lands in section 106 on a project specific basis."<sup>99</sup> Therefore, per this District Court, a federal agency does not have NHPA Section 110 responsibilities on Indian lands.

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<sup>93</sup> *Id.* at 1408.

<sup>94</sup> *Id.* at 1407-1408. *See also* Pueblo of Sandia v. United States, 50 F.3d 856 (10<sup>th</sup> Cir. 1995) (National Forest Service violated NHPA regulations because its evaluation of a canyon, deemed a traditional cultural property by the Pueblo, for inclusion in the National Register was not reasonable or in good faith. Mailing of form letters soliciting information was not informed consultation with SHPO; no documentation of decision provided to SHPO.).

<sup>95</sup> *Attakai*, 746 F. Supp. at 1408.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 16 U.S.C. § 470h-2(a)(1)-(2) (1966).

<sup>99</sup> *Attakai*, 746 F. Supp. at 1409.

## B. The National Historic Preservation Act Amendments of 1992

### 1. Tribal Historic Preservation Officers and the Section 106 Process

The 1992 NHPA amendments emphasized and strengthened the role of American Indians and Indian tribes. As interpreted by the ACHP, the 1992 revisions:

...embody the principle that Indian tribes should have the same extent of involvement when actions occur on tribal lands as the SHPO does for actions within the State; this includes the ability to agree to decisions regarding significance of historic properties, effects to them and treatment of those effects, including signing Memoranda of Agreement.<sup>100</sup>

Accordingly, the ACHP's revised regulations<sup>101</sup> now contain specific provisions for involving Indian tribes when actions occur on tribal lands,<sup>102</sup> with enhanced consultation with Indian tribes and Native Hawaiian organizations throughout the Section 106 process. Pointedly, an express provision is now made for "Tribal historic preservation officer[s]" (THPOs).<sup>103</sup> The revised NHPA regulations provide that:

For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands...the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.<sup>104</sup>

For tribes that have not assumed SHPO functions, federal agencies are required to consult with a representative designated by the Indian tribe, in addition to the SHPO, regarding undertakings occurring on or affecting historic properties on its tribal lands.<sup>105</sup> These Indian tribes have the same rights of consultation and concurrence that THPOs are afforded; yet the SHPO remains a consulting party in the Section 106 process. For federal undertakings occurring on non-tribal lands to which any Indian tribe or Native Hawaiian organization attaches religious or cultural significance to potentially affected

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<sup>100</sup>Section 106 Regulations Users Guide, Section 106 Major Changes, available at <http://www.achp.gov/106changes.html>.

<sup>101</sup> 36 C.F.R. § 800 (2003).

<sup>102</sup> Tribal lands include all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities. *Id.* § 800.16(x).

<sup>103</sup> The THPO is the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands. *Id.* § 800.16(w).

<sup>104</sup> *Id.* § 800.2(c)(2)(i)(A).

<sup>105</sup> *Id.* § 800.2(c)(2)(i)(B).

natural resources can have a religious significance, such as sacred sites or native plants used in ceremonies.<sup>112</sup>

The U.S. Constitution's First Amendment precludes Congress from enacting legislation prohibiting the free exercise of religion.<sup>113</sup> To ensure American Indians received protections equivalent to those of the First Amendment Free Exercise clause, Congress passed AIRFA, which, in its entirety, states:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.<sup>114</sup>

AIRFA represents the first cultural resource preservation law enacted specifically for American Indians, as opposed to the NHPA or ARPA.

#### **A. AIRFA Protections Do Not Extend Beyond Those of the First Amendment's Free Exercise Clause**

The Free Exercise Clause of the First Amendment has traditionally been held to prevent the Government from 1) imposing coercive action or requirements against the practice of one's religion and/or 2) penalizing one's access to public benefits or rights because of religious beliefs or practices.<sup>115</sup> American Indians have sought rights beyond these two protections, using AIRFA as a legal cause of action to preclude government development of natural areas on the grounds that these areas constitute sacred sites.

For example, in addition to the NHPA claim in the aforementioned *Attakai* case, Navajo plaintiffs also claimed that BIA installation of fencing and construction of livestock watering stations on Hopi Partitioned Land would interfere with the practice of their religion, therefore constituting a

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<sup>111</sup> Indeed, some American Indian tribes considered the Endangered Species Act to be "Indian law." The Hopi consider all religious matters to be intellectual property. The Pueblos incorporate agriculture, such as corn, into ceremonies.

<sup>112</sup> See *Pueblo of Sandia v. United States*, 50 F.3d 856, 857 (10<sup>th</sup> Cir. 1995)(Sandia Pueblo tribal members visit Las Huertas Canyon, which they deem a traditional cultural property, to gather evergreen boughs for use in significant private and public cultural ceremonies. They also harvest herbs and plants along the Las Huertas Creek, which are important for traditional healing practices. The canyon contains many shrines and ceremonial paths of religious and cultural significance to the Pueblo.).

<sup>113</sup> "Congress shall make no law . . . prohibiting the free exercise [of religion]." U. S. CONST., amend. I.

<sup>114</sup> 42 U.S.C. § 1996 (1978).

<sup>115</sup> *Crow v. Gullet*, 541 F. Supp. 785, 790 (D. S.D. 1982), *aff'd*, 706 F.2d 856 (8<sup>th</sup> Cir. 1983), *cert. denied*, 464 U.S. 977 (1983).

in confirming that it is pursuant to an established religion espoused by an appropriately authoritative representative of an Indian religion.<sup>123</sup> This is pursuant to E.O. 13007's definition of a "sacred site" as--

any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.<sup>124</sup>

Where appropriate, E.O. 13007 requires agencies to maintain the confidentiality of sacred sites.<sup>125</sup>

## 2. Notice of Action or Policy Impacting Sacred Sites

E.O. 13007 ensures reasonable notice to Indian tribes, where practicable and appropriate, of proposed actions or land management policies that may restrict future access<sup>126</sup> to or ceremonial use of, or adversely affect the physical integrity of, sacred sites.<sup>127</sup> All actions pursuant to E.O. 13007, to include tribal notice, must comply with the Executive Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments."<sup>128</sup>

This Executive Memorandum acknowledges the unique legal relationship between the federal government and Native American tribal governments and seeks to ensure that rights of sovereign tribal governments are fully respected by federal agencies.<sup>129</sup> It provides that executive branch activities shall operate within a government-to-government relationship with federally recognized tribal governments, and consult, "to the greatest extent practicable," prior to taking actions that affect them.<sup>130</sup> All such consultations are required to be "open and candid," allowing tribal governments to evaluate potential impacts.<sup>131</sup>

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<sup>123</sup> *Id.* § 1(b)(iii).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* § 1.

<sup>126</sup> The E.O. provides for access to sites by "Indian religious practitioners," which is not defined in the E.O. *Id.* Hence, access pursuant to E.O. 13007 is not necessarily limited to federally recognized tribes or their members.

<sup>127</sup> *Id.* § 2(a).

<sup>128</sup> *Id.*; Exec. Memorandum, "Government-to-Government Relations with Native American Tribal Governments," 59 Fed. Reg. 22951 (April 29, 1994).

<sup>129</sup> Exec. Memorandum, *supra* note 128.

<sup>130</sup> *Id.* § (a)-(b).

<sup>131</sup> *Id.* § (b).

### C. Eagle Feathers and American Indian Religion

Recognizing that eagle feathers hold a sacred place in American Indian culture, President Clinton released an additional Executive Memorandum on April 29, 1994, "Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes."<sup>132</sup> The Memorandum undertakes policy and procedural changes to better accommodate religious practices, requiring federal agencies to "take steps to improve their collection and transfer of eagle carcasses and eagle body parts for Native American religious purposes."<sup>133</sup> This includes, among other actions, simplifying the eagle permit application process, ensuring first priority for distribution of eagles to Native American permit applicants, and "ensuring respect and dignity in the process of distributing eagles for Native American religious purposes to the greatest extent practicable."<sup>134</sup>

### V. FEDERAL CONSULTATION AND COORDINATION WITH AMERICAN INDIAN TRIBAL GOVERNMENTS

*When you gave us peace, we called you father, because you promised to secure us in possession of our lands. Do this, and so long as the lands shall remain, the beloved name will remain in the heart of every Seneca.*

*Cornplanter, Seneca*

*(from an address to George Washington, 1790)<sup>135</sup>*

#### A. Executive Order (E.O.) 13175

In the formulation and implementation of federal policies with tribal implications, E.O. 13175, "Consultation and Coordination with Indian Tribal Governments," requires federal agencies to "respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments."<sup>136</sup> "Early consultation" is mandated in the process of developing, or prior to implementing, proposed regulations with tribal implications. Federal agencies are further tasked with providing to the Office of Management and Budget a "statement of the extent to which the concerns of tribal officials have been met."<sup>137</sup>

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<sup>132</sup> Exec. Memorandum, "Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes," 59 Fed. Reg. 22953 (April 29, 1994).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> NATIVE AMERICAN WISDOM, *supra* note 1, at 44.

<sup>136</sup> Exec. Order No. 13175, § 3(a), 65 Fed. Reg. 67249 (November 6, 2000).

<sup>137</sup> *Id.* § 5(a)-(c).

## B. Practical Considerations

The following are some practical considerations for engaging in consultation or coordination with American Indian tribal representatives, whether pursuant to NAGPRA, issuance of an ARPA permit, NHPA Section 106, or an E.O.:

- It is not the responsibility of federal agencies to settle disputes between different tribes during consultation. In fact, in most cases it is not at all recommended, especially if tribal politics are involved.
- Individual tribal representatives are usually not given unilateral authority to represent their tribe. Rather, they may be required to take information from an initial consultation back to a tribal council or tribal elders for their input. This can be a timely process of building consensus so that decisions can be made.
- Some American Indian tribes or tribal representatives will want to be paid for certain consultations that they deem an intellectual property right issue.<sup>138</sup>
- Federal agencies possess a wealth of documentary materials such as maps and studies that can be very helpful to American Indians and create a better understanding during consultations.

## VI. DoD AMERICAN INDIAN AND ALASKA NATIVE POLICY

*Will you ever begin to understand the meaning of the very soil beneath your feet? From a grain of sand to a great mountain, all is sacred. Yesterday and tomorrow exist eternally upon this continent. We natives are guardians of this sacred place.*

*Peter Blue Cloud, Mohawk*<sup>139</sup>

In 1998, DoD initiated formulation of its American Indian and Alaska Native Policy for interacting and working with federally recognized American Indian and Alaska Native governments.<sup>140</sup> This policy, promulgated in 2001,

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<sup>138</sup> DoD may pay tribes for professional services rendered under contract, purchase order, or cooperative agreement, but does not pay "consultation fees." Military departments may reimburse for "invited travel" for the purpose of conferring upon official government business. 5 U.S.C. § 5703 (1966).

<sup>139</sup> NATIVE AMERICAN WISDOM, *supra* note 1, at 110.

<sup>140</sup> This policy governs interaction with federally recognized tribes only; it does not govern interaction with unrecognized tribes, state-recognized tribes, Alaska Native village or regional

party; where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for purposes of consultation.”<sup>151</sup> “Second, in most cases, consultation should include an invitation to potentially affected tribes to provide information to DoD concerning actions that may significantly affect tribal interests; that information should be given special consideration.”<sup>152</sup>

Recognition and respect are required for the significance tribes attach to certain natural resources and properties of traditional or customary religious importance. Such respect can be accorded in part by developing tribal-specific protocols to protect tribal information disclosed to or collected by DoD.<sup>153</sup> A caveat is provided, however, that at present, “legal authority to protect tribal information concerning sacred sites is very limited.”<sup>154</sup> Therefore, this policy warns military installations to be “careful not to overstate their ability to keep sensitive tribal information confidential.”<sup>155</sup>

## VII. CONCLUSION

*Our land, our religion, and our life are one. It is upon this land that we have hunted deer, elk, antelope, buffalo, rabbit, turkey. It is from this land that we obtained the timbers and stone for our homes and kivas.*  
*Hopi creed*<sup>156</sup>

“The culture that is indigenous to the 48 contiguous states is the American Indian culture, which was here long before the arrival of modern Europeans and continues today.”<sup>157</sup> Since 1831, the federal government’s concept of guardianship in relation to that culture has shifted from the federal government as guardian over American Indians, to American Indians as guardians of their cultural heritage.

Accordingly, cultural resource preservation law developments over the past few decades have provided American Indians with previously denied cultural property rights, allowing for control and repatriation of ancestral remains and other cultural items as opposed to their scientific curation. Additionally, American Indians now possess the legal ability to freely practice religion, including access to sacred sites, and to garner respect for requests of confidentiality.

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<sup>151</sup> *Id.* § (m).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* § (r).

<sup>154</sup> Section 9 of ARPA and Section 304 of NHPA may provide some protection from a request for such information, but may not be enough to guarantee confidentiality in the face of a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request for disclosure--especially under NHPA, which does not cross-reference FOIA.

<sup>155</sup> DoD American Indian and Alaska Native Policy, *supra* note 141, § (r).

<sup>156</sup> NATIVE AMERICAN WISDOM, *supra* note 1, at 13.

<sup>157</sup> *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1138 (D. Or. 2002).