

# USALSA Report

United States Army Legal Services Agency

## *Environmental Law Division Notes*

### Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes the *Bulletin* electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 4, is reproduced in part below.

#### Storage and Disposal of Non-Department of Defense Toxic and Hazardous Materials

Section 343 of the National Defense Authorization Act for Fiscal Year 1998<sup>1</sup> provided welcome news for installations which face the problem of non-Department of Defense (DOD) entities wishing to store or to dispose of toxic or hazardous materials on DOD installations. This provision amended 10 U.S.C. § 2692, which generally forbade the storage or disposal of such materials.<sup>2</sup>

Initially, section 343 amended 10 U.S.C. § 2692(a) to permit storage or disposal of materials which are owned by the DOD or by a member of the armed forces or dependent family members assigned to installation housing.<sup>3</sup> In effect, this amendment now allows soldiers and their families to legally possess toxic and hazardous materials, such as pesticides and household cleaning supplies, while residing on a military installation.

Section 343 also greatly expanded the number of exceptions to the general prohibition against storage or disposal of non-DOD toxic or hazardous materials. Under the previous authority of 10 U.S.C. § 2692, non-DOD entities could store or dispose of toxic or hazardous materials only under extremely limited circumstances.<sup>4</sup> In particular, the statute provided hardships for

Base Realignment and Closure (BRAC) installations because local reuse authorities who were seeking to redevelop the property could not obtain the needed exemptions to store the materials of potential lessees pending conveyance.

One of the more important changes to the exemptions in the statute is that which permits storage when the Secretary of the Army determines that the "material is required or generated in connection with the authorized and compatible use of a facility of the DOD . . ."<sup>5</sup> This encompasses the BRAC situation, allowing reuse authorities more flexibility in marketing property to potential lessees. A second exception will allow installations to assist federal, state, or local law enforcement agencies in temporarily storing explosives.<sup>6</sup> Another significant exception will permit storage, treatment, or disposal of materials used in connection with a service or activity performed on an installation for the benefit of the DOD.<sup>7</sup>

It is important to note that many of these exceptions require Secretary of the Army approval, but efforts are underway to delegate this approval authority to lower levels of command. The ELD is assisting in the development of guidance on this issue and will provide information as it becomes available. Major Polchek.

### The Sikes Act Improvement Act of 1997

#### *Introduction*

Since 1960, hunters and fishers held dear the principles of the Sikes Act,<sup>8</sup> which facilitated access to twenty-five million acres of land managed by the Department of Defense (DOD).<sup>9</sup> On 18 November 1997, President Clinton signed into law the Sikes Act Improvement Act (SAIA) as Title XXIX of the National Defense Authorization Act for Fiscal Year 1998.<sup>10</sup> In many ways, the SAIA simply codifies present DOD and Army practices. In other ways, however, the SAIA fundamentally

1. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 343, 111 Stat. 1629 (1997).

2. 10 U.S.C.A. § 2692 (West 1997).

3. National Defense Authorization Act for Fiscal Year 1998 § 343(a).

4. See 10 U.S.C.A. § 2692(b)(1-9).

5. National Defense Authorization Act for Fiscal Year 1998 § 343(d). The amendment also authorizes the secretary to permit treatment and disposal of non-DOD materials in more limited circumstances. *Id.* § 343(e).

6. *Id.* § 343(c). The statute previously permitted such assistance only to federal law enforcement agencies. 10 U.S.C.A. § 2692(b)(3).

7. National Defense Authorization Act for Fiscal Year 1998 § 343(b)(2).

changes the way in which the DOD manages its land and natural resources. Most notably, what was once done according to guidance must now be accomplished according to statute. The Sikes Act is not just for hunters and fishers anymore: the DOD's installation trainers, range managers, natural resource managers, and attorneys should take note.

### *That Was Then*

As it existed prior to the SAIA,<sup>11</sup> the Sikes Act authorized much but mandated little. The Act primarily focused on empowering the DOD and its component services to enter into partnerships with the Department of the Interior (DOI), state fish and wildlife agencies, and even private entities to provide for the sound management of natural resources on military installations. The intended management framework revolved around the authority for installations to enter into "cooperative plans" that were "mutually agreed upon" by the military installation, the DOI, and the state wildlife agency.<sup>12</sup> Cooperative planning allowed installations to develop sustainable fish and game programs by generating revenue for conservation projects,<sup>13</sup> establishing management partnerships, and facilitating enforcement. Formal natural resource planning under the Act, however, remained entirely discretionary.

Prior to 1986, the Sikes Act did not mandate planning. A 1986 amendment,<sup>14</sup> however, directed each military department to manage the natural resources at its installations to provide for

"sustained multiple purpose uses" and public access "necessary or appropriate for those uses."<sup>15</sup> Congress made it clear that the military mission must prevail in situations where natural resource management goals conflict with the military mission.<sup>16</sup> Rather than legislate how this mandate should be carried out, Congress committed this judgment to the discretion of each military department, effectively precluding judicial review of DOD natural resource planning and management.

To more uniformly manage its natural resources, and despite the lack of a statutory mandate, the DOD adopted a policy in 1996 which required formal integrated natural resource management plans (INRMPs).<sup>17</sup> In early 1997, the Army established guidance and a timeframe for completing installation INRMPs.<sup>18</sup>

### *This Is Now*

The SAIA continues the baseline requirement for the DOD to manage installation natural resources on a sustained multiple-use basis, and it makes the DOD's self-imposed INRMP requirement a Congressional directive.<sup>19</sup> Most DOD installations are required to prepare and to begin implementing INRMPs by 18 November 2001.<sup>20</sup> Each INRMP must: (1) reflect the "mutual agreement" of the U.S. Fish and Wildlife Service (FWS) and state fish and wildlife agencies in regard to certain aspects of the plan,<sup>21</sup> (2) address specified areas,<sup>22</sup> and (3) solicit public comments.<sup>23</sup> In short, natural resource plan-

8. 16 U.S.C.A. § 670a-f (West 1997). The Sikes Act was first enacted in 1960. It authorized the DOD to manage fish and wildlife resources in cooperation with state fish and game agencies and to retain hunting and fishing fees on installations to help finance conservation programs. Pub. L. No. 86-797, 74 Stat. 1052 (1960). Subsequent amendments substantially expanded the Act to provide authority for cooperative plans with both government and non-governmental entities and encouraged planning for sustained multiple-use management of a broad range of natural resources.

9. RAND NATIONAL DEFENSE RESEARCH INSTITUTE, MORE THAN 25 MILLION ACRES? DOD AS A FEDERAL, NATURAL, AND CULTURAL RESOURCE MANAGER 4 (1996). The Army manages approximately 12.5 million acres, while the Air Force and Navy (including the Marine Corps) manage 9.0 million acres and 3.5 million acres, respectively.

10. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

11. The last time the Sikes Act was significantly amended was in 1986. See Pub. L. No. 99-561, 100 Stat. 3149 (1986).

12. If an installation chose to develop a "cooperative plan," the Act established minimum content requirements that must be met (for example, range rehabilitation and habitat improvement projects). See 16 U.S.C.A. § 670a.

13. The Sikes Act's most important financial provisions allow the DOD to retain funds collected from the operation of any cooperative plans and agreements and restrict their spending to the purposes of those plans and agreements. *Id.* § 670d.

14. The Act contained other minor mandates, such as the requirement to use, "to the extent feasible," professionally trained DOD personnel for fish and wildlife management and enforcement. See *id.* § 670a-1(b).

15. *Id.* § 670a-1(a).

16. *Id.* Management for multipurpose uses and public access was required, but only "to the extent that those uses and that access are not inconsistent with the military mission of the reservation." *Id.*

17. U.S. DEPARTMENT OF DEFENSE, INSTR. 4715.3, ENVIRONMENTAL CONSERVATION PROGRAM (3 May 1996).

18. See Memorandum, Major General Randolph W. House, Army Assistant Chief of Staff for Installation Management, to Army Major Commands, subject: Army Goals and Implementing Guidance for Natural Resources Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP), para. 13 (21 Mar. 1997) (copy on file with authors). See also *Integrated Natural Resources Management Plan (INRMP) Guidance Released*, ARMY LAW., June 1997, at 57.

ning and management must now follow a statutorily mandated process which establishes timelines, prescribes necessary elements, and requires open and coordinated preparation.

Equally important to military commanders, the SAIA expresses the intent of Congress to ensure that military installations remain focused on conducting military training and operations. In particular, three statements in the SAIA signal the Congressional intent to protect the primary purpose of military installations. First, Congress recognized and unequivocally declared that military departments have the use of "installations to ensure the preparedness of the Armed Forces."<sup>24</sup> Second, Congress mandated that every INRMP must be "consistent with" the primary use for installation lands.<sup>25</sup> Third, Congress required that each INRMP ensure that there is "no net loss in the capability of military installation lands to support the military mission of the installation."<sup>26</sup> The conference report for the SAIA further establishes that the Congressional intent of the Sikes Act reauthorization effort was to give military installation commanders a better tool to conduct military operations and training activities while conserving natural resources.<sup>27</sup>

### Practice Notes

19. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997). The SAIA also imposes substantial reporting requirements. The DOD must report to Congress by 18 November 1998, describing all installations for which INRMPs will be prepared, and must explain its reasons for excluding installations from the INRMP requirement. *Id.* Thereafter, the DOD must report annually the status of INRMP preparation and implementation for those installations for which the INRMP requirement applies. *Id.*

20. *Id.* § 2905(c). Reporting requirements apply to installations with sufficient resources to warrant INRMPs.

21. *Id.* § 2904(a). These provisions tend to favor fish and wildlife interests over other natural resource interests, such as outdoor recreation, livestock grazing, and timber harvesting.

22. *Id.* § 2904(c).

23. *Id.* § 2905(d).

24. *Id.* § 2904(a). It should also be noted that Congress did not use the words "necessary for reasons of national security" when dictating the level of consideration for military activities, as it has done with many other environmental statutes. *See, e.g.,* Endangered Species Act of 1973, 16 U.S.C.A. § 1536(j) (West 1997). While the term "national security" denotes a high standard that can only be invoked when overall military readiness is threatened, the use of the term "military preparedness" denotes a much lower standard, which ensures that INRMPs do not interfere with military operations and training activities that contribute to military or unit readiness. The SAIA emphasis on "preparedness" strengthens the "purpose" statement that had previously been in the Sikes Act. *See supra* note 16 (prior statutory text).

25. National Defense Authorization Act for Fiscal Year 1998 § 2904(c).

26. *Id.*

27. H.R. CONF. REP. NO. 105-340, at H9435 (1997).

The conferees note that the reauthorization of the Sikes Act would directly affect the nearly 25 million acres managed by the Department of Defense. The conferees agree that reauthorization of the Sikes Act is not intended to expand the management authority of the U.S. Fish and Wildlife Service or the state fish and wildlife agencies in relation to military lands. Moreover, it is expected that integrated natural resources management plans shall be prepared to facilitate installation commanders' conservation and rehabilitation efforts that support the use of military lands for readiness and training of the armed forces.

28. *Sikes Act Agreement in Jeopardy After Military Services' Objections*, DEF. ENVTL. ALERT, June 12, 1996, at 3.

29. National Defense Authorization Act for Fiscal Year 1998 § 2904(a).

30. *Id.*

Several important implementation issues warrant careful attention by installation environmental law specialists (ELS).

*The Scope of FWS and State Involvement.* For two years, the Sikes Act reauthorization effort floundered because the DOD would not accede to FWS and state control over portions of the INRMPs which did not address fish and wildlife.<sup>28</sup> Under the SAIA, only those portions of the INRMP which concern "conservation, protection, and management of fish and wildlife resources" are subject to the "mutual agreement" of the FWS and state fish and game agencies.<sup>29</sup> While the FWS and states are significant stakeholders and are entitled to close coordination in INRMP development, the Act clearly states that nothing in the Act "enlarges or diminishes the responsibility and authority of any [s]tate for the protection and management of fish and resident wildlife."<sup>30</sup> If the INRMP is to be used as a valuable tool by military installations, it must address military training and land use planning areas beyond fish and wildlife. The language of the SAIA reflects the DOD's position and excludes the need for the DOD to reach mutual agreement with the FWS and the state on issues beyond their expertise.

*Existing INRMPs.* The conference committee report indicates an intent to "grandfather" existing "cooperative plans" that could be modified to meet the new legislation.<sup>31</sup> Nevertheless, the SAIA directs installations with existing cooperative

plans to “complete negotiations with the [FWS] and [the state] regarding changes in the plan” which are necessary for the plan to meet the requirements for an INRMP.<sup>32</sup> While the term “negotiation” is not defined, installations with existing INRMPs may want to point out during those negotiations the Congressional intent to grandfather existing INRMPs.

*Prepare Record for Possible Litigation.* The SAIA’s elevation of the INRMP to mandatory agency action has significant administrative law consequences. Preparation of an INRMP may be subject to the judicial review provisions of the Administrative Procedure Act (APA).<sup>33</sup> The APA empowers the federal judiciary, at the request of an aggrieved party, to set aside agency action that is taken without adherence to all of the procedures required by law. Thus it is possible for a state fish and wildlife agency to seek judicial review of an INRMP in which the state did not concur. It is also possible that potential litigants could challenge natural resource management activities designed to enhance military training (e.g., prescribed burning) but which are not part of an INRMP.

*Ensure INRMPs Integrate Other Planning Statutes.* The legal procedures associated with development of an INRMP are not limited to those set forth in the SAIA. Installations should consider the necessary levels of supporting National Environmental Policy Act (NEPA)<sup>34</sup> documentation, Section 7 of the

Endangered Species Act (ESA)<sup>35</sup> consultation, and Section 106 of the National Historic Preservation Act (NHPA)<sup>36</sup> consultation. The INRMP development process must be tailored to integrate these processes.<sup>37</sup> Most importantly, installations must document the decision-making process in a detailed, thorough administrative record.<sup>38</sup> This process would also prove helpful for Army secretariat review and override of a nonconcurrency to an INRMP by the FWS or state fish and game agencies.

*Develop Compliance Strategy.* The Army must amend its existing natural resource management policy and guidance to implement many of the provisions of the SAIA. In the meantime, the ELS can review the state of the existing natural resource program on post,<sup>39</sup> establish communications with the FWS and relevant state agencies, and work closely with the installation natural resource professionals to establish a compliance strategy. The compliance strategy should project timelines, funding, and the procurement mechanisms necessary to ensure completion of the planning level surveys, integration of all legal processes (SAIA, NEPA, ESA, and NHPA), and coordination with all major stakeholders prior to the 18 November 2001 deadline.

*Develop a Baseline for Non-Mission Lands.* Each installation’s natural resource managers, range officers, and training

31. See H.R. CONF. REP. NO. 105-340 (1997).

The conferees note that the military departments will have completed approximately 60 percent of the required integrated natural resources management plans by October 1, 1997. The conferees understand that most of these plans have been prepared consistent with the criteria established under this provision. In addition, the conferees note the significant investment made by the military departments in the completion of current integrated natural resources management plans. The conferees intend that the plans that meet the criteria established under this provision should not be subject to renegotiation and reaccomplishment.

32. National Defense Authorization Act for Fiscal Year 1998 § 2905(c).

33. 5 U.S.C.A. §§ 701-06 (West 1997). The APA provides that “a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.* § 702.

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

35. Endangered Species Act, 16 U.S.C.A. § 1536(a)(2) (West 1997). See Implementing Regulations: Interagency Cooperation—Endangered Species Act of 1973, as amended, 50 C.F.R. pt. 402 (1997).

36. National Historic Preservation Act, 16 U.S.C.A. § 470f (West 1997).

37. Environmental law specialists should also give close consideration to how an INRMP addresses impacts from testing, training, and other mission-related activities. Challenge to an INRMP could provide a forum for indirectly attacking such activities.

38. Under the Army INRMP implementing guidance, all installation INRMPs must undergo NEPA analysis in accordance with *Army Regulation 200-2 (AR 200-2)*, Environmental Effects of Army Actions (1988). In most cases, because INRMPs are derived to maintain and to sustain natural resources, an environmental assessment and a Finding of No Significant Impact (FONSI) should satisfy the requirements of *AR 200-2* and the NEPA. If, however, implementation of the INRMP will significantly impact the environment, the installation must produce an Environmental Impact Statement (EIS). To comply with *AR 200-2*, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a range of reasonable alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain a detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP (for example, perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency).

39. In the review, the environmental law specialist should initially focus on existing cooperative plans, endangered species management plans, ESA biological assessments and opinions, and NEPA documents addressing impacts to natural resources. Many installations have also prepared draft INRMPs in anticipation of SAIA enactment. These should be reviewed for consistency with the new mandates.

officers should coordinate and document existing non-mission uses of installation land and natural resources. This is an essential task that should be completed either as part of the INRMP process or as a separate activity. This effort may ultimately give effect to the SAIA's intent that lands be used to ensure the preparedness of military units and that there must be no net loss in the use of those lands for intended purposes (namely, military operations and training). At the same time, the installation should develop a baseline of documented military use and the need for training flexibility on the installation's range and training lands. This will entail doing more than just cataloging numbers of training days on which ranges were used. It should include such details as the necessity and use of weapons safety buffer zones, requirements for flexibility (to accommodate preparations for deployments, visiting units, reserve units, or expanding missions), and the requirement "to rest and to rotate" training areas for natural resource renewal and to keep soldiers from knowing terrain too well. Mr. Scott M. Farley and Lieutenant Colonel Richard A. Jaynes.

### **EPA's New Guidance on the Use of RCRA's Imminent Endangerment Authority**

On 20 October 1997, the Environmental Protection Agency (EPA) sent to its regional offices new enforcement guidance on using the Resource Conservation and Recovery Act's<sup>40</sup> (RCRA) Section 7003, the imminent and substantial endangerment authority.<sup>41</sup> The guidance emphasizes the power of Section 7003 as a broad enforcement tool that can be used to address circumstances that may present an imminent and substantial endangerment to health or the environment. This document takes the place of previous guidance issued in 1984 that dealt exclusively with how to issue administrative orders pur-

suant to Section 7003.<sup>42</sup> The new guidance also discusses procedures for taking judicial action and updates policy to conform with new case law and revised enforcement priorities.<sup>43</sup> The EPA provides an explanation of imminent substantial endangerment, case-screening factors, the relationship of Section 7003 to other authorities, and the legal requirements for initiating action under Section 7003.<sup>44</sup>

The EPA cites the many benefits of Section 7003, chiefly its effectiveness in furthering risk-based enforcement and in addressing the worst RCRA sites first.<sup>45</sup> The guidance also points out the availability of Section 7003 as an enforcement tool for sites and facilities that are not subject to the RCRA or other environmental regulation.<sup>46</sup> In addition, Section 7003 can be used to address endangerment at facilities that are in compliance with a RCRA permit.<sup>47</sup> In this instance, however, the guidance directs the regions to consider requiring necessary actions under the permit authorities rather than Section 7003.<sup>48</sup> Another benefit noted by the document is that administrative remedies do not have to be exhausted before using the imminent and substantial endangerment authority.<sup>49</sup>

In deciding whether to take action under Section 7003, the EPA urged the regions to give the highest priority to sites that pose serious risks to health or the environment.<sup>50</sup> In addition, the guidance cautions that special consideration should be given to sites that pose environmental justice concerns.<sup>51</sup> Other screening factors which regions are directed to consider are the technical difficulty of performing the necessary activities and the likelihood that the responsible party will be capable of the required performance.<sup>52</sup>

The EPA cited case law in which courts have interpreted Section 7003 authority broadly in describing what constitutes an "imminent and substantial endangerment."<sup>53</sup> The EPA

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40. 42 U.S.C.A. § 6973 (West 1997).

41. Memorandum, Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, subject: Transmittal of Guidance on the Use of Section 7003 of RCRA (Oct. 20, 1997) [hereinafter Guidance]. The EPA guidance is available on the internet at <<http://es.epa.gov/oeca/osre/971020.html>>.

42. *Id.* § I.

43. *Id.* § VI.

44. *Id.*

45. *Id.* § II.

46. *Id.* § III A.

47. *Id.*

48. *Id.*

49. *Id.* § III B2.

50. *Id.* § II.

51. *Id.*

52. *Id.*

emphasized that the endangerment “may” occur in the future and that there need not be proof of harm, only a risk of potential harm.<sup>54</sup> The guidance states that for the “substantial” component to be satisfied, the risk does not have to be quantified, as long as there is a reasonable cause for concern about potential harm.<sup>55</sup>

The guidance gives the circumstances under which the use of RCRA Section 7003 is preferred over the Comprehensive Environmental Response, Compensation, and Liability Act<sup>56</sup> (CERCLA) authority. Regions are advised to consider using the RCRA if the materials which pose the risk of harm meet the RCRA’s statutory definition of hazardous waste but do not qualify as hazardous substances under the CERCLA.<sup>57</sup> Section 7003 may also be advantageous in addressing potential endangerment caused by petroleum, because petroleum is not a hazardous substance under the CERCLA.<sup>58</sup> In addition, RCRA Section 7003 authority is preferred in circumstances where a region is seeking an administrative order requiring long-term cleanup.<sup>59</sup> Under the CERCLA, remedial action must be in the form of a judicial consent decree.<sup>60</sup>

Using the language of the statute and recent case law, the EPA has proposed the most expansive reading of the Section 7003 enforcement authority. Only time will tell whether the new guidance will result in an increase in Section 7003 enforcement actions or just a heightened awareness of the breadth of the authority. Major Anderson-Lloyd.

### Fines and Penalties

At the close of the first quarter of fiscal year 1998, four new fines had been assessed against Army installations. Of the 160 fines assessed against Army installations since fiscal year 1993, the majority are Resource Conservation and Recovery Act<sup>61</sup> fines (89), followed by fines under the Clean Air Act<sup>62</sup> (40), the Clean Water Act<sup>63</sup> (22), the Safe Drinking Water Act<sup>64</sup> (6), and, finally, the Comprehensive Environmental Response, Compensation, and Liability Act<sup>65</sup> (3).

The latest reporting quarter marked the first fine assessed against an Army installation under the amended Safe Drinking Water Act.<sup>66</sup> The fine was based on allegations by the Environmental Protection Agency (EPA), Region IV, that an Army installation failed to collect samples of coliform bacteria, exceeded maximum contaminant levels (MCL) for coliform bacteria, failed to maintain properly a disinfectant residual throughout the drinking water distribution system, failed to implement an adequate main flushing system, failed to operate and to maintain properly storage tanks and reservoirs, and failed to provide timely public notice of MCL violations. The EPA, Region IV, has proposed a \$600,000 fine due to the allegations, and negotiations have begun.

The Safe Drinking Water Amendments of 1996, which became effective on 6 August 1996, significantly expanded federal liability to include injunctive relief, civil and administrative fines and penalties, administrative orders, and reasonable service charges assessed in connection with permits, plans, inspections, or monitoring of drinking water facilities, as well as any other nondiscriminatory charges respecting the protection of wellhead areas or public water systems or underground injection.<sup>67</sup> Under the amendments, the EPA may issue penal-

53. *Id.* § IV (citations omitted).

54. *Id.* § IV A1.

55. *Id.*

56. 42 U.S.C.A. §§ 9601-75 (West 1997).1

57. Guidance, *supra* note 41, § III B1a.

58. *Id.*

59. *Id.*

60. *See* 42 U.S.C.A. § 9622(d)(1)(A).

61. *Id.* §§ 6901-92k.

62. *Id.* §§ 7401-7671q.

63. 33 U.S.C.A. §§ 1251-1387 (West 1997).

64. 42 U.S.C.A. §§ 300f through 300j-26.

65. *Id.* §§ 9601-75.

66. *Id.* §§ 300f through 300j-26.

67. *See generally* Safe Drinking Water Amendments of 1996, Pub. L. No. 104-182 (1996).

ties against federal agencies, and the penalties can be as high as \$25,000 per day per violation.<sup>68</sup>

Installation environmental law specialists should keep in mind that the payment of fines and penalties by Army installations is governed by, inter alia, the Supreme Court decision in *Department of Energy v. Ohio*.<sup>69</sup> Additionally, by regulation, the Environmental Law Division must “review all draft environmental orders, consent agreements, and settlements with federal, state, or local regulatory officials before signature.”<sup>70</sup> Major DeRoma.

## ***Litigation Division Note***

### **Congress Rescues MEPS Medical Exams**

Congress recently amended two sections of Title 10<sup>71</sup> to extend malpractice protection to military entrance processing station (MEPS) part-time physicians. The amendments grant health care providers hired through personal services contracts the same malpractice protection enjoyed by other military and Department of Defense (DOD) civil service health care providers.

During the late 1970s and early 1980s, the need for more DOD health care providers (HCPs) became acute. In response, Congress authorized the DOD to hire HCPs through personal services contracts (PSCs) to staff military treatment facilities.<sup>72</sup> The DOD agencies considered these PSC HCPs to be federal employees, thus entitling them to certain privileges and immunities which are provided to military and DOD civil service HCPs. In fact, many of the PSCs contained language to the effect that the hirer recognized the HCP as a federal employee. The contract HCPs, therefore, were not required to carry personal malpractice insurance, and the Army did not purchase an overall malpractice insurance policy for PSC HCPs.

The Department of Justice (DOJ), however, strictly construed the Federal Tort Claims Act (FTCA) and contended that

PSCs did not create a federal employer-employee relationship.<sup>73</sup> The DOJ considered such HCPs to be independent contractors. Several courts agreed with the DOJ’s interpretation, finding that personal service contractors were excluded from coverage under the FTCA’s contractor exception.<sup>74</sup> In spite of the DOJ’s position and that of the courts, the DOD continued to use PSCs to hire HCPs and continued to maintain that these HCPs were federal employees.

Although the court decisions and the DOJ’s position were not conducive to HCP recruiting and hiring, it was not until a suit was brought against a MEPS fee-based physician that Congress resolved the issue. The suit involved an Army officer-to-be who alleged physician misconduct during her pre-commissioning physical examination and filed a suit against the part-time, fee-basis physician working at the MEPS. The physician requested, pursuant to the requirements of 10 U.S.C. § 1089 and the FTCA, that the United States substitute itself for him, the named defendant. The DOJ refused his request on the grounds that he was a contractor, not a federal employee. Upon learning of the decision not to represent the physician, fee-basis contract physicians at fourteen of the sixty-three MEP stations refused to perform health care duties.

Congress thereafter amended 10 U.S.C. § 1091 specifically to authorize the Secretary of Defense to enter PSCs “to carry out other health care responsibilities of the secretary (such as the provision of medical screening examinations at Military Entrance Processing Stations) at locations outside medical treatment facilities.”<sup>75</sup> Congress also amended 10 U.S.C. § 1089, adding that the remedy against the United States for personal injury caused by the negligence of health care providers of the armed forces acting within the scope of their employment includes those health care providers serving under personal services contracts entered into pursuant to 10 U.S.C. § 1091.<sup>76</sup>

An additional provision of the amendments removes the authority for the Secretary of Defense and designees to enter into PSCs for health care responsibilities outside medical treatment facilities one year after the enactment of the amend-

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68. 42 U.S.C.A. § 300j-6(b)(2).

69. 503 U.S. 607 (1992).

70. U.S. DEP’T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 17d (21 Feb. 1997).

71. The National Defense Authorization Act for Fiscal Year 1998 amends Title 10 United States Code, Section 1089 (Defense of Medical Malpractice Suits) and Section 1091 (Personal Services Contracts).

72. 10 U.S.C. § 1091(a) (1994).

73. See *DeShaw v. United States*, 704 F. Supp. 186 (D. Mont. 1988).

74. See, e.g., *United States v. Orleans*, 425 U.S. 807 (1976); *Loque v. United States*, 412 U.S. 52 (1973); *Maryland v. United States*, 381 U.S. 41 (1965); *DeShaw*, 704 F. Supp. at 186.

75. 10 U.S.C. § 1091, as amended by National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629.

76. National Defense Authorization Act for Fiscal Year 1998 § 736.

ments.<sup>77</sup> The Secretary of Defense must submit to Congress a report on “feasible alternative means” for MEPS medical screening.<sup>78</sup> This provision, however, does not affect PSC HCPs who were hired to work in medical treatment facilities.

Personal services contract HCPs who are acting within the scope of their employment are now protected from personal lia-

bility for malpractice claims—at least until next November. Such HCPs who are sued in their individual capacity for work-related acts should contact the Litigation Division’s Tort Branch to request representation or substitution from the DOJ. Lieutenant Colonel Belser.

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77. *Id.*

78. *Id.*