

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The latest issue of the *Bulletin*, volume 5, number 6, is reproduced in part below.

Changes in Utility Infrastructure Raise NEPA Consideration

The Army continues its efforts to change how it operates its utility infrastructure. Many installations are trying to get out of the business of providing installation utility services, either by contracting out those services or by transferring those operations to other entities, either private or governmental. Several issues have arisen concerning the appropriate environmental documentation under the National Environmental Policy Act¹ for these transfer actions.

*Army Regulation (AR) 200-2*² provides two potential categorical exclusions (CXs) that installations may use. While each situation must be evaluated on its individual facts, CX A-15³ may be appropriate when the utility is being contracted out under the provisions of *Department of Defense Directive 4100.15*.⁴ For situations in which the Army has not done a complete divestiture of the property, environmental law specialists should consider the use of CX A-20⁵ and ensure completion of a record of environmental consideration for such actions. The list of categorical exclusions in the pending revision of *AR 200-2* is expected to address situations in which there is a total divestiture of the utility. Installation environmental law specialists should consult their major command environmental law specialist or the Environmental Law Division concerning individual situations, as appropriate. Colonel Rouse.

Use of Multidisciplinary Army Teams on Environmental

Issues

The Environmental Protection Agency (EPA) recently commended a multidisciplinary Army team that focused on ozone protection. The EPA awarded United States Army Pacific (USARPAC) the "1997 Stratospheric Ozone Protection Award" in the corporate category. This Army team provides an example of the success of the multidisciplinary approach to environmental issues.

The team consisted of four individuals who represented the acquisition, logistics, engineering, and legal communities. Their cross-functional, integrated approach conveyed the message to subordinate commands within the USARPAC and to the EPA that ozone depleting compounds are a legitimate concern to the Army.

The team prepared the approach, methodology, training plan, assessment plan, and compliance plan. The team traveled to all major subordinate commands in Hawaii, Japan, and Alaska. At each installation, the team briefed the commanding general and provided him with instruction and training on his roles and responsibilities as a senior approving official. The team also performed other tasks on the site visits, including training, evaluation, town hall meetings, roundtable discussions, reviewing contracts, and assisting in drafting elimination plans.

The Pacific Command's Environmental Compliance Action Team will follow up the team's efforts. The Environmental Compliance Action Team is also interdisciplinary and operates under the auspices of the USARPAC Inspector General. Mr. Nixon.

EPA's Monitored Natural Attenuation Policy

On 18 November 1997, the Environmental Protection Agency (EPA) issued a draft interim final policy, *Office of Solid Waste and Emergency Response (OSWER) Directive 9200.4-17*, entitled Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites.⁶ The stated purpose of the directive is to clarify the EPA's policy concerning the use of monitored natural attenua-

1. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994).
2. U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) [hereinafter AR 200-2].
3. *Id.* app. A. The A-15 categorical exclusion covers "[c]onversion of commercial activities (CA) to contract performance of services from in-house performance under the provisions of *DOD Directive 4100.15*." *Id.*
4. U.S. DEP'T OF DEFENSE, DIR. 4100.15, COMMERCIAL ACTIVITIES PROGRAM (10 Mar. 1989).
5. AR 200-2, *supra* note 2, app. A. Categorical exclusion A-20 refers to granting of easements for various utility infrastructure.
6. OFFICE OF SOLID WASTE, EMERGENCY RESPONSE DIR. 9200.4-17, USE OF MONITORED NATURAL ATTENUATION AT SUPERFUND, RCRA CORRECTIVE ACTION, AND UNDERGROUND STORAGE TANK SITES (Dec. 1, 1997) [hereinafter EMERGENCY RESPONSE DIR. 9200.4-17].

tion for the remediation of contaminated soil and groundwater at sites regulated by the OSWER. This includes programs managed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);⁷ the Resource Conservation and Recovery Act (RCRA);⁸ corrective action; and the RCRA underground storage tank provisions. The effective date of the directive was 1 December 1997.

The *OSWER Directive 9200.4-17* is a policy document that provides guidance to the EPA staff, the public, and regulated entities on how the EPA plans to implement national policy on the use of natural attenuation.⁹ As guidance, the directive does not carry the force of statute or regulation and does not impose legally binding requirements on the regulated community. The EPA intends for the directive to encourage consistency in the proposal, evaluation, and approval of monitored natural attenuation remedies.¹⁰ The document does not, however, provide technical guidance on how to evaluate the remedies. In the directive, the EPA admits that there is a “relative lack” of EPA guidance concerning implementation of monitored natural attenuation remedies.¹¹ The EPA has not yet published specific technical guidance to support the evaluation of monitored natural attenuation for the OSWER sites.

The EPA is careful to say that monitored natural attenuation should be used “very cautiously” as the exclusive remedy at contaminated sites.¹² The EPA views natural attenuation as suitable more often for use in conjunction with active remediation or as a follow-on to other remedial measures.¹³ The EPA supports the evaluation and comparison of all viable remediation methods with the consideration of natural attenuation as one alternative for achieving site-specific remediation objectives. The EPA emphasizes that the use of the natural attenuation remedy does not signal a change in the OSWER’s

remediation objectives of controlling source materials and restoring contaminated groundwater.¹⁴

Natural attenuation is defined in the directive to “include a variety of physical, chemical, or biological processes that, under favorable conditions, act without human intervention to reduce the mass, toxicity, volume, or concentration of contaminants in soil or groundwater.”¹⁵ The policy lists three ways through which natural attenuation may reduce the risk posed by site contamination: biodegradation may convert contaminants to less toxic forms, dilution or dispersion may lower concentration levels, and sorption to soil or rock may reduce contaminant mobility or bioavailability.¹⁶ The EPA states their preference for natural attenuation processes that degrade contaminants. For this reason, the EPA expects that sites that have a low potential for plume generation and migration are the best candidates for monitored natural attenuation.¹⁷

The directive addresses three categories of pollutants that are receptive to natural attenuation: petroleum-related contaminants, chlorinated solvents, and inorganics.¹⁸ Although biological degradation is well documented at petroleum fuel spills, the policy notes that natural attenuation alone is usually not adequate to remediate a petroleum release site. This is true because residual contamination will typically remain following degradation of a plume, and it may pose a threat to human health or the environment. The EPA recommends that source removal and institutional controls may be necessary, in addition to natural attenuation, at petroleum sites.¹⁹

Due to the nature and distribution of chlorinated solvents, natural attenuation may not be an effective remedial option. These contaminants are capable of biodegradation; however, the conditions that favor degradation of chlorinated solvents may not readily occur. In addition, a solvent spill often consists

7. 42 U.S.C.A. §§ 9601-9675 (West 1997).

8. *Id.* §§ 6901-6992k.

9. EMERGENCY RESPONSE DIR. 9200.4-17, *supra* note 6, at 1.

10. *Id.*

11. *Id.* at 3.

12. *Id.* at 1.

13. *Id.*

14. *Id.* at 2.

15. *Id.* at 3.

16. *Id.*

17. *Id.* at 4.

18. *Id.* at 4-6.

19. *Id.*

of a number of contaminants, including some that are not degradable.²⁰

The toxic form or concentration of inorganic contaminants in both groundwater and soil may be reduced by natural attenuation. Sorption and oxidation–reduction are the two methods that the EPA details as the most effective in reducing the mobility, toxicity, or bioavailability of inorganic contaminants.²¹

The EPA recognizes that natural attenuation is not a new remedy; it has been an element in Superfund groundwater cleanup since 1985.²² The policy cites the new scientific understanding of the mechanisms that contribute to natural attenuation for the heightened interest in this as a cleanup approach.²³ The EPA clarifies its position that natural attenuation is not to be considered a presumptive remedy at any site, but that it is appropriate as a remediation method only where its use is protective of human health and the environment.²⁴ In addition, the policy stresses that natural attenuation must be capable of achieving site-specific objectives within a reasonable time-frame, as compared to other methods.²⁵

The policy goes into great detail concerning the requirement for a demonstration of the efficacy of natural attenuation.²⁶ The decision to employ natural attenuation must be thoroughly supported with site-specific characterization data and analysis. The EPA stresses that the degree of site characterization required to support the evaluation of natural attenuation is actually more detailed than necessary to support active remediation.²⁷ Throughout the directive, the EPA dispels the notion that natural attenuation is a “no action” remedy.

The complete directive may be accessed at <http://www.epa.gov/OUST/directive/d9200417.htm>. Major Anderson-Lloyd.

Horsehead Resources Development Co. v. EPA

The United States Court of Appeals for the District of Columbia Circuit recently enunciated important precedent that should lay to rest any confusion over the window of opportunity to file a suit that challenges any rulemaking promulgated pursuant to the Resource Conservation and Recovery Act (RCRA).²⁸ In *Horsehead Resources Development Co. v. Environmental Protection Agency*,²⁹ the court ruled that an Environmental Protection Agency (EPA) hazardous waste regulation did not become final and, therefore, could not be challenged until it was published in the *Federal Register*.

In *Horsehead Resources Development Co.*, an electric arc furnace dust recycler challenged an EPA rule that excludes electric arc dust from the RCRA’s hazardous waste list when treated by a newer, cheaper alternative to recycling.³⁰ The instant petition was filed after the EPA administrator signed the rule, but twelve days before it was printed in the *Federal Register*.³¹

Under the RCRA, petitions for review of an EPA regulation may be filed with an appeals court “within ninety days from the date of promulgation.”³² The statute does not further explain the exact meaning of promulgation. *Horsehead* argued that the statute establishes only a filing deadline and that, thus, a petition for review may be filed at any time after the EPA takes final action, such as signing the rule. *Horsehead* argued in the alternative that, if the statute established a window rather than a deadline, the window opened when the rule was signed.³³

The court disagreed with this expansive definition, citing precedent set in 1988 in *National Grain & Feed Association*,

20. *Id.* at 5.

21. *Id.* at 6.

22. *Id.* at 8.

23. *Id.*

24. *Id.*

25. *Id.* at 10.

26. *Id.* at 10-13.

27. *Id.* at 11.

28. 42 U.S.C.A. §§ 6901-6992k (West 1997).

29. 130 F.3d 1090 (D.C. Cir. 1997).

30. *Id.* at 1091.

31. *Id.*

32. 42 U.S.C.A. § 6976(a)(1).

Inc. v. OSHA.³⁴ The court held that *National Grain* established a default rule that if an agency does not define “promulgation” through a rule, the term “is accorded its ordinary meaning,” which the court determined was publication in the *Federal Register*.³⁵

Based on this decision, environmental law specialists can advise with greater certainty concerning the potential timing of challenges of this nature. Absent any unlikely attempts by the EPA to attach a special meaning to the term “promulgation” through future rulemaking, an area that had been substantially muddled is now significantly clearer. Major Egan.

Fines and Penalties Update

At the close of the second quarter of fiscal year (FY) 1998, four new fines had been assessed against Army installations. Of the 168 fines assessed against Army installations since FY 1993, Resource Conservation and Recovery Act³⁶ (RCRA) fines (94) continue to predominate, followed by the Clean Air Act³⁷ (CAA) (43), the Clean Water Act³⁸ (22), the Safe Drinking Water Act³⁹ (6), and, finally, the Comprehensive Environmental Response, Compensation, and Liability Act⁴⁰ (3).

Of particular note in the latest reporting quarter, the fines assessed under the CAA have continued to be assessed almost as frequently as those assessed under the RCRA. Because these two statutes have differing waivers of sovereign immunity, the scope of federal liability also differs. An installation will pay punitive fines and penalties assessed under the RCRA but not under the CAA, which can create some confusion for state regulators. Installation environmental law specialists should take the opportunity to advise state agencies early on that payment of fines and penalties by Army installations is governed by the Supreme Court decision in *Department of Energy v. Ohio*.⁴¹

During the second quarter of FY 1998, there were several unreported fines from various installations. One installation attempted to justify the failure to report on the grounds that no notice of violation had been issued. By regulation, “any actual or likely [enforcement action] . . . that involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact will be reported through technical legal channels” to major command environmental law specialists and to the Environmental Law Division “within 48 hours, followed by written notification within 7 days, and report of significant development thereafter.”⁴² Major DeRoma.

33. *Horsehead Resource Dev. Co.*, 130 F.3d at 1092.

34. 845 F.2d 345 (D.C. Cir 1997).

35. *Horsehead Resource Dev. Co.*, 130 F.3d at 1093.

36. 42 U.S.C.A. §§ 6901-6992k (West 1997).

37. *Id.* §§ 7401-7671q.

38. 33 U.S.C.A. §§ 1251-1387 (West 1997).

39. 42 U.S.C.A. §§ 300f through 300j-26 (West 1997).

40. *Id.* §§ 9601-9675.

41. 503 U.S. 607 (1992).

42. U.S. DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 15-7c (21 Feb. 1997) (emphasis added).