

# 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, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at <http://www.jagcnet.army.mil>.

### Retain Records for Power Generating Plants

The United States is involved in litigation concerning the compliance status of several private electric utility coal- and oil-fired boilers.<sup>1</sup> As part of the proceedings, the defendants have requested certain materials pertaining to federal government compliance of similar units. The Department of Justice (DOJ) is working to narrow the scope of the discovery request, but recently requested that installations with coal- or oil-fired electric generating units preserve all documents related to the compliance of these units with the Clean Air Act<sup>2</sup> and its regulations. This request applies to documents in paper and electronic form. Examples of records to be preserved include inspection reports, Environmental Compliance Assessment System findings, stack test results, and other records required to be kept under permit conditions and regulations. As the utility litigation is expected to be lengthy, installations should accumulate the appropriate records and prepare files to facilitate responding to possible future information requests. Installation environmental law specialists should ensure that air program specialists understand that these files are to be preserved until further notice. Copies of the request from DOJ and a memorandum from the Department of Defense directing installations to retain these records can be obtained from ELD by sending an e-mail to [richard.jaynes@hqda.army.mil](mailto:richard.jaynes@hqda.army.mil). Lieutenant Colonel Jaynes.

## Requirements Clarified for Clean-Up Orders

The Army must occasionally conduct inspections and obtain samples on the property of neighbors to determine if contamination at Army installations has migrated off-post. The President's authority to do so is set out in section 104(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),<sup>3</sup> and has been delegated to both the Environmental Protection Agency (EPA) and the Army. Under certain circumstances, federal agencies can seek a judicial order to compel the cooperation of private landowners.<sup>4</sup>

A recent district court case has clarified the requirements for judicial orders. In *United States v. Tarkowski*,<sup>5</sup> the EPA sought a judicial order to enter land behind defendant's home "to implement response actions in response to the release or threat of release of hazardous substances," and to bar defendant from interfering with those actions. Later in the litigation, the government submitted a modified motion asking for a more limited right to enter the property.

The court noted that it had to determine three issues before issuing an order: whether the EPA had a reasonable basis to believe that there may be a release or threat of a release of a hazardous substance; whether the EPA's request for access was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; and whether defendant had interfered with the EPA's access to the property.<sup>6</sup>

The court found that EPA established that there were low levels of pesticides and other chemicals in defendant's soil consistent with consumer use.<sup>7</sup> The court concluded, however, that the statute does not provide an exception to the "reasonable basis" standard of section 104(e) for releases resulting from consumer use of products, and that it likewise did not provide an exception to that standard for *de minimis* concentrations.<sup>8</sup>

The court found that EPA's request for investigation went "vastly" beyond what would be considered reasonable given

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1. See, e.g., *U.S. v. Alabama Power Co.*, 1999 Extra LEXIS 54 (N.D. Ga. 1999) (DOJ initiated lawsuits against seven Midwestern and southern utility companies.).

2. 42 U.S.C. §§ 7410-7642 (2000).

3. *Id.* § 9604(e).

4. See *id.* § 9604(e)(5)(B)(i).

5. No. 99 C 7308, 2000 U.S. Dist. LEXIS 7393 (N.D. Ill. May 30, 2000).

6. *Id.* at \*3.

7. *Id.* at \*3-\*4.

8. *Id.* at \*4.

the evidence presented that releases of hazardous substances into the environment had occurred. It therefore found the EPA demand to be arbitrary and capricious.<sup>9</sup>

With respect to the EPA's second request made during the litigation, the court found that there was no evidence that the defendant had refused it.<sup>10</sup> A landowner must refuse a request or otherwise interfere with the federal agency before a court will issue an order for compliance.

The government apparently argued that the court did not have jurisdiction over the issue because the EPA was conducting a CERCLA removal action.<sup>11</sup> The court did not reach this issue since it was faced not with review of the EPA action *per se*, but rather with the narrow question of whether the requested order was proper.<sup>12</sup>

There are two lessons here for practitioners. First, be sure to document reasonable requests for entry and inspection under CERCLA section 104(e). This will later allow you to establish the element that consent was not granted or that interference occurred. Second, be sure that the evidence reasonably justifies the action sought. The DOJ prepares complaints for these orders, usually through the local United States Attorney's office. There is a prescribed format for the required litigation report, available from the ELD. Lieutenant Colonel Howlett.

### New Resource on Economic Benefit Available

The issue of whether the EPA can or should collect penalties intended to recapture economic benefit from federal facility violators remains a hotly contested matter between the EPA and

the Department of Defense (DOD). Army installations have found that the EPA often uses economic benefit as well as size of business<sup>13</sup> penalties to inflate the size of the penalties it seeks. In addition, the EPA often refuses to disclose its penalty calculations, which obfuscates the EPA's use of these "business penalties" during settlement negotiations with Army installations. The EPA also resorts to "inflate and then stonewall" tactics in an attempt to conclude a settlement with a substantially larger penalty than what would be achieved by negotiating based on gravity of the offense factors alone. Consequently, installations must be vigilant in guarding against these tactics and in opposing them when the EPA Regions attempt to apply them.

Many objections are being raised in response to the EPA's new enforcement strategy against federal facilities that showcases economic benefit as its centerpiece. The ELD has published several articles addressing this topic in previous editions of *The Environmental Law Division Bulletin*.<sup>14</sup> A more recent argument provides that "[t]he economic benefit component of a civil penalty should not apply to federal agencies, particularly as calculated by the deficient methodology used in the EPA's BEN<sup>15</sup> model."<sup>16</sup> No federal environmental statute expressly defines the term "economic benefit." The EPA describes "economic benefit" variously as "represent[ing] the financial gains that a violator accrues by delaying or avoiding . . . pollution control expenditures" and "the amount by which a defendant is financially better off from not having complied with environmental requirements in a timely fashion."<sup>17</sup> The key to benefit recapture in cases where a polluter delays or avoids compliance is the EPA's presumption that "financial resources not used for compliance . . . are invested in projects with an expected direct economic benefit to the [violator]."<sup>18</sup> According to the EPA,

9. *Id.* at \*8. The demand for entry or inspection cannot be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 9604(e)(5)(B)(i).

10. *Tarkowski*, 2000 U.S. Dist. LEXIS 7393, \*7.

11. Presumably, the argument was that jurisdiction was limited by CERCLA §113.

12. *Tarkowski*, 2000 U.S. Dist. LEXIS 7393, \*3.

13. Size of the business penalties are a surcharge (typically 50%) added to economic benefit and gravity-based penalties to ensure that wealthy violators feel the deterrent sting of enforcement. The amount of this type of penalty is based on the capital assets of the business that are presumed available to be sold or mortgaged to raise funds for environmental compliance or penalties.

14. See Major Robert J. Cotell, *Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction*, ENVTL. L. DIV. BULL., Oct. 1999, at 1; Lieutenant Colonel Richard Jaynes, *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ENVTL. L. DIV. BULL., Sept. 1999, at 6.

15. BEN is the computer model used by EPA to calculate the economic benefit component of an administrative civil penalty. See OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, BEN USER'S MANUAL 1-1 (Sep. 1999) for detailed information about the model, its underlying theories of economic benefit, and its calculation methodology.

16. Jacqueline Little, "Stop the Insanity!" EPA's BEN Model and its Application in Enforcement Actions Against Federal Agencies (2000) (unpublished LL.M. thesis, George Washington University) (on file with author). Lieutenant Colonel (LTC) Jacqueline Little, the newest member of ELD's Compliance Branch, completed the Masters of Law (LL.M.) program in environmental law at George Washington University. In partial satisfaction of the requirements for the LL.M., LTC Little wrote her thesis on the subject of EPA's BEN model and its application to federal facility enforcement actions. The Air Force has posted LTC Little's thesis on its FLITE Internet database. The environmental law section of FLITE is accessible via the Internet at <http://envlaw.jag.af.mil> and is available to DOD environmental legal specialists. Those interested in obtaining the thesis can also request a copy by sending an e-mail to LTC Little at [Jacqueline.Little@hqda.army.mil](mailto:Jacqueline.Little@hqda.army.mil).

17. Little, *supra* note 16, at 4.

“this concept of alternative investment—i.e., the amount the violator would normally expect to make by not investing in pollution control—is *the basis* for calculating the economic benefit of noncompliance.”<sup>19</sup> Since the concept of alternative investment does not apply to federal agencies, generally, there appears to be no basis for recapturing economic benefit in cases involving federal facility noncompliance.

Benefit recapture in the federal agency arena “improper[ly] interfere[s] with the missions assigned to and funds allocated for federal agencies by Congress”<sup>20</sup> and, therefore, constitutes bad policy. Because the payment of the EPA-imposed penalties effectuates a return to the U.S. Treasury of dollars disbursed by it to support federal agency missions, mission accomplishment is necessarily impeded. Such money shuffling is appropriate when it functions as a deterrent measure to ensure that facility managers reorder priorities in order to achieve environmental compliance. However, economic benefit penalties, by seeking to “recover a net financial gain that does not exist” fail to serve as a deterrent and, instead, “serve only to degrade federal missions.”<sup>21</sup> It is unlikely that Congress intended such a result.

The EPA has asserted that, in cases of federal agency noncompliance, economic benefit accrues to the “federal government as a whole,” with the Department of Treasury acting as the “surrogate holder of the benefit.”<sup>22</sup> The EPA bases this position on its 1999 memorandum entitled “Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies.”<sup>23</sup> This “guidance” document identifies the source of economic benefit in federal facility cases as the interest saved on unissued Treasury notes. If it is indeed the federal government or the Treasury that reaps the alleged benefits of a federal facility’s noncompliance, the EPA’s position is arguably invalid.

Is it legal for the EPA to recover economic benefit from the federal government? Environmental statutes authorize the EPA to regulate federal departments and agencies—not the federal government as a whole. Clearly, the EPA can collect noncompliance penalties only from those over which it has regulatory power—that is, “departments, agencies, and instrumentalities.” If no economic benefit accrues to these entities, however, the EPA cannot legally include such benefit in penalties assessed against either individual facilities or the departments or agencies that oversee them. On the other hand, since the “federal government as a whole” is not subject to the EPA regulation under federal environmental laws, it is not liable for penalties

of any kind. In short, the EPA’s position appears to leave the agency without a violator from whom it can properly collect the economic benefit it so desperately seeks.

Does the policy disgorge the alleged benefit or does it allow the recipient of such benefit to profit twice? If the Treasury is the federal government entity that ultimately benefits from federal agency noncompliance, the EPA’s position guarantees that the Treasury “benefits” twice—first, by avoiding the costs associated with paying interest on notes that should have been issued to fund pollution control projects; and, second, by collecting inflated penalty payments from federal facilities that failed to complete such projects in a timely manner.

The overriding factor in the EPA’s analysis of why economic benefit and the BEN model apply to federal agencies is its belief that, without exception, Congress and the President have directed it to treat federal agencies the same as any other member of the regulated community. However, in its attempts to treat federal facility violators “just like” private sector polluters, the EPA has had to modify the manner in which it applies its economic benefit policies to federal entities, thereby creating a situation where federal agencies are, in fact, treated differently than similarly-situated private entities. First, the Agency has significantly altered its theory of economic benefit to eliminate “alternative investment” as the basis for determining that benefit has indeed accrued. Second, unlike in the private sector, an the EPA federal agency enforcement action collects benefit-based penalties from an entity other than that which realizes the gain. Finally, it appears that the EPA is willing to excuse federal agencies from the requirement that economic benefit penalties be paid in cash, rather than offset with supplemental environmental projects. In sum, in order for the EPA to treat federal facilities “just like” private entities in terms of the size of fines, the EPA must apply economic benefit penalty policies “differently.”

Even if the EPA can recover economic benefit from federal agency violators, the computer model it uses to calculate such benefit (BEN) is unsound from both an economic and financial standpoint. As such, any penalty figures BEN generates are inherently suspect and should not be relied upon as a basis for penalty assessments in civil enforcement actions.<sup>24</sup> Lieutenant Colonel Jaynes.

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18. *Id.*

19. *Id.* at 15.

20. *Id.* at 70.

21. *Id.* at 71.

22. *Id.*

23. *Id.* at 61.

## Unexploded Ordnance (UXO): An Explosive Issue?

The recent increase in transition of military ranges to non-military uses has increased public and environmental regulatory agency concern regarding ranges. Much of this concern stems from the identification of UXO and its constituents as possible contributing sources of contamination of groundwater and soils. Making the situation potentially more explosive are EPA Region 1 actions at one of those installations, Massachusetts Military Reservation (MMR), where groundwater contamination has halted live-firing on ranges. This article highlights recent developments in the areas of munitions and ranges that influence the ability of installations to use their ranges.

In 1997, EPA Region 1 asserted the Safe Drinking Water Act (SDWA)<sup>25</sup> as the primary basis for prohibiting the use of lead, propellants, explosives, and demolitions, based on suspicion that ongoing training activities could contaminate the sole-source aquifer underlying the MMR impact area, thereby creating an imminent and substantial endangerment to human health and the environment. The EPA relied upon the SDWA to issue two administrative orders (AOs). These two orders required a complete groundwater study for the area underlying the impact area, provided for extensive EPA participation and oversight of the response action, established a citizens advisory committee to monitor the work, and ordered the cessation of all use of lead ammunition, high explosive artillery and mortars propellants, and demolition of ordnance or explosives (except for UXO clearance). In a third AO, the EPA ordered feasibility studies and removal of contaminated soil. The EPA's actions at MMR have Army-wide implications because other installations have training areas that overlay sole-source aquifers.

The Army has some provisions for dealing with military munitions, such as EPA's Munitions Rule (MR).<sup>26</sup> The MR provides some clarification for the treatment of military munitions by excluding training (including firing, research and development, and range clearance on active and inactive ranges) and materials recovery activities from being classified as waste management activities. The MR also allows the DOD storage and transportation standards to supplant environmental regulations under certain conditions. Additionally, the EPA postponed the decision regarding the status of military munitions on closed, transferred, and transferring (CTT) ranges pending DOD's publication of the Range Rule, which would govern military munitions at those areas. The DOD published the Proposed Range Rule in 1997. The DOD, the EPA, and other Federal Land Managers are currently participating in discussions with the Office of Management and Budget as part of the interagency review process regarding the Draft Final Range Rule, the last step before promulgation of the rule. Publication is expected in January 2001.

Recently, further Army guidance was issued in the *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges* ("Management Principles"), available on the Internet at <http://www.dtic.mil/enviroDOD/UXO-Mgt-Principles.pdf>. In March 2000, the Deputy Under Secretary of Defense (Environmental Security) and EPA Assistant Administrator for Solid Waste and Emergency Response signed the *Management Principles* as an interim measure effective until DOD issues the final Range Rule. In August 2000, the Army's Assistant Chief of Staff for Installation Management and Deputy Assistant Secretary of the Army (Environment, Safety, and Occupational Health) forwarded the *Management Principles*, along with an associated "Frequently Asked Questions," to the Major Army Commands (MACOMs) for distribution to their field organizations. The MACOMs and field organizations must consider these *Management Principles* in planning and execution of response actions at CTT ranges. Department of Defense and the EPA Headquarters negotiated the *Management Principles* and they have been shared with the states and tribes.

The *Management Principles* indicate that a process consistent with the CERCLA and the *Management Principles* provide the preferred response mechanism to address UXO at a CTT range. Response activities may include removal actions, remedial actions, or a combination of both, when necessary to address explosive safety, human health and the environmental hazards associated with a CTT range. Prior to accommodating any EPA request deemed unsafe (for example, from an explosives safety, occupational health, or worker safety standpoint), unreasonable, or inconsistent with CERCLA, the *Management Principles*, or other DOD or Army policy, installations must resolve those concerns. When necessary, installations should raise unresolved issues or disputes through the chain of command to the Assistant Chief of Staff for Installation Management or through other established mechanisms for resolution.

Installations must provide regulators and other stakeholders an opportunity for timely consultation, review, and comment on all response phases, except for certain emergency response actions. Installations should conduct discussions with local land use planning authorities, local officials, and the public, as appropriate, as early as possible in the response process to determine anticipated future land use.

Those in the field should be advised to follow the requirements set forth in the EPA's MR when dealing with military munitions used in training, testing, materials recovery, and range clearance activities. Until the DOD issues the Final Range Rule, installations must also comply with the *Management Principles* when conducting response actions for munitions and their constituents at CTT ranges. As for active range

24. *Id.* at 91.

25. 42 U.S.C. §§ 300f-300j-26 (2000).

26. 62 Fed. Reg. 6621 (Feb. 1997).

challenges, the Army's Assistant Chief of Staff for Installation Management recently requested that some installations test for explosive contaminants in their drinking water sources and groundwater adjacent and down gradient of impact areas. Clearly, the EPA's actions at MMR have garnered significant attention throughout the Army as it seeks to formulate workable approaches to assessing the costs and risks that this and similar scenarios pose to military training. Lieutenant Colonel Schenck.

### Update on Punitive Fines and Federal Facilities

During the past year significant developments have effected notable change in the regulatory landscape of federal facilities. One particular issue that has ripened on the vine involves the authority of environmental regulatory agencies to subject federal facilities to punitive fines. This discussion highlights the recent key events that surround this issue. Moreover, a table at the end of this discussion provides a ready synopsis of punitive fines as they currently apply to the primary media programs.

The 1992 amendments to the Resource Conservation and Recovery Act (RCRA Amendments),<sup>27</sup> authorize the EPA to assess fines for past violations of underground storage tank (UST) requirements. Five years after the enactment of the RCRA Amendments, the EPA began a policy of interpreting the RCRA Amendments so as to impose punitive fines against federal facilities with respect to USTs. From the onset of this policy, military services argued that the RCRA Amendments authorized EPA to impose only fines for hazardous and solid waste provisions in RCRA, but not for the independent federal facilities provisions for USTs. They also began challenging EPA's enforcement actions in litigation before the EPA administrative law judges (ALJs) and asked the Office of the Secre-

tary of Defense (OSD) General Counsel to seek resolution of the issue from the Office of Legal Counsel (OLC) in the Department of Justice (DOJ).

After OSD submitted a request to OLC in April 1999, the services asked for stays of administrative litigation in pending cases. Shortly before a stay was requested in one Air Force case, however, an ALJ rendered a decision upholding DOD's objections. The EPA appealed that decision to the Environmental Appeals Board (EAB). After the OLC decided in June 2000 that the EPA has authority to impose fines for UST violations, the Air Force asked the EAB to uphold the favorable ALJ decision. The EAB did not reach the merits of the dispute, but found that there was no compelling need to set aside the OLC opinion. Installations are now settling pending UST cases.

Whether the limited waiver of sovereign immunity in the Clean Air Act (CAA)<sup>28</sup> allows state regulators to impose penalties against federal facilities continues to be a hotly disputed issue. This situation has been exacerbated by recent cases. In a bizarre ruling last year, the United States Court of Appeals for the 6th Circuit found that the CAA's savings clause for its citizen suits provision contains an independent waiver of sovereign immunity authorizing punitive fines against federal facilities.<sup>29</sup> The DOJ chose not to appeal that case to the Supreme Court because there was no split of authority among the circuits. Instead, the military services anxiously awaited the decision of the United States Court of Appeals for the 9th Circuit on an appeal of a federal district court decision in California that had adopted the United States' position.<sup>30</sup> Instead of addressing the central issue, however, the Ninth Circuit Court held that the case should not have been removed to federal court.<sup>31</sup> The DOJ is now considering whether to pursue the issue before the Supreme Court. Final resolution of this issue is probably several years away. Major Arnold.

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27. 42 U.S.C. §§ 6901-6991(h)7.

28. *Id.* §§ 7401-7671.

29. *U.S. v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529 (6th Cir. 1999), rehearing *en banc* denied without opinion (Nov. 15, 1999).

30. *Sacramento Metro. Air Quality Mgmt. Dist. v. U.S.*, 29 F.Supp.2d 652 (E.D. Cal. 1998).

31. *Sacramento Metro. Air Quality Mgmt. Dist. v. U.S.*, 215 F.3d 1005 (9th Cir. 2000).

**Army Authority to Pay Punitive Fine and the Year Authority was Received**

<b>Statute</b>	<b>Imposed by State</b>	<b>Imposed by EPA</b>
Resource Conservation and Recovery Act (RCRA) [Subtitle C and D only--re hazardous and solid waste] 42 U.S.C. § 6961	Yes--1992	Yes--1992
RCRA [Subtitle I only--re Underground storage tanks] 42 U.S.C. § 6991f	No	Yes--2000 <sup>a</sup>
Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-6	Yes--1996	Yes-1996
Clear Air Act (CAA) 42 U.S.C. § 7418	No <sup>b</sup>	Yes--1997 <sup>c</sup>
Clean Water Act (CWA) 33 U.S.C. § 1323	No	No

a. The DOD disputed the EPA's assertion that it has authority to assess fines against federal facilities for UST violations and referred the issue to the Department of Justice (DOJ) in April 1999. On 14 June 2000, the DOJ released an opinion that concluded that amendments to the RCRA in 1992 gave the EPA the authority to assess the UST fines against federal facilities. The issue was also challenged before the EPA's Environmental Appeals Board, who deferred to the DOJ opinion.

b. Many states dispute the United States' position on this, and issue notices of violation that include assessments of fines. This issue was expected to have been settled through litigation in the Ninth Circuit Court of Appeals, but that court recently issued a surprise ruling that the case should not have been removed from state court and remanded without addressing the central issue. The DOJ may appeal to the Supreme Court on the issue of removing cases to federal courts. It will probably be several years before the sovereign immunity issue is settled nationwide. In the interim, installations will continue to assert the position of the United States (i.e., the sovereign immunity defense) except in the four states (KY, OH, MI, TN) of the Sixth Circuit, where the court found that federal facilities must pay penalties imposed by state regulators for the CAA violations.

c. The authority of the EPA to impose fines stems from an amendment to the CAA in 1990. A DOD challenge to that authority was resolved in favor of the EPA in a 1997 opinion by the DOJ.