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.

Department of Defense (DOD) Services Sign N.J. Multisite Agreement

On 31 August 2000, the DOD services signed the New Jersey Multisite Agreement. The Multisite Agreement is intended to lay the framework for streamlining New Jersey cleanups that are conducted consistent with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[1] Parties to the Agreement include the New Jersey Department of Environmental Protection, the Army, Navy, Air Force, and U.S. Defense Logistics Agency. Particular emphasis is given to how parties will document and maintain land use controls at various sites. (Land use controls are restrictions in access or uses of property that are intended to protect human health and the environment.) The sites addressed by this agreement include cleanups at active installations, facilities slated for transfer in accordance with the Defense Base Closure and Realignment Act,[2] and formerly used defense sites. A similar agreement was already signed with the State of Pennsylvania.[3] Ms. Barfield.

Superfund Recycling Equity Act Applies to Pending Litigation Brought by the California DTSC

In 1999, Congress enacted the Superfund Recycling Equity Act (Act)[4] in order to remove impediments to recycling created as an unintended consequence of the liability provisions of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[5] As a matter of "liability clarification," the new provision exempts arrangers for recycling of certain materials from CERCLA liability for clean up costs. These materials include scrap paper, scrap glass, rubber (other than whole tires), scrap metal, and spent batteries. The law states that it will not affect "any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to enactment." Regarding pending actions by parties other than the United States, the Act was silent.

The effect of the Act on such pending actions was recently addressed by a district court in California.[6] The court denied a partial summary judgment motion brought by the California Department of Toxic Substances Control (DTSC), who argued that that the Act does not apply to this action because it was pending at the time the amendments were enacted. The DTSC had brought suit against ten scrap metal dealers and the United States seeking response costs the DTSC incurred from a release of hazardous substances at the Mobile Smelting Site in Mojave, California. Two years later, the Superfund Recycling Equity Act was passed. The DTSC argued that since this case was pending at the time of passage, the Act should not apply.

The court identified and applied the two-part test of *Landgraf v. USI Film Products*:[7] "(1) Has Congress expressly prescribed the temporal reach of the statute?; and if not, (2) Does the statute have retroactive effect?"[8] Regarding the first test, the court first looked to the language of the Act to determine whether there was an express command or unambiguous directive regarding the temporal reach of the Act for parties other than the United States. The DTSC argued that there is no explicit statement that applies the Act's provisions to pending actions brought by a state agency before the date of enactment; therefore, it does not apply to this case. Some of the defendants argued that the specific exclusion of pending United States claims from the Act means that pending claims by all other parties are not excluded. Other defendants and some *amicus* parties argued that the court should first determine whether the language of the Act is plain and unambiguous. If the language

1. 42 U.S.C. § 9601 (2000).

2. *See generally* 10 U.S.C. § 2687.

3. Ms. Colleen Rathbun of the U.S. Army Environmental Center negotiated both the Pennsylvania and New Jersey Multisite Agreements on behalf of the Army.

4. 42 U.S.C. § 6001.

5. 42 U.S.C. § 9601.

6. California Department of Toxic Substances Control v. Interstate Non-Ferrous Corp., 99 F. Supp. 2d 1123 (E.D. Cal. 2000).

7. 511 U.S. 244 (1998).

8. *Id*. at 269-70.

is clear, the court's analysis stops. If the court finds no statutory language mandating retroactivity, then the court turns to the congressional intent of the statute. Here, the court reviewed all parts of the statute–its structure, verb tense, headings, purpose, express prospective language, proof standards, and its legislative history–in search of any express prescription. The court concluded that many aspects of the Act's structure and legislative history weigh heavily toward the argument that the Act should be read retrospectively.

The court, however, went on to assume, *arguendo*, that there was no conclusive language, and addressed the second test, the Act's retroactive effect. The court in *Landgraf* found that a statute would be improperly retroactive if "it would impair the rights a party possessed when [the party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[9] Retroactive application is consistently rejected when its application "result[s] in manifest injustice."[10] The DTSC claimed it was harmed because the amendment eliminated a cause of action that previously existed, but the court concluded that DTSC's rights were not impaired. The recyclers who can avoid liability under the new Act should be able to do so, and the Act does not impose any new duties against the DTSC. The DTSC will not incur more costs or suffer greater expense if some parties are exempt from liability under this Act. The DTSC did not assert that it engaged in conduct that it would not have otherwise engaged in had the law been enacted earlier. The court saw no vested expectation on behalf of the state that was defeated by the new Act. Overall, the application of the statute made no difference in the State's actions. Therefore, the Act is not improperly retroactive.

The court then identified a separate analytical approach to determine the retroactivity of the Act: whether a new statute clarifies or changes the existing law.[11] If the new statute clarifies the existing law then there is no retroactive effect because it is merely restating a current law. If the new statute had no retroactive effect, then it can be applied to the pending case. A significant factor that the court used to determine whether the amendment clarifies an existing law was whether, when the amendment was enacted, the conflict or ambiguity existed with respect to the interpretation of the relevant provision. If so, the amendment is a clarification, not a change of the existing law. After reviewing the arguments of the defendants and *amicus* parties, the court held that the legislative history supports the finding that the amendment is a clarification of recycler liability under CERCLA.[12] Therefore, the Act has no improper retroactive effect and the defendants can seek exemption from liability pursuant to the Act in the case.

In third-party sites, the Army is often named as a responsible party where it only sent recyclable materials to the site. This holding provides the Army the recycling exemption from liability under CERCLA section 107(a) for cases filed against the Army by a state agency or private party prior to when the Act was enacted. But this is just a beginning: to claim the exemption, the Army must still demonstrate by a preponderance of the evidence that the waste it allegedly generated, arranged, or transported to the site consisted solely of recyclable material. In addition, this is one district court's opinion in California; many other courts in other districts will have an opportunity to either follow or reject this ruling. Ms. Greco.

Yes, We Need No Permits

When the Army undertakes cleanups under the CERCLA,[13] it need not obtain permits for on-site response actions conducted under our CERCLA authority. In fact, the CERCLA contains a specific permit exclusion, which reads:

> No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with this section.[14]

The primary reasons that this exclusion was created are:

> (1) avoid delays in CERCLA response actions;
>
> (2) CERCLA and the National Contingency Plan (NCP)[15] provide detailed procedures that outline all steps of the cleanup action, while allowing for public involvement; and
>
> (3) CERCLA response actions follow the substantive provisions of law and regulation

9. *California Department of Toxic Substances Control*, 99 F. Supp. 2d at 1128 (quoting *Landgraf*, 511 U.S. at 280).

10. *Id.* at 1129 (quoting Two Rivers v. Lewis, 174 F.3d 987, 994 (9th Cir. 1999)).

11. *Id.*

12. *Id.* at 1152.

13. 42 U.S.C. § 9601 (2000).

14. *Id.* § 9621(e)(1).

15. *See generally* 40 C.F.R. pt. 300 (2000).

identified in the Record of Decision or comparable decision document.[16]

Thus, the environmental protection that might be provided by a permit is already met by complying with the requirements of the CERCLA, the NCP, and any applicable or relevant and appropriate requirements that are identified in the Record of Decision or other decision document. This process also allows the Army to proceed with cleanups in a straightforward manner and avoid needless delays.

The permit exclusion applies to on-site response actions. The NCP defines the term "on-site" to include the "real extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."[17] This concept can sometimes cause confusion at active installations that are undertaking the CERCLA cleanups. This is because an installation may have permits for hazardous waste management and air or water discharges. Although the terms of such permits would apply to the installation's operation in general, this does not mean that permits must be acquired to conduct specific CERCLA response actions. When the Army is operating under its authority to conduct a CERCLA cleanup on-site, the permit exemption applies. Ms. Barfield.

Court Ruling Heightens Import of Installations' Endangered Species Planning

Recently the federal district court for the Eastern District of California granted summary judgment to the National Wildlife Federation (NWF) in its lawsuit regarding the Natomas Basin Habitat Conservation Plan (HCP) in the Sacramento area,[18] finding violations of the Endangered Species Act (ESA)[19] and the National Environmental Policy Act (NEPA).[20] Because the Army (along with other DOD services) is now attempting to gain the same sorts of protections for its installations that the HCPs allow for non-federal lands, Army practitioners may wish to note the points of failure of this HCP. There are lessons in this case which are applicable to how the Army develops and implements its Integrated Natural Resource Management Plans (INRMPs) and Endangered Species Management Plans (ESMPs).[21]

The HCP in question encompasses approximately 53,000 acres of land straddling the northern boundary of the city of Sacramento, and was developed to protect the habitat of at least two federally listed species, the Giant Garter Snake and Swainson's Hawk. Of the total acreage, just over 11,000 acres fell within Sacramento's jurisdiction, with the remainder of the acreage falling into two counties. At the time of the lawsuit, neither of the counties had applied for an Incidental Take Permit (ITP) pursuant to the HCP.

The Natomas HCP set up a mitigation scheme whereby for each acre of land to be developed, one half an acre was to be acquired and set aside as a habitat reserve, with the assumption that much of the undeveloped land would remain either undeveloped or agricultural, the latter also providing good habitat value. Development fees were to be collected that would pay for both the acquisition and management of the reserve lands.

The HCP was developed in accordance with Section 10 of the ESA, which provides an exception from the prohibition on "take" found in Section 9 of the ESA.[22] The ITP granted to Sacramento was granted pursuant to Section 10's criteria:

"Upon submission of an HCP and an ITP application, [U.S. Fish and Wildlife Service (FWS)] shall issue the permit if it finds that:

> (1) The taking will be incidental;
> (2) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
> (3) The applicant will ensure that adequate funding for the plan will be provided;
> (4) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
> (5) Other measures required by [FWS] will be met."[23]

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16. For information on how cleanup standards are identified, see 40 C.F.R. §§ 300.400(g), which outlines the process for determining applicable or relevant and appropriate requirements governing cleanup actions.

17. 40 C.F.R. §§ 300.400(e)(1), 300.5.

18. National Wildlife Federation v. Babbitt, Civ. S-99-274 (E.D. Cal. Aug. 15, 2000).

19. 16 U.S.C. §§ 1531-1544 (2000).

20. 42 U.S.C. §§ 4321 (2000).

21. *See* Sikes Act Improvement Act of 1997, 16 U.S.C. § 670; *see also* U.S. Dep't of Army, Reg. 200-3, Natural Resources–Land, Forest and Wildlife Management, chs. 9, 11 (28 Feb. 1995).

22. Section 9 of the ESA prohibits "take" of any listed species. Take is defined very broadly, and includes "harm," 16 U.S.C. § 1538(a)(1), which includes any "significant habitat modification or degradation [which would impair] essential behavioral patterns . . . ." 50 C.F.R. § 17.3 (2000).

The district court held as arbitrary and capricious FWS's findings that Sacramento would to the maximum extent practicable minimize and mitigate the impacts of development,[24] and that Sacramento had ensured adequate funding for the plan.[25] Both holdings turned on the inadequacy and lack of economic analysis of the scheme whereby development fees would fund acquisition of reserve lands to mitigate habitat loss. Specifically, the court found it notable that the land inside the Sacramento city border would be rapidly developed,[26] but there were no assurances that the political entities outside Sacramento would submit ITP applications,[27] and no analysis of the how the scheme would work if the counties did not participate in the HCP.[28] The NWF also claimed, and the court agreed, that FWS should have prepared an environmental impact statement for the HCP, given its duration of fifty years, complexity, and certain controversy.[29]

For installation INRMPs and ESMPs, the lessons from this holding are clear: if FWS is to grant ITPs and defer critical habitat designations on Army installations pursuant to the installation's INRMP and ESMP, then clearly the Army will have to make an ironclad fiscal commitment to ensure funding, and to minimize and mitigate take. That said, however, it is clear that the Army is clearly committed to sustained funding for not only developing comprehensive, programmatic plans, but also for implementing those plans. MAJ Robinette.

Proposed Suspension of Historic Preservation Regulations Creates Compliance Confusion

With the specter of an unfavorable court ruling hanging over its head, the Advisory Council on Historic Preservation (Council) proposed to suspend 36 C.F.R. § 800,[30] its regulations governing review of federal agency actions with the potential to effect historic properties.[31] The regulations could be suspended as early as 30 October 2000 unless the Council receives comments expressing a compelling reason for not going forward. Once suspended, the procedures set forth in 36 C.F.R. § 800 will become non-binding guidance that federal agencies are encouraged to use to meet their responsibilities pursuant to section 106 of the National Historic Preservation Act (NHPA).[32] The Council anticipates republishing a new final rule by 17 November 2000. This target may be somewhat optimistic given the controversy surrounding publication of the current rules in 1999 and the willingness of certain stakeholders to resort to litigation for relief.

Promulgation of the current regulations has had a long and tortured history. Congress established the fundamental requirements of section 106 of the NHPA in 1966. Section 106 directed federal agencies to consider the effects of their actions on historic properties and provide the Council a reasonable opportunity to comment prior to making a final decision to proceed. Since 1986, federal agencies have complied with this mandate by following the detailed review procedures published by the Council in 36 C.F.R. § 800. Congress amended the NHPA in 1992, in large part, recognizing the need to provide for greater participation of federally recognized Indian tribes and Native Hawaiian Organizations (NHOs) in the review process.[33]

Realizing that the 1986 regulations were insufficient to address the amendments in 1992, the Council initiated the informal rule-making process pursuant to the Administrative Procedure Act (APA)[34] to amend and update 36 C.F.R. § 800. After almost five years and publication of two Notices of Proposed Rulemaking,[35] the Council completed a final rule,[36] cod-

23. 16 U.S.C. § 1539(a)(2)(B).

24. National Wildlife Federation v. Babbitt, Civ. S-99-274 (E.D. Cal. Aug. 15, 2000), at 42.

25. *Id.* at 47.

26. *Id.* at 41.

27. *Id.* at 44.

28. *Id.*

29. *Id.* at 42.

30. Protection of Historic Properties, 36 C.F.R. § 800 (2000).

31. The Notice of Proposed Suspension, which initiated a forty-five day public comment period, was published in the Federal Register at 65 Fed. Reg. 55,928 (Sept. 15, 2000).

32. *See* 16 U.S.C. § 470 (2000).

33. *See* 16 U.S.C. § 470a(d)(6)(A) (making clear that properties of traditional religious and cultural importance may be eligible for inclusion in the National Register); *see also* 16 U.S.C. § 470a(d)(6)(B) (directing federal agencies to consult with tribes and NHOs when carrying out Section 106 responsibilities with respect to properties of traditional religious and cultural importance).

34. 5 U.S.C. §§ 551-559 (2000).

ified at 36 C.F.R. § 800, which became effective on 17 June 1999–finally superceding the 1986 regulations. The 1999 regulations significantly altered the section 106 review process, delegating greater day-to-day responsibilities to State Historic Preservation Officers (SHPOs), redefining the Council's program and policy oversight roles, and establishing mandatory procedures for involvement of Tribal Historic Preservation Officers (THPOs), tribes and NHO's.[37]

Just as the Army and other federal agencies were coming to grips with the compliance challenges posed by the new regulations, the National Mining Association (NMA), filed suit in Federal District Court, alleging, among other things, that the Council's decision to promulgate the final rule violated the Appointments Clause of the United States Constitution by allowing representatives of the National Trust for Historic Preservation and National Conference of State Historic Preservation Officers to vote on the issue. Both representatives are members of the Council, but are not appointed by the President.

In response to the litigation, the Council voted to suspend 36 CFR § 800 to avoid an unfavorable ruling by the Court. It is presently in the process of republishing the regulations,[38] and anticipates completing a final rule by 17 November 2000. This means that there will be no binding section 106 regulations between 30 October 2000 and the date of final publication. To remedy this regulatory shortcoming, the Council has adopted 36 C.F.R. § 800 as "guidance" and encourages Federal agencies to comply with those procedures to avoid disruption in the compliance process while rule-making proceeds.

Whether the Council meets its 17 November 2000 deadline or not, Environmental Law Specialists should continue to advise their clients to comply with 36 C.F.R. § 800 until the Council publishes a final rule in the Federal Register. These procedures are consistent with those contained in *Army Regulation 200-4, Cultural Resources Management*, and will ensure that the Army continues to meet the fundamental requirements of section 106. Mr. Farley.

Assessing the Aftermath of Section 8149

The arrival of 1 October 2000 signals many things to many people, but to military attorneys who deal with environmental enforcement actions it holds the promise to the end of a year of frustration. The Defense Appropriations Act for Fiscal Year 2000[39] contained a rider, section 8149,[40] that upset the routine process of negotiating settlements in enforcement actions by requiring specific congressional approval of all settlements that would use fiscal year (FY) 2000 funding.[41] This meant that Army attorneys had to build into each settlement agreement provisions that would suspend payment of penalties or funding of supplemental environmental projects (SEPs) until Congress passed legislation approving the expenditure of funds. An additional dilemma was introduced when a survey of settlements from prior years turned up five installations that required FY 2000 funding to complete SEPs, some of which were already underway. This article surveys the impacts of what is now known simply as "section 8149" on enforcement actions against Army installations, and the status of legislation that may succeed it.

The main catalyst for section 8149 was EPA's proposal in August 1999 to issue a $16 million penalty to Fort Wainwright, Alaska. Over ninety-nine percent of the proposed fine was based on two types of "business" penalty assessment criteria[42] that have no relevance to federal agencies.[43] Although intended as the proverbial "shot across the bow" to the EPA, it was a message the EPA did not receive because the EPA has continued undeterred in its campaign to impose business penalties against federal facilities.[44] Section 8149 not only incurred a

35. These notices were published in the Federal Register at 59 Fed. Reg. 50,396 (Oct. 3, 1994) and 61 Fed. Reg. 48,580 (Sept. 13, 1996), respectively.

36. The final rule was published in the Federal Register at 64 Fed. Reg. 27,044-27,084 (May 18, 1999).

37. *See id.*

38. The Council published a Notice of Proposed Rule-making in the Federal Register. 65 Fed. Reg. 42,834 (July 11, 2000). The extended comment period closed 31 August 2000. The Council is presently reviewing comments in anticipation of publishing the final rule on 17 November 2000. *Id.*

39. Pub. L. No. 106-99, 113 Stat. 1235 (1999).

40. *Id.* § 8149. This section directs that none of the funds appropriated for FY 2000 "may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law." *Id.*

41. For background on the Defense Appropriations Act for FY 2000 and DOD and Army policy implementing it, see Major Robert Cotell: *Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction*, ENVTL. L. DIV. BULL., Oct. 1999; *Section 8149 Update*, ENVTL. L. DIV. BULL., Nov. 1999.

42. First, the EPA proposed to recover $10.5 million for alleged "economic benefits" (i.e., net profits from alternative investments) received by the installation for non-compliance. Second, the EPA sought an additional nearly $5.5 million simply because Fort Wainwright is a "large business" and has substantial assets that the EPA presumes the Army can sell or mortgage to raise money to pay for penalties.

43. For a discussion of Army and DOD objections to business penalties, see Lieutenant Colonel Richard A. Jaynes: *EPA's Penalty Policies: Giving Federal Facilities "The Business,"* ENVTL. L. DIV. BULL., Sept. 1999; *New Resource on Economic Benefit Available*, ENVTL. L. DIV. BULL., Aug. 2000.

reaction of indifference from the EPA, it was misunderstood and assailed by states and environmental activist groups. While DOD did not request and did not want the burdens imposed by section 8149, media coverage suggested otherwise and viewed section 8149 as an outrageous attempt by DOD's defenders on the Hill to protect DOD from its compliance responsibilities. Consequently, working under the constraints of section 8149 greatly impeded the process of reaching settlements and detracted from Army efforts to build positive relations with state regulators.

In its effort to implement section 8149, the Army submitted six enforcement action settlements for approval, five of which involved SEPs from earlier years. These became part of DOD's legislative package request that was initially submitted in March 2000, and it was supplemented with a few additional cases as time passed. The DOD's request was packaged as a rider intended to be attached to a piece of fast-moving legislation to obtain approval as quickly as possible. Instead, Congress included it as part of both the House and Senate versions of the FY 2001 Defense Authorization Bill. Initially, it was hoped that the Authorization Bill might be expedited under the schedule Congress planned for this election year. Unfortunately, two things happened to frustrate DOD's legislation packaged under section 8149 from achieving its original purpose. First, it was not passed in FY 2000. Second, and more importantly, DOD's legislative package was amended to only authorize the use of FY 2001 funds to pay for the fines and SEPs listed in the proposed legislation. These developments led to an instruction from the ELD in August 2000 for affected installations to spend any FY 2000 funds that had been fenced to meet the requirements of settlement agreements for other purposes before the end of the fiscal year.

The primary impact of section 8149, as it came to be implemented, was to frustrate the ability to spend FY 2000 funds for fines and SEPs after it became law. Although well intentioned as a means to curb the EPA's ill-conceived regulatory enforcement strategy against federal facilities, section 8149 cannot be said to have achieved its goal. Indeed, the overly broad swath it cut may have spelled doom to a subsequent and more surgical attempt to attack the EPA's business penalties strategy.[45]

Regarding the National Defense Authorization Act for 2001, section 342 of the Senate version was originally written to prohibit DOD Services from paying any environmental penalties that are "based on the application of economic benefit criteria or size-of-business criteria" unless Congress specifically approved payment.[46] Had section 342 been enacted as originally drafted, it would have contributed significantly to resolving the ongoing and contentious dispute with the EPA over the application of these "business" penalty criteria to federal facilities.

In reporting section 342, the Senate Armed Services Committee explained its rationale for drafting the business penalties provision. The Committee noted that these penalty criteria are designed for "market-based activities, not government functions subject to congressional appropriations."[47] After highlighting essential differences between the government and private sectors, the Committee concluded that applying these penalty criteria "would interfere with the management power of the Federal Executive Branch and upset the balance of power between the federal executive and legislative branches, exceeding the immediate objective of compliance."[48] These observations of the Committee are diametrically opposed to the position the EPA has been taking as the Army has been working to resolve the uniquely-large fine levied against Fort Wainwright, Alaska.

On 12 July 2000, the Senate agreed to Amendment 3815 to Senate Bill 2549 that removed any mention of business penalties in section 342. Senator Stevens proposed Amendment 3815[49] as a compromise that was reached with Senate opponents to section 342. In addition to removing the business penalties provision, the amendment curtailed the impacts of the section in other respects. The original version was a permanent requirement for Congress to approve any penalty that is $1.5 million or greater. Amendment 3815 restricts the application of section 342 to a three-year trial period and makes it applicable to federal regulators such as the EPA (i.e., there is no penalty threshold for state and local regulatory agencies). After Amendment 3815 was submitted, Senator Kerry made a speech explaining that he was opposed to any exemption of federal facilities from business penalties because they should be subject to the full range of penalties that apply to private industry.[50] Senator Kerry's remarks, in contrast to the Senate Armed Ser-

44. For example, the EPA dismissed any significance to section 8149 in a Memorandum from Steven A. Herman, Assistant EPA Administrator to Regional Administrators and Counsels, dated December 7, 1999, subject: Impact of Department of Defense FY 2000 Appropriations Act, Section 8149. Note also that section 8149 drew administration criticism both from the President, in his signing statement to the FY 2000 Appropriations Act, and from the Assistant to the President for National Security Affairs in a letter to Senator Frank R. Lautenberg, dated 10 March 2000.

45. The EPA's economic benefit policy for federal facilities is embodied primarily in its Memorandum from Steven Herman, EPA Assistant Administrator, to Regional Administrators and Counsels, dated September 30, 1999, subject: Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies.

46. S. 2549, 106th Cong. § 342 (2000).

47. S. REP. 106-292 (2000).

48. *Id.*

49. 146th Cong. Rec. S. 6538 (daily ed. July 12, 2000).

vices Committee's report on section 342, make it clear that there is no consensus in Congress on the issue of whether business penalties should apply to federal facilities. The legacy of section 8149 so heightens the political rhetoric on macro issues that it effectively obscures and precludes a close examination of the profound factual, legal, and policy deficiencies of the EPA's business penalties policy, a policy that amounts to rule-making without any notice and comment procedures.[51]

On 13 July 2000, the bill passed the Senate on a 97-3 vote as an amendment to its House counterpart. The National Defense Authorization Act for Fiscal Year 2001 was ultimately signed into law on 30 October 2000. In light of Amendment 3815, however, the Act is not expected to have much effect on the administrative litigation pending between the EPA and Fort Wainwright. The only possible impact may be that the amendment's $1.5 million threshold may serve as a negotiating cap to avoid the necessity of requesting the approval of Congress for settlements with the EPA regions.

The Army and DOD view business penalties as a floodgate for greatly increasing the size of fines against installations in most enforcement actions. In contrast, the EPA has made business penalties the centerpiece of its new federal facilities enforcement strategy. In practice, the EPA often asserts statutory maximum fines in its complaints, and then uses business penalties to develop an inflated negotiating position that drives all settlement discussions thereafter. The EPA's practice is particularly problematic because the EPA regions now often refuse to provide penalty calculations, thus making it difficult to determine whether business penalties have been used to inflate the settlement amount. This puts a greater burden on the installation to ensure that business penalties are removed from settlement discussions. These developments make it clear that Army installations must continue to oppose the EPA's "inflate and then stonewall" strategy for federal facilities. In individual cases, the ELD will work with installation environmental law specialists to ensure that settlements do not bear any "taint" from the EPA's business penalties campaign. LTC Jaynes.

50. *Id.*

51. See recent judicial disapproval of this sort of approach by EPA in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 2000 U.S. App. LEXIS 6826, (DC Cir., 2000).