

**Chief Counsel's Task Force on the
Delivery of USACE Legal Services**

APPENDIX D

Recommendation #	Subject
1	Integrated Legal Services System
2	Focus CECC on Policy
3	Establish Communication Protocols
4	Chief Counsel Field Visits
5	Expand CECC-T Circle
6	Modify Chief Trial Attorney Function
7	Communicate Legislative Information
8	Delegate FOIA Denial Authority
9	Delegate Agency Bid Protest Authority
10	Delegate Authority on GAO Protests
11	Delegate Civil Litigation Settlement Coordination
12	Increase Admiralty Settlement Authority
13	Transfer FOIA Officer Responsibility
14	Processing Tort Claims
15	Establish Labor Counselor Requirement
16	Establish Minimum Core Functions at Districts
17	Restructure Procurement Fraud Advisor Responsibilities
18	Establish Counsel as Senior Rater
19	Create Legal Services Deskbook
20	Enhance Awards Program
21	Develop System of Rotational Assignments
22	Develop Orientation Program
23	Increase Electronic Communication
24	Review CMIS-II
25	Establish Workload and Time Accounting System
26	Create Suspense/Tickler System

RECOMMENDATION 1 - *Integrated Legal Services System*

Recommend that the Corps legal services system operate as a single, unified, and integrated system among all Corps legal offices so as to maximize quality, efficiency and cost effectiveness, timeliness and responsiveness, accountability, and career development. The system should have the following attributes:

Identifies and assigns appropriate, value-added based roles and responsibilities to each legal office within the system, including developing and disseminating legal services policy, discharging assigned legal services missions and functions, establishing and maintaining legal services management, automation, and career development systems; assures that each legal office has the necessary resources and tools to carry out its assigned roles and responsibilities; designates appropriate and necessary centers of expertise; eliminates duplicative effort and multiple levels of review; and assures accountability to both the Command structure and to the legal services system.

Each legal services system office should have: clearly defined roles and responsibilities; self-sufficiency to perform assigned legal services functions ("core" functions for each office); access to other necessary legal services functions, including specialized subject matter expertise, consolidated, centralized, or otherwise provide elsewhere in the system.

Each legal services system echelon should have a primary focus. The Office of the Chief Counsel should focus on developing and disseminating legal policy and guidance; on addressing nationally significant or precedential issues; on resolving legal issues where the law is unclear; on providing "operational" legal services for the Chief of Engineers and the Headquarters staff on "operational" matters originating at and properly arising from the Headquarters role, those in support of programmatic policy or legislative development and interpretation, or where the Headquarters is the action office or decision maker; on providing subject matter expertise where it has been designated as the center of expertise; and on dealing with the national or Headquarters level of other federal and private entities.

The Division Offices of Counsel at Command and Control Divisions should focus on managing the legal services provided by its District Offices of Counsel; providing "operational" legal services to the Division Commander and the Division staff on "operational" matters originating at and properly arising from the Division role, where the Division is the action office or decision maker; on providing subject matter expertise where it has been designated a center of expertise; and on dealing with regional policy matters and with the regional representatives of public and private entities.

Operating Division, District, Laboratory, and FOA Counsel should focus on providing "operational" legal services to their respective Commanders and Command staffs in direct support of project execution, and in discharge of their own responsibilities as action office or decision maker. They also provide representation to public and private entities within their responsibilities and geographical boundaries not covered by other Command and Control Divisions or by the Headquarters.

SIGNIFICANT BACKGROUND

Corps' missions are changing. Corps' legal specialties are increasing and becoming more complex. Corps' resources are declining.

RATIONALE FOR CHANGE

Creating a truly integrated, value-added based legal services system is essential in order to continue to provide the preeminent legal services to which the Corps has been accustomed.

MCKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to do the work. This recommendation provides a structural framework for distributing roles and responsibilities throughout the Corps' legal services system. It relies on the existing Corps structure, but alters some of the current and traditional assignment of work.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. This recommendation supports the overall strategy of properly assigning roles, responsibilities, and resources to provide legal services where and as needed. Each legal office should be able to provide identified basic services and should be able to obtain other needed legal services elsewhere in the system.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. This recommendation affects style in attempting to discipline the system to empower legal offices and legal office members to execute assigned roles and responsibilities, without unnecessary review or duplication of effort. Additionally, reliance on other offices in the system to provide some of the legal services is a style change.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. Skills throughout the legal services system will be the same. However, distribution of skills is changed. Also, where necessary certain skills will be enhanced.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. This recommendation has staffing implications for all legal offices. Each legal office must be staffed to accomplish its assigned roles and responsibilities. Reduced overall Corps' resources and the elimination of redundancy in the new legal system design require proper staffing at each Corps legal office.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. This recommendation is a systems approach to providing legal services throughout the Corps. It depends on each legal office carrying out its assigned roles and responsibilities. It contemplates support from automation, communication, and management systems which are the subject of other recommendations.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). This recommendation is consistent with the goals of operating a legal services system that values quality, efficiency/cost effectiveness, responsiveness/timeliness, accountability, and career development.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. This recommendation enhances quality by making clear what each legal office is responsible for, by eliminating duplication, and by making individuals accountable for their work.

(2) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. This recommendation improves this success criteria by assigning roles and responsibilities according to Corps' need, by covering the essential legal services somewhere in the legal services system, and by eliminating unnecessary review and redundancy.

(3) **Efficiency/Cost Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. This recommendation fosters this success criteria by making clear what each legal office is responsible for, by eliminating duplication, and by making individuals accountable for their work.

(4) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. This recommendation supports career development opportunities by clearly identifying roles and responsibilities for each legal office and recognizing the scope of legal services assigned. It provides for specialization where appropriate. It anticipates office and individual accountability which makes each member of the legal services system more responsible.

(5) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. This success criteria is furthered through the assignment of clear roles and responsibilities and the streamlining inherent in the system design.

LEGAL SERVICES SYSTEM VIEWS

This recommendation was not presented to attendees at the Fifth Worldwide Legal Services Conference.

ACTION NEEDED

Revise Mission and Function statements for each Corps legal office.

Align resources to fit assigned Missions and Functions.

Develop system of accountability.

Develop automated systems to support all Corps legal offices and the recommended legal services system design.

Establish centers of expertise or specialization and criteria or qualifications for providing these services.

RESOURCE IMPLICATIONS

An assessment must be made to determine staffing levels and resource alignment of each legal office.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 2 - *Focus CECC on Policy*

The Chief Counsel should review the Office of the Chief Counsel workload, priorities, and resource allocation to ensure there is adequate focus in each of the substantive areas to perform the primary function of providing leadership in the delivery of USACE legal services by furnishing legal and legal policy guidance to the Field in a timely manner. He should also improve communications with the Field Offices of Counsel by initiating new methods of providing such information, such as electronic dissemination or a monthly newsletter.

SIGNIFICANT BACKGROUND

This recommendation reflects the Task Force's belief that one of the primary methods the Office of the Chief Counsel should use to provide leadership for the delivery of USACE legal services is to furnish legal and legal policy advice to the Field. It also is consistent with the Task Force's general philosophy and assumptions that, in an effort to enhance the quality and uniformity of legal advice, increase cost-effectiveness and avoid duplication of legal services, policy should be performed at the highest level of the organization and communicated to the lower levels in a timely fashion.

For a number of years, the roles and responsibilities of the various echelons involved in Corps' business processes have become almost indistinguishable. At the Headquarters, generally, the balance between performing work appropriate to the Headquarters, which would aid the field and add value to the Corps' business processes, and work for which the field should be responsible has become skewed. The Headquarters is doing more of the latter and less of the former. Many things are being handled on an *ad hoc* basis with everyone operating in a reactive rather than in a proactive mode. Each echelon is operating separately and independently, not as part of a unified system.

In an effort to be responsive to its Headquarters and higher authority clients, the Office of the Chief Counsel has become more "operational" and occupied with "managing the 'in' box", too. Advising the field about recent policy determinations in all subject matter areas, which should be a priority of the Office of the Chief Counsel, is given less attention.

Other factors contributing to this imbalance are the need to develop the legal framework for new Corps' mission areas and to maintain expertise as the law changes in our traditional mission areas. Additionally, staffing reductions and loss of field expertise has resulted in the Office of the Chief Counsel being used as an extension of field legal offices and as the center of expertise for many substantive legal subjects.

This recommendation is intended to address, at least for the Office of the Chief Counsel, the dysfunction of the Washington-level shift from performing its appropriate role towards doing what should be field roles and responsibilities. In this regard, the task force believes that workload should be assessed, priorities set, and resources aligned systematically, regularly, and preventively so as to maximize the value of the Office of the Chief Counsel's effort.

RATIONALE FOR CHANGE

The Task Force believes that this recommendation will improve the delivery of legal services by ensuring that USACE legal offices are provided the agency legal and legal policy guidance in a timely manner. In this way, there will no need for higher levels of the organization to review Field legal work products to ensure consistency and compliance with the latest guidance. It also will eliminate much of the *ad hoc* and reactive handling of issues.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to do the work. Recommendation 2 stems from the Task Force's principal assumption that one of the ways the Office of the Chief Counsel performs its primary function of providing leadership in the delivery of USACE legal services is by furnishing advice and guidance to the Field organization. Thus, the structure of the Counsel organization should reflect this priority, and the organizational elements at each level of the Counsel organization should be resourced accordingly. Consequently, the Office of the Chief Counsel should realign the manpower assignments within the circles so providing advice and guidance can be given the attention it deserves.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. Recommendation 2 results from one of the Task Force's key findings: that there is substantial duplication of legal services work performed within USACE; and one of the Task Force's key assumptions: that resources, particularly Operation and Maintenance, Army (OMA) and General Expenses (GE) funds which are used to fund Headquarters and Division offices, will be significantly cut in future. Accordingly, our strategy for providing quality, responsive legal services in the future must be aimed at eliminating unnecessary layers of review and duplication and, thus, significantly increasing efficiency. The Task Force proposes to accomplish this by creating a truly unified legal services system where the headquarters legal office is responsible for policy, the division legal office is responsible for legal services system management, and the district legal office is responsible for legal services system execution.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. Although this element was not a primary driving force behind Recommendation 2, the

recommendation is consistent with the Task Force's proposed "style" of cost-effectiveness (i.e., avoiding duplication, not performing unnecessary reviews of Field work products).

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. The people the Chief Counsel needs to manage the circles and perform the tasks under the system the Task Force is proposing (e.g. Recommendation 2) may not be the same people currently assigned to the circles. People who are competent at researching and preparing legal opinions (i.e., providing operational legal advice) may not possess the skills necessary to analyze, or be sufficiently experienced or respected to provide, broad policy advice. At the very least, some people may need training in how to perform these new duties, and performance standards may need revision, in order to emphasize the new priority of these duties. Simply stated, we may have the "right" people with the "right" skills, but they may not be in the "right" place.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. Quite frankly, for the reasons described in the paragraph above, the decisions made with respect to this element may be the most critical in implementing Recommendation 12 so that the Office of the Chief Counsel can successfully provide legal and legal policy advice and guidance to the Field). Consequently, this will require the Chief Counsel personal attention.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. Recommendation 12 reflects the Task Force's conclusion that one way to avoid duplication and conserve resources is to ensure that Field offices always are provided the current USACE legal and legal policy guidance in a timely manner. Thus, there will be no need for higher levels of the organization to revise Field work products to ensure consistency and compliance with the latest guidance. Systems have to be created to disseminate this new information. Implementation issues are the frequency and form of this communication.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). Again, although this element was not a driving force behind this recommendation, Recommendation 2 does reflect the Task Force's conclusion with respect how best to achieve the fundamental purpose of the Counsel organization i.e., to provide quality responsive legal services.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. The Task Force concluded that Recommendation 2 would improve the quality of the legal services because it is aimed at ensuring that all levels of the organization have timely access to the most current legal and policy positions of the agency.

(2) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. The Task Force has concluded that Recommendation 12 would improve the timeliness of legal services because, as indicated in the paragraph above, it is aimed at ensuring that all levels of the organization have timely access to the most current legal and policy positions of the agency and a better ability to respond to clients.

(3) **Efficiency/Cost-Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. The Task Force has concluded that Recommendation 2 would improve the efficiency and cost-effectiveness of providing legal services because time would not be wasted while higher level reviews revised Field work products which were inconsistent with organization positions of which the Field had not been apprised.

(4) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. Although Recommendation 2 does not detract from career development, and may in fact improve it to some small degree, this criterion was not a primary factor in making this recommendation.

(5) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. The Task Force has concluded that Recommendation 2 will improve the accountability of the legal office for its work product because they will have timely access to the most current legal and policy positions of the agency and, thus, will not be able to absolve itself of responsibility for positions of which they have not been advised.

LEGAL SERVICES SYSTEM VIEWS

Sixty percent of the participants at the Fifth Worldwide USACE Legal Services Conference either "strongly agreed" or "agreed" with this recommendation. Moreover, one of the "break-out" groups responded that the "lack of flow-down of policy positions within the Counsel chain" and "reversal of District actions based on unannounced policy" were two of the top five current legal services policies or procedures which inhibit their office from providing quality, responsive legal advice to their clients.

ACTION NEEDED

The Chief Counsel should revise the Mission and Functions Statement of the Office of Chief Counsel, Appendix F to OM-1-1, as appropriate to specify that providing legal and policy advice to the Field is a primary function of the office. He should also revise the job descriptions and performance standards of the Office of the Chief Counsel team members to reflect this priority. Further, the Chief Counsel should analyze the workload of the Office of the Chief Counsel in

light of the revised priority, determine the workload of the various circles, and realign the manpower to reflect the workload. Finally, the Chief Counsel should review the capabilities and competencies of the existing Office of the Chief Counsel staff to determine whether they have the aptitudes and skills necessary to perform the new duties. If not, he should identify and satisfy any necessary training requirements. Although internal USACE regulations or operations manuals may need to be revised, no additional authority is needed to implement Recommendation 2.

RESOURCE IMPLICATIONS

At this stage, it is not possible to make a detailed assessment of whether the Office of the Chief Counsel needs additional or fewer staff to implement Recommendation 2. Therefore, the Task Force recommends that the Chief Counsel assume that, in light of overall declining manpower resources, he will have to perform his responsibilities with no additional resources. Accordingly, he will have to make whatever realignments are necessary within existing manpower.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 3 - *Establish Communication Protocols*

The Chief Counsel should issue a written policy on oral and written inter-echelon communications, consistent with implementation of a unified legal services system design. All offices are expected to analyze legal issues and prepare that office's position prior to referring matters to a higher echelon. Every effort must be made to resolve matters at the lowest possible echelon. The Office of the Chief Counsel must be contacted on national policy matters and nationally significant or precedential issues; and may be contacted where the law is not clear or where the Office of the Chief Counsel has been designated the center of expertise. Districts must communicate through their divisions, except on center of expertise matters, when authorized by the District Counsel on a case by case basis. Districts will advise their divisions of any such direct contacts in a timely fashion.

SIGNIFICANT BACKGROUND

All attorneys are aware of the informal policy, but because of various Division Counsel policies, and disregard of same, Districts often contact all USACE attorneys in all areas, with or without the acquiescence of the Division. Recognizing there must be some control, but also recognizing that certain issues can be most efficiently discussed between District and USACE staffs, any policy drafted should not prohibit direct communication, but take into consideration the benefits to the District in receiving support in certain areas. Any abuses that occur can be dealt with from a management standpoint.

RATIONALE FOR CHANGE

Although there presently is no written USACE policy on interoffice communication, there is an informal rule that there should be no direct communication between the Districts and the Chief Counsel's Office, and many Division Counsels enforce this policy. There are many reasons for this:

1. Attorneys at the Chief Counsel's Office do not have time to work on policy and also field numerous substantive law questions.
2. Divisions are not made aware of issues and thus lose control.
3. Districts fail to first research issues for answers.
4. Places the Chief Counsel's Office in the position of answering questions without a full understanding of the facts and related circumstances.

Over the past few years, the number of substantive legal areas of responsibility has grown to such an extent that attorneys at the District and Division levels cannot develop and maintain expertise in all issues encountered. The Office of the Chief Counsel, meanwhile, has expanded its specialization to meet this challenge. When issues in these specialty areas are encountered at the field level, it is often tempting to call the Headquarters directly instead of researching the matter and trying to resolve it within the originating office or with intermediate headquarters offices.

However, increasingly constrained resources, the Office of the Chief Counsel cannot continue to provide original legal work on subjects more appropriately addressed in the field. Field Counsel are expected to fully analyze issues and develop the position of Counsel prior to elevation. The goal of this requirement is twofold: to ensure that each Counsel at each organizational level does his/her job, and to make best use of existing resources consistent with responsibilities.

McKINSEY 7-S MODEL

(1) Structure. This element of the McKinsey Model deals with how people are organized to do the work. It is important to reinforce the responsibilities of attorneys at each level, i.e. policy for HQUSACE, management for Divisions, and operations for Districts. Each legal office is responsible for carrying out its assigned role. There are structural elements to this recommendation.

(2) Strategy. This element involves the generic approaches and intentions used to accomplish the work and plan for the future. The strategy is to assign roles and responsibilities to each legal office; to provide an integrated legal services system with capability or access to all legal services functions and expertise; to foster accountability.

(3) Style. Style reflects the organizational culture, attitudes, and personality. This recommendation recognizes the various responsibilities of each legal office, requires that they be carried out, yet assures access to all legal services system functions and expertise. It accommodates the needs of each office.

(4) Skills. This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. By requiring attorneys in each organizational legal office to fulfill their responsibilities and to fully develop a legal analysis and position prior to elevating an issue, many issues will be resolved appropriately at the lowest possible level. This will ensure development in areas of expertise by Division and District personnel and avoid inappropriate reliance upon the subject matter experts at the Office of the Chief Counsel.

(5) Staffing. This element describes the number and type of people needed to provide the organizational tasks and responsibilities. This recommendation affects staffing at each legal office.

(6) Systems. This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. This recommendation is consistent with general roles assigned which form an integrated legal services system. Communications are multidirectional.

(7) Superordinate Goals. This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). When considered with the success criteria discussed below, this recommendation would make best use of existing resources by ensuring that each legal office understands, can and does meet their responsibilities.

SUCCESS CRITERIA

(1) Quality. This criterion deals with how an action affects the quality of the legal services furnished. This recommendation should improve the work product of each legal office by ensuring that each meets its responsibilities.

(2) Timeliness/Responsiveness. This criterion addresses how an action affects the timeliness of the legal services to the organization. Issues can be more quickly resolved by implementation of this recommendation.

(3) Efficiency/Cost-Effectiveness. This criterion deals with the impact of an action on the efficiency of providing the legal services. This recommendation may cost some initial time in the beginning by requiring the Districts (and Divisions) to analyze issues and develop a legal position prior to elevating matters to the Office of the Chief Counsel. However, this would increase subject matter expertise at the lowest possible levels, and would eliminate unnecessary elevation of matter which can most appropriately be resolved at lower echelons. It will permit the Office of the Chief Counsel to concentrate on its proper role which will in turn benefit the entire legal services system and the Corps.

(4) Career Development. This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. This recommendation should enhance the career development of field attorneys by increasing their understanding of specific areas of law.

(5) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. District and Division offices will be held accountable for preparing well developed legal positions prior to elevating matters; for those instances where direct contact with a subject matter expert at HQUSACE is appropriate, Districts are made accountable to the Division Counsel for advising of the substance and nature of contacts with the Chief Counsel's Office to ensure that management functions can be properly carried out and future questions may not require elevation to the Office of the Chief Counsel. The Office of the Chief Counsel will be able to focus on and be accountable for performing its primary functions.

LEGAL SERVICES SYSTEM VIEWS

This recommendation was presented to participants at the Fifth Worldwide USACE Legal Services Conference as a communications issues, and focused upon permitting the Districts to directly contact the Office of Chief Counsel under certain circumstances; it was well received. However, with further recognition that this recommendation deals more accurately with roles, responsibilities and relationships, the Task Force has substantially revised the recommendation.

ACTION NEEDED

It is recommended that the Chief Counsel prepare written policy and guidance consistent with above parameters.

RESOURCE IMPLICATIONS

This recommendation recognizes that increasingly constrained resources at each organizational level requires having each legal office fulfill its responsibilities, in support of an integrated legal services system. This recommendation should have a positive impact on resources in the long run.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 4 - *Chief Counsel Field Visits*

The Chief Counsel and Deputy Chief Counsel are encouraged to make periodic visits to the field to meet with USACE attorneys. Some suggestions include: (1) If Division Counsels desire periodic meetings with the Chief and Deputy Chief Counsel, the Division Counsel should assume responsibility for setting up these meetings including facilities, agenda, etc.; (2) The Chief and Deputy Chief Counsel should use the meetings with field counsel to establish the agenda for USACE legal services; (3) Establish a system for planning visits by the Chief Counsel and Deputy Chief Counsel; make their long term calendars available to the field so that joint meetings can be scheduled; (4) The Chief Counsel and Deputy Chief Counsel should make periodic visits to the field an important goal, and could review the time elapsed since prior visits, organizational and mission changes, etc.; (5) Field attorneys should avail themselves of the Chief Counsel and Deputy Chief Counsel's offer to meet with them during visits to Washington. Field attorneys should make sure the Chief Counsel and Deputy Chief Counsel are contacted in advance to facilitate scheduling a meeting; and (6) Consider inviting the Chief Counsel and Deputy Chief Counsel to significant events, such as regional meetings, retirements of key staff, periodic management meetings, etc.

SIGNIFICANT BACKGROUND

Communication is an extremely important facet in the provision of legal services. Currently, there is a policy regarding visits by the Chief Counsel. While USACE hosts a well regarded Worldwide Legal Services Conference, several suggestions were made by both the Chief Counsel's Task Force as well as those attending the Fifth Worldwide USACE Legal Services Conference for making better use of existing meetings and conferences as well as periodic visits to the field.

RATIONALE FOR CHANGE

This recommendation is not regarded as a major "change", but an enhancement of the existing process to make better use of existing (and diminishing) resources. The roles of the Chief Counsel and Deputy Chief Counsel are extremely important within the USACE legal services community. Attorneys in the field regard opportunities to meet with the Chief Counsel and Deputy Chief Counsel as very beneficial in terms of facilitating strong working relationships, improving communications, and fostering positive morale. Several suggestions are made to maximize attendance at meetings already being held, propose different types of meetings, and permit the Chief Counsel and Deputy Chief Counsel to make best use of previously planned travel.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to do the work. The structure of the legal services organization is strengthened by the recommendation in that it fosters stronger working relationships and increased communications among organizational elements.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. The recommendation offers the opportunity to better plan the strategy and long term agenda of the USACE legal services communities.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. Increased contact between field attorneys and the Chief Counsel and Deputy Chief Counsel will be of mutual benefit to all by shared information and strong collegial relationships.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. Communication skills will be enhanced by fostering enhanced working relationships.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. No additional staff will be needed to implement this recommendation. However, it will redirect the travel and some meetings of the Chief Counsel and Deputy Chief Counsel.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. It reinforces current organizational system by increasing visibility of Chief Counsel and Deputy Chief Counsel.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). The values of strong professionalism, good working relationships, clear communication, trust, improved morale and welfare will be enhanced. The Corps strongly values its sense of being "family"; this recommendation reinforces this.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. The quality of legal services will be improved by the enhanced communications and closer working relationships.

(2) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. Timeliness and responsiveness would be improved by fostering closer communication between the field and the Chief and Deputy Chief Counsel.

(3) **Efficiency/Cost-Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. If there are increased meetings as a result of the suggestion, there may be some additional costs associated with travel. However, if significant savings could be realized if the suggestion is incorporate into travel otherwise planned by the Chief Counsel and Deputy Chief Counsel so that a single trip could serve several purposes. This latter would be very cost effective.

(4) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. The proposal would increase the accountability of Counsel by providing increased opportunities for information exchange and interface.

(5) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. More frequent opportunities to meet with the Chief Counsel and the Deputy Chief Counsel would bring members of the Corps' legal services organization more closely together, fostering stronger working relationships.

LEGAL SERVICES SYSTEM VIEWS

This recommendation was not presented to participants at the Fifth Worldwide USACE Legal Services Conference.

ACTION NEEDED

The Chief Counsel and Deputy Chief Counsel must concur in this recommendation, and implement these suggestions into planning their schedules and travel.

RESOURCE IMPLICATIONS

This suggestion will not require any additional resources to implement, but may necessitate the Chief and Deputy Chief Counsel to rethink their travel.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 5 - *Expand CECC-T Circle*

The Chief Counsel should retain and strengthen the Legal Services Policy, and Programs Circle, CECC-T. He should merge the labor counselor, ethics and standards of conduct, legal services system management functions into CECC-T. The Circle should be renamed "Legal Services Policy, Information, and Programs".

SIGNIFICANT BACKGROUND

The position of Assistant Chief Counsel for Legal Services Policy and Programs was established when the Office of the Chief Counsel embraced the highly integrated Circle concept in 1987. Since that time the position has served as the head of a one-person circle, the only circle of its kind in the Office of the Chief Counsel. The incumbent is responsible for developing legal services plans, programs and policies, advice on the USACE attorney career management program, liaison with standing committees, and execution of special projects. He also processes, within the agency, position classification actions and appeals involving Corps attorneys. The Management and Administration Office, although not specifically identified as a circle on the organization chart of the Office of the Chief Counsel, is nevertheless a discrete entity providing general administrative support to the management of the entire legal services organization, and direct administrative support to the Office of the Chief Counsel as a whole. Specific functions include administrative services and management guidance on manpower, budget, automation, performance management, and technical advice and assistance on excepted service personnel actions affecting civilian attorneys, law clerks, and legal interns throughout USACE. The Senior Counsel for Ethics and Standards of Conduct is located within the Procurement Circle. The incumbent also serves as advisor for procurement fraud and procurement integrity. The Labor Counselor function is now performed in the Chief Trial Attorney's Circle. The incumbent serves as legal advisor on personnel and EEO law and develops legal services policy for representation of the agency in actions before the Federal Labor Relations Authority, Merit Systems Protection Board, and Equal Employment Opportunity Commission, including actions brought by Corps attorneys.

RATIONALE FOR CHANGE

It is the sense of the Task Force that CECC-T can be a significant "force multiplier" for the entire legal services organization, *if adequately resourced*. In the past it was a one-person circle. It was an anomaly which seemed to violate basic management principles of organization. It had an important mission, but inadequate resources with which to execute that mission. Implementation of this recommendation will adequately resource the circle, group functions more logically, balance the

workload and resources of the circles more appropriately, and establish a counsel staff element capable of stimulating and sustaining strategic planning, TQM and other innovative management initiatives. Moreover, it will be capable of fully and appropriately coordinating these and other legal services policy initiatives, as well as facilitating inter- and intra-legal office communication generally. Implementing this proposal should lead to tangible improvements in quality, responsiveness, efficiency, accountability, and career development in the short to intermediate term.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to do the work. The basic structure of circles within the Office of the Chief Counsel would not change. However, the structure within circles would change. The circle concept would remain intact, and even be strengthened by grouping functions more logically and by balancing the existing circles better.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. The proposed CECC-T would be assigned responsibility for liaison among legal services system office and would support legal service system strategic planning. This change would ensure the continuity and coherence of legal services strategic planning, in support of the Chief Counsel and Deputy Chief Counsel. It would also ensure that such efforts are fully coordinated with appropriate staff and other concerned elements internally and externally, including legal services system committees, task forces, *ad hoc* bodies.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. As a result of being more appropriately resourced, the style of CECC-T would change to that of a more proactive, service-centered organization, capable of stimulating and sustaining innovative management initiatives as well as addressing substantive legal issues relating to personnel matters. The basic focus of the circle would be largely internal (to the Corps, not just Corps legal services), and support oriented.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. This recommendation does not affect skills needed by the organization; it does not relocate them within the Office of the Chief Counsel.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. The proposed CECC-T Circle would require reallocation of resources to adequately execute its revised mission and functions. Professional, technical, administrative, and clerical personnel would all be required, but would be available from other circles and the legal services management and administration function.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. The proposed CECC-T Circle would assume responsibility for management of CEALS, development and fielding of legal office management products, and personnel and career management systems. The circle would also develop and deploy research and practice aids of general application. The activity would be the focal point for identification, development and integration into CEALS of state of the art office automation, including workload and time accounting systems.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). This proposal is fully consistent with and in furtherance of the shared values reflected in the concept of client care. If adopted, the recommendation would institutionalize TQM in the Office of the Chief Counsel and help make the values identified in the Corps Vision Statement more tangible throughout the legal services organization.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. The recommended CECC-T Circle will serve as the catalyst for development and deployment of quality-enhancing legal services, personnel, career, automation, and office management systems and procedures. It will facilitate institutionalization of preventive law practice. Moreover, it will stimulate legal services policy development with a broad perspective. It will institutionalize TQM in the Office of the Chief Counsel.

(2) **Efficiency/Cost-effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. This proposal has great potential for improving both the cost effectiveness and efficiency of the delivery of legal services throughout the Corps of Engineers. The proposed circle will be able to focus on and emphasize the very activities which can impact productivity most: TQM, automation, management systems and procedures, and career management.

(3) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. The recommendation, if implemented, will establish a circle that is resourced and empowered to develop and deploy systems and procedures that could enhance timeliness and responsiveness significantly throughout the Corps Legal Services Organization.

(4) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. The proposed circle would oversee the development and deployment of workload and time accounting systems. Although intended

more to help manage the allocation and utilization of resources, such systems will probably have a salutary impact on technical and professional accountability as well. Moreover, the development and dissemination of practice aids and better management information systems could contribute significantly to improved accountability generally. Collectively, these systems should contribute significantly to positive financial accountability within the legal services organization at all levels.

(5) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. The recommended circle will directly oversee and participate in the activities and deliberations of the Chief Counsel's standing committees, including the Career Management Committee and the Training Committee, both of which are directly concerned with career development throughout the legal services organization. Although CECC-T always was assigned responsibility for this function, it was not adequately resourced to emphasize career development efforts. The strengthened circle should be able to positively influence career management and development at all echelons. Incorporation of staff responsible for organizational issues will permit earlier and better assessment of career development impacts associated with the possibly dramatic organizational changes that may lie ahead.

LEGAL SERVICES SYSTEM VIEWS

This specific recommendation was not directly addressed at the Fifth Worldwide USACE Legal Services Conference. When asked a related question about possible realignment of manpower at headquarters to ensure adequate support to particular areas, including policy development, sixty percent of the respondents either agreed or strongly agreed with the recommendation.

ACTION NEEDED

The Mission & Functions Statement, Appendix F for the Office of the Chief Counsel in OM 10-1-1, should be rewritten to reflect the reassignment of responsibility for personnel law, ethics and standards of conduct, management and administration, and reorganization legal support to CECC-T. Revise organizational diagram accordingly. A reassignment (management directed change) of affected people in the Office of the Chief Counsel should take place, and their offices should be designated to allow them to be co-located. The rest of the legal services organization and affected clients should be informed of this organizational change. Finally, the budget within the Office of Chief Counsel should be reallocated as appropriate.

RESOURCE IMPLICATIONS

Implementation of this recommendation requires reassignment of already authorized personnel spaces, and reallocation of already authorized elements of the operating budget for the Office of the Chief Counsel. There may be some expense involved in rearranging existing office space.

This circle will require an additional budget to pursue the initiatives it will be responsible for properly. As discussed above, this additional expense will be an investment in the future and should result in operational cost savings across the entire legal services (and Corps) organization over time.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 6 - *Modify Chief Trial Attorney Function*

It is recommended that the Chief Counsel modify the trial attorney function by instituting a program with the following key elements: (1) a voluntary certification program; (2) a standardized training program; (3) elimination of multiple levels of review; (4) documents filed directly from district, operating divisions, laboratories & FOAs to the Boards of Contract Appeals; (5) Division Trial Attorney positions being restructured in favor of division management role; (6) Chief Trial Attorney position being restructured to policy review, Boards and Army Chief Trial Attorney liaison, and oversight only; (7) support to certain districts on large, complex appeals provided by districts with experienced trial attorneys on a fee-for-service basis; and (7) networking of trial attorneys Corps-wide.

These recommendations propose a voluntary certification program and a mandatory training program administered by the Division Counsels and the Chief Counsel based on standardized criteria. Under these recommendations, the District Counsels will assign trial attorneys for type I and II appeals and will recommend a trial attorney, if one is available, to the Division Counsel who will approve all trial attorneys for type III appeals using a certified trial attorney or allowing an exception based on individual circumstances. CECC-F will perform this function for operating Divisions, Laboratories, & FOAs. Division Counsels will manage the trial function at the districts using management and performance indicators. CECC-F will do so for operating divisions, labs, & FOAs. Divisions will not require technical expertise in trial practice or procedure to perform this function. CECC-F will remain the Board liaison on policy matters (not on individual appeals), issue policy guidance, and review national trends.

District Counsels also will identify appeals of precedential nature or national/regional significance to the Division Counsel and CECC-F. Trial attorneys and their supervisors are accountable alone for the quality and timeliness of their workproduct. Division Counsels and CECC-F will continue to receive copies of briefs and other documents as needed for their management and policy roles. Where a district does not have an attorney meeting training requirements or cannot provide the services for a type III appeal due to workload, staffing, or competency requirements, for example, the Division Counsel will assist the district in obtaining the trial services from another district on a fee-for-service basis. Further, there may be situations where a small district does not have the staffing and/or expertise to handle type I or II appeals. In those rare instances, a district may seek assistance from another district to try those cases also.

The Task Force recommends the Chief Counsel authorize establishing a task force to develop criteria and standards for the certification of trial attorneys and for the training program. Further, the Task Force recommends consideration of the previous Corps trial experience of our attorneys who now have progressed into management roles in the certification criteria.

SIGNIFICANT BACKGROUND

Under current procedures, contract appeals normally are tried by the district in which the claim arose. Under EFARS, Appendix A, Paragraph A-3-207.1, the Division Counsel assigns the trial attorney with the concurrence of the Chief Trial Attorney for appeals over \$500,000. A Division Trial Attorney may try the more difficult or large appeals with assistance from a district attorney. Appendix A, EFARS also designates procedures for filing documents with the Boards including transmission through the Division Counsel to the Chief Trial Attorney.

There is some specialization of the trial function at larger districts based on workload, but there is no formal training or certification program corps or division-wide. Training is largely managed by the individual District Counsel who, in practice, also assigns contract appeals within his/her district. Trial attorney workproduct presently is reviewed (or at least required to be submitted) through the Division Trial Attorney, CECC-F, and the Army Chief Trial Attorney (for ASBCA appeals). However, Army Chief Trial Attorney review for ASBCA appeals will be eliminated in the near future.

The number of contract appeals before the Boards has dropped significantly during the past year due to partnering and alternative disputes resolution initiatives and a decline in Civil Works and Military Construction. For example, at the end of FY 84 and FY 92, there were 418 and 414 Board appeals respectively. At the end of the third quarter of FY 93, however, there were just 359 appeals with only 245 active. The Task Force believes the number of appeals will continue to drop in the next several years until construction levels and partnering/ADR initiatives stabilize appeals at a lower level. There presently are and will continue to be an insufficient number of appeals at most districts to justify a separate trial attorney position and the training to maintain a trial attorney specialty, particularly for large, complex appeals.

RATIONALE FOR CHANGE

The quality of trial services is suspect in locations where there is insufficient workload to allow continuous practice and training in this area. Obtaining adequate resources at districts, also is a concern, especially for the occasional large, complex appeal. The lack of standardized training and experience requirements for trial attorneys hinders consistent quality in trial services. The existing multiple levels of review at Division and CECC-F adds significantly to the time and cost required to file Board documents and correspondingly decreases the time available to the District Trial Attorney to prepare documents. Quality is very difficult to obtain through reviews and must be built into the original legal services. The value added by these multiple reviews does not appear to be significant for most appeals. Accountability also is diffused among the many attorneys involved in a contract appeal.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to the work. Recommendations alter the existing structure for contract appeals. Division Trial Attorneys positions and the Chief Trial Attorney position will be restructured to provide management oversight and policy guidance and consistency reviews only. District Trial Attorneys communicate directly with Boards, e.g., file all pleadings, etc. directly with the Boards. Professional oversight on individual appeals is provided by the District Counsel. Operating Divisions, Laboratories, & FOAs receive their management oversight by CECC-F and function as a district regarding the other recommendations.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. Strategies are changed to eliminate multiple levels of review. Accountability and technical review is placed at the Districts, Operating Divisions, Laboratories, & FOAs while management responsibility remains at the command and control division. Chief Trial Attorney position is restructured to provide needed policy formulation, monitor national trends, issue guidance to the field, and identify performance indicators for Division Counsels to use as management tools. The voluntary certification program encourages development of a cadre of trained, experienced trial attorneys, improving quality and providing a resource for districts to use for appeals beyond its expertise or staffing. A standardized mandatory training program ensures all trial attorneys received minimum training and upgrades competence.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. A culture change is required to implement the recommendations regarding trial attorney, including elimination of technical review at divisions and CECC-F and substitution of management and oversight and policy development, etc. Division Counsels must become comfortable with a management role without trial practice technical expertise. Standardized job descriptions for the roles of the Division Counsel and CECC-F should be used. Increased emphasis on accountability will require clear statements to District Counsels and District Trial Attorneys regarding their responsibility for their workproduct.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. Skills required for trial practice are

unchanged. The recommendations address these skills in offering a certification program to recognize those attorneys with the training and experience to try complex cases. The training program will require completion of a level of training needed to ensure quality services by all trial attorneys. Skills or tools for management and oversight and policy development (not in trial practice or procedure) will be needed for the division staff and the Chief Trial Attorney position.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. Overall staffing reductions may be the result of the recommendation to restructure Division Trial Attorneys responsibilities. Division Counsels' offices would perform a management role but it is doubtful that function would require a full-time person. No changes in staffing appear needed to implement these recommendations at the districts. Districts which have qualified trial attorneys may provide those services to other districts upon request with the prior approval of the Division Counsel or CECC-F, as appropriate.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. Systems of review are changed by the recommendations. Systems of a voluntary certification program and the training program are established. As noted above, the modified trial attorney system includes professional review by the District Counsel, oversight and management by the Division Counsel, and policy development by CECC-F. Establishment of a trial attorney network on MAX or a similar system will encourage professional interchange of ideas, issues, etc. and allow distant trial attorneys to confer on specific problems. The recommendation includes formalization of an existing system where the Division Counsel assists districts in locating a trial attorney on those appeals the District Counsel is unable to handle due to the size and complexity of the appeal, other workload, and staffing issues.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). Values and goals for the trial function do not change. The counsel mission for appeals is to provide timely, efficient, and competent trial practice services. This recommendation strengthen our ability to accomplish this mission.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. These recommendations enhance quality by promoting/requiring accountability at the organizational level responsible for the legal services, and by providing a mechanism for encouraging attorneys to meet high standards of expertise by the certification program. Additionally, the standardized training program will ensure basic skills are possessed by all attorneys who try appeals. The offloading of complex appeals on larger, better equipped,

districts helps resolve staffing limitations that might arise in smaller districts. However, Division Counsels must ensure districts do not "dump" appeal work they can handle.

(2) **Efficiency/Cost-Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. Cost is minimized by provision of the legal services at the lowest level in the organization and by eliminating multiple levels of review. Some savings in manpower are probable. Efficiency is improved by elimination of the reviews as well as clearly defining roles and responsibilities at each organizational level. Efficiency also should improved by creating a trial attorney network and concentrating CECC-F on policy and trends, etc. The recommendations make use of existing critical mass of appeal workload in larger, military construction districts already with capacity and skills to try complex appeals. Artificial boundaries are eliminated and flexibility achieved by allowing districts to shop for services when needed and not maintain excess capacity or waste training resources.

(3) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. The recommendations assist in maintaining client responsiveness by allowing districts to try their own appeals where they have the expertise and staffing and in improving timeliness by elimination of multiple levels of technical review.

(4) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. Accountability is promoted by elimination of diffusing layers of review and demanding professional workproduct from the district attorneys. Division Counsels provide oversight and enforce accountability.

(5) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. Career development is enhanced by recognition of the specialized skills needed for trial practice through the certification program as well as the standardization of training. With proper approvals, District Trial Attorneys who have expertise can provide that expertise to other districts, increasing their professional development while allowing all district attorneys to continue to participate in this primary legal activity.

LEGAL SERVICES SYSTEM VIEWS

At the Fifth Worldwide USACE Legal Services Conference, three questions were posed concerning the trial attorney function. On the question of whether the Chief Trial Attorney should focus on management and appropriate levels of staffing, seventy-two percent agreed or strongly agree with the statement. On the question of establishing a trial attorney certification and training program with internship opportunities, eighty percent (supported the statement by agreeing or strongly agreeing. Finally, on the direct question of should the Corps establish trial centers responsible to the Chief Counsel, fifty-eight percent disagreed or strongly disagreed. Several of the respondents agreeing with the trial center concept provided qualifications such as

using the trial center only where the district does not have the resources, allowing the districts to handle less complex appeals, and farming out appeals from small districts to large districts, for example. Several comments noted the difficulty in supporting a distance trial centers without any staff and problems with lack of knowledge of the facts, witnesses, etc. by trial center attorneys. The percentage of Corps' managing attorneys opposed to the trial center concept appears actually higher after consideration of the comments on those responses that agreed with the concept.

The Task Force considered several options before posing the question at the Worldwide Conference. The current recommendations are a modified version of another option as an alternative to trial centers. Recommendations concerning the function of the Chief Trial Attorney and the certification and training programs were retained in this recommendation. However, based on the survey and comments received at the Worldwide Conference, the trial center concept has been modified to reflect those comments and concerns. The Task Force had discussed similar concerns with trial centers during its meetings and the comments received at the Worldwide Conference verified the validity of those concerns. The Task Force believes the current recommendations meet all the success criteria, and will receive support from the legal services community.

ACTION NEEDED

The Chief Counsel should establish a task force to draft criteria for certification of trial attorneys and of a training program. The task force should also draft management and performance indicators for use by Division Counsels and a position description for CECC-F.

Those sections of EFARS dealing with reviews and correspondence with Boards should be revised in accordance with this recommendation. The Chief Counsel should issue a Corps regulation or circular establishing the voluntary certification program and training program for trial attorneys, and for fee for service trial services provided by one district for another.

A trial attorney network should be established including, for example, using the MAX conferencing software, a trial attorney task force or committee to develop brief banks, other common interest items, and Corps-wide training/conferences for trial attorneys as needed.

District, Division, and Office of the Chief Counsel missions and functions statements and job descriptions should be revised as needed to reflect this recommendation.

RESOURCE IMPLICATIONS

No change in district staffing is anticipated. Elimination of division review and technical involvement in contract appeals will require restructuring of division trial attorney positions allowing reallocation of time to other duties. The Chief Trial Attorney position also will require restructuring.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 7 - *Communicate Legislative Information*

The Chief Counsel should designate the appropriate circle within the Office of the Chief Counsel to review proposed and recently enacted legislation to determine whether there is an impact on USACE operations and, if so, advise the Field Offices of Counsel in a timely fashion. The Chief Counsel should also emphasize the legislative program to ensure that the Office of the Chief Counsel keeps the Field abreast of legislative matters, and that it involves the Field in legislative development.

SIGNIFICANT BACKGROUND

At present, no circle within the Office of the Chief Counsel has the express responsibility for reviewing all newly-enacted legislation to determine whether it has an impact on USACE operations and, if so, advise the Field. Whereas various offices individually may be reviewing all legislative proposals and recently-enacted statutes, responsibility is fragmented and haphazard. Moreover, although HQUSACE requests the Field to provide military and civil works legislative proposals through the command channels, the proposals submitted are not formally reviewed within the Counsel "stovepipe", and often the individual Field offices do not coordinate such requests with their respective Offices of Counsel. Accordingly, Field Counsel are not informed about legislative proposals which may have a significant impact on Field operations.

This recommendation reflects the Task Force's belief that one of the primary methods the Office of the Chief Counsel should use to provide leadership in the delivery of USACE legal services is to furnish the Field with timely access to the latest HQUSACE views on the effect of proposed and recently-enacted legislation on USACE operations. It also is consistent with the Task Force's general philosophy and assumptions that, in an effort to enhance the quality and uniformity of legal advice and increase cost-effectiveness and avoid duplication of legal services.

RATIONALE FOR CHANGE

The Task Force believes that this recommendation will improve the delivery of legal services by ensuring that USACE views on the impact of proposed legislation will be furnished to the appropriate decision-makers at a time when it can be appropriately considered, and also by ensuring that USACE legal offices are provided notice of newly-enacted legislation which may have an impact on USACE operations. In this way, there will be no need for higher levels of the organization to review Field legal work to ensure it is consistent with the latest legislative enactments.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to do the work. Recommendation 7 stems from the Task Force's principal assumption that one of the ways the Office of the Chief Counsel performs its primary function of providing leadership in the delivery of USACE legal services is by furnishing timely advice and guidance to the Field organization with respect to proposed and recently-enacted legislation. Thus, the structure of the Office of the Chief Counsel should reflect this priority function and the circles should be resourced accordingly.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. Recommendation 7 results from one of the Task Force's key findings: that there is substantial duplication of legal services work performed within USACE. It also reflects one of the Task Force's key assumptions: that resources, particularly Operation and Maintenance, Army (OMA) and General Expenses (GE) funds which are used to fund Headquarters and Division offices, will be significantly cut in future. Thus, our strategy for providing quality, responsive legal services in the future must be aimed at eliminating unnecessary levels of review and duplication and, therefore significantly increasing efficiency. The Task Force proposes to accomplish this by creating a truly unified legal services system where the Chief Counsel is responsible for policy, the Division Counsel is responsible for legal services system management, and the District Counsel is responsible for legal services system execution. Ensuring the Field has timely access to information on the effect of proposed and recently-enacted legislation on USACE operations is essential to the efficient operation of such a system.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. Although this element was not a primary driving force behind Recommendation 7, it is consistent with the Task Force's proposed "style" of cost-effectiveness (i.e., avoiding duplication, not performing unnecessary reviews of Field work products).

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. The people the Chief Counsel needs to perform the tasks under the system the Task Force is proposing (e.g. Recommendation 7) may not be the same people currently assigned to the circles. Some people may need training in how to perform these new duties or performance standards may need revision in order to emphasize the new priority of the duties.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. Quite frankly, for the reasons described in the paragraph above, the decisions made with respect to this element may be the most critical in

implementing Recommendation 7 so that the Office of the Chief Counsel can successfully provide information on the effect of proposed and recently-enacted legislation to the Field. Consequently, this will require the Chief Counsel's personal attention.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. Recommendation 7 reflects the Task Force's conclusion that the best way to avoid duplication and conserve resources is to ensure that Field offices always are provided timely information on proposed and recently-enacted legislation. Thus, there will be no need for higher levels of the organization to revise Field work products to ensure consistency and compliance with the latest information. Systems have to be created to disseminate this information. Implementation issues are which office in headquarters should have responsibility (and resources) for monitoring and tracking the legislation, and the frequency and form of the communication of the information to the Field.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). Again, although this element was not a driving force behind this recommendation, it does reflect the Task Force's conclusion with respect how best to achieve the fundamental purpose of the Counsel organization i.e., to provide quality responsive legal services.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. The Task Force concluded that Recommendation 7 would improve the quality of the legal services because it is aimed at ensuring that all levels of the organization have timely access to the current positions of the agency with respect to proposed and recently-enacted legislation.

(2) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. The Task Force has concluded that Recommendation 7 would improve the timeliness of legal services because, as indicated in the paragraph above, it is aimed at ensuring that all levels of the organization have timely access to the current positions of the agency with respect to proposed and recently-enacted legislation.

(3) **Efficiency/Cost-Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. The Task Force has concluded that this recommendation would improve the cost-effectiveness and efficiency of providing legal services because time would not be wasted while higher level reviews revised Field work products which were inconsistent with organization positions of which the Field had not been apprised, and it would eliminate the need for multiple (or all) offices having to review all proposed and recently-enacted legislation for possible impact on USACE operations.

(4) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. Although Recommendation 7 does not detract from career development, and may in fact improve it to some small degree, this criterion was not a primary factor in making this recommendation.

(5) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. The Task Force has concluded that Recommendation 7 will improve the accountability of the legal office for its work product because they will have timely access to the current positions of the agency with respect to proposed and recently-enacted legislation and, thus, will not be able to absolve itself of responsibility for positions of which they have not been advised.

LEGAL SERVICES SYSTEM VIEWS

Seventy-two percent of the participants at the Fifth Worldwide USACE Legal Services Conference either "strongly agreed" or "agreed" with this recommendation. Moreover, one of the "break-out" groups responded that "HQ should issue clear policy, management, and technical guidance and allow implementation (at the lowest possible level)".

ACTION NEEDED

The Chief Counsel should revise the Office of Chief Counsel Appendix F to OM-1-1 as appropriate, to specify that providing legal and policy advice to the Field concerning proposed and recently-enacted legislation is one of the primary functions of the office. He should also revise the job descriptions and performance standards of the Office of the Chief Counsel team members to reflect this priority. Further, the Chief Counsel should analyze the workload of the Office of the Chief Counsel in light of the revised priority, determine the workload of the various circles, and realign the manpower to reflect the workload. Finally, the Chief Counsel should review the capabilities and competencies of the existing Office of the Chief Counsel staff to determine whether they have the aptitudes and skills necessary to perform the new duties. If not, he should initiate any necessary training or reassignments.

This issue may require additional data collection. For example, it may be appropriate for HQUSACE to evaluate whether there are multiple offices performing duplicate review of proposed and recently-enacted legislation. If that is the case, there may be a need for a centralized office in HQUSACE which should be assigned responsibility (and resources) for monitoring legislation and distributing this information to the Field.

Although internal USACE regulations or operations manuals may need to be revised, no additional authority is needed to implement Recommendation 7.

RESOURCE IMPLICATIONS

At this stage, it is not be possible to make a detailed assessment of whether the Office of the Chief Counsel needs additional or fewer staff to implement Recommendation 7. Therefore, the Task Force recommends that, in light of overall declining manpower resources, the Chief Counsel assume that he will have to perform his responsibilities with no additional resources. Accordingly, he will have to make whatever realignments are necessary within existing manpower.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 8 - *Delegate FOIA Denial Authority*

It is recommended that the Chief Counsel delegate the Freedom of Information Act Initial Denial Authority to the action office. Appeals to Army General Counsel will be made directly from the action office, through CECC-K.

SIGNIFICANT BACKGROUND

The Freedom of Information Act is found in 5 U.S.C. Section 552, and is implemented throughout the Army by AR 25-55. Prior to 1988, the Chief Counsel served as the Initial Denial Authority (IDA) for all USACE Freedom of Information Act (FOIA) requests. The Chief Counsel delegated this authority to the Division Councils for all requests at both division and district levels in October 1988, and permitted Laboratory Counsel to function as IDA after December 1991. In February 1992, the Chief Counsel allowed Division Council to delegate fee waiver denial authority to District Counsel, and in October 1992 further permitted the delegation of a "no records" denial authority to the district counsel. The Chief Counsel (through CECC-K) acts as IDA for FOIA decisions at HQUSACE, provides expert advice, and reviews all appeals of denials to the Army General Counsel. Appeals to Army General Counsel will be made directly from the action office, through CECC-K.

Section 5-200 of AR 25-55 deals with Initial Denial Authority. The delegation and redelegation of the IDA function is permitted with the caution that the DoD component shall "...balance the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding to each request within the time limits of the FOIA". It is clearly permissible for the Chief Counsel to delegate the responsibility of Initial Denial Authority to the action office in which the request arose. It is the recommendation of the Task Force that the IDA responsibility for FOIA requests arising at the district level be delegated to the District Counsel. Other action offices would retain their responsibility, i.e. the Division Council would continue to serve as IDA for all FOIA requests made to the division office, Laboratory Counsel for the lab, and the Chief Counsel for HQUSACE. Action offices will advise higher authority of cases involving national/regional significance or precedential issues.

RATIONALE FOR CHANGE

Delegation of IDA responsibility to the District Counsel is consistent with the overall goal of empowering the districts to carry out their ascribed missions and to eliminate unnecessary review by higher echelons. District Counsel already have the ability to determine whether or not requested material may be released. The sole reason for withholding the Initial Denial Authority is to ensure that the goal of consistent decisions is maintained. This goal can be achieved by providing clear guidance on current law and policy. If a district experiences difficulty in meeting this goal, the matter can be dealt with as a management measure, with the last and unlikely resort of revoking the District Counsel's IDA delegation.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to the work. No structural changes are required within the Office of Counsel for HQUSACE, Divisions, Laboratories, and the Districts. There would be a minor increase in effort for the District Counsel to send out the letter of denial to the requester. Little else is required since the district currently prepares a legal and factual analysis by providing a completed ENG Form 4544 R to the Division Counsel with each denial sought. Delegation of the IDA responsibility would result in a minor workload shift from the division to the district, although the division would retain a management oversight role.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. The recommended deletion of IDA to the District Counsel is consistent with empowerment of the districts and minimization of unnecessary higher level review by higher headquarters.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. Review and approval by the division of the district's request to deny the FOIA request would be eliminated. This would free the division to focus upon management instead of operational work arising from the district level.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. The District Counsel already possess the requisite skills to determine whether or not a FOIA request falls within any of the exemptions articulated by the statute, and the ability to factually analyze the information sought for susceptibility to denial. The District Counsel will be assisted by clear articulation of policy and recent legal developments as provided by higher headquarters.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. There will be minimal impacts upon staffing at the district assuming the IDA responsibility, with little additional time required for completing the action. Staff at the division formerly reviewing the district's requests and issuing denial letters will be freed to assume more appropriate management duties.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. The current system of elevating decision making authority for Initial Denial of a FOIA will be changed, placing both legal authority and acceptability for consistency of results at the district level. The annual FOIA report required by AR 25-55 of the number of requests, denials, and other statistical information will continue to be compiled as required.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). Values and goals of the Freedom of Information Act to provide the maximum amount of timely and accurate

information about the dealings of government are unchanged, as is the specific Department of Army policy of uniformity of decisions.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. This recommendation will enhance quality of the work product by ensuring that the district provide a thorough legal and factual analysis of its recommendation that a FOIA request be denied. At present, these recommendations are made with the knowledge that they will be "second guessed", an unnecessary review measure.

(2) **Efficiency/Cost-Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. The recommendation of delegating IDA responsibility to the District Counsel will be more efficient by eliminating the division's review and approval process. It will be more cost effective than the current procedure by eliminating the division's assumption of responsibility of the IDA function.

(3) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. Delegation of the IDA responsibility to the District Counsel will result in a more timely response to the requester by eliminating the time now required to transmit the request to the Division Counsel, as well as the time spent reviewing and deciding upon the request. The recommendation is more responsive to the requester since the District Counsel is located in closer proximity to the information sought as well as those producing or handling the matter.

(4) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. The District Counsel will be fully accountable for appropriate handling of the IDA responsibility. All appeals of FOIA denials will continue to be handled by the Army General Counsel and tracked by HQUSACE. Should problems arise or an inordinate number of initial denials be overturned, the District Counsel will be required to review the IDA performance.

(5) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. Denial of FOIA requests would be a grade enhancing responsibility for the District Counsel. Loss of this responsibility would not have an adverse affect upon the career development of the Division Counsel.

LEGAL SERVICES SYSTEM VIEWS

This recommendation was strongly supported by those attending the Fifth Worldwide USACE Legal Services Conference in September, 1993.

ACTION NEEDED

The Chief Counsel should issue a letter delegating FOIA Initial Denial Authority to the action office, specifically permitting District Counsel to serve as IDA for those FOIA requests at the district level. Mission and functions statements of Division and District Offices of Counsel should be changed to reflect this recommendation.

RESOURCE IMPLICATIONS

No additional resources are anticipated for the District Offices of Counsel. The change would be beneficial to the Division Counsel and permit redirection of some effort; for the most part, the FOIA Initial Denial Authority is not a significant duty.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 9 - *Delegate Agency Bid Protest Authority*

The Chief Counsel should delegate agency protest decision authority to all Division Counsel of Command and Control Divisions (LMVD, MRD, NAD, NCD, NPD, ORD, SAD, SWD, SPD, TAD, and POD) for agency protests, including, for example, protests against award, protests based on improprieties in a solicitation, and protests against the reasonableness of the Government Estimate, arising from procurement activities of their respective districts. This authority has already been delegated, ad hoc, to MRD, NPD, SAD, SPD, and POD (for Korea and Japan).

Agency protest decision authority should be delegated to HECSA Counsel for protests arising from procurement activities for which Operating Divisions (NED; HND), laboratories, and other FOAs (HECSA) are responsible.

Protests to the General Accounting Office on matters which were the subject of Agency protests and decisions should be processed by the Division which rendered the agency protest decision or by HECSA, as appropriate. Where a Division Counsel rendered the Agency protest decision, it will determine the nature and extent of District involvement in any subsequent protest to the GAO (and HECSA will for its agency protest clients). The Office of the Chief Counsel recognizes the general rule that the Agency will not award or proceed with performance of a contract in the face of a protest. Any determination to award or perform such a contract must be approved by HQUSACE.

Division Counsel and HECSA Counsel are responsible for advising HQUSACE (CECC-C) when nationally significant or precedential issues are involved in an agency protest. Protest decisions as to those will be made by the responsible office in consultation with the Chief Counsel's Office.

SIGNIFICANT BACKGROUND

For the past three fiscal years, an average of approximately 190 protests per year requiring formal decision or dismissal have been filed as a result of Corps procurement activity. Of these, approximately 60 per year (not including those decided by Division Counsel already having delegate decisional authority) have been agency protests.

Under the current system, agency protests arising from procurement activities within Command & Control Divisions are processed as follows: Contracting Officers' Reports emanate from the procuring district; that report is then sequentially reviewed by the Division and by HQUSACE; the decision is rendered by the Chief Counsel. Thus, there are two layers of review: HQUSACE is performing substantial operational legal work; and there may be as many as nine Corps attorneys involved in each protest (a district staff attorney and a supervisory attorney, a division staff attorney and a supervisor, an HQ staff attorney, the protest managing attorney, the Procurement Circle Head, the Deputy Chief Counsel, and the Chief Counsel). For Operating

Divisions, Laboratories, and other FOAs, the Contracting Officers' Report emanates from the procuring activity, is reviewed by HQUSACE, and a decision is rendered by the Chief Counsel.

Agency protests are addressed in the FAR, section 33.103; in AFARS, and in EFARS. The latter provides that all agency protests shall be submitted to the Chief Counsel for decision. It excepts from this requirement protests addressed to the contracting officer that are able to be resolved at the district or division level by allowance or withdrawal. There are no prohibitions in the other regulations which would preclude delegation of his decision authority to Division Counsel of Command and Control Divisions or to HECSA Counsel.

RATIONALE FOR CHANGE

The Task Force believes that this recommendation will streamline the agency protest process, will put responsibility (authority and accountability) where it properly belongs, and will permit HQUSACE, particularly the Chief Counsel's staff, to focus on policy development, trend analysis, and matters of national significance.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to the work. It would affect the Mission and Function Statement of both the Command & Control Divisions and the Office of the Chief Counsel. All Command & Control Divisions would be delegated Agency protest decision authority. HQUSACE would limit its Mission and Function Statement in this area. The resulting restructuring would result in a two tier organization for this area.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. Strategic changes involve the formal recognition of the ad hoc arrangement presently in practice at some Division locations. This should encourage horizontal linkage among Divisions. It would also affect HQUSACE strategies for insuring consistency in the positions in a two tier organization for this area.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. This recommendation has no effect on style.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. The system must assure that expertise is available in order to carry out this most significant function. Contract formation knowledge and skill should already exist at all Division and HECSA Counsel offices. There are support skill considerations elsewhere within the organization (e.g. engineering, estimating). An open issue is whether each Division must be staffed to provide these support services or whether reliance should be on District technical staff or elsewhere obtained.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. It may affect resource allocation in the Office of the Chief Counsel. The recommendation may affect resources at Command & Control Division Counsel and HECSA Counsel which must assure the on-going availability of competent staff to properly carry out this function, covering staff changes, schedules, and workload variances.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. This recommendation changes current the current system and must incorporate accountability, primarily through professional evaluations or performance evaluations for all involved counsel. The Office of the Chief Counsel must focus on policy and information sharing throughout the Legal Service System. This recommendation requires resource considerations were crossing Command lines.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). This powers down decisional authority, eliminates levels of review and multiple handling. It properly allocates responsibilities among organizational levels.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. Recommendation 2 will enhance quality by allowing concentration on value-added activities at each organizational level. This recommendation reduces any disincentives for the districts to do a quality job the first time because they perceive their work will be reworked within the higher levels of the organization.

(2) **Efficiency/Cost-Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. This recommendation will promote better use of resources in dealing with protest matters and may allow reordering of resources to benefit other legal services functions.

(3) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. Improvement is expected with elimination of reviews and multiple handling, focus on value-added activities at each organizational level, and better accountability. Communication between two rather than three parties will also positively affect this criteria.

(4) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. Accountability will be more identifiable and effective; eliminating redundant reviews and multiple handling will foster incentive to do things right, the first time. Responsibility and accountability should be at the field level for processing protests. Policy and guidance are properly the domain of HQUSACE. Performance standards should be developed for all counsel involved in this process to assure accountability.

(5) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. Contract formation will continue to be a significant area of expertise at all organizational levels, thereby promoting movement through the system. This recommendation allows for meaningful work in this area at all organizational levels.

LEGAL SERVICES SYSTEM VIEWS

Eighty-seven percent of the participants at the Fifth Worldwide USACE Legal Services Conference favored the proposal to delegate decision authority for agency bid protests to the Division Counsel. The proposal at that time specifically excluded operating Divisions, Laboratories, and the US Army Center for Public Works.

ACTION NEEDED

The Chief Counsel should issue a delegation of authority to each Command & Control Division Counsel and HECSA Counsel. The EFARS, section 33.103 a and c should be changed to reflect this recommendation. Performance standard(s) for this function should be developed for all Counsel affected by this change. The Chief Counsel should communicate with Division Commanders about programmatic and resource implications for Divisions, their legal offices, and the technical support requirements. Office of Counsel Mission and Functions statements should be revised to be consistent with this recommendation.

RESOURCE IMPLICATIONS

The Chief Counsel must assure that Division and HECSA Offices of Counsel are adequately staffed to properly carry out this function. Inasmuch as certain Divisions are performing a role in this area already, allocation of additional resources to these is not anticipated. For those Divisions which do not presently decide Agency protests, consideration must be given to the allocation of additional resources.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 10 - *Delegate Authority on GAO Protests*

The Chief Counsel should delegate authority to all Division Counsel of Command and Control Divisions (LMVD, MRD, NAD, NCD, NPD, ORD, SAD, SPD, SWD, TAD, and POD) to prepare the final agency position on GAO protests arising from procurement activities of their respective districts and directly submit the contracting officers report and the agency position to the General Accounting Office (GAO).

The Chief Counsel should delegate authority to HECSA Counsel to prepare the final agency position for GAO protests arising from procurement activities for which Operating Divisions (NED; HND), Laboratories, and other FOAs (HECSA) are responsible.

Division Counsel or HECSA Counsel are responsible for advising the Office of the Chief Counsel when nationally significant or precedential issues are involved in a protest. In such cases, the agency position will be prepared by the Division or HECSA Counsel in consultation with the Office of the Chief Counsel.

The Office of the Chief Counsel should continue to be the initial POC with GAO for all GAO protests. The Chief Counsel should publish a policy that USACE will follow the GAO protest decision recommendation; any request to deviate from the GAO recommendation must be submitted to the Chief Counsel for approval. Requests for award or to continue performance in the face of a protest will be handled at HQUSACE per current regulatory requirements. Copies of protest reports and agency positions will be transmitted to HQUSACE (CECC-C) by the Division Counsel or HECSA Counsel, as appropriate, simultaneously with their submission to the GAO.

SIGNIFICANT BACKGROUND

For the past three fiscal years, an average of approximately 130 GAO protests per year have been filed as a result of Corps procurement activity. Under the current system, GAO protests arising from procurement activities within Command and Control Divisions are processed as follows: Contracting Officers' Reports emanate from the procuring district; that report is then simultaneously reviewed by the Division and by HQUSACE; the final agency position for submission to GAO is prepared by the Office of the Chief Counsel. Thus, there are at least two layers of review. The Office of the Chief Counsel is performing substantial operational legal work, and there may be as many as nine Corps attorneys involved in each protest (a district staff attorney and a supervisory attorney, a division staff attorney and a supervisor, an HQ staff attorney, the protest managing attorney, the Procurement Circle Head, the Deputy Chief Counsel, and the Chief Counsel).

For Operating Divisions, Laboratories, and other FOAs, the Contracting Officers' Report emanates from the procuring activity, is reviewed by HQUSACE, and the final agency position for submission to GAO is prepared by the Office of the Chief Counsel.

GAO protests are addressed in the FAR, section 33.104; in DFARS, AFARS, and EFARS. Decisions to award or to continue performance in the face of a protest reside with the head of the contracting activity on a non-delegable basis. DFARS, section 233.104 (a) (7) provides for agency POCs to GAO. DFARS, section 233.104 (g) discusses notice to the Comptroller General where it is decided not to comply with a GAO protest recommendation. AFARS, section 3.104 (a) (4) addresses submission of protest reports through the Chief Counsel's office to the GAO.

RATIONALE FOR CHANGE

The Task Force believes that this recommendation will streamline the GAO protest process, will put responsibility (authority and accountability) where it properly belongs, and will permit the Office of the Chief Counsel to focus on policy development, trend analysis, and matters of a precedential nature or national significance. The Division Counsel or HECSA Counsel to whom this authority is delegated will be responsible for advising HQUSACE before finalizing the agency position when a protest is precedential or of national significance.

McKINSEY 7-S MODEL

(1) **Structures.** This element of the McKinsey Model deals with how people are organized to the work. Although this recommendation reorders or redefines roles and responsibilities, it would not change the structure of the organization.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. This recommendation is aimed at avoiding duplication of work, eliminating unnecessary levels of review, and "powering down" authority.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. This recommendation would change the culture of USACE to avoiding duplication and unnecessary levels of review.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. This recommendation would require the organization to assure that expertise is available in order to carry out this most significant function.

Contract formation knowledge should exist at all Division Counsel offices and at HECSA Counsel. It also has implications for support services (e.g. engineering, estimating) whether the Divisions or Districts would provide them to the Divisions.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. This recommendation may affect resource allocation in Chief Counsel's office. It also may affect resources at Command and Control Divisions and HECSA, which must assure the on-going availability of competent staff to properly carry out this function, including the accommodation of staff considerations (vacancies, leave, training) and workload peaks.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. This recommendation changes the systems to avoid duplication and eliminate levels of review. It would require focus on policy by HQUSACE and information sharing throughout the Legal Service System, as well as require the consideration of issues created by crossing commands, such as adequate resourcing.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). This recommendation focuses on the organization values of powering down decisional authority and eliminating levels of review. It correspondingly allocates responsibilities among organizational levels.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. This recommendation will enhance quality by allowing concentration on value-added activities at each organizational level.

(2) **Efficiency/Cost-Effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. The recommendation will promote better use of resources in dealing with protest matters and may allow reordering of resources to benefit other legal services functions.

(3) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. Improvement in Timeliness/Responsiveness is expected from implementation of this recommendation with elimination of reviews and multiple handling, focus on value-added activities at each organizational level, and better accountability. Communication between two rather than three echelons will also positively affect this criterion.

(4) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. Accountability will be more identifiable and effective; eliminating redundant reviews and multiple handling will foster incentive to do things right the first time. Responsibility and accountability should be at the field level for processing protests. Policy and guidance are properly at HQ. This recommendation will clearly separate the policy from the operational function and enhance accountability as to each. Performance standards should be developed for all counsel involved in this process to assure accountability.

(5) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. Contract formation will continue to be a significant area of expertise at all organizational levels, thereby promoting movement through the system. This recommendation allows for meaningful work in this area at all organizational levels.

LEGAL SERVICES SYSTEM VIEWS

This recommendation was not presented to participants at the Fifth Worldwide USACE Legal Services Conference.

ACTION NEEDED

The Task Force recommends that the Chief Counsel (1) issue a delegation of authority to each Command & Control Division Counsel and to HECSA Counsel; (2) change applicable regulations; (3) establish necessary systems (e.g. POCs, performance evaluation standard, staffing requirements); (4) communicate with Division Commanders about programmatic and resource implications for Divisions, their legal offices and technical support requirements; and (5) revise Office of Counsel Mission and Functions statements.

RESOURCE IMPLICATIONS

The Chief Counsel must assure that Division and HECSA Offices of Counsel are adequately staffed to properly carry out function. In as much as some Divisions are already performing a role in this

area, additional resources needs are not anticipated. This recommendation may have implications for support from other staff elements. It may result in reallocation of resources in the Office of the Chief Counsel.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 11 - *Delegate Civil Litigation Settlement Coordination*

The Task Force recommends that the Chief Counsel (1) take action to resolve the conflict in Army regulatory guidance pertaining to the responsibilities of USACE and TJAG for USACE civil litigation; (2) take action to update and repromulgate ER 27-1-1 (28 January 1985) titled "Legal Services - CLAIMS AND LITIGATION"; and (3) delegate authority to maintain direct contact (including developing and transmitting settlement positions commensurate with that described in DOJ Civil Division Directive No. 176-91) with DOJ in certain civil litigation. Originating offices will advise higher authority of cases involving national/regional significance or precedential issues.

SIGNIFICANT BACKGROUND

DOJ initiates and defends civil litigation, in domestic and foreign courts, on behalf of the United States, its agencies and instrumentalities, and employees whose official conduct is involved. The various U.S. Attorney offices, under the oversight of the Attorney General, and DOJ staff attorneys generally conduct the representation.

AR 27-40 (2 December 1987) titled "Legal Services - LITIGATION" states with regard to TJAG responsibilities at paragraph 1-4.a., in pertinent part, as follows:

TJAG will :

- (1) Initiate, administer, supervise, and coordinate litigation which arises out of DA operations, or which otherwise involves its interests.
- (2) *Act for the Secretary of the Army on matters concerning litigation.*
- (3) Other than that undertaken directly by the Army General Counsel, *conduct liaison between DA and the Department of Justice (DOJ).* (emphasis added)

Paragraph 1-5. states, with regard to restrictions on contact with DOJ, in pertinent part, as follows:

Except as authorized by this regulation, no military or civilian personnel of the Army will confer or correspond with any representative of DOJ concerning legal proceedings within the purview of this regulation without the prior approval of TJAG. This paragraph, however, in no way affects the requirement for JAs and legal advisors to maintain liaison with U.S. Attorneys. (emphasis added)

This same regulation states with regard to USACE responsibilities at paragraph 1-4.e. as follows:

e. Legal representatives of the Chief of Engineers. These officials may *maintain direct liaison with DOJ in litigation arising from the civil works and real property functions of the U.S. Army Corps of Engineers.* (emphasis added)

Thus, existing Army regulatory guidance appears on its face to state that only TJAG has the authority to represent the Army's settlement position to DOJ. However, even though USACE attorneys are only authorized to maintain direct liaison with DOJ, it is the practice that USACE attorneys, in coordination with CECC-K, have represented the Army's position in civil litigation for which USACE is responsible, i.e., litigation arising from the Civil Works and real property functions of USACE. This practice is expressly provided for in ER 27-1-1 (28 January 1985) titled "Legal Services - CLAIMS AND LITIGATION" which predates the existing AR by almost three years. It states with regard to USACE attorney communications to DOJ at paragraph 6-3 as follows:

In no event will a District or Division recommendation regarding appeal, rehearing, settlement, or certiorari be sent directly to the Justice Department without authorization of the Chief Counsel.

AR 27-40 is in the final stages of being amended and reissued by TJAG and, the Task Force obtained a copy of relevant portions of the soon-to-be-published regulation. That regulation states with regard to TJAG responsibilities at paragraph 1-4.b. as follows:

b. The Judge Advocate General (TJAG). Subject to the ultimate control of litigation by DOJ (including the various U.S. Attorney Offices), and to the general oversight of litigation by the Army General Counsel, TJAG is responsible for litigation in which the Army has an interest. *Only TJAG (or Chief, Litigation Division) will communicate to DOJ the Army's position with regard to settlement of a case.* (emphasis added)

Paragraph 1-5. states, with regard to restrictions on contact with DOJ, as follows:

a. General rule. *Except as authorized by TJAG, the General Counsel, the Chief of Litigation Division, or this regulation, no Army personnel will confer or correspond with DOJ concerning legal proceedings in which the Army has an interest.*

b. Exceptions. This prohibition does not preclude contact with DOJ required by the Memorandum of Understanding between DOJ and DoD relating to the

investigation and prosecution of certain crimes. (See AR 27-10, para 2-7). In addition, an installation SJA or legal adviser is expected to maintain a working relationship with the U.S. Attorney in each district within his geographical area. An SJA or legal adviser should request the U.S. Attorney to advise him immediately when litigation involving DA or its personnel is served on the U.S. Attorney. (emphasis added)

This same regulation states with regard to USACE responsibilities at paragraph 1-4.i. as follows:

I. Legal Representatives of the Chief of Engineers. The Office of Chief Counsel, attorneys assigned thereto, and other attorneys designated by the Chief Counsel *may maintain direct liaison with DOJ in litigation and administrative proceedings arising from the navigation, civil works, Clean Water Act §404 permit authority, environmental response activities, and real property functions of the U.S. Army Corps of Engineers.* (emphasis added)

Note that while the substantive areas of USACE's responsibility have increased to include areas such as environmental response activities, the proposed revision of AR 27-40 continues to preserve that only TJAG can communicate the Army's position with regard to settlement of litigation to DOJ. Thus, it appears that if AR 27-40 is repromulgated as currently drafted, USACE will no longer be able, as a matter of established practice or otherwise, to communicate directly with any DOJ attorney regarding settlement of litigation assigned to USACE notwithstanding ER 27-1-1, paragraph 6-3.

Assuming the restriction in AR 27-40 can be removed, ER 27-1-1 should be amended and repromulgated to reflect that and other necessary changes. Particularly, paragraph 6-3. should be changed so that USACE Division, District and Laboratory Counsels can represent USACE's position regarding settlement to DOJ U.S. Attorneys, Branch, Office and Staff Directors and Attorneys-in-Charge of Field Offices for all civil litigation within those individuals' delegated authority as set forth in DOJ Civil Division Directive No. 176-91, published in the Appendix to Subpart Y immediately following 23 C.F.R. §0.172. This delegation should be subject to the requirements that the litigation has been fully and timely entered and updated in CMIS II or its successor and CECC-K has been consulted in advance of any recommendation to DOJ regarding litigation of national/regional significance or is precedential in nature. Additionally, brief after-action reports explaining the basis of the action shall be provided CECC-K within 15 calendar days of providing a recommendation to DOJ.

RATIONALE FOR CHANGE

The recommended changes are necessary in order to remove or otherwise resolve clear statements of responsibility and authority in Army and USACE regulatory guidance which adversely affect the ability of USACE to effectively and efficiently communicate and resolve USACE civil litigation. Once the AR's limitations on USACE are resolved, the Chief Counsel's delegation of a portion of his authority to Division, District and Laboratory Counsels with certain conditions would allow USACE to be more responsive to DOJ, especially local U.S. Attorneys.

Additionally, this delegation would reinforce the concepts of placing operational matters at the lowest possible organizational level and having HQUSACE address litigation policy, precedential cases and cases of national significance.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to the work. This recommendation clearly determines and defines the responsibilities of USACE managing attorneys at all levels for litigation settlement.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. This recommendation changes the general approach heretofore adopted to perform the work. The work will now be accomplished on a more decentralized basis.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. This recommendation affects the style of the Legal Services Organization in that it implements the concept of delegating operational decisions to operating levels. This is a marked change in the established way of performing the work.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. This recommendation should not require different expertise, knowledge, talent, or competency in order to implement.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. This recommendation should have no direct effect on the number and types of people required to perform organizational tasks, missions, roles and responsibilities for each organizational level. It will allow CECC-K and the Divisions to concentrate limited resources on their respective policy and management roles.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. This recommendation dramatically changes the processes, procedures, and mechanisms heretofore used to accomplish the work. These changes will occur within USACE and between USACE and TJAG. These will include changes in tracking, reporting and approval requirements.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). This recommendation goes to the heart of the Legal Services System's basis for existence and the USACE Vision. We exist to, among other things, provide client care through quality, responsive services. This recommendation allows local USACE managing attorneys to completely address the USACE position with respect to settlement of USACE litigation directly rather than passing a part of that responsibility to other offices.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. Quality will remain constant or improve.

(2) **Efficiency/Cost-effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. This recommendation will provide a basis for litigation to be resolved at the operational level more quickly while, at the same time, provide a basis for HQUSACE to focus on litigation policy and precedential cases.

(3) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. See explanation for preceding criteria.

(4) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. When implemented together with Recommendation No. 9 which pertains to the evaluation and rating of Division, District, Laboratory and FOA Counsels, this recommendation will enhance the accountability of those individuals and their organizations.

LEGAL SERVICES SYSTEM VIEWS

This recommendation was not presented to participants at the Fifth Worldwide Legal Services Conference.

ACTION NEEDED

The Chief Counsel should resolve with TJAG (and SAGC, as appropriate) the restrictive and limiting language in AR 27-40. Repromulgate ER 27-1-1 clarifying USACE's authority to communicate with DOJ regarding settlement positions in USACE civil litigation and delegate authority to Division, District, Laboratory and FOA Counsels.

RESOURCE IMPLICATIONS

There are no resource implications associated with this recommendation.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____

RECOMMENDATION 12 - *Increase Admiralty Settlement Authority*

It is recommended that the Chief Counsel seek delegation of authority to approve settlement of maritime claims. The Task Force urges that the Chief Counsel seek authority to settle maritime claims up to the amount of \$100,000, and to delegate this same amount of settlement authority to the District Claims Attorney.

SIGNIFICANT BACKGROUND

The settlement of maritime claims in the Corps of Engineers Arises from the Civil Works mission. The Maritime Claims Settlement Act is found in 10 USC Sections 4801-4804. 10 U.S.C. Section 4802, Admiralty claims against the United States, authorizes the Secretary of the Army to settle maritime claims up to \$500,000. For such claims up to \$100,000, the Secretary may delegate his authority to settle or compromise them to such persons as he may designate. Currently, authority has been delegated to the Judge Advocate General (TJAG) up to \$100,000; to the Commander, U.S. Army Claims Service (USARCS) up to \$25,000; and to District Claims Officer up to \$5,000. Note that a District Claims Attorney is generally delegated authority to both process and approve claims within his/her authority, thereby also serving as Claims Officer. Presently, maritime claims which exceed authority within the Corps are referred to USARCS.

RATIONALE FOR CHANGE

The Corps' legal community possess sufficient expertise to fairly evaluate maritime claims, both as to quantum and merit. An increase in the dollar amount of authority delegated to the Corps of Engineers Chief Counsel and District Claims Attorneys would reduce delays in making appropriate payments, recognize today's cost levels, and assist the districts in achieving and maintaining a better working relationship with the maritime industry. In reality, few claims are within the current \$5,000 limits now given to the District Claims Attorney. However, raising the limit to permit the Chief Counsel as well as the District Claims Attorney to settle claims would greatly ease the administrative burden of handling and processing such claims for the Corps of Engineers. Delegation of additional settlement authority to the Chief Counsel and the districts is consistent with the overall goal of the National Performance Review in empowering the lowest appropriate level to carry out their ascribed missions and to eliminate unnecessary review by higher echelons. The goal of protecting the interests of the United States in granting or denying such claims can be professionally and competently handled by the Chief Counsel as well as the District Claims Attorney.

McKINSEY 7-S MODEL

(1) **Structure.** This element of the McKinsey Model deals with how people are organized to do the work. No structural changes are required within the Office of Counsel for HQUSACE, the Divisions, Laboratories, and the Districts. There would be a minor increase in effort for Chief Counsel to make a determination regarding these claims, since CECC-K already has an attorney expert in admiralty matters who already reviews such claims at present. The District Claims Attorney would have authority to resolve many matters which are now prepared for signature by higher authority.

(2) **Strategy.** This element involves the generic approaches and intentions used to accomplish the work and plan for the future. The recommended delegation of additional settlement authority for admiralty claims to the Chief Counsel and District Claims Attorney is consistent with empowerment of the lowest possible echelon and minimization of unnecessary review by higher headquarters. The Divisions would retain management oversight of the function.

(3) **Style.** Style reflects the organizational culture, attitudes, and personality. Review and approval by the TJAG and Army Claims Service would be minimized or eliminated.

(4) **Skills.** This element of the McKinsey Model addresses the type of knowledge, expertise, and competencies needed to perform the organizational tasks. The Chief Counsel and the District Claims Attorney already possess the requisite skills to determine whether or not an admiralty claim is legally and factually appropriate for settlement.

(5) **Staffing.** This element describes the number and type of people needed to provide the organizational tasks and responsibilities. There will be no impacts upon staffing at the division level. There will be a minimal increase of responsibility for settlement of such admiralty claims to the Office of the Chief Counsel and the District Claims Attorney which now make recommendations to the TJAG and Army Claims Service regarding proposed disposition.

(6) **Systems.** This element of the McKinsey Model involves the processes, procedures, mechanisms, programs, and means used to accomplish the organizational goals and objectives. This recommendation would more fully utilize the existing capability at all echelons by delegating additional authority to perform work which is now done well but without recognition.

(7) **Superordinate Goals.** This element of the McKinsey Model deals with the fundamental principles, values, and goals of the organization (i.e., why it exists). Values and goals of the government regarding maritime claims will remain unchanged.

SUCCESS CRITERIA

(1) **Quality.** This criterion deals with how an action affects the quality of the legal services furnished. This recommendation will enhance quality of the work product by ensuring that the District provide a thorough legal and factual analysis of its recommendation that an admiralty claim be settled. At present, these recommendations are made with the knowledge that they will be "second guessed", an unnecessary review measure. Further, the Corps' own experts in admiralty will have the opportunity to apply these skills in handling these determinations.

(2) **Timeliness/Responsiveness.** This criterion addresses how an action affects the timeliness of the legal services to the organization. Delegation of the maritime settlement to the Chief Counsel and District Claims Attorneys will result in a more timely response by eliminating the time now required to transmit the request to the Army Claims Service and TJAG, as well as the time spent reviewing and deciding upon the request.

(3) **Efficiency/Cost-effectiveness.** This criterion deals with the impact of an action on the efficiency of providing the legal services. The recommendation of delegating settlement authority for maritime claims to the Chief Counsel and District Claims Attorneys is more efficient by eliminating the review and approval process of TJAG and Army Claims Service. It will be more cost effective than the current procedure by eliminating these additional levels of review and approval.

(4) **Career Development.** This criterion describes the effect of an action on career progression, satisfaction, and recruitment and retention of quality attorneys. Additional authority for handling of maritime claims would enhance professional responsibility for the District Claims Attorneys, and members of the Office of the Chief Counsel. Loss of current responsibility would not have an adverse affect upon career development.

(5) **Accountability.** This criterion involves how an action increases or decreases the accountability of a USACE legal office for its work product. The Chief Counsel and District Claims Attorneys will be fully accountable for appropriate handling of maritime claims. Command inspections as well as appropriate reporting requirements can be used to monitor the delegation of authority to determine is success; if the delegation is successful, reporting requirements should be minimized.

LEGAL SERVICES SYSTEM VIEWS

This recommendation was not presented to participants at the Fifth Worldwide USACE Legal Services Conference.

ACTION NEEDED

The Task Force recommends that the Chief Counsel seek delegation of authority to resolve maritime claims from the TJAG and USARCS, and the ability to redelegate such authority to the District Claims Attorneys as deemed appropriate. The mission and functions statements of Chief Counsel as well as division and district offices of counsel will need to be revised to reflect the empowerment of each organizational level. Any request for settlement authority beyond the stated statutory limits would require legislative change; the Office of the Chief Counsel should prepare draft legislation to provide authority for this delegation.

RESOURCE IMPLICATIONS

No additional resources are anticipated for the division offices of counsel. There may be minimal impact in additional demands upon the time of the admiralty expert within the Office of the Chief Counsel as well as the District Claims Attorney.

APPROVED

DISAPPROVED

COMMENTS: _____

LESTER EDELMAN
Chief Counsel

Date: _____