Message from Charles “Pete” Polen, LaRC Chief Counsel

As I write this to issue the latest version of the NASA Langley OCC Newsletter, we find ourselves navigating the realities of a world in which we face a particularly deadly COVID-19 virus. The health and well-being of our workforce has always been at the forefront of how Langley does business. Frank Peri, as Director of Safety and Mission Assurance, like Grant Watson before him, sets a tone of ensuring employee safety first in all we do, as does the Langley OD4. Now more than ever, we’re attentive to our potential vulnerability to an unseen danger. The watchwords “Safety First” never held more importance than they do now. We must watch out for our own safety, the safety of our colleagues at NASA, our families, and our neighbors. I expect this Safety First approach will more than ever color all we do going forward, and will pay dividends we do not yet realize. The NASA family cares deeply and has pulled together to engage like it always does in a crisis—to ensure our safety, carry out as much regular work as we are able, and address a myriad of problems that come to us from every corner of our country needing solutions in this new normal. Langley employees are leading efforts to design and improve ventilators, masks, sanitizing used equipment, and finding ways to share our technology with companies and other Federal Government partners, all playing a part to help save lives and protect our health care workers. I get to see first-hand the commitment and caring of your leaders and so many of you leaning forward to figure things out together. I could not be more proud of you and your Langley Legal Team, as they work alongside you to help. Our attorneys and administrative professionals are working to make your solutions to problems a reality. They serve on the LaRC Infectious Disease Working Group; are helping channel and work agreements on ventilators and masks; have worked Agency efforts to forebear on collecting royalties on technology licensed to struggling companies, and so much more. And they continue to provide legal advice on the full range of regular actions. In the midst of this, we are very glad to welcome attorneys Steve DeLange to our Business Law Team and Shawn Gorman to our Patent Law Team. They bring a wealth of experience and strength to our team. You will find their biographies on the next page as well as a number of useful legally-focused articles on the following pages. Please keep safe.
Steve DeLange is the newest member of our Business Law Team. A native of the Hampton Roads area, Steve began his now 25 year-long career in the area, starting as an Air Force judge advocate before transitioning to the Air Force Reserve and taking civilian positions with the Army Corps of Engineers and the Army Space and Missile Defense Command. Most recently, he completed a 3-year active duty tour as the Deputy Staff Judge Advocate at Air Force Reserve Command, managing a workforce which served approximately 70,000 Airmen. Steve has held multiple positions at all levels, and practiced in just about every area of government and military law, ranging from fiscal law and contracts, to labor and environmental law, to criminal defense. Coincidentally, he was also the Patrick Air Force Base Honor Guard Commander, where his 60-member team welcomed POTUS, John Glenn and the STS-95 Astronauts, and the U.S. Women’s Soccer Team to Cape Canaveral AS and Kennedy Space Center for missions. Please join us in welcoming Steve to the NASA family!

Shawn Gorman is our newest patent attorney on the Intellectual Property Law Team. Prior to joining NASA, Shawn was the Director of Intellectual Property for an international tech company and an equity partner at a national intellectual property law firm. While at the firm, he found a niche assisting clients implement global portfolio strategies, counseling clients with respect to introducing new products and services into crowded markets with several IP stakeholders, as well as handling contentious disputes involving medical devices and VoIP equipment. He also enjoyed drafting patent applications towards a wide array of technologies, including some of the innovations conceived here at NASA’s Langley Research Center. Shawn’s varied interests also led him to be involved as an Executive Member of the American Heart Association’s Innovation Forum. He was also a contributing author for The American Bar Association’s Legal Guide to Video Game Production, and was honored when the American Bar Association’s House of Delegates cited both his law review paper as well as peer-review studies he worked on while in graduate school to provide legal justification for adopting the resolution in 2017. Welcome Shawn!
We are living in very interesting times right now. Not since the flu pandemic of 1918 have so many feared such an invisible foe. As our lives are upended and we practice social distancing and become highly proficient tele-workers, we also need to address NASA’s needs to preserve both its civil servant and contractor workforce. This requires reaching deep into the contracting tool kit to devise mechanisms to accomplish that end and allow us to continue to be mission capable, both now and when this crisis passes.

**Some Fiscal Law Basics** – Before addressing how NASA is dealing with preserving the contractor workforce, it is important to recall the basic rules regarding appropriated funds. Congress appropriates money with three limitations: First, funds are appropriated for a specific purpose. That is, money is to be spent on things Congress tells us to do. For example, in FY 2020, Congress told NASA it had approximately $7.1 billion to spend on the Science program. It specified that within that budget, about $2 billion was available for Earth Science work, $2.7 billion for Planetary Science work, $1.3 billion for astrophysics, and so on. The Safety, Security and Mission Services (SSMS) account received about $2.9 billion in FY 2020. NASA has a number of budgetary categories, each with specified sums of money to be used. This leads to the second limitation, the amount appropriated for each budget category, as described above. Finally Congress limits the time during which the appropriated funds are available for obligation. For the most part, Congress makes NASA funds available for two years. The major exception to this time limit is the Construction and Environmental Restoration Account, where funds remain available for obligation for up to five years.

To prevent agencies from deviating from the appropriation rules set out above, Congress also enacted the Antideficiency Act, 31 U.S.C. §1341 et seq., which in essence says agencies may not spend money they do not have and cannot spend money beyond the amounts provided by Congress. Congress expects agencies to request supplemental appropriations in cases where the budgeted amounts are insufficient. If Government personnel violate this law, they face both criminal and civil punishment, as well as possible administrative action such as being fired or placed on leave without pay.

**How Do Agencies Contract for Amounts Greater than Current Appropriations?** As we know well, agencies, including NASA, often write contracts for amounts exceeding what is in the current budget. For example, the contracts for the Artemis program often are for sums much larger than the current year’s budget. How do agencies avoid violating the Antideficiency Act when doing this? The answer is there are two principal Federal Acquisition Regulation (FAR) clauses to cover these situations: The Limitation of Cost Clause (LOCC) at FAR 52.232-20, and the Limitation of Funds Clause (LOFC) at FAR 52.232-22. These clauses work in the same manner by stating the contract currently is funded to a specific dollar amount, which is expected to allow the contractor to work through a stated period of time. The clauses require the contractor to notify the contracting officer in writing when expenditures reach a specified percentage of the amount allotted, typically 75 percent. At that point, the contracting officer can either provide additional dollars to permit work to continue, or terminate the contract. The clauses specifically provide that the contractor is not obligated to perform past the amount currently funded and the Government is not obligated to provide additional funding. As an aside, it is improper for any Government employee to encourage a contractor to continue work past the amount funded; that constitutes an unauthorized commitment and also violates another provision of the Antideficiency Act that prohibits employees from making obligations or expenditures in excess of the funds already provided.
How Does this Relate to COVID-19 Activities? The NASA Administrator has set forth a goal that we preserve the space industrial base. To do that, we need to preserve the space industrial base workforce. On March 24, 2020, NASA's Assistant Administrator for Procurement sent a letter to the agency’s contractors telling them to maintain readiness to assume full performance of all contract performance once this emergency passes. Since that letter went out, Congress passed the Coronavirus Aid, Relief and Economic Security Act (CARES Act), P.L. 116-136. One provision in that law provides that agencies may modify contracts or other agreements without consideration (i.e., agencies do not need a concession from the contractor, as is usually required) to reimburse at the minimum applicable billing rate, not to exceed an average of 40 hours per week, any paid leave, including sick leave, provided by contractors to keep their employees at a ready state, but in no event beyond 30 September 2020. This provision also applies to subcontractors whose employees or subcontractors cannot perform work on a Government approved site, including federally-owned or leased facilities or sites, due to closures or other restrictions and who cannot telework because their job duties cannot be performed remotely. Further, any such reimbursement shall be reduced by the amount of credit a contractor is allowed under another law that sets out tax credits for paid sick leave and family and medical leave.

In addition, Congress appropriated an additional $60 million for preparing and responding to the coronavirus, and appropriated the funds to the SSMS account.

As you can see, there are a number of limitations imposed by this law that dovetail with the fiscal law discussion above. First, the funds may be used for the purpose of dealing with the pandemic. Second, it provides a limited amount of NASA funding to $60 million, in fulfilling that purpose. Other funds may be available for this purpose in our regular appropriation, but the supplemental funding is limited to this amount. Finally, the time in which the funds may be used is limited to the current fiscal year.

Additionally, within the purpose limitation, contract actions only may take place when contractor employees cannot perform any other work because of the closure of a Government-approved site and are unable to telework because the work cannot be performed remotely; limits payments to the minimum applicable billing rate for not more than 40 hours per week; and requires any reimbursements sought by contractors be reduced by the amount of any tax credits allowed to the contractor.

How will NASA carry out this mandate? First, it has devised an advance agreement to be used with such contractors. That advance agreement requires the contractor to identify the individuals impacted by the shutdown, the contract(s) involved, and to set up a separate account code to capture those costs. The advance agreement then identifies the applicable contract clause or other provision and uses the CARES Act as the default. Other provisions that could be cited include Denied Access to NASA Facilities clause at NASA FAR Supplement (NFS) 1852.242-72 (available only for on-site contractors) and the Stop Work Order clause at FAR 52.242-15 (which requires contractors to cease performance but to retain the workforce, and is limited to 90 days).

How will the funds be provided to the contractors? First, the LOCC or LOFC will be the vehicle by which funds are added to the contract in most instances, particularly for ongoing work. Contractors will capture the additional costs incurred and submit a Request for Equitable Adjustment once the crisis has passed.

As can be seen, the construct set up by our fiscal laws will drive how we address the need to retain a viable contractor workforce. While not all of the answers are available yet, the outlines of how to make it all happen are clear because of the existing legal scheme, contractual provisions that already exist, and creation of a new vehicle to permit contractors to incur these costs without NASA violating the Antideficiency Act or implementing regulations. Much work remains, but we are well on our way to accomplishing this goal that is critical to ensuring the success of the myriad of missions NASA is expected to fulfill.
Congratulations to the following current and past NASA LaRC inventors selected for NASA’s Inventors Hall of Fame. NASA’s Inventors Hall of Fame is a new recognition for inventors who have been awarded 20+ patents, have been inducted into the National Inventors Hall of Fame, or have developed significant inventions that contributed to NASA’s legacy missions.

Robert Bryant  Glen King  Richard Whitcomb
John Cantrell  Brian Jensen  Stanley Woodard
Sang Choi  Emilie Siochi  William Yost
John Connell  Joseph Smith, Jr.

For more information on this prestigious recognition, go to: https://technology.nasa.gov/ihof/?utm_source=Email&utm_campaign=IHOF%20Launch&utm_content=IHOF.

Hello Inventors!
Is there an invention you’ve been meaning to disclose but were too busy in your lab to find the time? With NASA’s e-NTR system, you can file your invention disclosures from the comfort of your home office! To disclose your invention, go to: https://invention.nasa.gov

Why wait for the Fall?
Take your Annual Ethics Training Online Today!

If you filed a financial disclosure report during 2020 (OGE Form 450 or 278), you probably know that you are required to take annual ethics training during 2020 as well. The good news is that taking the 2019 annual ethics training again will meet that requirement. The course is in SATERN, “Ethics for NASA Employees (2019) AG-ETH-001-19.” The training module has not changed in a few years, but is still relevant. Taking the course in 2020 will give you credit for the calendar year 2020 ethics training requirement.

If you still want further information, go to the U.S. Office of Government Ethics website, www.oge.gov. That site contains useful summaries of the law and regulations, as well as detailed opinions and references on frequent issues. You may also call or e-mail our office (757-864-3221 or larc-dl-ethics@mail.nasa.gov). They aren’t your personal attorneys, but they can provide you with definitive answers to your ethics concerns.
A recent Supreme Court case has made it easier for federal employees to succeed in age discrimination cases. As noted below, however, there is still a significant hurdle for such employees to be given back a job or receive a monetary award.

In *Babb v. Department of Veterans Affairs*, the U.S. Supreme Court reversed a lower appellate court by holding that the plain meaning of 29 U.S. Code § 633a demands that personnel actions be untainted by any consideration of age. A federal employee need not prove that a personnel action would have been different if age had not been taken into account. A federal employee is still required, however, to prove age discrimination was the deciding factor or “but-for cause” in order to obtain any tangible relief such as hiring, job reinstatement, back pay, and money awards. Without this proof, a federal employee may be left with an agency only being required to change relevant training, policies, or practices.

In simple terms, federal workers now have a lower bar for proving they were discriminated against based on age than employees in the private sector. A federal employee can win an age discrimination case by merely showing age was one factor in an employment decision rather than using the standard for private sector workers which requires that age was the deciding factor of an employment decision.

The Court interpreted statutory language of 29 U.S. Code § 633a(a), “[A]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age...shall be made free from any discrimination based on age.” The Court noted that when the ADEA was expanded to include government workers, Congress deliberately created a separate federal sector scheme. The Court also held that the ADEA’s language is plain and prohibits any adverse consideration of age in the decision-making process.

Borrowing an example from the Court, two employees were vying for the same promotion, one employee was 55 years-old and the other 35 years-old. A 100-point scale was used to evaluate the employees for promotion. The older employee was docked 5 points based on his age. Being docked 5 points based on age was discriminatory and violates the ADEA. The older employee wins his case, but it turns out the 35 year-old would have still earned the promotion by 5 points. The older employee loses out on the promotion, back pay, and any monetary award, but likely forced his agency to remove the 5-point deduction based on age.
RECENTLY ISSUED U.S. PATENTS
SEPTEMBER 2, 2019—APRIL 30, 2020

- Paul M. Danehy, NASA LaRC; Brian S. Thurow, Auburn University. U.S. Patent Number 10,417,779 issued September 17, 2019 for “Methods and Systems for Processing Plenoptic Images”


Donald L. Thomsen, III., NASA LaRC. U.S. Patent Number 10,600,522 issued March 24, 2020 for “Method of Making Thin Atomic (Z) Grade Shields”


Christopher J. Wohl, Jr., John W. Connell, Emilie J. Siochi and Joseph G. Smith, NASA LaRC. U.S. Patent Number 10,626,098 issued April 21, 2020 for “Anisotropic Copoly (imide Oxetane) Coatings and Articles of Manufacture, Copoly(imide Oxetane)s Containing Pendant Fluorocarbon Moieties, Oligomers and Processes Therefor”
NASA LaRC History

Pop Quiz!

Question:
What does this photograph depict and when was it taken?
Humor

From the Pentagon Rules:
- This is the only place where there are more people reviewing correspondence than writing it.
- An action passed is an action completed.
- You will never be questioned when walking the halls of the Pentagon with a piece of paper in your hand.

More Murphy’s Laws:
- Burnham’s Discovery – There are two types of drivers: Those who slow down to merge and those who speed up to merge. The latter will always be behind the former.
- Notturno’s Law – Stepping on the gas activates the red traffic light.
- Tropf’s Discovery – If any car you own develops a major problem, any other car you own will develop a major problem within one week.
- Gayer’s Amendment to Murphy’s Law – Anything that can go wrong will go wrong, except at the repair shop, where it will magically, mysteriously (and temporarily) repair itself. Once outside the shop, see Murphy’s Law.

What does an attorney have to wear when they appear in court?
A law suit.