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DoD Range Rule Withdrawn With a View Towards Re-proposal LTC Lisa M. Schenck

During DoD's Environmental Cleanup Stakeholders Forum in St Louis, Missouri in November, the Deputy Under Secretary of Defense (Environmental Security), Ms. Sherri Goodman, announced that she withdrew the Range Rule from the Office of Management and Budget (OMB), with the intent to re-propose the Rule.¹

As Ms. Goodman pointed out, she withdrew the Rule from the OMB for several reasons. First, DoD and EPA must resolve difficult issues, especially the role of explosives safety. Second, as the Environmental Council of the States and National Association of Attorneys General pointed out to DoD, after several years of sorting through and refining the draft range rule, it is time to step back and hear from all the stakeholders and state regulators. Third, all the parties involved must achieve a greater understanding and consensus regarding the processes, tools, techniques, and end goals of the unexploded ordnance cleanup program. Keeping the Range Rule at OMB excludes further input from our community and state stakeholders. Finally, as DoD develops the major initiative of defining a range sustainment program, Ms. Goodman wants to be sure that everyone's concerns are included in that process.

In the interim, DoD will issue a DoD Directive (DoDD) and DoD Instruction (DoDI) to provide consistent guidance regarding how to proceed with a closed, transferred, transferring range response program. The "DoD Policy for Closed, Transferred, and Transferring Ranges Containing Military Munitions Fact Sheet" and the outlines for the DoDD and DoDI were provided for public comment at DoD's Environmental Clean-up Stakeholders Forum and are available at: **Error! Bookmark not defined..**

Environmental law specialists should continue to use DoD and EPA's *Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges*² until DoD issues the DoDD and DoDI. (LTC Schenck/CPL)

New Executive Order on Tribal Consultation Mr. Scott Farley³

¹Available at **Error! Bookmark not defined..**

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On 6 November 2000, President Clinton signed Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments" (EO 13175).⁴ Consistent with the Presidential Memorandum of 29 April, 1994, "Government-to-Government relations With Native American Tribal Governments," EO 13175 recognizes the following fundamental principles: (i) Indian tribes, as domestic dependent nations, exercise inherent sovereignty over their lands and members; (ii) the United States government has a unique Trust relationship with Indian tribes and deals with them on a government-to-government basis; and, (iii) Indian tribes have the right to self-government and self-determination.

When developing and implementing "policies that have tribal implications,"⁵ Section 3 of EO 13175 directs Federal agencies to adhere to the fundamental principles listed above: "to respect Indian tribal self-government and sovereignty, to honor tribal treaty rights and other rights, and to strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." In addition, Federal agencies are required, when developing such policies, to encourage tribal development of policies to meet the agency's program objectives, to defer to tribally established standards, and to consult with tribes to consider the need for Federal standards and alternatives that would preserve tribal authority and prerogatives.

The EO also imposes significant new responsibilities on Federal agencies that promulgate regulatory policies or rules that impact tribes or tribal governments. By February 2001, each Federal agency must designate an official responsible for implementing the order. By March 2001, the designated agency official must submit documentation to the Office of Management and Budget (OMB) describing the agency's process for ensuring timely and meaningful consultation with tribes early in the rulemaking process.

Prior to going forward with any regulation that imposes substantial direct compliance costs on a tribal government⁶ or any regulation that preempts tribal law, an agency must meet several cumbersome procedural requirements. The agency must consult with affected tribes early in the promulgation process, prepare a tribal summary impact statement as part of the regulation's preamble, and submit to the Director, OMB, any written communications from tribal officials. When transmitting a draft final regulation with tribal implications to OMB, the agency must certify that "the requirements of EO 13175 have been met in a meaningful and timely manner."⁷

How will this impact the Army in its day-to-day operations? Initially, it is important to note that the EO is not limited to natural and cultural resource actions; it applies to any regulations or policies that have the potential to directly impact tribes, tribal governments and tribal resources. At Headquarters, Department of the Army (HQDA), the EO imposes several new responsibilities. HQDA must designate an agency official responsible for implementing the EO and forwarding a tribal consultation procedure to OMB. In addition, HQDA and the Secretariat will need to ensure that proposed regulations and policies are reviewed early in the developmental process for potential impacts to tribes, tribal resources or tribal governments. Where such impacts are identified, HQDA and the Secretariat must determine whether any of the requirements of the EO apply.

³ Mr. Farley is an attorney with the Army Environmental Center's Office of Counsel.

⁴ The new Executive Order supercedes Executive Order 13084 "Consultation and Coordination With Indian Tribal Governments," 14 May 1998.

⁵ The EO broadly defines "policies that have tribal implications" as " regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

⁶ These requirements only apply to proposed regulations that are not mandated by statute.

⁷ Similar certification requirements apply to proposed legislation with tribal impacts submitted to OMB.

At the local installation level, the EO will apply to “policy statements or actions that have substantial direct effects on one or more tribes.” This term is not defined in the EO, and will be subject to interpretation by local decision makers. Management plans⁸ that impact tribally protected resources are the types of “actions” most likely to trigger Section 3 of the EO. For all practical purposes, Section 3’s requirements can be met by consultation with Federally recognized Indian tribes in accordance with the principles and procedures set forth in the *Department of Defense American Indian and Alaskan Native Policy*, 20 October 1998 and Department of the Army Pamphlet 200-4, Cultural Resources Management, Appendix F, *Guidelines for Army Consultation with Native Americans*.⁹

ELs should work with cultural resource managers and/or designated Coordinator for Native American Affairs to identify Federally recognized tribes affiliated with their installation and land impacted by installation activities. ELs can then assist in identifying installation plans and policies with the potential to impact tribal governments or tribal resources protected by law or treaty.¹⁰ Where development and implementation of installation plans and policies¹¹ may directly effect tribal governments or resources, ELs should ensure that early tribal consultation occurs on a government-to-government basis in a manner consistent with Army policy and the principles discussed above. (Mr. Farley/AEC)

ELs Roster Now Available

MAJ Elizabeth Arnold

Across the Army JAG Corps, there are a number of officers and civilians who practice environmental law. Whether they are full or part time environmental law specialists (ELs), they need access to a handy network of other ELs.

To meet the demand for such a practical tool, ELD has compiled an army-wide roster of ELs. The roster is organized by MACOM and it includes the name, rank or civilian pay grade, location, phone number and e-mail address for each Army EL. The POC for this roster is MAJ Elizabeth Arnold, [Error! Bookmark not defined.](#), DSN 426-1593 or COML (703) 696-1593. Please contact the POC for changes or corrections.

You may access the roster now on JAGCNET. If you do not have access to JAGCNET, contact the POC for a faxed copy or else one can be electronically mailed to your location.

Last but not least, another handy networking tool for ELs is the Air Force FLITE database. See [Error! Bookmark not defined.](#). Thanks to the kind assistance of the Air Force, Army ELs are now entitled to limited FLITE access (FLITE-EL) to further their environmental research. If you need a FLITE password, you may also contact the above POC to arrange for that as well. If you have a FLITE password already and have experienced technical difficulties with it, please contact the same POC. (MAJ Arnold/CPL)

⁸ Master Plans, Integrated Cultural Resource Management Plans, Integrated Natural Resource Management Plans and range management plans are the types of planning documents that might trigger compliance requirements.

⁹ These documents can be found on the US Army Environmental Center web site, [Error! Bookmark not defined.](#), under Conservation, Cultural Resources.

¹⁰ Protected tribal resources usually involve cultural resources such as those covered by the Native American Graves Protection and Repatriation Act (burial of ancestral human remains) and National Historic Preservation Act (properties of traditional religious and cultural importance) or access to natural resources on traditional hunting areas guaranteed by Treaty.

¹¹ For example, an installation may develop a policy that restricts access to a site that is significant to a tribe for practice of traditional religion and culture.

NEPA And Cumulative Impacts Analysis

MAJ Ken Tozzi

Army environmental law practitioners should be well familiar with the requirements of the National Environmental Policy Act of 1969 (NEPA).¹² Requirements involving the use of categorical exclusions,¹³ and the merits of using an Environmental Assessment¹⁴ or an Environmental Impact Statement¹⁵ are generally well known and regularly applied by environmental lawyers. An area that can be overlooked in NEPA practice, however, is the analysis of the cumulative impacts¹⁶ of a federal action. This note will highlight the area of cumulative impacts analysis under NEPA and provide an example of a scenario where the need for cumulative impacts analysis may not be readily apparent.

The Council on Environmental Quality (CEQ) defines cumulative impact as:

{T}he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.¹⁷

Army Regulation 200-2 requires consideration of cumulative impacts in all levels of NEPA analysis. The screening criteria of Appendix A dictate that categorical exclusions may only be used if "[t]here are minimal or no individual or cumulative effects on the environment as a result of this action."¹⁸ Paragraph 5-2 states "An EA is required when the proposed action has the potential for - (a.) Cumulative impact on environmental quality when combining effects of other actions or when the proposed action is of lengthy duration."¹⁹ The considerations above also apply to Environmental Impact Statements. In sum, cumulative impacts must be considered in the analysis of Army actions under NEPA.

The methodology for examining the cumulative impacts of Army actions under NEPA is beyond the scope of this article. For those interested in the technical aspects of such analysis, the Council on Environmental Quality has published "Considering Cumulative Effects Under the National Environmental Policy Act." This publication can be downloaded from the CEQ NEPAnet website.²⁰

Environmental attorneys must be cognizant of cumulative impacts in rendering advice on NEPA issues. Environmental Assessments and Environmental Impact Statements will include a section analyzing cumulative impacts. However, situations may arise where cumulative

¹² 42 U.S.C.A. §§ 4321-4370.

¹³ See Army Regulation 200-2, Environmental Effects of Army Actions, Chapter 4 and Appendix A (23 December 1988).

¹⁴ Council on Environmental Quality NEPA Regulations, 40 C.F.R. §1508.9.

¹⁵ 42 U.S.C.A. §4332(C).

¹⁶ 42 U.S.C.A. § 1508.7.

¹⁷ *Id.*

¹⁸ Army Regulation 200-2, Appendix A, paragraph A-31(b).

¹⁹ *Id.* at paragraph 5-1(a).

²⁰ Considering Cumulative Effects Under the National Environmental Policy Act, January 1997
<<http://ceq.eh.doe.gov/nepa/ccnepaccnepa.htm>>

impacts could be overlooked. Consider a set of facts where there are several building projects on an Army installation either recently completed or where construction is ongoing. Assume that all of these projects are in the same general area, within two or three miles of one another. Now consider a proposal for the construction of another building on the same installation and in the same general area. Assume further that the proposed building is relatively small and no extraordinary circumstances are raised by its plans. It might be understandable to conclude after analyzing the environmental impacts of the project itself that there would be no significant impact on the human environment. However, it is important to include in the analysis the cumulative impacts of the project in conjunction with the "...past, present, and reasonably foreseeable future actions in the area."²¹ This would include all of the recent building projects and any other reasonably foreseeable actions to be taken in the area. CEQ regulations require consideration of whether "...a project's environmental effects may be cumulatively significant in conjunction with other environmental conditions that are reasonably foreseeable, even if they are not significant by themselves."²² Analysis of the direct and indirect environmental effects of the project along with analysis of the cumulative impacts could, of course, still result in a Finding of No Significant Impact (FNSI),²³ but the cumulative impacts clearly must be considered.²⁴

Cumulative impact analysis raises a number of factual questions, such as what geographic area should be considered in the analysis? What are foreseeable future actions? Is there a good baseline from which to base the analysis of cumulative impacts? The answers to these questions are rarely clear and will depend upon the facts and conditions existing on and around the installation in question. What is clear is that a good faith attempt to analyze cumulative impacts is required for compliance with NEPA.

These facts also arguably raise the related but slightly different issue of the improper segmentation of projects. "Significance cannot be avoided by terming an action temporary or by breaking it down into small components."²⁵ The courts have held that "Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each without 'significant' impact."²⁶ Segmentation issues require analysis of the degree to which the actions are related and connected to each other. The CEQ regulations provide definitions and some factors to consider in making such determinations.²⁷ Under our facts above, it would have been ideal to analyze all of the

²¹ *Supra* note 6.

²² *Roanoke River Basin Association v. Hudson*, 940 F. 2d 58, 64 (4th Cir. 1991).

²³ 40 C.F.R. §1508.13. "Finding of no significant impact' means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference."

²⁴ *See generally*, *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F. 2d 60(D.C. Cir. 1987); *Roanoke River Basin Association v. Hudson*, 940 F. 2d 58 (4th Cir. 1991).

²⁵ 40 C.F.R. §1508.27(b)(7).

²⁶ *Coalition on Sensible Transportation, Inc. v. Dole*, 826 F. 2d 60, 68 (D.C. Cir. 1991).

²⁷ 40 C.F.R. §1508.25(a)(1), in the context of defining the scope of an action, defines connected actions as "...closely related and therefore should be discussed in the same impact statement. Actions are connected if they: (i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification. 40 CFR §1508.25(a)(2) defines "Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement. 40 C.F.R. §1508(a)(3) defines "Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

building projects in a single NEPA document. However, this is not always possible as new projects are not always foreseeable. Assuming good faith on the part of the agency, our facts more properly raise the issue of cumulative impacts as opposed to segmentation.

The importance of a proper cumulative impacts analysis under NEPA cannot be overemphasized. Awareness of cumulative impacts issues is vital to compliance with NEPA and should be understood by the environmental attorney. This note provides the environmental practitioner with a starting point for spotting cumulative impacts issues and some basic references to begin legal research into this important issue. (MAJ Tozzi/RNR)

Army Environmental Center Prepares Guidance on Fuel Tanker Trucks

Ms. Colleen Rathbun

The Army Environmental Center (AEC) is preparing compliance guidelines regarding fuel tanker trucks. In connection with this effort, AEC's Office of Counsel has prepared a legal analysis of some of the issues associated with the tanker trucks. According to the opinion, if a fuel tanker truck leaves post (i.e., it is not used exclusively within the confines of the installation), it is subject to DOT regulations (49 CFR 130), and not EPA's Spill Prevention Control and Countermeasures (SPCC) regulations (40 CFR 112). On the other hand, if the tanker truck is used exclusively within the confines of the installation, and the other prerequisites for the SPCC regulations are met, the SPCC regulations would apply, and secondary containment is required unless it can be shown to be impracticable. The AEC memo provides some recommendations as to Army policy for fuel tanker trucks, including tanker trucks used during training exercises. Most importantly, AEC OC recommends that secondary containment be avoided for tanker trucks used in connection with training exercises, either because it is not required or because it is impracticable. Other fuel tanker trucks that serve in more of a storage role should be protected with some form of secondary containment. The memo and some related briefing slides used during the last ELS conference are posted on JAGCNET. If you can not access JAGCNET, and you would like a copy of the memo or slides, please feel free to contact Colleen Rathbun at colleen.rathbun@aec.apgea.army.mil, or in her absence, LTC German at [Error! Bookmark not defined.](#) (Ms. Rathbun/AEC)

consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement."