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January 5, 2001

MEMORANDUM FOR DEPUTY ASSISTANT TO THE SECRETARY OF DEFENSE  
FOR CHEMICAL AND BIOLOGICAL DEFENSE

SUBJECT: Legal Review of The Czech Republic Chemical Defense Data Collection Program

REFERENCES: (1) Executive Order 12114  
(2) Department of Defense Directive 6050.7  
(3) Memorandum on Chemical Agent Testing in the Czech Republic, Defense Threat Reduction Agency, 29 September 2000  
(4) Bullet Background Paper on Czech Republic Chemical Defense Data Collection Program, U.S. Air Force, 7 September 2000

This memorandum responds to your request that this office comment on actions taken to date in regard to the Czech Republic Chemical Defense Data Collection Program, including comment on compliance with both U.S. and international laws and treaties.

**Facts:**

On September 1, 2000, the U.S. Ambassador to the Czech Republic sent a message to the Secretary of State expressing concern about a U.S. funded program to conduct open-air tests of chemical agents in the Czech Republic, about which he had not been previously informed, and requesting guidance from Washington regarding continuation of the program. Ambassador Shattuck did not express the view that the program was a violation of international law, Czech law or U.S. law. However, he noted his concern that this program could have serious public and foreign relations implications, particularly if it appeared that it had been undertaken in the Czech Republic in order to circumvent statutory restrictions under U.S. domestic law.

The program at issue involves the open-air testing of chemical agents to determine specific agent characteristics. According to the Defense Threat Reduction Agency ("DTRA"):

This program was established as a result of the addition, by Congress, of \$5 million to the FY 98 DoD Appropriations Bill. The funds were specifically to support Wide-Area Decontamination research. The Commodity Area Manager (CAM) for Decontamination was assigned the responsibility for determining how best to use those funds. After conducting international workshops, the CAM determined that the outdoor work being conducted on two Czech decontaminates would potentially benefit both the U.S. Wide Area Decontamination Program and other nations. Although the Data Exchange Agreement (DEA) with the Czech Republic had not yet been signed, the CAM determined that the data could be



provided to Netherlands and then forwarded to the U.S. under the auspices of the existing U.S. - Netherlands DEA. According to the CAM, the Czech Republic agreed with this approach. The CAM arranged for the Air Force Research Laboratory to contract for the effort.<sup>1</sup>

## Discussion:

### 1. The Chemical Weapons Convention.

The Chemical Weapons Convention<sup>2</sup> ("CWC") prohibits States Parties from developing, producing, otherwise acquiring, stockpiling or retaining chemical weapons, or transferring, directly or indirectly, chemical weapons to anyone. Further, it prohibits States Parties from assisting, encouraging or inducing in any way, anyone to engage in any activity prohibited under the Convention.<sup>3</sup> The United States and the Czech Republic are States Parties to the CWC.<sup>4</sup>

Notwithstanding this broad prohibition, and the definition of "chemical weapon," which captures "toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention . . .,"<sup>5</sup> the CWC defines a range of activities involving toxic chemicals and their precursors that are not prohibited.<sup>6</sup> Among the purposes not prohibited involving toxic chemicals are research, medical, pharmaceutical or protective purposes.<sup>7</sup>

Additionally, Article X provides: "Nothing in this Convention shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under this Convention."<sup>8</sup> This article also provides: "Each State Party undertakes to facilitate, and shall have the right to participate in, the fullest possible exchange of equipment, material and scientific

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<sup>1</sup> See Reference (3).

<sup>2</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1997 (entered into force April 29, 1997).

<sup>3</sup> CWC, Art. I, para. 1.

<sup>4</sup> The United States deposited its instrument of ratification on April 25, 1997; the Czech Republic deposited its instrument of ratification on March 6, 1996.

<sup>5</sup> CWC, Art. II, para. 1.

<sup>6</sup> CWC, Art. VI and Verification Annex(VA) Parts VI-IX.

<sup>7</sup> CWC, VA Part VI, para. A.2(a). This section establishes the regime for permissible uses of Schedule 1 chemicals, the most dangerous and highly regulated of toxic chemical categories.

<sup>8</sup> CWC, Art. X, para. 2.

and technological information concerning means of protection against chemical weapons."<sup>9</sup>

The purpose of this Article, in particular paragraph 2, is to establish the right of States Parties to conduct programs for the continuing development of defenses against chemical weapons,<sup>10</sup> provided that these programs are in accordance with the Convention's definition of "purposes not prohibited."<sup>11</sup> Under this definition, "purposes not prohibited" include *any* protective purpose against toxic chemicals, including protection against chemical weapons.<sup>12</sup>

Based upon the information provided about the nature and purposes of the Czech Republic Chemical Defense Data Collection Program,<sup>13</sup> we conclude that no issues regarding compliance with CWC obligations are raised by this program.

## 2. United States Domestic Law.

(a) National Environmental Policy Act ("NEPA").<sup>14</sup> It is a well-settled principle that U.S. statutes are presumed not to have extraterritorial application absent express language to the contrary.<sup>15</sup> The courts have generally held that the procedural requirements of NEPA do not apply to Federal activities outside U.S. territory.<sup>16</sup>

(b) Executive Order Number 12114. E.O. 12114, which was originally promulgated by President Carter in 1979, establishes procedures and other actions to be taken by Federal agencies undertaking activities with the potential for environmental effects outside the United States, or its territories and possessions. The purpose of E.O. 12114 is "to enable responsible

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<sup>9</sup> CWC, Art. X, para. 3.

<sup>10</sup> S. TREATY DOC. 103-21, Message from the President of the United States Transmitting the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, at 68 (1993).

<sup>11</sup> CWC, Art. II, para. 9.

<sup>12</sup> CWC, Art. II, para. 9(b) (emphasis added).

<sup>13</sup> See References (3) and (4) and "Facts," above.

<sup>14</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>15</sup> Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). This principle is often referred to as the "Foley Doctrine."

<sup>16</sup> One notable exception is Environmental Defense Fund v. Massey, 986 F. 2d 528 (D.C. Cir. 1993). The D.C. Circuit held that NEPA was applicable to a decision by the National Science Foundation ("NSF") to incinerate the wastes generated at its research station in Antarctica. The court reasoned that since the NSF was making decisions concerning its activities in Antarctica in the United States, the issue of extraterritorial application of NEPA was moot.

officials of Federal agencies having ultimate responsibility for authorizing and approving actions encompassed by this Order to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions."<sup>17</sup> Central among the procedural requirements set forth in the Order is the requirement that an environmental study/review be performed for major Federal actions significantly affecting the environment in the following categories (among others):

- (1) the global commons outside the jurisdiction of any nation;<sup>18</sup>
- (2) the environment of a foreign nation not participating with the United States and not otherwise involved in the action;<sup>19</sup> or,
- (3) the environment of a foreign nation by providing to that nation a product, or physical project producing a principal product or an emission or effluent, which is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk.<sup>20</sup>

Department of Defense Directive 6050.7 ("DoDD 6050.7") was promulgated on March 31, 1979, to implement the requirements of E.O. 12114 for the Department of Defense and all of its components. Enclosure 2 of DoDD 6050.7 details the specific procedural requirements for DoD components preparing an environmental study/review. Both E.O. 12114 and DoDD 6050.7 remain in effect.

There are two "stages" of analysis for an agency or component to consider in deciding whether it must conduct an environmental study/review for its activities overseas. The first is whether the activity is a "major Federal action" within the scope of E.O. 12114 ("major action" under DoDD 6050.7).

DoDD 6050.7 defines "major action" for purposes of Department of Defense implementation of E.O. 12114:

3.5. Major Action means an action of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale or has substantial environmental effects

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<sup>17</sup> E.O. 12114, Sec. 1-1.

<sup>18</sup> E.O. 12114, Sec. 2-3(a).

<sup>19</sup> E.O. 12114, Sec. 2-3(b).

<sup>20</sup> E.O. 12114, Sec. 2-3(c).

on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this directive.

Our review of relevant materials suggests that an appropriate analysis of whether the Czech Republic Chemical Defense Data Collection Program meets the criteria of "major Federal action" was not conducted prior to commencement of the program. In our view, the component should conduct such an analysis in consultation with the component's legal counsel. This determination should be fully documented, and we recommend as a matter of policy that the component consider the concerns expressed by the Ambassador on the potential significance of the action for relations with the Czech Republic.

If the Chemical Defense Data Collection Program is deemed to be a "major action that does significant harm to the environment" under DoDD 6050.7<sup>21</sup>, the next question is whether an environmental study/review is required for such action under one of the provisions of E.O. 12114, as set forth above.

Our limited review of the project as described in the package suggests the possibility that an environmental study/review was required prior to the commencement of the Czech program, under the Section 2-3(c) of E.O. 12114. The decision whether to conduct such an assessment is best made by the component, taking into account the specific facts about the program, the environmental regulatory and policy concerns underlying E.O. 12114 and DoDD 6050.7, and other national policy concerns such as those raised by the Ambassador.

In analyzing the applicability of Section 2-3(c) of E.O. 12114, it should be noted that open-air testing of any lethal chemical or biological warfare agent -- as envisioned by this program -- is strictly prohibited within the United States unless specific statutory requirements have been met.<sup>22</sup> The applicable statute permits open-air testing in the United States if "the Secretary of Defense has determined that the transportation or testing proposed to be made is necessary in the interests of national security; [if] the Secretary has brought the particulars of the proposed . . . testing . . . to the attention of the Secretary of Health and Human Services. . . ; [and if] the Secretary has implemented any precautionary measures recommended . . .". The requirement to implement the precautionary measures recommended by the Secretary of Health and Human Services is subject to a Presidential override, if he determines that considerations of national security require testing that the recommended measures would make impossible, but even then the testing "shall be carried out in the safest practicable manner."

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<sup>21</sup> DoDD 6050.7, Enclosure 2.

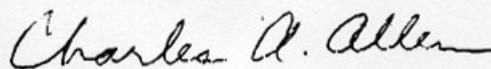
<sup>22</sup> 50 U.S.C. 1512.

Finally, to our knowledge, there was no consultation or coordination with the Department of State or the Office of the Secretary of Defense ("OSD") prior to the implementation of this program. In light of the concerns expressed by the Ambassador, we recommend as a policy matter that the component coordinate with the Department of State and OSD prior to any decision on whether to resume the program.

**Conclusions and Recommendations:**

In our view, the component should have conducted an internal review in consultation with its legal counsel prior to commencing this program. Such review could have led to one of the following courses of action: (1) determination that the requirements of E.O. 12114 and DoDD 6050.7 were not applicable to this program; (2) completion of an appropriate environmental study/review of the program's effects; or (3) invocation of an appropriate exemption available under E.O. 12114. Accordingly, prior to resumption of this program we recommend that the component undertake such a review now. Additionally, if the component desires to continue the program, it should first coordinate the proposed activity with the appropriate officials within the Office of the Secretary of Defense and the Department of State.

This memorandum has been coordinated with the Legal Counsel to the Chairman of the Joint Chiefs of Staff.



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