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***Final Military Munitions Rule: An Overview - LTC David Bell***

On February 12, 1997, the Environmental Protection Agency published the Military Munitions Rule (62 Fed. Reg. 6621), a rule that identifies when conventional and chemical military munitions become hazardous waste under the Resource Conservation and Recovery Act (RCRA). Military organizations that manage munitions must be prepared to implement this rule on August 12, 1997, the effective date.

The 1992 Federal Facility Compliance Act (FFCA) amended the Resource Conservation and Recovery Act (RCRA) by requiring the EPA to publish regulations that identify when munitions become a hazardous waste subject to RCRA. In developing its rule over the past four years, the EPA reviewed comments from numerous organizations and individuals, including DoD, other federal agencies, states, tribes, universities, corporations, and citizens' groups.

The Military Munitions Rule will primarily affect the Department of Defense, including the National Guard. Other federal agencies, such as the Department of Energy and U.S. Coast Guard, who deal with military munitions on behalf of the Department of Defense, will also be affected, as will government contractors who produce or use military munitions for the Department of Defense. Some parts of the rule, however, apply both to military and non-military activities. For example, the emergency response provisions, the new storage standards under Subpart EE, and the limited exemption from manifest and marking requirements apply to military and non-military alike.

The rule acknowledges that DoD has long-established and extensive storage and transportation standards that ensure explosive safety and security, while at the same time protecting human health and the environment. In drafting its rule, the EPA acknowledged that these DoD standards, developed and overseen by the Department of Defense Explosives Safety Board (DDESB), are at least as stringent as the RCRA standards. The EPA also relied upon the military's excellent safety record in its management of munitions and explosives, regardless of their status as a product or waste.

State Authority

EPA has adopted the traditional RCRA approach to state authority and allows states to adopt requirements for military munitions that are more stringent or broader in scope than the federal requirements. At the same time, EPA strongly encourages states to adopt the provisions of this new rule. It remains to be seen just how states will seek to manage

waste military munitions. Nonetheless, in preparation for implementing the rule in August 1997, DoD has drafted an Interim Implementation Policy and distributed it to the field.

In the coming months, DoD will be working closely with installations, major commands, and regulators to identify issues and to seek consensus on a Final Implementation Policy. To assist states in understanding its munitions management practices, DoD has been engaged in a partnering effort with state, tribal, and environmental group representatives. This initiative will continue in an effort to persuade regulators to adopt the EPA rule and DoD's plan for implementing the rule.

DoD's Regional Environmental Coordinators (RECs) will support the partnering process by briefing regulators and facilitating discussions. RECs will also work closely with state regulators to assist in modifying state laws and regulations as may be necessary to adopt the EPA rule. Whether some states develop more stringent standards or not, the EPA rule has set forth a blueprint and significantly clarified the military waste munitions management requirements.

#### When Are Munitions A Waste?

The Rule addresses a fundamental question - when do unused military munitions, unused and used become a waste and thereby subject to the requirements of RCRA? The rule identifies four circumstances under which unused munitions become waste:

- when abandoned by being disposed of, burned, detonated, incinerated, or treated prior to disposal;
- when removed from storage for the purpose of being disposed of, burned, or incinerated, or treated prior to disposal;
- when deteriorated or damaged (for example, leaking or cracked) to the point that it cannot be put into serviceable condition and cannot reasonably be recycled or used for other purposes; or
- when declared a waste by an authorized military official (for example, the determination made by the Army concerning the M-55 rocket in 1984).

40 CFR 266.202(b)(1) - (4)

In the case of "used or fired" munitions, EPA followed their long-standing position that deposit of a product on the ground incident to its normal and expected use does not trigger RCRA and indicated that some munitions can be expected to malfunction and not explode upon impact. In such circumstances, EPA has defined as solid waste those unexploded ordnance that are:

- transported off range or from the site of use for the purposes of storage, reclamation, treatment, disposal, or treatment prior to disposal;
- recovered, collected, and then disposed of by burial or landfilling, either on or off a range; or
- fired and land off-range and are not promptly rendered safe and/or retrieved.

40 CFR 266.202(c)(1) - (2), (d)

Equally important, the rule also identifies specific circumstances under which military munitions are not waste. Notably, military munitions are not waste when used for their intended purpose:

munitions used in training military personnel or emergency response personnel, including training in the destruction of unused propellant; munitions used in research, development, testing, and evaluation activities; munitions destroyed during range clearance activities on active and inactive ranges; and unused munitions that are repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subject to materials recovery activities. Assignment of a particular condition code or placement in one of DoD's demilitarization accounts does not automatically result in designation of an item as a waste because many of these materials are subjected to recovery, reuse and recycling activities.

40 CFR 266.202(a)(1) - (2)

EPA has postponed final action on whether military munitions on closed or transferred ranges are solid waste until the Defense Department issues its Range Rule. The Range Rule, which DoD expects to propose this summer, sets forth a process for addressing unexploded ordnance and other contaminants at these ranges.

#### Storage Standards

EPA has finalized two approaches for the storage of waste munitions. The "conditional exemption" approach is available only for the storage of waste military munitions, while the new unit standards under 40 CFR Parts 264/265, Subpart EE, are available to military and non-military handlers of waste munitions and explosives.

The "conditional exemption" is based on EPA's determination that DoD's management practices make it unlikely that these waste munitions will be mismanaged and thereby present a hazard to human health and the environment. The conditional exemption allows non-chemical waste military munitions to exit the traditional RCRA regulatory scheme for hazardous wastes and, instead, be managed under a more tailored set of rules. Chemical munitions and agents are not eligible for the conditional exemption provision.

Additionally, for munitions to qualify for the exemption, they must be subject to the jurisdiction of the Department of Defense Explosives Safety Board (DDESB), managed in accordance with the DDESB's published standards (no waivers are allowed), stored in units identified to regulators, and inventoried annually and inspected quarterly. Theft, loss, or violations that may endanger health or the environment must be reported to the regulatory agency.

While a failure to meet any of the previously outlined conditions results in an immediate loss of the exemption, owners or operators may request reinstatement. This conditional exemption will greatly reduce the administrative burdens of storing waste military munitions, while providing regulators with the oversight and accountability they sought.

Under the second approach for storage of waste munitions, EPA set forth new unit standards in Subpart EE of 40 CFR parts 264 and 265, dealing with permitted and interim status facilities. Subpart EE requires that hazardous waste munitions and explosives (military or non-military) be stored in units that minimize the potential for detonation or

release; provide a primary barrier to contain the hazardous waste; and, in the case of liquid wastes, provide for secondary containment or a vapor detection system.

The storage unit must be monitored and inspected frequently enough to assure that controls and containment systems are working as designed. DoD storage units that satisfy DDESB standards should already meet the unit standards of Subpart EE. Unlike “conditional exemption,” owners and operators will also have to comply with RCRA’s other Subtitle C requirements, including the need to obtain a RCRA storage permit.

DoD anticipates that Subpart EE permits will be sought for units storing waste chemical munitions and agents, as well as for units storing conventional munitions that do not qualify for “conditional exemption,” e.g., because the storage unit requires a waiver from one or more DDESB standards.

### Transportation

In light of the extensive controls that DoD employs when transporting munitions, EPA has provided a limited exemption from RCRA’s transportation requirements. A RCRA manifest is not required for shipments of waste munitions and explosives (excluding chemical munitions and agents) between military entities. Such shipments must comply with DoD shipping controls, including the use of a Government Bill of Lading (GSA SF 1109), Requisition Tracking Form (DD Form 1348), Signature and Talley Record (DD Form 1907), Special Instructions for Motor Vehicle Drivers (DD Form 836), and Motor Vehicle Inspection Report (DD Form 626).

Military is defined broadly enough to include the “Armed Services, Coast Guard, National Guard, Department of Energy (DOE), or other parties under contract or acting as an agent for the foregoing, who handle military munitions.” The exemption also provides for similar reporting requirements as required under the storage exemption. This limited exemption, however, may be difficult to implement on a widespread scale until states, through which such shipments must travel, have adopted the provision as part of their state laws and regulations.

EPA also adopted a second exemption from the transportation requirements that is applicable both to military and non-military generators and transporters of hazardous wastes, including waste munitions and explosives. EPA has deleted the requirements for marking and manifesting hazardous wastes transported on a public or private right-of-way within or along the border of contiguous properties under the control of the same person. 40 CFR §262.20(f).

While designed to benefit small quantity generators, such as universities seeking to consolidate their hazardous waste activities, DoD will also benefit. Military generators may transport hazardous wastes from one area of an installation to another by using the public highway that bisects the installation.

### Emergency Response Activities

EPA has also clarified long-standing EPA policies regarding the applicability of RCRA requirements to emergency response activities. These munitions-specific provisions are applicable both to military and non-military emergency response activities and are therefore scattered throughout the regulation, i.e., 40 CFR §§262.10(i), 263.10(e), 264.1(g)(8)(i)(D)(iv), 265(c)(11)(i)(D)(iv), and 270.1(c)(3)(i)(D)(iii). In essence, these provisions codify exemptions from the generator, transporter, and permitting requirements in connection with immediate responses to emergencies involving munitions or explosives.

For example, emergency response personnel need not obtain a generator identification number, make a hazardous waste determination, complete a RCRA manifest, mark or label the item, or obtain a regular RCRA treatment permit. A RCRA emergency permit is required, however, in those cases where the emergency response specialist determines that time will allow.

EPA also made clear in the rule's preamble that emergency response personnel need not be concerned with land disposal restrictions and corrective action requirements. They must maintain records of the actions taken for three years. These exemptions are directed toward relieving emergency response personnel from being distracted by RCRA's complicated administrative and substantive requirements.

#### Permit Modifications

The new definition of when munitions become a waste will encompass munitions that DoD previously did not view as wastes. EPA has partially assuaged DoD's concern that existing permitted facilities would be unable to accept these newly designated wastes if their permit or permit application does not specifically allow the receipt of wastes from off-site sources. The rule allows a "grace period" during which DoD facilities may seek modifications of their permit or permit application to allow receipt of these off-site wastes.

A permit holder may continue to accept waste military munitions despite the absence of such language or inclusion of an explicit restriction on receipt from off-site sources if the facility was already permitted to handle waste military munitions on the effective date of this rule, August 12, 1997; if the permit holder submits, by August 12, 1997, a Class 1 modification request to remove the restriction; and if the permit holder submits a Class 2 modification request by February 7, 1998.

To qualify for the "grace period," the modification is limited to removal of the off-site restriction. Other modifications to increase quantities or to accept new waste streams are outside the "grace period" provision. Because most of DoD's existing treatment permits are still pending regulatory approval, most modification requests will be to amend the permit application, rather than an actual permit. In these interim status cases, facilities must amend their Part A and B application prior to accepting off-site wastes, i.e., these changes are not subject to the August 1997 and February 1998 deadlines.

While this provision seems to be straightforward, the Services remain concerned because the final decision to grant or deny the modification request still rests with the regulator. DoD is also pursuing a technical amendment to make clear that the "grace period" also applies to similar modifications to storage permits.

#### Striking A Balance

The Military Munitions Rule is the result of a concerted effort by EPA and DoD to strike a balance between environmental concerns and explosives safety concerns. The Rule, as finally promulgated, clarifies how and to what extent RCRA's waste management scheme will apply to waste munitions activities. It provides federal and state regulators and the public with the oversight and input to which they have become accustomed in other waste management activities. It also affords DoD an opportunity to manage its munitions, both product and waste, in a way that is sensitive to environmental concerns while accomplishing its national defense mission. The task now is to work with state and federal regulators to ensure that the rule is implemented consistently in all the jurisdictions in which DoD has a presence.

**Harmon Decision Deals Enforcement Blow  
to Regulated Community - CPT Anders**

The U.S. EPA's Environmental Appeals Board (EAB) recently-issued decision in In Re Harmon Electronics, Inc., RCRA (3008) Appeal No. 94-4 (EAB, Mar 24, 1997), 7 E.A.D. \_\_\_, weakened industry's position on three key issues when contesting enforcement actions under the Resource Conservation and Recovery Act (RCRA).

For a 14 year period, employees of a Missouri company, Harmon Electronics, illegally disposed of various unused organic solvents by dumping them out the back door of the facility. Harmon management discovered the practice during an internal compliance assessment in November 1987 and ordered it stopped immediately. After assessing the environmental damage caused by the dumping, Harmon self-disclosed the disposal practice to the Missouri Department of Natural Resources (MDNR) seven months later. Since EPA had delegated hazardous waste permitting and enforcement authority to Missouri, MDNR inspected the site and entered into negotiations with Harmon. MDNR concluded that, "because of Harmon's voluntary disclosure and its cooperation in completing work to characterize the site," Harmon would be allowed to enter into a consent decree, rather than face an administrative order with a possible punitive fine. *Id.* at 6. The consent decree contained standard language that it "settled the petition," and that it "shall apply to all persons, firms, corporations or other entities who are or will be acting in concert and *in privity with*, or on behalf of, the parties to this Decree. . . ." EPA Region VII, which retains oversight authority in state RCRA programs, informed MDNR that Harmon's violations constituted "class I" violations under EPA's RCRA Enforcement Response Policy. EPA threatened to overfile MDNR if the latter did not pursue monetary penalties. When MDNR did not, Region VII filed a four-count complaint against Harmon, proposing a penalty of \$2,343,706.

At the administrative hearing in January 1994, the Presiding Officer lowered the penalty to \$586,716. Harmon's appeal to the EAB raised, among others, three important issues: (1) whether the Region's overfiled enforcement action was barred by RCRA and res judicata principles; (2) whether the Region's action was barred by the statute of limitations, since the violations took place more than five years before the enforcement action; and (3) whether the gravity-based portion of the penalty should have been eliminated under EPA's audit policy, since the violations were self-reported and voluntarily corrected.

**EPA Overfiling State Action**

In support of its position on the overfiling issue, Harmon first noted EPA's disregard of the plain language of RCRA § 3006, which provides that authorized State programs operate "in lieu of" the federal program, and that any action by the State under its authorized program "shall have the same force and effect" as actions taken by EPA. Harmon also pointed out that, while overfiling is appropriate when the State has taken *no* enforcement action, the appropriate response when EPA believes the enforcement response is inadequate is to withdraw the state authorization. *Id.* at 11. The EAB dismissed these arguments, citing the "well-established reading of the statute" that authorizes EPA to take action even after a State has already done so. *Id.* at 12.

Harmon's second point in support of its overfiling position was that the Region's enforcement action was barred by res judicata principles. Because the Harmon/MDNR consent decree was signed by a circuit court judge, Harmon argued, the full faith and credit statute, 28 U.S.C. § 1738, required that federal courts give the same preclusive effect to a state court judgment that other state courts would. *Id.* at 13. EPA countered that it was not in privity with Missouri, and that res judicata principles only apply to claims that have been adjudicated, where the present consent decree "resolves no issues of fact or law." *Id.*

The EAB sided with EPA, ruling that the State authorization did not itself create privity between Missouri and EPA. The EAB explained that State authorization alone does not ensure an identity of interests for purposes of establishing privity, that privity requires a sufficient identity of interests between the parties -- in this case, between a State's enforcement interests and EPA's. The Board concluded, based upon evidence presented, including the fact that Region VII had pressed MDNR to pursue monetary penalties and the latter did not, MDNR and EPA did not in this case share a sufficient identity of interests. *Id.* at 17. The Board also cited *In re Martin Electronics, Inc.* 2 E.A.D. 381, 385-86 (CJO 1987), in support of the proposition that, even had the identity of Missouri's and EPA's interests been closer aligned in this case, the parties still were not in privity, since EPA's approval of the State's consent order was not required.

#### Continuing Violations

In considering the second issue, the EAB conducted a lengthy examination of the precedents construing the 28 U.S.C. § 2462 statute of limitations, under which the government is barred from maintaining an action to enforce a civil fine or penalty unless the action is commenced within five years from "the date when the claim first accrued." The Board explained that a claim "accrues" when the legal and factual prerequisites for filing suit are in place, noting that this occurs at different points depending on the type of case (e.g., a victim's injuries suffered in an auto collision versus long-term health effects in a toxic tort case victim). *Id.* at 24. When the wrongful conduct is of the type that can continue over a period of time, "the violation accrues on the last day conduct constituting an element of the violation takes place." Thus, explained the EAB, the date when a violation accrues is different from the date it first occurs. A civil enforcement action can therefore be maintained "at any time beginning when the illegal course of conduct first occurs and ending five years after it is completed." *Id.* at 26-7. The Board also cited the plain language of RCRA § 3008, which allows penalties for "per day of noncompliance."

#### Application of the EPA Audit Policy

With respect to the third issue, Harmon detected its violations in November 1987 and reported them in June 1988. Because of this good-faith effort, the Presiding Officer reduced the Region's originally proposed multi-day penalty by 66% and increased the downward adjustment for good faith. Although Harmon conceded that it had not met all nine conditions for elimination of the gravity-based portion of the fine set out in EPA's *Incentives for Self-Policing: Discovery Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706 (December 22, 1995) ("Audit Policy"), it maintained that it satisfied the "spirit" of the Audit Policy, and that the gravity-based penalties assessed should therefore be eliminated. The EAB rejected the "spirit" argument, citing Harmon's failure to recognize that an important aspect of the Audit Policy is to encourage settlement over litigation. *Id.* at 58.

Some point out that *Harmon* is a poor candidate for an Audit Policy test case, see, Toxics Law Reporter, Vol. 11 No. 13, p. 917 (January 22, 1997), since Harmon's self-disclosure was issued before the final Audit Policy was published, and because Harmon was deemed to be a repeat offender, having engaged in illegal dumping for over fourteen years. But, without specifically holding that a facility would be ineligible to eliminate the gravity based portion of a penalty unless all nine conditions of the Audit Policy were satisfied, the EAB left a clear impression that the Policy's conditions "are to be respected," making use of the Audit Policy's penalty reductions in instances of self-reported violations more difficult. See also, EPA's Audit Policy Interpretive Guidance, summarized in, Inside EPA, Vol. 18 No. 4, pp. 9-10 (January 24, 1997).

### Conclusion

The EAB's ruling in *Harmon* has significant ramifications. First, *Harmon's* resolute approval of EPA overfiling State consent orders -- even those approved by the State courts -- could thus force States toward more stringent enforcement responses than they otherwise might have pursued. States will be aware that an *Harmon*-energized EPA will be keeping a close watch on effective enforcement of the delegated hazardous waste program. This more authoritative supervisory relationship could hamper some installations' extensive efforts to nurture congenial relations with their State environmental regulatory agencies. *Harmon* also illuminates some of the differences underlying State and EPA enforcement priorities: while the EPA Region repeatedly cautioned and reproved MDNR for failing to punish the violator through punitive fines, MDNR sought to reward *Harmon*, through a no-fine consent order, for self-reporting its violations upon discovery and taking pre-disclosure steps to assess the extent of the contamination. Second, *Harmon's* interpretation of RCRA's contemplation of when a violation "accrues," and the notion of a "continuing violation" is damaging, as the ruling allows enforcement agencies to stretch a single "act" of noncompliance into a continuous violation. Taken to its logical conclusion, one act of illegal dumping, as in the *Harmon* case, can be thus penalized as the multi-year operation of an unpermitted hazardous waste disposal facility and can bring an enforcement action any time within five years after the spill is ultimately cleaned or a proper permit is obtained. Finally, EAB's ruling that compliance with the "spirit" of the Audit Policy would not necessarily be enough to earn elimination of the gravity portion of an assessed fine further reduces the likelihood that self-reporting a violation would be in a facility's best interests, or that a good-faith report will regularly be rewarded with penalty reduction.

#### ***Application of RCRA to a One-Time Spill - MAJ Lisa Anderson-Lloyd***

An occasional occurrence during operational training is the accidental release of material such as oil or other fluids. This may be due to a minor leak from a vehicle or a larger spill as the result of a major accident. These materials are usually deposited on other than RCRA managed treatment, storage, or disposal facilities, and often on private property.

RCRA establishes a "cradle to grave" regulatory scheme for the treatment, storage, and disposal of solid and hazardous waste. Congress' intent throughout the legislative history of RCRA has been the protection of human health and the environment from the disposal of discarded hazardous waste. Hazardous waste under RCRA is a subset of solid waste (42 USC 6903). For a waste to be classified as hazardous, first it must qualify as a RCRA solid waste. The starting point in determining the applicability of RCRA is an examination of the statutory and regulatory definitions of solid and hazardous waste.

The statutory definition of "solid waste" includes: "any garbage, refuse, sludge generated from a treatment plant, water supply treatment plant, or air pollution control facility and other discarded material" (42 USC 6903(27)). The only category of waste that might describe a spill is "discarded material." The statute does not further define "discarded material."

EPA's regulations define "solid waste" in the context of the management of hazardous waste under RCRA Subtitle C. The regulations implementing the statutory definition define solid waste as "any discarded material." Discarded material is further defined as abandoned, recycled, or inherently waste-like material (40 CFR 261.2). The regulations then specify that "materials are solid waste if they are abandoned by being: "(1) disposed of; or (2) burned or incinerated; or (3) accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated" (40 CFR 261.2(b)).

The subcategory of "hazardous waste" refers to those solid wastes that may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed" (42 USC 6903(5)). EPA's regulatory definition of hazardous waste specifies that a solid waste is a hazardous waste if it is not excluded from the definition and is either specifically listed as hazardous or exhibits a hazardous waste characteristic (40 CFR 261.3(a)). EPA established three hazardous waste lists: (1) hazardous wastes from nonspecific sources, (2) hazardous wastes from specific sources, and (3) discarded commercial chemical products (40 CFR 261.31-261.33). If a solid waste is not a listed hazardous waste or a mixture of a listed waste and a solid waste, it may still be hazardous if it exhibits a hazardous characteristic. The four hazardous waste characteristics are ignitability, corrosivity, reactivity, and toxicity (40 CFR 261.20). The regulatory definition of hazardous waste identifies hazardous wastes for the purpose of Subtitle C regulation of these wastes. If a material satisfies the regulatory definition of solid waste and is hazardous under the regulations as either a listed or characteristic hazardous waste, then the comprehensive controls of Subtitle C apply. Subtitle C management includes permitting requirements, land disposal restrictions, and technical standards.

EPA does not consider it within the regulatory or statutory definitions of solid waste when the use of products for their intended purpose results in the deposit of hazardous material on the land. For example, the authorized use of pesticides is not covered by the regulatory scheme of RCRA. The regulations do not classify as solid waste those commercial products whose use involves application to the land when such products are used in their normal manner. Products applied to the land in their ordinary usage are not "discarded material" subject to waste management regulation.

In determining the applicability of RCRA to one-time spills during operational activity, the definitions of solid and hazardous waste must be considered. The key issue regarding the applicability of the regulatory definition to spills is whether the material has been "abandoned," as defined in the regulations. When material is spilled in the operation of equipment during normal training, the operator does not "abandon" the material. The focus of the activity is the use of the material, not the disposal of it. The fact that the material ends up in contact with the environment in the same way that wastes do is not dispositive. If the material is collected soon after the spill occurs, the recovered material would be considered solid waste when removed from the site for treatment or disposal.

Even if it can be successfully argued that the spilled material does not fall within the regulatory definition of "solid waste," it may fall within the broader statutory definition. The RCRA regulations clearly state that the regulatory definition of solid and hazardous waste applies only for purposes of implementing Subtitle C of RCRA (40 CFR 261.1(b)(1)). In issuing the final rule amending the definition of solid waste, EPA made it clear that the broader statutory definitions of solid and hazardous waste apply for purposes of enforcing the "imminent and substantial endangerment" provisions of 42 USC 7003 (50 Fed Reg. 614, 627, Jan 4, 1985; 40 CFR 261.1(b)(2)). The imminent and substantial endangerment provision of RCRA provides broad remedial authority to address a hazard to health or the environment presented by disposal of solid or hazardous waste. Courts have supported EPA's position that the regulatory definition of solid waste is narrower than the statutory definition. See, e.g., Connecticut Coastal Fisherman's Association v. Remington Arms Co., 989 F. 2d 1305 (2d Cir. 1993).

EPA's position is that if products are released into the environment and left indefinitely, they eventually become discarded within the statutory definition of "solid waste." In Remington Arms, the Second Circuit Court of Appeals agreed with the EPA in finding that lead shot and clay targets left in Long Island Sound had accumulated long

enough to be considered solid waste. The court did not decide how long materials must accumulate before they are considered discarded. Both EPA and the courts, however, have concluded that the statutory definition applies only to suits brought to abate an imminent or substantial endangerment to human health or the environment.

Therefore, if a spill is left in place, the spilled materials may be considered "discarded" within the statutory definition of "solid waste," and possibly within the regulatory definition. A failure to respond to a spill of hazardous material could be evidence of an intent to discard. It is unclear at what point in time a spill that has not been cleaned up would be considered a statutorily "discarded" solid waste subject to section 7003 remedial action or a regulatory solid waste subject to Subtitle C regulation. In accordance with Congress' intent, EPA applies the broader definition of solid waste for remedial purposes in contrast to regulatory purposes in order to preserve the widest latitude to address imminent threats to human health and the environment. RCRA's regulatory management requirements are limited to activities that warrant cradle to grave regulation. It is reasonable to construe the definition of solid waste narrowly for regulatory purposes to avoid the imposition of Subtitle C requirements.

The specific provisions of the RCRA corrective action program do not apply to one-time spills. Key corrective action provisions found at RCRA section 3004(u) and (v) require EPA to incorporate corrective action obligations into any permit issued. RCRA section 3008(h) subjects interim status facilities to corrective action authority. These provisions require clean up of any past or present contamination that results from operation of a "solid waste management unit."

EPA proposed a regulatory framework for implementing corrective action in July 1990 and issued a revised advanced notice of proposed rulemaking in May 1996. In the 1990 proposal, EPA defined the term solid waste management unit or SWMU to mean, "Any discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include an area at a facility at which solid wastes have been routinely and systematically released." An example of this, provided by EPA, is a loading area where operations result in a small but steady spillage that contaminates the soil over time. In this proposal, EPA also recognized that not all areas where releases have occurred are considered SWMUs. The proposal specifically indicated that a one-time spill that had been "adequately" cleaned up would not constitute a SWMU. EPA warned, however, that if the spill is not cleaned up it would be "illegal disposal" and subject to enforcement action.

In the 1990 proposal, EPA recognized that military firing ranges and impact areas are not SWMUs. Unexploded ordnance fired during target practice is not discarded material since the ordinary use of ordnance includes placement on the land. EPA cited a U.S. District Court decision (Barcello v. Brown, 478 F. Supp. 646, 668-669 (D. Puerto Rico 1979)), which suggests that materials resulting from uniquely military activities fall outside the definition of solid waste and are not subject to RCRA corrective action. More recently in the Military Munitions Rule, EPA affirmed the proposition that the normal use of munitions in training activities, including the resulting deposit on the land, does not constitute disposal within the meaning of RCRA (62 FR 6621).

EPA recognizes two definitions for both solid and hazardous waste, one definition from the RCRA statute for the purpose of remedial enforcement and one definition found in the regulations for the purpose of the Subtitle C management program. Although one-time spills may not be solid waste under the narrower regulatory definition, they may become RCRA statutory wastes if they are left in place and pose an "imminent and substantial endangerment" under RCRA Section 7003. One-time spills are not subject to the more specific corrective action provisions, which require clean up of contamination from SWMUs.

In managing our spills, we must adequately and in a timely manner clean up the material and reduce the likelihood of a release that may with the passage of time be considered "discarded" or pose an "imminent and substantial endangerment."

### ***Endangered Species Litigation - CPT David Stanton***

In a unanimous ruling on 19 March 97, the Supreme Court held that the Endangered Species Act (ESA) citizens suit provision (16 U.S.C. Section 1540(g)) negates the traditional "zone of interests" test traditionally used to determine standing to bring suits. The Court also held that, for purposes of the Administrative Procedures Act (APA), plaintiffs who suffer economic harm as a result of jeopardy determinations by the U.S. Fish and Wildlife Service (Service) under the ESA are included within the zone of interests of affected persons for purposes of standing to bring suit under the APA.

In Bennett v. Spear, 1997 WL 119566 (U.S.), ranchers and irrigation districts located within the Bureau of Land Management's Klamath Irrigation Project challenged a Service Biological Opinion (BO) regarding the effects of Project water levels on two endangered fish species. The Service found that the long-term operation of the Project was likely to jeopardize the fish, and then identified reasonable and prudent alternatives that included maintaining minimum water levels in two reservoirs. The petitioners argued that the Service's jeopardy determination violated Section 7 of the ESA, and that the BO also had the effect of designating critical habitat without the requisite consideration of economic impacts, in violation of Section 4 of the ESA. (The suit was brought against the Service, and did not include the Bureau of Land Management). The United States District Court for the District of Oregon dismissed the complaint on the grounds that the plaintiffs did not have standing, since their "recreational, aesthetic, and commercial interests . . . do not fall within the zone of interests sought to be protected by ESA." The United States Court of Appeals for the Ninth Circuit affirmed, holding that the "zone of interests" test limits classes that may bring an ESA challenge under either the APA or the ESA citizens suit provision.

In overturning the Ninth Circuit, the Supreme Court (quoting the ESA citizens suit provision stating that "any person may commence a civil suit), held that the zone of interests test does not apply to suits brought under the ESA citizens suit provision. Further, the Court held, because the petitioners' allegation of economic harm is sufficient to satisfy the requirement that they claim to have been "injured in fact" by the Service's BO (which was found to constitute a final agency action) and because their injury was "fairly traceable" to the BO, the petitioners have standing under Article III. The Court went on to hold that petitioners' claim that the Service failed to perform a nondiscretionary function by not considering economic impacts while effectively creating critical habitat, falls under the ESA citizens suit provision at 16 U.S.C. Section 1540(g)(1)(C). With respect to petitioners' claims that the Service violated Section 7 of the ESA, the Court found that the ESA citizens suit provision only includes violations committed by regulated parties. Therefore, since the Service is not a regulated party under this section, the petitioners' Section 7 claims, by default, fall under the APA. Applying the zone of interests test to the Section 7 claims, the Court found that the petitioners' claimed economic harm was sufficient to place them with the zone of interests protected by the ESA.

This decision opens the door to a new class of ESA challenges, i.e., those based on economic harm. Furthermore, because many such challenges may now be brought under the APA, the ESA's 60-day notice requirements will no longer apply, and successful plaintiffs may be able to recover attorneys fees under the Equal Access to Justice Act.

***Integrated Natural Resources Management Plan  
(INRMP) Guidance Released - MAJ Thomas Ayres - - -***

On 21 March 1997, Headquarters, Department of the Army issued the "Army Goals and Implementing Guidance for Natural Planning Level Surveys (PLS) and Integrated Natural Resources Management Plans (INRMP)" (hereinafter Guidance). In accordance with the Guidance, each installation in the United States with 500 or more acres, and certain OCONUS installations, must complete a PLS and complete and execute an INRMP. The Defense Planning Guidance also established goals to have all PLSs completed by Fiscal Year (FY) 1998 and to have an approved INRMP for each applicable installation by FY 2000.

The purpose of completing a PLS and an INRMP is to ensure that natural resources conservation measures and Army activities on mission land are integrated and are consistent with Federal stewardship and legal requirements. The primary objective of the INRMP, as recognized in the Guidance, is support of the installation operational mission. In the memorandum distributing the Guidance, the Army's Assistant Chief of Staff for Installation Management reinforces the critical relation of an INRMP to mission-support: "The availability of training land in the future will be largely determined by what is done today to properly integrate land use and natural resources management."

**Approval of INRMPs**

Army Major Commands (MACOMs) review and approve INRMPs. Prior to MACOM approval, the fish and wildlife aspects of the INRMP should be concurred in by the state fish and wildlife agency and the U.S. Fish and Wildlife Service.<sup>1</sup> Additionally, all aspects of the INRMP that potentially may impact any federally-listed threatened or endangered species must be the subject of consultation under Section 7 of the Endangered Species Act.<sup>2</sup> Finally, prior to implementing the INRMP, the installation must fully comply with the National Environmental Policy Act (NEPA) of 1969.

**NEPA Compliance**

As stated in the Guidance, all installation INRMPs must undergo NEPA analysis in accordance with Army Reg. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988) [hereinafter AR 200-2]. In most cases, because INRMPs are derived to maintain and sustain natural resources, production of an environmental assessment (EA) accompanied by a Finding of No Significant Impact (FONSI) should satisfy the requirements of AR 200-2 and NEPA. If, however, implementation of the INRMP will significantly impact the environment, then the installation must produce an Environmental Impact Statement (EIS).

When complying with AR 200-2, the installation must publish the FONSI and the proposed INRMP for public comment prior to actual implementation. When preparing an EA

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<sup>1</sup> Pursuant to the Sikes Act, 16 U.S.C. §§ 670a -670o, the military has authority to enter into cooperative agreements with the Secretary of Interior (U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service) and State fish and game agencies. Additionally, in accordance with 10 U.S.C. § 2671, the Army must require that all hunting, fishing, and trapping at an installation be held in accordance with State fish and game laws.

<sup>2</sup> The Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2), and also see implementing regulations at 50 C.F.R. Part 402 - INTERAGENCY COOPERATION - ENDANGERED SPECIES ACT OF 1973, AS AMENDED.

and a FONSI under AR 200-2, the installation has the latitude to use the scoping process to elicit public comments early in the drafting process or may limit the public comment to that period dictated by AR 200-2. A longer public comment period may be beneficial if the installation determines that certain aspects of the INRMP may be controversial. Past experience shows that potentially controversial aspects of an INRMP include those portions of an INRMP that determine management of:

- (a) guidelines for hunting and fishing programs (access, fees, etc.);
- (b) treatment of threatened and endangered species; and,
- (c) consumptive uses of natural resources, to include commercial forestry, grazing and agricultural leases, and mining.

The proposed action identified in the NEPA document will normally be implementation of the INRMP. The NEPA document should also include analysis of a reasonable range of alternatives, to include, at a minimum, analysis of the no-action alternative. Analysis of the no-action alternative often serves as a baseline for determining environmental effects. If implementation of the INRMP is potentially controversial, the NEPA document should contain detailed analysis of at least one additional alternative, for example, implementation of an alternative plan to the INRMP - perhaps one of the draft INRMPs or a management plan suggested by an interested group or agency.

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***Editor's Note: Beginning in May 1997, the Environmental Law Bulletin will be available on the Environmental Law Division Home Page (<http://160.147.194.12/eld/eldlink2.htm>) for download as a text file or in Adobe Acrobat format. Currently, the Bulletin is available in the environmental law files area of the LAAWS BBS.***