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Management of Unexploded Ordnance, Munitions Fragments, and Other Constituents on Military Ranges

Major Michael Egan

The Environmental Protection Agency's (EPA) Military Munitions Rule (implemented in August, 1997) identifies when conventional and chemical munitions become wastes regulated under the Resource Conservation and Recovery Act (RCRA). RCRA wastes must be handled under strict management standards for transportation, storage, treatment, and disposal. EPA has delegated RCRA implementation to most states, which can impose more stringent regulations than the Federal program. The Munitions Rule generally excludes unexploded ordnance (UXO) and munitions fragments on active and inactive ranges from RCRA coverage and postpones an EPA decision on whether to regulate these items on closed, transferring, and transferred (CTT) ranges until after the Department of Defense (DoD) completes its Range Rule.

DoD proposed the Range Rule in September, 1997 and is currently reviewing comments received during the public comment period. The Range Rule sets forth DoD's process for addressing UXO, munitions fragments, and other contaminants on ranges that are no longer needed to support the DoD mission, e.g., Formerly Used Defense Sites or Defense Base Closure and Realignment sites. Fundamental to DoD's efforts, as well as to regulatory and public acceptance, is development of a risk model that integrates explosives safety and environmental concerns. DoD expects to publish a final Range Rule in 1999.

While DoD was successful in persuading EPA that it is appropriate to exclude UXO and munitions fragments on active and inactive ranges from RCRA regulation, recent EPA comments suggest the agency may no longer support such an approach. EPA has indicated that UXO could become RCRA wastes after the passage of some unspecified period of time. Such an interpretation could subject active and inactive ranges to environmental regulations that make continued use of the ranges uncertain, at best, and impossible, at worst. Also, if UXO and munitions fragments on ranges are determined to be RCRA wastes, states may establish management standards that are more stringent than the current federal standards. Additionally, some elements within regulatory agencies and environmental groups have advocated that UXO on CTT are "hazardous substances" under the Comprehensive Environmental Response and Liability Act (CERCLA), thereby subject to release reporting and cleanup requirements that are outside DoD control. As a result of such a designation, activists could seek to use CERCLA to shut down range activities, or, as proposed in current

Superfund Reauthorization bills pending in Congress, seek fines and penalties for non-compliance. Although partnering initiatives with EPA and other stakeholders continue, it is imperative for the Army to emphasize the critical role ranges play in maintaining readiness. Implementation of the Munitions Rule, which successfully survived its initial legal challenge, and the partnering efforts to draft a pragmatic, yet protective Range Rule are designed to avoid overly restrictive regulations that will degrade readiness, while maintaining proper safeguards for human health and the environment. This is, first and foremost, a military readiness and training issue with environmental concerns rather than an environmental issue with readiness and training concerns.

Recent DoD policy initiatives are likely to draw additional attention to the issue. The Office of Secretary of Defense (OSD) has drafted guidance on Emergency Planning and Community Right to Know Act (EPCRA) Toxic Release Inventory (TRI) reporting for munitions used on active ranges. This may result in installations that previously had no reportable releases related to range activities suddenly reporting significant releases into the environment from range activities. The first report would be due July 1, 2001, if the guidance is finalized. OSD's TRI guidance could attract attention to range activities by characterizing range activities as releases of hazardous substances into the environment. The Army is developing data concerning actual emissions and residue from the firing of munitions so that any such reporting would not be overstated. Due to the number of munitions in the inventory and the nature of the testing, it will require several years to complete this effort. While the purposes and standards for reporting under CERCLA and EPCRA are different, the designation of munitions (or their constituents) as hazardous substances under one law will have a spill-over effect into the other law's requirements.

OSD has also drafted Department of Defense Instructions (DODI) that could require periodic clearance of UXO on active and inactive ranges, health risk characterizations, public outreach, and other actions. The Services have non-concurred in the draft DODIs, but it is apparent that some level of information collection and/or response actions on active ranges may be a future requirement.

The cumulative result of these actions will be ever-increasing visibility of range operations to the public and resulting pressure to monitor, if not reduce or curtail, operations that are perceived to have adverse impacts to the environment. Efforts to coordinate responses to these potential challenges require the close cooperation of the environmental and operational communities.¹ (MAJ Egan/CPL)

Recent Developments in Privatization Initiatives

Lieutenant Colonel Allison Polchek

Privatization continues to develop at a remarkable pace. To assist the field in this fast moving area, a number of tools are being developed. In the area of utilities privatization, the Assistant Chief of Staff for Installation Management (ACSIM) has issued guidance, in a question-and-answer format, regarding compliance with the National

¹ This article was originally presented to the Chief of Staff of the Army for inclusion in his weekly summary. The weekly summary highlights issues of national importance to be distributed to all general officers.

Environmental Policy Act (NEPA).² Copies of this guidance may be obtained from this office. In the near future, ACSIM plans to issue guidance regarding preparation of Environmental Baseline Surveys (EBS). The release of this guidance will be discussed in future articles. ACSIM is also examining future compliance issues related to waste water treatment at installations privatizing treatment or collection systems.

The housing privatization initiative has undergone the most intense change. Formerly entitled "Capital Venture Initiative," the concept is now known as "Residential Communities Initiative." This change represents a shift in philosophy whereby installations and the business community will act as partners developing a "total" residential living experience for military members and their families. In order to assist with NEPA compliance, ACSIM and HQUSACE are nearing completion on a boilerplate environmental assessment and NEPA instruction manual. This tool should be available later this year. (LTC Polchek/RNR)

Storage and Disposal of Non-Department of Defense (DoD)-Owned Toxic and Hazardous Materials -- Update³

Mr. Chris Wendelbo

This article focuses on recent amendments to the Military Construction Authorization Act, [hereinafter the Act]⁴ which may affect installations that store non-DoD toxic or hazardous materials. The Act now provides three new statutory exemptions that allow non-DoD (private and other agency) entities to store, treat, and dispose of non-DoD hazardous toxic and hazardous substances on DoD property.⁵ To facilitate timeliness, the approval process for instituting these exemptions has been delegated down the chain of command.

The Act's pre-amendment requirements were particularly onerous for specific installations. These include facilities closing pursuant to Defense Closure and Realignment Act (BRAC) actions, installations contracting for tenant services, and those engaged in privatizing installation maintenance, housing, or utility services.⁶ The recent amendments, however, bring the Act in line with current management trends for DoD installations. First, the statute was amended to allow for the storage, treatment, or disposal of non-DoD toxic or hazardous materials used in connection with a Department of Defense activity or with a service performed at a DoD installation for the benefit of DoD.⁷ Second, the Act now **ELD** exempts the storage of non-DoD toxic or hazardous material generated in connection with

² 42 U.S.C § 4321, *et. seq.*

³ See, Major Allison Polchek, *Storage and Disposal on Non-Department of Defense (DoD) Toxic and Hazardous Materials*, Volume 5, Number 4, ELD Bulletin, January 1998.

⁴ Military Construction Authorization Act, 1985, 10 U.S.C § 2692, Pub. L. No. 98-407, Title VIII, Part A § 805(a), 98 Stat. 1520 (1985).

⁵ National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-88 § 343 (Nov. 11, 1997).

⁶ 10 U.S.C. § 2692.

⁷ 10 U.S.C. § 2692(b)(1), Authorization Act § 343(b).

the authorized and compatible use of a facility.⁸ Finally, the amended act allows, under contract agreement, the treatment and disposal of non-DoD toxic or hazardous material if it is required or generated in connection with a facility's authorized and compatible use.⁹

The Secretary of the Army has delegated approval authority for these exemptions to the Assistant Secretary of the Army (Installations, Logistics, and Environment).¹⁰ In limited circumstances involving only the storage of non-DoD owned toxic and hazardous materials,¹¹ the approval authority has been delegated further to the MACOM Commander, with authority to further delegate to a Flag level Chief of Staff.¹² Sample forms to request an exemption, and the memorandums delegating authority are available by calling the author at the Army ELD Office, (703) 696-1597, DSN 426-1597. (Chris Wendelbo/RNR)

No RCRA Double Jeopardy

Major Robert Cotell

A recent District court case in Missouri provides some encouraging news for those installations struggling to satisfy two masters – the State and the federal Environmental Protection Agency (EPA). The court rejected an argument by EPA that it may take an administrative action when a State has already been delegated authority under the Resource Conservation and Recovery Act (RCRA).¹³ The court held that the EPA cannot seek to take action against a State-regulated entity unless it also withdraws the State's authority to administer RCRA. This is good news in the case where an installation is negotiating with a delegated State and suddenly EPA files a complaint.

In *Harmon Industries, Inc. v. Browner*,¹⁴ the plaintiff ("Harmon") was a manufacturer of safety equipment for the railroad industry. For fourteen years, Harmon's employees used organic solvents to clean equipment at one of its plants. Every one to three weeks, unknown to Harmon, maintenance employees would throw used solvent residues out the back door of the plant. Over the years about thirty gallons were dumped on the grounds. The discarded solvents were hazardous wastes under RCRA.

In 1987, Harmon discovered what the employees were doing and ordered the practice to cease. Harmon then hired consultants to investigate the effects of the disposal. The report of the investigation concluded that contaminants were in the soil but there was no danger to human health. Harmon then reported the disposal to the Missouri Department

⁸ 10 U.S.C. § 2692(b)(9), Authorization Act § 343(d).

⁹ 10 U.S.C. § 2692(b)(10), Authorization Act § 343(e).

¹⁰ Memorandum, Secretary of the Army, OSA, 4 Aug 1998, subject: Delegation of Authority under Title 10 U.S.C. § 2692.

¹¹ 10 U.S.C. § 2692(b)(9).

¹² Memorandum, Assistant Secretary of the Army (Installations, Logistics, and Environment), ASA (I, L, and E) 3 Sep 1998, subject: Delegation of Authority under Title 10 U.S.C. § 2692.

¹³ 42 U.S.C. § 6901, *et. seq.*

¹⁴ 47 ERC (BNA) 1229, 1998 U.S. Dist. LEXIS 13751 (W.D. Mo., August 25, 1998).

of Natural Resources (MDNR). EPA had authorized MDNR to administer its own hazardous waste program under RCRA. Since first being authorized to administer a program EPA had never withdrawn the State's authority.

After meeting with Harmon, MDNR oversaw the investigation and clean up of the Harmon facility. The State approved a variety of investigations by Harmon concerning the health risks of the contamination. The costs of the studies were over \$1.4 million. Ultimately, the State approved a post-closure permit for the facility, which anticipated additional costs of over \$500,000 during a period of over thirty years.

In 1991, the State filed a petition against Harmon in the State court, along with a consent decree signed by both Harmon and MDNR. The court approved the consent decree that specifically provided that Harmon's compliance with the decree constituted full satisfaction and release from all claims arising from allegations in the petition. The consent decree did not impose a monetary penalty.

Earlier, EPA had notified the State of its view that fines should be assessed against Harmon. After the petition had been filed and approved by the State, EPA filed an administrative complaint against Harmon seeking over two million dollars in penalties. In its complaint, EPA did not allege that the State had exceeded its authority. In addition, the complaint did not assert that the site posed a health risk, but merely demanded a fine. Harmon demanded a hearing. The administrative law judge (ALJ) found for EPA on the substantive counts of the complaint but reduced the fine to \$586,716. Harmon appealed to the Environmental Appeals Board (EAB), who affirmed the ALJ. Harmon then brought the case to Federal District Court on the issue of the authority of EPA to take an enforcement action where the State had already entered into a consent decree.

The court found for Harmon. The court concluded that the plain language of Section 3006(b) of RCRA provides that State enforcement programs operate instead of Federal programs. As such, the concept of co-existing powers is inconsistent with EPA's delegation of authority. Such a division of power was also anticipated in the memorandum of understanding (MOU) between EPA and the State that defined each party's responsibilities. The MOU required EPA to provide notice to the State prior to taking an enforcement action, even if the State elects not to act. Likewise, under the MOU, if the EPA recommends an assessment of fines, it must refer the matter to the State Attorney General. However, according to the court, neither the agreement, nor RCRA, gives EPA authority to override the State once it determines an appropriate penalty. Section 3006(e) of RCRA gives EPA only the option of withdrawing authorization of a State RCRA program. The EPA does not possess the option to reject part of a State program or to censor a State's course of action on an incident-by-incident basis.

Although the case reflects the view of only one Federal District Court and is presently subject to appeal, it may prove quite useful for an installation ELS responding to an EPA complaint. The case should be cited as the basis for an affirmative defense in all enforcement actions where the State has taken any administrative action and EPA subsequently files a complaint. Furthermore, although the case involved only the imposition of additional fines, it is not limited to these facts. Any action taken by the State to coerce

compliance on the part of an installation should preclude similar enforcement by EPA. Unless EPA specifically withdraws the State authorization to administer the program, EPA should not take independent action. Otherwise an installation does not know with whom it should negotiate during a State enforcement action. As the Court pointed out in *Harmon* such independent action by EPA would be “schizophrenic” and result in uncertainty in the public mind. (MAJ Cotell/CPL)

The CERCLA Permit Exclusion – a Reminder

Ms. Kate Barfield

This is a quick reminder – *you should not pursue permits for on-site CERCLA remediation activities*. Permits are specifically excluded from CERCLA, which states that no “...federal, state or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite...”¹⁵ This exclusion is based on Congress’ recognition that CERCLA cleanups should be spared the delay, duplication, and additional costs involved in acquiring permits for remediation. If you are uncertain as to whether an activity is considered “onsite” or if you have a question regarding CERCLA’s permit exclusion, contact your ELS. (Kate Barfield/RNR)

¹⁵ 42 U.S.C. § 9621(e). See *also*, the NCP provisions regarding permits at 40 C.F.R. § 300.4000(e).