

May 2, 2003

The Honorable John D. Dingell
Ranking Minority Member
The House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Dingell:

The purpose of this correspondence is to share the views of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) regarding the amendments to fundamental definitions in both the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) currently proposed by the Department of Defense (DoD) in its requested provisions for the Readiness and Range Preservation Initiative (RRPI) for inclusion in the FY 2004 Defense Authorization Act.

ASTSWMO's members are the State managers of hazardous waste, solid waste, and cleanup programs, who are engaged full time in the regulatory and remediation activities of their State environmental agencies, and have hands-on familiarity with the implementation of federal and State statutes governing those activities. The Association believes these member views are relevant and useful to Congressional decision-makers currently evaluating the DoD proposed statutory amendments. We offer these views in the hope that they will assist in the constructive debate now taking place in the Congress. We fully support the efforts of the Congress and the Administration to continue to improve the superb readiness of our Armed Forces, and our efforts have focused on a constructive approach to finding ways to make the application of hazardous waste laws to military ranges used for live-fire training of our forces reflect a balance of military and civil needs. We are grateful for the opportunity to share our views with you as you craft this legislation.

Our members have been following the debate over DoD range encroachment issues for some time, and have analyzed the range of impacts the RCRA, CERCLA and definitional proposals would have on their ability to effectively operate their delegated State programs. To summarize the results of that review, we have observed:

- The proposal to amend the definition of "solid waste" in Section 2019 of DoD's RRPI would remove or restrict State authority to take action under their RCRA authorized hazardous waste programs in all but a number of enumerated conditions on "operational

DoD Sites with Known Perchlorate Contamination

State	State "Advisories"	City	Facility	Status	Contamination Identified	Max. Conc. Water = ppb Soil = ppm	Reference
AL		Huntsville	Redstone Arsenal Missile Plant	NPL	Groundwater	19,000	EPA June 2, 2003
					Soil	NL	DoD NPL Oct03
					Springs/Seeps	37	EPA April 2003
AZ	14 ppb	Bellemont	Camp Navajo		Groundwater	NL	DoD Oct03
		Tucson	Davis Monthan Air Force Base		Soil	28	DoD Survey2
		Yuma	Yuma Marine Corps Air Station	NPL	Groundwater	4.21	DoD NPL Oct03
Surface Water	4.56				DoD NPL Oct03		
CA	4 ppb	Marysville	Beale Air Force Base		Groundwater	500	CA SWRCB/DTSC
		Ridgecrest	China Lake Naval Weapons Station		Groundwater	560	CA SWRCB/DTSC
		Edwards	Edwards Air Force Base	NPL	Groundwater	160,000	EPA June 2, 2003
					Soil	2,100	DoD Survey2
		El Toro	El Toro Marine Corps Air Station	NPL Closed	Groundwater	380	EPA June 2, 2003
		Rancho Cordova	Mather Air Force Base*	NPL Closed	Drinking Water	120	EPA June 2, 2003
					Groundwater	1,800	EPA June 2, 2003
		Sacramento	McClellan Air Force Base	NPL Closed	Groundwater	6	CA SWRCB/DTSC
		Herlong	Sierra Army Depot		Groundwater	8	CA SWRCB/DTSC
					Soil	7.52	CA SWRCB/DTSC
		Fairfield	Travis Air Force Base	NPL	Groundwater	NL	DoD Oct03
Vandenberg AFB	Vandenberg Air Force Base		Groundwater	517	CA SWRCB/DTSC		
			Soil	NL	DoD Letter to CalEPA		
San Nicholas Island	US Navy Firing Range		Drinking Water	20	CADHS 2003		
			Soil	88	CA SWRCB/DTSC		
CO		Pueblo	Pueblo Chemical Depot		Groundwater	180	EPA June 2, 2003
GA		Moody AFB	Moody Air Force Base		Soil	46.9	DoD Survey2
IA		Middletown	Iowa Army Ammunition Plant	NPL	Groundwater	9	EPA June 2, 2003
						30	Interview 02.25.04-EPA official
MA	1 ppb	Bourne	Massachusetts Military Reservation	NPL	Drinking Water	1.75	DoD Oct03
					Groundwater	300	DoD NPL Oct03
MD	1 ppb	Aberdeen	Aberdeen Proving Ground	NPL	Drinking Water	5	DoD NPL Oct03
					Groundwater	24	EPA June 2, 2003
					Soil	0.015	DoD NPL Oct03
		Adelphi	Adelphi Laboratory Center*		Groundwater	NL	DoD Survey2
		Odenton	Fort Meade	NPL	Groundwater	NL	DoD Oct03

DoD Sites with Known Perchlorate Contamination

State	State "Advisories"	City	Facility	Status	Contamination Identified	Max. Conc. Water = ppb Soil = ppm	Reference
MD	1 ppb	Indian Head	Naval Surface Warfare Center	NPL	Groundwater	25,000	DoD Survey2
					Soil	NL	DoD Survey2
					Surface Water	3,000	DoD Survey2
		White Oak	Naval Surface Warfare Center	Closed	Groundwater	798	EPA April 2003
MO		Independence	Lake City Army Ammunition Plant	NPL	Groundwater	79	DoD Oct03
					Soil	0.015	DoD NPL Oct03
NJ		Dover	Picatinny Arsenal	NPL	Groundwater	627	EPA June 2, 2003
NM	1 ppb	Clovis	Cannon Air Force Base		Drinking Water	46	EPA April 2003
					Soil	NL	DoD Oct03
					Surface Water	6.1	DoD Oct03
		Gallup	Fort Wingate Depot Activity		Groundwater	2,860	EPA June 2, 2003
					Soil	NL	EPA June 2, 2003
		Alamogordo	Hollomon Air Force Base		Groundwater	40	EPA June 2, 2003
					Soil	NL	EPA June 2, 2003
					Surface Water	16,000	EPA June 2, 2003
		Albuquerque	Kirtland Air Force Base		Soil	NL	EPA June 2, 2003
		Melrose	Melrose Air Force Range		Water Supply Well	40.7	EPA April 2003
		Las Cruces	White Sands Missile Range		Groundwater	30,000	DoD Survey2
					Soil	NL	EPA April 2003
OK		McAlester	McAlester Army Ammunition Plant		Surface Water	NL	DoD Oct03
OR		Hermiston	Umatilla Army Depot	NPL	Groundwater	10	EPA June 2, 2003
SC		Shaw AFB	Poinsett Range		Groundwater	8.4	DoD Oct03
TX	4 ppb, 7 ppb or 10 ppb	San Antonio	Camp Bullis		Groundwater	NL	DoD Oct03
					Soil	0.009	DoD Oct03
		Texarkana	Lone Star Army Ammunition Plant	NPL	Groundwater	23	EPA June 2, 2003
					Soil	0.009	DoD Oct03
					Surface Water	6	EPA June 2, 2003
		Karnak	Longhorn Army Ammunition Depot	NPL	Groundwater	247,000	DoD NPL Oct03
Soil	163				DoD NPL Oct03		
			Surface Water	11,000	ATSDR		

DoD Sites with Known Perchlorate Contamination

State	State "Advisories"	City	Facility	Status	Contamination Identified	Max. Conc. Water = ppb Soil = ppm	Reference		
TX	4 ppb, 7 ppb or 10 ppb	McGregor	McGregor Naval Weapons Plant	Closed*	Groundwater	91,000	EPA June 2, 2003		
					Soil	NL	EPA June 2, 2003		
					Springs	22,000	DoD		
					Surface Water	5,600	DoD		
		Texarkana	Red River Army Depot		Groundwater	80	EPA June 2, 2003		
					Soil	NL	DoD Oct03		
Storm Water	82				DoD Survey2				
					Surface Water	NL	DoD Oct03		
UT		Ogden	Hill Air Force Base	NPL	Drinking Water	NL	DoD Oct03		
					Groundwater	70	DoD Oct03		
					Soil	NL	DoD Oct03		
		Great Salt Lake Desert	Hill AFB, Utah Test and Training Range		Groundwater	84	DoD Survey2		
					Quench Water	4,668	DoD Survey2		
					Soil	0.25	DoD Survey2		
		Magna	Naval Industrial Reserve Ordnance Plant (NIROP) facility at Alliant Techsystems		NA	NL	DoD Survey2		
		WA		Vancouver	Camp Bonneville	Closed	Groundwater	200	EPA June 2, 2003
							Soil	NL	EPA June 2, 2003
WV		Rocket Center	Allegany Ballistics Lab	NPL	Groundwater	26,200	DoD Survey2		
					Surface Water	400	DoD NPL Oct03		

Notes:

*: source of perchlorate contamination may have originated from another site.

Closed: site closed under the Defense Base Realignment and Closure (BRAC) process. See <http://www.defenselink.mil/brac/docs/1995com.pdf>.

Closed*: site closed by DoD and undergoing divestiture. See DoDSurvey2.

Max. Conc.: maximum concentration reported.

NL: not listed.

NPL: site is on the Superfund National Priorities List. See http://www.house.gov/commerce_democrats/DODexemptions/superfundsites.pdf.

ppb: parts per billion.

ppm: parts per million.

Regulation Type: Based on a PowerPoint presentation by Kevin Mayer, EPA Region 9. See <http://www.swrcb.ca.gov/rwqcb4/html/perchlorate/presentations/PerchlorateLosAngl%20Mar'03.ppt>.

This data represents government-sourced information reviewed to date. It does not represent the full universe of DoD sites contaminated by perchlorate because a systematic assessment of DoD sites has not been conducted.

Sources:

ATSDR: Agency for Toxic Substances and Disease Registry. Public Health Assessment: Longhorn Army Ammunition Plant, Karnack, Harrison County, Texas. See http://www.atsdr.cdc.gov/HAC/PHA/longhorn/laa_toc.html.

CADHS 2003: California Department of Health Services. December 1, 2003. Perchlorate in California Drinking Water: Monitoring Update. See <http://www.dhs.ca.gov/ps/ddwem/chemicals/perchl/monitoringupdate.htm>.

CA SWRCB/DTSC: California State Water Resources Control Board & Department of Toxic Substances Control. See http://geotracker3.ecointeractive.com/slic_perchlorate/report_confirmed.asp.

DoD: Department of Defense. Document on perchlorate issues at the Naval Weapons Industrial Reserve Plant McGregor, Texas. See <https://www.denix.osd.mil/denix/Public/Library/Water/Perchlorate/McGregor/mcgregor.html>.

DoD Letter to CalEPA: Department of Defense. Document released by letter dated July 3, 2003 to CalEPA. See https://www.denix.osd.mil/denix/Public/Library/Water/Perchlorate/Correspondence/lowry_3jul03.pdf.

DoD NPL Oct03: Department of Defense. Document released by letter dated Oct. 6, 2003 to Rep. John D. Dingell and Rep. Hilda Solis. See https://www.denix.osd.mil/denix/Public/Library/Water/Perchlorate/Correspondence/enclosure5npl_facility_sampling.pdf

DoD Oct03: Department of Defense. Document released by letter dated Oct. 6, 2003 to Rep. John D. Dingell and Rep. Hilda Solis. See https://www.denix.osd.mil/denix/Public/Library/Water/Perchlorate/Correspondence/enclosure4sampling_since2001.pdf.

DoD Survey2: Department of Defense. 2001 perchlorate occurrence survey produced on August 1, 2003 to the Minority Staff, Committee on Energy & Commerce.

EPA April 2003: Environmental Protection Agency. Memo and table by Kevin Mayer, EPA Region 9, on perchlorate occurrences. See http://www.clu-in.org/contaminantfocus/default.focus/sec/perchlorate/cat/Environmental_Occurrence/.

EPA June 2, 2003: Environmental Protection Agency. Document entitled "Known Perchlorate Releases in the U.S. - As of June 2, 2003." Document released by letter dated June 27, 2003 to Rep. John D. Dingell and Rep. Hilda Solis.

Interview 02.25.04-EPA official.

This fact sheet answers the most frequently asked health questions (FAQs) about 2,4,6-trinitrotoluene. For more information, call the ATSDR Information Center at 1-888-422-8737. This fact sheet is one in a series of summaries about hazardous substances and their health effects. It's important you understand this information because this substance may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present.

SUMMARY: Exposure to 2,4,6-trinitrotoluene occurs through eating, drinking, touching, or inhaling contaminated soil, water, food, or air. Health effects reported in people exposed to 2,4,6-trinitrotoluene include anemia, abnormal liver function, skin irritation, and cataracts. This substance has been found in at least 20 of the 1,430 National Priorities List sites identified by the Environmental Protection Agency.

What is 2,4,6-trinitrotoluene?

(Pronounced 2,4,6-trī/ nī'trō-tōl/ yōō ēn)

2,4,6-Trinitrotoluene is a yellow, odorless solid that does not occur naturally in the environment. It is commonly known as TNT and is an explosive used in military shells, bombs, and grenades, in industrial uses, and in underwater blasting.

2,4,6-Trinitrotoluene production in the United States occurs solely at military arsenals.

What happens to 2,4,6-trinitrotoluene when it enters the environment?

- 2,4,6-Trinitrotoluene enters the environment in waste waters and solid wastes resulting from the manufacture of the compound, the processing and destruction of bombs and grenades, and the recycling of explosives.
- It moves in surface water and through soils to groundwater.
- In surface water, it is rapidly broken down into other chemical compounds by sunlight.
- It is broken down more slowly by microorganisms in water and sediment.
- Small amounts of it can accumulate in fish and plants.

How might I be exposed to 2,4,6-trinitrotoluene?

- Drinking contaminated water that has migrated from chemical waste disposal sites.
- Breathing contaminated air.
- Eating contaminated foods such as fruits and vegetables.
- Eating contaminated soil.

How can 2,4,6-trinitrotoluene affect my health?

Workers involved in the production of explosives who were exposed to high concentrations of 2,4,6-trinitrotoluene in workplace air experienced several harmful health effects, including anemia and abnormal liver function.

Similar blood and liver effects, as well as spleen enlargement and other harmful effects on the immune system, have been observed in animals that ate or breathed 2,4,6-trinitrotoluene.

Other effects in humans include skin irritation after prolonged skin contact, and cataract development after long-term (365 days or longer) exposure.

ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html>

It is not known whether 2,4,6-trinitrotoluene can cause birth defects in humans. However, male animals treated with high doses of 2,4,6-trinitrotoluene have developed serious reproductive system effects.

How likely is 2,4,6-trinitrotoluene to cause cancer?

The EPA has determined that 2,4,6-trinitrotoluene is a possible human carcinogen. This assessment was based on a study in which rats that ate 2,4,6-trinitrotoluene for long periods developed tumors of the urinary bladder.

Is there a medical test to show whether I've been exposed to 2,4,6-trinitrotoluene?

Laboratory tests can detect 2,4,6-trinitrotoluene or its breakdown products in blood or urine. Detection of its breakdown products in urine is a clear indication of exposure. This test isn't available at most doctors' offices, but can be done at special laboratories that have the right equipment.

A simpler, but less specific test of 2,4,6-trinitrotoluene exposure is a change in the color of urine to amber or deep red due to the presence of its breakdown products. However, none of these tests can predict whether a person will experience any health effects.

Has the federal government made recommendations to protect human health?

Since 2,4,6-trinitrotoluene is explosive, flammable, and toxic, EPA has designated it as a hazardous waste.

The Department of Transportation (DOT) specifies that when 2,4,6-trinitrotoluene is shipped, it must be wet with at least 10% water (by weight) and it must be clearly labeled as a flammable solid.

The Occupational Safety and Health Administration (OSHA) set a maximum level of 1.5 milligrams of 2,4,6-trinitrotoluene per cubic meter of workplace air (1.5 mg/m³) for an 8-hour workday for a 40-hour workweek.

The National Institute for Occupational Safety and Health (NIOSH) and the American Conference of Governmental Industrial Hygienists (ACGIH) recommend an exposure limit of 0.5 mg/m³ in workplace air for a 40-hour workweek.

Glossary

- Anemia: A decreased ability of the blood to transport oxygen.
- Breakdown product: A substance that is formed when a chemical breaks down in the body.
- Carcinogen: A substance that can cause cancer.
- CAS: Chemical Abstracts Service.
- Cataract: Clouding of the lens or capsule of the eye, causing partial or total blindness.
- Milligram (mg): One thousandth of a gram.

References

Agency for Toxic Substances and Disease Registry (ATSDR). 1995. Toxicological profile for 2,4,6-trinitrotoluene (update). Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

Where can I get more information? For more information, contact the Agency for Toxic Substances and Disease Registry, Division of Toxicology, 1600 Clifton Road NE, Mailstop F-32, Atlanta, GA 30333. Phone: 1-888-422-8737, FAX: 770-488-4178. ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html> ATSDR can tell you where to find occupational and environmental health clinics. Their specialists can recognize, evaluate, and treat illnesses resulting from exposure to hazardous substances. You can also contact your community or state health or environmental quality department if you have any more questions or concerns.



This fact sheet answers the most frequently asked health questions (FAQs) about RDX. For more information, call the ATSDR Information Center at 1-888-422-8737. This fact sheet is one in a series of summaries about hazardous substances and their health effects. It's important you understand this information because this substance may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present.

SUMMARY: RDX is an explosive. Few people will be exposed to RDX. Exposure to large amounts can cause seizures. RDX has been found in at least 16 of the 1,430 National Priorities List sites identified by the Environmental Protection Agency (EPA).

What is RDX?

(Pronounced RDX)

RDX stands for Royal Demolition explosive. It is also known as cyclonite or hexogen. The chemical name for RDX is 1,3,5-trinitro-1,3,5-triazine. It is a white powder and is very explosive.

RDX is used as an explosive and is also used in combination with other ingredients in explosives. Its odor and taste are unknown. It is a synthetic product that does not occur naturally in the environment. It creates fumes when it is burned with other substances.

What happens to RDX when it enters the environment?

- Particles of RDX can enter the air when it is disposed of by burning.
- RDX can enter the water from disposal of waste water from Army ammunition plants, and it can enter water or soil from spills or leaks from improper disposal at these plants or at hazardous waste sites.
- RDX dissolves very slowly in water, and it also evaporates very slowly from water.

- It does not cling to soil very strongly and can move into the groundwater from soil.
- RDX can be broken down in air and water in a few hours, but it breaks down more slowly in soil.
- RDX does not build up in fish or in people.

How might I be exposed to RDX?

Few people will be exposed to RDX. Fewer than 500 people are known to work with RDX. These people can be exposed by:

- Breathing dust with RDX in it.
- Getting RDX on their skin.
- Drinking contaminated water or touching contaminated soil near factories that produce RDX.

How can RDX affect my health?

RDX can cause seizures (a problem of the nervous system) in humans and animals when large amounts are inhaled or eaten. The effects of long-term (365 days or longer), low-level exposure on the nervous system are not known. Nausea and

ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html>

vomiting have also been seen. No other significant health effects have been seen in humans.

Rats and mice that ate RDX for 3 months or more had decreased body weights and slight liver and kidney damage.

It is not known whether RDX causes birth defects in humans; it did not cause birth defects in rabbits, but it did result in smaller offspring in rats. It is not known whether RDX affects reproduction in people.

How likely is RDX to cause cancer?

The EPA has determined that RDX is a possible human carcinogen.

In one study, RDX caused liver tumors in mice that were exposed to it in the food. However, carcinogenic effects were not noted in rat studies and no human data are available.

Is there a medical test to show whether I've been exposed to RDX?

Medical tests are available that can measure RDX levels in your blood or urine. However, these tests can only be used if you have come in contact with RDX in the last few days. These tests can determine if you have been exposed to RDX, but they cannot be used to determine how much RDX entered your body.

These tests aren't available at most doctors' offices, but can be done at special laboratories that have the right equipment. However, they cannot be used to determine long-term health effects from RDX.

The usual immediate health effects (seizures, muscle twitching, or vomiting) from very high exposures would probably occur before you had the blood or urine test.

Has the federal government made recommendations to protect human health?

The Department of Transportation (DOT) has many regulations on the transportation of explosives.

The EPA recommends a drinking water guideline of 2 micrograms (μg) RDX per liter for lifetime exposure for adults.

The National Institute for Occupational Safety and Health (NIOSH) has recommended an exposure limit of 1.5 milligrams RDX per cubic meter of air (1.5 mg/m^3) for a 10-hour workday, 40-hour workweek.

The NIOSH short-term exposure limit, which is the highest level of RDX that they recommend workers be exposed to for 15 minutes, is 3 mg/m^3 .

The American Conference of Governmental Industrial Hygienists (ACGIH) also recommends an exposure limit of 1.5 mg/m^3 in workplace air for an 8-hour workday, 40-hour workweek.

Glossary

Carcinogen: A substance that can cause cancer.

CAS: Chemical Abstracts Service.

Dissolve: To disappear gradually.

Evaporate: To change into a vapor or a gas.

Microgram (μg): One millionth of a gram.

Milligram (mg): One thousandth of a gram.

Tumor: An abnormal mass of tissue.

References

Agency for Toxic Substances and Disease Registry (ATSDR). 1995. Toxicological profile for RDX. Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

Where can I get more information? For more information, contact the Agency for Toxic Substances and Disease Registry, Division of Toxicology, 1600 Clifton Road NE, Mailstop F-32, Atlanta, GA 30333. Phone: 1-888-422-8737, FAX: 770-488-4178. ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html> ATSDR can tell you where to find occupational and environmental health clinics. Their specialists can recognize, evaluate, and treat illnesses resulting from exposure to hazardous substances. You can also contact your community or state health or environmental quality department if you have any more questions or concerns.



This fact sheet answers the most frequently asked health questions (FAQs) about 2,4- and 2,6-dinitrotoluene. For more information, call the ATSDR Information Center at 1-888-422-8737. This fact sheet is one in a series of summaries about hazardous substances and their health effects. It's important you understand this information because this substance may harm you. The effects of exposure to any hazardous substance depend on the dose, the duration, how you are exposed, personal traits and habits, and whether other chemicals are present.

HIGHLIGHTS: 2,4- and 2,6-Dinitrotoluene are used in a number of industries. Exposure to high levels may affect the nervous system and the blood. Both are known to cause cancer in laboratory animals. These substances have been found in at least 69 (2,4-DNT) and 53 (2,6-DNT) of the 1,467 National Priorities List sites identified by the Environmental Protection Agency (EPA).

What are 2,4-dinitrotoluene (2,4-DNT) and 2,6-dinitrotoluene (2,6-DNT)?

(Pronounced 2,4- and 2,6-dī' nī trō tōl' yōō ēn)

Both 2,4-DNT and 2,6-DNT are pale yellow solids with a slight odor. They are two of the six forms of the chemical called dinitrotoluene (DNT).

DNT is not a natural substance. It is made by mixing toluene with nitric acid. DNT is usually used to make flexible polyurethane foams used in the bedding and furniture industries. DNT is also used to produce explosives, ammunition, and dyes. It is also used in the air bags of automobiles.

What happens to 2,4- and 2,6-DNT when they enter the environment?

- DNT has been found in the soil, surface and ground water, and air.
- It has been found at hazardous waste sites that contain buried ammunition wastes.
- DNT does not usually evaporate; it is found mostly in the air of manufacturing plants.
- DNT does not stay in the environment because it is broken down by sunlight and by bacteria.

- In water, DNT tends to be more stable and less likely to break down.
- DNT can be transferred to plants by root uptake from contaminated water or soil.

How might I be exposed to 2,4- and 2,6-DNT?

- Most people will not be exposed to 2,4- and 2,6-DNT.
- Breathing contaminated air near manufacturing plants.
- Drinking contaminated water or eating contaminated food.
- Breathing air near a hazardous waste site that contains buried ammunition wastes.

How can 2,4- and 2,6-DNT affect my health?

Workers who have been exposed to 2,4-DNT showed a higher than normal death rate from heart disease. However, these workers were exposed to other chemical as well. 2,4- and 2,6-DNT may also affect the nervous system and the blood of exposed workers.

One study showed that male workers exposed to DNT had reduced sperm counts, but other studies did not confirm this finding.

ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html>

Animals exposed to high levels of DNT had lowered number of sperm and reduced fertility. Animals also showed a reduction in red blood cells, nervous system disorders, and liver and kidney damage.

How likely are 2,4- and 2,6-DNT to cause cancer?

In animal studies, both 2,4- and 2,6-DNT caused liver cancer in rats. There are no studies on the effects of 2,4- and 2,6-DNT on people. The International Agency for Research on Cancer (IARC) has determined that 2,4- and 2,6-DNT are possible human carcinogens.

How can 2,4- and 2,6-DNT affect children?

It is unlikely that children would be exposed to 2,4- and 2,6-DNT unless they live near a manufacturing plant or a waste site that contains these compounds. Children are at risk of exposure if DNT has leached into a community's drinking water supply from a nearby hazardous waste site, since they drink more fluids in proportion to their body weight than adults. Children playing in DNT-contaminated surface water might be more exposed than adults, because of their larger skin area in proportion to their body weight.

The health effects of DNT on children have not been studied. It is not known if DNT affects children differently than adults, or what long-term effects might appear in adults exposed as children.

How can families reduce the risk of exposure to 2,4- and 2,6-DNT?

If your doctor finds that you have been exposed to significant amounts of 2,4- or 2,6-DNT, ask if children may also be exposed. When necessary your doctor may need to ask your state Department of Public Health to investigate.

Is there a medical test to show whether I've been exposed to 2,4- and 2,6-DNT?

Both 2,4- and 2,6-DNT and the chemicals they change into in the body can be measured in the blood and urine. The urine must be collected within 24 hours of exposure. These tests cannot show how much 2,4- or 2,6-DNT a person has been exposed to. They are not usually available in a doctor's office, but they can be performed in special laboratories.

Has the federal government made recommendations to protect human health?

EPA requires that spills or accidental releases of more than 1,000 pounds of DNT be reported to the EPA.

The Occupational Safety and Health Administration (OSHA) requires that total DNT (all forms) in workplace air should not exceed 1.5 mg per cubic meter (1.5 mg/m³) for an 8-hour workday, 40-hour workweek.

The National Institute of Occupational Safety and Health (NIOSH) recommends a workplace limit of 1.5 mg/m³. This is the average concentration for a 10-hour day over a 40-hour workweek.

References

Agency for Toxic Substances and Disease Registry (ATSDR). 1998. Toxicological profile for 2,4- and 2,6-dinitrotoluene. Atlanta, GA: U.S. Department of Health and Human Services, Public Health Service.

Where can I get more information? For more information, contact the Agency for Toxic Substances and Disease Registry, Division of Toxicology, 1600 Clifton Road NE, Mailstop F-32, Atlanta, GA 30333. Phone: 1-888-422-8737, FAX: 770-488-4178. ToxFAQs Internet address via WWW is <http://www.atsdr.cdc.gov/toxfaq.html> ATSDR can tell you where to find occupational and environmental health clinics. Their specialists can recognize, evaluate, and treat illnesses resulting from exposure to hazardous substances. You can also contact your community or state health or environmental quality department if you have any more questions or concerns.



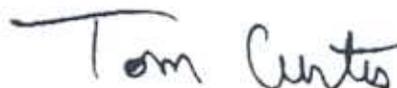
Our organizations also oppose the DoD's proposed amendment to the Safe Drinking Water Act (SDWA) to provide that a federal agency has a right of removal to a federal district court of any proceeding in a state court against such agency. We oppose this provision because it could interfere with the ability of states and local governments to protect drinking water supplies and public health. The SDWA specifically states that nothing in the SDWA or any other law of the United States shall be construed to prohibit, exclude, or restrict any state or local government from bringing any action or obtaining any remedy or sanction in any state or local court against an agency of the federal government under state or local law to enforce any requirement respecting the provision of safe drinking water. DoD proposes to negate this provision in the SDWA.

The DoD's proposals would leave many contaminated lands and sources of drinking water unprotected and undermine the ability of water systems to provide Americans with clean, safe drinking. We respectfully urge you to oppose enacting these provisions into law.

Sincerely,



Diane VanDe Hei
Executive Director
Association of Metropolitan Water Agencies



Tom Curtis
Deputy Executive Director
American Water Works Association



Peter Cook
Executive Director
National Association of Water Companies



Stephen Hall
Executive Director
Association of California Water Agencies

CC: Committee Members

**Association of Metropolitan Water Agencies
American Water Works Association
National Association of Water Companies
Association of California Water Agencies**

April 25, 2003

The Honorable John Warner
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Carl Levin
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Senators Warner and Levin:

We are writing today to express the opposition of our organizations to certain provisions in the Department of Defense's Readiness and Range Preservation Initiative, the broadened definition of "operational range," and the DoD's proposal to secure the right of removal of Safe Drinking Water Act cases from state courts to federal courts. If enacted, these provisions could greatly impact the safety of water supplies throughout the country and force consumers to bear the costs for cleaning up DOD-related contamination and securing alternative water sources.

In the Readiness and Range Preservation Initiative, new definitions of "solid waste" and "release" would exempt the DoD from key provisions of the Resource Conservation and Recovery Act and the Comprehensive Environment Response, Compensation, and Liability Act. The exemptions would inhibit the ability of EPA, its state partners or water systems to prevent contamination and prevent the loss of drinking water sources. The DoD proposal would require human health and environmental affects to occur beyond the boundaries of an operational range before action could be taken. Acting only after the damage has been done will incur unnecessary public health risks, unacceptable losses of water sources, and high costs to clean up water supplies and/or secure alternative sources.

The proposed broadened definition of "operational range," would appear to include DOD contractor facilities, labs, or retired training or research sites. In conjunction with the Readiness and Range Preservation Initiative, the broader definition would provide too many opportunities for DoD to block EPA, its state partners or even water systems from interceding to protect a water source threatened with contamination on a DoD-related site.

Many water systems across the United States have experienced contamination of their water supplies by the rocket fuel component perchlorate, for instance. It is well known that the Colorado River and the Central Arizona Project canal, both of which serve as drinking water sources for many large and small communities in the Southwest, are contaminated with perchlorate. In addition, there are at least two dozen known cases of groundwater, soil and surface water being contaminated by DoD-related sites in Alabama, Arizona, California, Maryland, Missouri, New Mexico, Texas, Utah, Washington and West Virginia. If the DoD proposals are enacted, EPA, states and water systems would be inhibited from addressing or preventing this type of contamination.

STAPPA / ALAPCO

STATE AND TERRITORIAL
AIR POLLUTION PROGRAM
ADMINISTRATORS

ASSOCIATION OF
LOCAL AIR POLLUTION
CONTROL OFFICIALS

March 12, 2003

S. WILLIAM BECKER
EXECUTIVE DIRECTOR

The Honorable John Warner
Chairman
Armed Services Committee
U.S. Senate
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Carl Levin
Ranking Member
Armed Services Committee
U.S. Senate
228 Russell Senate Office Building
Washington, DC 20510

Dear Senators Warner and Levin:

On behalf of the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO), the two national associations of state and local air pollution control officials in 54 states and territories and more than 165 major metropolitan areas across the country, we write to you today to express concerns regarding potential changes to Clean Air Act (CAA) provisions as they relate to activities of the U.S. Department of Defense (DOD), and to urge against such potential changes during upcoming debate over the "National Defense Authorization Act for Fiscal Year 2004."

As part of your Committee's deliberations over this bill, amendments to various environmental and public health statutes will be considered. We understand that there will be a hearing on such proposed amendments in your Committee tomorrow. These amendments, which were based on recommendations by DOD, would provide broad statutory exemptions for purposes of military readiness, including sweeping exemptions from the CAA. Our associations opposed these CAA exemptions when they were proposed last year and we are writing again now to oppose them just as forcefully. We are pleased that Congress rejected adoption of the CAA exemptions last year and we urge you to do so again this year.

444 North Capitol St. N.W.

Washington, D.C. 20001

Tel. (202) 624-7864

Fax (202) 624-7863

STAPPA and ALAPCO believe that the proposed CAA exemptions are unwarranted and will impede local, state and federal efforts to attain and maintain health-based National Ambient Air Quality Standards (NAAQS) and deliver healthful air to our citizens. Such exemptions would also interfere with our efforts to protect air quality in national parks and other important ecosystems. Section 2018 of the bill exempts air pollution caused by military readiness activities from state and federal implementation plans designed to meet the health-based NAAQS. For nonattainment areas, the exemption would last for three years, while for attainment and unclassifiable areas, the exemption appears to be permanent.

These exemptions would allow military readiness activities, alone among air pollution activities that our members regulate, to cause or contribute to violations of health-based NAAQS, increase the frequency or severity of such violations or delay timely attainment of the standards or interim milestones. Further, the bill's response to these sweeping exemptions is to allow EPA to approve areas as being in attainment with the ozone, carbon monoxide and PM₁₀ air quality standards – even when those areas in fact are not in attainment with those standards – if the area would be in attainment but for air pollution from military readiness activities.

We believe these exemptions and the bill's response are unjustified and would improperly compromise the CAA's mission and the responsibilities of state and local officials to protect public health and safeguard air quality. We oppose any approach that would undermine the integrity of health-based air quality standards by designating air quality to be healthy when it is not. Moreover, this approach would impose inequitable burdens upon the industries we regulate, as well as on the public. State and local air pollution control officials will still feel the responsibility to deliver truly healthful air to the public we serve and, therefore, we will have no choice but to call upon other sectors in order to obtain the emission reductions we can no longer secure from military facilities.

In addition, STAPPA and ALAPCO believe that such exemptions are unnecessary, in that the CAA already provides DOD ample flexibility to carry out its duties. Under Section 118 of the CAA, the President may exempt DOD from any requirements of the Act upon finding that it is of "paramount interest of the United States to do so." Further, the federal regulations implementing the CAA's "general conformity" provisions from which DOD specifically seeks exemption also allow DOD to suspend compliance in the case of emergencies (which, by definition, include terrorist activities and military mobilizations) and, additionally, permit DOD to conduct routine movement of material, personnel and mobile assets, such as ships and aircraft, provided no new support facilities are constructed.

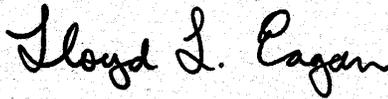
In light of the broad statutory and regulatory flexibilities already provided, we do not believe that additional CAA exemptions are necessary in order for DOD to conduct military readiness activities. Further, we believe the CAA exemptions sought by DOD would, essentially, serve only to allow routine, non-emergency activities that require the construction of additional support facilities to skirt important environmental

requirements. The significant adverse air quality impacts that could result from such exemptions could unnecessarily place the health of our nation's citizens at risk.

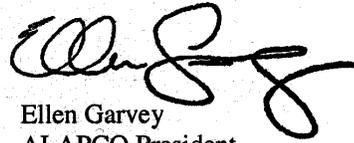
STAPPA and ALAPCO urge you and your colleagues to reject actions to exempt DOD from CAA requirements. If, however, such actions are to be further pursued, we respectfully request that Congress allow for full participation by all interested parties, including state and local air pollution control officials, and that other congressional committees with jurisdiction over CAA issues also be included.

If you have any questions, or if STAPPA and ALAPCO can provide any further information, please do not hesitate to contact either of us or STAPPA/ALAPCO Executive Director S. William Becker at (202) 624-7864.

Sincerely,



Lloyd L. Eagan
STAPPA President



Ellen Garvey
ALAPCO President

cc: The Honorable John Ensign
The Honorable Daniel K. Akaka



National Association
of Attorneys General

Adopted

**Spring Meeting
March 17 - 20, 2003
Washington, DC**

RESOLUTION

**SUPPORTING THE PRINCIPLE THAT FEDERAL FACILITIES BE SUBJECT TO
THE SAME ENVIRONMENTAL STANDARDS AS PRIVATE INDUSTRY AND
OPPOSING AMENDMENTS TO WEAKEN STATE AND EPA AUTHORITY OVER
THE DEPARTMENT OF DEFENSE**

WHEREAS, our nation has long made the protection of human health and the environment a priority through enactment of several environmental laws, including the Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund); and

WHEREAS, Congress recognized in each of these laws that the states have a fundamental right to protect their citizens and the environment within their borders and therefore included in each law a waiver of the federal government's sovereign immunity; and

WHEREAS, the Attorneys General play a primary role in protecting human health and the environment through their enforcement of state laws authorized under the Resource Conservation and Recovery Act, the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, and through representation of their states in cases brought under Superfund, and

WHEREAS, despite Congress' long-standing adherence to the principle that federal agencies should be subject to the same environmental standards and enforcement as private industry, the states have experienced significant difficulty in bringing federal agencies into compliance with federal and state environmental laws because federal agencies continue to dispute the extent of waivers of immunity in the environmental laws; and

WHEREAS, federal agencies have long been recognized as the nation's largest polluters with thousands of contaminated sites across the nation, which will cost hundreds of billions of dollars to remediate; and

WHEREAS, consideration and adoption of proposed legislation through regular order, with full and open hearings before the Congressional committees of jurisdiction, is one of the fundamental procedural safeguards of the legislative process, because it allows an opportunity for interested parties to present their views, allows for construction of a record upon which the need for legislation can be judged, and allows for debate on the merits of any proposed legislative language; and

WHEREAS, the Department of Defense has proposed legislation amending RCRA, CERCLA and the Clean Air Act that would provide broad exemptions from these laws, notwithstanding the lack of any demonstration that any of these laws has adversely impacted military readiness, and notwithstanding the existence of waiver mechanisms in each of these laws; and

WHEREAS, these proposed amendments to RCRA and CERCLA would preempt state and EPA authority over munitions-related and explosives-related wastes at a broad range of sites, including Department of Energy facilities, defense contractor sites, current military bases, and up to *16 million acres* of former ranges that may be contaminated with unexploded ordnance; and

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1. Urges the Congress to consider legislation affecting federal agency compliance with environmental requirements only through regular order, and to solicit and consider the views of affected states in considering any such legislation;
2. Urges Congress to strengthen and clarify existing waivers of immunity in Superfund and the Clean Water Act, and in the other environmental laws, as appropriate, and to reject any proposed amendments that would impair states' authority to protect the health of their citizens, such as DOD's proposed amendments to RCRA, CERCLA and the Clean Air Act;
3. Re-establishes the Federal Facilities Working Group, composed of representatives of the offices of interested Attorneys General, under the auspices of the NAAG Environment Committee to serve as a resource to the Attorneys General/ NAAG regarding federal agency compliance with state and federal environmental laws; to monitor proposed legislation and regulatory actions in this area; and to assist the Attorneys General in formulating such responses to such proposed legislation and regulatory actions as may be timely and appropriate; and
4. Authorizes the Executive Director to transmit this resolution to Congress, the Administration, and other interested organizations and individuals; and to monitor and report back on proposed legislation that might impair state authority over federal facilities.

Dissent: Attorneys General Bill Pryor (AL), and Gregg Renkes (AK)

Abstain: Attorneys General Paul G. Summers (TN) and Steve Carter (IN)

Resolution Number 03-5
Approved April 10, 2003
Washington, D.C.

As Certified by
R. Steven Brown
Executive Director

**CONCERNING THE READINESS AND RANGE PRESERVATION INITIATIVE
OF THE DEPARTMENT OF DEFENSE**

WHEREAS, in 2002, the Department of Defense (DoD) submitted legislation to Congress with eight provisions relating to conservation and environmental protection, collectively known as the Readiness and Range Preservation Initiative (RRPI); and

WHEREAS, Congress enacted three provisions, of which two apply to land transfers for conservation purposes and one provides a temporary exemption from the Migratory Bird Treaty Act for the unintentional taking of migratory birds as a result of military readiness activities; and

WHEREAS, the remaining five provisions being resubmitted in 2003 would provide additional exemptions or exceptions for military readiness activities under the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), the Endangered Species Act, and the Marine Mammal Protection Act; and

WHEREAS, the Environmental Council of the States (ECOS) understands the intent of this legislation to be to eliminate unnecessary or unacceptable obstacles to the DoD's ability to carry out its mission, in particular to conduct operations and training so as to be prepared for combat to do so by means of narrowly applicable exemptions or exceptions; and, at least with respect to endangered or threatened species and their habitat, to coordinate closely with the States in the development of integrated natural resources management plans that would substitute for the designation of critical habitat; and

WHEREAS, the DoD has cited certain examples of situations in which DoD believes that the application of the statutes referenced above interferes unacceptably with military readiness activities; but the DoD has not clearly identified specific problems it has experienced with the application of each of the referenced statutes particularly RCRA, CERCLA and the Clean Air Act, so as to justify the proposed package of exemptions or exceptions; and

WHEREAS, review of the proposed legislative language indicates that the exemptions and exceptions are in fact overly broad and could result in unintended and undesirable outcomes, in particular failure to account for the impacts from military readiness activities on air quality, water quality and public health, or to make reasonable efforts to prevent such impacts; and

WHEREAS, the concept of collaboratively developed integrated environmental protection plans and military readiness activities deserves support, but needs objective and enforceable criteria to ensure that these plans will avoid and minimize adverse environmental impacts to the maximum extent possible, and that where possible management measures will be designed so as to benefit the impacted resources in the long term; and

WHEREAS, ECOS is concerned that the RRPI may result in inappropriate infringement on the States' ability to protect the health of their citizens and their environment.

NOW, THEREFORE, BE IT RESOLVED THAT:

The ECOS membership commends the DoD on its stated intent to balance military readiness with environmental protection objectives, and to pursue collaborative and integrated approaches to protect the environment; and

The ECOS membership supports efforts, and continues to work with the DoD and other agencies, to facilitate military readiness activities; and in particular to develop integrated environmental protection programs; and

The ECOS membership cannot support the RRPI legislation until the concerns stated above are addressed. Specifically ECOS calls on the DoD and Congress to reexamine the initiative; i.e., to define with specificity the problems to be solved, to tailor the solutions narrowly to such problems with due consideration of administrative remedies, to respect the authorities and needs of the States, to provide for adequate accountability; and

Furthermore ECOS encourages DoD to continue to work closely with the environmental regulatory agencies in the States to harmonize military readiness activities with environmental protection so that public health and the environment are not compromised; and

The President of the ECOS shall transmit copies of this resolution to members of Congress, federal, state and local government agencies, ECOS members and interested parties.

Extract of the proposed Section 1043 of DoD's proposed legislative language for the 2004 Defense Authorization Act, which would establish the following statutory definition of an operational range:

(2) The term 'operational range' means--

(A) a range that is used for range activities, or

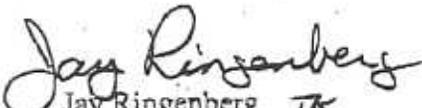
(B) a range that is not currently being used for range activities, but that is still considered by the Secretary concerned to be a range, is under the jurisdiction, custody, or control of the Secretary concerned, and has not been put to a new use that is incompatible with range activities.

(3) The term 'range' means a designated land or water area set aside, managed, and used to conduct research, development, testing, and evaluation of military munitions, other ordnance, or weapon systems, or to train military personnel in their use and handling. Ranges include firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access and exclusionary areas, and airspace areas designated for military use according to regulations and procedures established by the Federal Aviation Administration such as special use airspace areas, military training routes, or other associated airspace.

form of necessary relief for situations that restrict military force live-fire training on combat ranges. Until the concerns we have listed above, as well as those raised by other State executive and legal organizations, have been addressed and resolved, we strongly recommend that the Committee not include the proposed Section 2019 of DoD's proposed legislative amendments to RCRA and CERCLA in the 2004 DoD Authorization Bill (H.R. 1588), nor in any other legislative vehicle. If Section 2019 is not included, we see little use in adoption of the proposed Section 1043 definition of an operational range (currently included as Section 1041 of H.R. 1588) until its purpose could be clarified.

Thank you for your consideration of our views as you address this important aspect of national defense. As we indicated, we are prepared to work with DoD in seeking appropriate solutions to existing problems, and would welcome the opportunity to do so.

Sincerely,


Jay Ringenberg *TR*
ASTSWMO Vice-President

ranges". Instead, authority to intervene on an "operational range" would become the sole authority of EPA under a single CERCLA authority. This would restrict States from meeting the timely human health or environmental needs of their citizens in cases not permitted by this new legislative language. This is contradictory to a basic premise of RCRA that States will be authorized to implement hazardous waste laws in lieu of the federal government, and severely reduce the number of regulatory agencies able to monitor and act on specified range activities. This is not in the public interest.

- DoD has indicated that this proposed language only codifies the RCRA Military Munitions Rule (40 CFR 266.200) which has been in effect since 1997. While there are substantial similarities in language, that Munitions Rule allows the exercise of State RCRA enforcement authority, giving balance to the modified procedures allowed DoD by the rule. Once State authority to enforce compliance is rescinded, a fundamental weakness is created.

- Similarly, the proposed geographic scope in which these RCRA exceptions would apply gives reason for concern, as it would include both active and inactive ranges that could encompass vast areas of land and sea (see enclosed extract of DoD's proposed Section 1043 to the 2004 Defense Authorization Bill). DoD notes that much of this proposed definition is drawn from the Munitions Rule language, but again that RCRA rule is enforceable by States, while these potentially vast "operational ranges" would be excluded from State enforcement as specified in Section 2019.

We commend DoD's dedication to its mission and its desire to clear away barriers that stand in the way of achieving that mission. Our armed forces must be given the opportunity to continue the extraordinary level of combat training readiness they have just demonstrated by actual combat operations, and we want to assist in gaining them appropriate relief from actual legal and/or regulatory barriers. Unfortunately, in the case of the RCRA statute, that need has not been well defined by DoD, not even by examples of the use of existing exception authorities. DoD's stated RCRA needs appear to be based upon possible contingencies, yet the remedies it proposes will have real detrimental effects on the effectiveness of State hazardous waste programs.

Unfortunately, the legislative solution DoD proposes is far too broad and inclusive. We do not think it is in the public interest to reduce State authorities to achieve protection of human health and the environment, nor is it necessary under the circumstances DoD has described as the basis for its proposed legislation. Our experience has been that State hazardous waste program managers have worked closely with DoD component commands to find ways to avoid impeding training activities because of RCRA procedures. We think the absence of actual examples of regulatory barriers is evidence of the success of those cooperative efforts.

Consequently, we are unable to support the proposed DoD legislation as it now stands. We are willing to work with other State organizations, and individual State managers and directors, in conjunction with DoD in an effort to identify actual, existing RCRA barriers and to fashion some

http://www.latimes.com/news/local/la-me-perc2feb02_0,5934928.story?coll=la%2Dheadlines%2Dcalifornia

Colorado River Taint Worries Some Officials

Perchlorate, a rocket fuel ingredient, enters Lake Mead near Las Vegas. California is concerned about its effect on drinking water.

By Miguel Bustillo
Times Staff Writer

February 2 2003

A toxic rocket fuel ingredient that is polluting the Colorado River -- the main water source for millions of Californians and most of the nation's winter lettuce -- may be dangerous to public health even at extremely low levels, state and federal environmental officials now believe.

The U.S. Environmental Protection Agency and the California Office of Environmental Health Assessment, which are independently working to set the nation's first enforceable regulations on ammonium perchlorate, are concluding from a number of new studies that the substance could lead to health problems, even in trace amounts.

Those findings present a serious environmental problem for the Southwestern United States, because the entire lower Colorado River is polluted with small amounts of perchlorate from a now-closed Nevada rocket fuel factory.

California officials first discovered the contamination five years ago, and an effort has been underway since then to stem the pollutant's flow from a desert wash near the factory into Lake Mead. But more than 500 pounds of perchlorate still enters the river system every day, and it will be years before it is fully flushed out.

No one is saying a few glasses of tap water pose an immediate danger.

Environmental health scientists say there is an outside risk of developing health problems from perchlorate, basing their estimates on the assumption that a person would drink about two liters of the slightly tainted water each day of a lifetime.

Nonetheless, environmental groups say perchlorate's presence in the Colorado River raises questions about the safety of drinking the river's water and of eating foods, such as lettuce, that are grown with it.

Questions are thought to be particularly significant for pregnant women and babies. Perchlorate is known to affect the production of thyroid hormones, which are considered critical to brain development, so fetuses and newborn children may face a greater risk.

"The more we know about perchlorate, the more concerned we get, because the science is pointing to low doses affecting brain functions," said Gina Solomon, a health expert with the Natural Resources Defense Council, an environmental group.

"The kind of things that low to moderate doses of perchlorate might do include delays in things like language

acquisition, motor coordination," Solomon said.

In all, more than 15 million people, including those in the urban expanses of Las Vegas and much of Southern California, depend on drinking water from the lower Colorado River. Roughly 15% of California's water supply comes from the river.

Water siphoned off to the casinos of Las Vegas contains 10 to 12 parts per billion of perchlorate, according to officials with the Southern Nevada Water Authority. Water diverted downstream by the Metropolitan Water District of Southern California is less polluted, usually somewhere between 5 and 8 parts per billion. It is subsequently blended with Northern California water before being piped to Southern California consumers, reducing its contamination to below detectable levels.

One part per billion is roughly equivalent to a grain of sand in an Olympic-size swimming pool, according to the Metropolitan Water District.

Perchlorate pollution is an unexpected byproduct of the race to put a man in space and build bigger and better rockets during the Cold War.

Defense contractors and the Pentagon do not dispute that it can be harmful, but their interpretation of the data differs from that of environmental officials. The contractors and military authorities conclude that the contaminant is dangerous only in higher concentrations.

"Let me make this perfectly clear. We think the concentration in the Las Vegas Wash is not a health concern for those drinking it," said Pat Corbett, director of environmental affairs for Kerr-McGee Corp., which owns the former perchlorate factory near Henderson, Nev. The Las Vegas Wash is the desert streambed where the perchlorate pollution enters Lake Mead in greatest concentration.

Using the defense industry's own data, however, the federal EPA and California are arriving at far different conclusions.

The EPA has issued a preliminary public health goal of 1 part per billion for perchlorate -- a number one-seventh the average contamination now in the lower Colorado River. The number is also one 200th of what the defense industry says is scientifically sound.

California health officials have issued a draft public health goal of 2 to 6 parts per billion for perchlorate. The state expects to establish new regulations next year; the EPA estimates it will take several more years to put federal standards in place.

Most of the studies reviewed by the state and federal environmental officials were paid for by the military and its contractors, which have been cooperating for the last five years with the government regulators in the effort to arrive at new safety standards. But now the two sides find themselves at odds.

"We didn't really care" what the number considered safe by regulators was, "as long as it was based on good science," said Air Force Lt. Col. Dan Rogers, who has helped lead the military's response to the perchlorate pollution problem since 1997, and estimates that the Pentagon, NASA and defense contractors have invested \$22 million in studies.

"Unfortunately, some scientists disagree with EPA's interpretation of the data," Rogers said.

Strict new state and federal perchlorate rules could cost defense contractors and water agencies tens of millions of dollars, spent to cleanse waters of pollution. Many of those involved predict that taxpayers will ultimately foot the bill for a massive cleanup.

One central question bearing on the cost is how much risk may come from eating vegetables irrigated with perchlorate-contaminated water. More than 1.4 million acres of farmland are irrigated with Colorado River water, mostly in California's Imperial Valley and the Yuma, Ariz., area. Together, these areas grow more than

90% of the country's fresh lettuce during winter months.

Though data remain limited, some recent studies have suggested that perchlorate may collect in lettuce at higher concentrations than it does in the water used to grow the plants, adding to the concern about perchlorate in the river.

"We know perchlorate can attain high concentrations in plants -- we know that," said Phil Smith, a toxicologist at Texas Tech University who is conducting a study on perchlorate in plants for the U.S. Department of Agriculture. What remains unclear, Smith said, is whether perchlorate consumed by eating vegetables has the same effect on people and animals as perchlorate in drinking water.

Defense industry officials contend it is scientifically premature to conclude that perchlorate concentrates in plants. They say other research has even shown that some plants can naturally break down perchlorate over time. They argue that a 1999 EPA test of lettuce seedlings that found high concentrations of perchlorate in the seedlings had been discounted by some scientists because of the testing methods. The EPA is conducting a second lettuce study and expects to release its findings within weeks.

If perchlorate is shown to collect in vegetables and affect people who eat them, the finding would have significant consequences.

"It would mean that the problem of perchlorate is not confined to people in the West who rely on this drinking water, but the entire nation, which is eating this lettuce in the winter months," said Bill Walker of the Environmental Working Group, an organization that has sounded an alarm about perchlorate for several years and is now doing its own lettuce tests.

In addition to the Colorado River, the EPA has identified roughly 75 perchlorate pollution sites around the country.

In California, the San Gabriel Valley, the Inland Empire and the Rancho Cordova area near Sacramento are all struggling to address perchlorate pollution. In all three places, dozens of residents near the polluted sites have alleged they developed health ailments -- including thyroid problems and cancer -- from exposure to perchlorate. The state Department of Health Services is studying whether there is an increase in thyroid problems near those areas.

Though perchlorate had been a public concern for years, it was not until 1997 that the magnitude of the problem became clear. That year, California health officials developed a new method to detect the pollutant at levels far lower than previously possible, and water officials discovered to their surprise that contamination was far more widespread than first believed.

The Metropolitan Water District of Southern California, the area's primary urban wholesaler, soon detected perchlorate deep in its massive Colorado River Aqueduct, which pipes water 240 miles into Riverside County. It performed further tests and found that pollution levels increased as testing moved upstream. The sleuthing eventually pinned down the source of the contamination as the Las Vegas Wash, a formerly seasonal stream that now flows year-round with the treated waste water of Las Vegas. Tests further up the stream found no perchlorate.

The discovery quickly triggered a response from the EPA, the Nevada Division of Environmental Protection and Kerr-McGee, which owned a nearby perchlorate plant that for years dumped tons of the rocket fuel oxidizer directly into unlined lagoons.

The plant, which Kerr-McGee acquired through a merger in the late 1960s, was first converted to perchlorate manufacturing by the Navy after World War II. It was closed in 1998, when Kerr-McGee got out of the perchlorate business.

The current cleanup, overseen by Nevada and funded by the company, started in 1998 and is showing signs of success, according to state, EPA officials and the defense contractor.

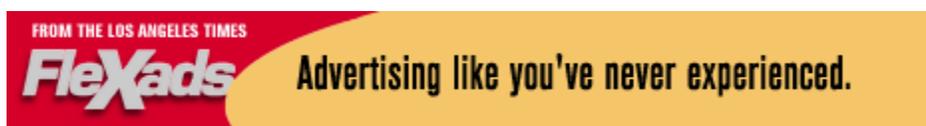
Officials isolated an underground stream that was carrying perchlorate pollution, and are now running 34 wells to pump out the ground water before it reaches the Las Vegas Wash.

As a result, the contamination spilling into the wash has dropped from an average of 900 to 1,000 pounds per day to 500 to 550 pounds, and recent gains suggest the numbers could go down dramatically in coming months, said Todd Croft, the Nevada official in charge of the cleanup.

Purging Lake Mead of perchlorate, however, is a far more complicated matter. EPA officials speculate it could take decades to fully wash out, even after the stream polluting it is cleaned up.

"Lake Mead is a complex reservoir," said Kevin Mayer, the EPA's point man on perchlorate. "It is not going to flush like a bathtub."

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**Response to the Department of Defense's position paper titled
"Readiness and Range Preservation Initiative (RRPI): Myth and Fact."**

**Prepared by the staff of the Attorneys General of
Colorado, Idaho, Utah and Washington
April 2004**

In support of its proposed legislative initiative known as the "Readiness and Range Preservation Initiative," the Department of Defense has prepared a paper titled "Readiness and Range Preservation Initiative (RRPI): Myth and Fact." DOD distributed this fact sheet at the summer 2003 meeting of the Conference of Western Attorneys General, among other places. Staff from the Attorneys General of Colorado, Idaho, Utah and Washington have prepared this response to the points raised in the DOD paper. DOD's statements are reprinted below in italics, followed by our response to each statement.

In reading this response, it is important to remember that many of the "myths" DOD describes are arguments that Attorneys General and others have raised regarding the 2002 and 2003 versions of DOD's proposed RRPI. The 2002 and 2003 versions were extremely broad, and would likely have preempted or otherwise impaired state and EPA authority over a wide range of sites with munitions-related contamination. Affected sites included both "operational" ranges and ranges that had been closed and transferred to other federal agencies or to private owners. DOD's 2004 version of the RRPI is somewhat narrower than the 2002 and 2003 versions in some respects. But even the narrowest reading of the 2004 RRPI would still likely result in preempting or impairing state and EPA authority to protect human health and the environment at over 24 million acres of operational ranges. And the 2004 RRPI may well be read more broadly to encompass additional sites, including closed and transferred ranges.

1. Myth: There is no evidence that environmental encroachment has affected military readiness. Even the non-partisan GAO found that readiness has not been impacted by environmental encroachment.

Fact: There is a significant body of evidence that readiness is being adversely impacted.

- *GAO raised a concern regarding DoD's ability to quantify readiness impacts, but its report explicitly states that encroachment is having demonstrable adverse effects on readiness.*
- *DoD is actively working to develop a mechanism to quantify training constraints caused by limitations on use of land, air, and sea resources.*

Response: The Attorneys General have emphasized that there is no evidence that RCRA, CERCLA or the Clean Air Act have adversely impacted military readiness. As of this writing, DOD has still not identified a single example where any of these laws has actually caused an adverse impact on military readiness. On March 7, 2003, Deputy Secretary of Defense Wolfowitz issued a memorandum to the military service Secretaries regarding DOD compliance with ten different environmental and natural resource laws. He stated "[i]n the vast majority of cases, we have demonstrated that we are able both to comply with environmental requirements and to conduct necessary military training and testing." In light of this, the Deputy Secretary directed the

Secretaries to give greater consideration to using the existing exemption processes in these environmental and natural resource laws in the "exceptional cases" that may present conflicts. To date, no exemptions have been invoked under RCRA, CERCLA, or the Clean Air Act. And at a meeting in December between DOD representatives and staff from several western states' Attorneys General office and environmental agencies, the DOD representatives acknowledged that there have not been any instances in which the Clean Air Act, RCRA or CERCLA have impacted military readiness.

DOD's statement above does not respond to the AG's criticism. Instead of addressing RCRA, CERCLA and the Clean Air Act, DOD refers to "environmental encroachment," a term that encompasses far more than regulatory or remedial requirements under these three laws. As described in the GAO report to which DOD refers, "environmental encroachment" includes:

- Urban growth around military installations;
- Competition for radio frequency spectrum;
- Air pollution;
- Noise pollution;
- Competition for airspace;
- Unexploded ordnance and munitions components;
- Endangered species habitat; and
- Protected marine resources.

The GAO report does state that "Encroachment was reported as having affected some training range capabilities," but goes on to state "Most encroachment issues are caused by population growth and urban development."¹ The GAO cites several specific examples where sprawl, and the resulting land use conflicts between residential use and military training, caused DOD to alter or suspend training activities.² It does not cite any instances in which RCRA, CERCLA or the Clean Air Act have impacted military readiness, or were reported to have done so. Nor has DOD cited any such instances. The GAO report demonstrates the speculative nature of DOD's concern with RCRA and CERCLA:

DOD believes that the Environmental Protection Agency could apply environmental statutes to the use of military munitions, shutting down or disrupting military training. According to DOD officials, uncertainties about future application and enforcement of these statutes limit their ability to plan program, and budget for compliance requirements.³

Given the widespread contamination from military activities, and the responsible track record states have developed over the past two decades of regulating the environmental aspects of military activities, we do not think that "uncertainties about future application and enforcement" of these environmental laws justifies preempting state and EPA authority over the cleanup of

¹ "MILITARY TRAINING: DOD Approach to Managing Encroachment on Training Ranges Still Evolving," Testimony before the Committee on Environment and Public Works, U.S. Senate, statement of Barry W. Holman, April 2, 2003, at unnumbered "Highlights" page.

² *Id.* at p. 7.

³ *Id.* at 5.

munitions-related contamination at potentially thousands of sites around the country. States have worked with DOD to better protect our military bases from unplanned urban sprawl.⁴ However, amending RCRA, CERCLA or the Clean Air Act will do nothing to solve the readiness issues caused by sprawl.

2. ***Myth: The RRPI provides broad exemptions from environmental laws for DoD activities.***

Fact: The initiative would apply only to military readiness activities--DoD is, and will remain, subject to precisely the same regulatory requirements as the private sector when we perform the same types of activities as the private sector.

- *RRPI does not apply to closed ranges or ranges that close in the future.*
- *RRPI is not applicable to the Defense Department activities that have traditionally been of greatest concern to state and federal regulators, such as the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage, schools, housing, motor pools, industrial activities, or the construction or demolition of such facilities.*
- *It does address only uniquely military activities--what DoD does that is unlike any other governmental or private activity.*
- *It does seek alternative forms of regulation only for the things we do that have no private-sector analogue: military readiness activities.*

Response: Regarding the last two bulleted points, we do not agree that activities should be exempt from environmental regulation simply because they are unique to the federal government. "Uniquely military activities" have caused vast amounts of environmental contamination in this country. Current estimates are that it will cost well over \$340 billion to address the environmental legacy of "uniquely military activities" at DOD and Department of Energy sites. In many cases, "addressing" this legacy does not mean cleanup of contaminated land or groundwater, but permanently restricting the use of such land or groundwater to one degree or another. DOD, the Department of Energy, and other federal agencies have fought the application of state environmental laws for years. However, as states that have seen the consequences of exempting "uniquely military activities" from environmental regulation, we can attest that it is a failed policy that should not be revisited.

DOD's first bulleted point responds to criticisms that the Attorneys General and others leveled at the 2002 and 2003 versions of RRPI. We have previously analyzed DOD's 2002 and 2003 legislative proposals to show that they do impair state and EPA authority over closed ranges.⁵ A preliminary analysis of DOD's 2004 RRPI indicates that it likely does not exclude munitions on

⁴ For example, several states have adopted legislation to encourage or require consideration of military training needs in land use decision-making. See also information on the National Governors' Association website. http://www.nga.org/center/topics/1,1188,C_CENTER_ISSUE^D_4504.00.html.

⁵ See STATEMENT BY THE ATTORNEYS GENERAL OF: ARIZONA, CALIFORNIA, COLORADO, DELAWARE, HAWAII, IDAHO, MASSACHUSETTS, NEW HAMPSHIRE, NEW MEXICO, NORTHERN MARIANA ISLANDS, NEW YORK, OREGON, SOUTH DAKOTA, UTAH AND WASHINGTON submitted in connection with the testimony of Daniel S. Miller, First Assistant Attorney General, Colorado Department of Law, before the Senate Committee On Environment And Public Works, April 2, 2003. (Hereinafter, "Senate Testimony") This statement is available at http://www.senate.gov/~epw/108th/Miller_040203.htm

closed ranges from RCRA's definition of solid waste. Thus, the 2004 RRPI likely does not preempt state or EPA RCRA authorities at closed ranges. However, the 2004 RRPI definition of "release" under CERCLA likely impairs state and EPA authorities under CERCLA and related state laws to address contamination at closed and transferred ranges.⁶ And the 2004 RRPI likely precludes a person who spends his own resources cleaning up munitions-related contamination at closed ranges from seeking reimbursement of their costs from DOD through a CERCLA cost recovery action.⁷

It is also important to recognize that the term "operational range" includes ranges that have not been used in years, or even decades.⁸ In a 1998 survey EPA noted that many ranges which had

⁶ The impact of the 2004 RRPI's definition of "release" on state and EPA CERCLA-type authorities over closed and transferred ranges is not entirely clear. On the one hand, proposed "Sec. __ Range Management"(b)(2)(C) (hereafter, all cites to the 2004RRPI are to the unnumbered section titled "Range Management") of DOD's 2004 proposal may be read to suggest that once a range ceases to be operational, the presence of any munitions that remain on the range constitutes a "release." It doesn't specifically state that the presence of such munitions contamination *is* a release, but it seems to permit such an argument.

On the other hand, under DOD's proposal, the initial deposit of the munition on the range is likely still excluded from the definition of release. This is because CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." However, the UXO that remains on an operational range after it has closed is not being spilled, leaked, poured, etc. It's just there. Thus, DOD may argue that the mere presence of unexploded ordnance on a now-closed range still does not constitute a release. Nearly all of EPA's authorities under CERCLA are keyed to the existence (or threat) of a release. And the scope of CERCLA's waiver of sovereign immunity also is a function of the definition of release, as explained in Senate Testimony, *supra* fn. 4. In a dispute between DOD and a state over the scope of CERCLA's waiver of sovereign immunity, we are concerned that a court would give undue deference to DOD's position to reach a construction of the statute that results in a narrower waiver. *See Department of Energy v. Ohio*, 503 U.S. 607 (1992).

⁷ Under CERCLA, a person who incurs costs in responding to a release of a hazardous substance may seek to recover those costs from liable parties under CERCLA § 107. In the case of a former military range now in private ownership, DOD's proposed language likely insulates it from CERCLA liability as follows. A party that incurred costs cleaning up UXO on such a range that sought to recover its costs from DOD under CERCLA would have to demonstrate that DOD met one of the four categories of liable parties described in CERCLA § 107(a)(1)-(4). DOD clearly would not be a current owner or operator (§ 107(a)(1)), an arranger (§ 107(a)(3)), or a transporter (§ 107(a)(4)). It could only be liable under § 107(a)(2) as a "person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." Thus, the person would have to show that they incurred costs responding to a "release" of a hazardous substance, that UXO is a "hazardous substance," and that DOD owned the facility at which the UXO was disposed at the time of disposal. CERCLA defines "hazardous substance" to include hazardous wastes having a characteristic identified under EPA RCRA regulations. One of those characteristics is reactivity, and "live" UXO exhibits the characteristic of reactivity. So, if UXO is a characteristic hazardous waste, it is a hazardous substance.

Two aspects of DOD's proposal may serve to defeat any such cost recovery claim. First, it appears that under (a)(2)(D), munitions contamination that remains on a range after the range is no longer an operational range may be considered a solid waste, and thus potentially a hazardous waste and a hazardous substance. But a range may only cease to be "operational" when the land has been transferred out of federal ownership, or possibly not until the transferred land has been put to a use that is inconsistent with being a range. In either case, any munitions contamination on the range would not become a solid waste (and thus a hazardous substance) until DOD no longer owns the land. If so, cost recovery claims against DOD under CERCLA § 107(a)(2) would fail.

Second, as described in fn. 5 above, DOD may argue that the mere presence of unexploded ordnance on a now-closed range still does not constitute a release. If successful, this argument would also defeat a cost recovery claim.

⁸ Nothing in the new definition of range restricts the amount of time a range can be inactive and still be considered "operational." *See* 10 U.S.C. 101(e)(3)(B).

not been used in decades had not been formally closed by DOD, and so were considered "inactive".⁹ Because RCRA and CERCLA cleanup actions can be implemented at active ranges without impacting readiness, there is clearly no justification for preempting these authorities at ranges that have not been used in years.

As for its statement that its proposal does not apply to activities that have traditionally been of greatest concern to state and federal regulators, we respectfully disagree. State and federal regulators have consistently shown great concern for any activity that may contaminate drinking water sources or that may cause death or dismemberment due to explosive risks. Conversely, States do not expend their scarce resources regulating matters that have no environmental or human health impacts. Finally, DOD's proposed amendments to RCRA and CERCLA are **not** limited to "military readiness activities," as that term does not appear in its proposed amendments to those two statutes.

3. **Myth:** DoD is backing away from its policy that it should comply with environmental laws in the same manner and to the same extent as private industry.

Fact: The RRPI initiative is narrowly focused on testing and training, i.e., on "military readiness activities." For DoD activities that are not unique, DoD must comply with environmental laws just like private parties.

Response: See previous answer for a rebuttal to the argument that "uniquely military activities" should be exempt from environmental regulation.

4. **Myth:** Most environmental laws already provide for national security exemptions that are sufficient to preserve military readiness activities.

Fact: The existing exemptions in environmental statutes are not appropriate for governing the conduct of ordinary, scheduled, and recurring military training and testing activities.

- Congress designed exemptions to require high-level government officials (e.g., the President, the Secretary of Defense) to decide how the government will act under extraordinary circumstances.
- Invocation of an exemption is characteristically to be based on "the paramount interests" of the United States--an exceptionally high standard which may not be met by individual military readiness activities that nevertheless are cumulatively essential to maintaining military readiness.
- Most national security exemptions in current environmental laws provide relief that is brief in duration and focuses on individual activities, facilities, or pollution sources--they are ill-suited to ongoing actions, including many categories of readiness activities that are part of the day-to-day training regimen for our forces.

⁹ The EPA survey "Used or Fired Munitions and Unexploded Ordnance at Closed, Transferred, and Transferring Military Ranges: Interim Report and Analysis of EPA Survey Results," EPA OSWER, EPA 505-R-00-01, April 2000, pp. 10-11.

- *Maintaining military readiness through use of emergency exemptions would involve issuing and renewing scores or even hundreds of Presidential certifications annually.*

Response: We disagree that the "paramount interest" standard is "exceptionally high" or that it cannot be met by individual military readiness activities that are cumulatively essential to maintaining military readiness. And at least with respect to RCRA, CERCLA, and the Clean Air Act, there is no evidence that the exemptions would need to be invoked frequently.

According to the existing case law, rather than being "exceptionally high," the "paramount interest" standard is quite deferential. The "paramount interest" standard is unique to the exemption provisions of the environmental laws. The paramount interest provisions have been the subject of litigation in two instances -- one at the Air Force facility near Groom Lake, Nevada, and the other at Puerto Rico's Ft. Allen.

In *Kasza v. Browner*,¹⁰ the Ninth Circuit Court of Appeals upheld President Clinton's decision under RCRA § 6001 to exempt the Air Force facility near Groom Lake, Nevada from any hazardous waste or solid waste provisions that would require the disclosure of classified information to any unauthorized person. The court stated:

Here, the President found that "it is in the paramount interest of the United States to exempt the operating location from any applicable requirement for the disclosure to unauthorized persons of classified information." . . . That is what the President determined was in the paramount interest of the United States, ***a matter the Congress explicitly left to the President's discretion***, and we have no problem with the district court's accepting that determination.¹¹

(Emphasis added.) Similarly, in *Colon v. Carter*,¹² the First Circuit described the exemptions provided in several environmental laws as follows:

[T]he determination that a President must make prior to issuing an exemption from the relevant environmental regulations is that the "paramount interest of the United States" requires the exemption. [citations omitted] ***It is difficult to imagine a determination more fully committed to discretion or less appropriate to review by a court.***¹³

(Emphasis added.) Thus, the only appellate decisions to address the exemption provisions make clear that the determination that a particular exemption is in the paramount interest of the United States is one that lies within the President's discretion. The President's discretion would certainly encompass a determination that it is in the paramount interest of the United States to exempt a

¹⁰ *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998).

¹¹ *Id.* at 1173-74.

¹² *Colon v. Carter*, 633 F.2d 964 (1st Cir. 1980).

¹³ *Id.* at 967.

number of individual military activities from certain environmental requirements because of the cumulative impact of compliance on readiness.

DOD's last two bulleted points make it sound as though conflicts between environmental requirements and readiness are commonplace. This is certainly not the case for RCRA, CERCLA or the Clean Air Act. Again, neither DOD nor GAO has cited any examples where any of these three laws has caused a conflict with military readiness.

5. **Myth:** *Title 10 already has an adequate provision allowing DoD to obtain relief for regulations that impair readiness, so the RRPI isn't necessary.*

Fact: *10 USC 2014, allows a delay of at most five days in regulatory actions significantly affecting military readiness, allowing insufficient time to resolve disputes of any complexity.*

- *Section 2014 merely codifies the inherent ability of cabinet members to consult with each other and appeal to the President regarding agency regulatory actions.*
- *The RRPI proposal was not occasioned by the actions of state or federal regulators. Rather, it seeks clarification or flexibility regarding the underlying statutes. Four of the five proposed amendments (RCRA, CERCLA, MMPA, and ESA), like the MBTA amendment Congress passed last year, were occasioned by Private litigants seeking to overturn federal regulatory policy and compel federal regulators to impose crippling restrictions on readiness activities. Section 2014 has no effect on such litigation. The fifth, the Clean Air Act amendment, was proposed because DoD and EPA concluded that the Act's "general conformity" provision unnecessarily restricted the flexibility of DoD, state, and federal regulators to accommodate military readiness activities into applicable air pollution control schemes. In such cases, where the law itself limits regulators' discretion, section 2014 is useless. Section 2014, therefore, although useful in some circumstances, would be of no use in addressing the critical readiness issues that the five RRPI initiatives address.*

Response: We previously cited 10 USC § 2014 as an example of one of the many existing mechanisms available to DOD to resolve potential conflicts with environmental requirements, not as a panacea to all issues it may have. What is interesting about DOD's statement here is that it admits that neither states nor the EPA have done anything to prompt its proposed legislation. Nonetheless, the primary impact of the RRPI would be to preempt or impair state and EPA authorities.

DOD's argument that the RCRA and CERCLA amendments are necessary because private litigants will use the courts to compel federal regulators to impose "crippling restrictions" on readiness activities does not hold water. First, as a practical matter, the only time RCRA or CERCLA cleanup authorities would be applied to an active military range is if range activities were causing groundwater contamination that posed an imminent and substantial endangerment to human health or the environment. Later on in its "Myth and Fact" statement, DOD acknowledges that contamination posing an imminent and substantial endangerment to human health or the

environment *is* an appropriate trigger for addressing military munitions-related contamination.¹⁴ Given DOD's record on environmental contamination, we think that outside oversight of any response to an imminent and substantial endangerment is vital. Yet, the 2004 RRPI would preempt most such oversight.

Underlying DOD's concern is the assumption that any response action addressing military munitions-related contamination would necessarily impact readiness. There is no basis for this assumption. There is a wide range of alternative approaches to cleaning up environmental contamination. DOD has simply not explained how the installation of monitoring wells or groundwater treatment systems would disrupt its readiness activities. There is flexibility in siting the specific location of monitoring wells and treatment systems, and additional flexibility in the timing of their installation and sampling or maintenance. One example of successfully coordinating environmental cleanup and training activities on an operational range is at Ft. Carson, Colorado. There, the Colorado Department of Public Health and Environment worked with range officials at Ft. Carson to install groundwater monitoring wells on an active range without impacting any training activities. The wells were installed on a day when the range was not in use, and the State adjusted the normal sampling period to coincide with range use schedules.

A December 2003 meeting of state and DOD officials highlighted just how much flexibility there is "on the ground" to address the environmental impacts of military munitions without impacting readiness. Ranges are typically divided into different areas such as impact areas, buffer zones, and maneuver areas. DOD allows public access to the maneuver areas and buffer zones for recreational purposes when such activities do not conflict with DOD's own use of the range. If recreational activities in buffer zones and maneuver zones are compatible with range operation, it is difficult to see why installing a groundwater monitoring well or treatment system in such areas would cause any difficulties. And if there were cases where wells or treatment systems had to be placed in an impact area, they could be hardened against the possibility of being damaged or destroyed by a military munition.

DOD also incorrectly assumes that a cleanup approach at a given site would set a binding precedent that all other cleanups would have to follow.¹⁵ Remedial responses to environmental contamination are invariably site-specific. A cleanup approach employed at a given site may provide a useful example for how to approach cleanup at other sites, but it does not establish any legal or technical precedent for other sites.

DOD overstates the relief available under CERCLA's citizen suit provision. Citizen suits under CERCLA simply cannot compel DOD to perform any particular cleanup action. The CERCLA citizen suit provision only allows relief for violations of "requirements" that have become effective under CERCLA, or for failure of the U.S. to perform a non-discretionary duty under CERCLA. But CERCLA is a remedial statute, not a regulatory one. It creates authorities to

¹⁴ See DOD's "Myth and Fact" number 7, *infra*.

¹⁵ This argument appears more explicitly in DOD's legislative background materials accompanying the introduction of the RRPI in 2003. It also appears in testimony that DOD has provided on this issue over the years. See, e.g., STATEMENT BY HONORABLE MARIO P. FIORI, ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS AND ENVIRONMENT) BEFORE THE HOUSE ARMED SERVICES COMMITTEE SUBCOMMITTEE ON MILITARY READINESS U.S. HOUSE OF REPRESENTATIVES, MARCH 14, 2002

require responses to releases of hazardous substances, but does not dictate any particular response, nor that any "cleanup" actually occur. The National Contingency Plan is the set of regulations that governs how EPA implements response actions under CERCLA. It defines a particular *process* for investigating a site, evaluating risks, identifying alternatives, and selecting a specific response action, but it does not dictate any particular action. See, e.g., 40 CFR §§ 300.430(a)(1)(ii), (d), (e)(2) and (e)(9). See also, Stewman v. Mid-South Wood Products, 784 F. Supp. 611 (W.D. Ark. 1992) (nothing in CERCLA requires EPA to take remedial action). In large measure, the selection of a remedy under CERCLA is discretionary, and under Executive Order 12580, that discretion lies largely or wholly with DOD.¹⁶ Even assuming that the relief available under a CERCLA citizen suit includes a judicial order compelling DOD to select a response action (an assumption that is questionable), no response action is required unless there is some clear risk to human health or the environment, and DOD would be free to decide what the appropriate response should be (DOD does need EPA concurrence in remedy selection at NPL sites).

DOD similarly overstates the impact of a citizen suit under RCRA. To obtain any relief whatsoever under a RCRA citizen suit, plaintiffs must first demonstrate that there is an imminent and substantial endangerment.¹⁷ DOD acknowledges that an imminent and substantial endangerment is an appropriate trigger for addressing environmental consequences of routine testing and training with military munitions,¹⁸ so it is not clear why the 2004 RRPI preempts the RCRA citizen suit provision.

DOD has previously cited *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (DDC 2002), for the proposition that citizen suits under RCRA or CERCLA could force regulators to require cleanup. But permitting cases such as *Pirie* are simply inapposite to the sort of discretionary agency enforcement at issue in cleanups under RCRA or CERCLA. As a general matter, an administrative agency has absolute discretion in deciding whether (and how) to take enforcement actions. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649 (1985). Certainly, the language of RCRA's and CERCLA's relevant provisions make clear that Congress intended to leave the choice of whether to require a response action in a particular case up to EPA. See RCRA §§ 3008(h) and 7003 (42 U.S.C. §§ 6928(h) and 6973), which employ permissive language ("may") regarding issuance of administrative orders and civil actions, even where there may be imminent and substantial endangerment; CERCLA §§ 104(a) (President is "authorized to act, consistent with the national contingency plan" when there is a release or threat of release of a hazardous substance) and 106(a) (President "may" issue orders or require the Attorney General to seek relief when President determines that there may be an imminent and substantial endangerment) (42 USC §§ 9604(a) and 9606(a)).¹⁹ The discretionary language of RCRA's and

¹⁶ For DOD sites that are on the NPL, DOD selects the remedy with EPA's concurrence; if EPA does not concur, it selects the remedy. 42 U.S.C. § 120(e)(4)(A). At non-NPL sites, DOD selects the remedy without EPA participation. E.O. 12580(2)(d).

¹⁷ Pursuant to the EPA munitions rule, the use of munitions on ranges is exempt from RCRA permitting requirements, so the only part of the RCRA citizen suit provision that is at issue is the "imminent and substantial endangerment" provision.

¹⁸ See DOD's "Myth and Fact" number 7, *infra*.

¹⁹ See also the *Stewman* case and the cites to the NCP in the preceding text.

CERCLA's cleanup provisions stands in contrast to the mandatory nature of environmental permitting provisions, and explains the difference between the two lines of cases.²⁰

6. Myth: *Because the military is such a large landholder, the consequences of exempting ranges from RCRA and CERCLA protections could be vast.*

Fact: *The DoD controls approximately 1/26th (25 of 650 million acres) of the federal lands in the United States. Of this DoD land, the RCRA and CERCLA provisions of the RRPI will affect only those portions of DoD lands that meet the definition of an "operational range." While DoD has large tracts of land that meet this definition, operational ranges are still only a subset of DoD lands, and are the only lands affected by the RRPI RCRA/CERCLA proposal.*

Response: It is misleading to suggest that DOD's proposal will not have significant consequences because it will "only" apply to somewhat less than 25 million acres. Operational ranges actually comprise the overwhelming part of DOD's lands -- over 24 million acres.²¹ This is an area equivalent to the states of Maryland, Massachusetts, New Jersey, Hawaii, Connecticut and Rhode Island combined. These ranges, some of which are hundreds of square miles in extent, can impact human health both on-range and off-range. Activities on DOD operational ranges have already caused shutdown of municipal groundwater supply wells in Massachusetts and Maryland, and groundwater contamination from range activities has been detected at other sites. Nationwide, there are at least 40 DOD facilities with known perchlorate contamination of groundwater or surface water.²²

Moreover, as noted elsewhere, the definition of "operational range" is quite broad, and may include DOE and defense contractor facilities with groundwater contamination problems.²³

And DOD's proposed amendments to RCRA and CERCLA may not be limited to "operational ranges." DOD's proposed amendment to "release" under CERCLA may be read to preempt state and EPA CERCLA-type authorities at the **16 million acres** of closed, transferred, and transferring ranges that DOD estimates are contaminated with UXO.²⁴ And DOD's proposed

²⁰ See, e.g., 42 U.S.C. § 6925(a) (directing EPA to promulgate regulations "requiring each person owning or operating" a hazardous waste treatment, storage or disposal facility to have a RCRA permit); 33 U.S.C. §§ 1311 and 1342 (together prohibiting discharge of pollutants except in compliance with a permit issued under the Clean Water Act); 42 U.S.C. § 7661b(a) ("Any source specified in section 7661a(a) of this title shall become subject to a [Clean Air Act] permit program, and **required** to have a permit, on the later of the following dates . . .").

²¹ This figure comes from information provided by DOD to the General Accounting Office. Additionally, during oral argument in the case challenging the EPA's munitions rule, Department of Justice attorneys stated that "The Department of Defense has 2100 active and inactive ranges. The land portions of these ranges alone encompass approximately 24 million acres." *Tides Center and Military Toxics Project v. Environmental Protection Agency*, case no. 97-1342, transcript of April 2, 1998 oral argument before the U.S. Court of Appeals for the District of Columbia, p. 32. The new definition of "operational range" encompasses both active and inactive ranges. See 10 U.S.C. § 101(e)(3).

²² Assessment compiled by Democratic staff of the House Energy and Commerce Committee, available on the Committee's website at http://www.house.gov/commerce_democrats/press/dod_final_chart.pdf.

²³ See response to "Myth #9."

²⁴ See footnote 6, *supra*. The 16 million acre figure is cited in a 2001 GAO report titled "ENVIRONMENTAL LIABILITIES: DOD Cleanup Cost Estimates Are Likely Understated," GAO-010479, April 2001, p. 11.

redefinition of "solid waste" under RCRA may also be read more broadly to preempt state and EPA authority over the investigation and cleanup of contamination caused by munitions or their constituents in a variety of situations other than the normal use of munitions on an operational range.²⁵ These situations may include:

- munitions contamination that arose from improper management of discarded munitions or munitions constituents;
- munitions contamination arising from disposal through discharge, injection, dumping, spilling or placing of munitions off of an operational range,²⁶ potentially including:
 - groundwater contaminated by waste streams from the manufacture of munitions or munitions constituents (such as perchlorate, RDX, TNT, etc.) at hundreds of defense contractor facilities, such as the Kerr-McGee plant in Henderson, Nevada that is contaminating the entire downstream stretch of the Colorado River;
 - groundwater contamination arising from ammunition washout; and
 - UXO and munitions-contaminated groundwater at Department of Energy facilities such as Los Alamos National Laboratory.

Finally, the broad reading of DOD's proposed re-definition of solid waste could result in preempting state and EPA regulation under RCRA of the destruction of the nation's stockpile of chemical weapons such as nerve gas and mustard agent.²⁷ We understand that there are 8 different chemical depots in the United States where such munitions are stored awaiting destruction. At most, if not all of these sites, States play a critical role in ensuring the safety of the destruction process through their RCRA permitting authorities.

7. *Myth: The RCRA and CERCLA provisions of the RRPI will exempt hazardous waste management activities and ongoing cleanups at ranges from regulation.*

²⁵ Paragraph (a)(1) of DOD's 2004 proposal may be read two different ways. The alternative readings arise because the grammatical construction of this paragraph -- a long series of phrases set off by commas -- is ambiguous at best. The phrase that starts "that are or have been deposited, incident to their normal and expected use, on an operational range, and remain thereon" could modify the term "military munitions," or it could modify the phrase "including unexploded ordnance, and the constituents thereof." If the limiting phrase "that are or have been deposited, incident to their normal and expected use, on an operational range, and remain thereon" modifies "unexploded ordnance, and the constituents thereof," then the only limitations on the types of military munitions exempted from RCRA under paragraph (a)(1) of DOD's 2004 proposal are the four specific examples set forth in (a)(2)(A)-(D). Paragraph (a)(1) might as well read "The term 'solid waste' as used in the Solid Waste Disposal Act, as amended (42 U.S.C. 6901 et seq.), does not include military munitions." Because this interpretation would result in a narrower scope of state authority over DOD, we are concerned it is the one a federal court reviewing this language would adopt, utilizing judicial doctrine on waivers of sovereign immunity. *See Department of Energy v. Ohio*, 503 U.S. 607 (1992).

²⁶ Subparagraph (a)(2)(C) of DOD's proposal says that munitions or munitions constituents that are "deposited" off an operational range do not fall within paragraph (1)'s exclusion from the definition of solid waste. "Deposit" is one of several different actions that constitutes "disposal" under RCRA. A court interpreting DOD's proposed amendment to RCRA would certainly look to the definition of disposal in interpreting the word "deposited." Again, because courts give meaning to all words in a statute, "deposit" would likely be construed as meaning something different than the other actions that constitute disposal. Therefore, munitions that are discharged, injected, dumped, spilled or placed off an operational range (or on one, for that matter) would still fall within (a)(1)'s exclusion from RCRA's definition of solid waste.

²⁷ Because these munitions do not meet any of the criteria set forth in proposed (a)(2), under the broad reading of (a)(1) (see footnote 25), DOD could argue that they would no longer be solid wastes, and thus not subject to state or EPA regulation under RCRA.

***Fact:** The RRPI RCRA and CERCLA provisions apply only to use of munitions for their intended purpose and only while that activity takes place on operational ranges.*

- *Even on operational ranges, hazardous waste management activities involving military munitions (such as disposal of munitions by open burning/open detonation (OB/OD)) will continue to be regulated under the Federal and State RCRA programs.*
- *The intent and legal effect of these two provisions are simply to codify longstanding Federal and State policies and practices concerning military munitions use on operational ranges—that (1) the normal and expected use of military munitions on an operational range (e.g., testing and training) is not, by itself, a waste management activity or a "trigger" for cleanup requirements, and (2) the appropriate "triggers" for DoD to address the environmental consequences of routine testing and training with military munitions are (a) after a range ceases to be an operational range; (b) when military munitions or their constituents migrate or threaten to migrate off-range; or (c) when military munitions or their constituents create an imminent and substantial endangerment to the public health or welfare or the environment.*

Response: RRPI only applies to munitions used for their intended purpose and only on operational ranges. We have already responded to this contention. See footnotes 6, 7, 25, and 26 and accompanying text.

Open burning and open detonation. It is not clear how DOD can assert that the open burning and open detonation (OB/OD) of munitions on operational ranges will still be subject to RCRA authority under the 2004 version of the RRPI. RRPI states that munitions that are deposited, incident to their normal and intended use, on an operational range are exempt from the definition of solid waste. That would likely exempt them from RCRA regulation, and RCRA regulation is the basis for regulating OB/OD on ranges.

Codifying existing policy. We also disagree that DOD's proposal simply codifies existing federal and state policies regarding military munitions. These policies are reflected in EPA's "military munitions rule," which has been upheld by the D.C. Circuit and adopted by 33 states thus far. To understand the munitions rule, a brief explanation of key RCRA provisions is necessary.

RCRA contains a broad **statutory** definition of solid waste and hazardous waste.²⁸ Statutory hazardous wastes are a subset of statutory solid wastes. RCRA also directs the Environmental Protection Agency to define a subset of statutory solid and hazardous wastes as **regulatory** solid and hazardous wastes.²⁹ Regulatory hazardous wastes are a subset of regulatory solid wastes. The key difference between a regulatory and a statutory hazardous waste is that the regulatory hazardous waste is subject to **both** RCRA's cleanup authorities and permitting authorities, while

²⁸ 42 U.S.C. § 6903(6) and (27).

²⁹ 42 U.S.C. § 6921.

statutory hazardous wastes are only subject to RCRA's cleanup authorities, not its permitting requirements.³⁰

In 1992, Congress passed the Federal Facility Compliance Act.³¹ In that Act, Congress directed EPA to promulgate regulations defining *when* military munitions become *regulatory* hazardous wastes.³² Because regulatory hazardous wastes are a subset of statutory solid wastes, *this means that military munitions are statutory solid wastes if they meet the statutory definition*, i.e., if they have been "discarded."³³ In 1995, EPA published its proposed "munitions rule" in the Federal Register.³⁴ Among other things, EPA proposed that munitions used for their intended purpose (including research, development, testing and training) are not *regulatory* hazardous wastes.³⁵

In the proposed munitions rule, EPA also proposed to define when used or fired military munitions would be *statutory* solid wastes.³⁶ EPA proposed that munitions discharged during military activities at ranges would be statutory solid wastes when the munitions were left in place at the time the range closed or was transferred out of DOD control. EPA also proposed that this provision would terminate upon DOD's promulgation of a rule governing the cleanup of munitions on closed and transferred ranges, and that DOD's rule would supersede all RCRA authority over such munitions.³⁷

Some commenters on the proposed rule noted that the proposal to "sunset" regulation of discharged munitions as statutory solid wastes upon promulgation of a DOD rule directly conflicted with the Federal Facility Compliance Act, and that EPA had no authority to preempt state authority to regulate discharged munitions. Commenters also argued that DOD had no authority to promulgate such a rule.

EPA's final munitions rule contained the proposal that munitions used for their intended purpose are not *regulatory* hazardous wastes.³⁸ EPA postponed action on the proposal to define when discharged munitions would be statutory solid wastes, as well as the sunset provision.³⁹ EPA's decision to postpone action was based partly on the comments objecting it had no authority to preempt state authority, and partly on the fact that DOD had not promulgated its "range rule."⁴⁰ EPA stated that it would further evaluate the legal arguments, and would also evaluate DOD's proposed range rule; if DOD failed to promulgate the rule, or if EPA found the rule to be

³⁰ 42 U.S.C. §§ 6924(u) and (v), 6925(a); 6928(h), 6972(a)(1)(B), and 6973(a). The permitting requirements in turn incorporate RCRA's regulations governing the day-to-day management of hazardous wastes (e.g., requirements related to safe storage, labeling, treatment, manifesting, training, etc.).

³¹ Pub. L. No. 102-386.

³² 42 U.S.C. § 6924(y).

³³ See 42 U.S.C. § 6903(27); *Military Toxics Project v. EPA*, 146 F.3d 948, 950-51 (D.C. Cir. 1998).

³⁴ 60 Fed. Reg. 56468.

³⁵ *Id.* at 56492.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 62 Fed. Reg. 6625, 6654 (Feb. 12, 1997), *codified at* 40 CFR § 266.202.

³⁹ *Id.* at 6632.

⁴⁰ *Id.*

insufficiently protective, EPA stated it would be prepared to address the issue under Federal environmental laws.⁴¹

EPA's decision to postpone promulgation of this provision does not mean that discharged munitions on ranges are not statutory solid wastes. As noted above, under the Federal Facility Compliance Act, if such munitions meet the statutory definition of "discarded," they are statutory solid wastes. Thus, the current state of the law is that used or fired munitions on ranges are statutory solid wastes if they are discarded. The Department of Justice took this position in recent litigation.⁴² Thus, under the munitions rule, munitions use does not require a RCRA permit, but the used munitions are subject to RCRA's cleanup authorities in appropriate circumstances.

DOD's proposal differs from the munitions rule in at least three significant ways.⁴³ First, DOD's proposal narrows RCRA's statutory definition of solid waste, while the munitions rule does not affect RCRA's statutory definition of solid waste. Thus, unlike the munitions rule, this statutory change precludes states and EPA from using RCRA's imminent and substantial endangerment authorities to address most munitions-related contamination.

Second, by narrowing the statutory definition of solid waste, a term used in RCRA's waiver of sovereign immunity, DOD's amendments likely narrow RCRA's waiver of immunity. The amendments may thus preempt state authority to require the cleanup of most munitions-related contamination on operational ranges, including unexploded ordnance and perchlorate contamination, under RCRA. (And as described above, potentially at contractor sites and elsewhere.) In contrast, the munitions rule does not preempt state authority at all. In the preamble to the final rule, EPA expressly acknowledged that under RCRA sections 3006 and 3009, "States may adopt requirements with respect to military munitions that are more stringent or broader in scope than the Federal requirements."⁴⁴

Third, by including the phrase "or constituents thereof," in paragraphs 2019(a)(1) and (a)(2), DOD's proposal may well preempt state and EPA authority over munitions-related and explosives-related constituents (e.g., perchlorate, TNT, white phosphorous) that have leached from the munitions and are contaminating the environment. The munitions rule does not address munitions constituents at all, and does not prevent EPA or the states from requiring cleanup of these chemicals when they leach from munitions into the soil or groundwater.⁴⁵

Proper "triggers" for cleaning up munitions. We agree that if any of the three "triggers" DOD describes exists, action should be taken to investigate and clean up munitions-related contamination. However, these triggers are not adequate to ensure DOD manages its ranges in a

⁴¹ Id.

⁴² See *Water Keeper Alliance v. U.S. Department of Defense*, 152 F. Supp.2d 163, 176, n. 3 ("Defendants [the United States] point out that they 'do not seek dismissal of any claim that ordnance debris and unexploded ordnance *left to accumulate* on the [Live Impact Area] constitute solid waste.' [citation omitted] Consequently, the Court will not dismiss this claim.")

⁴³ See Senate Testimony, section titled "DOD's amendments do not simply codify EPA's 'Military Munitions Rule,'" for additional detail.

⁴⁴ 62 Fed. Reg. 6625 (Feb. 12, 1997).

⁴⁵ 62 Fed. Reg. 6631.

manner that is sustainable, either from a readiness or an environmental perspective. As DOD noted in its "Munitions Action Plan,"⁴⁶:

There is increasing concern, inside and outside DoD (from both the general public and regulatory agencies), about the impacts of DoD's munitions-related programs on the environment, including the operations of our range infrastructure. These concerns need to be addressed in a way that enhances and sustains our mission readiness over the long-term. Inaction, or implementation of inappropriate measures, could lead to increased restrictions on our range operations and munitions management procedures, and ultimately detract from readiness.

Strong explosives safety and environmental protection programs are integral components of a strong national defense.⁴⁷

It is somewhat ironic that at the same time DOD has recognized that "strong . . . environmental protection programs are integral components of a strong national defense," it is supporting a legislative proposal that would substantially weaken the only state and federal programs designed to address groundwater contamination.

It is also ironic that DOD's proposed legislation would also likely impair or eliminate state and EPA authority to require investigation or cleanup of munitions contamination under any of the three triggers that DOD says are appropriate for addressing munitions-related contamination.⁴⁸ The first trigger is when a range ceases to be operational. As described above, DOD's proposal likely impairs state and EPA CERCLA-type authorities at closed ranges, and may impair the ability of local governments, water utilities, developers, and others to obtain reimbursement from DOD for their costs in cleaning up DOD's munitions-related contamination.⁴⁹

DOD's second trigger for addressing munitions-related contamination is when military munitions or their constituents migrate or threaten to migrate off-range. This trigger is likely inadequate to protect human health and the environment. Under DOD's proposed legislation, the presence of munitions contamination in groundwater below a range is *not* considered to be "off-range." Instead, the contamination must move beyond the lateral boundary of the range before it is considered off-range. Given that some ranges encompass hundreds of square miles, it is unwise to wait until munitions contamination threatens to move beyond the lateral boundaries of the range to address it. Allowing contamination to spread so far substantially increases the risk of unanticipated exposures to the contaminants, because our understanding of the subsurface environment is limited at best. It also substantially increases the costs of cleaning up the contamination -- if cleanup is even possible over such large areas. These concerns underscore the importance to the states of retaining the authority to require investigation of munitions contamination on ranges. Without this

⁴⁶ Department of Defense Munitions Action Plan: Maintaining Readiness through Environmental Stewardship and Enhancement of Explosives Safety in the Life Cycle Management of Munitions, prepared by Operational and Environmental Executive Steering Committee for Munitions (OEESCM), November 2001.

⁴⁷ Id. at 5.

⁴⁸ See response to Myth # 6.

⁴⁹ See footnotes 6 and 7, supra.

authority, how would regulators ever become aware of munitions contamination in groundwater until it had impacted drinking water supplies?

DOD's third trigger is when the contamination presents an imminent and substantial endangerment. Such an endangerment could arise on-range or off-range. If the endangerment were off-range, state and EPA authority to address it would be impaired, because they could take no action to require DOD to identify or address an on-range source of contamination. And if the endangerment were on-range, the state and EPA would be completely powerless to require any action under RCRA or CERCLA.⁵⁰ One example where on-range contamination likely presents an imminent and substantial endangerment is the Aberdeen Proving Grounds. There, perchlorate contamination from munitions has contaminated municipal drinking water wells that are located on an operational range.

8. *Myth:* *The RCRA and CERCLA provisions of the RRPI effectively exempt munitions and constituents that are deposited on an operational range and then simply left behind, whether or not the range is actually used for testing and training.*

Fact: *The RRPI RCRA and CERCLA provisions are narrowly constructed so as to apply only at operational ranges.*

- *The proposed legislation specifically states that nothing in the RRPI affects legal requirements applicable to military munitions and their constituents once the range ceases to be an operational range.*
- *In cooperation with EPA, the amendments to RCRA and CERCLA have been revised to make it absolutely unambiguous that they do not affect our cleanup obligations on closed ranges or ranges that may close in the future.*

Response: We have previously rebutted the argument that DOD's 2002 and 2003 RRPI proposals only applied to operational ranges in detail in our testimony before Congress. Although the 2004 RRPI does not appear to preempt RCRA authorities on closed ranges, it likely would impair state and EPA CERCLA-related authorities over closed ranges.⁵¹ In addition, as noted above, the definition of "operational range" includes ranges that have not been used in years, or even decades.⁵²

Regarding the bulleted points, subsection (d) of the 2004 RRPI provides "[n]othing in this section affects the legal requirements applicable to military munitions, including unexploded ordnance, and the constituents thereof, that have been deposited on an operational range, once the range ceases to be an operational range." DOD's contention that subsection (d) preserves state and federal cleanup authorities over closed ranges has previously been rebutted in our testimony. Briefly, in 1997, EPA deferred promulgation of a rule that would have codified EPA's interpretation that munitions left in place at the time a range closed or was transferred out of

⁵⁰ DOD would say that its proposal preserves EPA's CERCLA § 106 imminent hazard order authority. However, EPA has never issued a CERCLA § 106 order to DOD, nor may it do so without the concurrence of the Department of Justice. See E.O. 12580(4)(e). In our view, it is not realistic to rely on EPA's § 106 authority as a safeguard against imminent and substantial endangerments at DOD facilities.

⁵¹ See footnotes 6 and 7, supra.

⁵² See footnotes 8 and 9, supra, and accompanying text.

military control are solid wastes as defined in RCRA. In light of EPA's regulatory inaction, DOD may argue that there currently *are no* legal requirements applicable to munitions that were deposited on a range while it was operational, and remain there after it has closed.

Additionally, the federal government has repeatedly argued that the term "requirements" should be construed very narrowly, to encompass only precise standards capable of uniform application.⁵³ This gives DOD a second basis to argue that subsection (d) does not preserve the application of state cleanup authorities.

9. *Myth:* *The RRPI proposal exempts not only military use of munitions for training, but also private defense contractors' use of munitions for research and development.*

Fact: *The RCRA and CERCLA provisions of the RRPI provide no protections or relief to private contractors from regulation beyond those that already exist in law or under longstanding EPA and State environmental policy.*

- *The RRPI RCRA and CERCLA legislative proposals simply codify the existing principle that use of a product for an intended purpose is not a waste management activity subject to RCRA or a "release" subject to CERCLA.*
- *Current environmental principles are the same for both use of munitions in training and use of munitions for research, development, testing, and evaluation (RDT &E). RDT &E is not now regulated under RCRA or CERCLA, regardless of who is conducting the RDT&E and whether the object of the RDT &E is a military munitions or commercial product.*
- *Nonetheless, DoD has limited RRPI's RCRA and CERCLA provisions to activities occurring on operational ranges. To qualify as an "operational range," the property, whether owned by DoD or some other entity, must be under DoD's jurisdiction, custody, or control" and used for "range activities" (i.e., used for research, development, testing, and evaluation of military munitions, ordnance or weapons systems, or for the training of military personnel in their handling). Thus, activities involving military munitions that take place on the premises of a private defense contractor are not conducted on an "operational range" and have no more protection under the RRPI than they already have under current RCRA and CERCLA law and regulation.*

Response: We do agree that the munitions rule generally treats contractor-owned facilities the same as DOD-owned or leased facilities. However, we disagree with the rest of DOD's statements in "Myth # 9." DOD mischaracterizes the scope of the exemptions under the munitions rule, and also mischaracterizes the scope of the 2004 RRPI. The 2004 RRPI creates exemptions from RCRA regulation that are far broader than those in the munitions rule – specifically, unlike the munitions rule, the RRPI exempts munitions and munitions constituents from RCRA cleanup authorities.⁵⁴

⁵³ See, e.g., *U.S. v. New Mexico*, 32 F.3d 494 (10th Cir. 1994); *Colorado v. U.S. Department of the Army*, 707 F.Supp. 1562 (D.Colo. 1989); *Kelley v. U.S.*, 618 F. Supp. 1103 (W.D. Mich. 1985); and *U.S. v. Pennsylvania Dep't. of Environmental Resources*, 778 F. Supp. 1328 (M.D. Pa. 1991).

⁵⁴ See Response to "Myth #6."

DOD says that the 2004 RRPI does not extend its exemptions to defense contractor facilities. We are concerned that this is not the case, because of recently adopted definitions of the terms "range" and "operational range." The new definition of "range," codified at 10 U.S.C. § 101(e), provides:

"(3) The term 'range' means a designated land or water area set aside, managed, and used to conduct research, development, testing, and evaluation of military munitions, other ordnance, or weapon systems, or to train military personnel in their use and handling. Ranges include firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access and exclusionary areas, and airspace areas designated for military use according to regulations and procedures established by the Federal Aviation Administration such as special use airspace areas, military training routes, or other associated airspace."⁵⁵

Certainly many defense contractors conduct "research and development," if not also "testing and evaluation" of military munitions, other ordnance, or weapons systems at their facilities. Could these privately owned facilities be considered ranges? It seems possible, if not likely, that they could, as there is nothing in the definition of "range" or "operational range" that limits ranges to land owned or leased by the United States.

Although "operational range" means a range "under the jurisdiction, custody or control of the Secretary concerned,"⁵⁶ the phrase "under the jurisdiction, custody or control" does *not* mean the range must be owned by the United States.⁵⁷ We have not been able to identify any provision of the United States Code or the Code of Federal Regulations that defines the phrase "jurisdiction, custody or control." Nor have we been able to find any decision of a federal court that defines the phrase. Taken individually, none of these terms implies ownership.

Indeed, DOD has previously argued that facilities it does not own or lease may nonetheless be under its jurisdiction, custody, or control. In 1997, in the preamble to its proposed "Range Rule," DOD stated that it retained jurisdiction over military munitions on closed ranges that had been transferred to private ownership.⁵⁸ And in the fall of 2001, DOD forwarded proposed legislative

⁵⁵ H.R. 1588, section 321.

⁵⁶ 10 U.S.C. 101(e)(3).

⁵⁷ Compare the "jurisdiction, custody or control" phrase with language creating the Defense Environmental Restoration Program in 10 U.S.C. § 2701(c):

(1) Basic responsibility.--The Secretary shall carry out (in accordance with the provisions of this chapter and CERCLA) all response actions with respect to releases of hazardous substances from each of the following:

(A) Each facility or site **owned by, leased to, or otherwise possessed by the United States** and under the jurisdiction of the Secretary.

(B) Each facility or site which was under the jurisdiction of the Secretary **and owned by, leased to, or otherwise possessed by the United States** at the time of actions leading to contamination by hazardous substances.

(C) Each vessel owned or operated by the Department of Defense.

(Emphasis added.)

In fact, the language of (B) clearly indicates that jurisdiction is a distinct concept from ownership.

⁵⁸ 62 Fed. Reg. 50796, 50797 (September 26, 1997). Specifically, DOD stated:

[This proposal] applies to military munitions on closed, transferred, and transferring military ranges previously or currently owned by, leased to, or

language to the Office of Management and Budget that appeared to define the Secretary of Defense's "jurisdiction" to include facilities no longer owned by, leased to, or otherwise possessed by DOD, but at which DOD is carrying out a response action under the Defense Environmental Restoration Program (DERP).⁵⁹

DOD and counsel for DOD contractors could make similar arguments were these amendments to pass. For example, DOD might assert that defense contractor facilities are under its "control" because of contractual provisions that give it ownership of weapons or munitions, or some degree of control over their manufacture or use. DOD might also assert that it has "jurisdiction" over facilities it does not own because the CERCLA National Contingency Plan designates DOD as the "removal response authority with respect to incidents involving DOD military weapons and munitions or weapons and munitions under the jurisdiction, custody, or control of DOD."⁶⁰

Furthermore, in the definition of "range," the term "designated" is undefined. As far as we have been able to determine, there is no provision in the United States Code or the Code of Federal Regulations that establishes a procedure for "designating" a range. Nothing in the proposed definition explains or limits who designates a range, or how they designate one. Could a military contractor designate a range on land it uses to test or manufacture munitions? Perhaps. Nothing in the legislation adopted by Congress prevents it.

otherwise possessed or used by *the United States. These military ranges may not be under the administrative control of the Secretary of Defense* (or the Secretary of War prior to 1949); *however, the munitions themselves remain under the jurisdiction of the Secretary of Defense.* For this reason, this proposal applies to military munitions on closed, transferred, or transferring military ranges where the range itself is under the administrative control of another Federal agency or property owner, provided that the activity that led to the munitions being on those ranges was in support of the Department of Defense's national defense or national security mission.

Id. at 50797 (emphasis added).

⁵⁹ DOD's proposal would have amended 10 U.S.C § 2701, which establishes the DERP. Its relevant proposed revisions are shown below in underscored font.

(a) Environmental restoration program.--

(1) In General.--The Secretary of Defense shall carry out a program of environmental restoration at facilities under the jurisdiction of the Secretary listed in paragraph (c) of this section. The program shall be known as the "Defense Environmental Restoration Program".

(c) Responsibility for response actions.--

(1) Basic responsibility.--The Secretary shall carry out (in accordance with the provisions of this chapter and CERCLA) all response actions with respect to releases of hazardous substances from each of the following:

(A) Each facility or site owned by, leased to, or otherwise possessed by the United States and under the jurisdiction of the Secretary.

(B) Each facility or site which was under the jurisdiction of the Secretary and owned by, leased to, or otherwise possessed by the United States at the time of actions leading to contamination by hazardous substances where the Secretary is carrying out a response action under the program established in subsection (a).

(C) Each vessel owned or operated by the Department of Defense.

⁶⁰ 40 C.F.R. §300.120(d).

10. Myth: *The RCRA and CERCLA provisions of the RRPI will protect ranges owned by private companies or defense contractors.*

Fact: *DoD's [sic] has developed a definition of "operational range" specifically designed to prevent private companies or defense contractors from applying the RRPI to their lands even if they use them as ranges.*

- *Property, whether owned by DoD or some other entity, must be under DoD's "jurisdiction, custody or control" and be used for "range activities," i.e., used for research, development, testing, and evaluation of military munitions, ordnance or weapons systems, or for the training of military personnel in their handling, to qualify as an operational range.*
- *A range owned by a defense contractor, even though used for military munitions testing, would not be an operational range because it is not under the jurisdiction, custody, or control of the DoD; not being an operational range, it also would not be covered by the RRPI.*
- *Not only must the range be an "operational range", but only those activities related to the normal and expected use of military munitions conducted on the operational range are affected by the Readiness and Range Preservation Initiative (RRPI) proposal.*

Response: See response to issue # 9. Regarding the last bulleted point, see footnotes 25 and 26 and the accompanying text.

11. Myth: *The RRPI RCRA and CERCLA provisions will prevent environmental regulators from protecting public health from groundwater contamination from ranges.*

Fact: *The RCRA and CERCLA provisions of the RRPI apply only at operational ranges. They have no affect on any regulatory authorities at other than operational ranges.*

- *Even at operational ranges, if military munitions or their constituents migrate off the range, existing environmental laws would apply.*
- *If munitions constituents cause an imminent and substantial endangerment to the public health or welfare or the environment EP A may address the concern under its CERCLA section 106 authority.*
- *Nothing in the legislative proposal affects any State or Federal authorities under the Safe Drinking Water Act to take such action as may be necessary to protect the public from a "contaminant which is present or is likely to enter a public water system or an underground source of drinking water." This is the authority EPA used to order cleanup at the Massachusetts Military Reservation (MMR).*

Response: The argument that DOD's proposals only apply at operational ranges has been addressed previously.⁶¹ And the first bulleted point is quite misleading. Under the 2004 RRPI, even if munitions contamination has migrated beyond the lateral borders of a range, neither states nor EPA would have any authority (other than EPA's CERCLA § 106 authority) to require

⁶¹ See footnotes 6, 7, 25 and 26, *supra*.

investigation or cleanup of an on-range source of such contamination. Preserving EPA's CERCLA § 106 authority does not provide much comfort to the states, frankly. EPA has never issued a § 106 order to DOD, and may not do so without the concurrence of the Department of Justice.⁶²

The fact that DOD has thus far excluded the Safe Drinking Water Act from its legislative proposals in no way justifies preempting state or EPA authority under RCRA and CERCLA, for a variety of reasons. Most importantly, as described in our response to Myth # 1, DOD has still not cited a single instance in which RCRA or CERCLA has impacted readiness at all, so there is no basis for preempting state or EPA authorities under them.

Moreover, the SDWA is simply not an adequate substitute for RCRA or CERCLA authorities. Although the EPA does have broad remedial authority under the SDWA's imminent hazard provision, the SDWA is fundamentally not a cleanup statute. It contains no guidelines or procedures for investigating or cleaning up contamination. Instead, it primarily regulates suppliers of public drinking water. State agencies implementing the SDWA do not typically have remedial programs established under state drinking water laws. Some states do not even have any cleanup authorities under their authorized SDWA programs, nor are they required to.⁶³ Furthermore, the Safe Drinking Water Act does not apply to individual drinking water wells, nor to water used for agricultural purposes. And the Safe Drinking Water Act's waiver of sovereign immunity is limited in ways that RCRA's is not.⁶⁴

And while the Administration may not yet have put forward legislation to preempt what state and EPA authorities there are under the SDWA, DOD has expressed its objections to SDWA regulation on multiple occasions, as recently as February of this year.⁶⁵ So, the fact that DOD has

⁶² June 27, 2003 letter from Associate EPA Administrator Edward Krenik to the Honorable John Dingell, Ranking Member, House Committee on Energy and Commerce; Executive Order 12580 § (4)(e).

⁶³ 42 U.S.C. § 300h--7(a).

⁶⁴ 42 U.S.C. § 300j--6 (a) waives sovereign immunity for federal agencies:

- (1) owning or operating any facility in a wellhead protection area;
- (2) engaged in any activity at such facility resulting, or which may result, in the contamination of water supplies in any such area;
- (3) owning or operating any public water system; or
- (4) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 300h(d)(2) of this title).

⁶⁵ On March 14, 2002, Mario Fiori, Assistant Secretary of the Army testified before the Military Readiness subcommittee of the House Armed Services Committee that

"the use of environmental statutes, such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation & Recovery Act (RCRA) and the Safe Drinking Water Act (SDWA), to require investigation and cleanup of munitions and munitions constituents on operational military ranges will likely impact the Army's ability to fulfill its national security mission by causing the shut down or disruption of live-fire training. Regulators may themselves be compelled to enforcement by lawsuits alleging failure to vigorously apply these and other environmental laws."

And in a February 2004 report to Congress titled "Implementation of the Department of Defense Training Range Comprehensive Plan," DOD stated:

"Military live-fire training and testing activities by necessity deposit unexploded ordnance (UXO) and munitions constituents onto military lands. CERCLA, RCRA, the Clean Water Act (CWA), and the Safe Drinking Water Act have implications for the use of military munitions, to include UXO and munitions constituents on operational ranges. There is a growing recognition that the application of these environmental laws in ways unanticipated or unintended when first enacted can reduce range access, availability, capacity, and capability."

not yet proposed to restrict state or EPA authorities under the SDWA provides no assurance it will not attempt to do so in the future.

It is true that EPA is overseeing cleanup of extensive munitions-related groundwater contamination at the Massachusetts Military Reservation under SDWA's imminent hazard authorities. However, it is our understanding that DOD does not believe the SDWA is an appropriate mechanism for regulating this cleanup, and instead would prefer that this cleanup be overseen under CERCLA -- the very statute it is now seeking to render inapplicable to such cleanups.⁶⁶

12. Myth: *Contamination from munitions and their constituents (perchlorate, RDX and TNT) have resulted in regulators closing ranges in Maryland and Massachusetts because of groundwater contamination. If RRPI passes, environmental regulators will lose the authorities they used at these facilities.*

Fact: *There will be no change. There is no request by DoD for any exemption from the Safe Drinking Water Act, the law that protects drinking water sources. The basis for USEPA's action at the Massachusetts Military Reservation will be unchanged.*

Response: See response to issue # 11.

13. Myth: *If the RRPI passes, DoD will not do anything to assess and address contamination at its ranges.*

Fact: *Groundwater impact assessments have been done, particularly at ranges of particular sensitivity or concern, such as the Massachusetts Military Reservation, among others.*

- *An effort is now underway to do a more systematic assessment of potential drinking water issues.*
- *As part of its FY04 Defense Planning Guidance, the Department has initiated an effort to assess potential hazards from off-range munitions and begin remediation by FY2008. This will include characterization of potential areas of munitions contamination, as well as consideration of hydrology and potential issues associated with drinking water supplies.*

Response: We applaud any effort by DOD to proactively address groundwater contamination associated with its ranges. However, voluntary efforts by DOD are no substitute for independent state regulation. It is our experience that DOD is far more responsive to environmental concerns when the states are able to hold it accountable through injunctive relief and, when necessary, penalties.⁶⁷

Id. at p. 32.

⁶⁶ These views were expressed by DOD representatives at a meeting with various state agency and Attorney General representatives in Denver, Colorado, on December 11 and 12, 2003.

⁶⁷ See Senate Testimony under the section titled "DOD's compliance record warrants a regulatory structure that ensures accountability." The only environmental law under which DOD's compliance record is better than private industry's is

There is reason to think that DOD's self-assessments may not be particularly timely, thorough, or reliable. The General Accounting Office recently released a report that found "DOD has made limited progress in its program to identify, assess, and clean up sites that may be contaminated with military munitions."⁶⁸ This same report found that at current funding levels, "cleanup at the remaining munitions sites in DOD's current inventory could take from 75 to 330 years to complete."⁶⁹ And in an earlier, report, GAO found that the Army Corps of Engineers (which is responsible for executing the cleanup of "formerly used defense sites," including former ranges) "does not have a sound basis for determining that about 38%, or 1,486, of 3,840 formerly used defense sites do not need further study or cleanup action."⁷⁰ That GAO report went on to state that "the Corps appeared to have overlooked or dismissed information in its possession that indicated hazards might be present. . . . In other cases, the files contained no evidence that the Corps took sufficient steps to assess the presence of potential hazards."⁷¹

Additionally, many states have found that DOD's determinations that formerly used defense sites do not require any cleanup action are frequently mistaken. In a 1998 survey of state hazardous waste programs, nearly half of the responding states said that they had reason to believe that the Corps had not made sound environmental decisions in making some "no further action" determinations. Six states had conducted their own environmental or health assessments at 66 of the sites the Corps had designated "no further action." These states determined that 32 of the 66 did require cleanup.⁷²

14. Myth: *Under the RRPI RCRA and CERCLA proposals, DoD will have no responsibility to respond and regulators will have no authority to require a response to threats to public health from perchlorate contamination of groundwater before contaminated groundwater emanates from the confines of an operational range.*

Fact: *The Department of Defense is committed to addressing any contamination that poses an unacceptable risk to human health and the environment.*

- *If perchlorate or any other contaminant in the groundwater within the confines of an operational range poses an imminent and substantial danger because of a release or a threat of release from the range to the public*

RCRA. The record shows that this is the result of RCRA's clear waiver of sovereign immunity from state fines and penalties.

⁶⁸ "MILITARY MUNITIONS: DOD needs to Develop a Comprehensive Approach for Cleaning Up Contaminated Sites," GAO-04-147, December, 2003, p. 4. This report is available at GAO's website: www.gao.gov.

⁶⁹ *Id.* at 17.

⁷⁰ ENVIRONMENTAL CONTAMINATION: Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup." GAO-02-658, August 2002, p.4.

⁷¹ *Id.*

⁷² Contamination at the 32 sites included high levels of PCBs, unexploded ordnance, leaking underground storage tanks, asbestos, and groundwater contamination. "No Further Action Survey," Association of State and Territorial Solid Waste Management Officials, December 1998. Several of the states that responded they did not have any reason to doubt the Corps' determinations commented that they had not assessed the sites themselves. The complete survey is available on ASTSWMO's website at <http://www.astswmo.org/Publications/bookshelf.htm> by clicking on "Federal Facilities" and then on "No Further Action Review Efforts at Formerly Used Defense Sites (NOFA FUDS) December, 1998."

health or welfare, DoD has the responsibility to take appropriate action under section 104(a)(1) of CERCLA.

- *Under the Safe Drinking Water Act (SDWA), the EPA Administrator is empowered to take action necessary to protect the public health from an imminent and substantial endangerment created by a contaminant that is present in, or likely to enter, an underground source of drinking water. EPA need not wait until contamination has spread.*
- *SDWA allows for citizens suits to enforce any requirement under SDWA.*

Response: See responses to issues ## 11 and 13. In addition, DOD statement that the SDWA authorizes citizen suits to enforce any requirement under that Act is misleading. The SDWA citizen suit provision does not authorize citizens to bring suit to enjoin conditions that present an imminent and substantial endangerment.

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CHRISTINE T. MILLIKEN
*Executive Director
General Counsel*

May 31, 2000

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VICE PRESIDENT
CARLA J. STOVALL
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IMMEDIATE PAST PRESIDENT
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General of Mississippi

Jacob J. Lew, Director
Office of Management and Budget
Old Executive Office Building, Room 252
17th Street and Pennsylvania Avenue, NW
Washington, D.C. 20503

Dear Director Lew:

We, the undersigned Attorneys General, understand the Department of Defense recently submitted to OMB proposed language for a final rule ("the range rule") governing response actions at closed, transferred, and transferring military ranges that may contain unexploded ordnance ("UXO"). We have serious concerns with the proposed final rule. In short, we believe that the proposal contravenes Congressional intent that the States and the Environmental Protection Agency should share regulatory authority over cleanup of UXO, and that DOD does not have the statutory authority to promulgate the range rule. Further, we understand that the rule does not contain adequate standards to protect human health and the environment. This lack of standards, combined with DOD's track record in responding to UXO contamination, persuades us that the proposed rule will not adequately protect human health and the environment. Please note that this letter has been revised to reflect signatures of additional Attorneys General.

There is no accurate inventory of former military ranges that may contain UXO, but they likely number in the thousands. Many of these ranges are located on military bases that are being transferred to private ownership as part of the base closure process. Others, already in private ownership, face increasing development pressures. Consequently, potential public exposure to the UXO hazards present on these ranges is rapidly increasing. The increasing threat to the public from UXO heightens both our concerns with DOD's proposed rule, and the need for state oversight.

In 1992, Congress passed the Federal Facility Compliance Act. Section 107 of the Act (codified at 42 U.S.C. § 6924(y)) directed the Administrator of the Environmental Protection Agency, after consultation with the States and with the Secretary of Defense, to promulgate regulations defining when military munitions become hazardous waste under the Resource Conservation and Recovery Act ("RCRA"), and prescribing safe storage and transportation requirements for such waste. In adopting section 107 of the Act, the Conference Committee rejected a provision in the Senate version of the bill that would have authorized the Secretary of Defense to promulgate regulations governing the safe development, handling, use, transportation, and disposal of military munitions. This legislative history clearly demonstrates that Congress intended that states and EPA, rather than DOD, should regulate management of waste munitions.

Director Jack Lew

In 1997, pursuant to section 107 of the Act, EPA promulgated a rule defining various circumstances under which military munitions were considered hazardous waste. In that rule, EPA postponed making a final decision to regulate military munitions left on closed or transferred ranges, in part because DOD was proposing to draft a range rule, and EPA wanted to evaluate DOD's rule to determine whether it adequately protected human health and the environment. In light of the legislative history described above, the decision to defer EPA regulation of munitions on ranges in favor of DOD regulation flies in the face of Congressional intent. It also undermines the Congressional goal of independent state oversight of UXO cleanups, and could set the stage for significant federal-state conflicts.

Furthermore, as many states noted in commenting on the draft range rule, DOD does not have statutory authority to promulgate such a rule. Executive Order 12580 expressly gives EPA, not DOD, "lead agency" authority to oversee cleanups at sites no longer under DOD's jurisdiction, authority or control, and also gives EPA exclusive authority to promulgate rules affecting such sites. Nor does the Defense Environmental Restoration Program ("DERP") authorize DOD to promulgate such regulations. DERP merely makes DOD responsible to carry out the cleanup of UXO.

In addition to these legal flaws, the range rule simply does not adequately protect human health and the environment. Our understanding is that the rule itself sets no substantive criteria or standards for investigating or remediating UXO sites; instead, it is largely procedural. EPA has expressed concerns that the rule relies heavily on the concept of "technical impracticability" to excuse a decision not to remediate UXO. In practice, DOD continues to rely on statistical characterization and risk assessment models that do not protect human health and the environment. Although we understand that these models are not expressly incorporated into the proposed range rule, they are in fact the heart of DOD's UXO cleanup program. Experience with these models at the Lowry Bombing Range in Colorado, Ft. Ord in California, and other sites across the country amply demonstrates their shortcomings. DOD's characterization methodology routinely concludes that contaminated sites are clean, and the risk methodology plays a numbers game to manipulate clearly unacceptable levels of UXO contamination so that they fall within EPA's risk range.

Promulgating the range rule will lead to protracted litigation and lengthy delays in responding to a serious and widespread environmental problem looming on the horizon. Because the proposed range rule lacks legal authority, conflicts with Congressional intent, and fails to protect human health and the environment, we urge you to disapprove this fundamentally flawed rule. Instead, we urge you to direct EPA to consult with the states and with DOD in promulgating regulations under RCRA to govern cleanup of UXO at closed, transferred, and transferring ranges, as we believe Congress intended when it passed the Federal Facility Compliance Act in 1992. Thank you for considering our views.

Director Jack Lew
May 31, 2000
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Sincerely,

Attorney General Ken Salazar
Attorney General of Colorado

Attorney General Alan G. Lance
Attorney General of Idaho

Attorney General Bruce M. Botelho
Attorney General of Alaska

Attorney General Janet Napolitano
Attorney General of Arizona

Attorney General Bill Lockyer
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Attorney General Tom Reilly
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Attorney General Jennifer Granholm
Attorney General of Michigan

Attorney General Jeremiah W. Nixon
Attorney General of Missouri

Attorney General Joseph P. Mazurek
Attorney General of Montana

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Attorney General Frankie Sue Del Papa
Attorney General of Nevada

Attorney General John J. Farmer, J r.
Attorney General of New Jersey

Attorney General Eliot Spitzer
Attorney General of New York

Attorney General Heidi Heitkamp
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Attorney General of Utah

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Attorney General of the Virgin Islands

Attorney General Christine O. Gregoire
Attorney General of Washington

Resolution Number 00-14
Approved August 15, 2000
Girdwood, Alaska

As certified by
Robert E. Roberts
Executive Director

**Department of Defense Range Rule:
"Closed, Transferred, and Transferring Ranges Containing Military
Munitions"**

WHEREAS, Department of Defense (DOD) has written the Range Rule to address ordnance / explosive waste (OEW) and unexploded ordnance (UXO) at military ranges that are closed, transferring or transferred. The Range Rule is now in the final stages of rule making at the federal Office of Management and budget (OMB); and

WHEREAS, States, including the National Association of Attorneys General (NAAG), and other stakeholders have serious reservations about the proposed final Range Rule; and

WHEREAS, the proposed rule does not provide for a state role that is consistent with congressional intent establishing the Range Rule; and

WHEREAS, there is no accurate national inventory of closed, transferring and transferred military ranges, but it is expected to be in the thousands; and

WHEREAS, many ranges are scheduled to be transferred via base closure or have been transferred into private ownership increasing the potential of public exposure to OEW / UXO; and

WHEREAS, the proposed rule will not provide protection of human health and the environment because it does not contain the technical standards or criteria necessary to remediate OEW / UXO sites; and

WHEREAS, States believe DOD does not have statutory authority to promulgate the Range Rule and DOD's proposed rule contravenes congressional intent that the States and the U. S. Environmental Protection Agency (EPA) should share regulatory authority over cleanup of UXO / OEW; and

WHEREAS, the proposed Rule establishes DOD as the final decision maker, but good public policy mandates that DOD should not be the final arbiter of the cleanup of past activity areas for contamination that DOD has created; and

WHEREAS, this resolution full supports Policy NR-8, *Environmental Compliance at Federal Facilities* executed by the National Governors' Association.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF STATES:

- Authorizes the transmittal of this resolution to OMB, requesting the Range Rule be sent back to DOD to be revised after working closely with the States to develop a Range Rule that will adequately address the issues raised by States, the Association of State and Territorial Solid Waste Management Official (ASTSWMO), NAAG, EPA and other Stakeholders. Consulting with States should include national meetings of States and concerned stakeholders, meeting with ASTSWMO, and other venues.
- Requests DOD, as part of the effort to revise the Rule, to work with Association of State and Territorial Solid Waste Management Officials (ASTSWMO) to address states' comments and concerns on the proposed Range rule. ASTWMO will report progress on revising the Range Rule to ECOS, including recommendations for ECOS to resolve or support.
- Requests that DOD, and if necessary in consultation with OMB, evaluate and reply to NAAG's May 31, 2000 letter to OMB which questions DOD's authority to write a Range Rule.
- Agrees with congressional intent that States and EPA should share regulatory authority over cleanup of OEW / UXO.
- Requests DOD to work with the Interstate Technology regulatory Cooperation Work Group's UXO work group to develop technical guidance and technologies to address states' concerns about collection of adequate and technically defensible data, which is critical for reasonable and protective cleanup decisions.