FACT SHEET ON DOD EXEMPTIONS FROM RCRA AND CERCLA

Once again, the Department of Defense (DOD) is seeking legislation that would grant the Department exemptions from the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). These exemptions are spelled out in the *Range Readiness and Preservation Initiative* (RRPI) and are being sought for a fifth successive year. Neither the Senate nor the House of Representatives nor any Committee or Subcommittee thereof have adopted these provisions in the past four years.

DOD has asserted that the amendments are necessary "to maintain military readiness." In rebuttal, State organizations on a bipartisan basis assert that these laws do not adversely affect military readiness. Major associations of drinking water utilities, local government organizations, and environmental organizations stand together in agreement that the existing laws are vital and necessary to protect drinking water supplies and the health of military families and local communities.

GROUPS OPPOSING THE DEPARTMENT OF DEFENSE EXEMPTION LEGISLATION INCLUDE:

- The Environmental Council of the States
- The National Conference of State Legislators
- The National Association of Attorneys General
- The Association of State and Territorial Solid Waste Management Officials
- The Association of Metropolitan Water Agencies
- The American Water Works Association
- The National Association of Water Companies
- The Association of California Water Agencies
- The National League of Cities
- The National Association of Counties
- Governors of New York, Arizona, and Maine
- All major environmental organizations
- The Western Growers Association

MAJOR REASONS TO OPPOSE THIS LEGISLATION INCLUDE:

- The lack of a single example of military readiness negatively affected by these laws.
- Each of these laws already contains national security exemptions that allow the President to exempt any DOD facility from statutory or regulatory requirements if necessary for military readiness.
- The historic contamination of potential and actual drinking water supplies throughout the country by DOD. The amendments would result in groundwater "sacrifice zones" and higher ultimate cleanup costs for DOD and the taxpayers.
- The broad scope of the DOD exemptions.

- The preempting of State authorities to protect potential drinking water supplies, address environmental contamination, and take action where there may be *imminent and substantial endangerments* to human health.
- The termination of Federal statutory authorities that local governments, drinking water providers, and military families can use to seek action when DOD contaminates or threatens their water supply.
- The elimination of the EPA's RCRA *imminent hazard* authority and normal Superfund clean-up authority with respect to military munitions, including groundwater contamination, on operational ranges.
- The removal of the authority of the Agency for Toxic Substance and Disease Registry (ATSDR) to conduct health assessments for constituents (elements or chemicals) of military munitions.
- The acknowledgment by DOD in Congressional testimony that no action by any State, the Environmental Protection Agency, or the ATSDR using the Solid Waste Disposal Act or the Superfund statute has ever adversely affected training or military readiness.

SECTION 1: OVERVIEW

1. THERE ARE NO EXAMPLES OF ACTUAL ADVERSE EFFECTS ON MILITARY READINESS FROM THESE LAWS

A. Former EPA Administrator Christine Whitman has testified that she was "not aware of any particular area where environmental protection regulations are preventing the desired training." In addition, the former Administrator stated, "we have been working very closely with the Department of Defense and I do not believe that there is a training session, anywhere in the country that is being held up or not taking place because of environmental protection regulation." (Senate Committee on Environment and Public Works, February 26, 2003.)

B. DOD has acknowledged that there have not been any instances in which RCRA or CERCLA have hurt readiness and specifically that no State has ever used its RCRA or State Superfund authority in a manner that has hurt readiness. (Summary of State-DOD meeting of December 11-12, 2003.)

(Testimony of Ben Cohen, Deputy General Counsel for Environment and Installations, Department of Defense, before the Subcommittee on Energy and Air Quality and Subcommittee on Environment and Hazardous Materials, April 21, 2004):

> **Mr. Dingell**. I note that DOD has acknowledged that there have not been any instances in which RCRA or CERCLA have impacted readiness, and specifically no State has ever (sic) used its RCRA or Superfund authority in a matter which has affected readiness. Do you agree with that statement, Mr. Cohen?

Mr. Cohen. Yes, sir.

C. Deputy Secretary of Defense Paul Wolfowitz stated on March 7, 2003, "In the vast majority of cases, we have demonstrated that we are able both to comply with environmental requirements and to conduct military training and testing." Mr. Wolfowitz, however, requested the military departments to identify any "particular environmental restriction that poses a threat to military readiness," so that the existing exemptions under the environmental laws could be used. In the past two years, no such exemptions have been invoked by the executive branch.

(Testimony of Ben Cohen, Deputy General Counsel for Environment and Installations, Department of Defense, before the Subcommittee on Energy and Air Quality and the Subcommittee on Environment and Hazardous Materials, April 21, 2004):

Mr. Stupak. Thank you, Mr. Chair. Mr. Dubois and all the witnesses, thanks for staying so we can get these questions in. We talk a lot about Deputy Secretary Wolfowitz memorandum of March 7, 2003, which he asks for, and I am quoting, "Any proposed environmental restrictions that you believe threaten in a substantial way your ability to ensure the military preparedness of the armed forces for which you are responsible."

My question is did the Army, Navy, Air Force, Marines, Coast Guard submit any information that warrant using the national security exemption of CERCLA, RCRA, and the Clean Air Act?

Mr. Cohen. Sir, no service has formally submitted a proposal in the period since Deputy Secretary Wolfowitz issued the memorandum.

Mr. Stupak. So no one submitted anything back to you?

Mr. Cohen. That is correct.

Mr. Stupak. My follow-up question was if you would share with Committee members any responses you received in response to Mr. Wolfowitz memorandum. In other words, there wouldn't be anything in writing to his memorandum.

Mr. Cohen. That is correct, sir.

Mr. Stupak. So the service didn't feel compelled to seek these exceptions under CERCLA, RCRA, or the Clean Air Act underneath that memorandum?

Mr. Cohen. That is correct.

D. Department of Defense officials have stated that preempting State authorities was "not a matter of readiness, but of control." (Summary of State-DOD meeting of December 11-12, 2003.)

2. EACH OF THESE LAWS ALREADY CONTAINS NATIONAL SECURITY EXEMPTIONS THAT ALLOW THE PRESIDENT TO EXEMPT ANY DOD FACILITY FROM STATUTORY OR REGULATORY REQUIREMENTS IF NECESSARY FOR MILITARY READINESS

RCRA (Section 6001), CERCLA (Section 120j), and the Clean Air Act (Section 118) all contain national security exemptions that allow the President to exempt DOD facilities from any statutory or regulatory requirements on a case-by-case basis. The President has exercised this authority under RCRA at Groom Lake Air Force Facility with an annual notice in the *Federal Register*.

3. THE HISTORIC CONTAMINATION OF POTENTIAL AND ACTUAL DRINKING WATER SUPPLIES THROUGHOUT THE COUNTRY BY DOD

There are more than 20 chemical constituents of military munitions that DOD is seeking to exempt. Five of the most common explosive ammunition constituents, however, are perchlorate, trinitrotoluene (TNT), Royal Demolition Explosive (RDX), His Majesty's Explosive (HMX), and white phosphorus. A number of these chemical constituents are probable human carcinogens. Listed below are some of the acute effects of each of these constituents:

Constituent	**Cancer Classification**	**Potential Toxic Effects**
Perchlorate	Uncertain	Disrupts vital thyroid functions, impairs fetal development when ingested by the mother, and creates thyroid gland tumors. Can cause tremors, nausea, vomiting, diarrhea, and an increase in blood pressure levels.
TNT	Class C: Possible Human Carcinogen	Serious reproductive effects to men, dysfunction of organs and immune system, and damage to liver and blood cells.
RDX	Class C: Possible Human Carcinogen	Neurological damage, including seizures, liver damage, reproductive damage, nervous system dysfunction, nausea, vomiting, and organ damage.
HMX	Class D: Not Studied	Liver and central nervous system damage, and hepatic lesions.

White Phosphorus	Class D: Not Studied	Damage to liver, stomach, heart, kidney, and reproductive organs. Skin burns, irritation of throat and lungs, vomiting, and drowsiness.

The Massachusetts Military Reservation and the Aberdeen Proving Ground (Maryland) are two locations where military munitions constituents have forced the closure of drinking water wells due to contamination from "operational ranges." Live fire training at the Massachusetts Military Reservation has contaminated large amounts of groundwater with perchlorate and RDX (300 ppb in the groundwater). This aquifer is the sole drinking water aquifer for Cape Cod, affecting drinking water supplies for 200,000 year round and 500,000 seasonal residents of upper Cape Cod.

Perchlorate contamination from an operational range at Aberdeen Proving Ground has been detected in drinking water wells of the City of Aberdeen, Maryland, and resulted in the temporary closure of production wells. The local utility has been forced to blend the contaminated water with other water sources to keep the perchlorate levels below the Maryland health advisory level. The groundwater under Aberdeen is contaminated with perchlorate up to approximately 20 ppb. High levels of perchlorate have been found in the soil.

At Iowa Army Ammunition Plant, offsite contamination from RDX was detected significantly above the health advisory level of 2 ppb and required closure of offsite private drinking wells. One hundred and fifty-four property owners had to be hooked up to alternative drinking water supplies. One creek on the base that runs offsite flowed red in color due to the discharge of explosives contaminated wastewater (TNT and RDX). Perchlorate has been detected in the groundwater at levels up to 30 ppb after EPA sampling. There are nine operational ranges listed at the facility.

Nationwide, there are at least 50 DOD facilities with known perchlorate contamination of groundwater or surface water. There are also at least 38 DOD facilities that have RDX, TNT, HDX, or other military munitions constituents in the groundwater.

4. THE ENORMITY OF THE SCOPE OF THE DOD EXEMPTIONS

The DOD exemptions, under the most narrow reading (for "operational ranges" only), cover more than 8,000 ranges in every State in the country. The covered acreage is over 24 million acres (37,500 square miles). To put this number into perspective, the exemptions would include a land area the size of six States including: New Jersey, Massachusetts, Hawaii, Connecticut, New Hampshire, and Delaware.

DOD claims that virtually the entire land mass at some military bases is an operational range. For example, the Government Accountability Office reports that DOD is claiming 152,000 acres as operational ranges at Camp Lejune, North Carolina, or 99.3 percent of the entire facility. Similarly, DOD is claiming that 99.9 percent of Eglin Air Force Base in Florida is an operational range.

Under the DOD definition of "operational range," buffer zones, where hunting, fishing, and camping is allowed, are included in the land covered by the exemption, even if the range is inactive and last used for training decades ago. The definition of operational range also includes land not owned by the Federal Government as long as it falls under the "jurisdiction, custody, or control" of the Secretary of Defense. The EPA has stated that "jurisdiction, custody, or control" is an "expansive term" and can include private property, State property, or tribal property which DOD leases for use as an "operational range."

SECTION 2: IMPACTS ON EXISTING STATE AND FEDERAL AUTHORITIES

According to State officials, environmental regulators would likely be precluded from requiring an investigation or cleanup of groundwater contamination on these lands, even if it posed an *imminent and substantial endangerment* to human health. Associations representing drinking water utilities have described the impact of these proposals on drinking water supplies as follows:

> *The exemptions would inhibit the ability of EPA, its state partners or water systems to prevent contamination and prevent 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.* (Letter of April 25, 2003, from Association of Metropolitan Water Agencies, American Water Works Association, National Association of Water Companies, et.al.)

State Environmental Commissioners testified that the DOD amendments would directly supersede State sovereignty, threatening the ability of States to protect the health of its citizens.

> *"The Readiness, Range and Preservation Initiative as presented, is overly broad and will likely impair and preempt state and EPA authority over a wide range of sites with munitions related contamination. Affected sites include both operational ranges and ranges that have been closed and transferred to other federal agencies or to private owners. This initiative would directly supersede state sovereignty, threatening the ability of states to protect the health of its citizens.*" (Testimony of Steven Brown, Executive Director, Environmental Commissioners of the States, before the Joint Hearing of the Subcommittee on Environment and Hazardous Materials and the Subcommittee on Energy and Air Quality, April 21, 2004.)

State Attorneys General have testified to the broad preemptive effect of the proposed DOD exemptions:

> *"Even read in the narrowest possible fashion, the 2004 RRPI would hamstring state and EPA cleanup authorities at over 24 million acres of operational ranges, an area the size of Maryland, Massachusetts, New Jersey, Hawaii, Connecticut and Rhode Island combined. As a practical matter, environmental regulators would like to be precluded from using RCRA, CERCLA, and related state authorities to require any investigation or cleanup of groundwater contamination on these ranges, even if the contamination had migrated off-range, polluted drinking or irrigation water supplies, and even if it posed an imminent and substantial endangerment to human supplies, and even if it posed an imminent and substantial endangerment to human health. And it is likely that DOD's amendments would be construed more broadly to exempt even more contamination from state and EPA oversight."* (Testimony of Dan Miller, First Assistant Attorney General, Colorado Department of Law, on behalf of the Attorneys General of California, Colorado, Idaho, Utah and Washington, before the Joint Hearing of the Subcommittee on Environment and Hazardous Materials and Subcommittee on Energy and Air Quality, April 21, 2004.)

In addition, cleanups of these military munitions constituents at many DOD Superfund facilities would be adversely affected and environmental protection would be weakened. Some of these facilities are the Iowa Army Ammunition Plant, the Allegeny Ballistics Lab in West Virginia, Fort Richardson in Alaska, and Lake City Army Ammunition Plant in Missouri.

The normal section 104 clean-up process of the Superfund program is being used today to respond to a "release" or a "substantial threat of a release into the environment" from constituents of military munitions at DOD facilities. This basic authority would be eliminated under the DOD proposal. Instead, the EPA would be required to issue an abatement order under CERCLA section 106 which requires a higher evidentiary standard of proof that there "may be an imminent and substantial endangerment to the public health, welfare, or environment." EPA has acknowledged that it "has never issued an unilateral administrative order pursuant to section 106 of CERCLA to a DOD facility." The EPA is further constrained because the Executive Order 12580 requires that the Department of Justice concur in any such order. Lastly, the authority to issue an abatement order is rendered ineffective because the EPA would lose its authority to collect samples and conduct inspections under Section 104(e)(3) and (4) of CERCLA on "operational ranges."

The following are some of the specific statutory authorities of RCRA and CERCLA that would be eliminated or preempted by even the narrow interpretation of the DOD exemptions:

1. THE PREEMPTING OF STATE AUTHORITIES

A. Preempts State RCRA authority to require investigation or cleanup of environmental contamination from used/fired munitions within the external boundaries of a range, even if the contamination has migrated off the range (RCRA Section 6001, waiving sovereign immunity). Forty-eight States are authorized to implement the base RCRA program in lieu of EPA and 39 States are authorized to carry out the corrective action program.

B. Preempts State use of the Citizen Suit provision of Federal law to seek a Federal court order requiring investigation or cleanup where environmental contamination from used/fired munitions "may present an imminent and substantial endangerment to health or the environment" (RCRA Section 7002).

C. Preempts State authority under State "Superfund" or other remedial authorities to require investigation or cleanup of environmental contamination from used/fired munitions within the external boundaries of a range, even if the contamination has migrated off the range (CERCLA: Section 120(a) waiver of sovereign immunity; Section 101(22)(23)).

2. THE TERMINATION OF FEDERAL AUTHORITIES THAT LOCAL GOVERNMENTS, DRINKING WATER PROVIDERS, AND MILITARY FAMILIES CAN USE TO SEEK ACTION WHEN DOD CONTAMINATES THEIR WATER SUPPLY

Local governments, drinking water utilities, and military families are preempted from using RCRA's citizen suit provisions to seek a Federal court order requiring investigation or cleanup of environmental contamination from used/fired munitions within the external boundaries of a range that "may present an imminent and substantial endangerment to health or the environment," even if the contamination has migrated off the range (RCRA Section 7002 a(1)(B)).

3. THE ELIMINATION OF THE EPA'S RCRA IMMINENT HAZARD AUTHORITY AND NORMAL SUPERFUND CLEANUP AUTHORITY WITH RESPECT TO MILITARY MUNITIONS

A. Terminates the Administrator's authority to issue an administrative order or to bring a suit in Federal court to address contamination from used/fired munitions within the external boundaries of a range (including groundwater beneath the surface of the range) that may present an imminent and substantial endangerment to health or the environment (RCRA Section 7003).

B. Terminates the EPA's statutory ability to gather information under RCRA section 3007 with respect to constituents of used/fired munitions within the external boundaries of a range (RCRA Section 3007).

C. Eliminates corrective action authority for constituents of used/fired munitions at solid waste management units within the external boundaries of a range (RCRA Section 3004(u)).

D. Terminates the EPA's removal and remedial authority under CERCLA section 104 to address munitions-related and explosives-related contamination, that remains on an operational range at Superfund NPL facility (CERCLA Section 104 and 101(22)).

E. Terminates the EPA's authority to collect samples and conduct inspections under section 104(e)(3) and (4) of CERCLA to investigate environmental contamination from used/fired munitions within the external boundaries of the range.

F. Terminates the EPA's authority to select or concur in remedies for munitions and explosives-related contamination or operational ranges at NPL sites (CERCLA Section 120).

G. Eliminates the requirement that investigation and cleanup of munitions-related contaminants on operational ranges be conducted according to the National Contingency Plan standards that apply to all other CERCLA cleanups.

H. Potentially bars cost recovery claims against DOD under CERCLA section 107(a)(2) related to cleanup of munitions-related contaminants on operational and closed ranges.

4. THE REMOVAL OF THE AUTHORITY OF ATSDR TO CONDUCT HEALTH ASSESSMENTS FOR CONSTITUENTS OF MILITARY MUNITIONS

Eliminates ATSDR's authority to conduct health assessments and perform epidemiological studies for releases of used/fired munition constituents within the external boundaries of a range located on a Superfund National Priority List site (Section 104(I)). This authority is eliminated even if the contamination migrates off the range.

5. DOD ACKNOWLEDGES THAT NO STATE ACTION, EPA ACTION, OR ATSDR ACTION UNDER THE SOLID WASTE DISPOSAL ACT OR SUPERFUND LAW HAS EVER ADVERSELY AFFECTED TRAINING OR MILITARY READINESS

(Testimony of Ben Cohen, Deputy General Counsel for Environment and Installations, Department of Defense, before the Joint Hearing of the Subcommittee on Environment and Hazardous Materials and the Subcommittee on Energy and Air Quality, April 21, 2004):

Mr. Dingell. Now, please name the States' Governors that have you under siege by using the current Solid Waste Disposal Act of State Superfund authorities.

Mr. Cohen. None, sir. We have received exemplary support from the States.

Mr. Dingell. So no States have you under siege. Are you under siege from Administrator Leavitt at EPA because they are using the Solid Waste Disposal Act or Superfund statutory authorities in a manner which adversely affects training or military readiness?

Mr. Cohen. No, sir. To the contrary. Our concern is that State and Federal laws will be overturned.

Mr. Dingell. Are you under siege from the Agency for Toxic Substances and Disease Registry using its authorities that stem from the term release as defined in the Superfund statute?

Mr. Cohen. No, sir.